Overview

Over two days, the Supreme Court of Virginia (SCV) considered 54 petitions for appeal. I was unable to listen to all the oral arguments. In fact, I was only able to listen to the second day of the panel. Justices Kelsey and McCullough, as well as Senior Justice Millette, sat on the panel. We'll see what cases are granted review of the merits.

The Court of Appeals of Virginia (CAV) issued a number of opinions this week. 2 published opinions (both civil) and 12 unpublished opinions (7 criminal and 5 civil).

The major criminal cases are both probation revocations. In Brawner v. Com., Record No. 0216-23-4, the CAV held that the circuit court was required to inform Brawner of the ability to complete community service instead of paying court costs before finding Brawner in violation for failing to pay court costs. In Jackson v. Com., Record No. 1065-23-4, the CAV held that circuit courts cannot consider the fact that a probationer contests his violations as an aggravating factor when sentencing them.

In civil cases, in Stafford Board of Zoning Appeals, et al. v. Grove, et al., Record No. 2023-23-4, the CAV ruled that a demurrer is a proper responsive pleading in a BZA appeal to the circuit court. In Cascade Creek Homes, Inc. v. County of Chesterfield, Record No. 1179-23-2, the CAV held that legal costs or "reasonable expenses" do not include attorney fees or mediation costs.

SCV Opinions and Orders

No new opinions or orders this week.

CAV Published Decisions

Keil v. O'Sullivan, Record No. 1621-23-1: (Lorish, J., writing for Fulton and White, JJ.)
FOIA; Data act; Statutory interpretation; Noscitur a sociis canon of construction
Keil not entitled to a copy of his personnel file under the Data Act. Keil failed to prove that the Sheriff's Office withheld documents he was entitled to under FOIA.

> Keil was a sergeant with the Chesapeake Sheriff's Office "when deputies under his supervision used force against an inmate" in 2022. Keil was demoted, and Internal Affairs investigated the incident. Subsequently, Keil issued a Freedom of Information Act request for all evidence related to the incident. O'Sullivan (the Sheriff) claimed an exemption under § 2.2-3706(B)(4) and (B)(9). So, Keil communicated to the O'Sullivan that the request was also under the Government Data Collection and Dissemination Practices Act (Data Act). O'Sullivan simply responded with his prior FOIA response. Keil made multiple further requests, but Keil only received his personnel file.
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> After failing to obtain more information, Keil filed suit for a writ of mandamus ordering O'Sullivan to provide all of his employment information, a large portion of which was not provided in the previously produced personnel file. O'Sullivan

stated that any information withheld that related to his employment was "an oversight," and O'Sullivan subsequently produced the documents, except the internal investigation file. The circuit court held that Keil was not entitled to the information in the investigation file "because he was not a data subject" under the Data Act.

The CAV affirmed. First, the CAV reviewed the purpose of the Data Act, finding that it was "to provide standards which a government agency must follow in the operation of personal information systems." (quoting Carraway v. Hill, 265 Va. 20, 23 (2003)). "[T]he Data Act seeks to protect personal information from misuse by government agencies." In short, the Data Act is about privacy.

But, the rights "extend only to data subjects" which are defined as "an individual about whom personal information is indexed." (quoting Code § 2.2-3801). Further, personal information is that which relates to private information: "social security number, student identification number, real or personal property holdings . . . education, financial transactions, medical history," etc. (quoting id.). The CAV found that "whether someone is a data subject depends on the way his personal information is stored and able to be retrieved." In this case, the internal investigation file was not stored in a way that made Keil a data subject. Thus, he was not entitled to any information under the Data Act.

The CAV state that this "interpretation of the Data Act aligns with the interpretation federal courts have applied to the Data Act's federal counterpart, the Federal Privacy Act of 1974." (citing Hinderliter v. Humphries, 224 Va. 439, 443 n.*(?) (1982)).

The CAV next reviewed whether O'Sullivan violated FOIA by not responding to the subsequent requests for information. The CAV found that "the trial court was correct that the letter sought the same information" and that Keil was not entitled to relief.

The CAV found that Keil failed to demonstrate that he was entitled to relief under either FOIA or the Data Act based on the failure to timely disclose the withheld portions of his personnel file. Keil did not demonstrate that the information was intentionally withheld or unlawfully disseminated.

Commentary: It is not that often that the Court of Appeals delves into the canons of construction. I don't think it is a coincidence that Judge Lorish, who is a former federal appellate public defender, is the one that did so. In the federal system, attorneys are much more likely to raise the canons of construction, and appellate judges are prone to apply and interpret them. Judge Lorish writes an extremely thorough analysis of the Data Act and clarifies the Court of Appeals' position on this issue, distinguishing several cases.

Stafford Board of Zoning Appeals, et al. v. Grove, et al., Record No. 2023-23-4: (AtLee, J., writing for Huff and Ortiz, JJ.)
Interlocutory appeal; Special exception permit; Demurrer; Statutory interpretation; Absurd result
Demurrer is proper responsive pleading in BZA appeal to the circuit court. No issue in naming an improper party because the same attorney represented the improper party and the proper party.

> The Groves applied for a special exception permit to operate a commercial kennel in Stafford. The Board of Zoning Appeals (BZA) denied the permit after a hearing. The Groves appealed to the circuit court. The BZA (and other respondents) demurred, and the circuit court overruled the demurrer, holding "that responsive pleadings may not be filed" in these types of cases and that the BZA was not a proper party. The circuit court relied on a letter opinion from the Fairfax Circuit Court in doing so.
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> The CAV reversed. First, the CAV held that while the Groves "improperly named the BZA as a party" the demurrer was filed by the Board of Supervisors, a proper party. Secondly, the CAV found that a demurrer was permitted in "any action at law." (quoting Code § 8.01-273 and citing Rule 3:1). While the Rules expressly excluded writs of habeas corpus from the scope of Rule 3:1, no such provision excludes BZA appeals. As such, "the default rules apply." The CAV found that "to interpret Code 15.2-2314 as the circuit court does here would lead to absurd results."
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> In this case, because the BZA and the Board of Supervisors (a necessary party) were represented by the same attorney. Because the Board signed the motion, the demurrer was properly before the circuit court. It was error to find that the Board of Supervisors could not file a demurrer. The CAV remanded for further proceedings.

CAV Unpublished Decisions

Brawner v. Com., Record No. 0216-23-4: (Chaney, J., writing for O'Brien and AtLee, JJ.)
Probation revocation; Definition of "willfully"
Probation revocation reversed where the circuit court never informed Brawner of his ability to complete community service instead of paying court costs. CAV held that the circuit court was obligated to do so, and Brawner's failure to inquire was not a willful failure to pay.

> Brawner pleaded guilty to possession of heroin in 2019. As part of the suspended portion of his sentence, he was required to pay $1650 in court costs. When he was released in 2021, he was informed that he owed $3373. 2 months later, probation filed a major violation report, based on new Maryland charges. Hearings were conducted, and Brawner demonstrated that his Maryland charges were dismissed.
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> "[T]he circuit court raised additional violations arising from Brawner's marijuana use, failure to abide by treatment recommendations, and failure to pay court costs."

Ultimately, the circuit court found that Brawner willfully failed to make payments on his court costs, finding that Brawner could have been doing community service in lieu of court costs and failed to make efforts to do so.

The CAV reversed. The CAV found that the circuit court erred in finding "reasonable cause to justify revocation" because Brawner was not informed that he could "complete community service in lieu of paying court costs." The CAV found that the circuit court abused its discretion in revoking Brawner's probation because nobody had informed Brawner that he could do community service instead of paying court costs. The CAV found that it was "the circuit court's obligation to notify probationers of the availability of community service."

Commentary: This is a case that I argued on behalf of the Commonwealth. But, I do not dispute the findings of the Court of Appeals. Here, the circuit court found that because Brawner could have asked the circuit court about alternatives, Brawner willfully violated his responsibility to pay court costs. The Court of Appeals simply reiterates that courts have an obligation to inform defendants/probationers about their options, rather than forcing potentially unsophisticated individuals to be aware of things outside of their knowledge.

I have communicated with the Attorney General's Office, and they are petitioning the SCV for an appeal in this case. We'll see how the SCV comes down. I anticipate that the SCV will not grant an appeal, but I could be wrong.

Bobocholov v. Turaeva, Record No. 0542-23-4: (Chaney, J., writing for O'Brien and AtLee, JJ.)
Spousal support/alimony; Attorney fees
No abuse of discretion in determining Husband's income and ordering $5,500 in monthly support obligation. Circuit court used all statutory factors in coming to its conclusion and thus did not abuse its discretion.

Bobocholov (Husband) and Turaeva (Wife) married in 2012 and had 2 children in common. Husband was the primary provider of the family, which "enjoyed a high standard of living during the marriage." While Husband suffered a stroke in 2016, he still taught computer programming. Husband obtained a green card in 2018 because of the marriage and subsequently told Wife that he wanted to marry another woman. "When Wife refused to live in a polygamous lifestyle, Husband left her and married a second woman in a religious ceremony."

Wife began working remotely as an information technologies specialist, as her family loaned her money and provided her housing. In 2022, Husband filed for divorce, and Wife counterclaimed for desertion. During discovery, Husband never provided financial documents to Wife, but she obtained some information through subpoenas and a private investigator. The circuit court found that Husband "earned several million dollars annually between 2020 and 2022," awarding $5,500 in spousal support indefinitely and granting Wife a divorce based on desertion.

The CAV affirmed. The CAV reiterated that § 20-107.1(E) does not mandate a "mathematical formula" and instead "requires only that the factfinder consider the estimated needs of the parties, thus authorizing a flexible, commonsense approach to this aspect of the factfinding exercise." (quoting Robbins v. Robbins, 48 Va. App. 466, 484 n.10 (2006)). The CAV found that the circuit court properly evaluated all the factors listed in 107.1(E) and thus found no abuse of discretion in the support order. The CAV also found no error in the award of attorney fees.

Petty v. Com., Record No. 0892-23-3: (Chaney, J., writing for Friedman and Lorish, JJ.)
Juror strike for cause
No error in denying a motion to strike Juror Willis for cause solely because Willis knew multiple victims of violent crime. Juror Willis demonstrated that he could be impartial throughout voir dire.

The facts of Petty's robbery and firearm convictions are omitted from the opinion as they are irrelevant to the analysis.

During the Commonwealth's voir dire, Juror Willis informed the court that his friend was the victim of a crime in Baltimore. Willis affirmed that "the experience would not affect his ability to be fair and impartial." But, when the Commonwealth asked if he believed "a just result" had been reached in the case, Willis responded, "I'd rather not say." Willis was brought before the circuit court for additional questioning outside the presence of the other prospective jurors.

Willis produced additional information about the incident where "two men had beaten his friend to a bloody pulp on the sidewalk in front of Willis's home." Willis witnessed the incident and had video recording of it. In the actual case, "nothing had come to fruition" and the "result had jaded Willis's view of justice a little bit." Willis also informed the circuit court of a second incident in Baltimore where "an acquaintance had been shot and killed in an armed robbery." Willis affirmed that he would be able to "set aside both of those experiences" and sit impartially.

The circuit court denied Petty's motion to strike Willis for cause, finding that Willis "was very adamant that he could be fair and impartial, set aside those experiences." The circuit court found that Willis understood "the process is sometimes different from jurisdiction to jurisdiction." The circuit court was satisfied by Willis's answers and did not "see any reason to strike him for cause."

The CAV affirmed, reiterating that "[w]hether a juror is sufficiently impartial 'is a question of fact, and a trial court's decision to seat a juror is entitled to great deference on appeal.'" (quoting Huguely v. Com., 63 Va. App. 92, 121 (2014)). The CAV "will not disturb this determination 'on appeal unless there has been manifest error amounting to an abuse of discretion.'" (quoting id.).

The CAV reminded us that they "consider the juror's entire voir dire, not merely isolated statements." (quoting Taylor v. Com., 61 Va. App. 13, 24 (2012)). The CAV

> stated that "[m]any of [Willis's] responses during his questioning . . . volunteered his view that this case should be judged on its own merits." His responses were not "merely assenting to leading questions." Therefore, the circuit court's determination was not an abuse of discretion.

Hamilton, by his next friend Tanisha Hamilton v. Jackson, et al., Record No. 0944-23-3: (Lorish, J., writing for Friedman and Chaney, JJ.)
By next friend; Demurrer; Pleas in bar; Sovereign immunity; Motion craving oyer; Assignments of error
No sovereign immunity when a school bus driver hit a child and caused significant injury. But, no error in granting the plea in bar from the private LLC because Hamilton failed to properly assign error.

> Jaquan Hamilton (Hamilton) was hit by a car when he was getting off his school bus. He suffered broken bones and had $97,000 medical expenses. He sued the School Board, Durham School Services ("Durham," and a private llc), the driver of the school bus, and the driver of the car that hit him. The opinion states that "the driver" settled the case and was removed from the suit. I assume that this means the driver of the car, as the Doe in the case is the driver of the school bus, and he was never served.
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> The remaining parties demurred and filed a plea in bar, asserting sovereign immunity. The circuit court granted the plea in bar for all parties. After a hearing, the circuit court granted the plea in bar based on sovereign immunity, as to all the parties.
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> The CAV reversed, in part. Generally, on the issue of sovereign immunity, the CAV found that the School Board was not entitled to sovereign immunity because sovereign immunity was specifically abrogated by statute in these circumstances. The School Board "fell short" of its burden to prove sovereign immunity. "[I]nsufficient evidence was presented on the record below to allow a determination as a matter of law that Code § 22.1-194 did not abrogate [the School Board's] sovereign immunity."
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> But, the CAV found that the Hamilton limited his assignment of error against Durham, the private LLC in the case. Hamilton's assignments of error limited his arguments before the CAV, and required affirmation of the circuit court's decision granting the plea in bar. While the CAV would likely not have granted the plea in bar against Durham, the CAV stated that "this Court does 'not consider issues touched upon by the appellant's argument but not encompassed by his assignment of error.'" (quoting Banks v. Com., 67 Va. App. 273, 289 (2017)). The CAV also found that Hamilton failed to adequately plead gross negligence against Durham. So, the CAV affirmed the plea in bar as it relates to Durham but reversed it regarding the School Board.

Commentary: Judge Lorish explains why there is a fine line between being too vague and too specific in one's assignments of error. You can't be too vague, or else you run afoul of Rule 5A:20 which outlines the outer bounds for opening briefs or Rule 5A:25, which governs the designation of the assignments of error. If you are vague, then the appellate courts will strike your assignments of error as insufficient. In contrast, if you are too specific, your arguments may fail on appeal, even if there is merit.

Clements, Administrator of the estate of Hodnett, v. Medical Facilities of America, Inc., et al., Record No. 1060-23-3: (Fulton, J., writing for Raphael, J., and, in part, Causey, J.; Causey, J., concurring in part and dissenting in part)
Wrongful death; Summary judgment; Standard of care; Admissibility of evidence
A split panel found that the circuit court abused its discretion in refusing to permit an expert witness in testifying about the standard of care. No error in limiting other expert testimony as a penalty for discovery violations.

In 2013, Hodnett went into a nursing facility. During his time, he suffered pressure ulcers and began having symptoms of clostridium difficile (C. diff.). He was not diagnosed with C. diff. until four months after the staff first observed symptoms consistent with it. His pressure ulcers continued to grow and became infected. He died in 2014.

During the suit for wrongful death, the pre-trial scheduling order required Clements to designate experts 90 days prior to trial. Clements did not identify Dr. Aponte or Schaubach as experts. The circuit court limited Clements's expert witnesses to one nurse witness and one physician, limiting the testimonies of Aponte and Schaubach. Clements had one nurse practitioner (Crawford) slated to testify.

The Defendants moved to strike Crawford's testimony as unfair because she had more knowledge than the nurses on staff, none of whom were nurse practitioners. The circuit court held a hearing before limiting Crawford's testimony. The primary limitation was that Crawford needed to be qualified outside the presence of the jury and Defendants had "the opportunity to cross-examine Crawford as to her qualifications before [she] would be permitted to testify."

At the trial, after examination, the circuit court "concluded Crawford improperly blended the standard of care for physicians with that of the nursing staff." The circuit court then excluded Crawford's testimony, and the Defendants moved for summary judgment. The circuit court granted summary judgment.

The CAV reversed, in part, finding that the circuit court improperly excluded Crawford's testimony. The CAV contrasted medical negligence cases to those of medical malpractice, and stated that § 8.01-581.20 permits "any health care provider" to testify about "the statewide standard of care in the specialty or field of practice in which he is qualified and certified." The CAV found that by excluding Crawford as a witness, the circuit court abused its discretion.

> The CAV affirmed the limitations of Aponte's and Schaubach's testimony because the limitations were based on violations of discovery. The remedies for discovery violations are within the circuit court's discretion, and in this instance, the remedy was appropriate.
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> Judge Causey would have affirmed the finding of summary judgment, finding that Crawford "failed to demonstrate knowledge of the standard of care owed." Judge Causey believed that the circuit court "reasonably doubted Crawford's knowledge."

Jackson v. Com., Record No. 1065-23-4: (Frucci, J., writing for Malveaux and Raphael, JJ.)
Probation revocation; Balancing of evidence
Probation revocation remanded for resentencing because the circuit court improperly considered the fact that Jackson contested his probation violations. Contesting his probation violations is not "the opposite of acceptance of responsibility."

> Jackson was originally convicted in 2018 of felony larceny and driving on a revoked license charges. He was placed on supervised probation upon his release from incarceration in 2021. He tested positive for cocaine, missed multiple appointments, failed to report for drug tests, absconded from supervision, and obtained new charges, to which he later pleaded guilty.
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> Jackson conceded his condition 1 violation for obtaining new convictions but contested his other violations. The Commonwealth "argued that his not-guilty pleas could justify a higher sentence." The circuit court held that because the new sentencing guidelines permit the circuit court 'to consider acceptance of responsibility as a basis for lowering the guidelines, it was fair at this juncture to argue that the opposite of acceptance of responsibility can be considered by the court in imposing sentence." The circuit court then imposed a 2-year sentence.
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> The CAV reversed and remanded for resentencing. The CAV stated that "to penalize a defendant for pleading not guilty would be a blatant violation of due process and his constitutional rights." (citing Smith v. Com., 27 Va. App. 357, 362 (1998)). The CAV held that the only item at issue was the circuit court's improper evaluation of evidence and not the violation or the sentence itself, remanding the case for resentencing.

Cascade Creek Homes, Inc. v. County of Chesterfield, Record No. 1179-23-2: (Beales, J., writing for AtLee and Malveaux, JJ.)
Easements; Condemnation petition; Costs and fees; Attorney fees
Attorney fees and mediation costs are not "reasonable expenses that have been actually incurred . . . in preparing for the trial." The CAV followed SCV precedent that stated that "legal costs" do not include attorney fees.

> Chesterfield filed a condemnation petition for an avigation easement for air travel over the property owned by Cascade Creek. After mediation and lengthy discovery

processes and preparation for the trial, Chesterfield moved to dismiss its own petition. The circuit court granted the motion over Cascade Creek's objection. The circuit court then ordered that Chesterfield pay $21,155.70 in costs that Cascade Creek had incurred under § 25.1-248, but the circuit court denied attorney fees and mediation costs.

The CAV affirmed. The CAV found that the language in § 25.1-248 ("reasonable expenses that have been actually incurred by [the owner] in preparing for the trial") is fundamentally identical to "any directly associated legal costs incurred by the owner." (citing Chacey v. Garvey, 291 Va. 1, 8 (2015)). The SCV stated therein that attorney fees were not "legal costs," so the CAV found that attorney fees are not included in § 25.1-248.

Further, the CAV found that mediation costs are not "incurred . . . in preparing for the trial." Therefore, as a matter of first impression (it appears), the CAV found no reason to include mediation costs as reimbursable under § 25.1-248. The CAV also rejected another legal theory for attorney fees under § 25.1-419 because the property had not been taken yet, and the code section therefore did not cover Cascade Creek's case.

Rockingham County School Board, et al. v. Rohrbaugh, Record No. 1193-23-2: (Beales, J., writing for AtLee and Malveaux, JJ)
Workers' Compensation Commission; Definition of "medical treatment"
Worker entitled to compensation for inpatient care in 2022 where the Commission found that the treatment was caused by worker's 1987 compensable injury.

Rohrbaugh was a teacher's aide in Rockingham in 1987 when she tripped and fell down a flight of stairs, suffering a traumatic brain injury, which was found compensable. Her "condition has gradually deteriorated over the ensuing decades." She had a home health aide but could not live on her own. Rohrbaugh was placed in an assisted living facility in 2021, after falling and suffering "a laceration that required sutures."

The deputy commissioner found that her inpatient care "was a medical consequence of her compensable injury" from 1987. The full Commission affirmed the deputy commissioner's award, likening the case to another in which it held "that placement in an assisted living facility was reasonable and necessary medical care."

The CAV affirmed, reiterating that "the role of establishing what care is medically necessary for a claimant is best left to that claimant's physician." (citing Low Splint Coal Co. v. Bolling, 224 Va. 400, 404 (1982)). The CAV also stated that appellate courts "must liberally construe the Workers' Compensation Act to the benefit of the workers." (citing Dinwiddie Cnty. Sch. Bd. v. Cole, 258 Va. 430, 436-37 (1999)).

Bard v. Com., Record No. 1304-23-3: (Per Curiam opinion: Huff, Athey, and Fulton, JJ.)
Jurisdiction; Speedy trial; Sufficiency
Bard's jurisdiction arguments wholly without merit where witness "unequivocally testified" that the sexual assaults occurred in Virginia.

> The CAV rejected Bard'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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> Bard dated D.B.'s older sister, but even after the breakup, Bard continued to keep in contact with D.B., and D.B. considered Bard his brother. D.B. visited Bard often to escape his own abusive parents. Bard sexually abused D.B. by threatening D.B. with a firearm and forcing D.B. to take Bard's penis in D.B.'s mouth. Bard also placed D.B.'s penis in Bard's mouth.
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> Bard was indicted on September 6, 2022, and Bard was tried by a jury on February 23, 2023. At the trial, Bard moved to strike the evidence as insufficient as a matter of law because there was insufficient evidence to prove that the abuse occurred in Virginia. The circuit court denied the motion, finding "that D.B. was very clear that the acts occurred in Tazewell County." The circuit court also stated that it "found Bard's testimony preposterous and unbelievable."
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> The CAV affirmed Bard's convictions, stating that "D.B. unequivocally testified that Bard committed that charged acts of sodomy at Bard's residence in Tazewell County." The CAV also found sufficient evidence on the major elements of the convictions, rejecting Bard's allegation of inherent incredibility. Finally, the CAV found that the Bard's statutory speedy trial rights were not violated.

Green v. Com., Record No. 1390-23-1: (Ortiz, J., writing for Athey and Chaney, JJ.)
Pro se appellant; Brady violations; Sufficiency; Prior bad acts; Admissibility of evidence; Rule 5A:18
No Brady violation in not delivering a transcript of a proceeding where Green was present and had equal access to the transcript. Evidence sufficient for 2nd degree murder where a factfinder could conclude that Green's actions were the direct cause of Officer Thyne's death and that he had the requisite intent.

> Detective Kidder was working surveillance and noticed a gold-colored Mercedes with 2 occupants "rolling a marijuana cigarette." Kidder notified road patrol about a possible DUI. Officers Meier and Thyne responded and approached the vehicle, noticing the odor of marijuana. Officers advised the occupants that they were detained for the drug investigation, and the passenger complied, but Green refused to exit the car.
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> Both officers attempted to remove Green from the driver's seat, but he began accelerating the car. Meier was able to get away from the car, but Thyne could not and began running next to the car, with her hands still in the car. Kidder testified that "Thyne got caught" in the car. Meier ran back to his patrol car but saw that "as

the vehicle increased speed, it appeared that [Thyne] started to fall forward." Green crashed his car over a curb, through a street sign, and into a tree. Green fled the scene. Meier found Thyne and attempted to provide first aid, but Thyne was pronounced dead at the hospital.

Green was convicted of second-degree murder and hit and run. Green, pro se, filed several post-conviction motions, which were denied. One of Green's motions was that the Commonwealth violated its obligations under Brady "by failing to disclose a transcript from a federal sentencing proceeding relating to [Green's] guilty plea in federal court for possession of a firearm and marijuana."

The CAV affirmed Green's convictions, finding sufficient evidence for Green's convictions. The CAV reiterated that the question is whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (quoting Sullivan v. Com., 280 Va. 672, 676 (2010)). The CAV likewise rejected Green's Brady violation motion because he was present at his own federal proceeding "and the transcript is publicly available and readily accessible." (citing Juniper v. Warden of Sussex I State Prison, 281 Va. 277, 281 (2011)). The CAV rejected Green's other 2 assignments of error on minor grounds, including Rule 5A:18.

Mettinger v. Com., Record No. 1718-23-4: (Frucci, J., writing for Malveaux and Raphael, JJ.)
Admissibility of evidence; Rule 5A:18
No abuse of discretion in admitting texts and photographs that were relevant and not unfairly prejudicial.

The facts of the abuse are irrelevant to the CAV's analysis and thus omitted from this synopsis.

At trial, the Commonwealth introduced 2 exhibits which were admitted over objection. Exhibit 9 was a set of 3 nude photographs of Mettinger. Exhibit 12 was a set of text messages between Mettinger and a contractor regarding a work schedule to accommodate the minor victim coming over to Mettinger's house.

The CAV affirmed the admission of both exhibits, reiterating that relevant evidence was any that tended to make "any fact in issue more probable or less probable than it would be without the evidence" and that relevant evidence should be admitted unless it is unfairly prejudicial. The CAV found that Exhibit 12 was relevant "to show Mettinger's desire to hide his criminal conduct with the child and his consciousness of his guilt." The CAV also found that Exhibit 9 bore on the victim's credibility and description of Mettinger's body.

The CAV reiterated that "the mere fact that evidence is highly prejudicial to a party's claim or defense is not a proper consideration in applying the balancing test." (quoting Lee v. Spoden, 290 Va. 235, 252 (2015)). The CAV found that the circuit court properly weighed the probative value of the evidence with the potential

undue prejudice and did not abuse its discretion in admitting the evidence. (citing Walker v. Com., 302 Va. 304, 321 (2023)). The CAV rejected Mettinger's argument on inherent incredibility because it was procedurally defaulted under Rule 5A:18.

Railey v. Com., Record No. 1816-23-2: (Decker, CJ., writing for Raphael and White, JJ.)
Intent to defraud; Sufficiency
Railey's appeal wholly without merit where the factfinder could reject Railey's hypothesis of innocence as unreasonable.

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

Railey agreed with Coleman to repair Coleman's bulldozer's hydraulic pump for $955. Coleman paid Railey, and Railey left with the pump under the pretense of fixing it. Railey stopped communicating with Coleman, and Coleman subsequently reported Railey for larceny/fraud. Railey was arrested and returned the pump, with no evidence that it had been worked on, and made full restitution of the $955 payment. Railey's explanation was that he was sick and could not complete the work for 2 and a half months. The circuit court convicted Railey of obtaining money by false pretenses.

The CAV affirmed, reiterating that the proof of intent is "acting with an evil intent, or with the specific intent to deceive or trick." (quoting Beshah v. Com., 60 Va. App. 161, 170 (2012)). The CAV found sufficient evidence to prove that Railey had the intent to deceive, rejecting Railey's argument regarding hypotheses of innocence, finding that when a "factfinder has rejected the hypothesis as unreasonable, that determination cannot be overturned as arbitrary unless no rational factfinder would have come to that conclusion." (quoting Haskins v. Com., 44 Va. App. 1, 9 (2004)). The CAV found that the circuit court's conviction was not plainly wrong or without evidentiary support.