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72nd Annual Meeting – Virginia State Bar

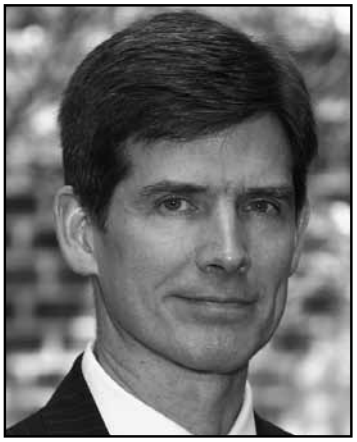
Melendez-Diaz and Confrontation – Practicality and Efficiency v. Constitutional Guarantees

Sponsored by the Criminal Law Section

Friday, June 18, 2010 - 11:00 a.m.
Cavalier Oceanfront Hotel

(1.5 Credits; no Ethics)

Steven D. Benjamin
Benjamin & DesPortes, P.C., Richmond.



John G. Douglass
Dean and Professor of Law, University of Richmond School of Law, Richmond.

Stephen R. McCullough
Opinions Counsel and Senior Appellate Counsel, Office of the Attorney General, Richmond.

The program will involve a detailed discussion of the constitutional and financial implications of implementing the mandates of the Sixth Amendment and *Melendez-Diaz* in criminal trials in Virginia. Speakers will address the matter of how Virginia will afford the requirement of financing sufficient laboratory support to provide testimony and expert attendance in every criminal trial requiring forensic and expert opinion, from the smallest drug misdemeanor to the most complicated DNA-involved felony.

Annual Section Business Meeting: 12:30 p.m.

Moderator:
David P. Baugh - Virginia Capital Defender/Central District, Richmond; Immediate Past Chair, Criminal Law Section.

Melendez-Diaz and Confrontation –

72nd Annual Meeting • June 18, 2010

Steven D. Benjamin is an attorney with the Richmond firm Benjamin & DesPortes. In addition to his private practice, he serves as Special Counsel to the Virginia Senate Courts of Justice Committee and to the Virginia State Crime Commission. He is a member of the Virginia Forensic Science Board and the Virginia Indigent Defense Commission. He is Vice-President of the National Association of Criminal Defense Lawyers, a Past President of the Virginia Association of Criminal Defense Lawyers, and a Fellow of the American Board of Criminal Lawyers. He is a recipient of the Virginia State Bar's Lewis F. Powell Pro Bono Award, and is a frequent national lecturer on criminal justice.

John Douglass is Dean and Professor of Law at the University of Richmond, where he has taught Criminal Law, Evidence, Criminal Procedure, litigation skills and trial advocacy. His principal academic publications have focused on prosecution, the criminal trial process and the Confrontation Clause. Before joining the Richmond Law faculty in 1996, he practiced law for 15 years. He served for eight years as an Assistant United States Attorney in Baltimore and Richmond, and was Chief of the Criminal Division of the United States Attorney's Office in Richmond from 1992 to 1996. He also served on the staff of Independent Counsel Lawrence Walsh in the Iran-Contra investigation. As a partner in a Richmond law firm, he specialized in commercial litigation, insurance defense, construction litigation and white collar criminal defense. He has been a faculty member of the Virginia State Bar's Course in Professionalism, an instructor in trial advocacy and other litigation skills for the National Institute for Trial Advocacy, and a frequent lecturer at continuing legal education programs. He serves on the Ethics Committee for Virginia Commonwealth University Hospitals and is Chair of the Richmond City Charter Review Commission. Mr. Douglass serves as a mediator of commercial disputes through the McCammon Group in Richmond. He is a graduate of Dartmouth College and Harvard Law School.

Stephen R. McCullough currently serves as Opinions Counsel and Senior Appellate Counsel at the Office of the Attorney General. He has extensively litigated Confrontation Clause issues, including serving as lead counsel in *Briscoe v. Virginia* in the United States Supreme Court. He received his undergraduate degree with high distinction from the University of Virginia and graduated *cum laude* from the T.C. Williams School of Law at the University of Richmond.

David Baugh is currently the Capital Defender – Central for the Indigent Defense Commission of Virginia. Prior to becoming a Capital Defender David was in private practice concentrating in criminal law in Richmond, trying cases in Washington, New York, Georgia, Nevada. Although not a large portion of his practice he is well known for his representation in First Amendment cases around the nation.

Over the years David has garnered numerous awards and citations including being named a Human Rights Hero by the ABA – Civil Rights Division, the Lewis F. Powell Award, the Bill Geimer Award for Capital representation, a Courageous Advocate's award from the Old Dominion Bar Association, The L. Douglas Wilder Award and hasbeen cited as a Super Lawyer by Virginia Law Weekly. He is particularly proud of having been cited for his representation by Penthouse Magazine.

A past chair of the Virginia State Bar – Criminal Law Section, David is also a member of the Board of the American Civil Liberties Union of Virginia and a member of its legal advisory panel. David is an active board member of the Virginia Association of Criminal Defense Lawyers, the National Association of Criminal Defense Lawyers and the Old Dominion Bar.

David is active in bar and professional activities and frequently speaks in CLE courses around the state, the nation and in Jamaica.

Don't Delay - Register Before May 14 for a Discount!

To register for the 2010 Annual Meeting, please visit the State Bar's website at http://www.vsb.org/special-events/annual-meeting/index.php/. You may register online or download the brochure.

MESSAGE FROM THE CHAIR

There is an alarming crisis of confidence in our nation concerning the criminal justice system. The wisdom and practice of centuries is now seen by some as inadequate to address the exigencies of this age. Attorney General Holder's initial decision to try terrorists in federal court brought forth a storm of criticism especially from the right of the political spectrum. The perceived inadequacy of our criminal justice system is, however, not limited to the right—there are many on the left, who decry the use of the criminal justice system for the drug pusher and drug user or those with mental health issues. Like those who favor special tribunals for terrorists, they also call for special tribunals but this time they are called "drug courts" or "mental health courts." What is going on here?

At its core this lack of confidence is centered on our adversarial system—not because it does not work but rather because it works all too well. The adversarial system is premised on the idea that the issue is in the balance—the outcome is not preordained and the skill of the advocate matters. In the short term this may not build confidence. It is absolutely repugnant to many that an alleged terrorist could be acquitted. Confidence seeks certainty. The kind of certainty found in the persona of a Judge Roy Bean who is alleged to have uttered: "We'll give the defendant a fair trial followed by a first class hanging."

For those invested in the elixir of "treatment" it frequently seems unconscionable that an individual could be punished or set free if he/she has drug or mental health "issues". To these believers treatment and cure should be the goal – not exactly the same as truth and justice. It is interesting to note that in some "drug courts" the traditional role of the adversary is seen as a hindrance. In this type of model the "client" is turned over to the tender mercies of a committee who monitors his/her progress and with the power of a drug court judge administers swift and certain sanctions for "backsliding." This "therapeutic" model has no room for the machinations of defense counsel or even adversarial proceedings. It is "treatment" that rules the day.

Honesty compels the admission that those who trumpet special tribunals for terrorists or drug or mental health courts have a point. Perhaps we as a nation do not want to provide an alleged terrorist with a full set of rights given to an average criminal defendant. Perhaps we cannot abide an acquittal achieved by the triumph of advocacy over evidence. These are no small concerns. Likewise this nation may be tired of our decades long criminal struggle against drugs and it may be time to try something else. Certainly those who practice criminal law know that there is a tension between the concepts of responsibility and "illness" in the criminal law that may need further exploration.

While genuine concerns may call for the creation of special tribunals, this is a very slippery slope. When the issue is no longer in the balance – when the result is already manifest – there is great room for mischief. In such a situation the advocate is an anachronism and the potential for injustice blossoms. Recently the Supreme Court of Virginia applied the brakes in a case involving a revocation of a suspended sentence as a consequence of being terminated from a drug court. In *Harris v. Commonwealth*___Va__(2010) the Court held that the defendant had a liberty interest while participating in drug court which is entitled to the protection of the 14th Amendment to the United States Constitution and since he had no opportunity to participate in the termination decision by the drug court it was error for the sentencing court to refuse to consider the reasons for his termination from the program when his suspended sentence was revoked. Clearly the nose of the camel is in the tent!

There is no magic bullet that will immediately restore full confidence in the criminal justice system and perhaps experimentation is wise but no one can be sanguine about this. These special tribunals have the potential to elevate fad and passion over the goals of truth and justice. As advocates we must be on guard – for our own sake but more importantly for the long term good of the nation.

U.S. SUPREME COURT CRIMINAL LAW AND PROCEDURE DECISIONS

Padilla v. Kentucky, S.Ct. (2010). A criminal defense attorney fails to provide effective assistance within the meaning of *Strickland*, when the attorney misleads a noncitizen client regarding deportation following conviction.

Wilkins v. Gaddy, 103 S.Ct. 1175 (2010). The Fourth Circuit dismissed a prisoner's excessive force claim based entirely on its determination that his injuries were "*de minimis*." The Supreme Court reversed this "strained reading" of precedent and held that "injury and force, however, are only imperfectly correlated, and it is the latter that ultimately counts. An inmate who is gratuitously beaten by guards does not lose his ability to pursue an excessive force claim merely because he has the good fortune to escape without serious injury."

Florida v. Powell, 130 S.Ct. 1195 (2010). Police informed the defendant that "he had the right to talk to a lawyer before answering any of their questions and the right to use any of his rights at any time he wanted during the interview. The first statement communicated that Powell could consult with a lawyer before answering any particular question, and the second statement confirmed that he could exercise that right while the interrogation was underway. In combination, the two warnings reasonably conveyed Powell's right to have an attorney present, not only at the outset of interrogation, but at all times."

Briscoe v. Virginia, 130 S.Ct. 1316 (2010). The Court issued a one sentence per curiam opinion sending the case back for determination not inconsistent with *Melendez-Diaz*.

Presley v. Georgia, 130 S.Ct. 721 (2010). The trial court erred by excluding the public during jury selection. "Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials. *** Trial courts are required to consider alternative to closure even when they are not offered by the parties."

Thaler v. Haynes, 130 S.Ct. 1171 (2010). No Supreme Court decision "clearly establishes that a judge, in ruling on an objection to a peremptory challenge under *Batson v. Kentucky*, 476 U.S. 79 must reject a demeanor-based explanation for the challenge unless the judge personally observed and recalls the aspect of the prospective juror's demeanor on which the explanation is based." Therefore the federal habeas corpus petitioner could not establish that the State court decision was contrary to or involved an unreasonable application of "clearly established Federal law."

Smith v. Spisak, 130 S.Ct. 676 (2010). The Court distinguished *Mills v. Maryland*, 486 U.S. 367 which found it to be unconstitutional to instruct jurors that they must unanimously agree on each mitigating factor. Here it was permissible to instruct jurors that they must unanimously find that each of the aggravating factors outweighed any mitigating circumstances.

Wood v. Allen, 130 S.Ct. 841 (2010). Petitioner, a capital defendant, failed to meet his burden to overcome by "clear and convincing" evidence the presumption under federal law that "determination of a factual issue made by a State court shall be presumed to be correct."

McDaniel v. Brown, 130 S.Ct. 665 (2010). A federal habeas corpus court must confine its sufficiency-of-the-evidence analysis to "the evidence adduced at trial" including "all of the evidence admitted by the trial court." The court may not consider evidence offered for the first time in habeas corpus proceedings.

FOURTH CIRCUIT COURT OF APPEALS DECISIONS

U.S. v. Williams, 592 F.3d 511 (4th Cir. 2010). "The warrant authorized a search of Williams' computers and digital media for evidence relating to the designated Virginia crimes of making threats and computer harassment. To conduct that search, the warrant impliedly authorized officers to open each file on the computer and view its contents, at least cursorily, to determine whether the file fell within the scope of the warrant's authorization…. To be effective, such a search could not be limited to reviewing only the files' designation or labeling, because the designation or labeling of files on a computer can easily be manipulated to hide their substance. Surely, the owner of a computer, who is engaged in criminal conduct on that computer, will not label his files to indicate their criminality."

U.S. v. Day, 591 F.3d 679 (4th Cir. 2010). The "mere governmental authorization for an arrest [by private security guards] in the absence of more active participation or encouragement [by the State] is insufficient" to make the security guards government personnel for purposes of the Fourth and Fifth Amendments. Such security guards need not comply with *Miranda* or with the Fourth Amendment standards for search and seizure.

U.S. v. Chapman, 593 F.3d 365 (4th Cir. 2010). The decision to accept a mistrial is a tactical decision that rests with counsel. It is not ineffective assistance of counsel to ignore the client's wish to accept the trial court's offer of a mistrial. The only decisions the Supreme Court has recognized as belonging exclusively to the defendant are "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Jones v. Barnes*, 463 U.S. 745 (1983).

U.S. v. Wright, 594 F.3d 259 (4th Cir. 2010). *Apprendi*, 530 U.S. 466 held that any fact offered to increase a sentence beyond its statutory maximum – other than the fact of a prior conviction – must be found by a jury beyond a reasonable doubt. The Fourth Circuit decided that nonjury juvenile adjudications come within the prior-conviction exception to *Apprendi*.

VIRGINIA SUPREME COURT DECISIONS

Whitaker v. Commonwealth, 279 Va. 243, 688 S.E.2d 263 (2010). When police arrived in "a high crime area," defendant fled, abandoned his bicycle, ran behind a church, and jumped over two fences "in a seemingly frantic determination to elude the police." These facts constituted reasonable suspicion for a stop because "there is just no conceivable reason for defendant's evasive behavior other than to evade the police and avoid discovery of the contraband hidden on his person."

Logan v. Commonwealth, 279 Va. 288, 688 S.E.2d 275 (2010). Reaffirmed prior holdings that the exclusionary rule is not applicable in probation revocation proceedings absent a showing of bad faith on the part of the police. The Court expressly overruled the opinion of the Court of Appeals insofar as it suggested that the concept of bad faith had been altered by *Herring v. U.S.*, 129 S.Ct. 695. In contrast to a "good faith" analysis which turns upon purely objective factors, a "bad faith" analysis "turns almost entirely upon the subjective motivation or state of mind of the police officer making the search. In order to invoke the exclusionary rule in a probation revocation case, the evidence must show that the officer making the search was motivated by bias, personal animus, a desire to harass, a conscious intent to circumvent the law, or a similar improper motive."

Barnes v. Commonwealth, 279 Va. 22, 688 S.E.2d 210 (2010). The trial court found that omissions of material facts in the search warrant affidavit "were probably made in reckless disregard of whether they would mislead," but nonetheless found there was probable cause to issue the warrant even if the omitted material had been included in the affidavit. The Supreme Court agreed that there was probable cause but observed that "the circuit court followed an incorrect procedure when that court conducted the *Franks* [438 U.S. 154] hearing," and cautioned that "circuit courts in this Commonwealth should not conduct a *Franks* hearing absent the establishment of the requisite substantial preliminary showing" of deliberately false or recklessly false misstatements or omissions.

Jones v. Commonwealth, 279 Va. 295, 687 S.E.2d 738 (2010). Case of first impression. "In determining whether a police officer had probable cause to arrest a defendant for driving under the influence of alcohol, a court may consider the driver's refusal to perform field sobriety tests when such refusal is accompanied" by other evidence of intoxication. However, "a defendant's refusal to submit to field sobriety tests is not evidence of 'consciousness of guilt.'" The concurring opinion suggested that "it is difficult to reconcile these two conclusions."

Anderson v. Commonwealth, 279 Va. 85, 688 S.E.2d 605 (2010). The Court applied the "public safety' exception to *Miranda*. The arresting officer secured the defendant "some distance from any backup support. Meanwhile, the gun lay five to six feet away, in a public area during the afternoon, with the danger that if loaded someone might later come upon it. These circumstances do not suggest that the officer asked defendant whether the gun was loaded in order to "elicit testimonial evidence.' Rather, these circumstances suggest that an objectively reasonable police officer .. would 'instinctively'

need to know whether the gun was loaded in order to determine how quickly to retrieve the gun and neutralize the volatile situation confronting him."

Fullwood v. Commonwealth, Va., 689 S.E.2d 742 (2010). Defendant contended that his convictions for one count of possessing marijuana and one count of possessing cocaine within 1,000 feet of a school violated double jeopardy because there was only a single occasion when controlled substances were held. The court held that double jeopardy was not violated because during that single time period there was a transaction involving marijuana and a separate transaction involving cocaine.

Burns v. Commonwealth, 279 Va. 243, 688 S.E.2d 263 (2010). "The proceedings to determine the mental retardation of a person sentenced to death, undertaken upon remand of a case to the circuit court pursuant to Code s8.01-654.2, are criminal in nature. Any person whose claim is so remanded shall be afforded, in such proceeding, the same rights as those afforded to a defendant in a criminal sentencing proceeding. *** Because the remanded proceeding was criminal in nature, the circuit court erred in ruling that Burn's competence was irrelevant and in refusing to adjudicate Burn's competence." [The trial court had ruled that the proceeding to determine mental retardation was not a criminal matter, thus Burn's did not have a Sixth amendment right to be competent in the proceeding].

Scialdone v. Commonwealth, Va. , 689 S.E.2d 716 (2010). "Although a motion to vacate or a motion for reconsideration [of a summary contempt finding] would have been more precise, [to satisfy the Rule 5:25 requirement for a precise objection] the defendants' motions to stay [execution of the sentence] clearly encompassed the arguments they now present on appeal; that the circuit court improperly conducted a summary contempt proceeding and thereby violated their due process rights."

The Court also held that although the allegedly altered document was offered "in the circuit court's presence, the court's conclusion that the document was altered was the result of extensive questioning and evidence-gathering." The Court cautioned that it was not implying "that a trial court is unable to ask any questions in a summary contempt proceeding. Circumstances will undoubtedly arise when a trial court observes the essential elements of the contemptible conduct, but nonetheless needs to ask questions to clarify some detail." But in this case, the trial court erred "by failing to afford the defendants a plenary proceeding with the requisite due process rights."

Brown v. Commonwealth, 279 Va. 210, 688 S.E.2d 185 (2010). A juvenile tried as an adult and found guilty of a crime that has a mandatory minimum sentence must receive that minimum sentence rather than receive a juvenile disposition pursuant to Code s16.1-272.

Harris v. Commonwealth, Va. , 689 S.E.2d 713 (2010). The first case to consider the procedures utilized in a drug treatment court program. A plea agreement provided that upon successful completion of the drug treatment court program, all charges would be dismissed. When defendant was terminated from the program the circuit court imposed the terms of the plea agreement without affording defendant an opportunity to present evidence as to why he had been terminated from the program. The Supreme Court held that "like a person on probation or parole, Harris enjoyed a conditional liberty interest …[and] before that interest can be revoked, Harris was entitled to an orderly process providing him notice and an opportunity to be heard." Thus the trial court erred in denying Harris the opportunity to be heard regarding the propriety of the revocation of his liberty interest.

Brown v. Commonwealth, 279 Va. 235, 687 S.E.2d 742 (2010). At trial, defendant argued that police lacked probable cause for his arrest and subsequently unlawfully detained him. On appeal, defendant focused on the detention, and did not "provide any argument or authority, as required by Rule 5A:20(e) in support of" the probable cause to arrest issue. Thus, "even though defendant raised the probable cause argument before the circuit court, the Court of Appeals cannot resurrect arguments defendant abandoned on appeal." Thus the court of Appeals erred by considering the probable cause argument.

Boyce v. Commonwealth, Va., S.E.2d (5/15/10). The Court reaffirmed prior holdings that "mental health professionals often rely upon judicial records of charged conduct that may not have resulted in a final determination of guilt, yet nevertheless may be indicative of antisocial behavior." [The expert considered a prior charge that had been dismissed by nolle prose-

qui] The dismissed charge was merely one factor in the expert's evaluation, thus the Court distinguished Lawrence v. Commonwealth, 279 Va. 490 which held that "expert testimony did not have an adequate factual foundation to the extent it was dependent upon assuming the truth of the hearsay allegations concerning Lawrence's past sexual misconduct."

Orndorff v. Commonwealth, Va. , S.E.2d (5/15/10). The circuit court did not abuse its discretion in refusing to grant a new trial "when it determined that Orndorff's asserted after-discovered evidence was not credible and that, because it was not credible, it was not material and would not produce opposite results on the merits at another trial." The Supreme Court expressed no opinion on the issue of "whether a person with dissociative identity disorder [formerly termed multiple personality disorder] in some case be shown to be legally insane or incapable of exercising the power to control or restrain his or her actions because of an irresistible impulse."

Jones v. Commonwealth, Va. , S.E.2d (5/15/10). In the course of a lawful traffic stop an officer patted down the defendant and removed his wallet. This seizure of the wallet was in violation of Terry v. Ohio because the officer did not believe he was seizing a weapon or contraband. "Although the seizure of Jones' wallet was unlawful, Hones' detention remained lawful because at the time of the seizure the detectives were still trying to ascertain Jones' identity, which was within the scope of the traffic stop. Because Jones was lawfully detained at the time he consented to the search of his vehicle, his consent [to search the car] was not the result of an illegal detention and remained valid."

Clark v. Commonwealth, Va. , S.E.2d (5/15/10). The Court upheld defendant's conviction of assault. "Clark threatened to harm Coleman anywhere she could be found. Later, that same day, as Coleman was about to exit the school bus, Clark appeared outside of Coleman's open bus door, saying, 'I'm going to get you.' Given Clark's previous threat to inflict bodily harm upon Coleman, her reappearance at a place where she had no explained reason for being, and her blocking Coleman's path of exit and her unconditional threat to 'get' Coleman, Clark's act of approaching the bus could be understood as indicating a purpose to inflict bodily contact or injury upon Coleman. Therefore, there is sufficient evidence that Clark engaged in an overt act intended to place Coleman in fear or apprehension of bodily harm, by approaching Coleman's bus that afternoon."

Murillo-Rodriguez v. Commonwealth, 279 Va. 64, 688 S.E.2d 199 (2010). The Supreme Court approved the Court of Appeals' longstanding rule requiring "a defendant who elects to introduce evidence in his defense after the denial of a motion to strike the Commonwealth's evidence to reassert in some fashion a challenge to the sufficiency of the evidence as a whole after the record is complete, and if he fails to do so, he waives his ability to raise that issue on appeal."

Ghameshlouy v. Commonwealth, Va. , 689 S.E.2d 698 (2010). A defective notice of appeal that fails to name the proper appellee [a locality rather than the Commonwealth] is subject to dismissal, but does not deprive the Court of Appeals of jurisdiction to consider the appeal. When the appellee subsequently waived the defect, the Court was required to exercise that jurisdiction. Justice Koontz began his opinion by noting that the case "requires us to once again plumb the murky depths of the sea of 'jurisdiction.' – a word of many, too many, meanings." The opinion then offers analysis of various forms of jurisdiction. Compare, *Roberson v. Commonwealth*, Va. , 689 S.E.2d 706 (2010) (the court of Appeals did lack jurisdiction because the notice of appeal failed to identify the offense being appealed as the conviction for DUI under the local ordinance).

Teleguz v. Warden, 279 Va. 1, 688 S.E.2d 865 (2010). The Court rejected some 20 claims of ineffective assistance of counsel as satisfying "neither the performance nor the prejudice prong of the two-part test enunciated in Strickland, 466 U.S. 668." The court also reaffirmed that "Assertions of actual innocence are outside the scope of habeas corpus review, which concerns only the legality of the petitioner's detention."

Hamilton v. Commonwealth, 279 Va. 94, 688 S.E.2d 168 (2010). Interpreting Code s18.2-46.2(A) the court stated [in what appears to be dicta] the statute was written in the disjunctive to cover either **membership** in a street gang or **participation** in a predicate criminal act committed for the benefit of the street gang.

Avent v. Commonwealth, 279 Va. 175, 688 S.E.2d 244 (2010). Defendant "forfeited his right to a self-defense jury instruction because he was not without fault in bringing on" the altercation; he failed to

retreat; he was not in reasonable fear when he killed the victim; and he used excessive force.

Jones v. Commonwealth, 279 Va. 295, 687 S.E.2d 738 (2010). "A person authorized to enter a dwelling may nevertheless be guilty of burglary if that person actually enters for the purpose of carrying out a previously formed design to commit a felony."

VIRGINIA COURT OF APPEALS DECISIONS

Roseborough v. Commonwealth, 55 Va. App. 653, 688 S.E.2d 882 (2010) (en banc). A defendant's timely arrest within 3 hours of the offense for driving while intoxicated is a basic condition underlying the implied consent statute. But even if a police officer does not have statutory authority to arrest a motorist, "where a driver asks to have a breath test taken, as occurred here, the implied consent statute on its face has no relevance," and the results of the test are admissible.

Lawson v. Commonwealth, 55 Va. App. 549, 687 S.E.2d 94 (2010). "Given the information Investigator Tennis collected during his two-week surveillance of Lawson, … the police were justified in stopping Lawson's vehicle and detaining him, while awaiting the canine unit's arrival and investigation of the vehicle. Tennis' recent observations of Lawson leaving his apartment in his Jeep and apparently conducting drug transactions from his Jeep in a nearby park on multiple occasions, along with Tennis' information indicating that Lawson was also selling cocaine from his apartment, clearly established reasonable articulable suspicion (if not probable cause) that Lawson was, or was about to be, engaged in criminal activity. *** We likewise conclude here that the police diligently pursued their investigation of Lawson's vehicle for narcotics by dispatching the canine unit to the scene within twenty to twenty-five minutes."

Byrd v. Commonwealth, Va. App. , 689 S.E.2d 769 (3/9). The police lacked probable cause to search the defendant and his car because the tip furnished by a confidential informant did not establish the informant's basis of knowledge. "The officers were able to corroborate the [informant's] generic description of the vehicle, individuals, and location prior to stopping the car; however, they did not observe appellant engage in any conduct corroborating the existence of a drug transaction. While the officers are not required to witness the transaction if they have verified all the information provided in order to have probable cause, the information provided in this instance was not so detailed as to provide the inference that the [informant] obtained the information in a reliable way or that he had inside 4 or personal knowledge of the appellant's activities."

Ford v. Commonwealth, 55 Va. App. 598, 687 S.E.2d 551 (2010). The triggering condition for an anticipatory search warrant was that a package would be "accepted" by an individual at the specified address. Defendant contended that acceptance required a hand-to-hand delivery from one person to another. However, the Court held that "accept means to receive willingly. Ford retrieved the package from his front stoop, placed it in his van, and proceeded to open it by removing the shipping labels." Thus the triggering condition was satisfied.

Coley v. Commonwealth, 55 Va. App. 624, 688 S.E.2d 288 (2010). Although the Commonwealth failed to disclose evidence to which appellant was entitled, the other evidence was so "overwhelming that the nondisclosure of this piece of information did not prejudice appellant."

Pulliam v. Commonwealth, 55 Va. App. 710, 688 S.E.2d 910 (2010). The trial court amended the charge from indecent liberties with a child to aggravated sexual battery. The Court of Appeals held that "the amendment did not change the nature or character of the indecent liberties indictment. We do not compare the elements of the offenses, but the underlying conduct of appellant. …. Because the underlying conduct of both charges was essentially the same, and the purpose and subject matter of each charge were similar, we find the trial court did not err in allowing the amendment."

Wilder v. Commonwealth, 55 Va. App. 579, 687 S.E.2d 542 (2010). Because the caller "was not facing an 'ongoing emergency,' but was instead merely providing a narrative report of a larceny in progress, we hold that the tape recording of his 911 call was 'testimonial' within the meaning of the Confrontation clause. Thus, its admission violated Wilder's rights under the Sixth Amendment." The Court rejected the Commonwealth's argument that any ongoing felony constitutes an "emergency" for purposes of analysis under Davis v. Washington, 547 U.S. 813. Instead the Court held that what is required is "an

immediate or imminent danger to the declarant, a third person or the public generally."

Ray v. Commonwealth, 55 Va. App. 647, 688 S.E.2d 879 (2010). "Proffering the expected testimony of an excluded witness requires only that the litigant disclose what he in good faith believes the witness would likely say. No defendant could reasonably expect a trial judge to make a decision to admit or exclude challenged testimony without receiving such a proffer. Nor can a defendant expect an appellate court to vacate a criminal conviction and order a new trial without knowing whether the excluded testimony was admissible, relevant, or in the least bit probative. A trial court's exclusion of a witness, even if erroneous, does not constitute structural error and thus does not suspend the long-standing requirement of a proffer."

Lamm v. Commonwealth, 55 Va. App, 637, 688 S.E.2d 295 (2010). At the time of trial the victim of a beating had lost her sense of smell and taste. "Her eventual recovery of her sense of smell and taste, almost a year after [the beating] did not require that the trial court grant appellant's motion for a new trial based on this evidence. The improvement in her taste and smell was foreseeable by the jury, [medical testimony had been uncertain as to the permanency of her injury] and additional evidence before the jury – independent of her sense of taste and smell – proved that the victim was significantly and permanently injured by appellant's attack even after the return of these senses."

Merritt v. Commonwealth, Va. App. , 689 S.E.2d 757 (2010) Four months after an appeal to the Court of Appeals was filed, the defendant moved the Circuit Court to set aside the verdict and order a new trial based on newly discovered evidence. The circuit court dismissed the motion on the basis that it lacked jurisdiction to hear the motion since the case was pending before the Court of Appeals. In turn, the Court of Appeals ruled that it lacked jurisdiction to consider the motion because it only has jurisdiction over appeals "from action[s by the trial court] on motions filed and disposed of while the trial court retains jurisdiction over the case."

Herron v. Commonwealth, 55 Va. App. 691, 688 S.E.2d 901 (2010). Defendant was convicted for violating Code s53.1-203(5) making it unlawful for any prisoner in a correctional facility to possess a chemical compound not lawfully received. The Court held that "the conduct prescribed by [the Code] is one of strict liability. Further, where appellant was warned about the consequences of taking drugs into a correctional facility and chose not to disclose the presence of those drugs before entering the facility, we hold he voluntarily possessed the drugs inside the correctional facility. Finally, appellant's decision not to disclose the presence of drugs does not violate his Fifth Amendment right against self-incrimination."

Holloway v. Commonwealth, 55 Va. App. 609, 687 S.E.2d 557 (2010). The Court found "the evidence is insufficient as a matter of law" to convict of possession with intent to distribute. "Appellant was found with a small amount of imitation crack cocaine, wrapped in three baggie corners that would have cost about twenty dollars each if the substance was actually crack cocaine. Appellant did not have an ingestion device on his person. The officers did not recover from appellant or the surrounding area any firearms, unusual sums of money, or equipment related to drug distribution, such as scales or empty baggies." These fact were not sufficient to overcome the inference that this was possession for personal use. The Court, however, did find sufficient facts to uphold a conviction for assault and battery of a law enforcement officer.

Brown v. Commonwealth, Va. App. , S.E.2d (3/16/2010). "Under its current structure, Code s54.1-3401 provides that any stalks, fiber, oil or cake that were also present with the plant material are necessarily 'combined with other parts of plants of the genus Cannabis' to meet the definition of marijuana for purposes of statutory construction." The Commonwealth no longer has to separate the stalks from the other parts of the marijuana plant to prove that the accused possessed the proscribed weight of marijuana.

Thomas v. Commonwealth, Va. App. , S.E.2d (3/16/2010). Although the defendant failed to raise the issue at trial, the Court of Appeals invoked the "ends of justice" exception to overturn a conviction when the Commonwealth failed to prove an element of the offense – that the defendant escaped while being held on a charge or conviction of a felony. See, *Hubbard*, 276 Va. 292.

Felton v. Commonwealth, Va. App. , S.E.2d (2/23). Execution of a warrant to search "all persons present" at a location does not depend on the identity of the individuals present when the affidavit for the warrant was filed. Rather, the warrant allows

police to search all persons present at the time of execution "without regard to their identity."

Startin v. Commonwealth, Va. App. , S.E.2d (2/23) en banc. The Court overturned precedent [Sprouse, 19 Va. App. 548] holding that Code s18.2-53.1 [use of a firearm during commission of a felony] required that the firearm "actually be a firearm," as opposed to a replica that is incapable of firing a projectile. "The term firearm in Code s18.2-53.1 also includes other objects that are not capable of firing projectiles but give the appearance of being able to do so."

Hunter v. Commonwealth, Va. App. , S.E.2d (3/30/10). Code s18.2-308.4(B) punishes knowingly and intentionally possessing a firearm "on or about his person" while simultaneously in possession of a controlled substance. Applying previous interpretations of the concealed weapons statute, the Court held that the phrase "'about his person' has never *required* actual possession. Nevertheless, the phrase clearly requires something in addition to mere constructive possession …. [the Commonwealth must prove] that the defendant was aware of both the presence and character of the firearm, that the firearm was within the accused's dominion and Control, and that the firearm was readily accessible for prompt and immediate use."

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