Virginia Practice Series: Criminal Procedure

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DEDICATION

To my parents, Joseph and Helen Bacigal, who made it all possible. Also, to my children and to Margaret, who make it all worthwhile.
PREFACE

In this volume, statutory law is covered through the 2014 Session of the General Assembly. Decisions of the United States Supreme Court are included from the 2014–2015 term, as well as decisions from the U.S. Court of Appeals and District Courts in Virginia issued through at least July 15, 2014.

RONALD J. BACIGAL

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Chapter 1

Introduction

§ 1:1 Scope and purpose

The importance of procedure in criminal cases has increased dramatically over the years and many cases are won or lost on procedural grounds. This book is designed to aid Virginia practitioners in the handling of a criminal case. Through the sequential examination of the various stages of the criminal process from arrest to appeal, the reader should be able to find the relevant point of law applicable to a particular case.

Although this book focuses on Virginia law, attention also has been given to federal constitutional law. Since the days of the “Warren Court,” the U.S. Supreme Court’s concern with the constitutional aspects of procedure and its desire to safeguard the liberty of individuals have taken on increasing importance.

§ 1:2 Sources of law—Constitutional and statutory

Research References
West’s Key Number Digest, Constitutional Law ⇐ 18; Courts ⇐ 85(1); Federal Courts ⇐ 502
C.J.S., Constitutional Law §§ 16 to 17, 27 to 30, 39; Courts §§ 179 to 181; Federal Courts §§ 329 to 333, 341 to 346, 348 to 349

It is axiomatic that the United States Constitution is “the supreme law of the land.” The primary sources of federal law governing state criminal proceedings are those provisions of the
Bill of Rights made applicable to the states through the Due Process Clause of the Fourteenth Amendment. While due process of law "precludes defining," it does incorporate major provisions of the Fourth, Fifth, Sixth, and Eighth Amendments. Accordingly, this subject matter is the major focus of this book.

Article I of the Virginia Constitution sets forth the Virginia Bill of Rights, with sections 8, 9, and 10 constituting the important provisions with respect to criminal procedure. Article I, section 8, guarantees an accused the right (1) to demand the cause and nature of the accusation; (2) to be confronted with the accusers and witnesses; (3) to call for evidence in the defendant's favor; (4) to have a public and speedy trial; (5) to have an impartial jury of the vicinage, without whose unanimous consent the defendant cannot be found guilty; (6) to not be put twice in jeopardy for the same offense; and (7) to not be compelled to give evidence. Article I, section 9, prohibits excessive bail, cruel and unusual punishment, and ex post facto laws. Article I, section 10, prohibits general warrants of search and seizure.

While most of the provisions of the Virginia Bill of Rights closely parallel the Bill of Rights in the United States Constitution, the Virginia courts have the authority to interpret the state constitution to confer additional rights beyond those guaranteed by the United States Constitution. For example, in Henshaw v. 2

2 "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV.


The initial decision in Farmer v. Com., 10 Va. App. 175, 390 S.E.2d 775 (1990), on reh'g, 12 Va. App. 337, 404 S.E.2d 371 (1991), held that evidence of a refusal to submit to a field sobriety test did not violate the Fifth Amendment to the U.S. Constitution, but did violate the right against self-incrimination guaranteed by Article I, § 8, of the Virginia Constitution. The panel decision was reversed by the full court in Farmer v. Com., 12 Va. App. 337, 404 S.E.2d 371 (1991) (en banc).

Virginia Criminal Procedure

§ 1:2

Introduction

Commonwealth,⁶ the court held that Article I, section 8, of the Virginia Constitution gives a criminal defendant “a right to view, photograph, and take measurements of the crime scene, provided that the defendant makes a showing that a substantial basis exists for claiming that the proposed inspection and observation will enable the defendant to obtain evidence relevant and material to his defense or to be able to meaningfully defend himself.” At trial, “the rights to compulsory process, confrontation and due process give the defendant a constitutional right to present relevant evidence.”⁷

Although the federal courts have the final word on interpretation of the United States Constitution, a state court’s recognition of broader protection for criminal defendants precludes federal review if the state court decision indicates “clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent” state grounds.⁸

The primary source of statutory provisions governing criminal procedure is Title 19.2 of the Code of Virginia. Part Three A, Criminal Practice and Procedure, Rules of the Virginia Supreme Court, contains additional provisions governing criminal procedure. Statutory material in conflict with the Rules takes precedence.⁹

“While violations of state procedural statutes are viewed with disfavor . . . , neither the Virginia Supreme Court nor the legislature has adopted an exclusionary rule for such violations . . . where no deprivation of the defendant’s constitutional rights occurred.”¹⁰

constitutional law relating to the Fifth Amendment as applied to the States through the Fourteenth Amendment . . . Therefore, our constitution provides no greater due process rights than those granted under the Fifth Amendment of the United States Constitution.”


Clark v. Com., 262 Va. 517, 551 S.E.2d 642 (2001) held that “[i]f an accused in Virginia has no right to interview a rape case victim, and no right to discover statements made by Commonwealth’s witnesses to agents of the Commonwealth, and no right to discover certain internal Commonwealth documents, surely the accused should have no right to a physical examination of the victim in a statutory rape case.”


⁴Spivey v. Com., 23 Va. App. 715, 479 S.E.2d 543, 547 (1997) (abrogated by Virginia Bill of Rights, United States Constitution to interpret the state, beyond those guaranteed by the same as those contained in the United States Constitution. The same as those contained in the Virginia Constitution gives a criminal defendant “a right to view, photograph, and take measurements of the crime scene, provided that the defendant makes a showing that a substantial basis exists for claiming that the proposed inspection and observation will enable the defendant to obtain evidence relevant and material to his defense or to be able to meaningfully defend himself.” At trial, “the rights to compulsory process, confrontation and due process give the defendant a constitutional right to present relevant evidence.”

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§ 1:3 Court system in Virginia

Research References
West’s Key Number Digest, Courts ⊆157, 191, 250

The Supreme Court of Virginia consists of seven justices, each elected for a term of 12 years. The court may render decisions en banc or in divisions as prescribed by law.¹

On January 1, 1985, the Court of Appeals of Virginia was established and given jurisdiction over appeals from any final conviction in a circuit court of a traffic infraction or a crime, except where a sentence of death has been imposed.²

Courts of record (circuit courts) are established in every county and city of the first class. These courts have original jurisdiction over all felonies and indictments for misdemeanors, original writs of habeas corpus,³ and appellate jurisdiction in the form of de novo review over misdemeanors tried in courts not of record (district courts).⁴

Courts not of record (district courts) are of three types: general district courts, juvenile and domestic relations district courts, and drug treatment courts. General district courts have original jurisdiction over misdemeanors⁵ and conduct preliminary hearings in felony cases.⁶ Juvenile and domestic relations courts have exclusive jurisdiction over (1) defendants under the age of 18, (2) all misdemeanor offenses committed by one member of the family against another, and (3) all misdemeanor offenses committed against the person of a juvenile.⁷ Juvenile and domestic relations courts conduct the preliminary hearings in felony cases involving offenses committed by one member of the family against another, or felonies committed against the person of a child.⁸ Drug treatment courts have specialized dockets offering judicial monitoring of intensive treatment and supervision of addicts in drug and drug-related cases.⁹

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