



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

## New Criminal Law Section Board takes Office to Lead Section during 2009-2010



**2009-2010 Criminal Law Section Board** — **Front Row:** (L to R): Carolyn V. Grady, Vice Chair; Richard E. Trodden, Chair; Casey R. Stevens; Secretary; Reno S. Harp III; **Middle Row:** (L to R): Nina J. Ginsberg; Lisa K. Caruso; Marla G. Decker; Judge Ashley K. Tunner; David J. Damico; **Back Row:** (L to R): Judge John R. Doyle III; Jeffrey A. Swartz; Claire G. Cardwell; Judge Dennis W. Dohnal; Judge Beverly W. Snukals; Francis McQ. Lawrence; Prof. Ronald J. Bacigal

### Chairman's Column



*"What started out as just, black propaganda was one day seen to be, believed as truth"*

Van Morrison

"Professional Jealousy"

The other day I was leafing through the October 22, 2009 edition of The New York Review of Books when my eye landed on an article called "Go Directly to Jail." This was a review by Anthony Lewis of Amy Bach's book

*Ordinary Injustice: How America Holds Court.* I must disclose that I have not read Ms. Bach's book but I did read the review with great interest. I came away shaking my head – either I live on some other planet or there is a grotesque fantasy abroad about how the criminal justice system functions.

According to Mr. Lewis the promise of *Gideon vs. Wainwright* and *Argersinger v. Hamlin*, which established the entitlement to a free lawyer for poor criminal defendants, is not being met. This failure is laid squarely on the shoulders of court appointed counsel, public defenders and petty or petulant judges. While I realize that our system of criminal justice has its flaws, such a broad sweep

Chair's Column continued from page 1

of castigation seems undeserved. Lewis stated that

“[A]ccording to Bach, 47 million Americans have criminal records: an astounding figure. Many of them, certainly most, acquired their records by pleading guilty to a misdemeanor which may be as trivial as loitering. Why do they plead guilty? Because as Bach shows, they do not understand the consequences or think the alternative is worse.”

Now there is a breathtaking statement: either they are ignorant or calculating! I can't help but wonder if such critics of the system ever considered the fact that the pleading defendants may, in fact, be guilty or is that what the cryptic phrase: “the alternative is worse” means? Apparently, Ms. Bach seems to believe that the number of guilty pleas results either from the sloth or indifference of defense attorneys. In one instance she chastises a particular attorney for not taking more time to know about his client and then in an expression of legal machismo goes on to state: “It was thus difficult for him to bargain with prosecutors to secure a more lenient sentence, nor could he produce the ultimate trump card: a willingness to go to trial when his client claimed innocence.”

As a prosecutor I have to admit that I have almost no experience (except in my younger days) counseling defendants on the wisdom of a plea. I have, however, seen defense counsel play the so called trump card of going to trial – frequently to the defendant's detriment. More consistently what I have seen are conscientious defense attorneys trying to equalize the risk and minimize the damage to their clients – even when the lawyer's adrenaline for trial and combat is running high. This is not sloth or cowardice – this is the essence of good representation. These same lawyers do not fear to go to trial when the time is right but, let's face it, most of the time it's not.

In one final canard Lewis claims that our adversary system fails to work properly because prosecutors and defense lawyers are “too friendly with each other.” Herein lies the triumph of fiction over reality. The audacious television advocate or the bumbling or malevolent prosecutor is what the people want to see and if they don't see it then the system is not working. There can be no room for friendship in the arena of the adversary. Such an assertion reveals the critique to be what it is: a tourist excursion.

Certainly our system is not perfect. Humans are

essential to its mission and humans have had a checkered past even back to Adam. There comes a time, however, when we who practice in the arena must say “enough!” We are not corrupt, venal, lazy and ethically deprived. One book or one article will not tarnish our work but a steady drumbeat will eventually undermine confidence in criminal justice. I truly believe we should not fear the daylight and at every opportunity we should encourage the public to view our endeavors. The wisdom of the educated will eventually triumph over the opinion of the tourist.



## VIRGINIA SUPREME COURT CRIMINAL LAW AND PROCEDURE DECISIONS

*Whitehead v. Commonwealth*, Va. , S.E.2d (9/18/09). When a drug detection dog alerted on a vehicle, police searched the vehicle and its four passengers. No drugs were found until the fourth passenger, Whitehead, was searched. The Court of Appeals upheld the search, noting that the fruitless searches of the vehicle and the other occupants increased the likelihood that the contraband detected by the dog was on Whitehead's person. The Supreme Court, however, noted that these facts “also increased the likelihood that the dog alerted to the odor of contraband no longer present in the vehicle.” Thus, “the positive alert and the fruitless searches were not sufficient to establish probable cause particularized as to Whitehead that he was concealing contraband on his person.”

*Rawls v. Commonwealth*, Va. , S.E.2d (9/18/09). The jury was erroneously instructed that the maximum sentence was 40 years, and imposed a sentence of 25 years [in excess of the proper maximum sentence of 20 years]. The Court noted its prior inconsistency in addressing such issues and adopted a “rule that is designed to ensure that all criminal defendants whose punishments have been fixed in violation of the statutorily prescribed ranges are treated uniformly without any speculation. We hold that a sentence imposed in violation of a prescribed statutory range of punishment is void ab initio because ‘the character of the judgment was not such as the Court had power to render.’” Thus, a criminal defendant in that situation is entitled to a new sentencing hearing.”

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# 40th ANNUAL CRIMINAL LAW SEMINAR

**Doubletree Charlottesville – February 5, 2010**

**Williamsburg Marriott – February 12, 2010**

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| <p><b>8:00 Late Registration and Exhibits</b></p>   | <p><b>12:15 Luncheon</b><br/><i>Charlottesville: Reno S. Harp III</i><br/><i>Williamsburg: Robert F. Horan, Jr.</i></p>   |
| <p><b>8:15 Welcome and Opening Remarks</b><br/><i>Richard E. Trodden, Section Chair</i></p>   |   |
| <p><b>8:30 Recent Developments in Criminal Law and Procedure</b><br/>Annual comprehensive review of developments in substantive criminal law and criminal procedure during the past year.<br/><i>Professor Ronald J. Bacigal</i></p>  | <p><b>1:45 Ethical Issues in the Practice of Criminal Law</b><br/>Criminal law practice creates a significant number of ethical pitfalls for the unwitting practitioner. What are some of those pitfalls and how can the ethical lawyer avoid them?<br/><i>Hon. Dennis W. Dohnal</i><br/><i>Rodney G. Leffler</i></p> |
| <p><b>9:45 Coffee Break and Exhibits</b></p>  |   |
| <p><b>10:00 Developing the Theory of a Case</b><br/>Two experienced trial attorneys from opposite sides will share their analysis and trial strategy using several fact patterns from noteworthy cases in 2009.<br/><i>Charlottesville: Donald S. Caldwell</i><br/><i>Williamsburg: Michael N. Herring</i><br/><i>Both Locations: Craig S. Cooley</i></p>   | <p><b>2:45 Technology Can Be Your Friend</b><br/>Advanced technology can be helpful in the trial practice world and this session will enlighten the practitioner on how to use some of the latest technologies to advance the practice of law.<br/><i>Casey R. Stevens</i></p>  |
| <p><b>11:00 Preserving the Record</b><br/>We all plan to win our cases but must be prepared to lose. This lecture will focus on practical advice from experienced appellate attorneys and a distinguished member of the Virginia Court of Appeals.<br/><i>Charlottesville:</i><br/><i>Frank K. Friedman &amp; Virginia B. Theisen</i><br/><i>Williamsburg:</i><br/><i>L. Steven Emmert &amp; Leah A. Darron</i><br/><i>Both Locations: Hon. Robert J. Humphreys</i></p> | <p><b>3:45 Handling Experts like an Expert</b><br/>This lecture will highlight the best ways to select, prepare, use and cross-examine expert witnesses at trial.<br/><i>Claire G. Cardwell</i></p>   |
| <p><b>12:00 Indigent Defense Data Collection</b><br/><i>John E. Lichtenstein</i><br/><i>James M. Hingleley, Jr.</i></p>   | <p>Brochures will be mailed in mid-December. Registration information will also be available at: <a href="http://www.vsb.org/sections/criminal">www.vsb.org/sections/criminal</a></p>   |

*Commonwealth v. Anderson*, Va. , S.E.2d (9/18/09). The Court found the evidence insufficient to uphold a robbery conviction when a store supervisor saw a person display a gun while apparently robbing a cashier. The Court found that 1) the supervisor/victim saw the weapon but it was not “displayed” to him; 2) the record did not establish the supervisor/victim’s intent to “interpose himself” to stop the robbery; 3) the record did not establish that the supervisor/victim was “put in fear.”

*Morva v. Commonwealth*, Va. , S.E.2d (9/18/09). Upheld the trial court’s refusal to appoint an expert on “Prison Risk Assessment and Prison Violence and Security.” To be admissible, such evidence “must be evidence peculiar to the defendant’s character, history, and background in order to be relevant to the future dangerousness inquiry. Conditions of prison life and the security measures utilized in a maximum security facility are not relevant to the future dangerousness inquiry unless such evidence is specific to the defendant on trial and relevant to that specific defendant’s ability to adjust to prison life.” The dissent maintained that “the majority effectively adopts a per se rule that expert prison risk assessments are inadmissible to rebut evidence of future dangerousness in a capital murder case.”

*Prieto v. Commonwealth*, Va. , S.E.2d (9/18/09). The Court reversed two sentences of death because the verdict forms were defective in two areas: 1) “Our decisions in *Powell* and *Morrisette* make it clear that a verdict form must provide the jury with the explicit option of imposing a life sentence even if the jury finds one or both aggravating factors. The Commonwealth’s argument that any error in the verdict form is cured by the jury instructions is without merit.” 2) “In the penalty phase of capital murder trials the death penalty may not be imposed unless the jury unanimously finds either one or both of the aggravating factors of ‘vileness’ or ‘future dangerousness’ beyond a reasonable doubt. We further hold that the verdict form in *Prieto II* is defective in failing to explicitly set out the unanimity required in the jury finding of one or both of the aggravating factors beyond a reasonable doubt.”



## VIRGINIA COURT OF APPEALS CRIMINAL LAW AND PROCEDURE DECISIONS

*Paiz v. Commonwealth*, 54 Va. App. 688, 682 S.E.2d 71 (2009). Defendant, who did not use or possess a firearm, cannot be held criminally responsible for murder by mob [Code s18.2-53.1] simply because he was a member of the mob that committed the offense. [The Court noted that its holding was narrow because the Commonwealth presented only the “mob” theory of collective responsibility and did not argue other vicarious responsibility theories such as principal-in-the-second-degree or concert-of-action].

*Gheorghiu v. Commonwealth*, 54 Va. App. 645, 682 S.E.2d 50 (2009). “Unlike credit card theft, which is completed in the locality where the card or number is unlawfully taken from its rightful owner or is received with knowledge that it has been taken and with the intent to use it, identity theft is a continuing offenses [that] necessarily continues for as long as the perpetrator is in unlawful possession of the victim’s identifying information with the intent to use the victim’s identity in a fraudulent manner....” Thus venue was proper in any jurisdiction where the defendant was apprehended in the unlawful possession of the victim’s identifying information.

*Carter v. Commonwealth*, 54 Va. App. 700, 682 S.E.2d 77 (2009). Defendant took paint from a display shelf in the store, presented it as previously purchased, and attempted to return it for a cash refund. The conviction for larceny was upheld “because the return of the paint was conditioned on Home Depot’s acceptance of the refund request and we presume the trial court found the paint would have been kept had Home Depot refused the refund. \*\*\* The intent to return, conditioned on a future event that may or may not occur and based on a false assertion of ownership, should be disregarded as a matter of law and, as such, cannot negate the inference of intent to steal.” The dissent found that there was insufficient evidence that defendant intended to keep the paint if the refund request was denied.

*Carroll v. Commonwealth*, 54 Va. App. 730, 682 S.E.2d 92 (2009). Defendant maintained that his probation violation for making claims of innocence during sex offender therapy was inconsistent with his *Alford* plea. “At its core, Carroll’s argument is that an *Alford* plea, by its nature, contains an implicit promise that the defendant will never be required to admit his guilt.” The Court held that an *Alford* plea does not impose special limits on the probation conditions a court may impose, thus the trial court had reasonable cause to revoke defendant’s probation. The dissent maintained that defendant “could not be required to admit to the crime in sex offender therapy when he tendered an *Alford* plea.”

*Grant v. Commonwealth*, 54 Va. App. 714, 682 S.E.2d 84 (2009). The Court applied *Melendez-Diaz* and held that the attestation clause in the certificate of chemical analysis of defendant’s breath “is testimonial in nature and its admission ... constitutes a violation of the Confrontation Clause.”

*Startin v. Commonwealth*, 54 Va. App. 778, 682 S.E.2d 115 (2009). Case of first impression. “A replica firearm that is visually indistinguishable from a real firearm but incapable of expelling a projectile is a ‘firearm’ for the purposes of Code §18.2-53.1.”

*Bly v. Commonwealth*, Va. App. , S.E.2d (9/15/09). In a 6 to 5 en banc decision the court held that when the trial court denied defendant’s motion for a new trial, the court implicitly made a factual determination that defendant was not prejudiced by the nondisclosure of *Brady* material. Where “a trial judge, sitting as ‘both trier of fact and arbiter of law,’ finds the *Brady* evidence inconsequential, there can be ‘no logical possibility’ that its earlier disclosure ‘would have altered the outcome of the case.’”

*Smith v. Commonwealth*, Va. App. , S.E.2d (10/6/09). “The issue is whether police who encounter a passenger in the course of a routine traffic stop have reasonable suspicion to believe he may be armed and dangerous when they learn he has no warrants outstanding but that he was previously arrested on a warrant for possession of a firearm by a convicted felon based on an act of possession that occurred *eleven months earlier* and previously arrested for possessing cocaine with an intent to distribute based on an act of possession that occurred *six months earlier*. We hold that, in the absence of some contemporaneous indication that the individual might be carrying a weapon, these facts do not provide rea-

sonable suspicion to believe he may be *presently* armed and dangerous.”

The Court also held that “despite the breadth of some of the Court’s language in *Herring*, 129 S.Ct. 695, it did not narrow the exclusionary rule beyond the bounds previously defined and that the good faith exception does not apply to a police officer’s honest but erroneous legal conclusion that a particular set of facts provides him with the necessary reasonable suspicion or probable cause for a seizure or search.”

*Rodgers v. Commonwealth*, Va. App. , S.E.2d (10/6/09). Defendant contended that he was not guilty of attempted robbery because he never confronted the intended victim. The Court found that an attempt occurred because the defendants “clearly formed the intention to rob G.V.’s family in G.V.’s home. The men then obtained firearms and the address for G.V.’s home. They went to that home with the firearms. Appellant put on a bandana to hide his identity. The men took firearms and a bat inside the building and to the door of the home. One of the men held a gun out so that it could be seen if someone opened the door. The men knocked on G.V.’s door and rang his doorbell, attempting to gain entry into the home so that they could commit the robbery at gunpoint. These acts clearly moved beyond the planning stage and into the realm of commencing the robbery and the use of the firearms.”



## SELECTED 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 would approach black males and ask for a DNA sample.

**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, 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.

**Prior Recipients**

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

**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 Richard E. Trodden, 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 4, 2009.** 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.

**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 4, 2009.**

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.)

## MEMBER RESOURCES AREA AVAILABLE ON SECTION'S WEBSITE

[HTTP://WWW.VSB.ORG/SITE/SECTIONS/CRIMINAL/](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.

A **Directory of Section Members** also will be posted on the section's website in late November, 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

# Criminal Law NEWS



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[www.vsb.org/site/sections/criminal](http://www.vsb.org/site/sections/criminal)

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