



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

Criminal Law Section Board Elected to Lead Section in 2013-2014



Front Row, seated (l to r): Andrea L. Moseley, Secretary; Francis McQ. Lawrence, Chair; Joel R. Branscom, Vice Chair.
Back Row, standing (l to r): Judge Rufus A. Banks, Jr.; Judge Steven C. Frucci; Reno S. Harp III, ex officio; Esther J. Windmueller; Robert G. Morecock; Theo K. Stamos; Judge Ivan D. Davis; S. Eugene Fischel IV, ex officio; Lisa K. Caruso; Nancy G. Parr; Colette Wallace McEachin; Elizabeth P. Murtagh; and Manuel E. Leiva, Jr.

New Board Members



Manuel E. Leiva, Jr

Manuel Leiva was born in Washington D.C. and raised in Arlington and Fairfax County. Mr. Leiva attended American University where he received a dual degree in International Relations and Political Science. He then attended American University's Washington College of Law where he graduated in 1998. While at the Washington College of

Law, Mr. Leiva was a member of his law school's moot court team and served as President of the Hispanic Law Student Association.

Upon graduating from the Washington College of Law, Mr. Leiva served as an Assistant Public Defender in Fairfax County. Thereafter, Mr. Leiva left the Public Defenders office and worked as an associate with the law firm of Leffler & Hyland.

Mr. Leiva is a former two-term President of the Hispanic Bar Association of Virginia, served on the Virginia Bar Association's commission on Professionalism and currently serves on a committee to reform the discovery rules in criminal cases and is on the Board of the Virginia State Bar's Diversity Conference.

**Esther J. Windmueller**

Esther Windmueller has spent over twenty years practicing exclusively criminal defense. Additionally she has been an adjunct professor of law at the University of Richmond; president of the Virginia Association of Criminal Defense Lawyers; president of the Richmond Criminal Bar Association; chairwoman of the Richmond Community Criminal Justice Board; co-chair of the Virginia Criminal

Justice Conference; and a member of the Virginia Sentencing Commission. She also has served as a member of the Virginia State Bar's Third District Disciplinary Committee, and currently serves as a member of the Virginia State Bar's Disciplinary Board. Lastly she enjoys sitting on the bench as a substitute judge appointed in the 13th judicial circuit. She also has founded an ovarian cancer awareness non-profit, CancerDancer.

**Timothy J. Heaphy**

Prior to being appointed United States Attorney for the Western District of Virginia in 2009, Heaphy's career included 12 years of service (1994-2005) as an Assistant United States Attorney in both the Western District of Virginia and the District of Columbia. During his time as an AUSA, Heaphy prosecuted a broad spectrum of criminal matters including, narcotics, weapons offenses, homicides,

sexual offenses, white collar fraud cases and racketeering.

In 2002 and 2003, he was counsel for the United States in the longest-running criminal trial ever held in the U.S. District Court for the District of Columbia -- a RICO prosecution of a violent drug gang in which the defendants faced capital punishment. He also briefed and argued more than a dozen criminal appeals. After moving to Charlottesville, Va., he spent three years prosecuting environmental, national security, narcotics, violent crime, and public corruption crimes as an Assistant United States Attorney in the Western District of Virginia.

Virginia State Bar • 44th Annual Criminal Law Seminar

FEBRUARY 7, 2014 - DOUBLETREE HOTEL - CHARLOTTESVILLE

FEBRUARY 14, 2014 – DOUBLETREE WILLIAMSBURG

8:00	Late Registration and Exhibits
8:15	Welcome and Opening Remarks
8:30-9:30	Recent Developments in Criminal Law and Procedure
9:30-9:45	Coffee Break
9:45 -11:00	Immigration Issues: How to Avoid the Road Home
11:00-12:00	Stress Management for Lawyers (Ethics)
12:15-1:30	Luncheon
1:30-2:45	Ethical Issues in the Practice of Criminal Law
2:45- 3:45	Revocations: Serving Your Suspended Sentence on the Installment Plan
3:45-5:00	The Changing Landscape of Discovery
5:00	Closing Remarks and Adjournment

Joel R. Branscom – Seminar Program Chair

Look for seminar brochure and registration information in mid-December

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



Chair's Column

Francis McQ. Lawrence

The Criminal Law Section of the Virginia State Bar brings together an amazing group of individuals who participate in the criminal justice system all over the state. Our membership includes judges at all levels; prosecutors; public defenders and defense counsel, both federal and state.

Your board reflects that diversity and we take our responsibility in educating the criminal bar seriously. We participate in educational efforts in both our annual seminar in February and at the annual meeting of the Virginia State Bar; and we pay attention to what is happening in the criminal bar.

One of the things we have done and continue to do is talk about issues in criminal law with a perspective to improve the criminal justice system, both for the participants and for our communities.

What is out there now that we should be talking about?

In what has been hailed as a “landmark report,” the Virginia Death Penalty Assessment Team’s recent report (www.ambar.org/virginia) contained recommendations that are important not only for improvements to fairness and accuracy in capital cases, but important for the criminal justice system in general, especially in the in areas of eyewitness identification, interrogation procedures and discovery.

The report notes that while some law enforcement agencies across the Commonwealth have adopted policies that improve the likelihood of accurate eyewitness identifications, and the Virginia Department of Criminal Justice Services has a “model policy on eyewitness identification,” statewide use is not yet mandated. The model policy provides for a double blind administration of the eyewitness procedure in which both the officer and the witness are unaware of the identity of the suspect during the lineup. The report also noted that almost 70% of law enforcement agencies did not require documented lineup results and only 10% indicated preference for video or audio recording procedure.

In discussing suspects’ interrogation and confession, the report recommended that Virginia require law enforcement agencies to record interrogation interviews with suspects and witnesses that take place in a law enforcement-controlled setting in any potential capital case. Of course, every serious felony involves the loss of liberty and many require long prison sentences, even life without parole. Accordingly, all of the

recommendations from this Commission probably should be implemented across the board in felony criminal prosecutions.

The report concludes that Virginia' discovery rules are more restrictive than in other states and the federal system. The report also noted that some prosecutors provide more discovery than the rules require. It continues to be the case that a capital defendant, or any defendant, may go to trial without knowing who testified against him or her, and counsel will face the process of cross examining witnesses without access to written or recorded statements made by the witness at the time of the events. The Committee recommends, with respect to capital cases, a requirement that prosecutors disclose the identity and any prior statements of testifying witnesses at a time sufficient to allow adequate preparation for cross examination and to allow discovery of police reports. The report notes security and safety issues and recommends that the rules provide for protective orders to protect witness safety in appropriate cases.

My local newspaper had a follow up editorial on the report, suggesting several issues that we, as citizens, should be talking about. The editorial noted that "many Virginia law enforcement agencies have failed to voluntarily adopt best practices when conducting lineups and gathering eyewitness evidence." The article went on to state that "the Virginia Supreme Court should require prosecutors to disclose the identity of testifying witnesses as well as any other prior statements they might have made, so that a suspect's attorneys have a better chance to prepare a defense." The article argued that we should "require police to electronically record interrogatories and confessions" because such a practice "would provide an accurate record of this form of evidence – gathering."

The editorial notes that the report addresses death penalty cases but it notes that any loss of freedom should require that such a determination be made with "best practices."

So, these are the things for all of us to think about in the coming year.

I am pleased to report that as of September 2013, the membership of the Criminal Law Section stands at 2,356 including 331 judicial members. We are the second largest section in the Virginia State Bar.

We welcome new board members Manuel E. Leiva, Jr., a criminal defense attorney from Fairfax; Esther J. Windmueller, a criminal defense attorney from Richmond; and Timothy J. Heaphy, the U.S. Attorney for the Western District of Virginia.

We say goodbye, with appreciation, to our retiring board members, including Casey R. Stevens of Woodbridge; Claire G. Cardwell of Richmond; John P. Fishwick, Jr. of Roanoke; and Neil H. MacBride, the U.S. Attorney for the Eastern District of Virginia.

Lisa K. Caruso, retires as Chair having done a wonderful job and will continue to serve as Immediate Past Chair.

Please mark your calendars now for our February annual seminar in Charlottesville, February 6 -7, 2014, and Williamsburg, February 12 – 14, 2014.

All of us who served on your board are proud to do so. There is no other organization in Virginia that is so broadly representative of prosecutors, defense counsel, trial judges, and academics concerned with the criminal justice system in the Commonwealth.



U.S. SUPREME COURT CRIMINAL LAW AND PROCEDURE DECISIONS

Salinas v. Texas, 133 S. Ct. 2174, (2013). A plurality held that: “A suspect [not in custody] who stands mute has not done enough to put police on notice that he is relying on his Fifth Amendment privilege.” The privilege is not self-executing and a person “who desires its protection must claim it.” The two concurring Justices stated that even if the privilege is claimed, “a defendant is not compelled ... to be a witness against himself simply because a jury has been told that it may draw an adverse inference from his silence.”

Alleyne v. United States, 133 S. Ct. 2151, (2013). Because mandatory minimum sentences increase the penalty for a crime, any fact that increases the mandatory minimum is an “element” that must be submitted to the jury. [Overruling *Harris v. United States*, 536 U.S. 545 (2002)].

FOURTH CIRCUIT COURT OF APPEALS CRIMINAL LAW AND PROCEDURE DECISIONS

United States v. Yengel, 711 F.3d 392 (4th Cir. 2013). Warrantless entry of a closet to recover a hand grenade was unconstitutional because “the stable nature of the threat, the immobile and inaccessible location of the threat, and the failure by police officers on site to view the threat as serious enough to warrant evacuation of a nearby child, alone, support our conclusion ... that no exigency existed in this case.” The opinion lists relevant factors in determining whether an exigency justifies a warrantless search – “(1) the degree of urgency involved and the amount of time necessary to obtain a warrant; (2) the officers’ reasonable belief that the contraband is about to be removed or destroyed; (3) the possibility of danger to police guarding the site; (4) information indicating the possessors of the contraband are aware that the police are on their trail; and (5) the ready destructibility of the contraband.”

VIRGINIA SUPREME COURT CRIMINAL LAW AND PROCEDURE DECISIONS

Jordan v. Commonwealth, Va. (9/12/13). Evidence was sufficient to convict defendant of possession of a firearm by a convicted felon. Defendant pointed the instrument directly at the victim's head and concurrently demanded that he part with possession of the vehicle. Even without actually saying the words, 'or I will shoot you,' a reasonable fact-finder could have concluded that defendant's words and actions implied as much and that what he pointed at the victim was a firearm and not a replica or toy.

Boone v. Commonwealth, 285 Va. 597, 740 S.E.2d 11 (2013). "While the article 'a' in Code §18.2-308.2(A) does ... reflect legislative intent that proof of only one violent felony is necessary to obtain the enhanced sentence, that article does not limit the evidence the Commonwealth may adduce to prove it." The Commonwealth is "entitled to utilize its entire arsenal" of prior convictions to meet its burden. The trial court retains discretion to exclude evidence as repetitious and cumulative, and defendant's offer to stipulate to a prior felony is relevant.

Sigmon v. Director, 285 Va. 526, 739 S.E.2d 905 (2013). "Sigmon's petition for a writ of habeas corpus [based on ineffective assistance of counsel] can proceed simultaneously with his direct appeal in this Court."



VIRGINIA COURT OF APPEALS CRIMINAL LAW AND PROCEDURE DECISIONS

Chappelle v. Commonwealth, Va. App. (8/20). The Court assumed that the "side-switching doctrine" applies to criminal cases. The doctrine "bars an expert witness from testifying when the party seeking disqualification of the expert proves that it was objectively reasonable to believe a confidential relationship existed between the party seeking disqualification and the expert, and the party seeking disqualification disclosed confidential or privileged information to the expert."

Belew v. Commonwealth, 62 Va. App. 55, 741 S.E.2d 800 (2013). Felony hit and run under Code §46.2-894 requires that the accident caused injury to or the death of another. Injury includes "so-called 'soft tissue' injury such as muscle pain or damage."

Jeffer v. Commonwealth, 62 Va. App. 151, 743 S.E.2d 289 (2013). "Search warrants are not directed at persons; they authorize the search of 'places' and the seizure of things." [it did not matter whether the described out-building was occupied or not].

Fauntleroy v. Commonwealth, 62 Va. App. 238, 746 S.E.2d 65 (2013). The vehicle was properly impounded and inventoried because "the vehicle was 'not drivable' (due to its display of an invalid inspection sticker) and ... the vehicle was parked in 'the middle of the road' impeding traffic."

Bonner v. Commonwealth, 62 Va. App. 206, 745 S.E.2d 162 (2013). (en banc). Under the language of Code §18.2-311 [altering the serial number of a firearm] "the offense is complete once the person tampers with the serial number of the firearm.... Thus, the offense constitutes a discrete act rather than a continuing offense [like larceny]." Proper venue lies only where the alteration took place, not all localities into which the firearm was taken.

Ferrell v. Commonwealth, 62 Va. App. 142, 743 S.E.2d 284 (2013). "When a principal in the first degree and a principal in the second degree in the same offense have separate trials, the judgment against one, whether of conviction or of acquittal, has no bearing upon a judgment against the other."

MEMBER RESOURCES AREA

<http://www.vsb.org/site/sections/criminal/>
ELECTRONIC NEWSLETTERS FOR
SECTION MEMBERS

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

To post your email address, visit the VSB's website at <https://member.vsb.org/vsbportal/>. You will be given the opportunity to limit the use of your email address on this site.

Newsletters also will be posted on the section's website. To access, use this info:

Username: **criminallawmember** Password: **48gLsj47**

This site is available only to Section members.

CALL FOR NOMINATIONS

HARRY L. CARRICO PROFESSIONALISM AWARD
 VSB Section on Criminal Law

The Harry L. Carrico Professionalism Award was established in 1991 by the Section on Criminal Law of the Virginia State Bar to recognize an individual (judge, defense attorney, prosecutor, clerk, or other citizen) who has made a singular and unique contribution to the improvement of the criminal justice system in the Commonwealth of Virginia.

The award is made in honor of the Honorable Harry L. Carrico, a former Chief Justice of the Supreme Court of Virginia, who exemplifies the highest ideals and aspirations of professionalism in the administration of justice in Virginia. Chief Justice Carrico was the first recipient of the award, which was instituted at the 22nd Annual Criminal Law Seminar in February 1992.

Although the award will only be made from time to time at the discretion of the Board of Governors of the Criminal Law Section, the Board will invite nominations annually. Nominations will be reviewed by a selection committee consisting of former chairs of the section and Chief Justice Carrico.

Criteria

The award will recognize an individual who meets the following criteria:

- ◆ Demonstrates a deep commitment and dedication to the highest ideals of professionalism in the practice of law and the administration of justice in the Commonwealth of Virginia;
- ◆ Has made a singular and unique contribution to the improvement of the criminal justice system in Virginia, emphasizing professionalism as the basic tenet in the administration of justice;
- ◆ Represents dedication to excellence in the profession and “performs with competence and ability and conducts himself/herself with unquestionable integrity, with consummate fairness and courtesy, and with an abiding sense of responsibility.” (Remarks of Chief Justice Carrico, December 1990, Course on Professionalism.)

Submission of Nomination

Please submit your nomination on the form below, describing specifically the manner in which your nominee meets the criteria established for the award. If you prefer, nominations may be made by letter.

Nominations should be addressed to Francis M. Lawrence, Chair, Criminal Law Section, and mailed to the Virginia State Bar Office: Eighth and Main Building, Suite 1500, 707 East Main Street, Richmond, VA 23219. **Nominations must be received no later than December 3, 2013.** Please be sure to include your name and the full name, address, and phone number of the nominee.

If you have questions about the nomination process, please call Elizabeth L. Keller, Assistant Executive Director for Bar Services, Virginia State Bar, at (804) 775-0516.

Prior Recipients

The Honorable Harry L. Carrico	1992	Prof. Robert E. Shepherd	2003
James C. Roberts, Esquire	1993	Richard Brydges, Esquire	2004
Oliver W. Hill, Esquire	1995	Overton P. Pollard, Esquire	2005
The Honorable Robert F. Horan	1996	The Honorable Paul B. Ebert	2006
Reno S. Harp III, Esquire	1997	Rodney G. Leffler	2007
The Honorable Richard H. Poff	1998	Prof. Ronald J. Bacigal	2008
The Honorable Dennis W. Dohnal	1999	The Honorable Jere M.H. Willis Jr.	2010
The Honorable Paul F. Sheridan	2000	Melinda Douglas	2012
The Honorable Donald H. Kent	2001	Claire G. Cardwell	2013
Craig S. Cooley, Esquire	2002		

HARRY L. CARRICO PROFESSIONALISM AWARD
 NOMINATION FORM

Please complete this form and return it to the Virginia State Bar, Eighth and Main Building, Suite 1500, 707 East Main Street, Richmond, VA 23219. **Nominations must be received no later than December 3, 2013.**

Name of Nominee: _____

Profession: _____

Employer/Firm/Affiliation: _____

Address of Nominee: _____

City _____ State _____ Zip _____

Name of person making nomination _____ Telephone _____
 (Please print)

E-mail _____ Signature _____

(Please attach an additional sheet explaining how the nominee meets the criteria for the Harry L. Carrico Professionalism Award.)

Criminal Law NEWS



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