



42nd Annual Seminar Program Confirmed



February 3, 2012
Kingsmill Marriott - Williamsburg
Hon. Martin F. Clark, Jr. to Speak



February 10, 2012
Doubletree Hotel - Charlottesville
DeMaurice "De" Smith, Esq. to Speak

The detailed seminar schedule and registration form are available at <http://www.vsb.org/site/sections/criminal/>. The seminar program will begin at 8:15 at each location, with welcoming remarks from the section's chair, Casey R. Stevens, followed by the annual lecture on **Recent Developments in Criminal Law and Procedure** by Professor Ronald Bacigal from the University of Richmond. Following a coffee break, Sara Poole, Counsel, Virginia State Police, will speak at 10:00 on **FOIA & Law Enforcement Records**. At 11:00 there will be a panel presentation on **What Can You Do When the Defendant is Mentally Ill But Not Legally Insane**. Judge Martin Clark will

be the luncheon speaker in Williamsburg, while DeMaurice Smith will speak at the Charlottesville luncheon. The afternoon session will begin at 1:30 with the traditional presentation on **Ethical Issues in the Practice of Criminal Law**, led by Judge Jane Roush and Rodney Leffler. A panel presentation will follow at 2:45 with a discussion of **Understanding and Navigating the Sexually Violent Predator Commitment Process**. The final topic of the day, beginning at 3:45, will be **Trials and Tribulations: Practice Pointers from the Bench**, presented by Judges Michael McGinty, Charles Sharp and Philip Trompeter.

LECTURERS

Ron Bacigal is a Professor of Law at the University of Richmond, and Reporter of Criminal law decisions for the Court of appeals of Virginia. He graduated from Washington and Lee Law School and did graduate study at The Hague as a Fulbright Scholar. He is the author of VIRGINIA CRIMINAL



PROCEDURE [with an accompanying form book], VIRGINIA CRIMINAL OFFENSES AND DEFENSES, VIRGINIA JURY INSTRUCTIONS, and TRIAL OF CAPITAL MURDER CASES IN VIRGINIA. He was the 2008 recipient of the Section's Harry L. Carrico Professionalism Award.

Sara N. Poole received her Bachelor of Arts degree from The College of William and Mary, and her J.D. from the University of Richmond. She practiced as a criminal defense attorney, and as Senior Assistant Commonwealth's Attorney in the Petersburg Commonwealth's Attorney's Office. She presently serves



as Hearing & Legal Services Officer with the Virginia Department of State Police. In that capacity she provides internal legal consultation & research for the Department; instructs the Department members and other law enforcement agencies around the Commonwealth on criminal, procedural and other legal matters; provides legal assistance in criminal investigations; coordinates FOIA and SDT requests; and acts as liaison with the Attorney General's Office in civil litigation cases.

Annette Miller is a Senior Assistant Public Defender with the City of Virginia Beach specializing in those individuals who suffer from serious mental illnesses. She received her undergraduate degree from Va. Tech, a master's in English from Syracuse University, and a J.D. from the University of Richmond.



She was awarded a Virginia Beach Human Rights Award for mental health education and advocacy

in 2000. She was recently published "The Post-Adjudication 'Not Guilty by Reason of Insanity' Process in the State of Virginia," in the American Bar Association's Criminal Litigation Magazine, Winter 2010, Volume 10, Number 2. She regularly teaches a comprehensive CLE seminar for her office entitled "Handling Criminal Cases and the Mentally Ill, A Guide for Attorneys, Clients, & Their Families.

Dan Shenaman MD is Assistant Facility Medical Director, Central State Hospital, and Clinical Professor of Psychiatry, VCU/MCV. He is a Board Certified Diplomate in the specialty of Psychiatry and is Board Certified Diplomate in the sub-specialty of Forensic Psychiatry. He has more than



twenty years experience in forensic psychiatry and the treatment of serious/chronic mental illness

Leslie J. Weisman is Bureau Chief, Client Services Entry, Arlington Community Services Board, Behavioral Healthcare Division. Programs include Emergency Services, Jail Diversion/Forensic Case Management, Discharge Planning, Homeless Outreach, and Entry Services.



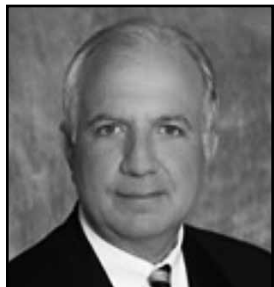
A 23 year employee of Arlington CSB, Ms. Weisman was the NGRI (Not Guilty by Reason of Insanity) Coordinator for six years, and now serves as CSB Forensic Admissions and Evaluation Coordinator. Ms. Weisman also serves as mental health liaison to the Arlington County Police Department Crisis Negotiation Team. She has worked closely with the Arlington County Police throughout her career, developing Crisis Intervention Team training for Arlington police and other first responders in January 2008.

Hon. Michael N. Herring has been the City of Richmond's Commonwealth Attorney since 2006. He received his B.A. and J.D. from the University of Virginia. Prior to his election as Commonwealth's Attorney he was a partner at Bricker & Herring, and an associate



at LeClair Ryan, and Hunton & Williams. In 2005-2006 he served as President of the Richmond Bar Association. He has served on numerous commissions, including the VBA Jury Task Force, Virginia Supreme court Magistrate Study Group, and the VBA Commission on Professionalism.

Rodney Leffler served as a police officer, and an Assistant Commonwealth's Attorney in Fairfax. He is currently a partner in the firm of Leffler & Mosley, and is also a substitute judge in the 19th Judicial District. He is an Adjunct Professor of Professional Responsibility at the George Mason University



School of Law, a Fellow of the American College of Trial Lawyers, has been named one of Virginia's Legal Elite and called the "man to see in Northern Virginia" by the Legal Times. He was Chair of the Section in 1998-99, and received its Harry L. Carrico Professionalism Award in 2007.

B. Leigh Drewry, Jr. received his B.A. from the University of Virginia in History and his J.D. from the University of Richmond. He was an assistant Commonwealth's Attorney for 10 years and has been in private practice since 1994 focusing on criminal law. He was lead counsel in 3 capital



cases and co-counsel in 1 and has represented five individuals subject to civil commitment. He currently serves as Secretary-Treasurer of the Lynchburg Bar Association, as president-elect of the Virginia Association of Criminal Defense Lawyers (VACDL), as a member of the Board of Directors of Big Brothers Big Sisters of Virginia, and as chairman of the Pastor Staff Parish Relations Committee of Heritage United Methodist Church.



David B. Hargett is a criminal defense attorney with a concentration in criminal trials, criminal appeals, and habeas cases. He is a Richmond native and a 1996 graduate of the University of Richmond's law school, the T.

C. Williams School of Law. He received his bachelor's degree from the University of Richmond, with a major in economics. He is a former Chair of the Criminal Law Section of the Virginia Trial Lawyers Association, and remains active in the VTLA (Criminal Law Section, Amicus Committee, Board of Governors), the VBA (Appellate Section Council), and the VACDL. He has been a lecturer at many seminars, and he has argued numerous cases in the Virginia Supreme Court, the Virginia Court of Appeals, and the United States Courts of Appeals for the Fourth Circuit. When not working, he stays busy with his wife and six children.

Evan S. Nelson earned his doctorate in clinical psychology from the University of North Carolina at Chapel Hill in 1991. In addition to being a Licensed Clinical Psychologist, he is also a Certified Sex Offender Treatment Provider, holds a Diplomate in Forensic Psychology from the American Board of Professional Psychology, and he is clinical faculty in the Department of Psychiatry at the VCU Medical Center. Dr. Nelson has been conducting evaluations for Sexually Violent Predator commitments since the statute went into effect and has been a Commonwealth's or respondent's expert in nearly 250 SVP proceedings. Dr. Nelson has been a partner in Forensic Psychology Associates in Midlothian, VA, since 1994, and maintains a psychosexual testing lab with a penile plethysmograph, ABEL and Affinity sexual interest tests, and a consulting polygrapher. He has been an expert in nearly 7,000 criminal and civil cases in Virginia during his 20 years of practice.

Erin D. Whealton is an Assistant Attorney General working in the Sexually Violent Predator Civil Commitment Section of the Office of the Attorney General. She has worked in the SVPCC section since January 2009. She was admitted to practice before the Virginia State Bar in 2001. She started her legal career



in the Hampton Commonwealth Attorney's Office in 2002, focusing on crimes of domestic violence. She moved on to the Gloucester Commonwealth Attorney's Office from 2006 to 2009, prosecuting cases of domestic violence and sexual assault. She has spoken previously on issues involving sexually violent predators at the Virginia Association of Commonwealth Attorneys conference in Norfolk, Virginia, and the Virginia Network for Victims and Witnesses of Crime conference in Williamsburg, Virginia.

Hon. Michael McGinty was born and raised in Philadelphia, Pa. He received his B.A. from Saint Joseph's University in 1982 and his J.D. from William and Mary in 1985. He served on active duty for four years in the Navy JAG Corps, was an assistant Commonwealth's Attorney for Williamsburg/



James City County from 1991-1997 and served as Commonwealth's Attorney from 1997-2007. He was appointed to the General District Court for the Ninth Judicial Circuit in 2007. Married with three children.

Hon. Charles S. Sharp is a Stafford County, Virginia Circuit Court judge. He was the Commonwealth's Attorney for the City of Fredericksburg for eighteen years. Before assuming that position, he was engaged in private practice and served as an assistant Commonwealth's Attorney in both Stafford and



Spotsylvania Counties. He received his undergraduate degree from Vanderbilt University and his law degree from the University of Virginia. He is a past president of the Virginia Association of Commonwealth Attorneys and past chairman of the Commonwealth Attorney's Services Council. He previously served as the first President of the Virginia Drug Court Association, and has been a facilitator for drug court teams around the country. Judge Sharp is currently a member of the Virginia State Drug Treatment Court Advisory Board and serves as chairman of the Evaluations Committee of that Board. He currently serves on the Board of Governors of the Criminal Law Section of the Virginia State Bar, and is also a member of the Virginia Code Commission.

Hon. Philip Trompeter is a Judge of the Juvenile and Domestic Relations District Court for the 23rd Judicial District of Virginia. He received his B.A. Degree from New York University and his Juris Doctor from the University of Richmond School of Law. Judge



Trompeter has served as president of the Mental Health Association of Roanoke

Valley and the Child Abuse Prevention Council. He serves on the Board of Directors of the Jefferson College of Health Sciences, and recently completed service on the Board of Directors of the Community Youth Program at St. John's. He has served on the Board of Governors of the Family Law Section of the Virginia State Bar, and was chairman of the Substance Abuse Committee of the National Council of Juvenile and Family Court Judges. He chaired the Roanoke Valley Drug and Alcohol Abuse Council for 14 years. He was recently appointed to the Board of the Domestic Relations Section of the Virginia Bar Association, and was appointed as a Mentor Judge for newly-appointed judges by the Chief Justice. Last year, Judge Trompeter received a "Courage To Care" award from the Roanoke Valley Prevention Council for his advocacy in substance abuse prevention for youth.

Judge Jane Marum Roush sits as a Circuit Court



Judge in the 19th Judicial Circuit, the largest court in Virginia which encompasses Fairfax County and Fairfax City. Judge Roush obtained her undergraduate degree from Wellesley College, a Liberal arts college for women, and is a 1981 graduate of the University of Virginia School of Law. Judge Roush was sworn in to the Circuit Court of Fairfax County on July 1, 1993. In 2003 Judge Roush presided over the D.C. Sniper trial of Lee Boyd Malvo.

MEMBER RESOURCES AREA

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

ELECTRONIC NEWSLETTERS & DIRECTORY FOR SECTION MEMBERS

Receive your newsletters electronically. Visit the VSB website at <https://member.vsb.org/vsbportal/> to verify or change your address of record and post your email address. Newsletters also available online for section members only, using:

Username: criminallawmember *Password:* **P7CVRWk1**

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Chair's Column

Casey R. Stevens

The Section is well on its way to finalizing preparations for the 42nd Annual VSB Criminal Law Seminar. The Seminar will be held live on Friday, February 3rd, 2012 in Williamsburg and Friday, February 10th, 2012 in Charlottesville. Our Williamsburg Luncheon Speaker will be the Honorable Martin F. Clark, Jr. a sitting Circuit Court Judge for the Virginia Counties of Patrick and Henry as well as for the City of Martinsville. Further, Judge Clark is also a bestselling author having been referred to as “the thinking man’s John Grisham” by *The New York Times Magazine*. Our Charlottesville Luncheon Speaker will be DeMaurice “De” Smith a former trial attorney and now the Executive Director of the National Football League Players Association. Mr. Smith, as many will recall lead the NFL Players through the 4 1/2-month lockout that ended in late July of 2011.

As mentioned in the Section’s last *Criminal Law News*, the Continuing Legal Education Board of the VSB adopted a new regulation, effective November 1, 2011. Said regulation mandates that of the twelve (12) credit hours minimally required of each active member of the Bar annually, no more than eight (8) may be earned from pre-recorded courses. Stated differently, four (4) of the minimally required hours annually must now be obtained at live seminars. Accordingly, I again encourage each of you to mark your calendar to attend the 42nd Annual VSB Criminal Law Seminar.

Additionally, the Carrico Professionalism Award Selection Committee, composed of the current Chair of the Board, the past three Chairs, and Justice Carrico, met in late 2011. The award, which is bestowed from time to time at the discretion of the Board of Governors of the Section on Criminal Law, will be presented this year at the Seminar luncheon in Williamsburg. Please join us this year at the Seminar in celebrating our distinguished Honoree.

Professor Ronald J. Bacigal has just completed the 2012 Supplement to the *Capital Case Trial Manual* which will be first available at each of the Criminal Law Section’s Seminars this year as well as thereafter directly from Virginia CLE. The Manual, prepared as a cooperative effort of Virginia CLE and the Section on Criminal Law, is supplemented annually between each new edition.

As another reminder, the VSB 74th Annual Meeting will be held June 13, 2012 through June 17, 2012 in Virginia Beach. The Section is presently working on submitting a presentation for consideration as the showcase seminar tentatively titled “*Big Brother is Watching*”. This program will address issues related to GPS tracking, cell site tracking, electronic fourth amendment issues and the like. Additional information regarding this intriguing CLE will be provided as the Annual Virginia Beach Seminar approaches. Accordingly, consider placing the Annual Meeting in your calendar now so as to reserve the date if you have already decided to attend or should you subsequently so decide.

As always, the success of the Criminal Law Section and your Board of Governors certainly is due to the notable lawyers, judges, and academics who dedicate their time and effort in support of the mission of our Section. However, said success is likewise due to the talented and committed members of the VSB staff that keep our section focused on our many worthwhile endeavors. I wish to thank the VSB staff for the many hours of corralling us lawyers for the good of our section.

Lastly, as has become custom, I would like to focus the members of our Section on a quotation which I find most inspiring in directing my thinking while engaged in the necessary clash between the Government, the accused, and sometimes the Court: “The law condemns and punishes only actions within certain definite and narrow limits; it thereby justifies in a way, all similar actions that lie outside those limits.” -Lev Nikolayevich Tolstoy. Let us commit ourselves to achieving justice.



U.S. SUPREME COURT CRIMINAL LAW AND PROCEDURE DECISIONS

Hardy v. Cross, SCt. (12/12). Per curiam reversal of habeas relief on a claim that petitioner’s confrontation rights were violated because the state made inadequate attempts to locate the witness before declaring her unavailable. “When a witness disappears before trial, it is always possible to think of additional steps that the prosecution might have taken to secure the witness’ presence, ... but the Sixth Amendment does not require the prosecution to exhaust every avenue of inquiry, no matter how unpromising.”

Greene v. Fisher, S.Ct. (11/8). The term “clearly established Federal law” in the antiterrorism and Effective Death Penalty act refers to the law in place when a state court adjudicated a habeas corpus petitioner’s claim, rather than the law at the time the petitioner’s conviction became final.

Bobby v. Dixon, S.Ct. (2011) (Per Curiam). The Court distinguished *Missouri v. Seibert*, 542 U.S. 600 which had condemned a “deliberate question-first, warn-later strategy.” (1) “Unlike in *Seibert*, there is no concern here that police gave Dixon *Miranda* warnings and then led him to repeat an earlier murder confession, because there was no earlier confession to repeat. (2) In *Seibert*, ‘the unwarned and warned interrogations blended into one ‘continuum.’ ... [But in this case a] significant break in time and dramatic change in circumstances created ‘a new and distinct experience,’ ensuring that Dixon’s prior, unwarned interrogation did not undermine the effectiveness of the *Miranda* warnings he received”

FOURTH CIRCUIT COURT OF APPEALS CRIMINAL LAW AND PROCEDURE DECISIONS

U.S. v. McKenzie-Gude, F.3d (4th Cir. 12/16). The court applied the good faith exception of *Leon* and held that a court does not abandon “the objective inquiry required by *Leon* when it considers the uncontroverted *facts known* to the officer, which he has inadvertently failed to disclose to the magistrate.”

U.S. v. Summers, F.3d (4th Cir. 12/16). “Although the government is required, after *Melendez-Diaz*, to provide live testimony if it deems evidence of certain ‘steps in the chain of custody’ to be crucial, no such requirement inheres when chain-of-custody evidence is introduced by the defense.” The Court also held that the numerical identifiers in the DNA report were not statement implicating the Confrontation Clause.

U.S. v. Glover, F.3d (4th Cir. 12/9). While the “high crime” nature of an area does not transform it into “a search zone, it is nonetheless a relevant factor in a *Terry* analysis. *** The Fourth Amendment does not preclude officers from taking modest steps to protect twenty-four hour gas stations, convenience stores, or fast-food outlets from armed robberies.”

U.S. v. Montieth, F.3d (4th Cir. 12/5/2011). Armed with a search warrant for defendant’s house, the police watched defendant exit the house, then stopped his car a mile away to ask him to consent to their entry of the house. The stop of defendant’s car was reasonable because the Fourth Amendment “does not impose upon police a duty based on geographic proximity ... rather the focus is upon police performance, that is, whether the police detained defendant as soon as practicable after departing from his residence.”

U.S. v. Medford, 661 F.3d 746 (4th Cir 2011). Under Fourth Circuit precedent, when a motion to sever is based on an asserted need for a co-defendant’s testimony, the moving defendant must establish: “(1) a bona fide need for the testimony of his co-defendant; (2) the likelihood that the co-defendant would testify at a second trial and waive his Fifth Amendment privilege; (3) the substance of his co-defendant’s testimony; and (4) the exculpatory nature and effect of such testimony.”

U.S. v. Powell, F.3d (4th Cir. 11/14). The latest in a series of cases where the Court expresses its “concern about the inclination of the Government toward using whatever facts are present, no matter how innocent, as indicia of suspicious activity.” Here the Court found a pat down to be unconstitutional because it was based solely on “caution data” – i.e., radio report that the passenger in the car had “priors” for armed robbery.

U. S. v. Guijon-Ortiz, 660 Fed 3rd 757 (2011). “Possessing probable cause that a driver has committed a traffic infraction does not give an officer free rein to keep the vehicle and its passengers on the side of the road while the officer investigates any hunch, whether through questioning or other methods, so long as the stop is shorter than the time it would have taken to conduct the ordinary incidents of a traffic stop. Although an officer may investigate matters unrelated to the justification for a traffic stop, those investigatory pursuits must be limited in both scope and duration, and are evaluated under the totality of the circumstances.”

Elmore v. Osmint, 661 F.3d 783 (4th Cir. 2011). Having scrutinized volumes of records of Elmore’s three trials and his state PCR proceedings, we recognize that there are grave questions about whether it really was Elmore who murdered Mrs. Edwards. And we are constrained to conclude — notwithstanding the demanding strictures of § 2254(d) — that Elmore is entitled to habeas corpus relief on his Sixth Amendment claim of ineffective assistance of counsel premised on his trial lawyers’ blind acceptance of the State’s forensic evidence. All told, Elmore’s is one of

those exceptional cases of “extreme malfunctions in the state criminal justice systems” where § 2254 may appropriately be used to remedy injustice. Accordingly, we reverse the district court’s judgment denying relief and remand for the court to award Elmore a writ of habeas corpus.

U.S. v. Higgs, F.3d (4th Cir. 11/23). Comparative Bullet Lead Analysis evidence “generally consisted of two components: (1) the scientific test used to measure the elemental composition of the lead in bullets; and (2) the conclusions drawn by the examiner based upon the similarities or differences in the elemental compositions of the compared bullets.”

U.S. v. Wellman, F.3d (4th Cir 12/7). “We decline to impose a requirement that a search warrant application involving child pornography must include an image of the alleged pornography. While the inclusion of such material certainly would aid in the probable cause determination, we do not impose a fixed requirement or a bright-line rule, because law enforcement officers legitimately may choose to include a variety of information when submitting a search warrant application. Instead, when considering the merits of a judicial officer’s probable cause determination, we will review a search warrant application in its entirety to determine whether the application provided sufficient information to support the issuance of the warrant.”

VIRGINIA COURT OF APPEALS CRIMINAL LAW AND PROCEDURE DECISIONS

Williams v. Commonwealth, Va. App. , S.E.2d (12/13). Defendant “failed to establish a good faith basis for seeking to withdraw his plea and, further, he has failed to proffer evidence of a reasonable basis for contesting guilt. *** A ‘reasonable defense,’ one sufficient to withdraw a guilty plea, is one based upon a proposition of law, or one supported by credible testimony, supported by affidavit.”

Purvy v. Commonwealth, Va.App. (12/13). As a general principle, an indictment citing a criminal statute incorporates its contents by reference. “But when the descriptive text of an indictment *narrows* the factual allegation, it limits the scope of the incorporation.” Although the indictment referenced Code s18.2-472.1, which encompasses both failure to register as a violent sexual offender and registering with false information, the language of the indictment alleged only a failure to

register. Thus a conviction for filing false information was reversed because of a fatal variance which “occurs where the indictment charges a wholly different offense than the one proved.”

Haynesworth v. Commonwealth, Va. App. , S.E.2d (12/6). In a two sentence opinion, the court granted Haynesworth’s Petitions for a Writ of Actual Innocence. There are three dissents discussing the standards for granting such writs.

Burriesci v. Commonwealth, Va. App. , S.E.2d (11/8). The trial court did not abuse its discretion in ordering restitution of \$180,000 for fraud perpetrated in relation to providing care services to Medicaid-eligible clients.

Epps v. Commonwealth, Va. App. , 717 S.E.2d 151 (11/15). As recognized in *Hernandez v. Commonwealth*, 281 Va. 222, “until the court enters a written order finding the defendant guilty of a crime, the court has the inherent authority to take the matter under advisement or to continue the case for disposition at a later date.” However, **after** adjudicating a defendant guilty, the trial court may not, “based solely on the defendant’s compliance with the conditions of suspension [of sentence] vacate that judgment and adjudicate the defendant not guilty.”

Baker v. Commonwealth, Va. App. (11/29). “Appellant exercised dominion and control over the firearm on three separate occasions – each a distinguishable incident of the proscribed conduct. Accordingly, the evidence established that appellant committed three distinct violations of possession of a firearm in violation of Code s18.2-308.2 [Possession of a firearm by a felon] Thus we hold that the trial court did not err in convicting appellant of three counts of possession of a firearm, and affirm the trial court’s judgment.”

CALLING GUEST AUTHORS – Virginia Lawyer Magazine!

The Section is accepting applications for feature articles for the December 2012 issue of the magazine. Additional details on section’s website (link to news item with full text)

**Deadline for proposals is
January 23, 2012.**

Criminal Law NEWS



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**74th Annual Meeting
VSB – Virginia Beach**

June 14-17, 2012

**BIG BROTHER IS
WATCHING!**

Look for Annual Meeting
registration
information in April
at www.vsb.org

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