BARTLETT & SPIRN, P.L.C.
Attorneys at Law

GILBERT A. BARTLETT
STUART D. SPIRN

DARLEY RICHARD TWIDDY

firm@bartlettspirn.com
www.bartlettspirn.com

809 Richmond Road
Williamsburg, Virginia 23185
Telephone (757) 229-1910
Facsimile (757)903-2357

©2016

Defense of Criminal Cases

1. Pre-trial

If an individual knows that he or she may be the subject of a criminal investigation, having an attorney to assist them can be invaluable. Often, however, an accused will not have the benefit of legal counsel until after the government files formal charges. If you are accused you should avail yourself of the full range of constitutional protections granted to all persons. Prior to arrest, the most important protections are the Fourth Amendment's guarantee of freedom from unreasonable searches and seizures, and the Fifth Amendment's right against self-incrimination ("the right to remain silent"). The situations in which these two constitutional provisions can apply, and how they can apply, are the subject of volumes of legal writings. In the hands of skilled legal counsel they can provide an accused protection during a criminal investigation.

2. Constitutional Protections:

The Fourth Amendment requires law enforcement to have a warrant before they can search and seize potential evidence of a crime. There are exceptions to this requirement if, for example, police observe evidence in "plain view" or if there is an emergency that requires them to act without taking the time to obtain a warrant. However, the general rule is that a person may refuse to grant consent to the police to, for example, search one's vehicle, one's home and/or one's person if the police lack a warrant.

Similarly, the Fifth Amendment's right against self-incrimination means that an accused does not have to answer questions, especially investigative questions from law enforcement. The exercise of this right is crucial: incriminating statements severely restrict the possible defenses available at trial, and even statements professing innocence may help a skillful prosecutor eliminate possible defenses. This right is particularly important after a person has been arrested. Following arrest, the police must advise the accused of his or her Miranda rights (right to remain silent, any statements may be used against them in court, have a lawyer, have a lawyer appointed if unable to afford one), and if police fail to do so, the government may not introduce evidence of any post-arrest statements of accused made in response to custodial questioning. Furthermore, if a person invokes his right to silence, all police questioning must cease. In order for the police to resume questioning, they must re-advise the accused of his Miranda rights. Informing the police of the desire for an attorney provides even greater protection: once an accused asks for an attorney during custodial questioning, all questioning must cease, and police may not resume questioning unless an attorney is present.

It is worth noting the difference between exercising one's constitutional rights and being uncooperative with legitimate police work. An accused must always act respectfully to law enforcement, not only because they are due respect, but also because prosecutors and judges have little tolerance for those who are rude, or worse, to law enforcement. Firmly exercise your rights, but be polite about it, and never physically resist an officer's efforts. Assaulting a law enforcement officer is a felony and carries with it a mandatory minimum six months in jail. In addition, non-assaultive rude behavior can, and frequently will, result in a harsher penalty at sentencing.

3. Preliminary Hearing

In Virginia, if you are arrested on a felony warrant, you are entitled to a preliminary hearing in the locality where the offense occurred in the General District Court for crimes committed by and against adults or entities; or in the Juvenile and Domestic Relations District Court for domestic crimes, crimes committed against children and crimes committed by minors unless that minor is to be tried as an adult. The Commonwealth must demonstrate "probable cause" that the accused committed the crime charged. "Probable cause" is a much lower standard than "beyond a reasonable doubt", and it does not even mean that it is more likely than not that the accused committed the crime. All that is required is that the Commonwealth demonstrate that it possesses sufficient evidence such that if a court believed its evidence without question, and gave the Commonwealth the benefit of all inferences, there would be enough evidence to convict. This low standard means that an accused should almost never present evidence at a preliminary hearing. At a preliminary hearing, defense evidence is irrelevant: the only question is whether the Commonwealth's evidence would be sufficient if viewed in the best possible light.

The preliminary hearing can be quite useful, however. Since the government has to present enough evidence to satisfy probable cause, it must put on some witnesses. This gives the defense a preview of what the Commonwealth's evidence will be at trial. While many, if not most, prosecutors will be open with defense attorneys about their evidence, the ability to cross-examine the government's witnesses can be invaluable for two reasons: 1) evidence that looks strong on paper can wilt in court if presented by a weak or untrustworthy witness and 2) if the witness testifies differently at trial than he or she did at preliminary hearing, that witness may be impeached with the inconsistent prior statements to show that the witness lacks credibility. Finally, it can be an opportunity to flesh out any suppression issues (see below) by questioning officers about their manner of gathering evidence.

If the Commonwealth can demonstrate probable cause for a charged offense, the district court will certify the case to the grand jury, which will meet privately. If the grand jury finds probable cause, it will issue an indictment. Although technically a grand jury is a separate safeguard to ensure the existence of probable cause, in reality, a grand jury generally will find probable cause unless there are clerical errors in the Commonwealth's submitted indictment.

If the Commonwealth is unable to prove it has probable cause for each charged offense, the trial court will dismiss the case without prejudice. The dismissal is without prejudice because, in Virginia, only circuit courts may dismiss felonies with prejudice as those courts possess exclusive jurisdiction for felonies [The exception is that felonies allegedly committed by juvenile defendants if the Commonwealth does not charge the juvenile as an adult. Since in such a hearing it is a full blown trial and not a preliminary hearing, dismissal is with prejudice]. This means that the Commonwealth may continue to prosecute these charges, although the accused will temporarily be free from any restraints that accompanied the dismissed charges. If the Commonwealth elects to do so, it may file a direct indictment, which sends the charge directly to the grand jury, or it can even proceed on a new arrest warrant. Since the Commonwealth may continue to prosecute the case, it may not be advisable to ask that the district court dismiss a case at preliminary hearing, since it will result in the accused being rearrested, and often will require the accused to post another bond for the same charge. In addition, if a defense attorney succeeds in dismissing the charges at preliminary hearing, one can be sure that the prosecutor will be prepared to counter the same defense at trial. Of course, if the Commonwealth is unlikely to continue to prosecute the case, such as where it is a minor offense and/or the government's case is particularly weak, or if the accused is in jail pending trial, requesting a dismissal can be the correct approach.

Since a preliminary hearing often does not result in a completed prosecution, the accused and his or her attorney should discuss strategy for the preliminary hearing. Specifically, the client should know whether the goal is to dismiss the charges, or merely just to gather information to utilize at the trial itself.

4. Motions to Suppress

If there is reason to believe that the government violated one or more of the accused's constitutional rights, the defense attorney may file a motion to suppress any evidence obtained as a result of that constitutional violation ("the fruit of the poisonous tree"). As was stated above, constitutional law in a criminal context can be complex, but if a

suppression issue exists, it can be among the most effective defenses available to an accused. The Exclusionary Rule states that any evidence obtained from a constitutional violation can be excluded from the trial. While a recent United States Supreme Court opinion, Herring v. United States, caused a lot of discussion amongst criminal attorneys about the future of the rule, Herring was decided on unusual facts and the Court's ruling was so narrow that it will rarely, if ever, play a role in a criminal case. The Exclusionary Rule, along with Miranda, has endured judicial critics for decades, and these rules are now so well established that it is almost inconceivable that courts will alter them significantly. This means that a successful motion to suppress can exclude, by way of common examples, a confession taken in violation of Miranda, evidence of statements following an arrest unsupported by probable cause, evidence discovered during an unlawful traffic stop or evidence seized from one's person without justification.

As discussed above, since a dismissal at preliminary hearing does not prohibit the Commonwealth from continuing with its prosecution, a motion to suppress at the preliminary hearing stage generally often is inadvisable.

5. Pre-trial Considerations

Virginia law limits discovery in criminal cases to specific items listed in the Rules of the Virginia Supreme Court. At the district court level, an accused is entitled only to his statements to law enforcement and his criminal record. In circuit court, an accused may review and/or inspect statements to law enforcement and his criminal record, and he has access to additional evidence unavailable in district court, including lab reports, forensic evidence reports, photographs, relevant documents, and any written statements of the accused. Many Commonwealth's Attorney's Offices permit "open discovery." Open discovery has different meanings to different people, but it always includes discovery beyond that required by the Rules. Finally, preliminary hearings can provide an excellent opportunity to discover the strength of the Commonwealth's case.

The most important task during the time before trial is to determine whether the defense should seek a plea agreement or proceed to trial. Beyond the apparent strength or weakness of the Commonwealth's case, the defense must consider the likely sentencing range should the case end in conviction. It makes little sense to agree to a straight guilty plea if the agreement on sentencing is no better than the accused likely would receive without an agreement. At the same time, an accused with a great deal of sentencing exposure can benefit from the certainty a plea agreement can provide, particularly one that results in the reduction or dismissal of charges or a favorable sentencing agreement. An accused with a criminal history must also be aware of the effect a new conviction can have on outstanding suspended sentences: a conviction with a suspended sentence can still result in incarceration if it violates an older suspended sentence.

6. Trial Preparation and Trial

The first step in preparing for trial is deciding whether to request a jury. If it is a misdemeanor case in district court, a jury trial is unavailable. However, a person convicted in district court has an absolute right to appeal the conviction to circuit court, where jury trials are available.

It often is prudent to waive one's right to a jury trial. In Virginia, juries sentence, and they have access to the defendant's criminal history, if any. Furthermore, juries cannot suspend sentences, so the accused will serve the sentence the jury imposes. After a jury issues a sentence, the judge may modify it, or leave the sentence untouched. Despite the non-binding nature of jury sentences, many judges are highly reluctant to reduce them. An accused, particularly one with a criminal record, takes a big risk when he requests a jury trial.

Although juries change with each case, they tend to have common characteristics that, if understood, can create situations in which a jury trial is advantageous to the criminal defendant. The "CSI Effect" stems from many jurors' familiarity with crime dramas and their exaggerated sense of the proliferation of forensic capabilities. This familiarity often creates an expectation that the government can present compelling forensic evidence. In reality, forensic evidence is rare in most non-violent cases, and often will be lacking even in a prosecution for a violent crime. A defense attorney often can exploit this lack, particularly in those cases where the prosecution relies on

eyewitnesses with marginal credibility. Other cases where a jury trial may be beneficial are those in which the victim is unlikeable or the offense is of a technical nature rather than one that lay people commonly associate with criminal behavior.

Most trials are bench trials. A judge will hear the case and determine the sentence. Although judges are susceptible to the inherent biases of human nature, bench trials are less likely to depend on emotional or irrelevant facts, such as the defendant's character or the extent to which the victim is sympathetic. In general, judges are more likely to convict, but, because judges are less likely to sentence based on emotion, and they examine discretionary sentencing guidelines, judges tend to be more lenient.

After determining the method of trial, it is important to develop a trial strategy. Specific trial strategies will vary with the facts of a case, and are outside the scope of this article, but there are basic considerations common to each case. Perhaps the biggest decision is whether the defense will present any evidence of its own. The Commonwealth has the burden to prove the case beyond a reasonable doubt, and the defense has no obligation to present evidence. The defendant has the absolute right not to testify, and the judge or jury cannot consider the exercise of that right during deliberations. However, if the defense can present credible evidence, through the defendant or through other witnesses, it obviously should do so.

Another consideration is whether the defense should broadly attack the entire case or focus narrowly on a specific factual question. If the Commonwealth's case appears tenuous and circumstantial, a defense aimed at many facets of the prosecution's evidence can be highly effective. More often, though, the government will possess strong evidence supporting most of the elements of the charged offense. In these cases, the defense attorney should concede those points and focus entirely on the weaker pieces of the Commonwealth's case. In doing so, the defense attorney will gain credibility when arguing the portions of the case that are truly contestable.

7. Sentencing and Appeals

For those cases that end in conviction, the immediate decision is whether to seek a pre-sentence report. Virginia grants individuals convicted of felonies the right to have a pre-sentence investigation report. Probation officers will interview the defendant about the case and research the person's criminal and probation history, as well as investigate the defendant's family, educational and employment background. The probation officer will then assemble a report and furnish the court with the sentencing guidelines. This often will allow the defendant to present himself in the best possible light at sentencing. Pre-sentence reports should be avoided, however, where the defendant is likely to appear abrasive and has little in his background to suggest to the court that he is likely to lead a productive life. Furthermore, older juvenile convictions and out-of-state convictions frequently do not appear on the criminal records to which the prosecutor will have access. A probation officer, however, will locate these convictions and their discovery during the pre-sentence investigation can add significant time to the sentencing guidelines range.

Regardless of whether a defendant requests a pre-sentence report, it is critical to enter sentencing with evidence that humanizes the defendant. This often will include testimony or written statements from family members and employers, and where appropriate, will include testimony from the defendant. The presentation of the defendant in preparation for a possible future sentencing should begin near the outset of the representation: if unemployed, the defendant should find a job, and should work on collecting funds for restitution if applicable.

Appeals beyond the circuit court level are discretionary, with the exception of capital murder cases. The most common appeal challenges the sufficiency of the Commonwealth's case. On appeal to the Virginia Court of Appeals or the Virginia Supreme Court, a party may not introduce new evidence. The only question is whether the evidence was sufficient as a matter of law (essentially, this is the same standard that governs preliminary hearings). The Court will examine the relevant statutes, as well as prior cases that analyzed the same or similar issues. It is critical that the attorney filing and arguing the appeal cite specific cases and place the argument within the context of these cases. Appeals that present generalized arguments about the government's case are sure to fail.

Almost every prosecution will be susceptible to one or more defenses. A skilled and knowledgeable defense attorney can exploit these deficiencies and obtain a favorable result for his client.

To make an appointment, please call 757-229-1910, or email

Gilbert A. Bartlett at **gbartlett@bartlettspirn.com**,

Stuart D. Spirn at **stuspirn@bartlettspirn.com** or

Darley Richard Twiddy at **dtwiddy@bartlettspirn.com**