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

81st Annual Meeting – Virginia State Bar
June 12 - 15, 2019 • Virginia Beach, Virginia

Showcase CLE Program

So the Officer was Wearing a Body Camera – Now What?

Friday, June 14, 2019 • 1:30 p.m. • Hilton Hotel

The panel will discuss the infusion of digital evidence into the practice of law with a focus on body worn cameras. Panelist will provide an overview of the landscape of body worn cameras across the Commonwealth, guidance on the ethical implications and mandates for practitioners handling cases where there is digital evidence, and finally practical advice on what to do both in and out of the courtroom.

Panelists

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 law career 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.

James McCauley is Ethics Counsel for the Virginia State Bar, and manages the staff counsel serving the Standing Committee on Legal Ethics. His office also investigates complaints alleging unauthorized Practice of Law Mr. McCauley and his staff write the draft advisory opinions for the Standing Committee and provide informal advice over the telephone to members of the bar, bench and general public on matters involving legal ethics, lawyer advertising and the unauthorized practice of law. Frequently lectures and publishes articles on matters relating to legal ethics and the unauthorized practice of law. Taught Professional Responsibility for 16 years at the T.C. Williams School of Law in Richmond, Virginia. From 2008-2011, served on the American Bar Association's Standing Committee on Legal Ethics and Professionalism. Formerly, an Assistant Bar Counsel for the Virginia State Bar for six years, prosecuting cases of attorney misconduct before the District Committees, Disciplinary Board and Three-Judge Courts. Mr. McCauley graduated cum laude from James Madison University in 1978. He received his law degree from the University of Richmond, in 1982. Served as a member on the Virginia State Bar's Mandatory Professionalism Course faculty from 2004-2010. Fellow of the Virginia Law and the American Bar Foundations. Member of the John Marshall Inn of Court in Richmond, Virginia. Appointed in 2013 by Chief Justice Kinser to serve on the Special Committee to Study Criminal Discovery Rules. Elected in 2014 to Board of Directors, Lawyers Helping Lawyers. Selected for the Class of 2018 "Leaders in the Law" sponsored by the Virginia Lawyers Weekly.

Colin D. Stolle earned a Bachelor of Arts in Political Science from Virginia Commonwealth University. Upon graduating from VCU, Colin entered into the Virginia Law Reading Program while working in the Office of the Commonwealth's Attorney. Colin passed the bar and was hired as an Assistant Commonwealth's Attorney in 1996. Since that time, he has handled every type of case from speeding to Capital Murder. He has served on the Property Crime Team, Precinct Trial Teams, Juvenile and Domestic Relations Team, and the Vice and Narcotic Team. Colin was elected Commonwealth's Attorney in 2013. He supervises forty attorneys, twenty paralegals, and with the rest of the staff a total office of about 100 dedicated public servants. Colin's duties also involve overseeing and managing a multi-million dollar budget consisting of both state and local funds. Even with the demands of management and policy responsibilities, Colin still handles some of the most serious and high profile cases that come into the office. Colin serves as an Executive Board Member of the Virginia Association of Commonwealth's Attorneys and currently sits on the Board of the Chesapeake Bay Alcohol Safety Action Program.

Bonnie Hoffman serves Director of Public Defense Reform and Training for the National Association of Criminal Defense Lawyers (NACDL) where she focuses on addressing the needs of both public defense systems and the attorneys who provide representation to those accused. Bonnie assists full-time public defenders, private assigned counsel, and contract counsel by developing and delivering training programs and materials, as well as working with local, state and national leaders to address reforms in our nation's public defense delivery systems. Prior to joining NACDL this May, Bonnie spent over 21 years as a state court public defender in Loudoun County, Virginia. Representing adults and juveniles charged with misdemeanor and felony offenses from drunk driving on a farm tractor to murder; her practice included both trial and appellate work. Bonnie as served as a presenter in a variety of local, state, and national trainings. She has lectured on a variety of ethical issues associated with criminal defense representation, and has served on a number of committees and work groups associated with public defense, the criminal justice system, and special populations. She earned her law degree from George Mason University School of Law and her undergraduate degree from the University of Virginia.

Chair's Column

Nancy Parr

Criminal lawyers, defense and prosecutors, tend to think of themselves as thick skinned and emotionally detached from their cases. Maybe this self-description is merely a cover to protect ourselves from all the hate, ugliness and evil we encounter because we chose to be prosecutors and defense attorneys.

We have known for a long time occupational risks come with practicing law. The statistics for attorneys experiencing problematic drinking, depression and suicidal thoughts have been provided for years. The percentages have always been discouraging and disheartening. However, recently, thoughtful and well researched wellness initiatives are being implemented in Virginia and across the country.

If you have not read the 2018 "A Profession at Risk, Report of the Committee on Lawyer Well-Being of the Supreme Court of Virginia", then I suggest you take the time to do so. The section written by the Public Sector Task Group and the Appendix Exhibit 3 discuss the vicarious trauma attorneys may experience. Both note correctly that there is little information on this particular wellness issue. While I recognize that all attorneys deal with the stress of long hours, constant adversarial stances and perhaps even isolation, criminal lawyers deal with those stressors and then see and hear, regularly, the worse of the worse.

We work with the victims (and their families) suffering from and the alleged perpetrators (and their families) charged with murder, sexual assaults, child pornography, aggravated malicious wounding, and their hurt, pain, and fear. For us, it is not about money. It is about prosecutors working hours upon hours to provide justice and protect our citizens. It is about defense attorneys working hours upon hours to provide the best defense no matter who the defendant is or what the charge is.

Ethically, we have to look at the child pornographic photographs, watch the bloody crime scene videos, listen to the fear and despair in the 911 calls, and learn all the details – no matter how disgusting they may be. Law enforcement officials have long recognized the necessity of addressing stress related problems of their officers from their exposure to the violence and ugliness involved in their work. I appreciate that Chief Justice Donald W. Lemons, VSB president Leonard Heath, immediate past president Doris Causey, Executive Director Karen Gould and her staff have taken active steps to address the need for us to take care of ourselves.

I could say that I regularly foster "resilience through developing physical, emotional, and spiritual resources" but, if I did, I would be lying. (American Bar Association Publications, Law Practice Magazine, Vol. 38, #3 May-June 2012). All I can say (like most of us) is that some days I do and some days I don't.

This column is my last as Chair and it has been an honor. I wish you all good health and better wellness. ✧

U.S. SUPREME COURT CRIMINAL LAW AND PROCEDURE DECISIONS

Bucklew v. Precythe, 587 U.S. ___, 139 S. Ct. 1112 (2019). Petitioner contended that the State's lethal injection protocol would cause him severe pain because of his particular medical condition. When determining whether a punishment is unconstitutionally cruel because of the pain inflicted, the law asks whether the punishment "superadds" pain well beyond what's needed to effectuate a death sentence. Petitioner here failed to establish that he would experience significantly less pain after receiving nitrogen hypoxia than after receiving pentobarbital.

Nielsen v. Preap, 587 U.S. ___, 139 S. Ct. 954 (2019). Federal immigration law provides that certain aliens [those bearing links to terrorism or having committed specified crimes] shall be arrested "when the alien is released" from jail and shall be held pending

a determination on removal. The government's failure to arrest respondents **immediately** after their release from criminal custody does not remove them from the statute's coverage. Failure to act "immediately" does not "preclude action later."

Madison v. Alabama, 587 U.S. ___, 139 S. Ct. 718 (2019). Precedent establishes that a State may not execute a prisoner whose "mental state is so distorted by a mental illness" that he lacks a "rational understanding of the State's rationale for his execution." Although this defendant claimed that he could not recollect committing the crime for which he had been sentenced to die, the legal standard is a person's comprehension of the State's reasons for the punishment, not his memory of the crime itself. "One may exist without the other." Nonetheless, the case was remanded because the record was unclear on whether the State court had incorrectly focused on the cause of the defendant's mental state [psychotic delusion vs. mere dementia] rather than the existence of "incomprehension of why he has been singled out" to die. The judge must look to the defendant's actual mental state regardless of whether one disease or another is to blame.

Garza v. Idaho, 587 U.S. ___, 139 S. Ct. 738 (2019). In a claim of ineffective assistance, there is a presumption of prejudice when counsel fails to file an appeal as instructed by the defendant. This presumption applies even when the defendant has entered into a plea agreement waiving the right to appeal.

Yovino v. Rizo, 587 U.S. ___, 139 S. Ct. 706 (2019). "Federal judges are appointed for life, not for eternity." It was error to count a deceased judge as a member of the majority in a decision, even though, prior to his death, the judge had fully participated in the case and authored the opinion.

Timbs v. Indiana, 587 U.S. ___, 139 S. Ct. 682 (2019). Defendant's drug conviction subjected him to a maximum $10,000 fine, but the State also sought civil forfeiture of his vehicle [$40,000 value] used to transport the drugs. The Supreme Court ruled for the first time that the Eight Amendment's Excessive Fines Clause is an incorporated fundamental protection applicable to the States under the Fourteenth Amendment's Due Process Clause. The opinion did not address the particular forfeiture in this case, but merely remanded for further proceedings in which the excessive fine clause would be applied.

Shoop v. Hill, 587 U.S. ___, 139 S. Ct. 504 (2019) Federal habeas relief requires that the state court's decision was contrary to Supreme Court precedent "clearly established **at the time of the adjudication**." The Sixth Circuit's granting of habeas relief was reversed because it relied on Supreme Court decisions that post-date the state court's determination.

Stokeling v. U. S., 587 U.S. ___, 139 S. Ct. 544 (2019). The Armed Career Criminal Act (ACCA) defines a violent felony, in relevant part, as "any crime punishable by imprisonment for a term exceeding one year" that "has as an element the use, attempted use, or threatened use of physical force against the person of another." This encompasses a robbery offense that requires the defendant to overcome the victim's resistance, which is inherently "violent" and suggests a degree of power that would not be satisfied by the merest touching that might establish misdemeanor battery.

U.S. v. Stitt. 587 U.S. ___, 139 S. Ct. 399 (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. Walker, ___ F.3d ___, (2019). The Court listed factors that guide a court's discretion in rejecting a plea agreement. (1) to facilitate appellate review, the justification for the rejection should be on the record; (2) the rejection must pertain to the specific

agreement at hand, and not rely on extraneous considerations or broad categorical determinations; (3) consideration of whether the agreement is "too lenient or too harsh;" (4) whether the plea agreement is in the public interest.

Hayes v. Carver, ___ F.3d ___ (2019). "New reliable evidence of actual innocence creates a gateway for a habeas petitioner to present procedurally defaulted constitutional claims … to prevent a fundamental miscarriage of justice." Petitioner's burden of proof is "demanding" and requires an "extraordinary case." That standard was not met in this case.

U.S. v. Riley, 920 F.3d 200 (4th Cir. 2019). "The requirement that an out-of-court admission of criminal activity be corroborated is a rule applicable to *criminal* proceedings," and does not apply in supervised revocation proceedings. Exclusion of statements pursuant to the Fifth Amendment or *Miranda* apply only in criminal proceedings and not in supervised revocation proceedings.

Bowling v. Director, 920 F.3d 192 (4th Cir. 2019). Rejected the argument that "it is cruel and unusual punishment for a parole board to deny juvenile offenders parole without specifically considering age-related mitigating characteristics as a separate factor in the decision-making process."

U.S. v. Smith, 919 F.3d 825 (4th Cir. 2019). "Courts have consistently approved of law enforcement agents … offering expert interpretations of gang and drug communications based on their experience." When the agent testified both as to facts and as an expert, the Court handled any possible confusion or prejudice by giving a lengthy cautionary instruction and by having the agent take the witness stand twice, "separating in time his fact and expert testimony."

U.S. v. Davis, ___ Fed. Appx. ___ (4th Cir. 2019). Federal Rule of Evidence 901(b)(5) states that "[a] n opinion identifying a person's voice — whether heard first hand or through mechanical or electronic transmission or recording — based on hearing the voice at any time under circumstances that connect it with the alleged speaker" satisfies the requirement of authenticating evidence. Thus, we conclude that [the officer's] testimony that his in-person conversations with Davis enabled him to recognize the voice on the telephone as Davis's was sufficient authentication. Again, any further doubt could be resolved by the jury.

U.S. v. Tillmon, ___ F.3d ___ (2019). "When considering whether evidence is unfairly prejudicial, 'damage to a defendant's case is not a basis for excluding probative evidence because evidence that is highly probative invariably will be prejudicial to the defense.' Instead, 'unfair prejudice speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground *different from proof specific to the offense charged.*'"

U.S. v. Pratt, 915 F.3d 266 (4th Cir. 2019). Although the initial seizure of defendant's phone was proper, an extended seizure [31 day while agents debated in which state to obtain a search warrant] unreasonably infringed defendant's possessory interests in the phone. The agents could have removed or copied incriminating files and returned the phone to defendant. The court also applied the "forfeiture by wrongdoing" exception to the hearsay rule which recognizes that "wrongfully and intentionally causing a witness's unavailability estops a defendant from asserting confrontation rights."

U.S. v. Azua-Rinconada, 914 F.3d 319 (4th Cir. 2019). The concurring opinion characterized the case as "a rare exception" to the well-established rule that a defendant's alleged consent to a search ordinarily will be deemed invalid when that consent was obtained through an "officer's misstatement of his or her authority." Although they lacked such authority, the officers announced: "Open the door or we're going to knock it down." Nonetheless, the video recording demonstrated that the officers subsequently engaged in casual, nonconfrontational conversation, such that "any coercive effect … had dissipated."

U.S. v. Edgell, 914 F.3d 281(4th Cir. 2019). "The government must carefully balance its duty of candor to the sentencing court [providing all relevant information and correcting misstatements] with the sometimes competing – but equally solemn duty to honor its commitments under a plea agreement. …This balance is achieved where the government makes the necessary disclosures to the sentencing court, but nevertheless 'continues to advocate for acceptance of the agreement.'" The government in

this case committed reversible error and "affirmatively undermined the plea agreement by requesting a sentence inconsistent with its stipulation, effectively tripling its recommended sentence from" 10 months to 30 months.

U.S. v. MacDonald, 911 F.3d 723 (4th Cir. 2018). "Over the last four decades, we have repeatedly been called upon to review Jeffrey R. MacDonald's trial and convictions in the Eastern District of North Carolina for the murders in 1970 of his pregnant wife and their two young daughters at Fort Bragg." **[See various books, movies and TV mini-series sometimes titled "Fatal Vision"]** Today we now affirm the district court's judgment denying two § 2255 motions - a prosecutorial misconduct claim based on newly discovered evidence, plus a freestanding actual innocence claim premised on the results of DNA testing.

U.S. v. Abdallah, 911 F.3d 201 (4th Cir. 2018). The Court suppressed defendant's confession because interrogation continued after defendant invoked his right to remain silent by stating that he: "wasn't going to say anything at all." The Court listed a number of examples of unambiguous invocations – "I have decided not to say any more;" "I don't want to talk no more;" "I don't want nothing to say to anyone;" "I don't want to talk about it." These examples appear to contrast with Virginia cases finding the following statements to be too ambiguous to invoke the right to silence: "I ain't got shit to say to y'all;" "I don't got to answer that;" "I don't have anything more to say." The Court also found a *Brady* violation when the trial court refused to conduct an *in camera* review before denying defendant's request for production of the email exchange among law enforcement officers attending defendant's interrogation.

U.S. v. Lyles, 910 F.3d 787 (4th Cir. 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, 909 F.3d 716 (4th Cir. 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, 909 F.3d 614 (4th Cir. 2018). *Lawlor v. Commonwealth*, 285 Va. 187, 251, 738 S.E.2d 847, 883 (2013) had 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 Virginia 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 that 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

Brown v. Commonwealth, Va. (5/2/2019) A motion to withdraw a guilty plea *after* sentencing is governed by the manifest injustice standard. Collateral consequences such as "actual or potential adverse employment or housing consequences that flow from defendant's guilty pleas do not satisfy the manifest injustice standard and, therefore, did not provide a basis upon which to set aside defendant's guilty plea."

Collins v. Commonwealth, 296 Va. ___, 824 S.E.2d 485 (2019). Although the U.S. Supreme Court found the search to be unconstitutional, "The exclusionary rule does not apply under the facts of this case because, at the time of the search, a reasonably well-trained police officer would not have known that the automobile exception did not permit him to search a motorcycle located a few feet across the curtilage boundary of a private driveway."

In re Scott, 296 Va. ___, 824 S.E.2d 1 (2019). Petition for writ of actual innocence granted because "no rational trier of fact would have found him guilty beyond a reasonable doubt in that he has been scientifically proven by DNA analysis to not be the source of the sperm found on the victim's jeans or the male DNA found on the vaginal swab obtained from the victim."

Reyes v. Commonwealth, 296 Va. ___, 823 S.E.2d 243 (2019). "Because Code 19.2-159.1 requires a defendant who ceases to be indigent to obtain private counsel at his or her own expense whenever the indigence ends, the General Assembly provided for a continuance to allow the defendant time to choose a new attorney and time for that new attorney to prepare to provide effective assistance. But a court's deviation from the legislature's prescribe course of conduct does not violate any independent right for which the defendant is entitled to an independent remedy. A violation of the defendant's rights occurs only if the underlying Sixth Amendment protections are infringed."

Dennis v. Commonwealth, 296 Va. ___, 823 S.E.2d 490 (2019). "Despite the statutory mechanism for referring issues in actual innocence cases to a circuit court for factual determination, the Court of Appeals determined from the record alone that the evidence supporting Dennis' petition was not material and accordingly denied the petition. Although the Court of Appeals has broad discretion to determine whether the facts require further development, … in this 'heavily fact-dependent case' the refusal to order a hearing constituted an abuse of discretion. Accordingly, we reverse the Court of Appeals' judgment dismissing Dennis' petition and remand for purpose of ordering a circuit court evidentiary hearing…."

Hall v. Commonwealth, 296 Va. ___, 823 S.E.2d 485 (2019). Interpreted the "safety valve" provision of Code 18.2-248C providing relief from mandatory sentences when the defendant truthfully provides all information and evidence to the Commonwealth "not later than the time of the sentencing hearing." A motion under Code 18.2-248C is timey if made "not later than the commencement of the sentencing hearing." [Reversing the Court of Appeals decision that timeliness depends on the time necessary to test the statement for veracity and completeness].

McGinnis v. Commonwealth, 296 Va. 489, 821 S.E.2d 700 (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, 296 Va. 450, 821 S.E.2d 543 (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 incomplete instruction actually 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, 296 Va. 412, 821 S.E.2d 540 (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

Fahringer v. Commonwealth, Va. App (4/30/2019) Virginia's Rape Shield Law, Code 18.2-67.7(A) incorporates an exception for evidence of "specific instances of prior sexual conduct … between the complaining witness and the accused." The Court held that the act of kissing does not fit within the definition of "sexual conduct" as contemplated by Code 18.2-67.7.

Taylor v. Commonwealth, 70 Va. App. ___ (2019). *Birchfield*, 136 S.Ct. 2160 (2016) invalidated implied consent statutes that threaten criminal sanctions for refusing to provide a blood test, but this holding has not been applied retroactively. The blood test in this case was taken prior to Birchfield and in accord with then existing law. "Under these circumstances, we cannot fathom any deterrent purpose that would be served by excluding otherwise relevant evidence." The exclusionary rule exists to deter willful or negligent conduct by the police.

Eley v. Commonwealth, 70 Va. App.___ (2019). Upheld conviction of Code 18.2-287.4, carrying a loaded firearm equipped with a high-capacity magazine in public. Defendant had claimed the statutory exemption for a firearm carried in "a personal, private motor vehicle." Held that the exemption "did not apply because the appellant knew that the truck in which he secured the firearm was stolen, thus, it was not 'a personal, private motor vehicle' within the meaning of the exemption."

Wandemberg v. Commonwealth, 70 Va. App. 124, 825 S.E.2d 291 (2019). Defendant's actions constituted "the definition of strangulation." Defendant "got on top of the victim, straddled her, placed both hands on her neck, and started choking her. Defendant strangled the victim for so long that the victim's face and lips went numb, thus constituting an impairment of her physical condition. The victim also testified that her neck hurt and was red after the strangulation."

"While the circuit court implicitly found that defendant disabled or destroyed the victim's cell phone in convicting him of interfering with a 911 phone call, it previously stated that it could not resolve an evidentiary dispute regarding who destroyed the victim's cell phone. As a result, the circuit court acquitted defendant of misdemeanor property damage. Without a sufficient explanation for these inconsistent verdicts, we reverse defendant's conviction for interfering with a 911 phone call."

Bondi v. Commonwealth, 70 Va. App. 79, 824 S.E.2d 512 (2019). Denied motion for new trial based on after discovered evidence. Appellant asserted that the victim did not remember the crime of object sexual penetration until she underwent Eye Movement Desentization and Reprocessing (EMDR). Defendant did not learn of the therapy until the sentencing hearing, and claimed he was denied the opportunity to cross-examine the victim about her "recovered memory," and to introduce expert testimony about EMDR therapy. The court found that the victim's recollection occurred independent of EMDR therapy.

Lambert v. Commonwealth, 70 Va.App. 54, 824 S.E.2d 18 (2019). Driving while intoxicated under Code 18.2-36.1 applies to any "self-administered intoxicant or drug." Defendant admitted that he had received a dose of methadone at a treatment clinic just before the accident, but there was no evidence about the procedure at the clinic. The court held that "regardless of the procedure used to ingest the methadone, the evidence was sufficient to find that defendant self-administered the drugs." I.e., his methadone dose "occurred in a voluntary treatment program where he agreed to ingest the substance by his participation in the program."

Rams v. Commonwealth, 70 Va.App. 12, 823 S.E.2d 510 (2019). In finding sufficient evidence of the corpus delicti, the court noted that Virginia law "provides that motive is among the types of circumstantial evidence that may be used to establish both a death was not the result of natural causes and that it was caused by the defendant." Further the law "does not require the Commonwealth to prove the precise cause of death, only that the death 'resulted through a criminal agency.'" [A bill of particulars is discretionary with the trial court]. Although the Commonwealth changed its theory from drowning to suffocation, "the record shows that the appellant had notice of the existence of an alternate theory of the case in time to satisfy any due process right to notice of the precise manner in which he was alleged to have caused his son's death."

Amonett v. Commonwealth, 70 Va. App. 1, 823 S.E.2d 504 (2019). Defendant contended that the officer's statement - "if he cooperated further he would possibly be able to go home that night without being arrested or charged" - amounted to an immunity and plea agreement. The court held that any such agreements must be entered into by prosecutors, not the police. Promises of leniency by police are only relevant to determining the voluntariness of defendant's statements. Furthermore, the existence of any such agreements is a "pure question of law" for the judge and cannot be submitted to a jury. The court also held that the failure to appear at the preliminary hearing by the person who prepared a certificate of analysis, does not necessitate the exclusion of that witness from the trial itself.

Carlson v. Commonwealth, 69 Va. App. 749, 823 S.E.2d 28 (2019). After "sniffing at the doors and windows" of each trailer in a trailer park, the officers concluded that the order of marijuana was coming from defendant's trailer. A detective then arrived to confirm the odor and left to obtain a search warrant for the trailer. The trial court erred in refusing to suppress the evidence seized in the trailer. The initial intrusion into the curtilage was an improper search which led, in an unbroken chain, to issuance of the search warrant and the seizure of the marijuana. The link between the initial illegal search and the marijuana was not broken by the doctrines of independent source; attenuation; or inevitable discover.

Blankenshio v. Commonwealth, 69 Va. App. 692, 823 S.E.2d 1 (2019). In a case of first impression the Court analogized Va. Code 18.2-67.7:1 to Federal Rule of Evidence 414. Like its federal counterpart, 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." Thus the trial court properly admitted a sixteen year old North Carolina conviction of the defendant for indecent liberties with a child.

Fleisher v. Commonwealth, 69 Va. App. 685, 822 S.E.2d 679 (2019). Defendant abandoned the stolen vehicle which contained the victim's keys to her second car. No keys were recovered from the abandoned vehicle. In order to protect against unauthorized use of the missing keys, the court properly ordered defendant to pay to replace the locks and cylinders on the vehicles and to reprogram the vehicle's computer.

Warren v. Commonwealth, 69 Va. App. 659, 822 S.E.2d 395 (2019). Rejected a constitutional challenge to Code 18.2-361(A) and the "attempt to equate private sexual acts among consenting adults with sexual acts between humans and animals." Bestiality is not a fundamental right.

Johnson v. Commonwealth, 69 Va. App. 639 822 S.E.2d 385 (2019). This is the second case interpreting the relatively recent statutory prohibition of sex trafficking for money. "Threats of violence or actual use of violence are not necessary elements for a conviction" under Code 18.2-357.1(A) which is a Class 5 felony. Use of force or intimidation elevates

the offense to a Class 4 felony under subsection (B).

Marshall v. Commonwealth, 69 Va. App. 648, 822 S.E.2d 389 (2019). Common law battery [Code 18.2-57.2] occurs with "the least touching of another willfully or in anger, including touching done in the spirit of rudeness or insult." Nonetheless, "any conviction for violating Code 18.2-57.2 involves a sufficient use of physical force to qualify as a conviction for a 'misdemeanor crime of domestic violence' as that term is used in 18 U.S.C. 921(a)(33)." [Thus defendant, in failing to report his prior conviction under Code 18.2-57.2, made a materially false statement on his ATF form.

Pittman v. Commonwealth, 69 Va. App. 632, 822 S.E.2d 382 (2019). "The bulk of jurisprudence regarding embezzlement cases" focus on whether the property has been "entrusted" to another. However, Code 18.2-111 speaks in the alternative as to property "which shall have been entrusted or delivered" to another. When the victim "delivered" the vehicle to defendant for a limited purpose, and the defendant failed to return it, an analysis of whether the victim also "entrusted" the vehicle to defendant is unnecessary.

Kelley v. Commonwealth, 69 Va. App. 617, 822 S.E.2d 375 (2019). Defendant "grabbed the victim's face against her will [and attempted to kiss her] while she was trying to pull away from him as she repeatedly told him 'no.'" Battery occurs with "the slightest touching of another if done in a rude, insolent, or angry manner." Defendant's intent to act rudely was established when he admitted that he knew the victim was "uncomfortable" with his actions.

Barney v. Commonwealth, 69 Va. App. 604, 822 S.E.2d 368 (2019). Code 18.2-53.1 [use of a firearm in the commission of a felony] requires that "the accused *actually had a firearm [or replica firearm] in his possession*. Therefore, the trial court erred in instructing the jury that it was not necessary that the object was in fact an actual or replica firearm so long as the victim perceived a threat or intimidation by firearm." Conviction reversed because during the robbery the victim never saw a firearm or replica, but merely described the defendant as making a "poking motion of what the victim thought was going to be a weapon in defendant's pocket."

Jones v. Commonwealth, 69 Va. App. 582, 822 S.E.2d 19 (2018). In a case of first impression, the court held that "any prior conviction of an offense under Code 18.2-248, [possession with intent to distribute] including a conviction as an accommodation under Code 18.2-248 (D), triggers the enhanced punishment provisions of Code 18.2-248 C."

Phillips v. Commonwealth, 69 Va. App. 555 820 S.E.2d 892 (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, 69 Va. App. 452, 820 S.E.2d 379 (2018). Code 19.2-128 criminalizes a willful failure to appear for certain proceedings, 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 just 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, 69 Va. App. 475, 820 S.E.2d 390 (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, 69 Va. App. 528, 820 S.E.2d 879 (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."

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