

Criminal Law News

Volume 48, Number 2
November 2018

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



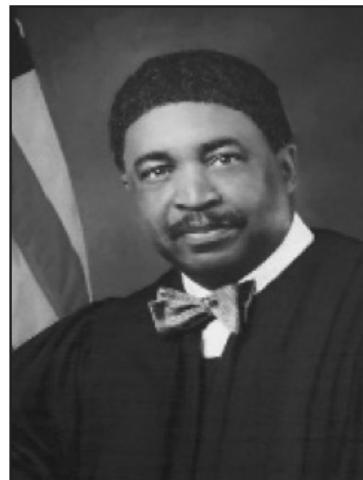
Chuck Rosenberg served as the Administrator (Director) of the Drug Enforcement Administration (DEA), from May 2015 until October 2017. Prior to joining DEA, Chuck served as the Chief of Staff and Senior Counselor to FBI Director Jim Comey (2013-2015). Before

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

(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 Wallendaal, Ph.D.* • *Seth C. Weston*
- 12:15** **Luncheon Presentations** _____
- | | |
|-------------------------------|-------------------------------------|
| Charlottesville: | Williamsburg: |
| <i>Chuck Rosenberg</i> | <i>Hon. Rossie D. Alston</i> |
-

(After lunch schedule continued on next page)

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 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.



Virginia State Bar 49th Annual Criminal Law Seminar

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

- 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>

Chair's Column

Nancy Parr



The 49th Annual Criminal Law Seminar is just around the corner. On February 1st, we will be in Charlottesville and on February 8th, we will be in Williamsburg. Pick your favorite (or more convenient) site and mark your calendar.

During last year's seminar, I implored attendees to complete the evaluations. I appreciate everyone who did and the Board read each and every one of them. The comments and suggestions for topics and speakers provided guidance for this year's seminar. So you did not waste your time.

The seminar kicks off with the popular Criminal Law Update. Professor Corinna B. Lain's lecture and materials are the best and most convenient way to make sure you have not missed any important criminal cases during 2018. She has had big shoes to fill since Professor Ronald J. Bacigal decided to retire from the lecture circuit and she has met the challenge.

The other topics are practical and involve issues that many of you face every day in your practices. Discovery in Circuit Court after July 1, 2019, pre-trial motions, eye witness

identification, transfer and certification of juveniles to Circuit Court, preserving your objections and trial strategy sessions will cover trials from the beginning to the end. Always a favorite lecturer, Craig Cooley will wrap it up at the end of the day with ethics that are ever present from the beginning to the end of our cases.

The luncheon speakers will make it easy for you to choose to dine with us instead of running out to a nearby restaurant. Chuck Rosenberg, Senior Counsel in Crowell & Moring's Washington, D.C. office, will be with us in Charlottesville. Joining us in Williamsburg will be the Honorable Rossie D. Alston, Court of Appeals of Virginia. I have no doubt that both gentlemen will engage us with their thoughts and comments.

More details about the seminar will be arriving in your mailboxes in December when registration opens. This is really just a **SAVE THE DATE**. We all have very busy schedules and we book hearings, cases, meetings, and appointments months in advance so mark your calendar now and plan to attend.

I hope to see you in February! And Happy and Safe Holidays to you and your families. ✧



FOURTH CIRCUIT COURT OF APPEALS CRIMINAL LAW AND PROCEDURE DECISIONS

U.S. v. Birchette, F.3d (4th cir. 11/7) The court denied defendant's request to interview jurors for evidence of racial animus [see, *Penorodriguez v. Colorado*, 137 S.Ct. 855]. *Penorodriguez* requires a threshold showing that racial bias was a "significant motivating factor" in the verdict, and the "practical mechanics of acquiring ... such evidence" is shaped by local court rules. Here the court rule required counsel to establish "good cause shown," which is "quintessentially a judgment call for [trial] courts."

U.S. v. Camara, F.3d (4th cir. 11/6) The indictment charged defendant with conspiring with Ray Ekobena *and* other, the judge instructed the jury that they must find defendant conspired with Ray Ekobna *or* others. Defendant contended that the instruction unlawfully amended the indictment. The court rejected this argument because "the existence of the conspiracy, rather than the particular identity of the conspirators, is the essential element of the crime. Indeed, the government need not identify *any* co-conspirators. While two persons are necessary to constitute a conspiracy, one person can be convicted of conspiring with persons whose names are unknown."



VIRGINIA SUPREME COURT CRIMINAL LAW AND PROCEDURE DECISIONS

Botkin v. Commonwealth, 11/1 Code 18.2-308.2(A), possession of a firearm by a convicted felon, requires that mandatory minimum sentences run consecutively. The circuit court's imposition of sentences to run concurrently was void *ab initio*. Thus appellant is entitled to a new sentencing hearing upon remand.

Thomas v. Commonwealth, 10/18 The trial court impermissibly lengthened the sentence fixed by the jury because the court's order did not specify that the additional time was imposed pursuant to Code 18.2-10 and 19.2-295.2, and the period of post-release supervision was not under the supervision and review of the Virginia Parole Board.

Johnson v. Commonwealth, 10/18 At probation revocation hearings the "reliability test" permits the admission of hearsay "if it possesses substantial guarantees of trustworthiness." In this case evidence established that defendant and victims lived in the same area, the victims' statements to police were consistent with text messages, and the man who approached the victims shared the same age, place of employment, and physical appearance as the defendant. This evidence established the reliability of the victims and thus did not violate defendant's right to confront witnesses against him.

Secret v. Commonwealth, 10/11 Case of first impression establishing the appellate standard of review applicable to the deliberate "question first, warn second," interrogation technique condemned in *Missouri v. Seibert*, 542 U.S. 600 (2004). *Seibert's* "deliberateness finding is appropriately reviewed as a factual finding." Unlike de novo review of legal findings, factual findings are reviewed to determine if they are plainly wrong or without evidence to support them. Because the trial court's finding that police "did not employ a deliberate two-step

interrogation strategy has ample evidentiary support, that finding is dispositive.”

The Court also held that “the mental state required for attempted murder is the intent to kill a human being, not a *particular* human being.” In what’s known as a “kill zone” example, a defendant wants to kill as many people as possible, and does not know or care who the victims will be.



VIRGINIA COURT OF APPEALS CRIMINAL LAW AND PROCEDURE DECISIONS

Hall v. Commonwealth, 11/6 Defendant contended that at her first trial, the dismissal of a charge for possession of a firearm while possessing cocaine triggered a collateral estoppel prohibition against a subsequent trial for possession of a firearm by a convicted felon. [This charge was severed from the other charge]. Defendant’s argument was rejected because *Currier v. Virginia*, 138 S.Ct. 2144 established that collateral estoppel does not apply when defendant made a voluntary decision to request that the charges be severed. It is irrelevant that the defendant in *Currier* was acquitted by a jury, while the defendant here prevailed on a motion to strike the charges.

Butcher v. Commonwealth, 11/6 Conviction under Code 46.2-894 for failure to stop and report information at the scene of an accident. The information must be reported to one of the persons in the statutory list.” I.e., police authority; the person injured or some other occupant of the vehicle collided with. The fact that one of those people knew defendant’s “name and address does not excuse his failure to provide his driver’s license number or the vehicle registration number.”

Anderson v. Commonwealth, 11/6 When a defendant raises self-defense, “the number of specific acts of violence of the victim which might be introduced is a matter within the sound discretion of the trial court.” Here, the court did not abuse its discretion by admitting four of the victim’s prior convictions and excluding six other instances of alleged misconduct. The excluded charges and convictions occurred between 17 and 20 years before the commission of the present offense.

Speller v. Commonwealth, 11/6 Case of first impression. “To obtain a conviction for grand larceny of a firearm [Code 18.2-95], when a value of more than \$200 is not shown, the Commonwealth must prove that the item stolen was ‘any instrument designed, made, and intended to fire or expel a projectile by means of an explosion.’ ... Proof that the firearm was operable at the time of the theft is not required.”

Daniels v. Commonwealth, 11/6 The magistrate failed to file a copy of the affidavit for a search warrant, as required by Code 19.2-54. The Court ruled that the purpose of the Code’s filing requirement “is to give the defendant reasonable opportunity to determine that the affidavit on file is the same one upon which the determination of probable cause was based.” Although the affidavit was delivered to the circuit court by the officer who executed the search warrant rather than by the magistrate who issued it, “the notice-based purpose of Code 19.2-54 was achieved. Further, defendant has not pointed to any prejudice he suffered as a result of the affidavit not having been filed by the magistrate.”

Midgette v. Commonwealth, 10/18 At defendant’s trial and acquittal for running a red light, he produced a video that he testified was true and accurate. When he was subsequently tried for perjury regarding the video, he claimed that collateral estoppel barred the perjury conviction because his acquittal for running a red light meant that the court accepted the truth of the video. The Court of Appeals held that collateral estoppel did not apply because the trial court did not address the factual issue of

“whether appellant testified truthfully when he stated that the video was a true and accurate depiction of the traffic stop.”

The court also ruled that expert testimony about the accuracy of the video was not testimony on the ultimate issue because the ultimate issue “was appellant’s false testimony, not the video’s accuracy.”

Davidson v. Commonwealth, 10/23 The court rejected defendant’s argument that “the trial court erred in giving jury instructions for forcible sodomy and aggravated sexual battery that combined the alternative theories of force, mental incapacity, or physical helplessness as the means by which the sexual acts were committed against the victim’s will.” “No matter which theory [the jury] accepted, all jurors convicted under a theory supported by the evidence and all jurors convicted the defendant of the same offense.”

Reed v. Commonwealth, 10/16 Although the Commonwealth obtained cell phone records in violation of the recent decision in *Carpenter v. U.S.*, 138 S.Ct. 2206, the police had a “good faith belief that their actions were constitutional at the time. Accordingly, the exclusionary rule does not apply as there was no police or governmental conduct that needed to be deterred at the time it occurred.”

Spratley v. Commonwealth, 69 Va.App. 314 (2018). “Unlike the larceny statutes, Code 18.2-137 provides a specific method for the Commonwealth to establish the value of destroyed property, ‘by proof of the ... fair market **replacement** value.’ This is unlike the larceny statutes which require that market value take into consideration factors such as age, condition, and depreciation.



MEMBER RESOURCES AREA

<http://www.vsb.org/site/sections/criminal/>

RECEIVE ELECTRONIC NEWSLETTERS

To post your email address, visit the VSB’s website at
<https://member.vsb.org/vsbportal/>
You may limit the use of your email address using this site.

Newsletters also will be posted on the section’s website.

To access, use this info:

Username: **criminallawmember**

Password: **Ywn9783**

This site is available only to Section members

Criminal Law News



FIRST CLASS
U.S. POSTAGE
PAID
PERMIT NO. 709
RICHMOND

Virginia State Bar
1111 East Main Street, Suite 700
Richmond, Virginia 23219-0026

Virginia State Bar Criminal Law Section Board of Governors 2018-2019

Hon. Nancy G. Parr, *Chair*
Seth C. Weston, *Vice Chair*
S. Eugene Fishel IV, *Secretary*
Timothy J. Heaphy,
Immediate Past Chair

Hon. Michael R. Doucette
Richard H. Doummar
Maria D. Jankowski
David R. Lett
Steven P. Milani
Joseph D. Platania

Hon. James E. Plowman
Theresa J. Royall
Hon. Tasha D. Scott
Hon. Gordon S. Vincent
James D. Vinson

Joshua M. Parrett, *Ex-Officio*,
Hon. Robert S. Ballou, *Ex-Officio*, Judicial
Hon. Tanya Bullock, *Ex-Officio*, Judicial
Hon. Richard S. Wallerstein, Jr., *Ex-Officio*, Judicial
Mrs. Maureen D. Stengel, *Liaison*

Newsletter Editor: Professor Ronald J. Bacigal, University of Richmond School of Law

www.vsb.org/site/sections/criminal

STATEMENTS OR EXPRESSIONS OF OPINION OR COMMENTS APPEARING HEREIN ARE THOSE OF THE EDITORS
AND CONTRIBUTORS AND NOT NECESSARILY THOSE OF THE STATE BAR OR SECTION.