Overview

1 published case this week, and 2 cases were granted review en banc. Both en banc cases involve the Commonwealth, but only one is a criminal case. However, the criminal case will be a landmark decision when it comes out. Criminal defense and Commonwealth's attorneys should keep an eye on Jennings.

In Jennings v. Com., Record No. 1407-22-3, Jennings was found with a concealed firearm during a routine traffic stop. He was convicted of possession of a firearm by a felon w/in 10 years and carrying a concealed weapon. He contests only the firearm by felon conviction/sentence primarily because he was not "convicted" of a felony but rather "adjudicated delinquent" and therefore the mandatory minimum should not apply. The CAV panel found that Carter v. Com., 38 Va. App. 116 (2002), was dispositive of the issue. The CAV applied the interpanel-accord doctrine, which is that a panel's opinion can only be overruled by the CAV en banc or the SCV. Judges Lorish and Ortiz concurred in the result but specifically stated that the "Court should revisit Carter en banc." The fact that this case was granted en banc review indicates that potentially 9 judges would like to see Carter overturned. See § 17.1-402(D) (discussing that in the absence of a dissent or certification that a decision is contrary to another opinion, a majority of the judges need to agree to take the case). It is possible that juvenile adjudications might not serve as prior "convictions" any longer.

The other en banc review is far less interesting but no less important, especially because it involves a published CAV panel opinion. Williams v. Com., Record No. 1201-22-2, involves a tort claim alleging that the Commonwealth is liable for the actions of a DOC officer. The officer hastily tried to get Williams out of a van without unshackling Williams. The officer fell, pulling Williams down to the ground. Williams suffered injuries as a result. The circuit court dismissed the case after a plea in bar claiming Williams had not exhausted her administrative remedies and thus the Commonwealth had not waived sovereign immunity pursuant to § 8.01-195.3. The CAV panel reversed, stating that Williams was not an inmate at the time of filing the complaint. Judge AtLee dissented, interpreting the code section to find that a written notice of the claim to the Commonwealth is the time of determining status of "inmate," concluding that Williams was an inmate and did not satisfy the statutory requirements. The Commonwealth petitioned for en banc review, and we'll see how the full Court comes down on the issue, which could impact sovereign immunity doctrine but will most likely be a straightforward statutory interpretation issue.

In unpublished cases, Cribbs v. Com., Record No. 0347-23-2, demonstrates the importance of proper objections, as the CAV explicitly stated that because Cribbs conceded certain links in the chain of custody/authentication, the CAV did not review them. This could have changed the outcome of the case. Bonilla v. Com., Record No. 0742-23-1, reminds us that malice can be demonstrated by one or two strikes and that two punches can be sufficient to kill.

And finally, Yohannes v. Com., Record No. 1748-22-4, and Boyer v. Frederick County Board of Supervisors, Record No. 0846-23-4, remind us of the doctrines and rules that restrict attorneys in our presentation of evidence and requests for action. Boyer failed to properly articulate her arguments in her brief, resulting in the CAV refusing to review her assignments of error. Yohannes specifically requested a sentence that may have violated § 19.2-306.1, and the CAV was thus precluded from reviewing the legality of his sentence because he approbated and reprobated.

Published Decisions

H.C. v. Potomac Hospital Corp. of Prince William, Record No. 0521-23-4: (Decker, CJ., writing for O'Brien and AtLee, JJ.)
Motion to strike; Vicarious liability; Respondeat superior; Scope of employment
The CAV affirmed the decision to grant the motion to strike the evidence against Potomac where Yeboah's actions were clearly outside the scope of his employment. The CAV provided distinctions between Yeboah's actions and other sexual assaults by nurses which may allow for vicarious liability.

H.C. was sexually assaulted by Frederick Yeboah (convicted and sentenced in 2019) while he was an employee of Potomac. H.C. sued Yeboah in his personal capacity and Potomac as his employer. After the evidence was presented, Potomac moved to strike the evidence, stating that the presumption of vicarious liability was defeated by H.C.'s own evidence that Yeboah "had a bad motive" and "acted significantly outside of what he was supposed to be doing. While the circuit court denied the motion at the conclusion of H.C.'s case-in-chief, it granted Potomac's renewed motion to strike at the conclusion of all evidence. The circuit court stated "[T]he assault stood alone" from Yeboah's duties and that "Yeboah's motive must have been his own rather than his employer's."

The CAV affirmed and conducted a thorough analysis of respondeat superior and its burden-shifting framework. "A rebuttable presumption that that an employee was acting within the scope of his employment arises when the plaintiff alleges an employment relationship." (quoting A.H. v. Church of God in Christ, Inc., 297 Va. 604, 633 (2019)). This shifts the burden to defendant to present such evidence that "permit[s] the factfinder to conclude that the employee was not acting within the scope of his employment at the time of the tortious conduct." (same).

The CAV stated that the circuit court properly applied the burden-shifting framework and that Potomac established more than sufficient evidence to support the circuit court's ruling. The CAV recognized that "[i]f the employee's 'acts of molestation occurred simultaneously with his performance of . . . job-related services' such as while 'undressing' or 'bathing' a resident of a nursing home," then a jury could infer that the molestation occurred because of a "mixed motive." (quoting Our Lady of Peace, Inc. v. Morgan, 297 Va. 832, 849 (2019)). "If 'the deviation from the employer's business is slight on the one hand, or marked and unusual on the other,' the trial court may resolve the issue as a matter of law." (quoting Parker v. Carilion Clinic, 296 Va. 319, 341 (2018)).

In the instant case, however, the CAV found that Yeboah's actions were purely personal and was sufficiently outside of the scope of Yeboah's employment that the circuit court did not err in resolving the issue. However, the CAV stated that if the case were closer, then it would have been appropriate to submit the case to the jury.

Unpublished Decisions

Molina v. Com., Record No. 0229-23-1: (Causey, J., writing for AtLee and Malveaux, JJ.)
Sufficiency; Admissibility of evidence; Mistrial; Term of probation; Improper argument; Venue; Recent complaint statute; § 19.2-268.2
The Commonwealth's statement that its evidence was uncontroverted was not improper comment on Molina's right not to testify. The CAV found no error in admitting testimony pursuant to recent complaint statute and no error in imposing a 10-year supervised probation term where aggravated sexual battery is exempted from the 5-year limit.

C.D. and her mother lived with Molina when C.D. was six years old. Molina coerced C.D. to "touch him on his penis" by allowing her to play games on Molina's phone in exchange for sexual acts. Molina exposed himself, and C.D. touched his penis, but when Molina asked C.D. to "lick" his penis, she refused. C.D. disclosed the abuse to her father, Dennis, when she visited him a few months later.

At trial, Dennis testified that Molina lived in Portsmouth and that C.D. told Dennis about "an event that had taken place at Mr. Molina's home where Molina asked her to touch his penis." Molina objected to both statements, which the circuit court overruled. Further testimony from C.D.'s mother was that she and Molina lived in several houses together with C.D. in Portsmouth, South Norfolk, and Suffolk. The circuit court granted Molina's motion to strike in relation to one charge and denied the motion with respect to aggravated sexual battery.

In closing argument, the Commonwealth stated, "The defense has not put on any evidence to refute what the Commonwealth has put on." Molina objected and asked for a mistrial, alleging that the comment was prejudicial and an improper comment on Molina's Fifth Amendment right not to testify. The circuit court denied the motion for a mistrial, stating that it "had instructed the jury that there was no burden on defense to produce any evidence" and "that opening and closing statements are not evidence."

In affirming Molina's convictions, the CAV reminds us and the parties that the Commonwealth only needs to present sufficient evidence "to give rise to a strong presumption that the offense was committed within the territorial jurisdiction of the court." (quoting Tanner v. Com., 72 Va. App. 86, 94 (2020)). Further, the CAV reviewed the recent complaint statute and found that the circuit court did not err in admitting Dennis's testimony regarding C.D.'s disclosure.

The CAV held that the Commonwealth's statement was not improper comment on Molina's right not to testify. The Commonwealth was simply "referring to the lack of contradictory evidence" and thus commenting on the Commonwealth's witness's credibility. Finally, the CAV held that the imposition of 10 years of supervised probation was permissible because aggravated sexual battery is an exception to the 5-year limitation on supervised probation.

Spurlock v. Com., Record No. 0288-23-3: (Causey, J., writing for Lorish and White, JJ.)
Sufficiency; Jurisdiction; Age of Victims/Perpetrator
The Commonwealth's evidence was sufficient to convict Spurlock of rape, OSP, sodomy, indecent liberties, and ASB. The jury could rely on its observations of the defendant in determining his age at the time of the offense.

> Spurlock was convicted of 2 counts of each of the following: rape of a child under the age of 13, object sexual penetration of a child under the age of 13 by an adult, sodomy of a child under the age of 13 by an adult, indecent liberties with a child by a custodian, and aggravated sexual battery.
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> K.A.H. testified that Spurlock sexually assaulted her and her younger sister "at least twice a week" beginning after K.A.H.'s mother moved out of the home until K.A.H and A.H. were removed from the home. K.A.H. eventually disclosed the assaults to her adoptive mother in 2020. The opinion goes into detail about the abuse, but I do not reiterate the facts here.
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> Spurlock raised purely sufficiency claims, stating the Commonwealth failed to prove Spurlock's age or the age of the victims, that the offenses occurred in the Commonwealth of Virginia, identity of the perpetrator, and each of the substantive elements of the offenses. The CAV affirmed Spurlock's convictions and dispensed with each of the assignments of error in turn, reminding us that the review on appeal is only whether any rational factfinder could find the defendant guilty.

Cribbs v. Com., Record No. 0347-23-2: (Clements, SJ., writing for Beales and Callins, JJ.)
Admissibility of evidence; Sufficiency; Chain of custody
The Commonwealth proved the necessary links in the chain of custody, even when the West Virginia officers who obtained the phone and mailed it to Virginia did not testify.

> Detective Strickland initiated an investigation into solicitation of minor children on several messaging applications. Strickland set up profiles and had a profile picture the appeared to be 12-14 years old. Strickland used her own face and used age regression software to create the photograph. A profile by the name of "Cribbs Jam," with a profile picture later identified as Cribbs, began messaging Strickland, and the two subsequently moved to another messaging system, where Strickland had a similar age-regressed photo, and Cribbs used a profile called "Junior James" and a username of "JJ Redman 39." They used these messaging systems for approximately 2 months until they switched to text messages. Five days after that, the two spoke on the phone.
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> During the messaging, Cribbs asked about Strickland's age, which Strickland stated was 14. Cribbs "loved her age" and told her it did not bother him that she was 14. At length, Cribbs asked Strickland to perform various sexual acts and record them

for him. Cribbs asked Strickland if she would like to perform sexual acts on him and sent her pictures of his penis.

Strickland obtained a subpoena duces tecum to one of the messaging platforms asking for his location and certain subscriber information. Strickland found that the phone number associated with the messaging account was the same as the one that was texting and calling her. Cribbs's residence was in West Virginia, and he was arrested by local authorities who sent Cribbs's cell phone via FedEx. Some of the photographs and text metadata stated Cribbs was in West Virginia and other metadata indicated that he was in Virginia when he sent some of the texts to Strickland.

Cribbs contested the admissibility of the evidence obtained from the phone for insufficient proof of chain of custody from West Virginia to Strickland, claiming that the messages and metadata could have been altered. Cribbs did not contest that the phone belonged to him. The circuit court overruled Cribbs's objections and admitted the evidence, with the jury convicting Cribbs. The circuit court denied Cribbs's motion to set aside the verdict.

The CAV affirmed the admission of the cell phone evidence, finding that Strickland's testimony regarding obtaining the warrants for Cribbs's arrest and cell phone as well as the Forensic Detective's testimony that there was no evidence of tampering or other malicious software satisfied the initial link in the chain of custody. However, Cribbs did not contest the assertion that the West Virginia police were the ones who sent the phone, nor did he contest that the phone belonged to him. The CAV found that there was no evidence that the postal workers nor the police officers abdicated their responsibilities, and in the absence of affirmative evidence to that end, there is a presumption that they "properly discharged their official duties." The CAV further found sufficient evidence to convict Cribbs of solicitation of a minor.

Mahdi v. Com., Record No. 0545-23-1: (White, J., writing for Huff and Malveaux, JJ.)
Motion to suppress; Probable cause; Automobile exception; Plain view doctrine
The CAV found that automobile exception applies where officer observed crack cocaine after advising Mahdi that the vehicle would be impounded.

Officers observed a black Nissan stopped on the street and ran the plates through a law enforcement database. Mahdi was the registered owner of the Nissan, and there was an active felony warrant for his arrest. Officer Labat activated his emergency lights to initiate a stop of the Nissan. Labat exited his car and walked to the driver's door, identifying Mahdi as the driver. Mahdi sped off, and a front-seat passenger jumped out of the Nissan and fled on foot.

Mahdi lost control of the Nissan and ran off the road. Labat and his partner arrested Mahdi, and Mahdi told them the Nissan was not in park. Labat placed the Nissan in park and shut the driver's door. Later, Labat used his flashlight to look in the

Nissan, identifying a baggie containing crack cocaine sitting on the front passenger seat. Labat advised that the vehicle was going to be impounded, and then he conducted a search of the car and found a Vipertek stun weapon, a concealed machete, and marijuana. Labat did not complete an inventory search form. Mahdi moved to suppress this evidence because Labat did not have a search warrant.

The circuit court denied the motion to suppress, finding that while Labat did not properly conduct an inventory search, Labat observed the narcotics in plain view, providing the officers with probable cause to search.

The CAV affirmed the ruling, finding that Labat acted reasonably by placing the car in park and shutting the door. Subsequently, Labat acted reasonably by looking through the windows with his flashlight, without opening the doors. The identification of the substance as crack cocaine, based on his training and experience, gave Labat probable cause to search, and the automobile exception allowed him to do so without obtaining a warrant.

Commentary: This case could have been more easily decided (in my opinion) through the inevitable discovery doctrine, which is an exception to the exclusionary rule. Assuming any error, such error is harmless, and the evidence should not be suppressed because the officers would have obtained the evidence following appropriate procedures. Labat had advised Mahdi that the car was going to be impounded, and an inventory search is required for that process. As such, it was inevitable that the officers would discover this evidence, even if the exact procedures required for the inventory search were not followed because of Labat's observation.

The reason I say this is because appellate courts are supposed to rule on the best and narrowest grounds. The automobile exception was originally intended to allow officers to search vehicles which are capable of being driven away by the defendant or another party. In this case, there is no exigency in searching without a warrant because the driver and registered owner is being arrested, and the car is about to be impounded. That being said, SCOTUS has basically distilled the automobile exception down to: "If it's capable of being driven away, it falls under the exception." But, I dislike hinging the automobile exception doctrine to that broad of a spectrum. Based on the information in the opinion, Labat and/or his partner would have stayed with the vehicle to perform an inventory search regardless of Labat's noticing the crack-cocaine. Because the officers would have inevitably discovered all of the evidence in the vehicle, any error on Labat's part was harmless and the evidence should not have been excluded. Perhaps there is some evidentiary reason why the CAV did not rely upon this ground but chose not to include it in the statement of facts or analysis.

Crowell v. Com., Record No. 0671-23-1: (Huff, J., writing for O'Brien and Fulton, JJ.)
Motion to suppress; Impermissibly broad search warrant; Exceeding scope of warrant; Conditional guilty plea
The officers did not expand the terms of the search warrant when they collected multiple electronic devices capable of sending text messages attributed to a single telephone number. By stopping the execution of the search warrant and obtaining a second to collect firearms observed during the search, the officers acted reasonably.

Crowell, a 46-year-old man, and R.L. a 14-year-old girl, lived in the same neighborhood. R.L. had run away from home several times to Crowell's house. R.L.'s mother did not permit R.L. to see Crowell. One day, R.L. went to a friend's house and used her friend's phone to contact Crowell to pick R.L. up and take her to Crowell's house. R.L.'s friend kept in contact with R.L. and asked a few times if R.L. was okay. R.L.'s friend received messages from Crowell's phone including the following: "I killed her"; "She's in the trunk"; and "I'm fine lmao."

The friend contacted R.L.'s mother and sent screenshots of the messages. R.L's mother contacted the police and provided Crowell's address and phone number. Officers responded to Crowell's house, and Crowell stated that R.L. was not there. Officers secured the outside of the residence and did not enter, allowing Crowell to access his external shed. Officers obtained a search warrant for both Crowell's house and shed to search for "electronic communication device" and R.L. Officers found R.L. in Crowell's bedroom, as well as multiple cell phones and computers. Officers entered the shed, observing a firearm and marijuana in plain view. Officers secured the area but stopped searching until they obtained another search warrant to collect any firearms and narcotics.

Crowell moved to suppress all evidence because the warrant did not state "devices" and instead had "device" singular. At the hearing, officers testified that they had intended the warrant to say multiple devices and thought it was a clerical error. Crowell also argued that the entrance into the shed was impermissible. The circuit court denied the motion, and Crowell entered into a conditional guilty plea to contributing to the delinquency of a minor and possession of a firearm by a felon.

The CAV affirmed, finding that the search "warrant did not specify 'an' or 'one' device" and instead "authorized the police to search appellant's property 'for the following property, **objects** and/or persons." (emphasis in original). Therefore, "[e]very device capable of sending messages using the specific number provided in the affidavit fit that criteria and was eligible for seizure." The CAV further found that the shed was explicitly identified and thus the entrance was permissible. After the officers saw the firearms in plain view, the officers appropriately stopped searching and obtained a new warrant. All actions were reasonable and therefore permissible.

Bowes v. Franklin County DSS, Record No. 0716-23-3: (Fulton, J., writing for Causey and Raphael, JJ.)
Termination of parental rights; Best interests of the child; Alternative grounds
No error in terminating parental rights under § 16.1-283(B) where mother failed to improve her living conditions or demonstrate her ability to be a caretaker. Under alternate grounds theory, the CAV did not review termination under § 16.1-283(C)(2).

> Bowes is the biological mother of L.P., A.H., and J.H. DSS became involved in 2021 and "discovered unsafe conditions in the home" including a roach infestation, as well as "sharp objects and marijuana . . . within the children's reach." Both parents tested positive for marijuana and cocaine. After a stipulated removal of the children from parents' custody, DSS created a plan to return the children home.
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> Bowes made sufficient progress by April 2022 for DSS to return the children on a trial basis. Father was verbally and physically abusive to Bowes, and DSS helped Bowes move into a motel but placed the children into foster care. However, Bowes returned to father and failed to maintain a stable job. Bowes also had failed to enroll in counseling services, which rendered her ineligible for other aid.
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> In December 2022, JDR terminated Bowes's parental rights, which Bowes appealed. The circuit court also terminated Bowes's parental rights under Code § 16.1-283(B) and -283(C)(2), finding that Bowes was unwilling to give up her relationship with the father, which was indicative of "prioritizing that relationship over her children's needs."
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> The CAV affirmed under § 16.1-283(B), finding that the record supported that it was in the best interests of the children to terminate her rights. The CAV found that DSS had offered Bowes more than sufficient services for Bowes to take advantage of and pursue regaining custody of the children. Bowes's actions belied her statements at trial that she was attempting to improve her condition. Because the CAV affirmed under § 16.1-283(B), the CAV did not review whether termination was appropriate under § 16.1-283(C)(2) because appellate courts only review to "determine whether any of the alternatives is sufficient to sustain the judgment." (quoting Castillo v. Loudoun Cnty. Dep't of Fam. Servs., 68 Va. App. 547, 574 n.9 (2018)).

Bonilla v. Com., Record No. 0742-23-1: (Huff, J., writing for O'Brien and Fulton, JJ.)
Sufficiency; Character evidence of victim; Self-defense; Malice
Character evidence of a murder victim must rise to evidence showing a propensity for violence or some other stated issue. Because the proffered evidence failed to meet that burden, the circuit court did not abuse its discretion. The Commonwealth's evidence was sufficient to demonstrate malice even though Bonilla only punched the victim twice.

> Bonilla and Dudney were at a bar. Dudney was annoying some of the patrons, who complained about Dudney's behavior. Dudney approached Bonilla and "act[ed] familiarly" with him. Bonilla "just looked at [Dudney] like he didn't know what

Dudney was talking about." Later that night, Dudney re-approached Bonilla and said, "[I]f there's something you want to get off your chest, we can go to the bathroom." Bonilla stood up, Dudney raised his arm, and Bonilla "punched Dudney twice in the face in quick succession with considerable force" then walked out to his car. Dudney later died as a result of his injuries.

At his trial for second-degree murder, Bonilla attempted to elicit character evidence of Dudney that he was aggressive in the bar two weeks prior to his death. Bonilla proffered "that testimony would describe how Dudney had appeared to become angry about something on the prior occasion and how he then mouthed off to other patrons and even invaded the personal space of a patron by tapping him on the shoulder." The circuit court sustained the Commonwealth's objection to the evidence, finding it "insufficient to establish an admissible character trait" of Dudney. Bonilla also proffered a self-defense claim and testified that "he thought Dudney was going to hit him because Dudney made a quick move." A jury convicted Bonilla.

The CAV held that Bonilla's proffered testimony did not amount to "showing a propensity for violent and turbulent acts." As such, the CAV found that the circuit court did not abuse its discretion in excluding the evidence. Further, the CAV determined the Commonwealth presented sufficient evidence to support Bonilla's conviction. The CAV reviewed Bonilla's self-defense claim and determined the evidence supported the jury's rejection of his defense.

Even though Bonilla only struck Dudney twice, the CAV found that "the jury was entitled to find that [Bonilla] acted out of anger when he punched Dudney." "Volitional acts, purposefully or willfully committed, are consistent with a finding of malice and inconsistent with inadvertence." (quoting Luck v. Com., 32 Va. App. 827, 833 (2000)). "[M]alice may be proven even with a single punch." (citing Johnson v. Com., 53 Va. App. 79, 103-04 (2008)).

Boyer v. Frederick County Board of Supervisors, Record No. 0846-23-4: (White, J., writing for Chaney, J., and Annunziata, SJ.)
Conditional use permit; Demurrer; Leave to amend; Rule 5A:20
Boyer failed to show a prima facie case that the Board acted unreasonably in denying her application. Boyer's assignments of error were mere assertions without evidentiary or legal support which is insufficient to warrant appellate review. The circuit court did not abuse its discretion in denying Boyer's motion to amend her complaint where she failed to identify what new facts she would include that could sustain her claim.

Boyer petitioned for a conditional use permit to provide boarding and training services for dogs within her home. The Board requested permission to inspect Boyer's house by 2 Supervisors, which Boyer denied. Boyer alleged that one of the Supervisors had a conflict of interest because he owned "a neighboring property." Boyer attempted to have all the Supervisors inspect the property, but under the Virginia Freedom of Information Act, such an act required "public advertising."

Therefore, the Board did not inspect the property. Several neighbors wrote comments concerned about potential "sound pollution" and "damage [to] property values."

The Board denied her application, and Boyer appealed to the circuit court under § 15.2-2285(F). Boyer claimed she was entitled to the conditional use permit because the Frederick County Planning Commission recommended approval with certain conditions. Boyer alleged that the Board acted arbitrarily and capriciously in denying the application. The Board filed an unopposed motion craving oyer to incorporate the prior record, and the circuit court granted Boyer leave to file an amended complaint. The Board filed a demurrer, which the circuit court sustained without giving Boyer leave to amend, dismissing her appeal with prejudice.

In doing so, the circuit court found that the Board "was acting in a legislative, not judicial, capacity" and thus, "even if Graber was biased or offended others in the performance of a purely legislative duty, he was answerable only to voters." (citing Blankenship v. City of Richmond, 188 Va. 97 (1948)).

In determining the legality of a grant or denial of a conditional use permit, the "locality's decision . . . is presumed valid and will not be altered by a court absent clear proof that the action is unreasonable, arbitrary, and bears no reasonable relation to the public health, safety, morals, or general welfare." If plaintiff/petitioner demonstrates any evidence of "unreasonableness" the Board is required to show that the decision was "fairly debatable." In this case, the CAV found that Boyer failed to articulate how "any of the allegations . . . , if true, would constitute probative evidence of an unreasonable decision by the Board." "Unsupported assertions of error do not merit appellate consideration." (quoting Bartley v. Com., 67 Va. App. 740, 744 (2017)). Therefore, Rule 5A:20 precluded review of Boyer's AOEs.

On the issue of the circuit court's decision not to give Boyer leave to amend, the CAV found that Boyer failed to identify what new facts "proffer[,] or description of the new allegations she would include." As such, the CAV found no abuse of discretion in the circuit court's denial of Boyer's request.

Peralta v. Com., Record No. 0873-23-4: (Decker, CJ., writing for O'Brien and AtLee, JJ.)
Sufficiency
The Commonwealth need not present evidence of a BAC when proceeding under a general theory of DUI. There was sufficient evidence for a rational factfinder to find Peralta guilty.

Peralta was stopped at a traffic light, and Officers Hetzner and Nunez stopped behind him. When the light turned green, Peralta failed to move, and the light turned red again. Hetzner exited his cruiser and approached Peralta's driver's door, observing the car was running, brake lights activated. Nunez positioned his cruiser in front of Peralta's car, in order to stop it from entering the intersection if Peralta disengaged the brake.

> Peralta was alone and asleep in the driver's seat, unresponsive to Hetzner's knocking on Peralta's window. Peralta finally awoke and struggled to place the car into park. Peralta also had difficulty unlocking and opening the door to talk to the officers. Exiting the car, Peralta was "sluggish and unsteady on his feet." Further, officers observed "a strong odor of alcohol" as soon as Peralta opened the door, and Peralta's eyes were "glossy[,] and he fumbled through his wallet twice before producing his driver's license." Peralta's speech was slurred, and he had delayed responses to the officers' questions.
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> When asked to perform field sobriety tests, Peralta claimed he did not understand English. Nunez, a native Spanish speaker, interpreted the instructions, but stopped when Peralta began responding to Hetzner's instructions before Nunez could interpret them, concluding Peralta could understand English. Peralta was arrested for DUI and refused to provide a breath sample. A jury convicted Peralta of DUI, driving on a suspended license, stopping on a highway, and unreasonable refusal, after the circuit court denied his motions to strike the evidence.
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> The CAV reminds us that Code § 18.2-266 has several subsections, each of which are independent of one another and require different elements/proofs. Because the Commonwealth did not proceed under a theory requiring a BAC, Peralta's BAC level or lack of evidence thereof was irrelevant to the CAV's analysis. The CAV found sufficient circumstantial evidence for a rational factfinder to conclude he was guilty of DUI.

Highsmith v. Franklin County DSS, Record No. 1534-23-3: (Fulton, J., writing for Causey and Raphael, JJ.)

Termination of parental rights; Alternative grounds

The CAV affirmed termination of parental rights under § 16.1-283(C)(2) where Highsmith demonstrated significant failure to amend his behavior. Under alternate grounds doctrine, the CAV did not reach the question of termination under § 16.1-283(B).

> Highsmith is the biological father of A.H. and J.H. DSS became involved in 2021 and "discovered unsafe conditions in the home" including a roach infestation, as well as "sharp objects and marijuana . . . within the children's reach." Both parents tested positive for marijuana and cocaine. After a stipulated removal of the children from parents' custody, DSS created a plan to return the children home.
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> Highsmith was referred to a domestic violence program, which he never attended. Highsmith was required to submit to drug screens and participate in substance abuse treatment in order to "demonstrate appropriate parental capacity." Mother obtained a two-year protective order against Highsmith, but she requested it be dissolved only two months later. Highsmith was verbally and physically abusive against Mother. Highsmith had a DUI conviction and abused alcohol, as well as other narcotics.

DSS petitioned to terminate parental rights of Mother and Highsmith. The circuit court granted the petition under § 16.1-283(B) and -283(C)(2).

In contrast to the Mother's case (Bowes), the CAV affirmed under § 16.1-283(C)(2) and did not address the question of whether the circuit court was correct under § 16.1-283(B). The CAV found that there was no evidence that Highsmith had modified his behavior or made reasonable changes. Further, Subsection (C) decisions "hinge not so much on the magnitude of the problem that created the original danger to the child, but on the demonstrated failure of the parent to make reasonable changes." (quoting Yafi v. Stafford DSS, 69 Va. App. 539, 552 (2018).

Yohannes v. Com., Record No. 1748-22-4: (White, J. writing for Chaney, J., and Annunziata, SJ.)
Probation violation; Rule 5A:18; Ends of justice exception; Approbate and reprobate
The approbate and reprobate doctrine precluded the CAV from exercising the ends of justice exception and reviewing whether Yohannes was properly sentenced under § 19.2-306.1.

Yohannes pleaded guilty to a felony in 2016 but was not sentenced until 2018. In October 2019, Yohannes's probation officer filed a major violation report, and Yohannes's first set of revocation proceedings began. Eventually, Yohannes was arrested and appeared in court in April 2021. Yohannes had incurred multiple charges in several jurisdictions, with some being dismissed/nolle prossed, but others still pending. The circuit court extended probation without a finding of violation and continued the case several times.

In November 2021, the circuit court "found Yohannes in compliance with the terms of his probation and dismissed" the -01 charge. In May 2022, the probation officer filed another MVR for positive substance screenings. The circuit court ordered Yohannes into CCAP after finding Yohannes in violation. In July 2022, an -03 was initiated for failure to enter CCAP. The circuit court then learned of new charges in New Jersey, and the circuit court *sua sponte* issued a rule to show cause in an -04 charge.

Ultimately, the circuit court found Yohannes in violation in the -03 and imposed no sentence. The circuit court also found Yohannes in violation in the -04 and imposed the balance of Yohannes's sentence, closing the case. Yohannes appealed, alleging that the newly enacted § 19.2-306.1 did not allow for such a sentence.

The CAV rejected Yohannes's claims, finding that not only that Yohannes failed to preserve his arguments (as Yohannes conceded) but that Yohannes has approbated and reprobated, which precluded that applicability of the ends of justice exception to Rule 5A:18. In his revocation proceeding, Yohannes requested "a three-month sentence or for a fully suspended sentence." In doing so, Yohannes requested the circuit court impose a sentence that would be in violation of § 19.2-306.1, if it applied. On appeal, Yohannes is precluded from raising the question of whether § 19.2-306.1 applied because if the circuit court had agreed with Yohannes, it still

would have violated the statute, and Yohannes is not allowed to take opposite positions at trial and subsequently on appeal.

Sutton v. Com., Record No. 1854-22-1: (Huff, J., writing for Malveaux and White, JJ.)
Voir dire; Strikes for cause; Admissibility of evidence; Juror misconduct; Voluntary intoxication
The CAV found that the circuit court did not abuse its discretion in modifying Sutton's proposed voir dire questions. The CAV refused to add a per se ground for excusing jurors on the basis that two prospective jurors cohabitate. Evidence of intoxication did not rise to the level to negate the Commonwealth's evidence of premeditation, and the circuit court did not err in denying Sutton's motion to strike the first-degree murder charge.

Sutton shot his girlfriend and her daughter, killing his girlfriend. Sutton admitted to killing his girlfriend but raised the defense of voluntary intoxication.

The parties presented written voir dire questions, and the Commonwealth objected to several of Sutton's proposed questions, including "Is there anyone who has a negative opinion in general about individuals who drink heavily" and "Do you feel that since Sutton has been charged with this offense that he is, therefore, probably guilty? You will hear evidence that he also consumed alcohol that night, does that change your opinion?" After argument, the circuit court removed reference to the conclusion of "intoxication" and amended the end of the first question to "individuals who use alcohol" and part of the second question to, "You may hear evidence that he also consumed alcohol."

During voir dire, Sutton moved to strike "either juror 10 or 11" because they were significant others and lived together. Sutton argued that "allowing both members of a romantic domestic relationship to serve together as jurors would be inherently problematic." The circuit court denied the motion, as neither had displayed any evidence of prejudice or bias.

On the third day of trial, a juror approached a witness and "greeted [the witness] by name, and said that [the witness] had given very good testimony the day before." The witness informed the Commonwealth, and the Commonwealth disclosed the interaction to defense counsel. The circuit court questioned the juror outside the presence of the rest of the jury, and she apologized for her conduct. The circuit court "reminded her that jurors are not to engage in any conversations with any of the parties, witnesses, attorneys, or any of the spectators." Sutton moved for a mistrial, but the circuit court denied the motion. However, the circuit court adopted the Commonwealth's position to change the position of this juror with one of the alternates, presumptively dismissing the juror at the conclusion of the case. No alternate jurors were utilized, and, thus, this juror was not involved with the deliberations or final verdict.

Sutton presented testimony from his brother, Ivan. Ivan testified about Sutton's alcohol consumption that night. Anticipating Sutton's line of questioning, the Commonwealth raised an objection outside the presence of the jury as to Ivan's

conclusions about Sutton's intoxication level. Sutton was attempting to elicit a conclusion that Sutton was intoxicated based on body-worn camera footage that Ivan did not personally observe. The circuit court agreed that it was improper and limited Ivan's testimony to his personal observations, but allowed Sutton to admit the footage into evidence.

Sutton moved to strike the evidence, which was denied. The first-degree murder charge was submitted to the jury because "both parties had introduced conflicting evidence as to whether [Sutton] was intoxicated or if [Sutton] had been drinking at all." The circuit court did instruct the jury on second-degree murder in addition to first-degree.

The CAV reiterated that "a defendant has no absolute right to have the court ask every question he propounded" to the venire. (quoting Thomas v. Com., 279 Va. 131, 162 (2010)). When a circuit court limits or excludes certain questions, the proponent "must prove that such limitation or exclusion violated [the party's] right to a fair and impartial jury." (citing LeVasseur v. Com., 225 Va. 564, 582-85 (1983)). The circuit court found not abuse of discretion in the circuit court's denial/limitation of Sutton's proposed questions.

The CAV "refuse[d] to take the unprecedented step of declaring cohabitation a per se ground for the disqualification of prospective jurors." The mere possibility of bias or prejudice does not justify the per se exclusion of such a juror/pair of jurors. Instead, the CAV found no evidence that there was actual or implicit bias in this pair of jurors and found no abuse of discretion in refusing to strike one of them. "A party's unsupported subjective belief is not a legitimate basis for requiring juror disqualification for cause."

Similarly, the CAV found no actual misconduct regarding the juror's interaction with the witness on the third day of trial. "[T]he record lack[ed] evidence showing that [the juror's] misconduct probably resulted in prejudice" to Sutton. "The mere fact of juror misconduct does not automatically entitle either litigant to a mistrial." (quoting Riner v. Com., 268 Va. 296, 317 (2004)). The CAV found no abuse of discretion in denying the motion for mistrial.

The CAV further found no abuse of discretion in limiting Ivan's testimony because "[t]he jury was capable of determining" the level of Sutton's intoxication based on their own interpretation of the video evidence. Finally, the CAV found no error in the circuit court's decision to deny the motions to strike. "Mere intoxication will not negate premeditation." (quoting Wright v. Com., 234 Va. 627, 629 (1988)). While Sutton had demonstrated some evidence of intoxication, the Commonwealth had established a prima facie case of premeditation. A genuine material fact was in question, evidenced by the circuit court granting a second-degree murder instruction. The circuit court properly submitted the case to the jury.