Overview

This week we learned that only 1 published case from June was appealed from Court of Appeals of Virginia (CAV) to the Supreme Court of Virginia (SCV). It was City of Emporia v. County of Greensville, Record No. 0792-23-2, in which the CAV required the City of Emporia to pay a proportional share of Sheriff's budget regarding communal actions and buildings but found that Emporia was not required to pay a proportional share of law enforcement activities because the Emporia created its own police department.

By published opinion, the CAV reversed the imposition of an additional term of probation in Barrow v. Com., Record No. 0769-23-1, where it had been over 10 years since Barrow's original sentencing date and the maximum statutory punishment for his crimes was 10 years combined. Criminal practitioners should be prepared for this case and its potential appeal, as it will have broad impacts on probationers who were sentenced quite some time ago and have been continued on probation.

In civil published opinions, I think the biggest case is Hazelwood v. Lawyer Garage, LLC, et al., Record No. 1374-23-1. Therein, the CAV reminds us that Virginia has a broad choice of law statute, where the substantive law "where the wrong occurred" applies. In Hazelwood, the wrong occurred in Arizona, and the circuit court should have applied Arizona law. The CAV also found that the tolling language for sexual assault in the accrual statute (§ 8.01-249) Doe v. Green, Record No. 1450-22-4, was not retroactive and affirmed dismissal of Doe's case. In Turner, et al. v. Massie MHP, LLC, Record No. 1508-23-3, the CAV stated that simple negligence does not rise to the level willfulness required for deprivation of essential services under the Virginia Residential Landlord Tenant Act.

In municipal/local government law, we got a new published opinion on the Dillon Rule in Williams, et al. v. Rappahannock County Board of Supervisors, Record No. 1585-23-4. The CAV found that § 27-13's limited grant of authority to appoint new directors and officers did not include the implied authority to dismiss or fire directors and officers.

The CAV delivered 8 unpublished opinions. There were only 2 civil cases: Golden Key Group, LLC v. Communication Technologies, Inc., Record No. 1594-22-4, finding that a non-solicitation clause was narrowly tailored, not against public policy, and therefore enforceable; and Mattawoman Energy, LLC v. Cove Point LNG, LP, Record No. 0896-23-2, reversing summary judgment where the circuit court refused to allow Mattawoman to conduct discovery on affirmative defenses.

The criminal cases revolved primarily around sufficiency of the evidence and admissibility of evidence. While normally sufficiency opinions are brief and are basically summary affirmations (especially as of late), the CAV reversed convictions in 2 cases. For the most part, I agree with Lickey v. Com., Record No. 0959-23-2, where the CAV reversed Lickey's conviction for obstruction of justice, where the Commonwealth presented no evidence that Lickey knew or should have known that the officer was investigating possession of narcotics or paraphernalia. But, in Evans v. Com., Record No. 0809-23-3, the CAV reversed convictions of animal cruelty, resisting arrest, and disorderly conduct. See below for the full facts and my perspective.

SCV Opinions and Orders

No opinions or published orders this week from the Supreme Court of Virginia.

An unpublished order came out in Crumpler v. Stark, et al., Record No. 230606. The circuit court had held Stark in civil contempt for defaming Crumpler and violating a travel injunction. By unpublished decision, the CAV reversed the finding of contempt completely, holding that the allegedly defamatory statement was an opinion, and that the travel injunction did not include a bicycle, which was what Stark used. The SCV affirmed that the statement was an opinion but found that a bicycle is a vehicle, consistent with § 46.2-100 (confirming that Virginia classifies bicycles as vehicles when ridden on a public highway). The SCV held that the CAV erred in finding that the bicycle was not a vehicle and reversed on those grounds. Therefore, the SCV affirmed in part and reversed in part, remanding the case to the circuit court for further proceedings.

CAV Published Decisions

Barrow v. Com., Record No. 0769-23-1: (Fulton, J., writing for Lorish and White, JJ.)
Probation revocation; Term of probation; Rule 5A:18; § 19.2-303.1; § 19.2-306; Absurd result; Statutory interpretation
No error in revoking Barrow's suspended sentence and imposing active incarceration, but the CAV found that the circuit court no longer had authority to impose an additional term of probation upon release, as the General Assembly expressly limited imposition of additional terms of probation.

> Barrow was convicted of 2 Class 6 felonies and 2 minor misdemeanors/city ordinance violations in November 2007. In 2015, the circuit court revoked Barrow's probation and resuspended a majority of it for an additional period of supervised probation. The circuit court again revoked his probation in 2017, imposed active incarceration, and resuspended the remaining time for yet another term of probation.
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> The instant revocation proceedings began in 2022, which related to Barrow's failure to meet with his probation officer and update his current address. This was due, in part, to him being arrested in Texas. Barrow was held for 8 months before his charges were dismissed, and he returned to Virginia, where he turned himself in upon learning he had a capias. The circuit court revoked Barrow's probation and sentenced him to 1 year and 6 months before imposing an additional term of probation (not to exceed 2 years).
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> The CAV affirmed the revocation but reversed the additional term of probation. In particular, the CAV found that the revocation was properly grounded in the face of Barrow's "bald assertions as to what weight the trial court did or did not give to certain evidence." The CAV further found that Barrow preserved his argument that the circuit court did not have the authority to impose a new term of probation.

On the merits of Barrow's argument on the new term of probation, the CAV found that the 2021 amendments to § 19.2-303 *et seq*. modified the circuit court's ability to impose additional terms of probation. The CAV found that the General Assembly limited the timeline for additional terms of probation. (citing Hamilton v. Com., 79 Va. App. 699 (2024)). The CAV determined that § 19.2-306(C)'s statement that courts may only resuspend defendants' sentences "for a period up to the statutory maximum for which the defendant might originally have been sentenced to be imprisoned, less any time already served" meant that the circuit court has authority to order new probation within the following timeline: Date of original sentence + Maximum Statutory Punishment = Deadline for when supervised probation must end.

In the instant case, because Barrow was sentenced in November 2007 to 2 Class 6 felonies, the statutory maximum punishment was 10 years and the deadline for new probation terms was 2017. Thus, the circuit court erred in ordering a new term of probation after the law change of 2021.

Commentary: I completely understand the logic behind this decision, and it is obviously consistent with precedent. But, allow me to develop a hypothetical situation. Defendant is sentenced to 10 years on 2 Class 6 felonies, none suspended, with 3 years of supervised probation following his release from incarceration, with a further penalty of 3 years of incarceration suspended under § 19.2-295.2, along with supervised probation. Assume that the Defendant was not incarcerated pre-sentencing and earns no sentencing credit, serving the full 10 years of his time, being released exactly 10 years to the day of his sentencing.

Under the CAV's interpretation of § 19.2-306(C) if the circuit court revokes the Defendant's supervised probation and imposes some of the Defendant's post-release incarceration of 3 years, could the circuit court then re-suspend a portion of the 3 years conditioned upon supervised probation or post-release supervision? I don't think the current interpretation would allow for that because the "statutory maximum penalty" is only 10 years and 10 years have passed since the circuit court sentenced the Defendant.

Now, this is a niche hypothetical and may not be applicable because post-release incarceration is from a different code section than § 19.2-303 et seq., but it raises a potential issue with the extremely strict interpretation used in this case. Let me know your thoughts, if you have any, on this issue.

The intent of the General Assembly's amendments was to stop indefinite probation and force the circuit courts to make a decision with probationers who repeatedly violate their conditions. Either incarcerate them or cut them loose. But, I think that the General Assembly believed most circuit court would just cut them loose, and I think the opposite is going to start occurring. The more you limit a court's discretion, the circuit court is going to have fewer options to rehabilitate individuals and lean towards punishment.

Doe v. Green, Record No. 1450-22-4: (Chaney, J., writing for Callins and White, JJ.)
Matter of first impression; § 8.01-249 (Accrual Statute); Intentional infliction of emotional distress; Plea in bar; Statute of limitations; Retroactivity; Rule 5A:20; Harmless error; Right result for a different reason
Accrual statute is not retroactive, and Doe knew or should have known of her psychological injuries from Green's sexual assaults. As such, statute of limitations began running when she turned 18, and the circuit court properly dismissed her case.

Green sexually assaulted Doe between 2005 and 2006. Doe was 14 when the sexual abuse began while Green was 33 years old, and Doe developed eating disorders and displayed suicidal ideation because of the abuse. Doe attempted to escape the abuse by going to New York, where she attempted suicide. She was brought back to Virginia and had significant struggles in her young adult life because of the abuse.

In 2021, she was diagnosed by a psychologist with Post-Traumatic Stress Disorder (PTSD) because of Green's actions. A few months later, she filed suit against Green for intentional infliction of emotional distress, as well as other claims. Green filed a plea in bar alleging the statute of limitations, arguing that her accrual date was the day she turned 18, which was in 2008. Therefore, the statute of limitations ran in 2010, and her 2021 complaint was untimely. Doe responded that the Accrual Statute, § 8.01-249, as enacted in 2011 (2011 Accrual Statute) and 2021 (2021 Accrual Statute) were retroactive and allowed for either a 20-year limitation period or a 2-year limitation when diagnosed with psychological disorders based on the abuse.

The circuit court evaluated the different iterations of the Accrual statute and determined that the 2005 Accrual statute was the one that applied. The others were not retroactive. Therefore, because Doe failed to bring her claim within 2 years of turning 18, Green's plea in bar should be granted. The circuit court dismissed Doe's claims.

The CAV first reviewed whether the 2021 Accrual Statute was retroactive and applied to Doe's claims. Finding that the language of the statute does not "clearly convey[] a legislative intent to apply the statute retroactively" the CAV further found that "[appellate courts] may not apply the statute retroactively."

Then, the CAV interpreted "the knowledge requirement in the 2005 Accrual Statute" in a matter of first impression. The 2005 Accrual Statute allowed for a tolling of the statute of limitations "if the fact of the injury and its causal connection to the sexual is not then known" when she turned 18. The CAV determined that because she experienced many symptoms before she turned 18 and specifically identified the sexual abuse as the cause of her symptoms, even though she wasn't diagnosed until much later. "She became angry with her parents for not protecting her from Green when she returned to Virginia two months" after fleeing to New York to escape his abuse. Clearly, the CAV found that Doe should have known that

she had sustained an injury because of the sexual abuse. The CAV affirmed dismissal of Doe's claims.

Turner, et al. v. Massie MHP, LLC, Record No. 1508-23-3: (Humphreys, SJ., writing for O'Brien and Ortiz, JJ.)
Statutory interpretation; Definition of "willfully"; Essential services; Virginia Residential Landlord and Tenant Act (VRLTA)
No willfulness in depriving tenants of water for approximately 4 hours where there was mere negligence in failing to pay the water bill. CAV reserved for another day what actions would meet the burden for willfully depriving tenants of an essential service.

Massie MHP, LLC (Massie) owned a mobile home park and engaged the Montgomery County Public Service Authority to provide water and sewer services, signing up for bills via email and mail. A handwriting error caused the bills to be sent to the correct email address but incorrect mailing address. Massie failed to pay the bills, but Massie contacted the Service Authority and ultimately corrected the address issue. Massie made no payments before the Service Authority shut off water services. Within 3 hours of shutoff, Massie paid the past due amount in full. 1 hour later, the Service authority restored services.

12 current and former residents sued for 4 hours of service lost, alleging willful interruption of essential services. After a bench trial the circuit court found that Massie's actions did not rise to the level of willfulness" required by § 55.1-1243.1. The circuit court stated that negligence is insufficient to support a claim under the code section.

The CAV affirmed, but reiterated that willfulness relates to the "actor's intent concerning his actions and [not] his intent concerning the *result* of his actions." (citing Infant C. v. Boy Scouts of Am., 239 Va. 572 (1990)). "Ill will is not a necessary element." (quoting Benedict-Miller v. Va. Dep't of Soc. Servs., 73 Va. App. 679, 694 (2021)).

In this case, the CAV found that the circuit court's decision was not plainly wrong or without evidentiary support. In pertinent part, the CAV found that Appellants simply failed to carry their burden at trial to "adduce evidence that the act or omission that caused the interruption was intentional rather than merely inadvertent or negligent." The CAV expressly stated that this decision was because of the "sparse evidentiary record concerning the circumstances of Massie's failure to pay the bill" and that "failure to pay a bill for an essential service could constitute a willful interruption of that service in certain circumstances.

Williams, et al. v. Rappahannock County Board of Supervisors, Record No. 1585-23-4: (Frucci, J., writing for Malveaux and Raphael, JJ.)
Plea in bar; Declaratory judgment; Judicial review of an election of directors; Doctrine of judicial restraint; Equitable estoppel; Implied powers; § 27-13; Dillon Rule
Circuit court erred in finding that the Board of Supervisors had the implicit power to dismiss officers and directors simply because § 27-13 gives the Board the ability to appoint officers and directors. The CAV found that the Dillon rule precludes that interpretation and reversed on those limited grounds, reserving for another day whether the nonstock corporation was actually incorporated under Title 27.

Williams and the rest of the appellants were previous directors and officers of the Flint Hill Volunteer Fire Company (Flint Hill). In 1954, Flint Hill was incorporated as a nonstock corporation to fight fires in Flint Hill and Rappahannock. Flint Hill and Rappahannock entered into an agreement in 2018, along with other groups, to "provide a clear framework" for volunteer fire services to "mutually operate to deliver timely and efficient fire, rescue, and emergency medical services."

"Flint hill had difficulties meeting performance goals and certification requirements." So, they reached out for assistance from other volunteer fire services and Rappahannock. Rappahannock called a special meeting of the Board of supervisors who then "removed the existing officers and directors of Flint Hill and appointed new ones" in violation of Flint Hill's bylaws.

The prior directors sued Rappahannock and the new directors and officers for violating the bylaws. Appellees filed pleas in bar alleging that Flint Hill was incorporated under Title 27, which gave the Board of Supervisors under control to "appoint officers and directors" under Code § 27-13. The circuit court found the same and also found that Flint Hill was "organized pursuant to Code § 27-8," even though it was incorporated under Title 13 as a nonstock corporation. Finally, the circuit court found the doctrine of equitable estoppel barred Appellants' claims because they participated in the 2018 agreement. The circuit court granted the pleas in bar.

The CAV reversed and remanded for further proceedings. Assuming without deciding that § 27-13 applied, the CAV found that the statute did not allow the Board of Supervisors to remove and appoint officers and directors. The CAV applied the Dillon Rule and interpreted § 27-13 to grant the Board of Supervisors the ability to "appoint" officers and directors, but it does not include the ability to "remove" officers and directors. Because the Board did not have the authority under § 27-13 to remove any officers, the subsequent appointments were invalid, as well, because the vacancies only existed because of inappropriate actions of the Board.

Hazelwood v. Lawyer Garage, LLC, et al., Record No. 1374-23-1: (Athey, J., writing for Ortiz and Chaney, JJ.)
Negligence; Vicarious liability; Interlocutory appeal; Matter of first impression
Law of the case is decided by where the place of the wrong occurred. Because the injury/wrong occurred in Arizona, Arizona law controls the substantive issues. CAV reversed and remanded case for application of Arizona law.

> In 2019, Hazelwood contracted with Lawyer Garage, LLC, and others (Appellees) to retrieve 4 vehicles from Lawyer Garage's repair facility and transport them to Arizona. One vehicle was a modified Chevy Blazer chassis with a Pontiac Fiero body. It appears that Lawyer garage was also contracted to repair the vehicles prior to the instant contract. It also appears that Hazelwood was purchasing these vehicles without test-driving them, and was not the initial owner of the vehicles.
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> Hazelwood received the vehicles in Arizona and, when unlocking them from their restraints, the modified Chevy Blazer rolled backwards unexpectedly, causing Hazelwood injuries. Hazelwood sued for negligence and vicarious liability according to both Virginia and Arizona law. The circuit court overruled the Appellees' demurrers in part and sustained them in part. Hazelwood obtained a certificate of appealability for the order, allowing for an interlocutory appeal pursuant to § 8.01-675.5.
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> The CAV reversed. The CAV reiterated that Virginia "applies its own 'choice of law' rules to decide which state's law controls substantive issues." (quoting Dreher v. Budget Rent-A-Car Sys., Inc., 272 Va. 390, 395 (2006)). The CAV stated that "the substance law of the . . . place of the wrong" controls the case. (quoting Jones v. R.S. Jones and Assocs., Inc., 246 Va. 3, 5 (1993)). In interpreting where the act of negligence/cause of injury was located, the CAV found that "the law of the place of the wrong was" in Arizona. (quoting McMillan v. McMillan, 219 Va. 1127, 1128 (1979)). The law of Arizona controlled in this case; thus, the circuit court erred in finding that Arizona law did not apply in the case. The CAV reversed and remanded for further proceedings

CAV Unpublished Decisions

Brouillard v. Com., Record No. 1162-23-2: (Per Curiam: Decker, CJ., Raphael and White, JJ.)
Intent; Forgery; Rule 5A:20
Evidence sufficient for forgery of a check where Brouillard was in the possession of the check, it was clearly doctored, and Brouillard did not present credible evidence to rebut the prima facie case. Argument related to fatal variance of the indictment and the evidence at trial was not encompassed by his assignments of error.

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

Shelor hired Brouillard to repair Shelor's house, but Brouillard never performed. Shelor wrote Brouillard 2 checks: 1 for 23,000 and the other for 6,000, which were cashed/deposited. About a month after the 2nd check was deposited, Brouillard went back into his bank to deposit a 3rd check from Shelor, in the amount of 6,000. The bank's system was down, so Brouillard attempted a mobile deposit. The next day, Brouillard was notified that his account was closed because of an altered check.

At trial, a representative from the bank testified that the 3rd check had 2 alterations and that the 3rd check was a copy of the 2nd check. The date had been changed from 2-24-22 to 2-27-22 and the check number had been changed from 2832 to 2882. Shelor confirmed he never wrote a 3rd check to Brouillard. Brouillard testified in his own defense, "insist[ing] that the bank teller . . . was lying." The circuit court denied Brouillard's motion to strike and found him guilty of forgery.

The CAV reiterated that the test for sufficiency is "whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (quoting Vasquez v. Com., 291 Va. 232, 248 (2016) (citation and quotation marks omitted)). The CAV found that the circuit court's finding of guilt was not plainly wrong or without evidentiary support, including pictures of each check in its opinion.

In particular, the CAV affirmed that "possession of a forged check by an accused, which he claims as a payee, is prima facie evidence that he either forged the instrument or procured it to be forged." (quoting Oliver v. Com., 35 Va. App. 286, 295 (2001) (citation omitted)). Even though Brouillard testified in an attempt to rebut the prima facie case, the circuit court found that his testimony was an "incredible version" of the events, "especially Brouillard's claim that he found the check in the trash and that the two bank employees were lying." The CAV also "decline[d] to consider Brouillard's argument that there was a fatal variance between the indictment and the offense proved at trial." Brouillard did not assign error to any ruling by the circuit court regarding the variance and thus his argument was not encompassed by his assignments of error. (citing Rule 5A:20(c)(1)).

Meadows v. Com., Record No. 0868-23-3: (Friedman, J., writing for Ortiz and White, JJ.)
Admissibility of evidence; Failure to proffer; Rule 5A:18
Evidence sufficient to convict Meadows of unlawful wounding. No error in circuit court excluding Meadows's father's testimony where counsel did not proffer what the substance of the testimony would be nor did he testify out of the presence of the jury. Without a record of specific statements, CAV cannot find an abuse of discretion in excluding the evidence.

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

Meadows leased a building to an automobile body shop to the shop's manager/owner, who passed away. Meadows and his father were cleaning the shop after the owner passed when Jones, a mechanic, went to the shop to retrieve some

items. Meadows told Jones that he could not take anything from the shop because the items need to be documented by an attorney.

Jones agreed but then told Meadows that Jones was going to take a truck that the owner agreed to give him. Jones grabbed the keys but was blocked from leaving by Meadows. A struggle ensued, but Jones escaped the struggle and ran away. "He heard a pow and felt his back get real wet." He continued running and looked back, seeing "Meadows standing in the doorway looking for him with the gun." Jones had been shot twice but survived. Meadows admitted that he had shot Jones but claimed that Jones was the aggressor.

At trial, Meadows attempted to impeach Jones's credibility based on inconsistent statements from testimony at another trial. Meadows first tried to introduce this evidence through Jones and then through Meadows's father. The evidence related to Jones's prior testimony was excluded. Meadows and his father testified about the incident, stating that Jones was the first to become violent and that Jones said, "I've got something for you mother fuckers out in the truck." The jury convicted Meadows of unlawful wounding.

The CAV affirmed without oral argument, finding that the record was insufficient to demonstrate any abuse of discretion. The CAV stated that "[appellate courts] cannot competently determine error—much less reversible error—without a proper showing of what that testimony would have been." (quoting Tynes v. Com., 49 Va. App. 17, 21 (2006) (citation and quotation marks omitted)). Where there is no proffer, as in this case, it is impossible to determine error.

Commentary: The CAV in this opinion is less indignant or scathing than the SCV was in Eckard v. Com., Record No. 230333, but the message of the opinion is no less evident. Attorneys must prepare a record and ensure that the courts (trial and appellate) have the appropriate information to make a competent ruling. In this case, the CAV is admonishing us to make sure we proffer testimony or have the witness testify outside the presence of the jury. Appellate courts must know what the evidence will be with specificity or they cannot evaluate the prejudicial effect of exclusion.

Lickey v. Com., Record No. 0959-23-2: (AtLee, J., writing for Huff and Callins, JJ.)
Sufficiency; Obstruction; Rule 5A:20
CAV reversed Lickey's obstruction of justice charge where the officer did not communicate that Lickey was under investigation for possession of narcotics, nor was there evidence that Lickey told his wife to discard or destroy a smoking device.

Deputy Notgrass saw Lickey in a passenger seat of a truck in a parking lot. Lickey's wife, Tracy, was the driver. Notgrass knew that Tracy's license was suspended, so he tailed the truck. Notgrass initiated a traffic stop after learning that the license

plate was not on file in Virginia. Notgrass asked for the truck's registration and saw a "glass smoking device" with "drug residue" in the glove box.

Notgrass "moved to a position between the truck and his patrol vehicle and called for backup." He saw "Lickey pass an object to Tracy" which she hid in her jacket. Notgrass went back to the window and asked them about the object. Notgrass asked Tracy to exit the truck, but she "delayed, argued, and stated that she had no idea" what he was talking about. She eventually got out of the truck and "threw the glass smoking device over the truck into the grass on the highway shoulder." Notgrass collected the device.

At trial, Lickey moved to strike the evidence on his obstruction of justice charge, arguing that "there was no issue of an active investigation that he impeded or that he obstructed Notgrass in his official capacity." The circuit court denied the motion to strike, and the jury convicted him of obstruction and acquitted him of possession of a controlled substance.

The CAV reversed Lickey's conviction, finding that no rational trier of fact could have found Lickey guilty beyond a reasonable doubt. "The Commonwealth must prove that the defendant's 'actions did, in fact, prevent a law-enforcement officer from performing his duties.'" (quoting Maldonado v. Com., 70 Va. App. 554, 564 (2019)). Next, the Commonwealth must also prove that "the defendant 'acted with an intent to obstruct'" the officer. (quoting id.).

The CAV reminds us that "actions that make an officer's discharge of his or her duty simply more difficult, but achievable, do not constitute obstruction of justice without force." (quoting id. (in turn quoting Thorne v. Com., 66 Va. App. 248, 255 (2016))). There was no evidence that Lickey told Tracy to destroy or otherwise discard the smoking glass, and Lickey's action of passing the smoking device occurred before Notgrass informed them that he knew of the paraphernalia, meaning that Lickey was unaware of Notgrass's intention to investigate the paraphernalia. Thus, the evidence was insufficient as a matter of law.

Commentary: Footnote 3 in this case is a slight surprise in this case. The Commonwealth argued that Rule 5A:20 precluded appellate review of the case because Lickey's brief cited to only one case and one legal principle. Further, the quotation on the legal principle "applied to a different, since repealed, statute." The CAV stated that "Lickey's brief is lackluster at best," but the CAV found that "Lickey's brief passes muster, barely, under Rule 5A:20."

While it is never a good practice to rely upon only one case or citation, this footnote should allay some concerns of practitioners that your brief will not be dismissed if you simply cannot find legal precedent. On matters of first impression or on crimes rarely appealed (like obstruction) that will likely be the case. But, as long as you

can cobble together a coherent argument, the CAV will not reject it out of hand for not citing a large number of cases.

That being said, never cite to a repealed statute, unless you are contrasting it with the current iteration to make a point.

Mattawoman Energy, LLC v. Cove Point LNG, LP, Record No. 0896-23-2: (Malveaux, J., writing for Beales and AtLee, JJ.)
Breach of contract; Enforceability of contract; Genuine dispute of fact; Discovery; Affirmative defenses; Doctrine of judicial restraint; Summary judgment
Circuit court abused its discretion by not permitting Mattawoman to conduct discovery related to its affirmative defenses before granting summary judgment in favor of Cove Point.

Cove Point operates a natural gas pipeline, and Mattawoman planned to build an electrical power plant fueled by natural gas. They entered into a service agreement for Cove Point to provide natural gas for the plant. But, Mattawoman never built the plant and never paid Cove Point for the reserved natural gas that Cove Point set aside. Cove Point ultimately terminated the contract.

Cove Point sued for breach of contract. Mattawoman demurred, which was overruled, then raised 5 separate affirmative defenses. Mattawoman served Cove Point with discovery requests, which Cove Point responded in part, refusing to provide responses to a majority of requests. Cove Point moved to restrict discovery, arguing that Mattawoman's affirmative defenses were "meritless as a matter of law." The circuit court granted a limited motion to compel responses. The circuit court did not allow Mattawoman to conduct discovery on 4 of its 5 affirmative defenses. The circuit court then granted summary judgment in favor of Cove Point.

The CAV reversed on Mattawoman's 3rd assignment of error (Discovery), applying the doctrine of judicial restraint and deciding not to evaluate Mattawoman's other assignments of error. The CAV found that the circuit court abused its discretion when it prevented Mattawoman from obtaining discovery related to its affirmative defenses because it affected Mattawoman's "ability and right to litigate [its] defense." (quoting Nizan v. Wells Fargo bank Minn. Nat'l ass'n, 274 Va. 481, 501 (2007)).

The CAV distinguished the case from Dick Kelley Enters. v. City of Norfolk, 243 Va. 373 (1992), in which the circuit court granted partial summary judgment and struck several affirmative defenses as a matter of law. In Dick Kelley, though, the circuit court only precluded discovery on the affirmative defenses that it struck, as they were no longer part of the case and discovery would be unduly burdensome. In this case, the circuit court limited discovery before addressing the affirmative defenses, and, in fact, never addressed the affirmative defenses.

Golden Key Group, LLC v. Communication Technologies, Inc., Record No. 1594-22-4: (AtLee, J., writing for Decker, CJ., and O'Brien, J.)
Federal government contract; Subcontractors; Contract interpretation; Non-solicitation clause; Rule 5A:18; Restraint of trade
$9-million judgment affirmed where non-solicitation clause was narrowly tailored and an enforceable restraint on trade. GKG violated non-solicitation clause and also breached its subcontract with COMTek by failing to properly compensate COMTek.

Golden Key Group (GKG) and Communication Technologies (COMTek) secured a government contract to provide ROTC instructors for the U.S. Army, with GKG has the prime contractor and COMTek as the subcontractor. GKG was to perform 51% of the work, and COMTek would do 49%. If there was any change to the prime contract's provisions for payment, GKG was to modify the payments to COMTek accordingly. The subcontract also contained a non-solicitation clause, so the parties were not supposed to hire or solicit for hire employees of the other party that were working on the contract.

"The Army dramatically increased the size of the prime contract." GKG however, did not proportionally increase COMTek's portion of the work, nor did GKG pass along an increase in pay. GKG proposed a modification to the subcontract, reducing COMTek's positions by 10 and lowering COMTek's proportion of the work to 46%. COMTek signed the proposed agreement, but with the express caveat that it was not accepting the reduction in work proportion because they were entitled to 49%. Shortly after, the parties' agreement fell apart due to discord, and GKG terminated the contract. GKG then emailed all of COMTek's employees working on the subcontract with information on how to apply to GKG ROTC positions, hiring 157 of COMTek's employees.

COMTek sued for breach of contract, alleging underpayment in 3 ways and violation of the non-solicitation clause. The circuit court issued a letter opinion after a bench trial. The circuit court found that GKG failed to abide by the payment clauses, specifically finding that GKG failed to pass along a pay increase, properly portion the work, and pay COMTek for work performed in a particular month. The circuit court also found that the non-solicitation clause was valid and enforceable and that GKG violated the clause by soliciting employment from COMTek's employees. The circuit court awarded COMTek $8,703,823.63.

The CAV affirmed. The CAV found that there was evidentiary support for all of the circuit court's factual findings, and there was no error in the circuit court's interpretation of the contract. The CAV re-stated the elements of a breach of contract: (1) enforceable obligation; (2) violation/breach; and (3) injury/damage. (citing Filak v. George, 267 Va. 612, 619 (2004)). The CAV found that each of the payment provisions of the contract were valid and enforceable and that there was support for the circuit court's findings that GKG violated those provisions.

On the non-solicitation clause, the CAV conducted a review of restraint of trade, which are generally disfavored and "will be held void as against public policy if it is unreasonable between the parties or is injurious to the public." (quoting Therapy Servs. V. Crystal City Nursing Ctr., 239 Va. 385, 388 (1990)). In the instant case, the restraint was "narrowly tailored" and "did not violate public policy." The clause protected COMTek because GKG had access to a "necessary contracting vehicle, HR Solutions" but did not have substantive experience with ROTC instruction. COMTek had the inverse, leading to a dependent relationship on both sides. By soliciting COMTek's experienced ROTC instructors, GKG had eliminated a substantial portion of COMTek's workforce and reduced COMTek's ability to compete for future contracts. As such, there was no error in finding the non-solicitation clause reasonable and enforceable, nor in the finding that GKG violated it.

Evans v. Com., Record No. 0809-23-3: (White, J., writing for Ortiz and Friedman, JJ.)
Sufficiency; Definition of "willful"; Rule 5A:18
Animal cruelty, resisting arrest, and disorderly conduct convictions reversed where evidence was insufficient to demonstrate Evans's intent to harm the K-9, Evans was never within the officer's span of control, and no evidence that Evans's conduct was likely to incite violence.

Knox is a K-9 at the service of Officer Reed. Reed was dispatched to a disorderly call to Evans's house about Evans's behavior outside his house. When officers arrived, Evans slammed his front door. Reed informed Evans that he was a police officer, and Evans opened his front door again and was "very amped up, very angry, and very aggressive." Evans repeatedly said he was fine and for the officers to "get the fuck out of here." Evans yelled at the officers, and based on his behavior, Reed believed Evans was under the influence of narcotics.

Reed retrieved Knox from his cruiser and attempted to arrest Evans for disorderly conduct. Knox and Reed attempted to enter the front door, when Evans tried to slam the door shut, striking "Knox's head and body" with the door and door handle. Reed ordered Knox to apprehend Evans, so Knox bit Evans's leg. "Evans repeatedly punched Knox in the head with a closed fist," then pried Knox's jaws apart and "put one hand over Knox's nose causing Knox to gag." Reed knew this to be "back breathing" which meant Knox was suffocating. Reed was able to get into the house and "struck Evans" three times, knocking him unconscious before arresting him. The circuit court, after a bench trial, convicted Evans of disorderly conduct, resisting arrest, and animal cruelty.

The CAV reversed all three convictions. On the disorderly conduct, the CAV found that Evans's language, while rude, did not "have a direct tendency to cause acts of violence." (citing City of Houston v. Hill, 482 U.S. 451, 461 (1987)). "Evans made no threatening remarks or movements to the police officers." The CAV found that "this case contained no evidence that Evans's actions and words had the necessary tendency to incite a breach of the peace or cause a violent action from a reasonably trained police officer."

On the resisting arrest conviction, the CAV found that "Evans was never within Officer Reed's immediate span of control and Officer Reed had no immediate physical ability to place Evans under arrest." (citing Hackett v. Com., 78 Va. App. 92, 98 (2023)). "When the arrest was attempted to be made, a door separated Officer Reed from Evans." Therefore, "the Commonwealth failed to satisfy the close-proximity requirement."

On the animal cruelty conviction, the CAV found that there was insufficient evidence of willfulness. "A voluntary act becomes willful, in law, only when it involves conscious wrong or evil purpose on the part of the actor, or at least inexcusable carelessness, whether the act is right or wrong." (quoting Black's Law Dictionary (10th ed. 2014)). "The act . . . must be intended or it must involve a reckless disregard for the rights of another and will probably result in an injury." (quoting Barrett v. Com., 268 Va. 170, 183 (2004)).

The CAV found that Evans's actions were "reflexive punches thrown at the dog [and] were not intended to harm Knox." The CAV further found that there "was no conscious wrong or evil purpose behind his actions as he merely did enough to get the dog to release his leg."

Commentary: I will be interested in seeing if the Commonwealth petitions for either a rehearing en banc or an appeal to the SCV in this case. From the evidence in the opinion, I agree with the disorderly conduct reversal; however, I disagree with the other two. On the animal cruelty issue, in addition to Evans striking Knox and prying Knox's jaws apart, Evans took the extra action of placing a hand over Knox's nose, leading him to start suffocating. This allows for the reasonable inference that Evans had the intent to harm Knox or cause him inhumane pain. Further, Code § 3.2-6570(A)(ii) has a disjunctive "or" where the evidence can support a conviction where the defendant "unnecessarily beat[]. . . any animal." I think that this qualifies as unnecessarily beating Knox. Remember that the test is whether any rational factfinder could have concluded the elements beyond a reasonable doubt. I think the CAV overstepped the deferential standard of review, which does not change if it is a bench trial or jury trial.

On the resisting arrest conviction, there is an interesting issue that could come up, which is whether Knox is an officer of his own right or whether he is an extension of Reed. The CAV has found that the use of a TASER is sufficient for span of control, so if Knox is an extension of Reed's ability to control, then there is an argument that Reed did have the immediate physical ability to arrest Evans. (The CAV previously rejected a similar argument I made regarding a firearm in Hackett, but the Commonwealth chose not to petition the SCV for an appeal in that case). If Knox is an officer in his own right (acting under the authority of his handler) then Knox had the immediate physical ability to arrest.

McFadden v. Com., Record No. 0900-23-4: (Frucci, J., writing for Friedman, J., and Humphreys, SJ.)

Prior bad acts; Motion to sever; Sufficiency; Abuse of discretion in sentencing; Admissibility of evidence; Rule 5A:18

Evidence of McFadden's prior uncharged assaults admissible to show the nature of the relationship between the parties. Circuit court took steps to mitigate any resulting prejudice, so evidence was certainly not substantially more prejudicial than probative. Evidence was sufficient to show the injury was permanent and significant.

> McFadden began a romantic relationship with Wiley in 2011, when Wiley was 17 years old. The relationship lasted for about 7 years, during which they had 2 children. McFadden physically assaulted Wiley in 2016. She suffered a gash on the back of her head and other injuries, requiring 10 stitches to the forehead and 10 staples to the back of her head. McFadden called 911 and told Wiley that they would make up a story to tell emergency services. Wiley lied to the police, telling them that she fell off of the kitchen counter and that she threw a ceramic bowl at McFadden. Police knew the evidence was not consistent with that version of events, but Wiley persisted because she thought McFadden would kill her and her family.
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> In 2018, McFadden accused Wiley of cheating on him and called her 60 times. McFadden drove to where Wiley was living and looked through her phone. Afterwards, McFadden "smacked Wiley to the ground with an open hand." McFadden texted Wiley after he left, "[I] didn't fucking hit u. I pushed you, which was wrong of me, but y'all got what y'all wanted, to get me pissed off." He also texted, "Mushed ur fucking head." Wiley reported this incident to the police and told them that she lied about the 2016 incident. McFadden was charged with aggravated malicious wounding for the 2016 assault and domestic assault and battery for the 2018 assault.
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> McFadden moved to exclude evidence of uncharged assaults against Wiley. The circuit court denied his motion, permitting Wiley to testify about 4 incidents. In 2012, McFadden "picked Wiley up by her neck and put her against the wall" before punching her. On the same date, he "stuck Wiley out of a window and eventually pulled her back in." In 2013, "McFadden put a knife to her neck and . . . accused her of cheating." In 2015, McFadden accused Wiley of stealing money from him. He picked her up and "threw her in the kitchen."
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> McFadden testified in his own defense and told the jury that Wiley had fallen off of the kitchen counter in 2016. He stated he helped her clean up and get to the hospital. He further told the jury that he did not assault her in 2018. The jury convicted him as charged.
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> The CAV affirmed. On the issue of the prior bad acts evidence, the CAV determined that there was no abuse of discretion in the circuit court's admission of the evidence. In doing so, the CAV found that the prior bad acts evidence "tended to shed light on the nature of McFadden's and Wiley's relationship, McFadden's attitude towards

Wiley, and explain actions taken by McFadden and Wiley during the incidents." (citing Osman v. Com., 76 Va. App. 613 (2023)). The CAV further found that the evidence was not substantially more prejudicial than probative and specifically that "the circuit court took action to mitigate the prejudicial effect of the evidence." (citing id. and Brooks v. Com., 73 Va. App. 133, 148 (2021)).

McFadden assigned error to having a single jury trial, but he failed to properly and timely object to having a single trial. McFadden never filed a motion to sever, and the charges were never specifically joined by a motion of the Commonwealth, so the circuit court "was never given the opportunity to consider the issue, let alone make a ruling on it." As such, appellate review was precluded by Rule 5A:18.

The CAV determined that the evidence was sufficient to support his convictions, reiterating that the test is "in the light most favorable to the [Commonwealth, whether] 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)). There was evidence that supported the conclusion that "Wiley's injury was both significant and permanent," so there was no error in convicting him of aggravated malicious wounding. The CAV also found no abuse of discretion in sentencing him within the statutory maximum, again stating that if "a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end." (quoting Guest v. Com., 78 Va. App. 187, 198 (2023)).

Pearson v. Com., Record No. 2002-22-1: (Athey, J., writing for Huff and O'Brien, JJ.)
Admissibility of evidence; Expert testimony; Unlawful arrest; Fourth Amendment; Jury instructions; Rule 5A:18
Lawfulness of attempted arrest is a question of law not fact; therefore, jury not entitled to make that determination, and the circuit court properly instructed the jury that the arrest was unlawful. Circuit court did not abuse its discretion in excluding evidence of protective order because they related to probable cause to arrest, and circuit court did not err in finding that the jury did not need expert testimony and a guided frame-by-frame video review because the jury can review the video on their own.

In 2019, Berry called to report his 9-year-old son was missing. Pearson was one of the responding officers to Berry's house. Berry showed the officers a video of his son, showing them that his son had a black eye. But, Berry's son stated that the bruising was from "roughhousing with his siblings." The officers refused to issue a missing person's report because Berry's son's whereabouts were known, and there was insufficient evidence to conduct a welfare check on the son.

Pearson warned Berry that he could be charged with "falsely summoning law enforcement" and that there was a protective order "preventing Berry from having contact with his son." The officers left, and Berry repeatedly contacted the Newport News emergency services to conduct a welfare check on his son. "Berry also contacted the Fairfax County Police department to do the same.

Pearson and a few other officers returned to Berry's house but did not obtain a warrant. They attempted to get Berry to leave his apartment, but "Berry insisted on remaining in the doorway to his apartment." Eventually. Pearson and another officer "rushed through the apartment door and attempted to seize Berry." Officers attempted to deploy a TASER, but "Berry wrested control of the taser from Officer Pitterson." Pearson shot Berry in the back, and Berry died.

At trial, the circuit court admitted a video recording of Pearson's first interaction with Berry from the night of the shooting over Pearson's objection. The video was "redacted to exclude any mention of the protective order against Berry." The circuit court further precluded Pearson from using the protective order to refute Berry's statements that he had "sole custody of his son." Pearson testified in his own defense, stating that "shooting Berry was 'the only option that I had to stop' Berry from using the taser on the officers.

When the circuit court was deciding jury instructions, Pearson objected to 5 jury instructions regarding the legality of arrests and entry into the residence to effectuate an arrest. In particular, Instruction 22 specifically stated, "The attempted arrest of Mr. Berry was unlawful." Instruction 24 stated, in part, "The decedent was entitled to resist the attempted unlawful arrest with such reasonable force as was necessary to repel that being exercised by the officer in his unwarranted undertaking." The jury convicted Pearson of voluntary manslaughter and entering property with the intent to damage.

The CAV affirmed Pearson's convictions. The CAV rejected Pearson's argument that the circuit court improperly decided as a matter of law that his attempted arrest of Berry was unlawful. The CAV stated, "It is fundamental that the court must respond to questions of law and the jury to questions of fact." (quoting Amonett v. Com., 70 Va. App. 1, 8 (2019)). Reviewing the attempted arrest *de novo*, the CAV found that the circuit court did not incorrectly determine that Pearson's attempted arrest was unlawful. The CAV found no exigency in entering Berry's home to effectuate an arrest and no reason Pearson and the other officers could not have obtained a warrant. (citing Verez v. Com., 230 Va. 405, 410 (1985)).

The CAV then reviewed the circuit court's decisions on admitting or refusing evidence. The CAV found that any evidence that tended to support probable cause to arrest Berry was irrelevant and inadmissible because the circuit court properly concluded that the attempted arrest was unlawful. The CAV further found that the circuit court did not abuse its discretion in refusing to allow Pearson to show the video frame by frame. The jury was able to review the evidence in its own right. (citing Coppola v. Com., 220 Va. 243, 252 (1979)).