Criminal Law NEWS
Volume 39, Number 3
January 2010
PUBLISHED BY THE CRIMINAL LAW SECTION OF THE VIRGINIA STATE BAR FOR ITS MEMBERS

40th Annual Seminar Program Confirmed

Robert Horan, Jr. to Deliver Luncheon Speech in Williamsburg; Reno Harp III to Speak in Charlottesville

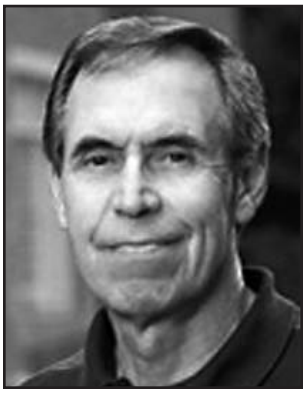
The Honorable Robert F. Horan, Jr. will be the featured luncheon speaker for the *40th Criminal Law Seminar* session in Williamsburg on Friday, February 12. He was appointed Commonwealth's Attorney for Fairfax County in 1967. He has served as president of the Virginia Association of Commonwealth Attorneys, as a member of the Virginia State Crime commission, the Criminal Law section's Board of Governors, and on almost every significant criminal justice study committee for the state. He was the 1996 recipient of the Section's Harry L. Carrico Professionalism Award.

Reno S. Harp III will deliver luncheon remarks in Charlottesville on Friday, February 5. He received his BA and JD from Washington and Lee University. He served as Assistant Attorney General of Virginia from 1956 to 1970; Deputy Attorney General from 1970 to 1978; and Counsel and Chief Counsel to the Judicial Inquiry and Review commission from 1971 to 1996. He was the 1997 recipient of the Section's Harry L. Carrico Professionalism Award.

The detailed seminar schedule and registration form are available at http://www.vsb.org/docs/section/criminal/CLS09.pdf. The seminar program will begin at 8:15 at each location, with welcoming remarks from the section's Chair, Richard E. Trodden, followed by the customary lecture on **"Recent Developments in Criminal Law and Procedure"** by Professor Ronald Bacigal from the University of Richmond. Following a coffee break, Craig Cooley [both locations] and Donald Caldwell [Charlottesville] and Michael Herring [Williamsburg] will speak at 10:00 a.m. on **"Developing the Theory of a Case."** At 11:00 a.m. at both locations, the Honorable Robert Humphreys, will lead a panel discussion on **"Preserving the Record."** Judge Humphreys will be joined in Charlottesville by Frank Friedman and Virginia Theisen, while L. Steven Emmert and Leah Darron will join the judge in Williamsburg. At noon there be a brief report on **"Indigent Defense Data Collection"** by John Lichtenstein and James Hingeley. The afternoon session will begin at 1:45 p.m. with the traditional presentation on **"Ethical Issues in the Practice of Criminal Law,"** led by Judge Dennis Dohnal and Rodney Leffler. Casey Stevens will follow at 2:45 p.m. with a discussion of how **"Technology Can Be Your Friend."** The final topic for the day, beginning at 3:45 p.m., will be Claire Cardwell's presentation on **"Handling Experts like an Expert."**

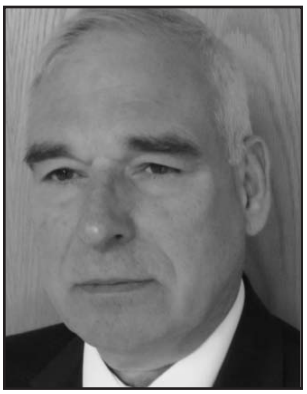
MORNING LECTURERS

Ron Bacigal is a Professor of Law at the T.C. Williams School of Law of the University of Richmond, and a Reporter of Decisions for the Court of Appeals of Virginia. He is an alumnus of Concord College and graduated with highest honors from Washington and Lee Law School. He did graduate study at The Hague as a Fulbright Scholar, served as a law clerk to United States District Judge Ted Dalton, and then served as a Lieutenant in Navy JAG. Bacigal joined the University of Richmond Law School faculty in 1971 where he teaches Criminal Law, Criminal Procedure, Criminal Process and Evidence. He is the author of VIRGINIA CRIMINAL PROCEDURE, VIRGINIA CRIMINAL PROCEDURE FORMS, CRIMINAL OFFENSES AND DEFENSES and he co-authored VIRGINIA JURY INSTRUCTIONS. He also has authored TRIAL OF CAPITAL CASES IN VIRGINIA for the Section and Virginia CLE. He has twice been selected to receive the *Distinguished Educator Award* at the University of Richmond, and he received one of the Governor's *Outstanding Virginia Faculty Member* awards in 1991. He was the 2008 recipient of the Section's Harry L. Carrico Professionalism Award.



Craig S. Cooley - Craig Cooley is a criminal defense lawyer, a substitute judge in the Richmond area, and an adjunct Professor of Law at the University of Richmond. He is a graduate of the University of Richmond and received an M.A. in political science and his law degree from the University as well. Cooley is a past Chair of the Criminal Law section of the Bar, served as President of the Richmond Criminal Bar Association, and is a member of the Advisory Committee on Rules of Court for the Supreme Court of Virginia. He is a Fellow of the Virginia Law Foundation, received the Hill-Tucker Public Service Award from the Richmond Bar Association, the Harry L. Carrico Professionalism Award from the Criminal Law Section of the Virginia State Bar, and the Livingston Hall Juvenile Justice Award from the American Bar Association. His 31 years of law practice include 68 capital murder representations, over 500 murder trials, and over 4500 representations of indigent defendants. He has tried over 600 jury trials. He received much national acclaim for his participation as co-lead counsel in the defense of Lee Boyd Malvo in the Washington DC Beltway Sniper cases.

Hon. Donald Caldwell is the current



Commonwealth's Attorney for the City of Roanoke. He received his undergraduate degree from VMI, and his J.D. from the University of Richmond. He served as president of the Virginia Association of Commonwealth's Attorneys, and as an adjunct professor at Roanoke and Hollins colleges.

Michael Herring. Prior to his election as

Commonwealth's Attorney for the City of Richmond, he was a partner at the law firm of *Bricker & Herring* where he practiced criminal law and medical practice law. In 2002, he joined the faculty at the University of Richmond School of Law as an adjunct professor. He is a frequent speaker at Richmond's public schools, mentoring students with the Lunch Buddies and Richmond Against Drugs programs. Mr. Herring served as the first African-American President of the Richmond Bar Association in 2005 and was Chairman of the Board of Governors of the Criminal Law Section of the Virginia State Bar in 2004 and 2005.

Hon. Robert Humphreys received his under-

graduate degree from Washington and Lee University, and a J.D. degree from Widener University. Before becoming a judge, he spent 24 years as a trial lawyer and served as Commonwealth's Attorney for Virginia Beach from 1989 to 2000 when he was elected to the Court of Appeals of Virginia. In 1996 the Virginia Association of Commonwealth's Attorneys chose him as recipient of its *Robert F. Horan Award for Outstanding Service* to Virginia prosecutors.

Frank Friedman received his A.B. from

Harvard and his J.D. from Vanderbilt. He recently completed a term as President of the Virginia Capital Representation Resource Center and currently serves on its Board. He has been chairman of the Litigation Section of the State Bar, and Chairman of its Appellate Practice Subsection. He served as a member of the Supreme Court of Virginia Advisory Committee on Electronic Filing of Rehearing Petitions, and a Task Force Member of the Commission on Virginia courts in the 21st Century.

Virginia Theisen is a Senior Assistant Attorney

General. She is a graduate of the College of William and Mary and received her law degree from the college's Marshall-Wythe School of Law. She began her legal career in 1984 as an Assistant Commonwealth's Attorney for the City of Roanoke. In 1987 she joined the Office of the Attorney General as an Assistant Attorney General in the Criminal Litigation Section. From 1994-1998 she worked as a staff attorney (part-time) for the Court of Appeals of Virginia. In 1998 she rejoined the Criminal Litigation Section of the Attorney General's Office and in 2006 was promoted to Senior Assistant Attorney General. She handles criminal appeals and actual innocence writs in state courts, and habeas corpus cases in state and federal courts.

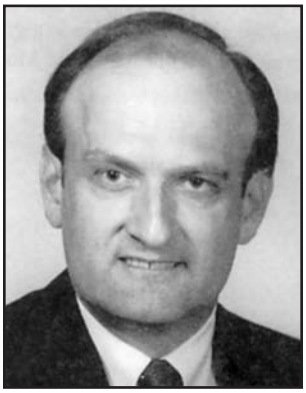
L. Steve Emmert is a member of the Virginia Bar Association (Boyd-Graves Conference), the American Bar Association (Council of Appellate Lawyers), the Virginia Trial Lawyers Association (co-chair, Amicus Curiae Committee), the Virginia Beach Bar Association (Circuit Court Liaison Committee), the Federal Bar Association, and the Virginia State Bar (chairman, Appellate Practice Subcommittee). He received a Bachelors of Arts in Economics graduating magna cum laude from the University of Richmond. In 1982 he received a Juris Doctor Degree from the University of Virginia School of Law. Mr. Emmert limits his practice to appellate advocacy in the state and federal courts and is a frequent lecturer on appellate advocacy before a variety of bar associations.

Leah A. Darron is a Senior Assistant Attorney General. She graduated from the University of Virginia and received her J.D. degree from the University of Richmond. In 1984, she joined the Office of the Attorney General of Virginia where she has worked for 25 years in the Criminal Litigation Section. Ms. Darron has represented the Commonwealth in more than 600 reported cases in the Court of Appeals of Virginia, Virginia Supreme Court, Fourth Circuit Court of Appeals and federal district courts. She handles criminal appeals, actual innocence litigation and habeas corpus matters and is responsible for reviewing habeas corpus pleadings drafted by her colleagues.

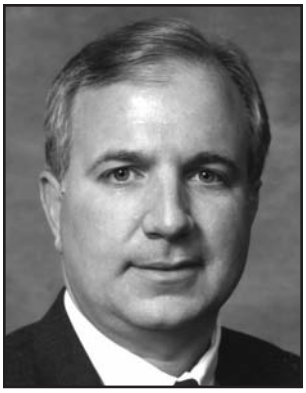
John E. Lichtenstein is a partner in the Roanoke firm of Lichtenstein, Fishwick & Johnson. He is a past chair of the Criminal Law Section of the Virginia State Bar.

James M. Hingeley, Jr. is Public Defender for the City of Charlottesville and a past member of the Board of Governors of the Criminal Law Section of the Virginia State Bar.

The Honorable Dennis W. Dohnal - Judge Dennis Dohnal is a graduate of Bucknell University and the George Washington University Law Center. Since graduation from law school he has served as an Assistant United States Attorney, as a partner with Bremner, Baber & Janus, and as a Director with Brenner, Dohnal, Evans & Yoffy in Richmond. He is currently a United States Magistrate Judge for the Eastern District of Virginia. He has also served as Special Counsel for the Division of Legislative Services for the Virginia General Assembly. He is a former President of both the Bar Association of the City of Richmond and the Richmond Criminal Bar Association, has served as Chairman of the Virginia State Bar Special Committee to Study the Virginia Code of Professional Responsibility, and serves as a member of the Virginia State Bar Council. Dohnal has also served as Chair of the Special Committee on Court-Appointed Fees of the Virginia Supreme Court and is on the Executive Committee of the Virginia State Bar. He served as Chair of the Criminal Justice Section from 1983-1984 and was the 1999 recipient of the Section's Harry L. Carrico Professionalism Award.



Rodney G. Leffler - Rod Leffler is an alumnus of Penn State and the George Mason University Law School. Between college and graduation from law school he served as a police officer in Fairfax County, and began teaching during that period at the Northern Virginia Criminal Justice Academy. He was an



Assistant Commonwealth's Attorney in Fairfax County for two years before joining a private firm in Fairfax. He is currently a partner in the firm of Leffler & Hyland and is also a substitute judge in the 19th Judicial District. Leffler has served on the Judicial Screening Committee of the Fairfax County Bar Association, and as Chairman of that group's Circuit Court Committee. He was also a member of the Tenth District Committee of the Virginia State Bar and was Chair of the Criminal Law Section's Board of Governors in 1998-1999. He was a faculty member for the Professionalism Course, and is an Adjunct Professor of Professional Responsibility at the George Mason University School of Law. Leffler is a Fellow of the American College of Trial Lawyers, is included in The Best Lawyers in America, has been named one of Virginia's Legal Elite and has been called "the man to see in Northern Virginia" by the *Legal Times*. He received the Section's Harry L. Carrico Professionalism Award of the Section in 2007.

Casey R. Stevens graduated in 1984 From Virginia Tech with a Bachelor of Science Degree in Business and obtained his Juris Doctorate degree from George Mason University School of Law in 1988. He clerked for United States District Judge James C. Cacheris and then served as an Assistant Commonwealth's Attorney in Prince William County from 1989 to 1994. Casey currently serves on the Virginia State Bar 5th District Ethics Committee, is Secretary of the Virginia State Bar Criminal Law Section Board of Governors, is a member of VACDL, NACDL, the Prince William Bar Association, Fairfax Bar Association, Fredericksburg Area Bar Association, American Bar Association, and The Virginia Bar Association. Casey is admitted to practice in The United States Supreme Court, The United States 4th Circuit Court of Appeals; The United States District Court, Eastern District of Virginia, and The Supreme Court of Virginia. Casey's areas of practice are criminal defense and personal injury.

Claire Cardwell graduated in the top of her class from the T.C. Williams School of Law at the University of Richmond. For the first ten years of her career, she maintained a busy private practice trying hundreds of cases throughout Virginia in state and federal courts. In 1994, Cardwell was named Chief Deputy Commonwealth's Attorney for the City of Richmond, where for the next eight years she tried homicide and other high profile cases. Since returning to private practice in 2002 she has concentrated on criminal defense trials and appeals, personal injury and other general litigation. She has received numerous honors including: Women of Achievement Award, Women's Richmond Metropolitan Bar Association; Profiled on WWBT Channel 12 as one of Richmond's Top Criminal Lawyers; Richmond Public Commendation for Exemplary Performance; Richmond's Best Lawyers, Richmond Magazine; Voted one of Richmond's Super Lawyers by other attorneys in the area for 3 consecutive years.

MEMBER RESOURCES AREA

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

ELECTRONIC NEWSLETTERS & DIRECTORY OF SECTION MEMBERS

The section is going green! **Don't miss the opportunity to receive your newsletters electronically. It's simple…** if you have provided your email address as part of their official address of record with the Virginia State Bar, you will receive future newsletters electronically.

The **Directory of Section Members** also will be posted on the section's website in January, using your address of record (your choice of home or business) with the Virginia State Bar. If you are currently using a home address as your address of record with the bar, please note that this is the address that will be published in the directory, unless you change it, using the steps below.

Here's what you need to do - visit the VSB's website at https://member.vsb.org/vsbportal/ to **verify or change the address of record** (home or business) and **post your email** address as part of your official address of record. You will be given the opportunity to limit the use of your email address on this site.

You are ready to go – access the section's site for the directory and newsletters with this info: **Username**: criminallawmember; **Password**: CLmember09

This site is available only to Section members.

Chairman's Column

Two events in this past month have illustrated a fundamental tension within our system of criminal justice. One is the ghastly murder of four police officers in Tacoma, Washington and the other is the opinion of the Court of Appeals in Hernandez v. Commonwealth, 55 Va. App. 190 (2009). The tension which these two seemingly unrelated events illustrate is between the call for certainty in the criminal law and the frequent tug for mercy.

We now know that Maurice Clemmons, the man responsible for the murders of the police officers, would have been in the Arkansas penitentiary instead of on the streets were it not for the decision of then governor Mike Huckabee to commute his prison sentence of 95 years. According to the Washington Post, Mr. Huckabee thought that his action was merciful, saying that Clemmons had received an unfairly harsh sentence because he was young and black. Given the consequence of this exercise of executive authority one cannot help but ask whether the Executive should have such authority in the first place.

In a similar vein many courts in this Commonwealth have taken the position that they have the "inherent authority" to defer findings or suspend the imposition of sentence and place the defendant on probation with the ultimate favorable outcome being a dismissal of the charge. Thus some courts – even when there is no legislative authorization for such action – were basically granting pardons to defendants. Certainly such action was not based on whimsy but rather out of a desire to ameliorate what may be seen as the harsh consequences of a conviction. Now with the decision in Hernandez such activity must cease except in situations where such a disposition is authorized by statute. The Court clearly framed its holding when it said: "To construe the inherent power of a court to dismiss a criminal charge on a basis other than the legal or factual merits would, by such construction, potentially authorize judicial nullification of a legislative act in violation of separation of powers."

Even with the decision in Hernandez we can be certain that we have not heard the end of this discussion. As of this writing the Supreme Court has not weighed in on this matter and with the legislature coming into session next month there are bound to be calls for giving courts such authority.

At this point it would seem appropriate to reflect upon whether we really want to go down this road. I must admit a prosecutorial bias on my part against a dismissal without the consent of the Commonwealth. This is particularly offensive when the defendant has pleaded not guilty and has forced the Commonwealth to prove his guilt beyond a reasonable doubt.

There is a more fundamental objection to selective "judicial pardons," however, than prosecutorial pique – it can lead to a dark cynicism and disrespect for our criminal law. On the one hand we may have the legislature proclaiming its "toughness" on crime with minimum mandatory sentences, while at the same time certain judges take it upon themselves to nullify such legislation. It is frequently said that we are "a nation of laws, not men" but this sort of "judicial pardon" would belie such an assertion. Should the legislature grant judges such power in all cases one could be forgiven for concluding that we have entered the era of a "wink and a nod".

Honesty compels me to admit that there are times when the consequences flowing from a criminal conviction are out of proportion to the weight of the crime. Only a heartless prosecutor would say "never" to a deferral and dismissal in such situations. It would seem appropriate, therefore, to empower the courts to dismiss after probation when all the parties agree. Yes, I know that by now many of my colleagues in the defense bar are thinking: "I know a lot of those heartless prosecutors." I grant that there are cases on the margins where positions will differ but those cases are on the margins – mercy is not unknown to the prosecutorial heart.

The real issue in tough cases is to admit that a tension exists and if a "call" is to be made for extraordinary leniency who should make that "call". Should it be a judge or should it be by agreement of the two parties? I submit that there is more accountability when it is done by agreement – especially when one of those parties is responsible to the electorate.

U.S. SUPREME COURT CRIMINAL LAW AND PROCEDURE DECISIONS

Bobby v. Van Hook, 130 S.Ct. 13 (2009). The Court reversed the Sixth Circuit's finding of ineffective assistance of counsel which had treated the ABA's Guidelines "not merely as evidence of what reasonably diligent attorneys would do, but as inexorable commands with which all capital defense counsel 'must fully comply.'" It remains the responsibility of the courts, not the ABA, to determine when counsel have met the obligations imposed by the Constitution.

Beard v. Kindler, 130 S.Ct. (2009). Pennsylvania applied the fugitive forfeiture rule – an escaped prisoner forfeits all claims challenging his conviction and sentence. Because this rule is discretionary rather than mandatory, petitioner argued that it could not satisfy the "adequate state grounds" rule. I.e., A federal habeas court will not review a claim rejected by a state court "if the decision of the state court rests on a state law ground that is independent of the federal question and adequate to support the judgment." The Supreme Court ruled that a state procedural rule may be "adequate," even though the rule is discretionary rather than mandatory.

FOURTH CIRCUIT COURT OF APPEALS DECISIONS

Monroe v. City of Charlottesville, 579 F.3d 380 (4th Cir. 2009). The court rejected defendant's claim that his Fourth Amendment and Equal Protection rights were violated when, while investigating a serial rapist, police approached black males and asked for a DNA sample.

Snider v. Seung Lee, 584 F.3d 193 (4th Cir. 2009). In order to make out a claim of malicious prosecution, a plaintiff must demonstrate both an unreasonable seizure and a favorable termination of the resulting criminal proceeding. The Fourth Circuit held that there was no termination of the proceedings in the plaintiff's favor because the relevant criminal proceeding was the extradition proceeding, [in the United States] which ended unfavorably for her. Her acquittal of criminal charges in the courts of a foreign country did not constitute the "favorable termination" of proceedings against her that was necessary to support her malicious prosecution claim against a U.S. law enforcement officer whose actions led to her extradition.

U.S. v. Rumley, F.3d (4th Cir. 2009). The arresting officer was about to conduct what would have been an improper search under *Arizona v. Gant*, 129 S.Ct. 1710 (2009). However, the seizable item, a firearm, came into plain view prior to the initiation of the search, and was properly seized under that doctrine.

VIRGINIA SUPREME COURT DECISIONS

Carroll v. Johnson, 278 Va. 683, S.E.2d (2009). The court overruled a prior case and held that a habeas petition may be filed so long as the relief sought will directly impact the duration of the petitioner's sentence, even if it does not result in his immediate release. Petitioner challenged the corrections department's refusal to give him credit for time served, which would have reduced his sentence by 288 days.

Baker v. Commonwealth, 278 Va. 656, S.E.2d (2009). "Code s18.2-119 requires proof, as an element of the crime of trespass, that oral or written notice of the proscription against entry be given or a 'no trespassing' sign be posted by the owner, lessee, custodian, or other person lawfully in charge of the property, or by the holder of an easement or other right-of-way who was authorized to post such a sign by the instrument creating that person's interest in the property." Conviction reversed because mere proof of the existence of a no trespassing sign fails to establish that the sign was posted by one of the enumerated persons authorized by statute to prohibit entry upon the property.

Turner v. Commonwealth, 278 Va. 739, S.E.2d (2009). The circuit court erred in admitting the results of polygraph tests in a probation revocation proceeding. "Any voluntary statements or admissions made by a person being tested remain admissible subject to the ordinary rules of evidence. Our holding is limited to the exclusion of the opinions of the polygraph operator or others purporting to offer expert opinion interpreting the test results."

Smallwood v. Commonwealth, 278 Va. 625, S.E.2d (2009). The Court found sufficient evidence to uphold defendant's

conviction for possession of a firearm after having been convicted of a felony. "Smallwood's own statements establish that he was aware of the presence and character of the firearm. And even without his admission, it strains credulity that someone entering and exiting a small vehicle over a period of six or seven hours would fail to notice a 'small .38 silver revolver' that was 'in plain view.'"

Brown v. Commonwealth, 278 Va. 523, 685 S.E.2d 43 (2009). During a high speed chase of a drunk driver [defendant] the pursuing officer struck and killed another person. The defendant's conviction of involuntary manslaughter was upheld because his "criminally negligent conduct was a proximate cause of the victim's death. *** When a defendant's criminally negligent conduct 'puts into operation' an intervening cause of a death, the defendant remains criminally responsible for that death. Thus, an intervening cause of such death that is a probable consequence of the defendant's own conduct will not constitute a superseding cause breaking the chain of proximate causation. In contrast, an independent, intervening act that alone causes the victim's injury or death is recognized as a superseding cause that will exempt the defendant from criminal responsibility for his or her conduct."

Commonwealth v. Squire, 278 Va. 746, S.E.2d (2009). "While the experts testified that, in their opinion, Squire was a sexually violent predator and was likely to commit violent sexual acts, the opinion of experts is not dispositive. The trial court specifically stated that it 'listened carefully to the reports' of the experts but that it also considered 'the chronology of the defendant's life.' As shown by the record, Squire had no incidents of a sexual nature for almost 10 years, since 1999, whether he was in the community or incarcerated. This evidence suggests that Squire's actions were, as a matter of fact, not consistent with the statistical predictors of re-offending and stood in contrast to the experts' opinions on the likelihood of Squire committing future violent sexual acts. Thus, the trial court's findings were not plainly wrong" in dismissing the Commonwealth's petition for the civil commitment of Squire as a sexually violent predator.

Wright v. Commonwealth, 278 Va. 754, S.E.2d (2009). "The cocaine recovered from Wright at the time of his initial arrest and 'everything combined,' which included the cocaine recovered at Wright's home, the gun, the packaging material, and the scale, along with the absence of items to use cocaine, supported the conclusion that the cocaine was not for personal use. Taking the evidence in the light most favorable to the Commonwealth, the prevailing party below, we conclude that the evidence recovered at Wright's house was sufficient to establish that Wright constructively possessed the firearm while constructively possessing cocaine with the intent to distribute." While upholding the conviction under Code s18.2-308.4(C), the Supreme Court rejected the Court of Appeals holding that "the statute requires proof of a nexus between the firearm and the drugs that the defendant actually or constructively possesses. *** The General Assembly has criminalized the possession of a firearm in conjunction with other circumstances without regard to whether the firearm is utilized for any purpose connected to such circumstances."

Williams v. Warden, 278 Va. 641, S.E.2d (2009). The Court distinguished a prior holding that possession of a hand-rolled cigarette, without more, is insufficient to establish probable cause for arrest. "However, here we are addressing reasonable articulable suspicion for a traffic stop. Furthermore, once Deputy Gary stopped Williams, he approached Williams' vehicle, 'got near the vehicle,' and he 'could smell the odor of marijuana coming from the vehicle and the smoke exiting the vehicle from the rolled-down window.' *** It is clear that Deputy Gary had reasonable articulable suspicion to stop Williams which ripened into probable cause to arrest and search."

Waller v. Commonwealth, 278 Va. 731, 685 S.E.2d 48 (2009). The Court reversed convictions of possession of a firearm after having been convicted of a violent felony because the prior convictions for a violent felony were not properly authenticated. "Circuit court orders shall be received only when authenticated pursuant to Code s17.1-123(A)" which requires that the judge sign the order.

Montague v. Commonwealth, 278 Va. 532, 684 S.E.2d 583 (2009). Defendant was not seized when two police officers approached him requesting information regarding his identity, and used that information to determine whether there were outstanding warrants for his arrest and whether he was trespassing on private property. The Court noted that the encounter with the police was consensual and a reasonable person would not have thought that he was required to remain in the police officers' presence. The fact that the officers did not explicitly tell defendant he was free to leave is a factor, but is not determinative of the issue whether a seizure occurred. The Court also upheld the

conviction for assault and battery of a law enforcement officer based on evidence that defendant pushed and struck the officer while trying to prevent the police officer from taking the defendant into custody.

Singleton v. Commonwealth; Zedd v. Commonwealth, 278 Va. 542, S.E.2d (2009). Two attorneys were held in contempt of court when they excused witnesses from appearing at a scheduled hearing on the assumption that the parties' agreement to a continuance would be granted by the court. The Court overturned the contempt citations on grounds that the attorneys acted in good faith and without the intent "to obstruct or interrupt the administration of justice.

The Court took "this opportunity to stress that criminal defense attorneys and as well attorneys for the Commonwealth, in the absence of an established contrary policy by a particular trial court, should not follow a practice of agreeing to a continuance of a pending case under circumstances that essentially limit, as a practical matter, the trial court's ability to exercise its discretion whether to grant a continuance. *** Undoubtedly, the better practice would dictate that until the trial court enters a continuance order, the defense attorney [and the attorney for the Commonwealth] should appear in court on the date scheduled for trial with his or her client and request the continuance."

Dowdy v. Commonwealth, 278 Va. 577, S.E.2d (2009). Defendant argued that the *Husske v. Commonwealth*, 252 Va. 203 standard for appointment of an expert witness – defendant must demonstrate that the subject which necessitates the assistance of the expert is "likely to be a significant factor in his defense," and that he will be prejudiced by the lack of expert assistance – runs afoul of the constitutional requirements of *Ake v. Oklahoma*, 470 U.S. 68. The Court, however, held that "*Husske*'s requirement of prejudice if faithful to *Ake* and is nothing more than another way of asking whether the denial of expert assistance would result in a fundamentally unfair trial."

The Court also rejected the statutory argument that there is a right to a court-appointed investigator "whenever leaving the investigation to counsel could result in [court appointed] counsel not being fully compensated for time expended."

Williams v. Commonwealth, 278 Va. 633, 685 S.E.2d 178 (2009). The Court upheld a robbery conviction where the defendant used the threat of force or violence against a victim who demanded return of his cell phone taken by the defendant in the victim's absence.

Grattan v. Commonwealth, 278 Va. 602, S.E.2d (2009). The Court found sufficient evidence to support the trial court's determination that defendant was competent to stand trial. The court also upheld the exclusion of testimony from defense experts on defendant's sanity at the time of the offense. Code s19.2-168.1 (B) authorizes the trial court to bar such testimony or to admit evidence of the defendant's refusal to be examined by the prosecution's experts. The trial court is not required to consider alternative, less drastic remedies not contemplated by the statute.

VIRGINIA COURT OF APPEALS DECISIONS

Lunsford v. Commonwealth, 55 Va. App. 59, 683 S.E.2d 831 (2009). The Court held that "because appellant framed his question as one of sufficiency of the evidence, and not one of admissibility *** when determining the sufficiency of the evidence, we consider all admitted evidence, including the evidence appellant here asserts was inadmissible." Relevant to the substantive issue before it, the court recognized that "upon proof of a breaking and entering and a theft of goods, and if the evidence warrants an inference that the breaking and entering and the theft were committed at the same time by the same person and as part of the same transaction, the exclusive possession of the stolen goods shortly thereafter, unexplained or falsely denied, has the efficiency to give rise to … an inference that he is guilty of the larceny."

Baylor v. Commonwealth, 55 Va. App. 82, 683 S.E.2d 843 (2009). "To be clear, we expressly do *not* hold that evidence of an item's replacement cost may never be used to assist in establishing a stolen item's value. It is axiomatic that some items appreciate in value with the passage of time just as other items depreciate. Moreover, it is certainly conceivable that stolen property may be of such character or recent manufacture that replacement value accurately reflects actual or fair market value. We simply hold that where, as here, there is an absence of evidence linking replacement value [of stolen catalytic converters] to an accurate determination of actual or fair market value, mere evidence of replacement value alone is insufficient as a matter of law to support an inference by the fact finder that the value of stolen property necessarily exceeds the statutory threshold" for grand larceny.

Delaney v. Commonwealth, 55 Va. App. 64, 683 S.E.2d 834 (2009). Where a defendant wishes to preserve a sufficiency motion, he must make a motion to strike at the conclusion of all the evidence, present an appropriate argument in summation, or make a motion to set aside the verdict. "Although Delaney maintains that he 'presented motions and arguments to strike the Commonwealth's evidence as being insufficient,' he concedes that the 'statement of facts [filed in lieu of a transcript] does not include his motions and arguments." Thus Rule 5A:18 bars consideration of this issue on appeal.

Elem v. Commonwealth, 55 Va. App. 55, 683 S.E.2d 830 (2009). When defendant was charged with felony petit larceny due to nine prior larceny convictions, she requested a bifurcated proceeding in which evidence of her prior larceny convictions would not be introduced until after the jury determined her guilt or innocence. The Virginia Supreme Court "has repeatedly held that the prior convictions of a criminal defendant facing trial as a recidivist may be introduced and proved at the guilt phase of the trial on the principal offense." Any potential prejudice that could arise from this approach "can be sufficiently solved by an appropriate limiting instruction to the jury."

Cauls v. Commonwealth, 55 Va. App. 90, 683 S.E.2d 847 (2009). A police officer "observed the knotted and frayed end of a plastic baggy protruding from the watch pocket [of defendant's pants] but was unable to see the baggy's contents. Based on his training and experience, [the officer] concluded that the baggy likely contained narcotics. However, like the capsules in *Cost*, 275 Va. 246 and the dollar bill in *Grandison*, 274 Va. 316, plastic baggies are often used for legitimate purposes that do not involve the packaging of narcotics. Thus, [the officer's] observation of the plastic knot and fray, standing alone, could not provide him with probable cause because the object's incriminating character was not immediately apparent."

Perry v. Commonwealth, 55 Va. App. 122, 684 S.E.2d 227 (2009). The Court applied the right result/wrong reason approach discussed in *Whitehead v. Commonwealth*, 278 Va. 105 (2009) and upheld the conviction because although the trial court found reasonable suspicion for a pat down, the officer actually had full probable cause for an arrest and a search incident to arrest. The Court found probable cause because: "first, appellant was one of only three people in the car, which was parked on the shoulder of the interstate, from which the smell of marijuana was emanating. Second, appellant had clearly ingested some intoxicating agent, and the only agents at the scene were PCP and marijuana. Third, the trooper, based on his training and experience, believed appellant's behavior indicated that he had ingested PCP and/or marijuana. In addition, [another passenger] had admitted that he smoked PCP earlier that evening, and appellant was behaving in exactly the same manner as [the other passenger]. These facts did more than suggest that someone in the general area had marijuana or PCP in his possession – they gave the trooper probable cause to believe that appellant in particular possessed and had been using illegal narcotics."

Lofgren v. Commonwealth, 55 Va. App. 116, 684 S.E.2d 223 (2009). When appellant telephoned the victim to call her a "fucking cunt" and "fucking bitch," these vulgar curse or swear words were used to communicate his frustration, anger, contempt or disgust. Although such words can have sexual connotations, as used here, they did not have as a dominant theme or purpose an appeal to the prurient interest in sex required to find the words obscene. "Because the language was not obscene, it did not violate [Code s18.2-372] and we need not consider whether appellant acted with the intent 'to coerce, intimidate, or harass.'"

Weeks v. Commonwealth, 55 Va. App. 157, 684 S.E.2d 829 (2009). "Given these unique circumstances" – during the sentencing stage, the jury sent the judge four notes indicating that they made a mistake in their guilty verdict – the trial judge should have set aside the verdict. The Court rejected the assertion that a jury is wholly discharged from its responsibilities on the issue of guilt after its initial verdict in a bifurcated proceeding. "Even in a bifurcated trial, a jury loses power over its guilty verdict only when it is 'discharged' from service at the close of trial. … Prior to discharge, however, the jury retains the power to revisit its guilty verdict." The Court cautioned that this "does not imply any right of the defendant to sow seeds of indecision during the sentencing phase in an effort to fluster the jury into reconsidering its earlier verdict. A defendant cannot inject 'residual doubt' about his guilt into the sentencing phase."

Roberts v. Commonwealth, 55 Va. App. 146, 684 S.E.2d 824 (2009). The police officer "did not indicate that appellant was armed, nor did he articulate any particular circumstances from which a reasonably prudent person could conclude that appellant may have been armed. [The offi-

cer] testified that he relied on appellant's balled up fist, raised voice, and nervous behavior in determining that his behavior was 'pre-assaultive' causing him to feel 'concern' for his safety *** Based on the totality of the circumstances presented on this record, we conclude that [the officer] lacked a reasonable, articulable, suspicion to believe that appellant may have been armed so as to justify a frisk for weapons."

Hernandez v. Commonwealth, 55 Va. App. 190, 684 S.E.2d 845 (2009). "No court has the sole authority to dismiss a criminal charge for any reason not based upon the legal or factual merits, unless authorized to do so by a legislature." The court did not address the question as to whether a court can order such a dismissal with the agreement of the Commonwealth and the defendant.

Scott v. Commonwealth, 55 Va. App. 166, 684 S.E.2d 833 (2009). En banc. The Court found "ample evidence" that defendant's possession of cocaine was with the intent to distribute. The evidence consisted of: (1) "possession a firearm, a recognized tool of the drug trade, is regularly recognized as a factor indicating an intent to distribute;" (2) "the absence of paraphernalia consistent with use is another factor indicating that the drugs were possessed with the intent to distribute;" (3) "simultaneous possession of a combination of disparate drugs can be indicative of the possessor's intent to distribute;" (4) "the drugs were packaged individually in baggie corners, making them easier and more profitable to sell;" (5) defendant's "assertion that he uses one type of drug, [marijuana] contrasted with his silence regarding the use of the other type [cocaine] undermines his argument that personal use is the only reasonable hypothesis of possession."

Duncan v. Commonwealth, 55 Va. App. 175, 684 S.E.2d 838 (2009). The court distinguished the recent decision in *Arizona v. Gant*, 129 S.Ct. 1710 (2009) in which the U. S. Supreme Court limited police authority to search a vehicle incident to arrest. In *Gant* the defendant did not have access to his car and the police had no reason to believe evidence could be found in the car. In contrast, the defendant here told police there was a firearm under his seat. "This statement provided the deputy with probable cause to search the vehicle for evidence that appellant was in possession of a concealed weapon."

Settle v. Commonwealth, 55 Va. App. 212, 685 S.E.2d 182 (2009). "We will not second-guess the trial judge's conclusion that appellant was identified through non-verbal nods and acknowledging glances by the Commonwealth's multiple witnesses as the person with whom those witnesses interacted multiple times over the course of one year. We hold that the witnessess' testimony identifying 'Charles Settle' was sufficient to prove beyond a reasonable doubt that the defendant, who was sitting in court in the witnesses' presence, was the same person with whom the witnesses dealt on numerous occasions." The Court also held that it had no jurisdiction over a civil forfeiture brought pursuant to Code s3.1-796 dealing with dangerous dogs.

Testa v. Commonwealth, 55 Va. App. 275, 685 S.E.2d 213 (2009) The Court distinguished *Georgia v. Randolph*, 547 U.S. 103 which held that police may not conduct a consent search of a home when one co-owner grants permission while another co-owner expressly refuses it. Here the defendant was not a co-owner but merely a live-in guest who could not "veto the owner's right to invite anyone he may choose (whether police officers or anyone else to accompany him into the common areas of his own home." The Court also held that neither the Fourth Amendment nor *Miranda*'s exclusionary rule bars the admission of "new and distinct criminal acts" committed during alleged violations of the Fourth Amendment or *Miranda*. I.e., the defendant's threats to deputies who attempted to arrest and interrogate him could not be suppressed.

Rivera-Padilla v. Commonwealth, Va. App. , S.E.2d (2009). Defendant claimed that her statements to the Virginia Department of Social Services (DSS) were coerced in violation of the Fifth Amendment because she feared she would be denied public benefits if she asserted the privilege. The court held that her statements were not coerced because "DSS neither conditioned Rivera-Padilla's eligibility to obtain benefits on a waiver of her Fifth Amendment rights nor threatened to disqualify her from seeking benefits if she did rely on the privilege."

Armstead v. Commonwealth, Va. App. , S.E.2d (12/15) "Assault is not a lesser-included offense in unlawful shooting at an occupied vehicle, for assault requires proof of a fact that unlawful shooting does not." I.e., assault requires a "specific intent to cause bodily injury or fear or apprehension to the person therein."

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