Overview

The Supreme Court of Virginia (SCV) returns to court at the end of August to hold its next Writ Panel. The Writ Panel is a panel of 3 justices who hear short arguments from Petitioners on why the SCV should take a particular case on the merits. The Respondents do not get an opportunity to argue, but they have the opportunity to write a Brief in Opposition to the Petition for Appeal. The SCV will return in September for a full session to hear cases on the merits. In the meantime, the SCV issued a published order declaring that a writ of mandamus did lie against a General District Court (GDC) clerk who failed to properly file a civil case. Writs of mandamus are rare but interesting pieces of the legal world that order an official (judge, clerk, or other governmental agent) to act in a particular way.

The Court of Appeals of Virginia (CAV) issued 2 published opinions last week. Both related to the circuit court's authority to hold someone in contempt of court. The CAV reversed an order of contempt in Bell v. Com., Record No. 1045-23-3, finding that the circuit court failed to follow the appropriate procedures for an indirect contempt charge. But, the CAV affirmed the dismissal of a civil action by an attorney who was held in contempt, finding that the circuit court had the authority to find the attorney in contempt and thus the deputies were not liable for false imprisonment. Virk v. Clemens, et al., Record No. 1903-22-4.

The CAV issued 12 unpublished opinions (8 criminal), including one on the issue of contempt, reversing a conviction for summary contempt because the judge testified about the actions the defendant made in court, which is prohibited by Code § 19.2-271. Hernandez v. Com., Record No. 1100-23-2. The other criminal cases covered a myriad of issues, including defective indictments, double jeopardy, Fourth Amendment analysis, and what constitutes an attempted abduction.

In civil news, the CAV affirmed the termination of parental rights in Washington v. Buckingham County DSS, Record No. 0739-23-2. The CAV issued an opinion on the statutory requirements for a resale certificate of a condo in Tshiteya v. Greenhouse Board of Directors, et al., Record No. 0806-23-4. The CAV then affirmed the dismissal of a medical malpractice case where there was sufficient reliability for the scientific testimony of a defense witness. Mullis v. McDow, et al., Record No. 1219-23-4. Finally, the CAV applied res judicata in a Worker's Compensation Commission appeal. Edelblute's Service Center, et al. v. Edelblute, Record No. 1430-23-2.

SCV Opinions and Orders

Johnson v. Wise County Circuit Court Clerk, et al., Record No. 240012: (Published Order)
Writ of mandamus
Writ of mandamus did not lie against the Circuit Court Clerk because Johnson failed to pay his filing fee. But, the writ did lie against a General District Court Clerk because the statute required the clerk to file the case, if it is accompanied by a request to proceed in forma pauperis, even if that request is deficient in some way.

> Johnson (also known as Olando Lee Trent) was a DOC inmate who filed petitions for a writ of mandamus against the Clerk of the Circuit Court for Wise County and the Clerk of the General District Court for Sussex County.

Johnson attempted to file 2 civil actions in Wise County. However, the Clerk did not process his civil cases because Johnson's money orders "were insufficient to pay the court's filing fees." The SCV rejected this petition, finding the writ did not lie because "[m]andamus is an extraordinary remedy employed to compel a public official to perform a purely ministerial duty imposed upon him by law." (quoting Richlands Med. Ass'n v. Com., 230 Va. 384, 386 (1985)). Because Johnson failed to pay the fee, the clerk "had no duty to file [Johnson's] pleading."

Johnson's claim against Sussex County were about the GDC clerk's failure to process a motion for judgment and an affidavit for proceeding in forma pauperis (IFP status), allowing him to file without paying a filing fee. The GDC clerk did not process the motion because Johnson "did not provide his inmate trust account statements for the proceeding twelve months, as required by Code § 8.01-691." The SCV still found that there was sufficient evidence to demonstrate that the clerk had a responsibility to file because "District court clerks have a ministerial duty to file pleadings without passing judgment on their validity." (citing Clay v. Yates, 809 F. Supp. 417, 424 (E.D. Va. 1992) and Bowman v. Eighth Jud. Dist. Ct., 728 P.2d 433, 435 (Nev. 1986)).

The SCV found that § 8.01-691 does not require the filing of the 12-month trust account statement as a predicate of the GDC clerk filing the corresponding motion. The SCV distinguished these cases from petitions for writs of habeas corpus because § 8.01-655(B) specifically mandates that the prisoner obtain IFP status prior to filing the petition.

CAV Published Decisions

Bell v. Com., Record No. 1045-23-3: (Causey, J., writing for Decker, CJ., and O'Brien, J.)
Summary contempt; Direct vs. Indirect contempt; § 18.2-456; Rule 5A:18; Miscarriage of justice
Contempt conviction reversed where judge summarily found Bell in contempt for indirect contempt case. Bell was entitled to a hearing on guilt or innocence. Remanded for new proceedings.

A jury convicted Bell of brandishing a firearm. After the conviction, Bell sent a 2-page letter to citizens "possibly among the 57 citizens asked to assemble at the Roanoke County Courthouse for jury duty on March 20, 2023." The 2-page letter "thanked the jurors for their service" but included information that the jurors "were not allowed to be told or presented with." Bell alleged that "three eyewitnesses refused to testify and that police reports that would have impeached the testifying witnesses were excluded from evidence." Bell also stated that "multiple audio or video files related to the offense were lost before the defense could have known to save and/or request the files." Bell asserted that "jurors should be entitled to ALL information."

The circuit court held Bell in summary contempt under § 18.2-456 and continued the matter for sentencing by a jury. The Commonwealth called 3 members of the venire to testify. The jury sentenced Bell to 6 months of incarceration. The circuit court imposed the jury's sentence.

The CAV reversed the conviction and remanded the case. The CAV reiterated that "there are two distinct types of contempt, direct and indirect" where direct occurs in the presence of the court and indirect occurs outside the presence of the court. (quoting Scialdone v. Com., 279 Va. 422, 442 (2010) and Gilman v. Com., 275 Va. 222, 227 (2008)). "Simply put, a court may not, consistent with due process, summarily adjudicate or punish an indirect contempt." (citing Scialdone, 279 Va. at 443-44).

The CAV rejected the Commonwealth's argument related to Rule 5A:18. The CAV found that the ends of justice exception applied, finding that the due process violation sufficed for a miscarriage of justice or manifest injustice. The CAV reiterated that a hearing for indirect contempt requires "the opportunity to present a defense or explanation." (quoting id.). "In cases involving indirect contempt, the judge cannot both present the government's case and decide the factual and legal issues." (quoting U.S. v. Neal, 101 F.3d 993, 998 n.4 (4th Cir. 1996)). The CAV remanded the case for further proceedings.

Virk v. Clemens, et al., Record No. 1903-22-4: (Callins, J., writing for Beales and Friedman, JJ.)
Summary Contempt; False imprisonment; Gross negligence; Negligence per se; Respondeat superior; Demurrers; Rule 5A:18; Rule 5A:8; Sovereign immunity; Civil conspiracy
Deputies not liable for false imprisonment where circuit court had the authority to hold Virk in contempt and properly issued an oral ruling. The copy of the order given to Virk may have been deficient, but it was corrected and issued appropriately.

The circuit court held Virk in contempt during an emergency hearing in a divorce case because Virk "persistently challenged the court's ruling." The circuit court imposed a $250 fine and one night in jail. The clerk issued a DC-352 form and then hand-wrote an amendment, "As a civil contempt sanction the court orders that [Virk] is remanded to custody for one (1) night in Jail and a $250.00 fine." The copy delivered to Virk did not include the handwritten amendment nor the circuit court's endorsement.

Over a year later, Virk brought a civil suit against the Deputies, Sheriff, a deputy clerk, and the Clerk of the Circuit Court (Defendants). Virk alleged false imprisonment, negligence per se, gross negligence, and civil conspiracy. Virk included an allegation of respondeat superior for the Sheriff and the Clerk of Circuit Court. Virk filed several amended complaints, resulting in the instant complaint, the Third Amended Complaint. The Defendants demurred for a final time. The circuit court dismissed the claims, finding Virk failed to properly identify a claim and dismissed Virk's case with prejudice, stating "Virk had enough bites of this apple."

The CAV affirmed on all issues. The CAV clarified that "the question before [This Court] concerns the legitimacy of the actions undertaken by the defendants in response to [the circuit court's] oral order." While a court generally speaks through its written orders, "This language generally refers to instances when some conflict or ambiguity exists between the language expressed in a transcript and a court's order." (quoting Com. v. Williams, 262 Va. 661, 668 (2001)). The circuit court maintained the power to hold Virk in contempt and issued a valid judicial order, directing the Deputies to take Virk into custody.

Because the Deputies were acting "under color of law," there was no error in the circuit court sustaining the demurrer on the false imprisonment charge. The CAV reiterated, "If the plaintiff's arrest was lawful, the plaintiff cannot prevail on a claim of false imprisonment." (quoting Lewis v. Kei, 281 Va. 715, 724 (2011)). The CAV reminded Virk that neither the CAV nor the circuit court are bound by a plaintiff's legal conclusions in her complaint, only by the factual allegations. (citing Harris v. Kreutzer, 271 Va. 188, 196 (2007)).

The CAV then dispensed with the negligence per se and gross negligence claims with relative ease. All parties "acted diligently and under color of authority." The CAV also clarified, "A summary contempt proceeding is not inherently criminal in nature . . . straddling the realms of the criminal and civil." (citing Gilman v. Com., 275 Va. 222, 231 (2008)).

The CAV then found that the circuit court properly did not rule on the sovereign immunity issue. Where the circuit court's conclusion is based on a plaintiff failing to state a claim, the circuit court did not need to review the plea in bar alleging sovereign immunity. On the other two theories of law (civil conspiracy and respondeat superior), the CAV reiterated that "civil conspiracy is grounded in either tortious or unlawful conduct." Because there was no unlawful conduct here, there can be no civil conspiracy claim. Likewise, if there is no unlawful activity by the actor, the employer cannot be held liable under the theory of respondeat superior.

CAV Unpublished Decisions

Wright v. Com., Record No. 0228-23-1: (Athey, J., writing for Ortiz and Chaney, JJ.)
Sufficiency; Strike for cause; Jury instructions; Invited error doctrine
Obstruction of justice conviction reversed where Wright did not use force and the jury instructions specifically stated that force was an element of the offense charged. Even though Wright was not initially charged for obstruction with force, the jury instructions made it the law of the case.

Police stopped Wright's car for failure to display her license plates. The officer approached and asked for identification. Wright refused to provide her driver's license or other identification. The officer then ordered Wright out of the car, and

she refused to do that, as well. Wright then refused to roll down her window to speak with the multiple police officers that had arrived on scene.

The officers informed Wright that there were spike strips in front of her car and that the officers were prepared to force Wright out of the car. Wright continued to argue with the officers. Finally, Wright exited the car, but she locked the doors with her key fob to prevent the officers from looking in the car. Officers obtained the VIN, but Wright still refused to give the officers her name or identification. Wright told the officers to "give her a ticket." The officers responded that she would be arrested because they could not write her a ticket without her name. Wright simply stated, "Exactly."

Officers advised Wright that she was under arrest. When they grabbed Wright, she "gripp[ed] her cell phone, and then contort[ed] her wrist while pulling back against the officer's attempt to remove [the cell phone] from her hand." She continued tensing her arms and body, telling the officers "that hurts" and "you put me up against the car." After less than a minute, officers handcuffed Wright and attempted to take her car keys. Wright used "a clenched fist to prevent the officer from seizing" the keys.

At Wright's jury trial, one of the circuit court's instructions, to which the Commonwealth did not object, stated "that the Commonwealth had the burden to prove beyond a reasonable doubt that the obstruction of a law enforcement officer as alleged in the case was committed by force." The jury convicted Wright of obstruction of justice.

The CAV reversed the conviction. "Virginia recognizes a 'broad distinction between avoidance of a lawful arrest and resistance or obstruction.'" (quoting Cromartie v. Billings, 298 Va. 284, 301 (2020)). Further, the CAV stated that while the warrant did not allege the use of force, the jury instruction did. "It is well settled that instructions given without objection become the law of the case and thereby bind the parties." (quoting Owens-Illinois, Inc. v. Thomas Baker Real Estate, Ltd., 237 Va. 649, 652 (1989)).

Under the law of the case, the CAV found that the Commonwealth failed to prove that Wright used force to obstruct the officers. The CAV analyzed three main cases to find that there was insufficient force: Hamilton v. Com., 69 Va. App. 176 (2018); Lucas v. Com., 75 Va. App. 334 (2022); and Jordan v. Com., 273 Va. 639 (2007). In Hamilton and Lucas, the CAV found sufficient force where a defendant actively pushed against the officers. In contrast, the SCV in Jordan found that walking slowly, stopping repeatedly, and "stiffen[ing] his arms and . . . pulling away" was insufficient for force. (quoting Jordan, 273 Va. at 643-44). The CAV found that Wright's behavior was more like Jordan than the other two cases, and thus, there was insufficient evidence for force.

Commentary: While this seems obvious while reading the case, attorneys should ensure that the jury instructions reflect the actual charges. In this case, the CAV's opinion reads as if the circuit court prepared its own instructions and that the parties (specifically the Commonwealth) did not read behind the circuit court and assumed the instructions were correct. Judges are not infallible, as most (if not all), will admit. Attorneys, especially younger attorneys, should not be afraid to ensure that the judges are appropriately apprised of the relevant law and standards of review in any particular case. There is a reason that even the Supreme Court of Virginia requires a section of their briefs outlining what the standard of review is for evaluation of legal issues. Always inform the judge of the appropriate test in a given case, even if you think it's obvious or the judge knows it.

Koob v. Com., Record No. 0408-23-4: (Frucci, J., writing for Friedman, J., and Humphreys, SJ.)
§ 19.2-154; Polling the jury; Sufficiency; Defect in indictment; Jury instructions; Fatal variance; Rule 5A:18; Identity; Permanent and significant; Double jeopardy
DISCLAIMER – I refer to individual circuit court judges in this case for clarity only, as 2 judges were intimately involved with major portions of the case, and 1 assignment of error was that the circuit court improperly used 2 judges during the trial.
Koob's aggravated malicious wounding and A&B charges affirmed. CAV rejected Koob's 12 Assignments of Error, including 5 for being procedurally defaulted. Evidence sufficient to convict, and Double Jeopardy not implicated by the A&B conviction because it was a lesser included of the strangulation.

Koob contacted L.S., a prostitute, through a website "Eros." Koob arrived at the hotel room L.S. had reserved, and L.S. "was immediately alarmed by the look in his eyes." Koob pulled out a knife and pointed it at L.S. Koob began attacking L.S., including choking her to the point where L.S. fell unconscious. A bystander, Wynn, heard the commotion and notified the manager. When the manager and Wynn arrived at the room, Koob exited "covered in blood," with his hands "covered by a towel."

L.S. was bleeding and unconscious on the floor. She had "puncture wounds" to her face and chest, as well as five stab wounds in her back. She had a punctured lung, and blood was "all over" the hotel room. Koob was detained by security, and it appeared that Koob had wounds on his hands, and Koob believed "that he could lose his fingers." Koob claimed he had been attacked by a man and a woman.

L.S. had to undergo physical therapy and used a cane at the time of trial. She also had scars because of her injuries. Koob sustained 2 severed tendons. Koob's blood and L.S.'s blood was on the knife, L.S.'s blood was on Koob's hand and shoes, and both contributed blood to the various areas of the hotel room. In the interview with police, Koob again stated he was attacked by a white man, while "the girl jumped on his back and tried to choke him." Later, on a jail call, Koob admitted that this story was a lie.

Judge Tran presided over Koob's jury trial, which was supposed to last for 3 days. Less than a week before trial, Koob requested a 4th day of trial, without following the local rules. Judge Tran ruled that if there was a 4th day of trial, Judge Kassabian would have to step in due to other commitments. "Neither of the parties raised an objection." Ultimately, Judge Tran instructed the jury once, then excused himself for his other commitments, and Judge Kassabian instructed the jury a second time and presided over closing arguments on the 4th day of trial. Judge Tran ruled that he would take any motion to strike under advisement "unless it was clear that he should grant the motion." Both parties agreed to Judge Kassabian reinstructing the jury and Judge Tran's procedures for the motion to strike.

Koob filed a motion to strike, which was taken under advisement, and the Commonwealth filed a written response. Judge Tran granted the motion to strike the abduction charge but denied the motion to strike as it related to the strangulation charge. The jury convicted Koob of aggravated malicious wounding and assault and battery (lesser-included of strangulation). Judge Kassabian polled the jury, but one juror was not counted and raised the issue to the bailiff. Judge Kassabian repeated the polling, and all jurors confirmed the unanimity of the decision. Koob did not object.

Koob filed 6 motions to set aside the jury verdict, each alleging different grounds for reversal. In his appeal, Koob assigned 12 errors to the circuit court's decisions. The CAV dispensed with AOEs[1] 1, 2, 7, 8, and 12 on procedural grounds, finding that they "were not timely objected to and are thereby waived" under Rule 5A:18.

AOEs 3 and 11 were on sufficiency of the evidence, specifically that the Commonwealth "did not exclude the reasonable hypothesis of innocence that another person attacked L.S.," which the CAV rejected. The CAV reiterated that a jury verdict will not be overturned if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (quoting Melick v. Com., 69 Va. App. 122, 144 (2018)). "The Commonwealth need only exclude reasonable hypotheses of innocence that flow from the evidence, not those that spring from the imagination of the defendant." (quoting Simon v. Com., 58 Va. App. 194, 206 (2011)).

AOEs 4-6 related to the circuit court not dismissing the aggravated malicious wounding charge because the indictment was fatally defective. A fatal variance "when the proof is different from and irrelevant to the crime defined in the indictment and is, therefore, insufficient to prove the commission of the crime charged." (quoting Traish v. Com., 36 Va. App. 114, 134 (2001)). "A non-fatal variance is one that does not undermine the integrity of the trial." (quoting Purvy v. Com., 59 Va. App. 260, 266 (2011)). The alleged variance here was that "the

[1] Technically, Assignments of Error should be shortened to "AsOE" but that looks terrible, so I use "AOEs."

indictment failed to allege the means of bodily injury to L.S." The CAV stated there was no fatal variance in the indictment and the proof and rejected these AOEs.

AOE 9 assigned error to the denial of a motion to set aside the verdict based on Giglio v. U.S., 405 U.S. 150 (1972) and Napue v. Illinois, 360 U.S. 264 (1959). Koob alleged that there was "an agreement of leniency" between the Commonwealth and L.S. in exchange for her testimony. The jury was not informed of the agreement. The CAV found that "the record . . . contains no evidence that any leniency agreement ever existed." The detective testified that there was no immunity agreement.

Finally, AOE 10 asserted that double jeopardy was implicated by the convictions of aggravated malicious wounding and A&B. The CAV rejected this AOE because A&B was a lesser included for the strangulation charge. Koob was charged with assaulting L.S. with a knife and choking her with his hands, and the jury was "entitled to conclude that [the choking] amounted to assault and battery."

Commentary: The CAV did not state this as blatantly as it did in Tatusko v. Com., Record No. 1500-22-2 (Published), but the CAV was clearly frustrated with how many assignments of error were raised. "Appellate courts have sometimes lamented that 'the number of claims raised in an appeal is usually in inverse proportion to their merit." (Id. (quoting Com. v. Ellis, 626 A.2d 1137, 1140 (Pa. 1993))). "When a party comes to us with nine grounds for reversing the trial court, that usually means there are none." (Id. (quoting Fifth Third Mortg. Co. v. Chi. Title Ins., 692 F.3d 507, 509 (6th Cir. 2012))).

Some criminal practitioners believe that if they do not raise every single possible error on appeal that they are either (1) failing in a perceived obligation to assert all possible arguments on appeal; and/or (2) opening themselves up to ineffective assistance of counsel claims. Neither of those are true.

(1) Assigning error to each and every adverse decision by the circuit court will not serve you well. Primarily, it will limit your ability to advocate on each of your assignments of error. You should maximize your written and oral argument to give full effect to your assignments of error. If you are hitting 5 assignments of error and are adding more, take a hard look back at each of them. With 5 assignments of error, you only have 3 minutes for each one, including answering judges' questions. Secondarily, it could serve to frustrate the judges. Similar to the above cases, the appellate courts in Virginia may be put off by the sheer number of assignments of error. Personally, absent extenuating circumstances, I would limit myself to the above-referenced 5 AOEs.

*(2) "Counsel does not render ineffective assistance of counsel when making a strategic decision to appeal certain errors and not to appeal weaker claims." Jerman v. Dir. Dep't of Corr., 267 Va. 432, 441 (2004). "[T]he attorney need not advance **every** argument, regardless of merit, urged by the appellant . . . and must*

> *play the role of an active advocate."* *Evitts v. Lucey, 469 U.S. 387, 396 (1985). "Effective appellate counsel* ***should not*** *raise every nonfrivolous argument on appeal, but rather* ***only*** *those arguments most likely to succeed." Davila v. Davis, 582 U.S. 521, 533 (2017).*

Washington v. Buckingham County DSS, Record No. 0739-23-2: (O'Brien, J., writing for Decker, CJ., and Causey, J.)
Termination of parental rights; § 16.1-283; Best interests of the child; Alternative grounds theory
Termination of Washington's parental rights affirmed under § 16.1-283(C)(2) for Washington's failure to address her behavior and remedy the situation. Termination was in the best interests of the child.

> Washington is the biological Mother of five children, two of which were the subject of this appeal (C.W. and D.W.). DSS became involved with the family in 2017. The family subsequently moved to Culpeper, where Culpeper DSS opened several cases and found that parents "were unable to appropriately care for the children's needs." The family returned to Buckingham County, and DSS transferred the cases back to Buckingham.
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> DSS was concerned about the home "which had holes/gaps in the floor, exposed electrical wiring, gaps in the walls, and unobstructed access to the hot water heater." DSS was also concerned about "the children's lack of supervision and hygiene." DSS received multiple reports, including one where Mother let A.W. (a nine-year-old) use Mother's marijuana vape pen. DSS had initiated parent aide services and parental counseling, as well as supervision and case-management. Mother's behavior did not improve, and DSS eventually placed the children in foster care and "established requirements for [M]other to complete before reunification."
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> Over the next year, Mother made significant steps towards reunification and had been granted unsupervised visitation, including overnight visits. However, Mother and Father were being evicted from their house and were unable to find other suitable housing. Soon after, "Mother stopped making significant progress on the requirements for reunification," and DSS petitioned to terminate her parental rights. JDR terminated the rights; Mother appealed to circuit court.
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> At the circuit court hearing, DSS presented testimony from D.W. and C.W.'s foster mother. After an adjustment period, both D.W. and C.W. were both improving in foster care. DSS acknowledged "that [M]other cooperated with the service providers, followed through with the recommendations, and was appropriate at visitations." However, DSS showed that Mother had consistently maintained a relationship with Father which "was a persistent issue and impeded her ability to parent her children correctly." There was significant domestic violence between the two, and Mother "had provided excuses for Father all the time." Mother "lacked capacity to care for all the children at one time without a lot of help" and there was

"no help from Father." The circuit court terminated her parental rights under § 16.1-283(B) and (C)(2).

The CAV affirmed, finding sufficient evidence to terminate under § 16.1-283(C)(2). (C)(2) permits termination in situations that "hinge not so much on the magnitude of the problem . . . but on the demonstrated failure of the parent to make reasonable changes." (quoting Yafi v. Stafford DSS, 69 Va. App. 539, 552 (2018) (citation omitted)). In this case, while Mother had made progress, the circuit court found that "any progress made was too little, too late." (citing Thach v. Arlington Cnty. Dep't of Hum. Servs., 63 Va. App. 157, 171 (2014) (citation omitted) (finding that a court "may discount the parent's current progress if the best interests of the child would be served by termination")). "It is clearly not in the best interests of a child to spend a lengthy period of time waiting to find out when, or even if, a parent will be capable of resuming her responsibilities." (quoting Simms v. Alexandria Dep't of Cmty. & Hum. Servs., 74 Va. App. 447, 463 (2022) (citation omitted)).

Tshiteya v. Greenhouse Board of Directors, et al., Record No. 0806-23-4: (Per Curiam Opinion: Chaney and Frucci, JJ., Annunziata, SJ.)
Submission on briefs; Summary judgment; Statutory interpretation; Absurd result; Material fact in dispute; Fraud; Caveat emptor
Board of Directors of Condo association did not violate the plain language of the statute by voting to raise the monthly condo fee the same day as it issued a resale certificate for Tshiteya that cited the soon-to-be-outdated condo fee. Caveat emptor obligated Tshiteya to ask for an updated resale certificate and apprise herself of the new condo fees.

Tshiteya and her siblings were looking for a condo to buy with a monthly fee of less than $1000. They found a condo with a fee of $913.50 and purchased it. The resale certificate under §§ 55.1-1990(D) and 55.1-1991(A)(3) stated the fee as the same. That day, the Board voted to increase the fees to $1013.75.

Tshiteya filed for an injunction "barring the Board from collecting the increased condominium assessment." The Board demurred, and the circuit court sustained the demurrer. Tshiteya filed an amended complaint then a second amended complaint, now alleging constructive fraud on behalf of the Board, stating that the Board knew they were going to increase the condo fee and that was a material fact. The circuit court granted summary judgment in favor of the Board.

The CAV affirmed. First, the CAV found that the Board complied with the plain language of the Virginia Condominium Act. The statute "specifically required that the statement of the assessments to be included in the resale certificate reflect those 'currently imposed by the unit owners' association." (quoting § 55.1-1991(A)(3)). The CAV rejected Tshiteya's request to interpret the statute to require "disclosure of both current and prospective information." The absence of "language from a statute that is present in surrounding statutes . . . [is] an unambiguous manifestation of contrary intention of the legislature." (quoting JSR Mech., Inc. v. Aireco Supply,

Inc., 291 Va. 377, 385 (2016)). The CAV likewise found that the plain language does not lead to an absurd result.

Next, the CAV found that there was no material fact in dispute and that there was no misrepresentation to Tshiteya. "The Board provided complete and correct information to the seller" which then delivered the information to Tshiteya. The CAV found that "Tshiteya had obligations of her own" under the doctrine of caveat emptor. Tshiteya had access to the bylaws and should have asked for an updated resale certificate or the minutes from the board meeting prior to closing. "The law gives no remedy for such voluntary negligence." (quoting Virginia Natural Gas Co. v. Hamilton, 249 Va. 449, 455 (1995) (citation omitted)).

Commentary: This included a pro se Appellant who submitted on her brief, and the Appellees also submitted on brief. This is generally unwise (although I cannot say it was unwise in this case, without knowing more details). Even though oral argument changes a judge's mind only 10-20% of the time, it is never a good idea to pass up the opportunity to argue the case. This is the same rationale as it relates to Reply Briefs. Reply Briefs are the opportunity to have the last word in a case, just like rebuttal closing arguments. You should always have the last word in a case, if you can, whether written or orally. If you, as Appellee, see that the Appellant has waived oral argument, why would you do the same? You, as Appellee, have been granted the opportunity to be the only person present to answer the judges' questions.

Quinones Berrios v. Com., Record No. 0915-23-1: (Ortiz, J., writing for Athey and Chaney, JJ.)
Due process rights; Right to present a defense; Admissibility of evidence; Identity
Quinones Berrios not entitled to a hearsay exception based on his due process rights under these facts. Evidence sufficient to convict Quinones Berrios of murder and using a firearm in the commission of murder.

Quinones Berrios met with multiple friends late at night to meet with Rivera, who was going to serve a short jail sentence the next day and wanted to see his friends before going. Quinones Berrios was wearing a black shirt with white on the sleeve. Rivera gave Quinones Berrios a tan .45 handgun in a Walmart parking lot. The friends split up for about 30 minutes before returning to the Walmart and going to a 7-Eleven. The friends planned to go back to Rivera's apartment to continue the party.

Rivera arrived at his parking lot when a tall and skinny individual wearing a black shirt with white lettering/stripes on the sleeves approached the driver's seat and said, "Because you fucked with us" in Spanish before shooting Rivera. Rivera got out of the car and began backpedaling across the parking lot toward a truck, but the shooter followed and shot Rivera multiple times. Rivera died that night as a result of 4 gunshot wounds. The shooter then got into a car and fled the scene.

Officers began investigating, and one officer observed "a slim, light-skinned male, about 5'10" to 6' tall, wearing black pants, a black hat, and a black long-sleeved shirt with a white stripe on the arm." The officer "began chasing the man on foot" when he began to run. The man evaded several police officers but was eventually apprehended and identified as Quinones Berrios. A gun shot residue test was performed which found residue on his left hand. The next morning, one of the residents in the area where Quinones Berrios was arrested "found a small bookbag on the ground behind her home" which contained the tan handgun Rivera had given Quinones Berrios and other items.

Quinones Berrios attempted to call Officer McMahon, but the subpoena was not served because McMahon had left the police department. Quinones Berrios still attempted to introduce McMahon's hearsay statements, relying upon his "due process right to present evidence in his defense" which "trumped the rules of evidence." The circuit court excluded the evidence because there was no proper exception to the hearsay rule. The jury convicted Quinones Berrios of murder and use of a firearm.

The CAV affirmed his convictions. The CAV found no exception to the hearsay nature of McMahon's statements. The CAV recognized that "the Due Process Clause of the Fourteenth Amendment at times compels an exception to the rules of evidence." (citing Chambers v. Mississippi, 410 U.S. 284, 302-03 (1973); Neeley v. Com., 17 Va. App. 349, 356 (1993)). But, the CAV affirmed that "The mere invocation of the due process right cannot automatically and invariably outweigh countervailing public interests." (quoting Grattan v. Com., 278 Va. 602, 623 (2009) (citation omitted)). The CAV found that the circuit court did not abuse its discretion in excluding the evidence.

The CAV further found that the jury's convictions were not plainly wrong or without evidentiary support, again reiterating that "the question is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (quoting Linnon v. Com., 287 Va. 92, 98 (2014)). The CAV reviewed the evidence and found sufficient evidence to support the convictions.

Palmer v. Com., Record No. 0922-23-1: (Athey, J., writing for Ortiz and Chaney, JJ.)
Conditional guilty plea; 4th Amendment motion to suppress
Reasonable articulable supported the stop of the vehicle because of suspected passenger's active warrants. Palmer consented to a limited search that uncovered a gun and narcotics; subsequent search of the entire vehicle warranted under the automobile exception.

The Tri-Rivers Drug Task Force was attempting to find and arrest White, a convicted felon with numerous outstanding arrest warrants. They were conducting surveillance of a residence where they thought White was living. Officers followed a truck that had pulled into the driveway then left. An officer identified the passenger of the truck as White. They stopped the vehicle and approached with weapons drawn.

Palmer was the driver of the vehicle, and White was the passenger. A search of the passenger's area was conducted which located a firearm and cocaine between the passenger seat and the center console. Palmer admitted that there was a dollar bill with cocaine residue in the driver's door. The officers also located several magazines with ammunition.

Palmer contested the search, "arguing that both the traffic stop and the subsequent search were constitutionally infirm." The circuit court denied Palmer's motion to suppress, finding that there was reasonable suspicion for the traffic stop and that "Palmer had consented to the initial search, which revealed the gun and suspected cocaine in the wax paper" then that "Palmer then admitted that the other item was in the driver's door." After the denial of the motion, Palmer entered a conditional guilty plea.

The CAV affirmed. The CAV found that the stop was supported by reasonable suspicion, reiterating that "there are no bright line rules for determining whether a reasonable and articulable suspicion exists to justify an investigatory stop." (quoting Mitchell v. Com., 73 Va. App. 234, 246 (2021) (citation omitted)). The CAV found that "the officers possessed a reasonable, articulable suspicion that the truck's passenger was White who had outstanding warrants for his arrest."

The CAV then found that Palmer "consented to a search of the area around the front passenger seat of the truck." Following this search, the officers had "probable cause to believe that other controlled substances could be in the truck; therefore, searching the entire truck was justified under the automobile exception."

Bethea v. Com., Record No. 1019-23-1: (Athey, J., writing for Ortiz and Chaney, JJ.)
Submission on briefs; Involuntary plea; Plea colloquy; Abuse of discretion in sentencing; Rule 5A:18; Ends of justice exception
Bethea's arguments related to the involuntariness of his plea were not properly preserved under Rule 5A:18, and the ends of justice exception did not apply. Circuit court did not abuse its discretion in sentencing Bethea to 27 years' active incarceration, as the sentence was within the statutory maximum.

In 2021, Bethea ended his relationship with Williams. Bethea, along with a friend, "brandished a firearm before subsequently dragging her around the golf course by her arm until Bethea's friend persuaded him to flee." Williams then called 911 and obtained a protective order against him. A few days later, Bethea was searching for Williams, when Bethea pointed a gun at Wright and threatened to kill him. Bethea took Wright's phone and texted Williams, who did not recognize the phrasing and requested a welfare check on Wright. Officers found Wright "on the floor, covered in blood, disoriented, and still bleeding from cuts on his head and arms."

Bethea requested multiple evaluations of his competence to stand trial and his sanity at the time of the offense. Ultimately, after several continuances and

evaluations, the circuit court found that Bethea was only "trying to manipulate the system by delaying the trial" and denied his third continuance request. Bethea then pleaded guilty pursuant to a written plea agreement.

The circuit court conducted a plea colloquy, confirming that Bethea was pleading guilty of his own free will and that he understood the consequences. Bethea waived his right to trial by jury and confirmed that he wanted the circuit court to accept his guilty pleas.

The CAV affirmed, reiterating that "where a conviction is rendered upon a guilty plea and the punishment fixed by law is in fact imposed in a proceeding free of jurisdictional defect, there is nothing to appeal." (quoting Savino v. Com., 239 Va. 534, 539 (1990) (citation omitted)). The CAV conducted a lengthy analysis of his argument, but ultimately the CAV found that Bethea's arguments related to his plea were procedurally defaulted under Rule 5A:18, finding that the good cause exception was not implicated.

The CAV also found that the circuit court properly reviewed all the mitigating evidence presented and fashioned an appropriate sentence. "Bethea cited his toxic relationship with Williams as the reason for committing the crimes which demonstrated 'a complete lack of understanding of the consequences' of his conduct." "It is within the circuit court's purview to weigh the mitigating circumstances of the case in deciding a sentence." (citing Keselica v. Com., 34 Va. App. 31, 36 (2000)).

Hernandez v. Com., Record No. 1100-23-2: (AtLee, J., writing for Beales and Malveaux, JJ.)
Contempt; Competence to testify; § 19.2-271; Right-result-for-a-different-reason doctrine
Contempt conviction reversed because the judge testified about a matter that arose in the course of his official duties, which is prohibited by § 19.2-271. Right-result-for-a-different-reason doctrine did not apply.

Hernandez was frustrated because, in a prior proceeding, the circuit court judge ordered that Hernandez's dog needed to be euthanized as a dangerous dog. Later, Hernandez appeared in front of the circuit court for a texting-while-driving charge. Hernandez called the presiding judge, "the Commonwealth's Attorney, and another courtroom officer 'cowards' in open court." Hernandez also signed a court document with "Fuck you."

The circuit court held a hearing on contempt and stated that there were two acts of contempt, one direct and one indirect. The circuit court "described the events that occurred," and Hernandez objected, citing § 19.2-271, which precludes a judge from testifying about matters that arose "in the course of [their] official duties." The circuit court overruled the objection and found that "the coward language was an affront to the respect that is due to the Commonwealth of Virginia." The circuit court also found that the "Fuck you" was not directed toward the circuit court and found no contempt.

The CAV reversed, stating, "It is undisputed that [the judge] testified at the contempt hearing." While the "circuit court could have handled the contempt issue . . . when the offense occurred," it gave Hernandez a hearing. At the hearing, "[t]he judge then chose, over Hernandez's objections, to testify in that hearing, despite being incompetent to do so under Code § 19.2-271." The CAV found that it could not affirm under the right-result-for-a-different-reason doctrine because additional facts needed to be developed.

Commentary: It appears that the judge who testified was the presiding judge at the hearing on contempt; however, that is slightly unclear, as the CAV's opinion refers to the judge by name when discussing the testimony and to the circuit court when discussing the findings/ruling. If this is the case, though, I'm curious how this is different than a judge simply stating its findings in a direct contempt proceeding. A judge sees something occur but decides not to immediately hold the person in contempt. The judge then issue process against the person after deciding it was too egregious not to hold the person in contempt. At a hearing, the judge reiterates the facts/findings of the court and holds the person in contempt. Is that really testimony?

Mullis v. McDow, et al., Record No. 1219-23-4: (Humphreys, SJ., writing for Friedman and Frucci, JJ.)
Medical malpractice; Admissibility of evidence; Expert testimony; Rule 5A:18; Summary judgment; Harmless error; Jury instructions
No error in the admission of scientific testimony related to Mullis's diagnosis. CAV held that any error in admitting a doctor's personal belief of the requirement of a liver biopsy was harmless. Circuit court did not abuse its discretion in denying a modified jury instruction and opting to give the model.

In 2008, Mullis began seeing Dr. Gill (gastroenterologist) for a variety of serious symptoms, for which he was hospitalized in 2016. Mullis also regularly saw a hematologist for liver diseases. In 2016, Dr. Gill diagnosed Mullis with a hyperkinetic gallbladder and recommended removing the gallbladder as well as a liver biopsy. Dr. McDow performed the surgery in April 2016. Mullis suffered a liver bile leak, which is a known risk of a liver biopsy, and sued for medical malpractice.

At trial, Mullis called 3 expert witnesses who opined that the liver biopsy was unreasonable and that Dr. McDow did not obtain informed consent. Mullis was confronted with significant prior inconsistent statements made during a deposition. Dr. Gill testified regarding his reasons for performing the liver biopsy. Mullis objected to Dr. Gill's testimony as it related to the liver biopsy being "judicious or smart," but the circuit court overruled the objection as one of Mullis's experts already testified that Dr. Gill thought the biopsy was "judicious or smart." The jury found in favor of the Defendants, and the circuit court dismissed the case.

The CAV affirmed. Mullis assigned 5 errors on appeal. The CAV dispensed with one related to one doctor's testimony because Mullis failed to obtain a ruling by the circuit court on his objection, citing Rule 5A:18. The CAV next found no error in the circuit court's denial of summary judgment because there was a fact in genuine dispute and "ripe for the jury to consider."

The CAV found that a doctor's testimony related to hyperkinesia was properly admitted because the circuit court properly found that the testimony was supported by reasonable and reliable scientific data. "When scientific evidence is offered, the court must make a threshold finding of fact with respect to the reliability of the scientific method offered." (quoting Spencer v. Com., 240 Va. 78, 97 (1990)). The evidence here was not inherently unreliable, so it was properly admitted. The CAV dispensed with another assignment of error on testimony, citing the harmless error doctrine.

Finally, the CAV rejected Mullis's argument that the circuit court should have given a modified finding instruction to the jury. The circuit court gave the model finding instruction, which properly stated the law, and there were no principles of law that were left out of the jury instructions. As an aside, the CAV reminded Mullis that he "did not submit a proposed instruction" so the CAV had "no way of determining whether it would have correctly stated the law."

Morse v. Com., Record No. 1240-22-2: (Decker, CJ., writing for Beales and Lorish, JJ.)
Venue; Sufficiency; Rule 5A:18
CAV affirmed Morse's attempted abduction conviction where Morse had done more than mere preparation for the abduction. The Commonwealth presented sufficient evidence to demonstrate venue. Morse's argument on the conspiracy was procedurally defaulted under Rule 5A:18.

Morse worked at a Comcast Cable location in Virginia along with Mitchell and Mason-Rogers, until Morse was transferred to a Florida location in 2018. In 2018 and 2019, 2 masked individuals "accosted" Mitchell and Mason-Rogers. The 2 individuals were identified as a "short, stocky female" and "a slim male with dreadlocks." Mason-Rogers affirmatively identified them as Morse and Morse's boyfriend, whom Mason-Rogers had met several times. Mason-Rogers stated she "felt 100 percent" about their identities.

In the 2018 incident, the robbers forced Mitchell to disarm the building's alarm and open the safe, stealing $26,000. The pistol used in the robbery had purple trim. In the 2019 incident, Mitchell had just left the office and noticed that a black sedan was following him aggressively. Mitchell called 911 and went straight to a Virginia State Police headquarters. Shortly after, a Trooper found Morse in a black sedan in the apartments Mitchell saw his pursuer enter. Morse had black ski masks, plastic masks, pepper spray, and a pistol with purple trim. A jury convicted Morse of charges related to the 2019 incident but could not agree on a verdict for the 2018 incident, and a mistrial was declared. Morse appealed her 2019 convictions.

The CAV affirmed. Morse's first argument was that venue was improper because there was no evidence of an action within Prince George County because Mitchell only noticed he was being followed in an adjacent jurisdiction. The CAV reiterated that "venue is not a substantive element of a crime and need not be proved beyond a reasonable doubt." (quoting Bonner v. Com., 62 Va. App. 206, 210 (2013) (en banc)). The evidence only needs to show "a strong presumption that the offense was committed within the jurisdiction of the circuit court." (quoting id.).

On the issue of sufficiency of the evidence, the CAV found that the jury's conviction was not plainly wrong or without evidentiary support. For the attempted abduction, the CAV found sufficient evidence that Morse had taken a direct act toward abducting Mitchell. "Mitchell's decision to go to the VSP building foiled the actual abduction, but it did not 'absolve the appellant of attempting to commit the crime.'" (quoting Rogers v. Com., 55 Va. App. 20, 29 (2009)). The CAV then rejected Morse's argument related to the conspiracy conviction because she did not argue her legal theory before the circuit court, citing Rule 5A:18 and refusing to exercise the ends of justice exception.

Edelblute's Service Center, et al. v. Edelblute, Record No. 1430-23-2: (Lorish, J., writing for Decker, CJ., and Beales, J.)
Worker's Compensation Commission; Res judicata; Attorney fees
Res judicata applied to the Service Center's refusal to reimburse Edelblute for mileage because the Commission's prior decision on the issue (which the Service Center did not appeal) was dispositive.

Edelblute was injured while changing tires at the Service Center in 1977. The Commission then awarded him lifetime medical benefits. Edelblute has received chiropractic care from the same physician since 1989. The physician is in Chesapeake, but Edelblute moved to Chesterfield in 2013, making his trip to see the physician much longer. The Service Center refused to reimburse Edelblute for mileage, arguing that Edelblute should see a closer physician. The Commission rejected the argument and ordered that the Service Center should reimburse him for mileage. The Service Center never appealed this decision.

A few months later, Edelblute filed another claim for benefits, along with mileage again. The Service Center refused, again. The Commission found that res judicata applied and barred the Service Center from raising the same arguments. The Commission also awarded attorney fees. The Service Center appealed this order.

The CAV affirmed, citing Gottlieb v. Gottlieb, 19 Va. App. 77, 81 (1994), for the elements of demonstrating res judicata. (1) same remedies sought; (2) same cause of action; (3) same parties; (4) "identity of the quality of the persons for or against whom the claim is made." (quoting id.). The CAV found that res judicata applied and awarded appellate attorney fees "because the Service Center's arguments

lacked merit" and weren't grounded in reasonable defenses. (citing Phillip Morris USA, Inc. v. Mease, 62 Va. App. 190, 205 (2013)).

Hunter v. Com., Record No. 1903-23-3: (Decker, CJ., writing for O'Brien and Causey, JJ.)
Admissibility of evidence; Certificate of analysis; Sufficiency; Chain of custody; DUI; Reasonable hypothesis of innocence
Hunter's DUI and possession of methamphetamine convictions affirmed where the Commonwealth proved every "vital link" in the chain of custody. Hunter's alleged reasonable hypothesis of innocence was merely a different interpretation of the evidence, and the circuit court's interpretation was supported by the evidence.

The CAV rejected Hunter's appeal without oral argument, finding it was "wholly without merit." Code § 17.1-403(ii)(a); Rule 5A:27(a).

Hunter crashed her car into a utility pole early in the morning. Officers arrived and administered field sobriety tests, which Hunter performed poorly. Another officer saw, in plain view, narcotic paraphernalia. Officers searched Hunter's car and found a clear pipe with residue, a burnt metal spoon, more residue, and a scraper. Hunter identified the pipe as "a meth pipe." The officers transported Hunter to the hospital for a blood draw and submitted the evidence for analysis. The residue came back as methamphetamine, and her blood had THC, .23 mg/L methamphetamine, amphetamine, and norbuprenorphine.

At trial, the Commonwealth introduced evidence from the phlebotomist who was certain she conducted the blood draw. The phlebotomist also recognized her own handwriting and name on the certificate of withdrawal form and that she would only have written her name on the certificate if she was the one who drew the blood. The circuit court convicted Hunter of DUI and possession of methamphetamine.

The CAV affirmed, finding sufficient evidence for the vital steps of the chain of custody because the Commonwealth established "that the [blood] obtained by the police was the same evidence tested" and that the blood was Hunter's. (quoting Hargrove v. Com., 53 Va. App. 545, 553 (2009) (citation omitted)). The CAV further found sufficient evidence for the possession conviction.

On the DUI, Hunter argued that there was a reasonable hypothesis of innocence that she was not under the influence at the time of driving, and that she "ingested drugs after the accident occurred." The CAV rejected this argument, finding that the circuit court's conviction was supported by the evidence. In particular, Hunter told the officers that the crash had "just occurred." The circuit court's interpretation of the evidence merely conflicted with Hunter's interpretation.

"Merely because a defendant's theory of the case differs from that taken by the Commonwealth does not mean that every reasonable hypothesis consistent with his innocence has not been excluded." (quoting Edwards v. Com., 68 Va. App. 284, 301 (2017)). "The question is not whether some evidence supported the hypothesis, but

whether a rational factfinder could have found the incriminating evidence rendered the hypothesis of innocence unreasonable." (quoting James v. Com., 53 Va. App. 671, 682 (2009) (citation omitted)).