The Virginia Champion

Virginia Association of Criminal Defense Lawyers

Summer 2017

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Inside this issue:

MESSAGE FROM THE PRESIDENT

I hope everyone is having a busy and productive summer so far. We are working on putting together an excellent program for our annual CLE meeting in October in Roanoke, Virginia. Our website is up and running and we've had a good discussion about the character of our organization.

We will meet at the Hotel Roanoke & Conference Center for our Fall CLE seminar with a reception on October 12 and our full program on October 13. It is going to be a great, informative, and useful CLE. Please come, join us and meet with the people who you communicate with on the Listsev.

I would also urge the members to please check out and use our website. Danielle has done an excellent job getting the site up and running. And it is extremely useful. Your President, Vikram Kapil, was late with his VACDL dues payment. But, the website came to the rescue. I was able to pay my dues online with a receipt and confirmation that I was paid up and not thrown off of the Listserv. Obviously, this type of activity is normal in the 21st Century. But for VACDL, we have joined the rest of Civilization in the ease and connectivity of our website. The members-only forums are waiting to be used. Particularly, the documents and motions library needs populating. Much of the information we share on the Listserv can be preserved on the members-only section of the website and help with our practices. Also, news about our members and information concerning causes VACDL is working on will be on the site. It is your site—for your benefit.

Finally, the Board had a great discussion on the character of VACDL. Justice Forward Virginia, a political

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* VACDL *Amicus Curiae* Brief Accepted by Supreme Court of Virginia *

On April 19, 2017, the Supreme Court of Virginia granted the VACDL's motion to file an Amicus Curiae brief in Valesky v. The Honorable Judge Donald Haddock, General District Court for the City of Alexandria. VACDL members Marvin Miller, trial counsel, and John Maus, who wrote the Amicus Curiae, deserve much credit for the well-crafted arguments and brief in this case.

At issue is the interpretation of when the defense must raise certain objections under Virginia Code § 19.2-266.2 (D). The statute states: "In a criminal proceeding in district court, any motion or objection as described in subsection A may be raised prior to or at such proceeding. In the event such a motion or objection is raised, the district court shall, upon motion of the Commonwealth grant a continuance for good cause shown."

Prior to trial, the court asked if there would be any

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2017 Board Members

BOARD MEMBER	REPRESENTATION CATEGORY	EXPIRATION OF TERM
1. Brandon Waltrip	1st Congressional District	December 31, 2019
2. Stephen Pfeiffer	2nd Congressional District	December 31, 2018
3. Elliott Bender	3rd Congressional District	December 31, 2018
4. Terry Marsh	4th Congressional District	December 31, 2019
5. Samantha E. Freed	5th Congressional District	December 31, 2017
6. Deborah Caldwell-Bono	6th Congressional District	December 31, 2017
7. Douglas Ramseur	7th Congressional District	December 31, 2019
8. John Zwerling	8th Congressional District	December 31, 2017
9. Cynthia Dodge	9th Congressional District	December 31, 2017
10. Glen Franklin Koontz	10th Congressional District	December 31, 2018
11. Shawn Stout	11th Congressional District	December 31, 2018
12. Phoenix Harris	Region A	December 31, 2017
13. Bryan Jones	Region B	December 31, 2018
14. Andrew Cornick	Region C	December 31, 2018
15. Robert Moody, IV	Region D	December 31, 2018
16. Seth Weston	Region E	December 31, 2018
17. Corinne J. Magee	At-Large	December 31, 2017
18. Marvin Miller	At-Large	December 31, 2019
19. Vikram Kapil	President	December 31, 2017
20. B. Leigh Drewry, Jr.	At-Large	December 31, 2019
21. Sandra Saseen-Smith	At-Large	December 31, 2018
22. David B. Hargett	Past President	December 31, 2017

2017 Executive Committee

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Vice-President	Corinne J. Magee
President-Elect	Seth Weston
Treasurer	Andrew J. Cornick
Secretary	Glen F. Koontz
Past-President	David B. Hargett
Committee Member 1	Samantha Freed
Committee Member 2	Phoenix Harris

The twenty-two Directors who constitute the VACDL Board of Directors are elected by the membership and serve rotating three-year terms. They represent Virginia's eleven Congressional Districts and are among the very best of Virginia's Criminal Defense Lawyers.

Message from the Executive Director, K. Danielle Payne

Just a few quick if/then statements from me (honestly, it is too hot to think, let alone write a long message):

1. If you forgot to remit a payment for your 2017-2018 dues by July 1st, then you are official a "lapsed" member. Our new online payment system makes it pretty easy for you to get back in good standing, but you can also send me a check in the mail, to 3126 W Cary Street, #615, Richmond, VA 23221!

2. If you are on the fence about renewal, then please give us the opportunity to speak with you and try to address your concerns. Maybe you just aren't sure if the dues cost is worth the benefit, or maybe you aren't engaged in the List Serv or in any VACDL work, or maybe your resentment about the shortcomings of the organization has been long-simmering (I really hope it isn't the last option! Yikes!). Whatever it is, the VACDL Board Members and I are ready and willing to hear you out. Your feedback, whether you ultimately decide to renew or not, is vitally important to us as we

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motions to suppress, and defense counsel stated he was unsure but reserved the right to do so upon testimony giving rise to such objection. The court ordered the parties to brief the issue and continued the case. The court ultimately held the phrase "at trial" meant "on the day of trial before the first witness was sworn." The court continued the trial again to allow defense counsel to further litigate, which he did by filing a Writ of Mandamus with the Circuit Court. The Circuit Court held that the Writ does not lie since this involved statutory interpretation and mandamus only applied to non-discretionary matter. Defense counsel appealed and a panel of the Supreme Court upheld the Circuit Court decision, and defense counsel filed to reconsider, which is when the VACDL became involved.

After pointing out the need for uniformity as set forth in prior case law and specifically in the Supreme Court Rules, the VACDL Amicus Curiae brief set forth the following issues if the lack of oversight of a General District Court's ruling on procedural issues is allowed to stand:

1. Depending on the extent to which a particular Commonwealth's Attorney permits pre-trial discovery, a citizen who is being prosecuted where there is less than complete open-file discovery may not become aware of information that allows him (or her) to make a motion to suppress until after the trial has started.

2. Statutes may be applied inconsistently from court to court and also from judge to judge within the same multi-judge court.

3. If a particular judge does not follow the clear meaning of the statute, an accused citizen may not obtain any relief until (s)he is able to complete an appeal to the circuit court, which could result in a lengthy period of pre-trial confinement and the resultant loss of employment, housing, and other fundamental essentials of life; and

4. Because this statute applies to felony preliminary hearings as well as misdemeanor trials, the less-than-uniform application thereof may deprive some citizens of the opportunity to be convicted of a misdemeanor in the district court rather than having to defend a felony in circuit court.

To sum it up, the meaning of Virginia Code §19.2-266.2(D) should not be subject to interpretation by a district court with no oversight by any higher court. So, with a tip of the cap to Jack and Marvin on their arguments and brief, we await the ruling of the Supreme Court.*

I also want to remind all VACDL members of the very important and useful benefit of your membership in having the *Amicus* committee. The current committee consists of me, Dave Hargett, Marvin Miller and Jack Maus. We are constantly looking for cases of merit to advance our cause and assist members, so please feel free to contact me at seth@scwestonlaw.com, or any other committee member so we can review your case.

-Seth Weston, VACDL President-Elect

*Ruling handed down 6/30/17, will be addressed in next Champion

Justice Reform, Featuring All of Us

By Brad Haywood, Esq.

For many of us, justice reform is to our jobs what the National Hockey League is to the average sports fan: something we ignore for eleven months of the year, until the stakes are high enough to grab our attention. Every January, or October, or whenever some bill tumbles out of an important committee and into another, a friendly legislator or committed advocate among our ranks sends an update to a listserv, or might be so bold as to convince an ally at the Washington Post or Times-Dispatch to pen an editorial. Year after year those voices call for the same changes: raise the larceny threshold, expand discovery, increase indigent defense funding, the list goes on. For one month a year—perhaps—the defense bar is engaged. We make our calls to legislators, send our emails, maybe even travel down to Richmond for public comment in the General Assembly. Some years optimism is greater than others—thanks to so much hard work, this year appeared to be one of them. Progress was evident and momentum was palpable, particularly with respect to discovery reform. But still, we came away empty handed. Following the defeat it was back to the drawing board for the policy advocates, and back to hibernation for the rest of us.

I can't pretend to know all of the legislative obstacles to reform. What I do know, however, is my own professional community. No matter what drew us to our work, it was rooted in a passion for justice: the cause of the accused, the plight of the indigent, the disproportionate power of the government over the individual. Whatever our motivation, we fight because we care, and we care a whole hell of a lot. Yet as great as we are at applying that passion inside the courtroom, we often struggle to mobilize ourselves outside of it, on a policy level. At the very least we struggle to a far greater degree than those who oppose us.

I am convinced that we can do better. And I'm also convinced that there's no sense in waiting around for anyone to do it on our behalf. The more I've spoken with colleagues, the more I'm persuaded of the need for grassroots action within our community. We may not have the public support or the resources of reform opponents, but we have justice on our side. If you haven't before, try telling a non-defense affiliated friend about how theft of a well-used cell phone in Virginia entails felony liability, or how a defendant has no a right to review the investigative reports from his own case. See what they think. I'm not telling you anything new in citing these examples; we're all aware that these reforms are years overdue. What I'm suggesting is that maybe our battle can be fought from higher ground. Maybe we would have public opinion on our side, if only people knew to care.

What do we do then? Like I said, I don't pretend to have all of the answers, or even most of them. What I figure we can start with, though, is strengthening and unifying a coalition of advocates—that means ***us***—and using our collective strength to raise awareness for the most urgent reforms. Many organizations already work for the changes we desire, but there is undoubtedly a gap in our community at a grassroots level. Further, we can develop relationships with those who can help us make a difference, like legislators and others who are close to the policymaking process. Along those lines, I have founded a political action committee: Justice Forward Virginia (www.justiceforwardva.com). Its purpose is to support state and local candidates in the Commonwealth who advocate for comprehensive reforms to our criminal justice system. And I am one of a core group

of advocates in the Northern Virginia defense bar—mainly current and former public defenders in Alexandria and Fairfax—who are seeking to use the PAC and other mechanisms to accomplish our goals.

You may have heard about the Justice Reform Happy Hour that Chris Leibig and I organized back in April, where Tom Perriello was one of our featured guests. It went exceptionally well, and seemed not only to be a great opportunity for advocates of reform to come together, but even more so it operated as something of a teaching moment—a chance for dialogue with a potential officeholder on issues he cared about, but with which he was comparatively unfamiliar. Given the success of the event, we are planning similar events for the coming months, with legislators and candidates as featured guests. These events will have a practical emphasis, focusing on the nuts and bolts of legislative advocacy more than specific reform topics, but with concrete goals in mind. And of course, more broadly we aim to open a dialogue with legislators and continue to build momentum within our ranks toward real change. The next of these events will take place in Alexandria on July 20th (Fireflies Restaurant, 5-7 p.m.), and a third is tentatively planned for later this summer in Fairfax. Stay tuned to the listservs for additional details. VACDL has pledged to co-sponsor the two upcoming events, and we're thrilled to have their support in our efforts.

It should be noted that both the PAC and all events with which it will be associated are nonpartisan in nature. Criminal justice reform doesn't belong to liberals or conservatives, or progressives or libertarians. It's one of the rare issues that enjoys a broad base of support from many parts of the political spectrum. Reform in Virginia will undoubtedly require coalitions built on that common ground.

I'm not so naïve as to think we can change the system all at once. That's not how policy is made, least of all in Virginia. But that doesn't mean we shouldn't do our part, whatever that might entail. In my mind, we have as much a duty to fight for policy change as we do for the rights of our individual clients. Just as we don't take eleven months off from courtroom advocacy, it's time to stop standing on the sidelines when it comes to reform advocacy, as well. If you want to help us with what we've already started, I welcome you. If you want to start your own group, PAC or nonprofit in your own part of the Commonwealth, have at it—and give me a call so we can work collectively. We need to stop watching and start doing, and we need all of the help we can get.

WELCOME THESE NEW AND RETURNING MEMBERS

Stephen Armstrong
Tabatha Blake
Gary Bowman
Thomas Cleator
R. Stuart Collins
Warren Cox
Angela Dinger
Jeffrey Early
Joshua Ellis
Brian Fayman
Sharon Fitzgerald
Ariel Hedgepeth
Alexandra Heilbronner
Jerald Hess
Leila Higgins-Fleishman
Jessica Lau
Joshua Lepchitz
William "Fred" Mason
Dennis Mersberger
Sheila Moheb
Daymen Robinson
Aubrey Rosser, Jr.
Don Scott
A. Daniel Zijerdi

Attorney General Debate: Adams v. Herring, Round 1

By K. Danielle Payne, VACDL's Executive Director

On June 17, 2017, the Virginia State Bar hosted the first debate between the two candidates for Attorney General of Virginia, at the Annual meeting in Virginia Beach. Led by moderator Barbara Hamm Lee, a radio host from Hampton Roads, the crowd in attendance settled in for a lively sparring between former Federal Prosecutor turned white-collar defense attorney John Adams (R) and the incumbent Virginia Attorney General and former Loudoun County Senator, Mark Herring (D).

For a first debate in his very first run for public office, John Adams held his own, for the most part, when faced with a more seasoned opponent in Herring. Adams seemed more sincere, open, and emotionally-charged, which may have worked against him as the debate progressed. In contrast, Herring's rehearsed remarks, at times, felt a little too polished, and without true feeling. Herring clearly hit all of his talking points, was relatively unfazed by barbs thrown by Adams, and reiterated what he had accomplished during his current term at Attorney General. Unfortunately, neither candidate outlined a plan for specific work as Attorney General related to criminal justice concerns, or fully answered the questions presented during the debate. The multi-part nature of the debate questions did not work in their favor, either.

Neither Adams nor Herring strayed from their respective typical party positions, which were even more clearly defined in the face of the current political climate in Washington. In his compelling opening statement, Adams gave the impression (briefly) that he was not going to align himself fully with the Trump agenda. Adams highlighted four-main promises he'd keep if elected: 1. Put the interests of the Commonwealth above his personal beliefs; 2. Provide timely, objective advice to members of the legislature, no matter which party or person was seeking it; 3. Fight back every time DC exceeds their constitutional authority, no matter if the person looking to impinge on Virginia's self-governance is President Trump or someone else; and 4. Defend the laws of Virginia, whether he agrees with them or not, because the laws are the people's. Voters will be interested to see whether Adams maintains these four principles in subsequent debates, particularly in regard to his personal beliefs and potential willingness to push back on Washington and the President. Herring made his own thoughts on this clearly known: "He [Adams] will be the attorney for the Republican caucus."

Herring chose to open with statistical highlights of his office's accomplishments during the past 3 years (fighting Medicare fraud, starting a $3.4 million program to clear out the rape kit backlog, working with law enforcement to battle the opioid epidemic, winning $100 million in debt relief for veterans, marriage equality, gun safety, etc.) before going on the attack against his opponent's current work at McGuireWoods, where Adams "shielded people involved in kickbacks, embezzlement, and bribery…billing hours protecting people that the AG's office would prosecute." Adams responded that he is "a lawyer, and I have clients, and I am proud to do what I do on behalf of my clients… everyone deserves adequate representation." Herring hit hard about Adams's role in the Hobby Lobby case and his belief that Adams would seek to

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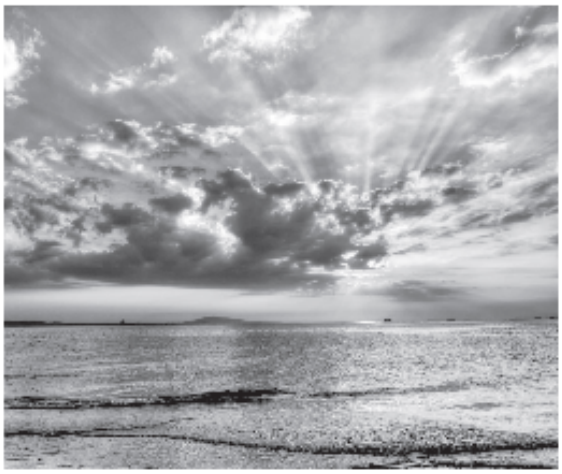

It's Monday, the First Day of the Rest of Your Life.

Too bad last Friday was the last day to file the Bergstrom motion.

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- **Additional Claim Expense** benefit equal to one half of the policy single limit up to a maximum of $250,000 per policy period.
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When is Hearsay NOT Hearsay?

By: Seth C. Weston, Esq.

I trust you are all familiar with the old maxim: It's better to be thought a fool than to open your mouth and remove all doubt. Even if you are not, jurors surely understand the concept. In the heat of trial, if your tone of voice, your attitude, your facial expressions, your overall demeanor, shows exasperation rather than confidence you will lose your credibility with the jury. I'm not saying that you need to win every objection or look like a fool. I also understand there are various tactical reasons to make objections you believe will fail, such as the need to shake up a witness, or just try to throw off the prosecutor. The art of lawyering requires the trial attorney to balance the need to object for reasons other than making a sound legal objection rooted in firm legal precedent to keep out evidence against the possibility of losing credibility with the jury to the point you hurt your case, which is beyond the scope of this article. The point I want to emphasize is that you do need to consider the legal basis of your objections before standing up to make the objection so you can articulate it to the court regardless of whether you believe you will win.

If you were to make a hearsay objection, what would you state as your legal basis? It seems the exceptions have almost swallowed the rule. Many of our cases involve out of court statements submitted for the truth of the matter asserted, almost always to the detriment of our client. Any good trial attorney knows to object when a witness begins testifying to something said by someone else. However, knowing when to make an objection is only part of the trial attorney's job. It is of little use to make an objection only to flounder when called upon to justify it.

In speaking with many of my colleagues, I found that most, like myself, missed the seismic shift in hearsay jurisprudence set forth by the U.S. Supreme Court in Ohio v. Clark 135 S. Ct. 2173 (2015), and the statue it spawned in 2016 that is now Virginia Code § 19.2-268.3, "Admissibility of statements by children in certain cases." In a 9-0 decision with two concurring opinions, a majority of the U.S. Supreme Court rewrote hearsay analysis to a primary purpose analysis, which is "whether, in light of all the circumstances, viewed objectively, the primary purpose of the conversation was to create an out-of-court substitute for trial testimony." Ohio v. Clark, 135 S. Ct 2173, 2180. (internal citations omitted.) It found this is compliant with the Confrontation Clause, and Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) in particu-

lar, and wrote "a statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial." Id.

To further muddy the waters, in dicta the majority opinion states the "primary purpose test is a necessary, but not always sufficient, condition for the exclusion of out-of-court statements under the Confrontation Clause." Id., 2180-2181. Justice Scalia's acerbic retort to this possible secondary analysis that may allow a statement into evidence even if the primary purpose analysis requires exclusion is a must read, as I am sure prosecutors will be using trying to expand the hearsay exceptions beyond the primary purpose analysis, and introduce statements under the now defunct Ohio v. Roberts standard of statements being admissible "so long as the statements bore adequate 'indicia of reliability', [meaning the statement is admissible if it] falls within a firmly rooted hearsay exception or bears particularized guarantees of trustworthiness." Ohio v. Roberts, 448 U.S. 56, 66, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980).

Not wanting to get left behind by their peers in other legislatures in making it easier rather than harder for the government to convict its own citizens, the General Assembly wasted no time in passing this decision into law by creating Virginia Code § 19.2-268.3. At issue in Ohio v. Clark was the admissibility of the statements of a 3-year-old to teachers, which the court found admissible under the new primary purpose analyses, going so far as to note statements "by very young children will rarely, if ever, implicate the Confrontation Clause." Ohio v. Clark, 2182.

In compliance with this, Virginia Code § 19.2-268.3 (B) states, in part, any "out-of-court statement made by a child who is under 13 years of age at the time of trial or hearing who is the alleged victim of an offense against children describing any act directed against the child relating to such alleged offense shall not be excluded as hearsay…" if certain criteria are met. These criteria consider several items including the age and maturity of the child, as well as the credibility of the person testifying as to the statement. Moreover, § 19.2-268.3 (B) (2) allows the statement into evidence even if the child testifies! Given this statute, any defense attorney dealing with such issues must either hire an expert or request the appointment of one who can provide evidence and testify concerning the various stages of the psychological development of children and the child complainant in particular.

So, when is hearsay not hearsay? And more importantly, what does this all mean to the trial attorney? To get the answer to these questions, and much more, I encourage everyone to attend our CLE scheduled for October 13 at the Hotel Roanoke.

The 4th Amendment and CSLI

By: Michael E. Hollingsworth, Esq.
Nichols Zauzig Sandler, P.C.

There is no question that the smart phone is one of the greatest technological innovations in history. According to multiple studies, almost 80% of adults in the U.S. now own a smart phone and enjoy limitless access to the digital world while on the go or in their homes. According to a 2013 Harris poll, nearly 75% of smart phone users report being within five feet of their phones most of the time, with 12% admitting that they even use their phones in the shower. Clearly American consumers overwhelmingly agree that the cost of a wireless plan is a fair price to pay for the mobile ability to browse the Internet, watch movies, listen to music, make calls, send texts and e-mails, check-in to Facebook, and countless other sources of enjoyment available to users.

But these same Americans may not be aware of the other costs that come with a wireless plan (and I am not talking about that vague "surcharges" section of your phone bill). The cost I speak of here relates to diminished privacy. Many, if not most, smart phone users know that wireless providers like Verizon and AT&T maintain several cell sites throughout their coverage areas. In 2015, there were over 307,000 total cell sites in the U.S. The number of sites in a given area depends upon population, data usage, etc. In urban areas and cities there are more sites than there are in rural areas.

What many people may not realize is that smart phones, as part of their normal function, identify themselves with different cell sites as they move through different areas regardless of whether a user actually makes or receives a call or text. The sites are tracked and logged by wireless providers ostensibly for billing and diagnostic purposes. But these logs also create a digital mosaic of each user's location history. This cell site location information ("CSLI") can be combined from multiple cell sites to pinpoint (or "triangulate") a phone's past or present location with a high degree of accuracy (typically around 150 feet).

CSLI is highly valuable to wireless providers in terms of marketing and advertising strategy. If you take a look at your provider's privacy policy, you will see a provision informing you that certain information you divulge is shared with other companies, but in such a way that you are not identified as an individual. However, further down you may also read that your provider may disclose information that individually identifies you or your device in to comply with subpoenas, court orders or search warrants.

Law enforcement obtains staggering volumes of CSLI, and often providers hand over months of a particular user's historical location data. You may have assumed police would use CSLI as an investigative tool. But did you know police and other government agencies are able to get CSLI from your provider without getting a warrant or showing probable cause?

The Fourth Amendment guards against "unreasonable" searches and seizures and commands that no warrants shall be issued unless supported by probable cause. John Adams and James Madison may not have owned smart phones, but both would surely be troubled by the ease with which the government is able to circumvent the

Fourth Amendment to gather such detailed personal information.

Under the federal Stored Communications Act ("SCA") (18 U.S.C. §§ 2701–2711), the government can obtain historical CSLI from wireless providers either with a search warrant based on probable cause that a crime has been or will be committed, or via an order based on "specific and articulable facts showing that there are reasonable grounds to believe that ... the records or other information sought are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703 (d). The latter method offers a substantially lower standard than that of probable cause. Virginia law offers no additional protection, and essentially mirrors the SCA. *See* Va. Code § 19.2-70.3. Therefore, if police are conducting an investigation but do not have probable cause for a warrant, they can utilize an easier method to build a case.

Federal and state courts across the country have offered differing opinions on the issue of whether a warrant based on probable cause should always be required before police obtain CSLI. But most federal circuits have come to the conclusion that citizens do not have an expectation of privacy in historical location data because they are aware that their wireless provider collects this information in the ordinary course of business. This is the same rationale the U.S. Supreme Court used in cases such as *United States v. Miller*, 425 U.S. 435 (1976), where it was held that people have no Fourth Amendment privacy interest in most bank records because customers voluntarily convey such information to the banks and their employees on a regular basis. This is commonly known as the "third-party doctrine." *See also Smith v. Maryland*, 442 U.S. 735 (1979) (no legitimate expectation of privacy in phone numbers dialed from home because caller assumes the risk that the phone company will disclose them to the police).

But this antiquated rationale cannot be applied to CSLI because it is doubtful a smart phone user *voluntarily* conveys his or her location information to their provider. By taking our phone with us from place to place, we take no affirmative action to share our location with our provider; rather, the provider silently generates location information without our participation and records this information for its internal use. We have no way of knowing which specific cell sites are communicating with our phones at any given time. Furthermore, how many of us have actually read our provider's privacy policy? Even if we did and objected to the collection and possible sharing of such information, our only recourse would be to forfeit our use of smart phones and all of their societal benefits. The fact of the matter is that smart phones have become so ubiquitous and essential to daily life that our courts must adapt and recognize the evolution of society's privacy expectations.

The Fourth Circuit Court of Appeals (which includes Virginia) had occasion to consider this issue in *United States v. Graham*, 796 F.3d 332, 358 (4th Cir. 2015). In that case, a panel of the Court held that "the government's procurement and inspection of Appellants' historical CSLI was a search, and the government violated Appellants' Fourth Amendment rights by engaging in this search without first securing a judicial warrant based on probable cause." *Id.* at 361. The Court declined to apply the "third-party doctrine" reasoning,

> [As] technology evolves, protections against government intrusion should

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"POLICE PROCEDURES vs. FOURTH AMENDMENT"

OR HOW DONNA MURPHY SKILLFULLY FOUGHT PRETEXT….AND TOTALLY PREVAILED

By: Patrick Edwards, Esq.

I had finished up my morning case in Courtroom 3B and, in accordance with my own idiosyncratic customs, was headed towards "my" table in the very back left corner of the law library and set up shop with my MacBook, a reference book, or both. The cheerful, energetic gathering of 3 -4 people in the law librarian's office temporary slowed my roll. "Did you hear the news?" asked Patty, who as the law librarian, appeared to be the unofficial host of our quasi-party. News? My brain starts racing. What could have happened? NASA satellites detect possible extraterrestrial communication? Outkast is reuniting and releasing a new album? Emma Watson is here in the building….and was totally asking if Patrick Edwards was single?

"Donna won a big motion in circuit court this morning," explained Patty. Of course that was gonna be my next guess!

I think we can fairly conclude that the Fourth Amendment isn't what it used to be. Victories on suppression motions – especially those that leave the Commonwealth with little evidence to work with – are serious high-five worthy accomplishments. "Hey, Donna, congrats on your big win," I say to the four-year veteran of the solo practice law and fellow law library rat, Donna Murphy. "Patty and Felix were preaching your gospel this morning."

"Well, my basic argument is that the officer's search of my client's vehicle – which was characterized by the officer as an inventory search – was actually pretextual in nature, and was really done with an investigative purpose"

I. The Law on Inventory Searches – a Brief Refresher

The warrantless inventory search exception to the Fourth Amendment is grounded in the policy considerations of (a) the need to protect the vehicle owner's personal property from theft, and to (b) Protect the police against accusations that they stole property inside the vehicle.

These are sensible policy objectives, but we're talking about a full-blown search of a vehicle. As an exception that is unlimited with respect to space, care must be taken to keep the exception restrained on how often it can be used by police. To that end, for a warrantless search to be deemed valid under the inventory search exception, the Commonwealth must show that:

- the vehicle was lawfully impounded, AND
- that the subsequent search of the impounded vehicle was done in accordance with established police procedures that themselves aren't inconsistent with Fourth amendment protections, AND
- the impoundment and subsequent search are not a pretext concealing an investigatory motive for conducting the search.

The validity of the impoundment is separate from the validity of the subsequent inventory search, and must be determined first.

The requirement that both the impoundment of the vehicle and the subsequent search of the same be done in accordance with established police procedures is a hurdle police must get over on the way to the finish, but not the finish line itself. Adherence to standardized police policy will nonetheless fail the inventory search requirements if the procedures themselves are constitutionally deficient ("A search authorized by state law may be an unreasonable one under [the Fourth Amendment]." *Cooper v. California*, 386 U.S. 58, 61 (1967).).

The final requirement that the search not be a pretext for an investigate search, both stands alone as its own negatively–articulated requirement – not investigative in nature! – and informs requirements #1 and #2

II. The Traffic Stop In Donna's Case – An Chronological Overview

HC was driving eastbound on I-66 in Arlington Coun-

ty and pulled over for an improper lane change.

Upon interaction with the officer, HC admits her license is suspended.

The officer leaves HC in the vehicle and walks to his cruiser.

Officer writes HC a summons for driving on a suspended license.

Officer walks back to HC's vehicle, orders HC to move the vehicle further off the shoulder, then orders her out of her vehicle and back to his cruiser.

HC signs the summons.

Officer starts asking HC a boatload of questions. (HC is getting agitated)

This includes trying to point out inconsistencies in her story, and telling her he thinks she's intoxicated.

Officer does full-blown search of her car while HC stands next to cruiser, signed summons in hand

Finds straw with white reside

Unopened bottle of fireball

White powder in plastic fishing lure container

Begins putting her through Field Sobriety Tests

HC has back injury, and tells officer this – cannot perform tests

HC repeatedly tells officer that she is not intoxicated

HC is nonetheless taken to the hospital for a blood draw

We put on the motion to suppress in Circuit Court and HC was charged with driving on suspended, DUI-D, Possession of Cocaine, and Possession of PCP. So, HC had a lot riding on the outcome of the suppression motion.

III. Sowing the seeds of pretext – "Stick Around -- I'm Gonna Take Her In"

From the outset of completing the discovery, she picked up a key piece of information from the mouth of the officer himself. After the initial interaction with HC at her vehicle, the officer knew that HC had a suspended driver's license and that she was coming from Manassas and going to a doctor's appointment on Columbia Pike, a location that gives him the idea that she is either going the wrong way or going somewhere else altogether. As he walks back from that initial encounter with HC towards his cruiser, a second officer is arriving on the scene.

Listening closely to the audio of from the dash cam video, and you can make out the first officer saying to the now-arriving second officer "Stick around, I'm taking her in." He makes the bold proclamation that he has already made the decision of arresting her -- based only on that initial encounter. Donna emphasizes the following:

> *"I listened over and over and over again to what sounded like the officer is making a statement that he had already made a decision about arresting my client – "Stick around, I'm taking her in" – before he had really done much of anything. "*

Donna believes the Officer thought from the beginning that HC was on drugs. This belief both (a) explains everything that he did during the stop, and (b) is consistent with his early plans to complete the stop with an arrest.

This was an important point in this case. Donna doesn't believe that the officer's audible statement alone was enough to independently establish pretext, but she believes that it was nonetheless very crucial to the case. It planted the seed in the judge's mind, and established a frame for the rest of their arguments. Much like The Dude's rug in "The Big Lebowski", it tied everything else together.

Indeed, at the actual suppression motion, she specifically identified the short audio clip to the judge at the suppression motion. The officer denied on the stand that that's what he said, but Donna had "listened to it a bunch of times, and that's what he said."

IV. Piecing Together The Argument

In his report, the officer had characterized the search of the truck as an inventory search. The Commonwealth advances arguments at the suppression motion were that the search was an inventory search, and there was probable cause to perform the search. This argument had to be

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effectively addressed and disposed of to box the commonwealth into the inventory search theory. The problem the Commonwealth ran into in arguing the search of the truck was supported by probable cause, was that the officer had issued HC a summons, and she had signed the summons.

At that point, there are two possible options:
(a) the officer needed to identify independent probable cause to support a full-blown search of the car, or
(b) HC was free to go.

There was nothing that they could point to at that point as establishing probable cause to perform the search of the truck. The officer could only muster on the stand that she was slurring her words. This wasn't going to cut, so the Commonwealth was left to rely solely on the inventory search exception. Against a lesser attorney, they might well have prevailed. But Donna was prepared to push back against an argument that it was lawful to impound the vehicle merely on the basis that her license was suspended – remember, she was not under arrest at that point -- and she came to the courtroom bearing case law.

> *"There's nothing in the statute that says they have to impound. (*See § 46.2-888). *And there's good case law that says that for it to be lawfully impounded it has to be impeding traffic, or not itself drivable, or parked illegally, or creating a safety hazard, or on private property after having been told it cant' stay there, etc. Between the Hocutt case (Commonwealth v. Hocutt, Record No. 0104-15-2 (2015)) and the King case (King v. Commonwealth, 39 Va. App. 306 (2002)), I was really able to nail the Commonwealth down on the issue of impoundment, and I could tell that the judge was responding favorably this angle."*

How long the car could lawfully remain there? How long did she have to get the car removed on her own? The statute says a reasonable amount of time, and the County Ordinance narrows that and specifies that it is only unlawful after 24 hours. (See § 46.2-888 in conjunction with Arlington Ordinance § 14.2-2.).

The reason the inventory search exception exists is for the protection of personal in the vehicle. When the vehicle doesn't need to be impounded and the defendant is not under arrest, then what exactly is the justification for the inventory search? There is none, and any search that is performed starts to look like an investigate search that's been resembled to appear as an inventory search.

Adhering to police procedures will keep a search that is otherwise solidly under the inventory search exception from getting pulled out into the rain. But it will not justify otherwise unconstitutional search. As the officer attempted to justify his search under the Arlington procedures, the Judge interrupted him to ask whether his police procedures trumped the Fourth Amendment (hint: they do not).

V. Concluding Thoughts

The motion to suppress evidence was granted, and resulted in everything suppressed, including the physical evidence from the vehicle, and the blood test that they had performed on HC. With no evidence left for the Commonwealth to work with, this ended the proceeding on all charges.

Donna believes that the inventory search exception is one that has been grossly abused by officers and courts are starting to push back. She advises that when faced with one of these issues, to really question whether the vehicle needed to be impounded:

> *"It's not Carte Blanche to hide investigative searches by doing an inventory search. Push back against the Commonwealth on the question of whether the vehicle really needed to be impounded. Can the car be legally driven? Is the person arrested? If so, can somebody drive the car for them? Is the car blocking traffic? The Commonwealth will always argue that the car needed to be impounded because it was a safety hazard, but is it a LEGITIMATE safety hazard, or is it one of these arguments that would apply to every vehicle parked on the street? These arguments are effective because if there is no reason to impound, then there is no justifiable reason to inventory."*

Thanks for the time and tips, Donna. Great job!

CLE REVIEW AND FORECAST by Jack Maus, Esq.

For those readers who accept court-appointed cases, the Supreme Court's 13th annual free Indigent Defense Seminar was held on May 3 in Richmond and was simulcast to two other locations. The seminar always sells out quickly, partly because it's free to court-appointed counsel, but also because it always contains a slate of simply awesome presenters. This year was no exception.

The morning stared with a panel consisting of Catherine French Zagurskie (from the Indigent Defense Commission) and Prof. Barbara Bergman (from the University of Arizona law school) giving an update of recent state and federal decisions in the criminal law area.

Next was an amazing presentation by Juval Scott, from the Administrative Office of the US Courts on persuasive sentencing hearings. She was an extremely dynamic speaker who encouraged us all to do better in preparing for post-adjudication hearings. Her visual aids were beyond wonderful.

Following a box lunch, Mark Mahoney, a lawyer from Buffalo, NY, spent an hour discussing representation of juveniles on the autism spectrum. He was followed by Prof. James Duane, of Regent University School of Law on the perils of communicating with the police. Once Prof. Duane was encouraged to speak a little more slowly, his presentation reaffirmed what we already know and what we should already be advising our clients, namely that nothing good can come from talking to the police.

The final presenter was The Hon. Jane Marum Roush, a retired Justice from the Supreme Court of Virginia. She talked about ethical issues in criminal trials.

Once again, court-appointed readers are strongly encouraged to sign up for this seminar as soon as registration opens to increase the likelihood of getting a slot.

So much for past (& missed) CLE opportunities. There are many in the future.

On July 19, Virginia CLE is offering a 2-hour live seminar at its Charlottesville office on Challenging Eyewitness Identification in Criminal Cases. It will also be given by webcast on August 30.

More interesting upcoming Virginia CLE programs for which specific dates have not yet been published are:

A 2-hour presentation from the 2015 Annual Criminal Law Seminar on Interviews and Interrogations – Understanding Best Practices

Defending Serious Traffic Cases: Strategies and Tactics in Representing Clients

Several CLEs relating to defense of DUI clients

If your local bar association is sponsoring CLEs, please let the Editor know so that we can include these in future columns.

REMINDER: BOOK YOUR HOTEL ROOM FOR VACDL's FALL CLE! Oct. 12-13, 2017

Hotel Roanoke and Conference Center, 110 Shenandoah Avenue, Roanoke, VA 24016

Website link: https://aws.passkey.com/e/49240351?utm_source=9515698&utm_medium=email&utm_campaign=275432703

New Law: Simple Possession of Marijuana and License Suspensions

Giving fresh meaning to the phrase "Baby Steps," the Virginia legislature passed new marijuana reform legislation. The new law went into effect July 1, 2017 and removes the mandatory six-month license suspension for a limited number of simple possession of marijuana prosecutions.[1] Based on the new law, the formerly mandatory six-month license suspension does not apply if the charge is a first offense. And if the defendant enters the first offender program. And if the defendant was not operating a motor vehicle at the time of the offense. And still, only if the judge exercises his discretion to remove the suspension. And finally only if the defendant agrees to complete an additional 50 hours of community service, in addition to the 24 hours she must complete in accordance with the first offender program.[2]

In summary, the new law creates an exemption to the mandatory six-month license suspension only if the accused is eligible for and enters the first offender program, agrees to complete an additional 50 hours of community service, was not operating a motor vehicle at the time of the offense, and if the judge agrees to exercise her discretion.

The new legislation also made minor changes to § 18.2-259.1 and § 46.2-390.1 consistent with the changes to § 18.2-251 discussed above.

-Bryan Jones, Esq.

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[1]The major changes are found in Va. Code § 18.2-251: "a court (1) may suspend or revoke an individual's driver's license as a term or condition of probation and (2) shall suspend or revoke an individual's driver's license as a term or condition of probation for a period of six months if the violation of 18.2-250.1 was committed while such person was in operation of a motor vehicle."

[2]§ 18.2-251: "In addition to any community service required by the court pursuant to clause (d), if the court does not suspend or revoke the accused's license as a term or condition of probation for a violation of § 18.2-250.1, the court shall require the accused to comply with a plan of 50 hours of community service."

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action committee, had asked for our participation in their program and possible future programs. The Board ultimately decided to cooperate with Justice Forward Virginia. It was clear from the vigorous discussion amongst the Board that our organization is and remains a non-partisan body. We focus on issues of VACDL, criminal justice reform and the laws that affect the people of the Commonwealth who our clients and fellow citizens. VACDL will work on issues like, discovery reform, increasing court-appointment fees, holding prosecutors to account. If any other organization works on these issues, we will evaluate and decide what is best for VACDL as a whole and see if cooperation is useful for our members. VACDL has great relationships with other organizations like the Virginia Trial Lawyers Association, the Virginia State Bar, etc. We as a group are getting good experience with cooperating and working with other organizations in advancing our goals. I would urge all our members to continue this dialogue about the nature and direction of VACDL. Let's talk on the listserv, let's use our website, and let's meet and work together on putting forward our thoughts and issues.

I look forward to seeing everyone in Roanoke on October 12 and 13.

-Vikram Kapil, VACDL President

~~~~~UPCOMING 2017 CLEs~~~~~

VIRGINIA:

- Virginia Bar Association: 127th Summer Meeting, The Homestead. July 20-22
- **VACDL's Fall Annual Meeting and CLE, Hotel Roanoke. October 12-13, 2017**

NACDL:

- 60th Annual Meeting and Seminar, "The Golden Rules of Cross: Strategies for Avoiding Troubled Waters," The Fairmont Hotel, San Francisco, CA. July 26-29
- Webinar (free!): Challenging Government Hacking in Criminal Cases, August 9
- "Defending the White Collar Case: In and Out of Court," Washington DC, September 14-15
- "DWI means Defend With Integrity" series "The Rock Stars of DUI Defense," Las Vegas, NV, October 5-7

American Bar Association (ABA):

- Annual Meeting, New York, NY. August 8-15, 2017

****Please send the editor YOUR local criminal law CLEs for advertisement!!****

SAVE THE DATE!

VACDL's Fall CLE

October 12-13, 2017

The Hotel Roanoke and Conference Center

Cont'd from page 6 limit women's reproductive rights in Virginia. Adams, fired up after the 3rd time this topic was revisited, responded "Let's end this debate once and for all: I have zero interest in limiting women's access to birth control!" While Adams claims the topic doesn't need to be revisited, his stance that Virginians have a "right to not be compelled by the government to violate [their] beliefs" is going to be a major issue raised by the Herring campaign team between now and election day.

A somewhat surprising moment occurred in response to a question about the Paris Climate Agreement, when both candidates agreed that climate change is a fact, that human activity is contributing to the temperature increase, and that we need to do something about it. However, Adams and Herring differed in their approach to handling this issue, which may be indicative of their overall view of the job description and authority of the State Attorney. Adams, who feels particular issues (like the environment and healthcare) are best left to experts, promises to provide legal advice to the General Assembly when they ask, and to uphold the laws that are passed. This more hands-off approach was repeated by Adams in response to questions about gun control ("it is the legislature's job to close the loophole"), marriage equality, and discrimination prevention. Conversely, Herring seems more willing to involve himself (and his office) in major issues, instead of waiting to provide counsel, which, one could certainly argue, oversteps the authority and role of the Attorney General. Adams made this point, referencing when Herring "refused to not only defend the law [banning gay marriage]... but also join[ed] the other side and attack his clients' position." Adams also railed against Herring's decision to go to Dulles Airport to speak out against President Trump's travel ban. Adams said he was "deeply concerned" about courts second guessing the decisions of the Commander-in-Chief when it comes to the safety of our country, and that, "a change in the constitutional order of power is not okay." Herring defended his actions by saying "the Attorney General has to keep everyone in Virginia safe...when Virginians' rights are in jeopardy, we have to step up."

On matters concerning the criminal defense community, the candidates did express agreement that criminal justice reform is "very important," and also agreed that alternative methods of sentencing, through Drug Courts and Veterans Courts, are needed for defendants in the Commonwealth. Both Adams and Herring indicated they would work with the VSB and also the General Assembly to support the growth of the judiciary, and planning for ways to, as Adams phrased it, "handle folks who get in trouble at a young age and are put in the criminal pipeline that does more harm than good." When asked what specific consequences should be in place for parents of children born addicted to opioids, both candidates chose to discuss the opioid epidemic itself, instead of addressing any increased punishment, or detailing an action plan other than calling for "an investigation."

Regarding the prosecution of child predators and those engaged in sex trafficking, Adams and Herring praised the new technology available to identify perpetrators and victims, without going into any detail about the new technology's features. Herring said he would be "relentless in pursuit" and was excited about the mobile lab that had been created for a more rapid response. Adams stated that the internet and gangs were the 2 drivers increasing sex trafficking, and that the police

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VACDL ENCOURAGES MEMBERS TO ATTEND THE FOLLOWING EVENTS:

July 20, 2017 5:00-7:00 p.m. **Justice Reform Happy Hour**, with Justice Forward Virginia (www.justiceforwardva.com),
Fireflies Restaurant, 1501 Mount Vernon Avenue, Alexandria, VA 22301

Bonnie Hoffman of NACDL and members of the Alexandria delegation to the General Assembly will enlighten attendees about the legislative process and obstacles to discovery reform, particularly with respect to discovery, the larceny threshold and indigent defense funding.

August 24, 2017 6:00-8:00 p.m., **Discovery Reform: An Advocacy Briefing to Engage the Community in Virginia**, with NACDL
Shenandoah University (Stimpson Auditorium)
1460 University Drive, Winchester VA 22601

Join NACDL for light refreshments and a learning experience about criminal justice and discovery reform efforts in Virginia. Senator Bill Stanley, Delegate Chris Collins and Winchester Public Defender Timothy Coyne will be the panelists for this community event.

RSVP to: https://winchesterdiscoveryreformevent.eventbrite.com
For more information, contact NACDL's Monica Reid at (202) 465-7660 or mreid@nacdl.org

VACDL's Fall CLE, Roanoke, October 12-13, 2017

Registration brochures will be mailed in August, and for the first time, registration will also be available online at www.vacdl.org!

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> remain consistent with those privacy expectations society deems reasonable. . . . That new technology has happened to generate and permit retention of this information cannot by itself displace our reasonable privacy expectations; nor can it justify inspection of this information by the government in the absence of judicially determined probable cause.

Id. at 359. Unfortunately, this decision was later overturned upon rehearing *en banc*, and the full court held that the "third-party doctrine" controls because CSLI is voluntarily exposed to the wireless provider simply by virtue of carrying a cell phone. *United States v. Graham*, 824 F.3d 421 (4th Cir. 2016). That decision has been appealed to the U.S. Supreme Court along with two others that each present the same issue for decision.

Virginia's appellate courts have not yet taken the opportunity to opine on the issue or analyze the constitutionality of Code § 19.2-70.3. However, the Virginia Court of Appeals was confronted with the question of CSLI collection under the Code in *Reynolds v. Commonwealth*, 2014 WL 2187774 (May 27, 2014) (unpublished), a case where police, following a hit and run incident in Arlington County, obtained an order for historical cell site location data instead of a search warrant. But the Court of Appeals sidestepped the issue of whether probable cause must be required because the Arlington judge who signed the disclosure order wrote that he found "probable cause" even though mere relevance and materiality were required. Notably, the defendant in that case did not argue the issue of whether probable cause actually existed.

Citizens clearly have an expectation of privacy in their location data, and likely would not expect police to have access to it without first demonstrating a compelling justification to a neutral judge or magistrate who is detached from the often competitive enterprise of ferreting out crime. *See Johnson v. United States*, 333 U.S. 10, 13–14 (1948). The time has come for the U.S. Supreme Court to weigh in and offer guidance on this crucially important question. On June 5, 2017, the Court granted the petition for a writ of certiorari filed in *Carpenter v. United States*, No. 14-1572 and will hear argument in October on the question of "[w]hether the warrantless seizure and search of historical cell phone records revealing the location and movements of a cell phone user over the course of 127 days is permitted by the Fourth Amendment." The Court deferred a decision on certiorari in the *Graham* case from the Fourth Circuit.

In *Carpenter*, the defendant was convicted of multiple counts of robbery and use of a firearm after the government used CSLI obtained under the SCA's "reasonable grounds" standard to establish Carpenter's location on the days of the charged robberies. On appeal, a divided panel of the Sixth Circuit held Carpenter had no reasonable expectation of privacy in cell phone location records held by his service provider, and thus no search occurred for Fourth Amendment purposes. In finding a lack of a reasonable expectation of privacy, the Court distinguished private content of communications from locations of cell tower connection, and likened location data to mere business records as in *Miller* and *Smith*.

The big question now is whether the current Supreme Court is prepared to modernize the third-party doctrine in our era of new technologies. Just three years ago, a unanimous

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THE VIRGINIA CHAMPION

APPELLATE SUMMARIES

CONTRIBUTED BY CATHERINE FRENCH AND BRYAN JONES

Supreme Court of Virginia

Cruz v. Commonwealth, Rec. No. 151185, (February 16, 2017), unpublished order

Subject: Proving Intent

Facts: Appellant was driving aggressively. Two cars pulled over to let him pass, and both drivers separately called the police. After "flying down the road," swerving between two lanes of traffic, running a red light, and crossing the center line, appellant hit Zulma Alvarez' van head on. Alvarez died from her injuries and damage to her van exceeded $1000. Appellant's BAC was 0.26. Among other charges, including aggravated involuntary manslaughter, appellant was convicted for intentional destruction of property valued over $1000.

Holding: It cannot be said that the trial court's factual findings that appellant intentionally destroyed property in violation of Code § 18.2-37(B) are plainly wrong or without support in the record. The testimony of witnesses about appellant's driving was found to be credible, which supports a reasonable inference that appellant intended the immediate, direct and necessary consequences of his volitional acts. The Court rejected appellant's argument that the findings of the trial court that he was driving while intoxicated and exhibiting a "reckless disregard to human life" in convicting him of aggravated involuntary manslaughter amounted to a finding that he was negligent and therefore his driving resulting in destruction of property was also negligent, not intentional. The ability to form a specific intent to engage in certain acts is not precluded by alcohol intoxication.

Virginia Court of Appeals

Perkins v. Commonwealth, Rec. No. 1040-15-1 (January 17, 2017)

Subject: Malicious Wounding– Sufficiency

Facts: Otis White was visiting Benita Perkins at her apartment. He had a little over $5,000 in his pants pocket because he had just received a back payment of his disability benefits. White left the apartment to walk to a nearby store. White "felt somebody walking behind" him. White turned around and saw appellant "holding a pistol up in the air like he was about to hit" him. White turned back around. White was struck in the back of his head by what he believed was the pistol held by appellant. White described the item as a black handgun. White lost consciousness for 10 minutes. He discovered that he was alone and his cash and wallet were gone. White's eye was swollen shut, his left ear bleeding, and his lips were swollen. Detective Jones interviewed Williams. Williams admitted that he and appellant had taken the cash and that appellant had a black handgun. Williams told Jones that appellant set up the robbery and that he received $100 for his role in the crime.

Holding: The evidence was insufficient to prove malicious wounding and the use of a firearm to commit that offense. The trial court found credible White's testimony that appellant struck him in the head with a gun. Although the force of this blow was sufficient to injure White, it cannot be said from the record that the trial court could have inferred an intent to cause permanent disability.

Broadous v. Commonwealth,
Rec. No. 0169-16-1, (February 7, 2017)

Subject: Safe Harbor Reporting Drug Overdose

Facts: Appellant and Boyfriend were in a motel room. Boyfriend called 911 because appellant was unconscious and non-responsive after injecting herself with Fentanyl. An emergency medical team responded and revived appellant. Appellant identified herself and remained at the scene until she was transported to the hospital. She made statements to law enforcement regarding the drugs and gave consent to search the room. Appellant was charged with possession of a controlled substance. Appellant made a motion to apply the affirmative defense provided in Code § 18.2-251.03 for those who "seek or obtain" emergency medical treatment for a drug overdose. The trial court denied the motion.

Holding: A plain reading of Code § 18.2-251.03 provides an affirmative defense only to the individual making the emergency report and not to an individual who passively receives emergency medical attention. "Seek" and "obtain" are active verbs that require more than passive receipt of emergency medical attention. Appellant was required to have actively planned and taken steps to obtain medical treatment.

Jin v. Commonwealth, **Rec. No. 0457-16-2**
(February 14, 2017)

Subject: Double Jeopardy

Facts: Appellant and his wife, Y.Y.Z., argued about money and divorce. The wife's brother entered the kitchen and saw appellant holding a knife and saying to Y.Y.Z. that he will kill her. Y.Y.Z. fled out the back door; appellant and brother followed. Appellant entered his car and began accelerating toward Y.Y.Z. The brother pulled Y.Y.Z. out of the way, testifying that if he did not that Y.Y.Z. "would have been dead." Appellant drove around and returned to the area, striking both Y.Y.Z. and brother. The brother moved the injured Y.Y.Z. inside. Appellant removed a hammer from the hatchback area of the car and entered inside to where Y.Y.Z. was laying on the floor. Appellant hit Y.Y.Z. multiple times in the head with the hammer and continued to try to strike her while the brother was attempting to restrain him.

Holding: The evidence supported the trial court's factual finding that the two attacks constituted two separate offenses and that appellant's double jeopardy rights were therefore not implicated in the attempted murder convictions of Y.Y.Z.

***Suter v. Commonwealth*, Rec. No. 1937-15-1**
(February 21, 2017)

Subject: Accessory after the fact—Murder

Facts: On May 21, 2014, appellant, her cousin, Andrew Roberts, and a third woman were at Tropical Delights restaurant. Appellant yelled to Roberts, who was at the bar, that it was time to go. Once outside the entrance, appellant told Roberts that Martin had spat at her. Roberts turned to immediately confront Martin who stood in the doorway. Appellant testified that in response to Roberts' inquiry of whether Martin had spat on her, Martin stated, "Yeah, I spit on that little B." Instantly, Roberts pulled a gun and fired two shots directly at Martin, striking him in the abdomen and thigh. After shooting in the direction of Martin, Roberts fled to appellant's BMW. Appellant rushed to the driver's seat and drove herself and Roberts. Soon thereafter, Roberts exited the BMW and fled the scene. Appellant drove away. Martin died on May 23rd, two days later. Appellant was convicted of the Class 6 felony count of accessory after the fact

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for a Class 1 or 2 felony.

Holding: The evidence is insufficient to prove accessory after the fact to murder because the completed felony of murder had not occurred when aid was rendered. (Case remanded for new trial on misdemeanor accessory after the fact.) Because the common-law rule that the felony must be complete at the time the assistance is rendered has not been modified by the General Assembly, a person cannot, as a matter of law, be convicted as an accessory after the fact to a murder because of aid given after the murderer's acts but before the victim's death. Here, the facts are undisputed that the victim's death did not occur until two days after appellant drove the getaway car from the scene of the shooting.

Turner v. Commonwealth, **Rec. No. 0034-16-1**
(March 7, 2017)

Subject: Eye Witness ID

Facts: In Newport News, Epps was approached by two men, who offered $50 if Epps could drive them to a movie theater. Epps agreed. But, with a gun pointed at him, the men took Epps' keys, wallet, and phone and drove away in his Chevy Impala. The perpetrators were standing five feet from Epps, and nothing obstructed his view. Both men were wearing black jackets, tshirts, and jeans. Within hours, in Richmond, Officer Umbel attempted to make a traffic stop of a Chevy Impala. Four people exited the car and ran. Another officer stopped and detained appellant about 2 blocks away. After appellant provided his ID, the police determined there was an outstanding warrant. Search incident to arrest, police found two of Epps' stolen credit cards and a loaded handgun. Police confirmed the Chevy Impala was Epps' car. The day after the robbery, Epps viewed a photo lineup. Epps did not identify appellant, selecting another man's photograph. Over a year and half later, at trial, Epps identified appellant as the man who had robbed him with the gun. He explained that he had picked the wrong picture because at the time of the incident the perpetrator had a "messed up" eye, so he picked the picture closest to that feature. Police confirmed that at the time of the arrest appellant's eye was swollen. Appellant's picture in the photo lineup was an older photo.

Holding: Epps had two opportunities to view the robbers. He was five feet away and had a clear view. Although Epps initially identified another man in the photo lineup, his explanation of the misidentification was corroborated by police. Additionally, the in-court identification was corroborated by other evidence: Appellant had Epps' stolen credit cards and a gun; he was out of breath, consistent with someone who had exited the Chevy and fled during the traffic stop, and he was wearing clothes consistent with Epps' description of the perpetrators.

Cont'd from page 18 don't have the resources they need. If elected, Adams intends to "double and triple down on gangs," and "vigilantly prosecute [persons having child] pornographic images as the recidivism rates are very high."

While there were no other criminal defense related questions asked of the candidates at this debate, it will be interesting to see what issues are re-addressed (or ignored) at the next debate.

-KDP

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Court held in *Riley v. California*, 134 S. Ct. 2473 (2014) that police must get a warrant to view information on a cell phone belonging to a person who has been arrested. In doing so, Chief Justice Roberts wrote, "cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans the privacies of life." *Id*. at 2494-95. He added that cell phones "are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy. *Id*. at 2484. With this in mind, perhaps the Court will acknowledge the Fourth Amendment concerns present when the government can procure massive amounts of sensitive information without even making a showing of probable cause. -M. Hollingsworth

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take steps to grow our membership (and keep the members we currently have) while trying to increase VACDL's presence and impact in the Commonwealth.

3. If you have been hearing about VACDL's new website, but haven't received an email in your inbox inviting you to log in and check it out, then I most likely have an old email address on record for you. The easiest way to remedy this is to send me an email yourself! I like hearing from the members, and then I'll also have your updated contact information as well. Everyone wins!

4. If you are interested in becoming more active within VACDL, and have considered running for a position on the Board of Directors, then now is the time to throw your hat in the ring! The following positions will be up for re-election as of January 1, 2018:

5th Congressional District	Region A ("Northern Virginia, including Arlington, Alexandria,
6th Congressional District	Fairfax and surrounding areas including the 17th (Arlington),
8th Congressional District	18th (Alexandria), 19th (Fairfax, Fairfax City), and 31st
9th Congressional District	(Prince William, Manassas, Manassas Park) Judicial Districts")
At-Large Seat #1	

Board Members serve 3-year terms and are asked to attend our 4 meetings each year (generally, in January, April, July and October), with regular communication by conference call and email in between meetings. We are looking for candidates who have a vested interest in the growth and development of the organization, and wish to become active participants in committee work, member outreach, and promotion of the organization's events and objectives. Prospective candidates must also be VACDL members in good standing (see "If/Then #1").

5. If you haven't already marked your calendars (and booked your hotel room) for our Fall Annual Meeting and CLE at the Hotel Roanoke October 12-13, 2017, then you should probably go do that now! We've got a great program set, and registration brochures will be available soon. Online registration will also be available this year, for the first time. Roanoke is going to be absolutely gorgeous in October, so I hope to see many of you there!

6. If you have any questions about VACDL, your membership, the CLE, the website, the List Serv, our plans for legislative efforts, etc. etc. etc., then feel free to contact me at vacdlawyers@gmail.com.

Stay cool in the a/c, but keep the heat on those prosecutors!

- K. Danielle Payne
VACDL's Executive Director

Other News:

NEXT BOARD MEETING: The next meeting of VACDL's Board of Directors is scheduled for Thursday, October 12, 2017 at 4:00 p.m. in the Appalachian Room at the Hotel Roanoke and Conference Center in Roanoke, VA. All VACDL members in good standing are welcome to attend, and are asked to please indicate on their CLE registration forms if planning to attend the Board Meeting before the reception.

AUTHORSHIP: The editor is Phoenix Ayotte Harris, Esq., of Harris & Carmichael, PLLC, who is currently assisted by Champion Committee Member Bryan Jones and VACDL's Executive Director, Danielle Payne. Authorship of individual articles is as noted. Any opinions expressed in any article are those of the author and not of VACDL. If you would like to submit an article, or would like to see a topic covered, please contact the editor at pharris@harriscarmichael.com.

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