



COMMONWEALTH'S ATTORNEYS' SERVICES COUNCIL  
*Training Virginia's Prosecutors for the 21st Century*

# Court of Appeals Update For Law Enforcement

2021-2022

Commonwealth's Attorneys' Services Council

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# This Presentation is Only an *OVERVIEW*

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- For a complete summary of all cases, including the facts and holdings, please see the full “2021 Case List” in your Dropbox (192 pages)
- The mini-digest in your binder is only a summary.
- Both lists have cases broken down by topic and court, with citations when available at time of print.

# Goals For Today

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- 1) Cover Significant Changes and Holdings
- 2) Review Trends and Patterns
- 3) Identify Issues to Expect in the Future



# PART ONE:

# Criminal Procedure

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Constitutional Law and Virginia Procedure

# Fourth Amendment

## Search and Seizure



*Commonwealth v. Martinez:*  
Ct. App. May 24, 2022 (unpublished)

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- Court ruled that the defendant's consent was involuntary.
- Court relied on the fact that three officers surrounded defendant, an officer took his license and did not return it, and no officer told him he was free to leave.
- "Because the exclusionary rule is necessary to deter such police misconduct in the future," the Court affirmed the trial court's decision.

# Court: Evidence Should be Suppressed

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- “The act of coercing consent while [the defendant] was awaiting medical assistance, and while the officers themselves were supposed to be aiding him, is police misconduct meriting the use of the exclusionary rule.”
- “It is objectively unreasonable for a police officer to not know that retaining a driver’s license under the circumstances presented here constitutes a seizure of a suspect and that the consent following that seizure would be involuntary.



# *Lange*, Hot Pursuit, and Homes

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One more time: Still only three ways into a home:

Warrant, consent, or exigent circumstances



## *Lange v. California:* No “Hot Pursuit” for DUI

- Defendant drew officer’s attention by driving and playing music very loudly and repeatedly honking his horn.
- Officer signaled for defendant to stop, but defendant continued to drive up the driveway of his home and parked inside his garage.
- Officer followed the defendant into his garage, questioned him, conducted field sobriety tests, and arrested him for DUI.
- On appeal, California Court of Appeals ruled that “hot pursuit” into a home to prevent a suspect from frustrating an arrest is always permissible under the exigent-circumstances exception to the warrant requirement, even for a misdemeanor offense.

# Supreme Court: Reversed

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- In a 9-0 ruling, the Court held that the pursuit of a fleeing misdemeanor suspect does not *always* or *categorically* qualify as an exigent circumstance.
- While the Court agreed that “a great many misdemeanor pursuits” involve exigencies that would allow warrantless entry, the Court ruled that whether a given case does so turns on the particular facts of the case.



## But ... Many Case *Will* Be Exigent

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- Court agreed that on many occasions, officer will have good reason to enter—to prevent imminent harms of violence, destruction of evidence, or escape from the home.
- “But when the officer has time to get a warrant, he must do so—even though the misdemeanorant fled.”
- Entry is not permitted “with **flight alone**, without exigencies like the destruction of evidence, violence to others, or escape from the home.”
  - *Lange v. California*: 593 U.S. —, 141 S. Ct. 1596 (2021)

# Impact in Virginia: Six Recent Cases on Emergency

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Real-World Applications for Virginia LEOs



## Emergency – with Delay

### *White v. Commonwealth*

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- Police responded to a call for a man who had reportedly beat a woman in the street with a gun.
- Police responded within minutes and found a large crowd gathered but did not find the victim or the defendant.
- Members of the crowd reported that a man had beaten a woman with a gun and that he had stomped on her head and then fled into a particular apartment.

# Police Arrive at Apartment

- Police knocked on the apartment door and received no response.
- After police knocked on the door hard enough to shake the door, the victim came to the door carrying a child; she had a “split lip” that was swollen but not bleeding.
- Victim initially denied any altercation. Officers confronted her with witness statements, but the victim indicated that there had been a verbal argument only.
- While officers believed that it was possible that others could have been present in the apartment, they had received no information to suggest that anyone else was in the apartment.



# Police Secure Victim

- Officers asked her if they could come inside to speak to her about it, but she said no and “slid out of the apartment” in such a manner that would not allow the officers or anyone else to see into the apartment.
- Victim then immediately shut the door behind her.
- She did not cooperate with the investigation, and instead was evasive and refused to identify the man who attacked her or to tell whether he was inside the apartment.
- Later, she provided a false name for the man.

# Standoff To Entry

- Within 20 minutes of the first call to 911, twelve to fifteen officers were on the scene.
- Officers set up a perimeter, positioning some officers near the windows at the rear of the apartment.
- Officers decided to wait to enter the apartment until they could obtain a ballistic shield, approximately 6 miles away.
- Once the shield arrived, officers made a forcible entry.
- Forcible entry took place approximately 45 minutes after officers had first arrived on scene and approximately 30 minutes after the officers had persuaded the victim to leave the apartment.



# Court: Evidence Suppressed

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- “absent other facts, such as sounds emanating from the dwelling indicating criminality, urgency, or exigency, the decision of a dwelling’s occupants to stand on their constitutional prerogatives to refuse to answer the door or to refuse to allow police to enter once they have answered the door does not provide a basis for concluding exigent circumstances exist.”
- After securing the victim, and the time from the initial parking lot altercation, the Court viewed the situation as less urgent when the officers entered without a warrant than when they first arrived.

# Court: Defendant was a Threat, But....

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- There was “barely was even a theoretical possibility, let alone a likelihood” that the defendant could escape if the officers had taken the time to get a warrant.
- Court noted that twelve to fifteen officers had formed a perimeter around the apartment, and the windows and the front door were the only means of ingress and egress from the third-floor apartment.



# Court: Gun was a Threat, But...

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- “the presence of a firearm, standing alone, is insufficient to establish exigent circumstances.”
- “Here, no shots had been fired that evening, the other participant in the altercation had been separated by both time and space from [the defendant], and [the defendant] made no threats to anyone, verbal or otherwise, after officers arrived on the scene.”

## Bottom Line:

- Nothing that officers observed or learned during the forty-five minutes on scene suggested that an “imminent danger to life or public safety” existed.
- By waiting 45 min before entering the apartment, Court found that officers’ conduct also suggested that there was not “a compelling need for immediate official action” because no such immediate action was taken.
- 45 min. delay, coupled with the ability of the officers to obtain a warrant relatively quickly without leaving the scene, meant the time necessary to obtain a warrant was not a significant impediment to the actions the officers wished to take and ultimately took.
  - *White v. Commonwealth*: October 12, 2021 (Ct. App., Published)



# Threat – Man with Gun

## *Walker v. Donahoe* – 4<sup>th</sup> Circuit

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- A week after the Parkland school shooting, a citizen saw the defendant walking along the road, dressed in a black sleeveless shirt and camouflage pants, in a suburban neighborhood within a mile of a local school while carrying an AR-15-style rifle.
- Citizen called 911 and officers responded.
- Based on his appearance, officers believed that he could be under the age of 18.
- Officers detained the defendant, learned he was an adult who lawfully possessed the firearm, and a criminal history check revealed no ground for his continued detention.
- Officers released the defendant after than nine minutes.

# Court: Lawsuit Dismissed

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- Court ruled that the circumstances of defendant's firearm possession were unusual and alarming enough to engender reasonable suspicion.
- Although openly carrying a rifle is lawful in West Virginia, Court repeated that lawful conduct can contribute to reasonable suspicion.
- Possession of a firearm plus something "more" may "justify an investigatory detention."



## Court's Analysis

*Walker v. Donahoe*: July 7, 2021 (4<sup>th</sup> Circuit)

- Court agreed that the officers had reasonable suspicion that the defendant was intent on perpetrating a mass shooting at the nearby school.
- Court pointed out that the defendant was in “dressed to look like a soldier,” and carrying a type of rifle that has been “the weapon of choice for the deadliest mass shooters of the past decade,” one that had just been used at Parkland school shooting one week before.
- Court also noted that the fact that the defendant was walking rather than driving suggested that he might be a minor and perhaps a student at the nearby school.

# Threat – Man with Crossbow

## *U.S. v. Coleman*

- SRO responded to a high school administrator's report that, as students were arriving that morning, an unknown man (who was plainly a non-student) was parked erratically in the campus parking lot, "asleep or passed out" in his vehicle with a crossbow visible in the backseat.
- Concerned for safety and believing that possession of the crossbow was illegal under § 18.2-308.1, officer pulled behind defendant's vehicle.
- Defendant's vehicle was running, had its brake lights engaged, and was haphazardly positioned and impeding a travel lane.
- When officer opened the door of his police cruiser, defendant began to drive away, and officer then engaged his emergency lights, stopping defendant.



# Court: RAS for Stop

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- Court: Presence of an unidentified individual on a school campus is a valid safety concern.
- Court: Reasonable officer could suspect that defendant was trespassing on school grounds, in violation of the school board policy and § 18.2-128(b).
- Court: Reasonable officer could determine that defendant was committing a parking violation.
- Court: Reasonable officer could suspect that defendant was unlawfully operating his vehicle under the influence, as he remained “asleep or passed out” during the bustling morning hours at the school.

# Role of Crossbow

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- Reasonable officer could conclude that, though it may have been lawful, defendant was in possession of a dangerous weapon on school grounds, which could be used to harm students, faculty, and/or staff at the school.
- Legality of crossbow possession under Virginia law was “largely tangential” to the question of whether the officer’s suspicion was reasonable.
- Reasonable minds could differ on whether § 18.2-308(A) encompasses crossbows, since crossbows bear resemblance to slingshots, which are enumerated in the statute.



## Court: Quotes *Aguilera* ruling in Ca.

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- “[S]chool officials, when faced with the credible threat of [weapon] violence, must have flexibility to respond in the manner most appropriate to protect the lives of students. Indeed, would any reasonable parent . . . send her child to [school] if a suspected armed non-student could not be disarmed by school administrators? It simply defies common sense to tie the[ir] hands . . . when they reasonably suspect a non-student visitor, armed with a “weapon,” threatens the lives and safety of students.”

# Emergency & CLSI – Homicide

## *Moreno v. Commonwealth*

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- Defendant, angry at his sister, struck her with his car and killed her.
- Witness tried to stop him, but defendant disregarded and continued driving.
- Witnesses later identified defendant's vehicle and photograph to police.
- Officer drove to defendant's residence but did not find him.
- Officer called and texted defendant's phone but got no response.
- Officer obtained the real-time "Cell-site location data" (CSLI) data for defendant's cell phone and located him and his car



Court: Proper Due to Emergency  
*Moreno v. Commonwealth*: 73 Va. App. 267, 858  
S.E.2d 432 (2021)

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- Warrantless request for real-time CSLI data to locate a fleeing murder suspect in an exigent circumstance is permissible under *Carpenter*.
- When law enforcement obtained the CSLI data, they needed to pursue what reasonably appeared to be a fleeing murder suspect.
- Defendant had possession and control of a significant piece of evidence—the vehicle—and every minute that passed afforded the defendant the opportunity to hide or destroy that evidence and evade apprehension.

# Emergency & CLSI – “Armed & Dangerous”

## *U.S. v. Hobbs*

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- Defendant, convicted felon, broke into woman’s home and committed an assault and a theft inside.
- Defendant threatened her life with a handgun and said he would not be taken alive by police.
- Defendant owned a rifle as well and was “obsessed with firearms.”
- Officers also knew that the defendant had a criminal history of violent offenses, including convictions for robbery and attempted murder.



# “Ping” of Defendant’s Phone

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- After assessing that victim’s account was credible and observing damage to her home, police requested defendant’s location data from T-Mobile without a warrant, contending that the situation was an exigent circumstance.
- Within an hour, T-Mobile responded with real-time “pings” on defendant’s cell phone that alerted police to every 15 minutes to defendant’s general location.
- Police used T- Mobile call logs to determine defendant’s location more precisely.
- Officers located defendant, arrested him, and recovered his firearm.

# Court: Search Lawful

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- Court: Officers reasonably concluded that use of the “exigent form” was necessary to obtain a prompt response from the cell phone provider when an armed and dangerous suspect was at large.
- In this case, “the only way to get help from T-Mobile” in a timely fashion was by submitting an “exigent form.”
- Court: Officers reasonably concluded that defendant was armed and dangerous, that he posed an imminent threat to the victim, to her family members, and to law enforcement officers, and that these exigent circumstances required them to seek the cell phone location information from T-Mobile without delay.



# Pure Emergency – Fourth Amendment Post-*Caniglia*

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What are the rules when life is at stake?

# Rescue – Overdose

*McCarty v. Commonwealth*: November 9, 2021

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- Defendant overdosed in a hotel room.
- Anonymous person called 911 and police responded to the room.
- Finding the door slightly ajar, they saw the defendant on the floor, near the bed.
- Defendant was unconscious, pale in the face, cool to the touch, sweating profusely, and struggling to breathe.
- Officers believed the defendant was suffering from an overdose.



# Hotel Search

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- As medics attempted to revive the defendant without success, officers first conducted a cursory sweep of the motel room to see what they could find in plain view.
- Officers then opened the nightstand's drawer and discovered a clear baggie containing heroin.
- Officers informed the medics of the substance.
- Medics revived defendant a few minutes later, and when asked by medics what substance he took, he admitted he had snorted heroin.

## Was the Search Ok under *Caniglia*?

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- Because *Caniglia* made clear that the community caretaker exception does not apply to warrantless searches of the home, the Court held that the exception does not apply to motel rooms either.
- Consequently, the Court determined that the trial court erred in relying on the community caretaker doctrine to deem the officers' search of the defendant's motel room lawful.



## BUT ... Search Still Ok as "Exigent Circumstance."

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- Court: The "emergency aid" doctrine gives law enforcement some leeway to search areas beyond what is in plain view and that the officers' search here was within the scope of that leeway.
- "it very likely would have been irresponsible for the officers not to have searched the nightstand when considering that appellant's life was still in danger and EMS personnel had not identified the cause of appellant's circumstances ... It would be an affront to that "commonsense rationale" to hold that the Fourth Amendment required the officers to throw up their hands and call it quits once the initial cursory survey provided no clues as to appellant's medical condition."

# *Rodriguez* and “Extending” Traffic Stops

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Scope of Lawful Detention



# Basic Legal Standard

- ✦ If you have Reasonable Suspicion that an individual is engaging in criminal activity:
- ✦ You may detain a person for a reasonable amount of time in order to
  - Identify suspect
  - Question them briefly
  - Confirm or dispel your suspicions
- ✦ You may use whatever force or steps as are necessary to maintain the status quo.

# Reasonable Amount Time Is...

- ✶ If an officer can complete traffic-based inquiries expeditiously, then that is the amount of “time reasonably required to complete the stop’s mission”
  - OL, Registration, Insurance, Record and Wanted Checks Are Routinely Permissible
- ✶ A traffic stop prolonged beyond that is unlawful.
- ✶ "On-scene investigation into other crimes detours from that mission”
  - ✶ *Rodriguez v. United States*, 575 U.S. 348, 354 (2015).



*U.S. v. Buzzard, et. al.* June 11, 2021  
1 F.4th 198 (2021)

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- One night, an officer observed car commit a traffic violation and stopped the vehicle.
- The area was a high-crime area, where officers, including this officer, had previously made multiple arrests for narcotics.
- Officer had prior interactions with one of the defendants while on duty, noting that he had a history of drug addiction, had recently gotten out of prison, and was a convicted felon.
- Officer requested that backup officers join him.

# Investigation

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- While waiting, the officer observed that one defendant was moving around and not making eye contact in an unusual way.
- He asked the defendants whether “there was anything illegal in the car.” They replied that they had drug paraphernalia.
- Other officers responded and patted down the defendants. One of the defendants then revealed that there were guns in the car.
- Defendant and his compatriot were felons



# Court: Search Lawful

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- Court found that the question “Is there anything illegal in the vehicle?” related to officer safety and thus related to the traffic stop’s mission.
- Court noted that the officer was outnumbered, and he asked the question because of the time of night and the high drug area, the one occupant’s criminal history, and the occupant’s behavior.
- “Given the totality of the circumstances, it makes sense that he needed to know more about what [they] had in the car.”

# Question *WAS* Problematic

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- Court acknowledged that the question “Is there anything illegal in the vehicle?” could be interpreted more broadly than one worded slightly differently (for example, “Is there anything dangerous in the vehicle?” or “Are there weapons in the vehicle?”).
- However, the Court explained that because “traffic stops are ‘especially fraught with danger to police officers,’ ... we decline to require such laser-like precision from an officer asking a single question in these circumstances.”



# Did NOT Unlawfully Extend the Stop

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- Court also pointed out that officer's question didn't extend the stop "by even a second."
- Court noted that, at the time, officer did not yet have the information he needed to perform the customary checks on the driver and vehicle and was waiting for an additional officer to arrive so he could safely proceed with the stop.
- Because he asked the question during a lawful traffic stop and the question did not prolong the stop, Court found that officer's question was proper under *Rodriguez*, even if it exceeded the scope of the stop's mission.

*U.S. v. McNeil*: 4<sup>th</sup> Circuit  
January 13, 2022

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- Officers stopped car for speeding and expired registration.
- Officer completed his speeding investigation in approximately 11 minutes.
- During this time, the officers questioned the defendant and his companion about their personal backgrounds and travel plans without prolonging the stop.



# Observations

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- Officers made several observations that caused them to extend the stop and request a drug-detection K9:
  - Occupants' conflicting stories regarding the length of their visit to New Jersey and how long they had known each other,
  - Defendant was breathing heavily, his carotid artery pulsating, and continuing to stare at his phone when approached by the officer, which was abnormal and appeared evasive.

## Observations (con'd)

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- Officers also pointed to the occupant's increasing nervousness, including his hand shaking when providing his license and beginning to sweat when the officer asked for consent to search the car, pinpoint pupils, and fresh track marks on both arms, indicating recent drug use.
- Officers also noted the men's known involvement in narcotics trafficking that was the subject of an ongoing investigation, and the defendant's criminal history involving drugs.



# Officers Find Drugs

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- A K9 unit arrived and detected drugs in the car.
- Officers found heroin
- District court denied the defendant's motion to suppress.

# Court: Stop and Search Lawful

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- Court: Officers had reasonable suspicion to extend the traffic stop for a dog sniff.
- Court observed that the initial investigation was reasonably related to the speeding and registration violations.
- Court repeated that, *Rodriguez*, an officer may permissibly ask questions of the vehicle's occupants that are unrelated to the alleged traffic violations, provided the conversation does not prolong the detention.
- Court: Officers provided articulable reasons justifying their reasonable suspicion to prolong the stop.



## *U.S. v. Buster*: February 24, 2022

### Scope of Patdown

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- Officers responded to report of domestic assault with firearm discharged.
- Officers approached defendant, who matched descriptions of assailant, and whom they had seen outside the victim's apartment earlier that evening.
- He fled on foot, but officers captured him.

# Bag Search

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- Defendant was wearing a bag strapped to his body, whose pouch was in front of the defendant when police caught him.
- Officers removed the bag from the defendant and handcuffed him.
- The bag felt hard to the touch, which the officers believed indicated a weapon.
- While the defendant was handcuffed and on the ground, a nearby officer opened the bag and found a gun and a box of ammunition.



# Court: Evidence Suppressed

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- “a doctrine authorizing a limited warrantless search to protect officer safety cannot be stretched to cover situations where there is no realistic danger to officer safety.”
- “quickly frisking an unsecured suspect or a bag during a *Terry* stop is simply not the same as methodically searching the contents of a bag to which a suspect no longer has access—particularly where the suspect remained restrained and under the officers’ physical control.”

## But....

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- Court distinguished this case from other situations, such as where a firearm was found on a suspect's person or a bag was opened before a suspect was subdued or while they were still within reach of the bag.
- Court also declined to opine whether or when officers may search a bag before returning it once a *Terry* stop concludes.



# What does the U.S. Supreme Court think?

## *Michigan v. Long* (1983)

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- “the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant" the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.

## *Long* rejected *Buster's* Reasoning

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- "suspects may injure police officers and others by virtue of their access to weapons, even though they may not themselves be armed"
- "The Michigan Supreme Court appeared to believe that it was not reasonable for the officers to fear that Long could injure them, because he was effectively under their control during the investigative stop and could not get access to any weapons that might have been located in the automobile.... *This reasoning is mistaken in several respects.*"



## Why *Long* Rejected *Buster* Theory – And What You Must Articulate

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- “A *Terry* suspect in Long's position break away from police control and retrieve a weapon from his automobile.”
- “if the suspect is not placed under arrest, he will be permitted to reenter his automobile, and he will then have access to any weapons inside.”
- “Or ... the suspect may be permitted to reenter the vehicle before the *Terry* investigation is over, and again, may have access to weapons.”
- See also *Glover v. C/w*, 3 Va.App. 152 (1986)

# When Is a Cellphone Search Warrant “Executed”?

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- *Walker v. Commonwealth*, April 5, 2022 (Published)
- Defendant contended that for a search warrant to have been “executed” within the meaning of Code § 19.2-56(A), the search it authorizes must have been “fully completed[.]”
- Argued that, because the incriminating data was extracted from his cell phones more than fifteen days from the issuance of the search warrant, the warrant was not executed within the time frame set out in the statute.



Answer:

Timing is not relevant to the 4th Amendment

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- Court: Neither the Fourth Amendment nor § 19.2-56(A) provide for suppression of the evidence

# Geofence Warrants

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New Ruling from a District Court in Richmond

*(Advisory Only - NOT necessarily binding on Virginia courts)*



## *U.S. v. Chatrue: E.D.Va., 2022*

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- Defendant robbed a bank of roughly \$200,000 using a gun and a note claiming that he had the teller's family held hostage.
- Witnesses stated that the perpetrator had come from a nearby church. Law enforcement knew only that the perpetrator had a cell phone in his right hand and appeared to be speaking with someone on the device.
- After police failed to locate the suspect via reviewing camera footage, speaking with witnesses, and pursuing two leads, law enforcement obtained a “geofence” warrant from Google.

# Geofence Terms

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- In the warrant, a detective drew a circle with a 150-meter radius that encompassed the bank, the entirety of the church, and the church's parking lot.
- The circle covered 70,686 square meters of land around the Bank, located in a busy part of the Richmond metro area. The Government then obtained a warrant seeking the location information for every device within that area.
- The warrant stated that it would follow a three-step procedure when obtaining the data from Google:



# Three Steps – In One Warrant

- Step 1: In this step, law enforcement would seek de-identified list of all Google users whose Location History data indicates were within the geofence during a specified timeframe.
- Step 2: In this step, law enforcement would seek additional de-identified location information for a certain device or devices to determine whether that device or devices are relevant to the investigation, and additional location coordinates beyond the time and geographic scope of the original request to eliminate devices from the investigation.
- Step 3: In this step, law enforcement would seek account-identifying information for the users the Government determined were relevant to the investigation.

# Court: Warrant Overbroad

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- “the geofence warrant captured location data for a user who may not have been *remotely* close enough to the Bank to participate in or witness the robbery.”
- The Geofence Warrant *could* have captured the location of someone who was hundreds of feet outside the geofence.
- At Step 2 of the process, the Government “obtained two hours of unrestricted location data for an individual who perhaps had only driven within the outer vicinity of the crime scene.”



# Court: Warrant Lacked Particularity

- “the warrant simply did not include any facts to establish probable cause to collect such broad and intrusive data from each one of these individuals.”
- “A person’s mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person.”
- “To be sure, a fair probability may have existed that the Geofence Warrant would generate the *suspect’s* location information. However, the warrant, on its face, also swept in unrestricted location data for private citizens who had no reason to incur Government scrutiny.”

# Court: Warrant Lacked Judicial Review

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- “Steps 2 and 3 of this warrant leave the executing officer with *unbridled* discretion and lack any semblance of objective criteria to guide how officers would narrow the lists of users.” “
- “Stated plainly, Steps 2 and 3 ‘put no limit on the Government’s discretion to select the device IDs from which it may then derive identifying subscriber information from among the anonymized list of Google-connected devices that traversed the geofences.’”



# What Now?

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- The Court found the officer relied in “good faith” on the warrant.
- “Although the *instant* warrant is invalid, where law enforcement establishes such narrow, particularized probable cause through a series of steps with a court’s authorization in between, a geofence warrant may be constitutional.”
- Court approved of procedure in *In re Search of Information That is Stored at the Premises Controlled by Google LLC*, (D.D.C. Dec 30, 2021).

# PART TWO:

## Crimes & Offenses

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New Cases Worth Noting



## Assault & “Words Alone”

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- *Harvey v. Commonwealth*: May 17, 2022 (Unp.):
- Defendant told neighbor: “You live here. You’ll die here. I’ll burn this bitch down.”
- Defendant remained in her car the entire time and drove away after making the threat.
- Court: Reversed Assault Conviction. Without any overt act, evidence rested on the defendant’s words alone.

# Strangulation

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- *Dodge v. Commonwealth*: February 22, 2022 (Unpublished)
- Statute does not require the Commonwealth to prove that the victim's ability to breathe or speak was completely restricted.
- Rather, pursuant to the ordinary meaning of “impede,” the evidence must show that the defendant's actions merely interfered with her ability to breathe or obstructed her breathing.



# Child Cruelty under § 40.1-103(A)

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- *Eberhardt v. Commonwealth*: December 14, 2021 (Published): A violation of § 40.1-103(A) may be proved with evidence that the defendant committed one of the proscribed acts against a child either “willfully or negligently.”
- *Mollenhauer v. Commonwealth*: 73 Va. App. 318, 859 S.E.2d 680 (2021): Conviction for violating the statute does not require proof that the defendants personally tortured or cruelly treated the child, only that they “caused or permitted” the actions constituting torture or cruel treatment to occur

# Conspiracy

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- *Commonwealth v. Richard*: December 29, 2021 (S.Ct.): Under “third-party exception” to Wharton’s Rule, conspiracy charge may be brought where the agreement which is the basis for the conspiracy involved more participants than were necessary for the commission of the substantive offense.
- *Pulley v. Commonwealth*: December 28, 2021 (pub): Co-conspirator statements admissible after making a prima facie case of both conspiracy to smuggle drugs into a prison and conspiracy to distribute a controlled substance.



## Fraud and Embezzlement:

### *Floyd v. Commonwealth*, Aug. 2021 (Unp.)

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- Defendant charged credit cards and stole money, costing the victim almost \$100,000, while working as her caretaker.
- Victim suffered from hydrocephalous, is confined to a wheelchair, and has permanent memory deficits.
- Defendant was her sole caretaker.
- Defendant claimed that victim had given her the money as a loan, but victim did not remember that.

# Court: Conviction Affirmed

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- Based on the extensive use and variety of the purchases placed on the credit cards, the Court concluded that the trial court could rationally infer that the defendant did not have consent or permission to use the cards for personal items.
- Court: The purchases were inconsistent with the victim's purchase history.
- Court noted that, before the defendant stole the card, the victim had made no purchases at a sporting goods store, had no tattoos, had not visited Disney resorts, and did not possess a vehicle, which was inconsistent with the purchases on the card.



# Joint “Ownership” and ”Power of Attorney” is **NOT License to Steal**

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- *Chittum v. Commonwealth*: January 25, 2022
- Defendant transferred to herself \$163,600 belonging to her mother, the victim, that the victim held in a joint checking account.
- Victim had previously given her a general durable power of attorney, but victim denied authorizing the transfer and testified at trial that those assets were essential to her financial security, because they were “all she had to live on for the rest of her life.”

## Court: Joint “Ownership” is *NOT* License to Steal

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- Court: “being named as an owner in a joint account does not provide license to drain funds belonging to or contributed by another account holder.”
- Court quoted § 6.2-606(A): “A joint account belongs, during the lifetimes of all parties, to the parties in proportion to the net contributions by each to the sums on deposit . . . unless . . . there is clear and convincing evidence of a different intent.”
- Court concluded that the money in the joint account was the victim’s property, and that the defendant had no right to transfer to herself solely by virtue of being a joint account holder.



## Court: Power of Attorney is *NOT* License to Steal

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- Court explained that defendant's role as the victim's agent with power of attorney did not authorize her to transfer the victim's money against her wishes and contrary to her best interest.
- Court quoted § 64.2-1612, to explain that a power of attorney has a duty to “act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest;” “act in good faith;” “act only within the scope of authority granted in the power of attorney;” and “act loyally for the principal's benefit.”

# Driving Suspended

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- *Nicholson v. Albemarle*: September 28, 2021 (Unp.): DC-225 Court notice of potential suspension was not sufficient to prove actual notice because it did not establish that the notices:
  - (i) were issued after the actual suspension,
  - (ii) listed a term of suspension that encompassed the instant traffic stop, or
  - (iii) adequately informed the defendant of the length of the suspension term.



# Marijuana v. Hemp

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- *Thompson v. Commonwealth*: November 22, 2021 (Published).
- Express language of § 18.2-263 allocates the burden of proving the statutory exception for “hemp” to the defendant.”
- Exceptions require proof not only that the substance has a THC concentration no greater than specified by state or federal law but also that it is either “industrial hemp . . . possessed by a person registered pursuant to [state law]” or a “hemp product . . . derived from industrial hemp . . . that [was] grown, dealt, or processed in compliance with state or federal law.”

# DUI: Challenges to Probable Cause

*Green v. Commonwealth*: 856 S.E.2d 587 (2021):

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- Trial court sustained C/w's objection to challenge to PC for arrest that defendant had failed to raise his "motion or objection . . . in writing, before trial," pursuant to § 19.2-266.2(A)-(B).
- Court: Reversed. If the defendant was not lawfully arrested, the statute did not deem him to have implicitly consented to participate in a blood or breath test and he could not have committed an offense by refusing to do so.



# Construction Fraud

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- *Phillips v. Commonwealth*: January 11, 2022:
- Conviction for False Pretense affirmed when defendant told the victims they needed the additional materials to get payment from them, even though he never intended to deliver the materials.
- Court noted that the bulk of the “additional materials” purchased with the victims’ money were never used by the defendant on their project.

# Firearms and Weapons Offenses

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- *Myers v. Commonwealth*: 857 S.E.2d 805 (2021): Defendant was entitled to the protection of subsection (C)(8)'s exception to criminal liability for carrying a concealed weapon because the handgun was secured in a container within his personal, private vehicle – in a zippered backpack.
- *Morgan v. Commonwealth*: October 5, 2021 (unpub): Firearm carried under 18.2-308(C)(8) while intoxicated is still unlawful under § 18.2-308.012



## Sexual Assault:

*Chavez Macias v. Com.*: October 5, 2021 (Unp.)

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- Defendant raped and sexually assaulted victim in the bathroom of a house during a party.
- Court: C/w was not required to prove specific intent under those statutes to demonstrate the defendant's knowledge, but proof of criminal negligence.
- C/w had to prove that "the conduct of the accused constitutes a great departure from that of a reasonable person which creates a great risk of harm to others and whereby the application of an objective standard the accused should have realized the risk created by his conduct."

# Unlawful Filming

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- *Johnson v. Commonwealth*: 73 Va. App. 393, 860 S.E.2d 408 (2021): Victim had a reasonable expectation of privacy that she would not be videorecorded, regardless of her consent to the defendant's presence, and regardless of her inability to expressly object at the time he made the recordings.
- *Haba v. Commonwealth*: June 15, 2021: 73 Va. App. 277, 858 S.E.2d 436 (2021): Fact that victim may have permitted him to see her naked before he started recording was irrelevant



Vehicular Manslaughter  
&  
Reckless Driving

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*Cady* Reconsidered

## “Reckless” and Manslaughter: *Cady v. Com.* 72 Va. App. 393, 846 S.E.2d 30 **(2020 Ruling)**

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- Defendant struck and killed a motorcyclist while driving at noon on a clear day on a straight roadway and was convicted of Reckless Driving.
- Defendant claimed he did not see the motorcycle and made no statements tending to show inattentiveness, intoxication, or fatigue.
- Defendant had been driving at a constant speed, two miles over the posted speed limit, and was not swerving.
- Investigators found no evidence of any distractions in the defendant’s car, and there was evidence about defendant’s cell phone moments before the crash.



# Court of Appeals: Reversed

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- Court: under *Powers*, a conviction for reckless driving cannot be based upon “speculation and conjecture” as to what caused a crash,
- Court concluded that “the dearth of evidence establishing recklessness in this case required the fact-finder to improperly speculate as to what caused appellant to strike the motorcycle.”
- Court argued that the defendant’s failure to stop before he hit the motorcycle established simple negligence, not recklessness.

## Va. Supreme Court: Reversed, Conviction Reinstated Oct. 28, 2021

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- The *mens rea* standards of criminal negligence primarily involve differences in degree, and even when courts apply the highest degree of *mens rea* in involuntary manslaughter cases, the Court explained that the “measuring stick” is the same in a criminal case as in the law of torts: the exercise of due care and caution as represented by the conduct of a reasonable person under like circumstances.
- Court: Defendant demonstrated a “lengthy, total, and complete” failure to keep a lookout, satisfying the *mens rea* requirement for reckless driving in violation of § 46.2-852.



# Reckless Driving v. Involuntary Manslaughter

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- Court explained that criminal recklessness requires a reckless “disregard by the driver of a motor vehicle for the consequences of his act and an indifference to the safety of life, limb, or property” of others.
- Court clarified that this requirement is more than simple negligence, as that concept is used in civil tort cases, but it is less than “gross, wanton, and culpable” negligence, the *mens rea* requirement for felony involuntary manslaughter
  - Court acknowledged, in a footnote, that the statute criminalizing involuntary manslaughter caused by driving under the influence has its own lesser mens rea requirement.

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