

## Criminal Law

# A balanced DUI defense strategy: The three-pronged method

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In Virginia, there is no panacea strategy to defending persons charged with driving under the influence of alcohol (DUI) or drugs. There are probably as many DUI defense strategies as there are attorneys defending those cases. Successful DUI attorneys develop DUI defense strategies that enable them, more often than not, to provide positive outcomes for their clients.

In our law practice, we use a DUI defense strategy that adapts well to the varied factual scenarios presented and our client's interests. We call our approach the "The Three Pronged Method." The Three Pronged Method is a fact-specific client-focused strategy to defending persons charged with DUI. The first prong is to analyze the facts of the client's case to determine what, if any, legal defenses exist. If legal defenses exist, then those defenses are categorized as strong or weak. The second prong is to create and implement a pretrial mitigation plan for the client. A properly implemented mitigation plan may mean the difference between a favorable result and an unfavorable result for a client in a close case. The third prong is to prepare and advise the client regarding any potential jail sentence, the loss of driving privileges, sentencing, and post sentencing issues.

### **First prong: analyze the client's case to determine what, if any, legal defenses apply**

The first prong of the Three Pronged Method is to analyze the client's case to determine what, if any, legal defenses apply. If a legal defense exists, then it is categorized as strong or weak. A strong legal defense is present where there is a high probability the prosecutor or judge will agree with the legal argument and results in a positive outcome for the client. A legal defense is weak when there is a low probability the prosecutor or judge will agree with the defense or the defense will not positively effect the outcome of the client's case.

The first step in determining any applicable legal defenses is to know the facts of the case from the client's and arresting officer's perspectives. A great way to know the facts of the case from the client's perspective is for the client to write a summary of everything the client remembers beginning with his first drink of alcohol and ending with his last contact with the arresting officer. It is best to have the client bring his written summary to the first meeting along with all documents the client received as a result of the arrest. A great resource for ascertaining the arresting officer's perspective is the

criminal complaint. Try to obtain a copy of the criminal complaint prior to the first meeting with the client. This way you can review the criminal complaint with the client at the initial meeting. Speaking with the officer before trial is another means of learning the facts from the officer's perspective.

A further option to learn more about the case and the client is to file a discovery motion. At the general district court level, a discovery motion requires the Commonwealth to disclose any statements made by the client and his criminal record. Rule 7C:5 of the Rules of Virginia Supreme Court. In Circuit Court, discovery includes the client's statements, reports, photographs, or any other materials that may be relevant to the defense. Rule 3A:11 of the *Rules of the Virginia Supreme Court*. Before filing for discovery know the policy of the jurisdiction in which the case is pending. In some jurisdictions, if you ask for information concerning your case without filing a discovery motion, the Commonwealth will provide you with more information than required under Virginia's discovery rules. Conversely, if you file a discovery motion in some jurisdictions the Commonwealth may only provide you with the information required.

After obtaining all the available facts,

its time to ascertain any legal defenses by conducting a legal analysis of the case. Initially, determine whether any search and seizure issues exist. Next, evaluate the Commonwealth's ability to prove the elements needed for a DUI conviction.<sup>1</sup>

A good starting point for the legal analysis is to assess whether any search and seizure issues exist. This is a good place to start because, if the client's seizure is unconstitutional, the exclusionary rule applies and all evidence obtained as a result of the seizure is inadmissible. The initial questions to answer are, "How did the arresting officer come into contact with the client?" and "Was the initial contact constitutionally permissible?" For example, if you discover the first contact was a traffic stop, then you need to determine whether the traffic stop was constitutionally permissible. A police officer only needs a reasonable articulable suspicion to initiate a traffic stop. A police officer may initiate a traffic stop absent the commission of a traffic infraction if the police officer has a reasonable articulable suspicion of criminal activity. For instance, a police officer's observation of the client's vehicle weaving within its own lane of travel for a sufficient distance constitutes reasonable articulable suspicion of criminal activity justifying a brief detention.<sup>2</sup> Often, police officers stop DUI clients because the client commits a traffic infraction or equipment violation. A police officer may make a traffic stop if the officer sees the client commit a traffic infraction or equipment violation. As a result, it is important to verify whether the client actually committed the traffic infraction or equipment violation statute giving rise to the stop. A stop based solely on the wrongful enforcement of a traffic infraction or equipment violation is constitutionally invalid and any evidence garnered from that stop should be suppressed.

Moving beyond the legal justification for the stop, the other search and seizure issue to review is the basis of the arresting officer's probable cause to arrest. This issue is even more important than before because, as of July 1, 2010, the officer may arrest a person without a warrant at any location, within three hours of the alleged offense, if the officer has probable cause to suspect the person of DUI. §19.2-81(D).<sup>3</sup> Look for ways to refute the police officer's probable cause determination. Police officers routinely rely on the smell of an alcoholic beverage on the client's person, the client's slurred speech, and bloodshot eyes. Additionally, police officers rely on the client's admissions regarding alcohol consumption prior to the stop. Officers may also use the preliminary breath test result to establish probable cause, even though the result is inadmissible at trial. §18.2-267. Officers almost always ask clients to perform field sobriety tests (FSTs). The usual FSTs include the nine-step walk and turn, one leg stand, alphabet test, horizontal gaze and nystagmus, finger dexterity, internal clock

and finger to nose. Police officers may consider a person's refusal to take FSTs as a factor in their probable cause determination when the refusal is accompanied with other factors indicating alcohol consumption.<sup>4</sup> To refute the officer's use of FST performance as probable cause to arrest, determine the existence of viable alternatives for the client's poor performance. These alternatives may include the grade of the road, the client's footwear, or a preexisting medical condition. Also, look to positive aspects of the client's performance on field sobriety tests to refute the officer's probable cause determination. If the client takes 15 consecutive steps correctly before making a mistake on the walk and turn, estimates 59 seconds to be a minute during the internal clock test, or touches the tip of his nose 95 percent of the attempts on the finger to nose test, then use those positive aspects to counter the arresting officer's probable cause determination.

After analyzing the search and seizure issues, the focus of the legal defense analysis moves to an evaluation of the Commonwealth's ability to prove the elements necessary to establish a DUI conviction. There are two ways the Commonwealth can prove an alcohol related DUI. The first is to use a chemical test establishing the presence of alcohol in the client's breath or blood pursuant to §18.2-266(i). Under this approach, the Commonwealth must prove, beyond a reasonable doubt, the client operated a motor vehicle while having a blood alcohol concentration (BAC) of .08 percent or more by weight by volume or .08 grams or more per 210 liters of breath as indicated by the results of a properly administered chemical test. The second is for the Commonwealth to establish an alcohol related DUI by proving the client operated a motor vehicle while "under the influence of alcohol" pursuant to §18.2-266(ii). Under this approach, the elements of proof are the same as §18.2-266(i), except, the Commonwealth does not need to prove the client had a specific BAC while operating the motor vehicle. In these cases, the Commonwealth may rely on the police officer's observation of the client's driving, the client's admissions to drinking alcohol prior to driving, the client's performance on FSTs, the client's appearance, including slurred speech, bloodshot eyes, and flushed face, as well as blood alcohol tests performed by a hospital and expert testimony.

Not all DUI charges are alcohol related. A client may be charged with driving under the influence of drugs or a combination of alcohol or drugs (DUID). In DUID cases the Commonwealth relies on certificates of analysis to establish presumptive levels of intoxication. For instance, if the client's blood contained .02 milligrams of cocaine per liter of blood according to a proper certificate of analysis there is a presumption of intoxication like a .08 is in a DUI. All drugs do not carry a statutory presumptive level of intoxication. The Commonwealth must

prove a marijuana based DUID without the benefit of a statutory presumptive level. In such cases, the Commonwealth uses a blood test and the testimony of an expert witness to assist in proving its case. Therefore, it is important to understand the science behind the blood analysis and the effects of the drug. It is good practice to speak with the Commonwealth's expert before trial to learn about the expert's qualifications and the basis of their opinion.

The first two elements the Commonwealth must prove for any DUI or DUID conviction is the client was "operating" a "motor vehicle." A motor vehicle is every vehicle that is self-propelled or designed for self-propulsion except bicycles, electric personal assistive mobility devices, or electric power-assisted bicycles §46.2-100. For purposes of §18.2-266, the Supreme Court of Virginia defined an "operator" of a motor vehicle as a person who "produces a physical effect or engages himself in the mechanical or electrical aspect of any process or activity..." of the motor vehicle.<sup>5</sup> According to Stevenson, a person who inserts the key into the ignition but does not turn on the car or any of its component parts is not an "operator." However, the vehicle need not necessarily be drivable in order for the Commonwealth to prove "operation." For example, in *Keesee v. Commonwealth*,<sup>6</sup> the Court ruled the defendant, whose legs were pinned under the steering wheel of a recently crashed car while the keys were in the ignition, was "operating" a motor vehicle even though the vehicle was not functional as a result of the crash. Not surprisingly, the issue of "operation" often arises in single vehicle accident cases involving no witnesses. Under such circumstances, the Commonwealth's case often rises or falls, absent circumstantial evidence, on your client's statements regarding his operation of the motor vehicle.

The additional element, under §18.2-266(i), is for the the Commonwealth to establish the client's BAC was .08 or higher. Virginia's implied consent law requires a person arrested for DUI within three hours of committing the offense to submit to a breath test as long the person committed the DUI on a highway. §18.2-268.2. However, there is no obligation for the arresting officer to compel submission to chemical testing as a prerequisite for prosecution.<sup>7</sup> The Commonwealth usually proves the client's BAC by introducing evidence of a breath or blood test denoting his BAC. The court may infer the breath or blood test result was the client's BAC at the time the client operated the motor vehicle as long it resulted from an implied consent breath or blood sample. §18.2-269.<sup>8</sup>

In a DUI prosecution based on §18.2-266(i), the Commonwealth may rely on a certificate of analysis produced by a breath test machine called the INTOX EC/IR II. The INTOX EC/IR II measures the BAC of the client's breath. The operations manual of the INTOX EC/IR II is available on the

Virginia Department of Forensic Science (DFS) website at [www.dfs.virginia.gov](http://www.dfs.virginia.gov). Make sure the breath test operator followed the procedures outlined in the manual. The breath test operator must observe the client for at least twenty minutes prior to the administration of the test. The client cannot have any foreign objects in his mouth, burp, or belch during this period. After the observation period, the client provides two breath samples by blowing into the breath test machine. The machine, then, produces a numerical result of the client's BAC on a piece of paper referred to as a certificate of breath/alcohol analysis. Make sure to request, from DFS, a copy of the maintenance records and results for the breath test machine used to take the client's sample, before and after the client's breath test, to ensure the machine worked accurately at the time of his test.

The Commonwealth may prove the client's BAC was .08 or higher by means of a blood test. Pursuant to Virginia's implied consent law, once the client submits to chemical testing, a blood test must be provided when a breath test is unavailable or the client is physically unable to provide a breath test. §18.2-268.2. The blood test must be performed by a person qualified under Virginia law using a kit prepared by DFS. Once the blood is drawn and properly sealed, the samples are sent to DFS for testing. After it is tested, a certificate of analysis is produced denoting the BAC of the client's blood. The client or his attorney has ninety days from the date of the blood draw to request a sample to conduct an independent analysis. The blood sample is destroyed after ninety days if no request for independent analysis is made within that period.

In all DUI and DUID cases, determine whether the client operated a motor vehicle on a highway. A breath or blood sample, obtained pursuant to implied consent, cannot be admitted in evidence unless the Commonwealth establishes the client operated the motor vehicle on a highway within three hours of the DUI arrest. The "highway" issue arises when the operation is limited to a private area like parking lots or apartment complexes. A highway is defined by statute and interpreted by Virginia courts to include ways on private property open to public use for vehicular travel. §46.2-100.<sup>9</sup> There is a *prima facie* presumption that streets in an apartment complex are highways.<sup>10</sup> However, this presumption does not apply to parking lots. Parking lots open to the public at the owner's invitation are not highways.<sup>11</sup>

The most recent development relating to the admissibility of certificates of analysis arose last year with the U.S. Supreme Court decision, *Melendez-Diaz v. Massachusetts*.<sup>12</sup> In *Melendez-Diaz*, the U.S. Supreme Court rejected Massachusetts's system which, like Virginia, allowed for the admission of certificates of analysis into evidence through an attestation clause. The Court ruled such statutory

schemes violated the Confrontation Clause of the Sixth Amendment. In response to *Melendez-Diaz*, the Virginia General Assembly enacted §19.2-187.1. Now, the Commonwealth must subpoena and call the breath test operator or DFS lab analyst who conducted the test as a witness or provide the defendant or his counsel with a notice of intent to introduce the certificate of analysis without the presence of the operator or analyst at trial. As of July 1, 2010, the Commonwealth may present such testimony by two-way video conference. If the Commonwealth chooses to send the notice, then the notice must be mailed or delivered to defense counsel no later than 28 days before trial. After receiving the notice, the defendant may object and force the Commonwealth to subpoena and call the operator or DFS lab analyst. The objection must be made no later than 14 days from the date the certificate of analysis is filed in the clerk's office. If timely notice is not provided by the Commonwealth, either party may make a motion to continue to satisfy the statutory requirements. If, however, trial begins without the required notice and defense counsel objects to admission of the certificate of analysis, the court may deem the certificate inadmissible.

If the Commonwealth relies on an implied consent certificate of analysis at trial, you must know the statutory prerequisites for its admission. The issues previously touched upon are just a few of the common issues that arise when the Commonwealth relies on implied consent certificate of analysis. Even though there may be a technical issue relating to the certificate, it does not necessarily mean that the certificate is inadmissible. Under §18.2-268.11, "procedural" issues relating to the certificate, which include those issues dealing with the "taking, handling, identifying, and disposing of blood or breath samples," will not result in the certificate being deemed inadmissible so long as the Commonwealth substantially complies with the statutory requirements. What fits within the domain of "procedural" and what steps reach "substantial compliance" will always be a matter of interpretation and litigation. It is important to recognize these issues can be ripe for use in plea negotiations or at trial.

Another issue exists in DUI related accident cases when the client is taken to a hospital for treatment. The records of a blood alcohol test conducted by the hospital in the course of treating the client is admissible as a business record. §19.2-187.2. However, the hospital blood sample does not receive the same statutory benefits regarding admissibility as implied consent blood. As a result, determine whether the Commonwealth can establish the chain of custody of the blood sample. Visit the hospital and learn the hospital's procedures for handling blood samples. By doing so, you may actually discover the Commonwealth cannot identify the employee who took the blood sample.

In DUI prosecutions alleging prior offenses,

the Commonwealth has the additional burden of proving the alleged prior convictions. There are a few ways to challenge alleged priors, even though §46.2-384 permits the Commonwealth to establish prior DUI convictions by introducing a properly certified transcript of a person's driver's conviction record denoting those convictions. When the client is charged with a second or subsequent DUI, order a certified copy of the prior conviction and review it to make sure the charge wasn't amended to a different charge. Also, determine that the client was present in court with his attorney or signed a waiver of attorney form. If the client pleaded guilty to the prior conviction, then make sure there is evidence on the face of the conviction that the court informed him of the rights waived by pleading guilty.<sup>13</sup> Finally, if the client's prior DUI conviction occurred in another state, the prior conviction may not be used by the Commonwealth unless that state's DUI law was, at the time of the conviction, substantially similar to Virginia's DUI law. §18.2-270(E)<sup>14</sup> For example, if the client could have been convicted in the state in which the prior conviction occurred for conduct that may not have resulted in a conviction under Virginia law, that prior out of state DUI conviction may not be used to enhance punishment. This rule applies for prior convictions based on a local ordinance rather than §18.2-266 as well.<sup>15</sup>

Sometimes clients are charged with DUI and unreasonable refusal (Refusal). A Refusal charge occurs when a person arrested for DUI unreasonably refuses to provide a breath or blood sample under the implied consent statute. For these clients, it is important to ensure the police officer read them the implied consent form and they refused after the officer read the form. Also, ask clients about their reasons for refusal to determine whether the reasons may be legally justified.

### **Second prong: establish and implement an effective pretrial mitigation plan for the client**

The second prong of the Three Pronged Method is to establish and implement an effective pretrial mitigation plan for the client. To be successful, a pretrial mitigation plan should be specific to the needs of the individual client as well as the charge. A client charged with a first offense DUI with a BAC of .09 may not have the same mitigation plan as a client charged with a second offense DUI within five years with a BAC of .16.

In certain DUI cases, the pretrial mitigation plan may be a valuable mechanism to modify dangerous behavior and obtain a positive outcome for a client. From the outset, clients must understand the mitigation plan is their opportunity to proactively benefit themselves as well as the outcome of their case. If present, clients must be willing to fully and honestly confront their alcohol or substance abuse issues. Otherwise, the mitigation strategy is not in their best interest.

A pretrial mitigation plan seems to be more beneficial when utilized in cases involving low BAC's (i.e., .08 through .10) and BAC's at or just over the mandatory minimum threshold (i.e., .15, .16, .21). The mitigation plan may include a substance abuse assessment and, if necessary, pretrial treatment in a substance abuse program. The client may benefit from entering into the Virginia Alcohol Safety Action Program (VASAP) prior to trial, which is permitted under §18.2-272.1(A). The local or regional jail servicing the area in which the case is pending may offer substance abuse treatment. If so, you may advise the client to consider voluntarily entering into the jail based program when, upon conviction, a lengthy active jail sentence is likely to result. Other valuable additions to a mitigation plan include character letters regarding the client and a list of the client's past community involvement, achievements, and work history.

### **Third prong: prepare and advise the client regarding post conviction issues**

The third prong of the Three Pronged Method is to prepare and advise the client regarding post conviction issues. The client needs to understand the consequences of being convicted. It is prudent to discuss any potential suspended or active jail sentences, the availability of alternative sentencing, license suspension, the scope of restricted driving privileges, installation of the ignition interlock device, and any court ordered treatment programs. A client who fully understands these issues will have a better opportunity to comply with post trial requirements.

Legal ramifications facing a client charged with a first offense DUI are drastically different than those facing a client charged with fourth offense DUI within a ten year period. A paramount question in the client's mind is, "What will happen to me if I'm convicted?" At the outset of the attorney client relationship, you need to inform the client of the applicable statutory punishments.<sup>16</sup> In fact, go beyond the statutory punishments and inform the client of the likely sentence for the charged DUI in the court in which the case is pending.

A client charged with first offense DUI who has a BAC of .08 or higher administratively loses the privilege to drive for seven days after arrest. Generally speaking, a client convicted of first offense DUI, with a BAC of .14 or lower, will be convicted of a Class 1 misdemeanor, receive a suspended jail sentence, a mandatory minimum \$250 fine, one year loss of driving privileges, be ordered to enter into and successfully complete VASAP, and be eligible for a restricted license. This general sentence may vary from jurisdiction to jurisdiction or from court to court in the same jurisdiction. It is important to remember a court has the statutory authority to sentence a client to active jail time and/or order the installation of an ignition interlock device for a first offense DUI absent evidence of an

elevated blood alcohol. A client so convicted, who has an elevated BAC, faces a mandatory minimum jail sentence. If the elevated BAC is .15 up to and including .20, then there is a mandatory minimum five day jail sentence and an additional mandatory minimum \$500 fine. If the elevated BAC is more than a .20, then there is a mandatory minimum ten day jail sentence and an additional mandatory minimum \$500 fine.

Whenever a client faces an active jail sentence, contact the local or regional jail regarding available alternative sentencing options. Many local and regional jails offer weekend time, work release, and home incarceration. Learn the qualifications and rules for those options and, if possible, have the client qualify pre trial. This may help the client maintain employment while serving a jail sentence. Keep in mind, clients sentenced for a misdemeanor to a mandatory minimum jail term serve 100 percent of the total sentence as opposed to 50 percent of the total jail term for non-mandatory minimum sentences.

A client charged with second offense DUI automatically loses the privilege to drive after his arrest for sixty days or until the trial date, whichever comes first. A client convicted of second offense DUI will receive a \$500 mandatory minimum fine and lose their driving privileges in Virginia for three years. If the client is convicted of second offense DUI within a five-year period, then the court must sentence him to at least a mandatory minimum 20-day jail term. In addition to the mandatory minimum jail term, the client cannot receive a restricted license for the first year from the date of conviction. A client convicted of a second offense within a 10-year period faces a mandatory minimum 10-day jail term. A client so convicted cannot receive a restricted license for the first four months from the date of conviction. When the client is convicted of a second offense and has an elevated BAC of .15 up to and including a .20, there is an additional mandatory minimum ten day jail sentence and an additional mandatory minimum fine of \$500. If the elevated BAC is more than a .20, then there is an additional mandatory minimum 20-day jail sentence and an additional mandatory minimum fine of \$500.

Clients charged with a third or subsequent DUI offense automatically lose the privilege to drive until the trial date for that charge. If the client is convicted of a third offense within a 10-year period, then he will be guilty of a Class 6 felony, receive at least a \$1,000 mandatory minimum fine, a mandatory minimum 90-day jail term, and a mandatory indefinite license revocation. A client convicted of a third offense within a five year period, will receive the same sentence of a person convicted of a third offense within 10 years, except the mandatory minimum jail sentence shoots up to a six-month jail term. A client convicted of a fourth offense within a 10-year period will receive, at least, a \$1,000 fine



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and a one year mandatory minimum jail sentence. Moreover, a motor vehicle owned and operated by the client used in commission of a third or subsequent DUI is subject to civil seizure and forfeiture.

In all DUIs and DUIDs, there is an additional punishment required if minors are in the motor vehicle at the time of the DUI offense. The court must sentence the client to an additional mandatory minimum jail term of five days and impose a \$500 to \$1,000 fine, if the client has any person 17 years old or under in the car at the time of the DUI offense.

Courts are required to order the installation of an ignition interlock device after the client is found guilty of a first offense DUI with an elevated BAC of .15 or more or a second or subsequent DUI offense. The ignition interlock device must be installed on all vehicles owned by or registered to the client for a period of at least six months not to exceed the period of suspension. As a result, it is in the best interest of clients to have one vehicle owned by or registered to them before their initial post conviction meeting with VASAP.

Clients charged with Refusal are subject to required statutory punishments as well.<sup>17</sup> A client convicted of first offense Refusal is in violation of a civil offense, will lose his driving privileges in Virginia for one year, and is not eligible for a restricted license. If a client is found guilty of Refusal and has previously been found guilty of Refusal or a DUI within 10 years prior to the date of the charged refusal, then he is guilty of a Class 2 misdemeanor and loses his privilege to drive for three years, and is not eligible for a restricted license. A client found guilty of refusal who was found guilty of two Refusals or DUI's within 10 years prior to the date of the charged refusal is guilty of a Class 1 misdemeanor and loses his privilege to drive for period of three years with no eligibility for a restricted license.

If eligible, clients usually want a restricted license. Restricted driving privileges may permit the client to drive to and from employment, during hours of employment, to and from school, to and from health care services for any person residing in the client's household, to transport a minor child under the care of the client to medical care, school, or day care, to drive to court appearances, to travel to court ordered treatment programs, to drive to and from appointments approved by the Division of Child Support Enforcement, and from a place of religious worship one day a week for a specific time and place.

The final post sentencing issue relates to the Restricted Driver's License Order. After granting the client restricted driving privileges, the court will issue a Restricted Driver's License Order. Review the order with the client to ensure the client knows, as stated on the order, it expires within 15 days after its issued if the client fails to report to VASAP

within that time period and 60 days after it is issued if the client fails to obtain a restricted license issued by Virginia Department of Motor Vehicles (DMV) within that time period. In addition, DMV won't issue a restricted driver's license unless the client's insurance carrier files a FR-44 financial responsibility certification with the DMV.

The defense of DUIs is a complex area of law. It requires a commitment to stay apprised of new statutes and court rulings while remaining focused on the needs of individual clients. The Three Pronged Method is a useful and adaptable DUI defense strategy to this end.

### Endnotes

1. §18.2-266 of the Code of Virginia, 1950, as amended, sets forth the elements necessary to prove a DUI.
2. *Neal v. Commonwealth*, 27 Va. App. 233, 498 S.E.2d 422 (1998).
3. All code sections cited in this article are from the Code of Virginia, 1950, as amended.
4. *Jones v. Commonwealth*, 279 Va. 52, 688 S.E.2d 269 (2010).
5. *Stevenson v. City of Falls Church*, 243 Va. 434, 437, 416 S.E.2d 435, 437 (1992).
6. *Keesee v. Commonwealth*, 32 Va.App. 263, 527 S.E.2d 473 (2000).
7. *Brown-Fitzgerald v. Commonwealth*, 51 Va. App. 232, 656 S.E.2d 422 (2008), quoting *Oliver v. Commonwealth*, 40 Va. App. 20, at 24, 577 S.E.2d 514, at 516 (2003).
8. *Yap v. Commonwealth*, 49 Va.App. 622, 643 S.E.2d 523 (2007).
9. *Seaborn v. Commonwealth*, 54 Va. App. 408, 679 S.E.2d 565 (2009).
10. *Id.* at 413.
11. *Id.* at 410; *Prillaman v. Commonwealth*, 199 Va. 401, 100 S.E.2d 4 (1957); *Roberts v. Commonwealth*, 28 Va. App. 401, 504 S.E.2d 890 (1998).
12. *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009).
13. *See James v. Commonwealth*, 18 Va.App. 746, 446 S.E.2d 900 (1994).
14. *Shinault v. Commonwealth*, 228 Va. 269, 321 S.E.2d 652 (1984)(North Carolina law not substantially similar to Virginia).
15. *Commonwealth v. Holtz*, 12 Va.App. 1151, 408 S.E.2d 561 (1991) and *Commonwealth v. Howell*, 20 Va.App. 732, 460 S.E.2d 614 (1995).
16. §18.2-270 of the Code of Virginia, 1950, as amended, sets forth the punishment for DUI and DUID convictions.
17. §18.2-268.3 of the Code of Virginia, 1950, as amended, sets for the punishment for unreasonable refusal convictions.