Overview

The Supreme Court of Virginia (SCV) reconvenes on August 28 for a two-day writ panel. There are a total of 54 cases on the panel, and there are quite a few large questions that may be taken up for appeal by the SCV. They will resume merit arguments in September, with 6 cases on the docket. The upcoming merit cases are split equally between criminal and civil; although, 1 of the civil cases is a disciplinary proceeding.

I have a strong suspicion that we will begin to see a significant uptick in the SCV's caseload based on the Court of Appeals of Virginia (CAV) rulings from the last few months. The SCV had begun increasing their case load over the last 6 months, and we will begin seeing new opinions coming out later on this year. As of now, the SCV has a completely clear caseload, with all of its argued cases being resolved by opinion or order.

There was only one published case from the CAV this week. The CAV affirmed a circuit court's judgment that Norfolk DHS was required to disclose documents related to an unfounded allegation of child abuse. Norfolk Dep't of Human Serv's. v. Goldberg, Record No. 1382-23-1. The circuit court found sufficient evidence for a bad-faith actor exception under § 63.2-1514.

In unpublished cases, the CAV focused on criminal cases and cases wholly without merit. In Freeman v. Com., Record No. 0217-23-2, the CAV affirmed an abduction conviction and clarified detention through intimidation. In Coleman v. Com., Record No. 0584-23-2, the CAV affirmed a murder conviction where the defendant was properly identified by circumstantial evidence. Finally, in Roane v. Com., Record No. 0971-23-1, the CAV affirmed the denial of a suppression motion where Roane resisted a lawful detention and pulled a gun on the officers during the struggle.

SCV Opinions and Orders

No Supreme Court of Virginia Opinions or Orders this week.

CAV Published Decisions

Norfolk Dep't of Human Serv's. v. Goldberg, Record No. 1382-23-1: (Lorish, J., writing for Fulton and White, JJ.)
Bad faith disclosure exception; § 63.2-1514(D); Writ of certiorari; Statutory interpretation; Ambiguous language; Doctrine of in pari materia; Negative implication; Rule 5A:20
Norfolk DHS must turn over documents related to an anonymous and unfounded allegation of child abuse because Goldberg demonstrated sufficient evidence to implicate the Bad-Faith-Actor exception.

> Goldberg is married to Ali with 2 children. An anonymous report was made to DHS that Goldberg was sexually abusing his daughter, L.G. DHS investigated and found the report to be "unfounded and closed the investigation." Because Goldberg is a member of the U.S. Navy, Naval Criminal Investigative Services (NCIS) also conducted an investigation.

Goldberg and Ali suspected that Ali's mother, MacKrell, was the one who made anonymous report based on their history with her. Goldberg petitioned the circuit court to order DHS to disclose the report under § 63.2-1514(D). 1514(D) permits disclosure of records if there "is a reasonable question of fact as to whether the report or complaint was made in bad faith or with malicious intent" and such disclosure does not endanger the complainant's safety. DHS opposed the petition.

The circuit court received evidence of MacKrell's history with the family. MacKrell had repeatedly made false allegations against Goldberg and the children's nannies, and generally interfered with the family. Ali testified that MacKrell "tried to make L.G. behave in a way that would support the allegations." Finally, there was information in the report that was known only to MacKrell. The circuit court granted the petition but stayed the execution of the verdict until the appeal resolved.

The CAV affirmed. First, the CAV found that "report" and "complaint" are not defined by the statute and are thus ambiguous. The CAV determined it had to "look to the purpose or spirit of the statute to help determine its meaning." (citing Eley v. Com., 70 Va. App. 158, 164 (2019)). The CAV found that the purpose of the statute was to "enable a person wrongfully accused of child abuse or neglect to obtain the details of the accusation from the . . . department that investigated the ill-founded charge." (quoting Gloucester Cnty. DSS v. Kennedy, 256 Va. 400, 404 (1998)).

The CAV recognized that "in today's society there is no more deplorable badge of infamy a person can wear than that of being a child abuser." (quoting Jackson v. Marshall, 19 Va. App. 628, 635 (1995)). The CAV stated that this statute "is one of the very few tools parents possess to fend off false reports that would deprive them of their children and potentially subject them to criminal punishments."

The CAV then reviewed whether the bad faith disclosure exception applied in these circumstances. The CAV rejected DHS's argument that the statute applied only in circumstances were the person directly complained to DHS instead of through an intermediary. In this case, DHS learned of the complaint from a mandatory reporter who heard it from an anonymous individual. The CAV stated that DHS's interpretation was adding "words into the statute that simply are not there." The CAV reviewed the in pari materia and negative implication doctrines in its statutory analysis before ultimately concluding that the bad faith exception did apply.

"Interpreting the disclosure statute not to allow the release of investigative records simply because the malicious accuser complained through an intermediary would frustrate the statute's purpose, preventing the victim of such a report from receiving civil relief." "[W]e do not think the General Assembly intended to allow a giant loophole for bad faith actors to avoid civil liability."

Commentary: Cases like this are interesting because, to a layperson, this conclusion is relatively obvious. It would likely surprise most people to learn that

this was not already established law. But, the CAV has to conduct a full statutory interpretation analysis to arrive at a conclusion most would reach in a few seconds after reading the statute. Judge Lorish's section on the application of various doctrines is well-written and should be read by all practitioners.

CAV Unpublished Decisions

Freeman v. Com., Record No. 0217-23-2: (Beales, J., writing for Decker, CJ., and Lorish, J.)
Sufficiency; Abuse of discretion in sentencing; Detention; Intent
Convictions for domestic A&B and abduction affirmed where there was sufficient evidence for detention through intimidation and an intent to deprive victim of her liberty. No abuse of discretion in sentencing Freeman to 5 years and 6 months.

Freeman and Womack were in a romantic relationship and living together in May 2022. They got into an argument, and Freeman "went to [Womack] and put both his hands around her neck." While Freeman was strangling Womack, she hit him with a frying pan, then he began "squeezing tighter." Womack hit him again, and he released her. She "gasped for air" and was dizzy.

Freeman asked Womack why she hit him with the frying pan before pushing her down and beating her. Freeman repeatedly stated, "I'll kill you." The downstairs neighbor called the police. Officers arrived at the apartment but "no one answered" the door. When officers finally entered the apartment, Womack did not speak to them and "would just nod and make head gestures." At trial, Womack testified that she did not answer the door because she was afraid and "gave up and prayed hope somebody come save me."

A jury convicted Freeman of felony domestic A&B and abduction. His prior convictions included four prior domestic A&Bs, a strangulation, and firearm-related convictions. The circuit court sentenced Freeman to four years and six months' active incarceration on the domestic A&B and one year of active incarceration on the abduction.

The CAV affirmed, reiterating that an abduction or detention can be accomplished solely through intimidation. "A defendant intimidates a victim if he puts the victim in fear of bodily harm by exercising such domination and control as to overbear her will." (quoting Brown v .Com., 74 Va. App. 721, 731 (2022) (citation omitted)). Further, "intimidation can occur even in the absence of an overt expression of an intention to do bodily harm" and can occur solely because of "psychological pressure." (quoting id. at 731-32). The CAV found that a rational factfinder could reasonably have concluded that a detention occurred through intimidation. On the question of Freeman's intent to deprive Womack of her liberty, the CAV again found sufficient evidence for a rational factfinder to conclude his intent.

The CAV found no abuse of discretion in the circuit court's sentence. The CAV found that the record showed that the circuit court "carefully weighed all of the

> evidence before it at the sentencing hearing." "[W]hen a statute prescribes a maximum imprisonment penalty and the sentence does not exceed that maximum, the sentence will not be overturned as being an abuse of discretion." (quoting Minh Duy Du v. Com., 292 Va. 555, 564 (2016)).

Charles v. Com., Record No. 0575-23-2: (Beales, J., writing for Decker, CJ., and Lorish, J.)
Sufficiency; Jury questions; Definition of "legal excuse"; Admissibility of evidence; Rule 5A:18; Ends of justice exception; Approbate and reprobate
Conviction of abduction affirmed where Charles locked victim in the bathroom overnight, and victim could only contact police by placing a sign in the window that said 911, relying on bystanders to call. Other assignments of error waived by Rule 5A:18 and the approbate and reprobate doctrine.

> In 2020, J.S. was struggling with heroin addiction and was unhoused. Charles took J.S. into his house after meeting her online. But, Charles had certain "rules" that J.S. had to follow. These "rules" included being handcuffed when Charles was outside the house and that Charles could turn off wi-fi access to J.S.'s phone when he thought that she was "misbehaving." Charles also had cameras throughout the house, including in J.S.'s bedroom. The two could communicate through the cameras. Charles kept "numerous firearms" in the house that he showed to J.S.
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> In December, J.S. went to a friend's house for Christmas but felt that she had to return to Charles's house because "all [her] stuff was there." Things were tense upon her return, and "Charles was keeping an eye on [her] more than usual." J.S. decided she wanted to leave and packed a bag, but Charles did not let her leave. Charles "handcuffed [J.S.] and then tied a rope to the handcuffs," locking J.S. in the bathroom. J.S. was forced to sleep in the bathroom that night. The next day, J.S. put a sign in the window that said "911." A bystander saw the sign and called the police. Police arrived and knocked on the door, but Charles refused to open the door. When police kicked down the door, "J.S. was handcuffed to the handrail." Charles had taken his pistol off his person and "tossed it behind him."
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> At trial, Charles attempted to introduce "a nude photograph of J.S." The circuit court ruled that Charles could ask about the photograph and could admit it only if she denied its existence. The circuit court subsequently ruled that because J.S. admitted to wearing handcuffs voluntarily, "there was no reason to introduce the nude photograph." Charles's counsel agreed.
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> The circuit court instructed the jury that to find Charles guilty of abduction, the jury must find beyond a reasonable doubt that Charles "acted without legal justification or excuse." The jury asked during deliberation, "What is an excuse?" The circuit court answered "that the court could not define the legal instruction but that the jury must consider it in its entirety" adding at the end, "words must be given their plain meaning." Charles did not object. The jury convicted Charles of abduction.

> The CAV affirmed. The CAV found that "Charles used physical objects to prevent J.S. from leaving the bathroom." The CAV reiterated that "the jury was not required to accept Charles's testimony that J.S. asked to sleep in the bathroom." "In its role of judging witness credibility, the fact finder is entitled to disbelieve the self-serving testimony of the accused and to conclude that the accused is lying to conceal his guilt." (quoting Speller v. Com., 69 Va. App. 378, 388 (2018)).
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> On Charles's other assignments of error relating to the answer to the jury's question and the exclusion of the nude photograph, the CAV found that Rule 5A:18 barred appellate review. The CAV further found that the ends of justice exception did not apply because Charles's counsel specifically agreed to the answer to the question and to the exclusion of the photograph. To permit appellate review would be allowing Charles to approbate and reprobate. (citing W. Refin. Yorktown, Inc. v. Cnty. of York, 292 Va. 804, 826 (2016) (citation omitted)).

Coleman v. Com., Record No. 0584-23-2: (Decker, CJ., writing for Beales and Lorish, JJ.)
Sufficiency; Identity; Recantation; Motion for new trial; After-discovered evidence
Conviction for murder affirmed where sufficient evidence was presented for a jury to conclude Coleman was the shooter. Coleman not entitled to a new trial based on after-discovered evidence because he failed to demonstrate that the evidence might have altered the verdict.

> Jackson and Mays were drinking in a hotel room. Jackson took out the trash late at night, and "a man whom he did not recognize approached from the parking lot and asked if Mays was in [the] room." The man identified himself as "Whoad or something like Whoad." Jackson returned to the room and told Mays that Whoad was outside. Mays recognized the name and went outside. Whoad "then pulled a handgun from his pocket and shot Mays in the head." Mays died. Jackson called 911, and police arrived shortly. Police recovered a single 9mm cartridge casing and, later, a singly 9mm bullet from Mays's body.
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> Coleman became a suspect when one of his former girlfriends told police "that she knew Coleman as 'Whoadie.'" Coleman "admitted that he was at the hotel on the night Mays was shot" and stated that "she had filed charges against [Coleman's] cousin." Coleman also "admitted that he had several nicknames, including Whoadie." Coleman (arrested on unrelated warrants) was incarcerated, and the Commonwealth reviewed his jail calls, 5 of which were played at trial. Several of the calls was to Browder, Coleman's girlfriend, and one of them directed Browder to "find that junk behind the trashcan and hide it somewhere real safe." Coleman told Browder to "drop that bitch" in a gutter and "take the clip out . . . and throw the clip somewhere else."
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> Based on the call, officers found a 9mm handgun in a sewer near Browder's house. Forensic analysis confirmed that Browder's fingerprint was on the gun and that it was the same gun that killed Mays. The jury convicted Coleman of first-degree

murder, use of a firearm, shotting in public, and solicitation to destroy evidence of a felony.

Coleman moved for a new trial, based on an affidavit purportedly from Jackson that he didn't want to testify at Coleman's trial. Coleman's counsel told the circuit court that he was unable to vouch for the authenticity of the affidavit but submitted it to the circuit court for its review. The affidavit stated, in part, that Jackson lied to the detectives and that Jackson was drunk that night and could not recall what the shooter said his name was. Jackson's testimony from another trial also stated that Jackson "was drunk and high out of his mind" that night. The circuit court denied the motion for a new trial because "one small area of discrepancy" was insufficient "to then discard all of the other evidence" that "showed Coleman's guilt beyond a reasonable doubt."

The CAV affirmed. Coleman's only argument on sufficiency was that the Commonwealth failed to prove his identity as the shooter. The CAV rejected this argument, finding that the jury heard all the evidence and Coleman's arguments on the insufficiency of the circumstantial evidence and the insufficient forensic evidence. "The record provides no legal basis for disturbing" the jury's conclusions that "the Commonwealth's witnesses were credible, knowledgeable, and believable." (citing Raspberry v. Com., 71 Va. App. 19, 29 (2019)). The CAV also found sufficient circumstantial evidence for the factfinder to conclude Coleman was the shooter, again stating that the jury "was at liberty to discount his self-serving statements as little more than lying to conceal his guild." (quoting Poole v. Com., 73 Va. App. 357, 369 (2021) (citation omitted)).

The CAV also found no abuse of discretion in the circuit court's denial of the motion for a new trial. The CAV reiterated the four-part test for a new trial based upon after-discovered evidence: (1) evidence was discovered after the trial; (2) the evidence "could not have been obtained prior to trial through the exercise of reasonable diligence"; (3) the evidence was not cumulative, corroborative, or collateral; and (4) the evidence is material, and "should produce an opposite result on the merits at another trial." (quoting Johnson v. Com., 41 Va. App. 37, 43 (2003)). The CAV found that Coleman failed to meet his burden; therefore, the circuit court did not abuse its discretion.

Commentary: In an unrelated point, the CAV pointed out that several of the jail calls admitted at trial were not made under Coleman's name. A jail employee testified that it is extremely common for inmates to use other inmates' phone accounts to make calls. Assumedly, this is done under the belief that the Commonwealth does not pay attention to all calls or have the capability to search all calls made at a jail. It never made sense to me as a Commonwealth's Attorney why inmates believe that. The Commonwealth routinely searches the database by telephone number called, locating all calls made from the jail to that number, regardless of the inmate's name/originating account. This is specifically because inmates have been known to do this.

Najacque v. Com., Record No. 0845-23-1: (Ortiz, J., writing for Athey and Chaney, JJ.)
Definition of "child cruelty"; Rule 5A:18; Doctrine of judicial restraint; Rule of lenity
Convictions of child cruelty affirmed because the definition of child cruelty includes giving a child a sexually transmitted infection. No issue of inconsistent verdicts, even though the jury acquitted Najacque of the rape and aggravated sexual battery charges.

> Najacque's daughter, A.N. was born in Haiti in 2006. Starting in 2014, Najacque sexually abused A.N. for years, including penetrating her with his penis. A.N. testified at trial that the abuse occurred at least 1-2 times a week that she was in Virginia. In 2017, the abuse escalated to 2-3 times per week. A.N. disclosed the abuse to Jasna (Najacque's sister), in 2018. A.N. tested positive for a sexually transmitted infection.
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> Najacque was indicted on 36 different felonies, including 6 counts of rape, 18 counts of aggravated sexual battery, 6 counts of indecent liberties, and 6 counts of child cruelty. At trial, Najacque testified that Jasna and Najacque's ex-wife persuaded A.N. to lie about the abuse. The jury convicted Najacque only of 5 counts of child cruelty.
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> The CAV affirmed, finding that while the statute was ambiguous, even when applying the rule of lenity, the definition of child cruelty includes giving a child a sexually transmitted infection. Code § 40.1-103(A) "covers a wide swath of criminal behavior (from mere endangerment to actual torture)." (quoting Barnes v. Com., 47 Va. App. 105, 111 (2005)).
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> The CAV further found that while the convictions may seem "inconsistent," it is impossible to peer behind the veil and determine what the jury was thinking "because the jury [may have] elected through mistake, compromise, or lenity to acquit or to convict of a lesser offense for one charged crime that seems in conflict with the verdict for another charged offense." (quoting Kovalaske v. Com., 56 Va. App. 224, 233 (2010) (citation omitted)). "Despite the apparent inconsistency of a verdict, courts may uphold inconsistent verdicts, provided that the evidence supports the verdict challenged on appeal." (quoting id.). The evidence here supported the jury's findings.

Murphy v. Olive, Administrator of the Estate of Darlene Olive, N.P., et al., Record No. 0865-23-2: (Huff, J., writing for AtLee and Callins, JJ.)
Summary judgment; Discovery; Code § 8.01-401.2; Rule 5A:8
CAV affirmed dismissal of case, finding that Murphy would be unable to present testimony from a physician regarding causality of the injury. No error in the circuit court not amending discovery deadlines.

> Murphy filed a medical malpractice claim against a Nurse Practitioner (NP), Darlene Olive, and others, alleging that the damage to his left foot, which resulted in the amputation of two of his toes, was caused by negligence. Murphy filed

multiple pre-trial motions, including one to disqualify Defendants' counsel. Defendants had elected to joint representation and had no conflicts, so the circuit court denied the motion. Murphy "continued to file legal memoranda throughout the continuing litigation, arguing that defense counsel should be disqualified for conflict of interest." The circuit court entertained 2 of the motions as requests for reconsideration, then "declined to address the issue further."

Murphy identified several expert witnesses: Dr. Armstrong, Dr. Boykin, N.P. Seaman, and N.P. Kinsella. Armstong (who was supposed to testify to causation) withdrew from the case, and discovery in the case closed. When they learned of Armstrong's withdrawal (from Armstong herself), Defendants filed a motion for summary judgment, arguing that Murphy would be unable to meet his burden of causation. The circuit court agreed based on the expert witness designations and § 8.01-401.2(B)(ii) that none of the other witnesses could testify to causation.

The CAV affirmed. The CAV found that the circuit court did not err under any of Murphy's 8 assignments of error. In part, the CAV found that Murphy failed to properly prepare the Record under Rule 5A:8 that would allow the CAV to review whether Dr. Boykin could testify to causation. The CAV found affirmatively that the plain language of the statute did not permit the NPs to testify as to causation and that the designation did not permit anyone to testify as to the breach of implied consent.

The CAV found that the circuit court did not err in receiving Armstrong's testimony at the summary judgment hearing, finding no privilege applied in her testimony. (distinguishing Turner v. Thiel, 262 Va. 597 (2001)). The CAV also found no error in the circuit court granting summary judgment or in refusing to re-open discovery to permit additional designations. The Rules permit the circuit court to amend discovery orders or pre-trial scheduling orders, but neither § 8.01-4 nor Rule 1:18 require it to do so. The CAV dispensed with Murphy's other 5 assignments of error, finding none related to the ultimate question of summary judgment.

Commentary: The courts in this case (circuit and CAV) stated that counsel were acting unprofessionally. The circuit court, in a letter opinion, specifically "called for the parties to behave professionally." The CAV referenced Murphy's sheer number of filings made in the circuit court, the request to increase the reply brief page limit, the 8 assignments of error, and the fact that Murphy failed to advise opposing counsel of Armstrong's withdrawal from the case. While simply having these items do not alone indicate disfavor by the courts, the combination of these factors and the language with which they are referenced certainly do.

The filing of repeated motions after a court has made its ruling is unnecessary and will only serve to frustrate the judge and damage your reputation with the court and the bar. File the motion, if it is denied, spend some time to ensure that all arguments are preserved in a motion for reconsideration, then let the issue lie for

appeal. Additionally, candor before the court is one of the most important ethical obligations of counsel. The court has no respect for liars.

Marshall v. Com., Record No. 0890-23-4: (Raphael, J., writing for Malveaux and Frucci, JJ.)
Admissibility of evidence; Motion to withdraw as counsel
Aggravated murder conviction affirmed where there was no abuse of discretion in admitting recorded interviews of the deceased victims identifying Marshall as the perpetrator of a break-in a few days prior to their murder. No actual conflict between Marshall and his counsel that required withdrawal of the case.

In May 2021, Marshall broke into the home of Brenda and Edward McDaniel. Michael, the McDaniels's son, warned them when he saw Marshall outside the house with a gun. Edward loaded his shotgun, and Brenda called 911. Marshall entered through the backdoor. Marshall repeatedly asked Edward and Brenda where Michael was. When he heard the police sirens, Marshall fled.

Two days later, Marshall finished his shift and asked a co-worker, Strand, to take him back to the McDaniels's house. Marshall told Strand that Michael had robbed him. Marshall and Strand entered the house, finding only Michael and Michael's girlfriend, who both ran upstairs and called the police. Edward and Brenda returned from walking their dog and saw Marshall. Marshall shot and killed Edward and Brenda.

Marshall was charged with aggravated murder and using a firearm. During the proceedings, Marshall wanted his counsel to file several motions, but counsel refused, which "Marshall interpreted . . . as just a lack of effort." Counsel moved to withdraw at Marshall's request. The Commonwealth opposed the motion because trial was imminent, but the Commonwealth also proffered the contents of a jail call wherein Marshall stated "his intention was to attack his attorney in a professional visiting booth" if the court denied the motion to withdraw. Marshall told the circuit court to listen to the entire conversation and that during the call, Marshall stated "Nah, I'm just playing. I would never do that." The circuit court listened to the jail call and denied the motion to withdraw.

At the trial, the Commonwealth introduced recorded interviews of Brenda and Edward from the day of the break-in. Marshall argued that the recordings would be "unfairly prejudicial . . . because of their emotional impact." Instead, Marshall offered that the statements could be introduced through the officer's testimony. The circuit court overruled Marshall's objections and admitted the evidence.

Marshall attempted to introduce videos of Michael rapping. Marshall argued that the videos were admissible because Michael was rapping about other people, so they showed "that there are potentially other people out there that also would not like Michael and would have motive to do him harm." The circuit court did not admit the videos, but "noted that one video mentioned somebody named Jamal." So, the circuit court permitted Marshall to ask Michael questions about Jamal. The

jury convicted Marshall of one count of aggravated murder and two counts of using a firearm.

The CAV affirmed. Marshall's argument that the circuit court should have granted the motion to withdraw was rejected because there was no "actual conflict." "An actual conflict of interest exists where counsel has responsibilities to other clients or personal concerns that are actively in opposition to the best interests of the defendant." (quoting Moore v. Hinkle, 259 Va. 479, 489 (2000)). Defendants are required to demonstrate "something beyond a mere theoretical concern." (quoting Spence v. Com., 60 Va. App. 355, 370 (2012)). Marshall failed to demonstrate actual conflict.

On the admission of the McDaniels's recorded interviews, the CAV reiterated that "[a]ll evidence tending to prove guilt is prejudicial to an accused." (quoting Powell v. Com., 267 Va. 107, 141 (2004)). It is only when the "probative value of the evidence is substantially outweighed by the danger of unfair prejudice" that evidence ought to be excluded. The CAV found that the circuit court did not abuse its discretion in admitting the interviews.

Further, the CAV stated that circuit court did not abuse its discretion in denying the admission of the rap videos. The CAV stated that when evidence "merely suggests or insinuates that a third party may have committed the crime [it] is irrelevant; it tends to confuse and mislead a jury unless evidence has been introduced that points directly to guilt of a third party." (quoting Ramsey v. Com., 63 Va. App. 341, 354 (2014)).

Roane v. Com., Record No. 0971-23-1: (Ortiz, J., writing for Athey and Chaney, JJ.)
Conditional plea; Alford plea; Fourth Amendment motion to suppress; Exclusionary rule
Fourth Amendment does not permit a defendant to resist a lawful detention. No error in denying the motion to suppress where Roane resisted/obstructed the traffic investigation and then pulled a gun on the officers during the struggle.

In September 2021, Officers Thompson and Torres were on patrol in a marked cruiser. Roane drove through a stop sign without stopping and "nearly collided with the police car." Officers were going to initiate a traffic stop, but Roane had already parked and exited his vehicle. Thompson exited the vehicle and called out to Roane, but "Roane ignored the officer's repeated demands to stop."

Thompson finally caught up to Roane on the front porch of a residence and informed Roane that he was being detained for a traffic infraction. Roane pulled back from the officer, but "Thompson grasped one of Roane's arms and pulled him off the porch." The front door opened, and another man began threatening the officers, demanding that they leave his yard. The man "mentioned obtaining a gun from inside the house." Roane tried to get back on the porch and presumably enter the house.

A struggle ensued, and during the struggle Roane indicated to the other man from the house by nodding his head down. The other man reached towards Roane's waistband, and the officers ordered him away. The officers used pepper spray, and Roane grabbed a gun from his waistband. Finally, officers handcuffed and detained Roane. Roane was a convicted felon and was charged with possession of a firearm by a convicted felon, obstruction, and brandishing a firearm.

Roane moved to suppress all evidence after the initial contact, arguing that "the police unlawfully detained him in the curtilage of his own home." He further argued that the detention exceeded the scope of the traffic stop. The circuit court disagreed, finding that there was no traffic stop and that "even if Roane was in the curtilage of the home, he was not entitled to resist the police officers and brandish a firearm." Roane entered a conditional Alford plea to possession of a firearm by a felon.

The CAV affirmed the suppression. First, the CAV found that the officers had cause to detain Roane based on the traffic violation. Roane's repeated refusal to stop allowed Thompson to physically detain him. "[O]nce Detective Thompson physically detained Roane, he did not have a right to resist as he did." (citing Com. v. Hill, 264 Va. 541, 546 (2002)). The CAV then assumed that there was error in detaining Roane within the curtilage of his home, finding that the exclusionary rule did not apply in the case. "If a person engages in new and distinct criminal acts during an allegedly unlawful police encounter, the exclusionary rule does not apply." (quoting Testa v. Com., 55 Va. App. 275, 283 (2009)).

Anderson v. Com., Record No. 1208-23-2: (Per Curiam: Decker, CJ., Raphael and White, JJ.)
Probation revocation; Special conditions
Special sex offender conditions are special conditions of probation. Thus no error in imposing one year of active incarceration for violating curfew 11 times.

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

Anderson was originally convicted of failing to register as a sex offender, second or subsequent offense, and placed on active supervised probation. Part of his probation requirements were to abide by the Sex Offender Special Instructions, and "be subject to electronic monitoring by means of a GPS tracking device." Anderson also had a curfew and needed to be in his residence from 10:00 pm to 6:00 am. Anderson violated his curfew 11 times and tested positive for cocaine. The circuit court imposed 1 year of active incarceration for his violations.

The CAV affirmed without oral argument, finding that the 4-pronged Diaz-Urrutia test applied for the determination of what type of violation was found and thus what was the applicable sentencing range (citing Diaz-Urrutia v. Com., 77 Va. App. 182, 193 (2023)). (1) is the behavior directly covered by § 19.2-306.1(A); (2) is the behavior covered by another condition other than general good behavior; (3) is

there a new criminal conviction; (4) is there "substantial misconduct amounting to a good conduct violation."

The CAV found that the violation was expressly covered by the special sex offender conditions, and it was a violation of a special condition. As such, the circuit court had the option of imposing all the remaining suspended sentence. The circuit court did not err in imposing 1 year.

Linkenauger v. Fraim, et al., Record No. 1225-23-3: (Causey, J., writing for Fulton and Raphael, JJ.)

Plea in bar; Derivative action; Alternative grounds theory; Written demand letter; Futility exception; Best and narrowest grounds doctrine

Dismissal of derivative lawsuit affirmed where Linkenauger failed to issue a demand letter to the LLC. Linkenauger failed to demonstrate futility in the circuit court, and the circuit court's conclusion was not plainly wrong or without evidentiary support.

Linkenauger, Fraim, and Walker, formed Roanoke Business Hub, LLC (RBH), with each member maintaining equal shares. There were limitations on compensation to the members and a "tiered dispute resolution method." Fraim, who did the accounting for the business, requested compensation in a way that required a member vote. Linkenauger voted no, but Fraim still paid himself the requested way and "stopped providing Linkenauger access to RBH's books." Linkenauger discovered over $73,000 had been paid to Fraim and Walker without proper authorization/votes.

Linkenauger sent several dispute letters with proposed solutions and began mediation, which was unsuccessful. Eventually, Linkenauger filed a derivative suit on behalf of RBH. Fraim and Walker filed a plea in bar. The circuit court sustained the plea in bar on multiple grounds, including that Linkenauger did not have standing under Jennings v. Kay Jennings Fam. Ltd. P'ship, 275 Va. 594 (2008), which outlined 8 factors relevant to standing. The circuit court also found that he did not properly file a demand letter under § 13.1-1042.

The CAV affirmed under the second theory, finding that there was no written demand letter and that Linkenauger did not demonstrate futility. Code § 13.1-1042 requires that "written demand has been made on the" LLC and that 90 days has passed. The CAV reiterated that there is a futility exception if the managing body was under the control of the wrong-doers. (citing Mount v. Radford Tr. Co., 93 Va. 427, 431 (1896)). But, the CAV found that the circuit court's conclusion that Linkenauger did not sufficiently prove futility was not plainly wrong or without evidentiary support. Thus, no error in sustaining the plea in bar.

Burford v. Com., Record No. 1393-23-3: (Per Curiam: Huff, Athey, and Fulton, JJ.)
Admissibility of evidence; Expert testimony; Hearsay; Business record exception; Rule 5A:18; Rule 5A:20
Jail photograph of Burford that showed gang-related tattoos was not unfairly prejudicial. Arguments related to expert testimony and other evidence were not preserved or supported by argument as required by Rules 5A:18 and 5A:20.

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

Police officers were conducting surveillance of a particular residence when they saw Burford enter and exit the house before driving away with Rucker in the passenger seat. Officers were advised that Burford did not have a license and attempted to initiate a traffic stop. Burford eluded law enforcement at a high rate of speed before crashing his car, fleeing on foot. Officers located Burford and Rucker nearby and found a firearm near the crash site. In the house, officers found another firearm, a picture of Burford, a red bandana, and some cocaine. The officers noted that the interior of the house was decorated with red, even red furniture.

At trial, Detectives Knabb and Babbitt were qualified as expert witnesses on "gangs and gang related activity." Knabb testified that four people were members of the Bloods and that Burford was a known associate of these four, including appearing on a recorded jail video call with several of the four, while in the house with the red furniture. Babbitt testified that Burford had gang-related tattoos, and the Commonwealth introduced a prison photo of Burford with tattoos. Burford objected to several statements by the detectives and the admission of the photograph. The circuit court overruled his objections, and the jury convicted him of gang participation and possession of a firearm by felon.

The CAV affirmed, finding that the circuit court did not abuse its discretion in the preserved evidentiary rulings. The circuit court's factual finding regarding the prejudice of the photograph was not plainly wrong or without evidentiary support. On the expert witness testimony, the CAV found that Burford's arguments were waived under Rule 5A:18 and Rule 5A:20 because he did not specify the rulings/statements at issue and did not cite to any authority. Finally, on the issue of the video as a business record, the CAV found this argument was waived under Rule 5A:18 because he did not object at the time of trial.

Holmes v. Com., Record No. 1403-23-2: (Huff, J., writing for AtLee and Callins, JJ.)
Sufficiency; Strike for cause; Admissibility of evidence; Rule 5A:20; Harmless error
No abuse of discretion in refusing to strike a juror for cause where juror affirmed that she could be unbiased, even though she had 2 relatives who were victims of sexual assault. Rape conviction affirmed where there was no inherent incredibility of the victim and any error resulting from admission of Holmes's hand-written motion/letter was harmless.

Holmes was living with his father and stepmother, C.B., who were helping him re-enter society after being released from prison. C.B. arranged for volunteer work and classes, as well as a therapist. Holmes was not improving and repeatedly made inappropriate sexual comments about C.B., which C.B. rebuffed. In May 2021, Holmes raped C.B. When he had finished, Holmes did not let C.B. go downstairs until she promised not to tell his father. C.B. continued with her day, planning on how to get Holmes out of the house without Holmes killing her or Holmes's father. A few days later, C.B. reported the rape, and Holmes was arrested.

At the trial, Juror 4328 informed the court that "she had two close relatives who had been victims of sexual assault." Juror 4328 affirmed she would be unbiased, so the circuit court denied Holmes's motion to strike for cause. Holmes testified in his own defense, stating that he only had consensual sex with C.B. and that it had happened 5 times. The Commonwealth presented a hand-written letter to the court from Holmes, wherein "he accused his former defense attorney of intentionally acting to help the Commonwealth." The circuit court admitted the letter over Holmes's objection, and the jury convicted Holmes.

The CAV affirmed. The CAV reiterated that the credibility of the witnesses was the purview of the factfinder, absent inherent incredibility. The CAV found that there was no inherent incredibility based on C.B.'s explanation for her delay in reporting, the expert witness testimony regarding delayed disclosure, and Holmes's "incriminating statement to his father before his arrest."

On the juror issue, the CAV stated that "A trial court's decision to seat a juror is entitled to great deference on appeal." (citing Thomas v. Com., 62 Va. App. 104, 111 (2013)). The CAV found that in this case, the circuit court did not abuse its discretion in denying the strike for cause. The circuit court found that Juror 4328 "expressed her ability to be impartial significantly with less hesitation than some of the others who indicated their family member or friends were victims."

Finally, the CAV found that any error in the admission of the hand-written letter to the court was harmless. The "other evidence of guilt [was] so overwhelming and the error so insignificant by comparison." (quoting Holmes v. Com., 76 Va. App. 34, 59 (2022)). The CAV found that there was no "substantial influence" on the verdict and thus any error was harmless.

Holland v. Com., Record No. 1800-23-3: (O'Brien, J., writing for Ortiz, J., and Humphreys, SJ.)
Sexually violent predator; Conditional release
Circuit court's finding that Holland should not be conditionally released was not plainly wrong or without evidentiary support. Circuit court properly evaluated the evidence.

> The CAV rejected Holland's appeal without oral argument, finding it was "wholly without merit." Code § 17.1-403(ii)(a); Rule 5A:27(a).
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> Holland was initially declared a sexually violent predator in 2016. He was involuntarily committed in that year and held review hearings in 2018, 2019, 2020, and 2021. Each time, the circuit court refused to grant him conditional release.
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> At Holland's 2023 review, the circuit court heard expert testimony from Dr. Brown that Holland "had a lack of respect for social norms and put his own needs about the needs of others." Dr. Brown testified that "Holland's personality disorders also resulted in an inability to control some of his behavior." Dr. Brown informed the circuit court "that Holland was not a suitable candidate for conditional release because he still needed to address his problematic thinking and reoffending pathways." The circuit court received a report from another expert stating similar opinions. The circuit court denied conditional release.
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> The CAV affirmed. The CAV found that the circuit court properly applied the factors listed in § 37.2-912(A) and that the circuit court's conclusion was not without evidentiary support. (citing Com. v. Squire, 278 Va. 746, 751-52 (2009)).

VCU/Com. v. Miller, Record No. 1958-22-4: (Per Curiam: Decker, CJ., Raphael and White, JJ.)
Worker's Compensation Commission; Causation
Commission's finding that a 2017 incident caused Miller's present psychological injuries was not plainly wrong or without evidentiary support. Causation in a medical malpractice case is fundamentally different than a worker's compensation proceeding.

> The CAV rejected VCU's appeal from the Worker's Compensation Commission without oral argument, finding "the dispositive issue has been authoritatively decided." Code § 17.1-403(ii)(b); Rule 5A:27(b).
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> In 2017, Miller was injured in an accident. VCU did not dispute this, and the injury caused pain in Miller's back and neck. Miller had surgery, which relieved some but not all of the pain, and she sought many other treatments. Because of the pain, loss of job, and inability to do other activities, "her mental health deteriorated." In 2021, she was diagnosed with depression. She filed for compensation based on the 2017 injury.
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> The deputy commissioner rejected the compensation because "Miller lacked competent medical evidence to establish that the workplace accident caused her anxiety and depression." The Commission reversed that conclusion, finding that

"Miller's testimony, combined with the medical evidence of her psychological symptoms and treatment, sufficed."

The CAV affirmed. The CAV stated that VCU's argument regarding insufficiency of evidence related to causation stemmed from a medical malpractice suit. (citing Summers v. Syptak, 293 Va. 606 (2017)). The CAV reiterated that "[i]n a workers' compensation case, by contrast, "a finding of causation need not be based exclusively on medical evidence, and Miller was not required to produce a physician's medical opinion in order to establish causation." (quoting Farmington Country Club, Inc. v. Marshall, 47 Va. App. 15, 26 (2005)). The Commission's conclusion was based on the evidence and was not plainly wrong.