

# Criminal Law News

Volume 53, Number 2  
January 2024

The Newsletter of the Criminal Law Section of the Virginia State Bar

## Agenda and Speakers set for 2024 Seminar

Friday, February 2, 2024 • Charlottesville DoubleTree Hotel

Friday, February 9, 2024 • Williamsburg DoubleTree Hotel

### LUNCHEON SPEAKERS



**Ben Chew** is a Fellow of the American College of Trial Lawyers. Ben represents clients in complex commercial litigation and arbitrations in the District of Columbia, Maryland, Virginia, and throughout the United States and internationally. Before the European Court of Human Rights, Ben represented a leading Georgian political and business leader in a petition to restore his wrongfully revoked citizenship, and favorably resolved a defamation claim for the former prime minister of the Czech Republic. Ben remains committed to pro bono, successfully representing an African American honors graduate of the University of Virginia in his civil rights case against certain government officers. The National Law Journal named him a "Sports/Gaming/Entertainment Law Trailblazer." Ben has been selected by his peers for inclusion in The Best Lawyers in America for commercial litigation since 2017. He also serves as a Trial Advocacy Instructor at Harvard Law School. He will speak in **Charlottesville**.



**Hon. Penney S. Azcarate**, is the Chief Judge of Fairfax County Circuit Court, the first woman to hold this position. As a judge, she implemented the Fairfax County Drug Court in 2018 and the Veteran Treatment Docket in 2015 which assists combat veterans with mental health and/or substance abuse issues. Judge Azcarate is the Chair of both the Supreme Court of Virginia's Veteran Specialty Docket Council and the Judicial Administration Committee. In addition, she serves as a mentor judge and a facilitator judge for the Office of the Executive Secretary. In 2017, she was chosen by Virginia Lawyers Weekly as a Leader in Law and, in 2022, an Influential Woman in Law. Judge Azcarate received a degree in Criminal Justice from Old Dominion University where she attended on a military scholarship. Upon graduating, she was commissioned in the United States Marine Corps and served in Saudi Arabia during Operation Desert Storm. She earned her J.D. degree from George Mason School of Law. Upon completion of law school, Judge Azcarate was a prosecutor, a criminal defense attorney and civil litigator in Fairfax County. She will speak in **Williamsburg**.

# Virginia State Bar

## 54<sup>th</sup> Annual Criminal Law Seminar

Friday, February 2, 2024 • Charlottesville DoubleTree Hotel

Friday, February 9, 2024 • Williamsburg DoubleTree Hotel

**8:30 AM Criminal Law Update (1.5 Hours)**

A fast-paced update of the significant Criminal Law cases in the last year.

- *Professor Corinna Lain, University of Richmond School of Law, Richmond*

**10:15 AM De-Mystifying Federal Practice (1.0 hour)**

Never practiced in federal court? No problem – this team of experts will walk you through appearing in federal court.

- *Hon. Roderick C. Young, Judge, U.S. District Court, Eastern District of Virginia, Richmond*
- *Nia A. Vidal, Assistant Federal Public Defender, Eastern District of Virginia, Richmond*
- *Rhonda E. Quagliana, MichieHamlett Attorneys at Law, Charlottesville*
- *Jessica D. Aber, United States Attorney, Eastern District of Virginia, Alexandria*

**11:30 AM Artificial Intelligence and New Legal Questions (1.0 Hour)**

- *Prof. Rebecca Crootof, University of Richmond School of Law, Richmond*

**12:30 PM Luncheon Presentations (1.0 Hour)**

**1:45 PM Mechanics, Themes and Theories of a Case - Voir Dire, Opening, Closing (1.5 Hours)**

Learn techniques for consistency in your case from beginning to end.

- *Hon. Alexander R. Iden, Judge, Frederick Circuit Court, Harrisonburg (Charlottesville)*
- *Hon. William W. Eldridge, Judge, Frederick Circuit Court, Harrisonburg (Williamsburg)*
- *Hon. Erin B. Barr, Chesterfield*
- *Craig S. Cooley, Richmond*
- *S. Mario Lorello, Zoby & Broccoletti, P.C., Norfolk*

**3:30 PM Vicarious Trauma/Wellness (1.0 Hour Ethics)**

Lawyer and Judge wellness is a perennial problem. How do you not bring home the traumas of your clients or cases? This panel will help you learn to leave the office AT the office.

- *Hon. Thomas P. Mann, Justice, Supreme Court of Virginia, Fairfax*
- *Barbara Mardigian, Virginia Lawyers and Judges Assistance Program, Richmond*
- *Renu M. Brennan, Bar Counsel, Virginia State Bar, Richmond*

**REGISTRATION  
OPEN**

See page 6 for details

Register to attend in Charlottesville at [bit.ly/4673N3C](https://bit.ly/4673N3C)

Register to attend in Williamsburg at [bit.ly/3ubmZQC](https://bit.ly/3ubmZQC)

## About the Speakers

### MODERATOR

**Joseph D. Platania**, graduated from Washington and Lee School of Law in 1998 and started his legal career at the Virginia Resource Center. He came to Charlottesville in 1999 at the Public Defender's Office. Platania joined the Charlottesville Commonwealth Attorney's Office in 2003 and was elected Commonwealth's Attorney in 2017. He was a cross-designated special assistant U.S. attorney for the Western District of Virginia from 2008-17. Platania currently serves on the Board of Governors of the Virginia State Bar's Criminal Law Section, the Board of the Charlottesville Albemarle Drug Treatment Court and the Charlottesville-Albemarle Restorative Justice Advisory Committee. He is a member of the Virginia State Bar's Disciplinary Board and previously served on the 7th District Disciplinary Committee. He is the director of the Prosecution Clinic at the University of Virginia School of Law and is also a member of the Virginia Criminal Justice Conference, an organization that seeks to improve criminal justice in Virginia.



**Hon. Roderick C. Young**, U.S. District Court, Eastern District of Virginia received his Bachelor of Arts and Master of Arts degrees from George Mason University and his Juris Doctor degree from the West Virginia University College of Law. Judge Young worked as an Assistant Public Defender in Portsmouth, Virginia and as an Assistant Commonwealth's Attorney in Richmond, Virginia. He also worked as a Special Assistant United States Attorney, in the U.S. Attorney's Office in the District of Columbia. Judge Young worked as an Assistant United States Attorney in Richmond, Virginia. During that time, he prosecuted a number of cases involving international narcotics organizations, racketeering crime, bank robbery, tax fraud, money laundering, and other violations of federal law. During his tenure in the U.S. Attorney's Office, Judge Young received numerous awards



and commendations, including the U.S. Attorney General's award for Superior Performance. In 2014, Judge Young was appointed to serve as a United States Magistrate Judge for the Eastern District of Virginia, Richmond Division. On September 29, 2020, Judge Young received his judicial commission and began service as a United States District Judge.

**Jessica D. Aber**, is the U.S. Attorney for the Eastern District of Virginia. She leads an office of over 300 criminal prosecutors, civil litigators, support staff, and contract personnel in Alexandria, Richmond, Newport News, and Norfolk, Virginia. Ms. Aber began her service to



EDVA in 2009 as an Assistant U.S. Attorney, taking on a variety of financial fraud, public corruption, violent crime, and child exploitation cases. From 2015 to 2016, she served on a detail assignment as counsel to the Assistant Attorney General for the Criminal Division of the Department of Justice. Since 2016, Ms. Aber has served as the Deputy Chief of the Criminal Division for EDVA. Ms. Aber received the Assistant Attorney General's Award for Exceptional Service from the Department of Justice in 2019. Prior to joining the Department of Justice, Ms. Aber was an associate at McGuireWoods LLP from 2007 to 2008. She served as a law clerk for then-United States Magistrate Judge M. Hannah Lauck on the United States District Court for the Eastern District of Virginia from 2006 to 2007. Ms. Aber received her J.D. from William & Mary Law School and her B.A., magna cum laude, from the University of Richmond.

**Renu Brennan**, is the Bar Counsel for the Virginia State Bar. She served as Deputy Executive Director of the VSB from 2016 to 2018, and as Assistant Bar Counsel for the Bar from 2008 to 2016. Ms. Brennan is a Fellow of the Virginia Law Foundation and a Leader in the Law, Class of



2019, sponsored by the Virginia Lawyers Weekly. Ms. Brennan has served as Secretary of Lawyers Helping Lawyers and as a member of the ABA Standing Committee on Client Protection. She was a faculty

member for the Virginia State Bar Harry L. Carrico Professionalism Course from 2008 to 2011, and she has been a member of the Board of Directors of the Asian Pacific American Bar Association of Virginia since 2007. She also served as co-chair of the Judicial Nominations Committee of APABA-VA from 2009 to 2011. Ms. Brennan participated as an instructor in the Virginia Bar Association's Rule of Law program. Prior to coming to the Bar, she was a partner with the firm of Vandevanter Black, LLP, where she handled professional malpractice and commercial litigation. From 1998 to 2004, Ms. Brennan was with the firm of Wright, Robinson, Ostheimer & Tatum in Richmond, Virginia. She holds a bachelor's degree from the University of Virginia and a law degree from Boston University School of Law.

**Hon. Erin Bumgarner Barr**, is Commonwealth



Attorney Elect for Chesterfield County. Most of her career has been spent prosecuting cases that originate out of the Juvenile and Domestic Relations Court, and that passion led her in May 2020 to the Colonial Heights

Commonwealth Attorney's Office. Erin has been the recipient of the Duvall Distinguished JDR Prosecutor Award from the Virginia Association of Commonwealth's Attorneys, the Unsung Heroes Award from the Virginia Attorney General's Office, and a Community Recognition and Appreciation Award from the Chesterfield County Police Department. She is originally from Amherst, Virginia, attended Randolph-Macon College, and then completed her law degree at the University of Richmond. She now lives in Chesterfield County with her family.

**Craig S. Cooley**, has practiced as a trial attorney



handling criminal defenses for over 46 years. He has tried over 600 jury trials, and handled over 500 murder cases, including 70 capital defenses. He was co-lead counsel in the case of Commonwealth v. Lee Boyd Malvo (the 17-year-

old D.C. Beltway sniper). A three-time graduate of the University of Richmond, BA, MA, JD,

he acknowledges that he has lost to nearly every prosecutor known to exist in the Commonwealth of Virginia. Mr. Cooley was raised in the Shenandoah Valley. He has been married for 50 years, establishing his wife, Sarah, as a true saint. Together, they have 3 children and are grandparents to five grandchildren. He has handled over 7000 court appointed cases, and over 18,600 cases overall. He is a frequent lecturer/presenter at seminars for the Bar and the public. His law practice has included representations around the Commonwealth of Virginia, but he concentrates now in the greater Richmond area. He is 76 years young.

**Rebecca Crootof**, is an Associate Professor of Law



at the University of Richmond School of Law. Dr. Crootof's primary areas of research include technology law, international law, and torts; her scholarship and popular press pieces explore questions stemming from the iterative

relationship between law and technology, often in light of social changes sparked by increasingly autonomous systems, artificial intelligence, cyberoperations, robotics, and the Internet of Things. Dr. Crootof earned a B.A. cum laude in English with a minor in Mathematics at Pomona College; a J.D. at Yale Law School; and a PhD at Yale Law School, where she graduated as a member of the first class of PhDs in law awarded in the United States. Dr. Crootof is a member of the Center for New American Security's Task Force on Artificial Intelligence and National Security, and she was a member of the United Nations' Council of Advisers on the Application of the Rome Statute to Cyberwarfare.

**Corinna Barrett Lain**, is the S. D. Roberts &



Sandra Moore Professor of Law at the University of Richmond School of Law, where she has been a law professor for 21 years. Professor Lain's scholarship focuses on two areas—Supreme Court decision-making and the death

penalty—and she has published numerous articles and essays about lethal injection over the last decade. Her work has appeared in the nation's top law journals and has been cited by the Supreme Court. She is a

frequent presenter at both national and international conferences and is co-author (with Ron Bacigal) of the Virginia Practice Series on criminal law, a four-volume treatise for the bench and practicing bar. Professor Lain graduated summa cum laude from the College of William and Mary and received her J.D. from the University of Virginia, where she was elected to Order of the Coif. She clerked on the Tenth Circuit and then was a prosecutor for three years before joining the Richmond Law faculty in 2001. Professor Lain is a recipient of the University of Richmond's Distinguished Educator Award and is a veteran of the United States Army. Her first book, *Secrets of the Killing State: the Untold Story of Lethal Injection*, is under contract with NYU Press and has an estimated publication date of late 2024/early 2025.

**S. Mario Lorello**, is a criminal defense attorney with the law firm of Zoby & Broccoletti in Norfolk, VA. He is a graduate of the University of Virginia School of Law, and received his bachelor's degree from George Mason University. Upon completing his J.D., he clerked for the Honorable F.G.



Rockwell, III., of the Chesterfield County Circuit Court before moving to Virginia Beach. There he served as an Assistant Commonwealth's Attorney for eleven years, specializing in serious and complex major crimes. Afterward, he entered private practice. Mr. Lorello has served as lecturer for a variety of CLE courses for lawyers and paralegals throughout the state of Virginia and nationwide, and regularly assisted in training federal law enforcement agents and FBI analysts on testifying as an expert in their respective fields.

**Rhonda Quagliana**, is a partner in the law firm of MichieHamlett, Charlottesville where she leads the firm's complex criminal and Title IX practice. Rhonda earned a B.A. in 1984 from Tulane University and a Ph.D. from the University of Virginia in 1992 before earning a J.D.



from the University of Virginia School of Law in 1995. For over 25 years, she has represented

individuals and corporate clients in some of the highest-profile criminal and civil cases in Virginia's state and federal courts. Rhonda was the first attorney to successfully challenge the constitutionality of the University of Virginia's Title IX policy in a federal court. She currently serves as the CJA representative for the United States District Court for the Western District of Virginia, and also serves on the Local Rules Committee. She is an adjunct faculty member at the University of Virginia School of Law, where she teaches Federal Criminal Pretrial and Trial Practice. She has served as president of the Charlottesville-Albemarle Bar Association and on its Board of Directors. She is a contributing author to several CLE publications and has spoken on such subjects as the uses of body-worn cameras; jury selection and voir dire; and the interplay between criminal prosecutions and Title IX proceedings. She has served on non-profit boards, including serving as a past president of Charlottesville-Albemarle Society for the Prevention of Cruelty to Animals ("CASPCA") and Region Ten Local Human Rights Committee. Rhonda also generously gives her time to provide pro-bono legal services to indigent clients.

**Nia Vidal**, is a career Assistant Federal Public Defender with the Office of the Federal Public Defender in Richmond where she represents indigent defendants charged with federal offenses. A graduate of the Howard University School of Law, Ms. Vidal was a judicial law clerk



for U.S. District Court Judge James R. Spencer, prior to beginning her career as an appellate attorney with the Office of the Federal Public Defender in Alexandria. She is a former adjunct professor teaching Lawyering Skills at the University of Richmond School of Law as well as a former adjunct professor at the Virginia Commonwealth University where she taught graduate forensic science students Criminal Law and Procedure. She is currently a member of the U.S. District Court Criminal Justice Act Panel Committee; the Virginia State Bar Standing Committee on Ethics; the Board of Governors of the criminal law section of the Virginia State Bar; the Metro Richmond Women's Bar Association; and the Lewis F. Powell, Jr. American Inn of Court.

**Justice Thomas P. Mann**, Supreme Court of Virginia graduated from New York University in 1987 with a degree in Political Science and from the Washington College of Law at American University with a law degree in 1990. He was appointed to the Fairfax J&DRDC bench in 2006. He served as Chief Judge of that court from 2010-2012. Immediately prior to taking the bench, Justice Mann was a partner in the Fairfax firm of Greenspun & Mann, PC. AV rated, he litigated criminal, domestic relations, personal injury, professional negligence and other commercial matters in the state and federal trial and appellate courts of Virginia. Justice Mann was elected to the Circuit Court in 2016. He is interested in and speaks frequently about domestic relations, ethics, domestic violence, criminal law and courtroom demeanor to the Bar and to the public. Along with other activities, while in the Circuit Court, Justice Mann was a member of the Fairfax County Drug Court Team, the Virginia Sentencing Commission, and the Fairfax County Domestic Violence Fatality Review Team. Presently, Justice Mann is the court's liaison to the Judicial Conference's Education Committee and is chair of the Virginia Lawyers Wellness Initiative.

**Barbara Mardigian**, has worked in the field of addiction since 1997. She received her Master's degree from The Medical College of Virginia (MCV/VCU) in Rehabilitation Counseling, specializing in Drug and Alcohol Education in 1997. She became a Licensed



Professional Counselor (LPC) in 2004. She has worked in a variety of settings including intensive outpatient, residential, private practice, and with the first Health Professional Monitoring Program in Virginia as the Director of Intake Services. Most recently as the executive director of an Intensive Outpatient treatment facility in Richmond. She worked for the Farley Center from 2010-2016 as a lead clinician in their Professionals Program, having

experience working with lawyers, physicians and CEO's as well as high ranking military individuals. She has been with Virginia Judges and Lawyers Assistance Program since September 2019 as the Deputy Clinical Director, and newly the Clinical Director in November 2022.

**Hon. Alexander R. Iden** serves as a circuit court judge of the 26th Judicial Circuit in the beautiful Shenandoah Valley and is presently the chief judge of that circuit. He is in his second term as a circuit court judge, having first been elected by the Virginia General Assembly in 2015. Judge Iden was previously a defense attorney for 12 years before serving for 13 years as the elected Commonwealth's Attorney for the City of Winchester. He is a graduate of the College of William and Mary and a graduate of Washington University in St. Louis School of Law. Judge Iden just celebrated 30 years of marriage to the same woman. Together they have three adult children and a grandchild.

**Hon. William W. Eldridge, IV** graduated Magna Cum Laude from The George Washington University with a Bachelor of Arts in International Affairs and minor in Economics. He then graduated Magna Cum Laude from George Mason University School of Law where he served as the Research Editor for the Law Review. Upon graduation, he became an Associate at Dykema Gossett PLLC in Washington D.C., representing clients in government contract litigation matters and white collar criminal investigations. In 2005, Judge Eldridge moved to Harrisonburg and co-founded Eldridge, Elledge, Evans & Harding PLLC. His practice areas included criminal defense, civil litigation and domestic relations law. Judge Eldridge represented clients charged with a variety of criminal charges, including representing two clients charged with capital murder. Judge Eldridge began serving as a General District Court Judge for the 26th Judicial District in July 2015. In 2020, Judge Eldridge was elected by the General Assembly to serve as a Circuit Court Judge for the 26th Judicial Circuit.

## Chair's Column

*George Neskis, Esquire*



It's hard to believe that it has been almost forty years since I graduated from law school. I suspect that most of us remember a professor that sparked an interest in a particular area of law or inspired you in some fashion. For me and many other law students, it was Ron Bacigal, who taught “Crim Pro” at the University of Richmond School of Law. Professor Bacigal is no stranger to our section. His Recent Developments in Criminal Law presentation was always a highlight of our Section’s annual seminars. For many years he has published the newsletter of our Section and his handbook on Virginia Criminal Procedure has been a must have for most criminal law practitioners. It is easy to be inspired by someone like Ron. Of course there have been many others—lawyers, partners, and judges— since law school who have provided great inspiration to me in my practice. I’m certain that many of you have been influenced similarly.

Those who inspire us in the practice of law, whether it be a professor, a colleague, or a judge, do so because of their “professionalism.” Since 1992, the Criminal Law Section has been honoring these individuals through the Harry L. Carrico Professionalism Award. The Carrico award recognizes individuals who “demonstrate 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” and who “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).

Take a second and visit the Criminal Law Section’s award page on the Virginia State Bar website and you will find yourself impressed, if not in awe, of the many many distinguished, inspiring professionals that our Section has honored since 1992, beginning with the awards namesake, the Honorable Harry L. Carrico. There in that list is Professor Ronald J. Bacigal, our 2008 recipient. I have been fortunate to have known personally and/or practiced in front of several of these recipients. The practice of criminal law is tough. Professionalism, while not necessarily essential to a successful criminal practice in the short run, is probably indispensable for success in the long run, especially if your definition of success includes taking pride in and gaining respect from your chosen career.

I take this opportunity to remind you of our upcoming 54th Annual Criminal Law Seminar, to be hosted in Charlottesville on February 2, 2024 and in Williamsburg on February 9, 2024. We have prepared an amazing lineup of presenters, interesting topics and great luncheon speakers. In Williamsburg, it will be my great honor to present the Carrico award to a worthy recipient, to join the list of names of those who have inspired us in the past with their professionalism. As I did in my November column, I urge each of you to consider attending in person for this unique experience to make new acquaintances and catch up with old friends. ✧

## FOURTH CIRCUIT COURT OF APPEALS CRIMINAL LAW AND PROCEDURE DECISIONS

***In re: GRAND JURY 2021 SUBPOENAS.*** 87 Fed 4th 229 (4th Cir. 2023). This Court “adheres to the universal rule that prosecutors cannot use grand jury proceedings for the sole or dominant purpose of preparing for trial on an already pending indictment.” Rather, “once a criminal defendant has been indicted, the government is barred from employing the grand jury for the sole or dominant purpose of developing additional evidence against the defendant.” The nature of grand jury investigations is such that they likely uncover evidence “pertinent to both already-indicted charges and new charges,” and the grand jury need not disregard the former when investigating the latter. Thus, defendants alleging abuse “bear the burden of rebutting the presumption of regularity attached to a grand jury’s proceeding.” Here, the district court did not clearly err by concluding that abusive discovery was not the government’s sole or dominant purpose when it sought the disputed subpoenas.



## VIRGINIA SUPREME COURT CRIMINAL LAW AND PROCEDURE DECISIONS

***Puckett v Commonwealth,*** 849 S.E.2d 312 (2023). Code § 19.2-305.1(B) does not require that restitution be paid to a victim; it only requires that the expenses be “incurred by the victim.” For purposes of Code § 19.2-305.1(B), a medical expense is “incurred” by a victim when he either pays it or incurs an express or implied obligation to pay it. The victim here “incurred” the medical expenses for the treatments that he received as a result of defendant’s brutal knife attack. The fact that the Virginia Department of Medical Assistance Services paid for some of the victim’s expenses through an agreement with the medical providers does not undermine this premise.

***Commonwealth v. McBride,*** 893 S.E.2d 391 (2023). Reversed the Court of Appeals decision that, once a court grants a motion to strike, Rule 3A:15 requires the court to enter an order of acquittal and the court is foreclosed from reconsidering its decision. “The power to decide carries with it the power to reconsider as a necessary adjunct.” Unlike Rule 3A:15, however, the Double Jeopardy Clause does impose restrictions on a court’s authority to revisit a granted motion to strike. But there was no double jeopardy violation when “the trial court promptly reconsidered its granting of a motion to strike, and it did so before the defendant presented any evidence or altered his strategy by, for example, releasing witnesses. Consequently, the defendant suffered no Double Jeopardy violation.”



## VIRGINIA COURT OF APPEALS CRIMINAL LAW AND PROCEDURE DECISIONS

***Calway v. City of Chesapeake,*** \_\_ Va. App. \_\_, 11/28 When a locality issues a notice of a zoning violation, Code § 15.2-2311(A) requires several specific statements to put the property owner on notice of their right to appeal. We hold that (1) while exact language is not required, each statutory statement is mandatory, (2) the failure to include these statements makes a notice inherently defective, and (3) if a locality fails to satisfy the statutory notice requirements, a subsequent enforcement action is voidable. Because the notice provided in this case was insufficient to satisfy the requirements of Code § 15.2-2311(A), making such notice defective, we hold that this enforcement action is void and thus reverse the judgment of the circuit court.

***Carolino v. Commonwealth,*** \_\_ Va. App. \_\_, (2023). Conviction reversed because trial court admitted bad acts evidence which related to a separate incident for which the defendant was not currently standing trial, and which was introduced solely for the purpose of impeaching the defendant.



***Davis v. Commonwealth***, \_\_\_ Va. App. \_\_\_, (2023). A single act violating Code § 18.2-308.2(A) [possession of a firearm in a concealed manner by a convicted felon] constitutes a single offense. Not two distinct offenses - one of possession and one of concealment. However, “in this case, the appellant had the forty-caliber handgun when he was driving the car and when he was stopped by the police. When he ran from law enforcement, he took it with him as he fled into the woods. The appellant was at large for thirty minutes before he was apprehended in a nearby field, at which time he was carrying the gun in a concealed manner. Although he ultimately was caught not far from his car, the appellant’s act of taking the firearm with him, concealing it, and keeping it with him for the thirty minutes during which he evaded police created a heightened danger to the community separate and distinct from the danger when the trooper first encountered him in the car.” There were two separate acts warranting two convictions.

***Baez v Commonwealth***, 79 Va. App. 990, 893 S.E.2d 604 (2023). “Unless the video contains conduct that ‘is intended [by the actor] as an assertion,’ the contents of the video simply are not hearsay.” Therefore the officer’s camera video itself does not implicate the Confrontation Clause. The Confrontation Clause will only be implicated by conduct or actions depicted within the video. The video and still photographs were not themselves testimonial in nature and they satisfied the silent witness doctrine. The video does not depict any conduct by the Officer intended to be an assertion. Instead, it merely depicts the occurrence of a search conducted by the Officer.

***Green v. Commonwealth***, 78 Va. App. 670, 892 S.E.2d 658 (2023). Upheld trial court’s refusal to lift the designation of “Restricted Dissemination Material.” Under Rule 3A:11(c)(2)(B)(ii), when the

Commonwealth designates evidence as restricted dissemination material without the agreement of the accused’s counsel, the Commonwealth must certify that the “disclosure of the designated material may result in danger to the safety or security of a witness or victim, danger of a witness being intimidated or tampered with, or a risk of compromising an ongoing criminal investigation or confidential law enforcement technique.”

***Stewart v. Commonwealth***, 79 Va. App. 79, 893 S.E.2d 599 (2023). Although Stewart was found to be unrestorably incompetent to stand trial for prior charges less than two years before the current charges, the trial court was not bound by that prior finding of unrestorable incompetence. We hold that the trial court’s finding that Stewart was competent to stand trial was not plainly wrong or without evidence to support it.

***Holland v. Commonwealth***, 79 Va. App. 11, 893 S.E.2d 402 (2023). Reversed trial court’s refusal to allow Withdrawal. In order to withdraw a guilty plea a defendant bears the burden to demonstrate: (1) that the defendant can present a “reasonable defense” to the charge, (2) that the plea was entered “in good faith,” and (3) that the motion to withdraw the plea was not filed “merely to cause undue delay in the administration of justice or [otherwise represents] bad faith or misconduct by or on behalf of the defendant.” Even if the defendant makes the requisite showing, the trial court must consider whether granting the motion would “unduly prejudice the Commonwealth,” and if so, weigh that prejudice against those equities that favored granting the motion. The defendant bears the overall burden to establish that the equities that favored granting the motion outweigh any prejudice to the Commonwealth, but not as requiring the defendant to affirmatively prove a negative.

# NEW DATE!

## VSB 2024 Annual Meeting Virginia Beach

**May 29 – June 1, 2024**

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# Criminal Law News



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Newsletter Editor: Professor Ronald J. Bacigal, University of Richmond School of Law

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