Overview

No significant update from the Supreme Court of Virginia (SCV) this week. The SCV held merit arguments on six cases on September 10 and 11. One of these cases, Jenkins v. Virginia State Bar *ex rel.* Eighth District Committee, Record No. 250276 is an original jurisdiction case. The rest were granted appeals (which only follows a writ panel argument) in February and March of this year, just to give a perspective on how long these cases have been pending. Unfortunately, I was not able to listen into the arguments this week, so I cannot give an update on what the Justices' perspectives on the following questions are until I can review the recordings. They are currently up, but I will likely not listen to them until later on this week.

The SCV criminal cases centered on whether the Court of Appeals of Virginia (CAV) erred in determining: (1) admissibility of hearsay statements (Bista v. Com., Record No. 230721); (2) testimonial nature of evidence given to forensic interviewer and whether those statements violated Confrontation (Bista v. Com., Record No. 230721); (3) ownership of a vehicle (King v. Com., Record No. 230483); and (4) probation revocation ability of circuit court and interpretation of §§ 19.2-303.1 and 306 (Johnson-Bey v. Com., Record No. 230619).

The SCV civil cases revolved around whether the CAV erred in: (1) ruling that a transcript was indispensable to the determination of the case on appeal (Medeiros, et al. v. Dep't of Wildlife Resources, Record No. 230691); (2) failing to resolve/attempt to resolve a perceived ambiguity in the circuit court's order (Medeiros, et al. v. Dep't of Wildlife Resources, Record No. 230691); (3) denying leave to amend the appellants' assignments of error (Medeiros, et al. v. Dep't of Wildlife Resources, Record No. 230691); (4) finding that a complaint "was a legal nullity" (Windset Capital Corp. v. Debosky, et al., Record No. 230733); and (5) affirming a circuit court's order vacating a default judgment (Windset Capital Corp. v. Debosky, et al., Record No. 230733).

The CAV focused on criminal cases this week, specifically motions to suppress. The CAV clarified what it means to have a sufficient nexus of tying the places to be searched with the items sought or believed to be present. The CAV distinguished the cases last week from precedent that found an insufficient nexus on similar(ish) facts. The two cases today (Moncrea v. Com., Record No. 0398-23-2 and Dawson v. Com., Record No. 1051-23-3) are inverses of one another. One dealt with a search warrant for a residence based on items found in a car, and the other dealt with a search for a car based on items believed to be in a residence (motel room).

SCV Opinions and Orders

The Supreme Court of Virginia did not issue any opinions or orders this week.

CAV Published Decisions

Perkins v. Howington, et al., Record No. 1239-23-3: (Ortiz, J., writing for O'Brien, J., and Humphreys, SJ.)
Stepparent adoption; Lack of contact; Best and narrowest grounds
Stepparent adoption without consent of the biological mother affirmed where the mother was prohibited from having contact with the child by court-order. The CAV found that the lack of contact was "without legal justification" because it was based on the mother's behavior. CAV defined what just cause means in this context.

Perkins is the biological mother of J.H. and maintained primary physical custody of J.H. until 2020, when the Howingtons (biological father and stepmother) obtained legal and physical custody of J.H. During the case, the JDR district court found that Perkins failed to cooperate with DSS's investigation and plan for supervised visitation. JDR entered a protective order, ordered a visitation schedule, and required Perkins to undergo drug screenings. Eventually, after several protective orders, including one in which the JDR ordered no further contact with J.H., her counselor was unable to contact Perkins for over 3 months and was only able to contact Perkins after reaching out to her probation officer.

The Howingtons petitioned for a stepparent adoption in 2021 and argued that under § 63.2-1202(H) Perkins had not contacted J.H. for 6 months, without just cause. JDR then modified its protective order and permitted Perkins to have contact with J.H. The last time Perkins saw J.H. for visitation was on March 13, 2022. A new protective order was entered prohibiting all contact with J.H. The circuit court held a hearing in June 2023 on the Howingtons' petition for adoption and agreed that there was no just cause for Perkins's lack of contact with J.H. and found that the adoption was in the best interests of J.H.

The CAV affirmed, explicitly adopting a definition of just cause. "To constitute 'just cause,' a parent's failure to visit or communicate must be due to factors beyond her control." (quoting Adoption of Dore, 469 So. 2d 491, 494 (La. App. 3d Cir. 1985)). The CAV found that Perkins's "own action caused the protective order, and thus her failure to contact the child for a period of six months prior to the adoption petition was without just cause."

The CAV also found that the circuit court's four references to Perkins's probation did not require reversal. "[T]his Court may not fix upon isolated statements of the trial judge taken out of the full context in which they were made, and use them as a predicate for holding the law has been misapplied.'" (quoting Bassett v. Com., 13 Va. App. 580, 583 (1992) (citation omitted)). The CAV found that the circuit court's oral ruling in its entirety demonstrated that "the court misspoke and was intending to refer to mother's issues in staying in contact with her CVCA Safety Officer." Therefore, there was no error in the circuit court's decision, finding that Perkins's consent was unnecessary and entering the adoption.

CAV Unpublished Decisions

Saunders v. Com., Record No. 0105-24-3: (Per Curiam Opinion: Huff, Athey, and Fulton, JJ.)
Sufficiency; Strangulation; Bodily injury
Appeal rejected where record plainly shows that Saunders caused injury to the victim by strangling her and causing her to be unable to breathe.

> The CAV rejected Saunders's appeal without oral argument, finding that "the dispositive issue has been authoritatively decided, and the appellant has not argued that the case law should be overturned, extended, modified, or reversed." Code § 17.1-403(ii)(b); Rule 5A:27(b).
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> Saunders's wife, Lisa, got a flat tire while near Greensboro, North Carolina. Saunders began driving toward her from Danville, but while he was en route, police officers helped Lisa change the tire. Lisa told Saunders to return to Danville, and she went to visit a friend. Saunders met Lisa in the friend's apartment complex and asked her to pay him $20 for gas he used driving toward her. She begrudgingly gave him the money and continued "load[ing] [clothes] into her car." Saunders then "grabbed her around her neck with both hands, thereby preventing her from breathing." Saunders accused Lisa of cheating on him and "pushed Lisa's head against the car." Lisa suffered "redness and scratches around the left side of her neck."
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> Saunders testified in his own defense that he "only grabbed her by the shoulder" but admitted that he had been convicted of felonies and misdemeanor crimes of moral turpitude. The circuit court convicted Saunders of strangulation, specifically finding that Lisa was "very creditable and she also had some injury that was observed by Officer Dailey."
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> The CAV affirmed, reiterating that "the only 'relevant question is, after reviewing the evidence in the light most favorable to the prosecution, whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (quoting Com. v. Barney, 302 Va. 84, 97 (2023) (citation omitted)).
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> The CAV found that Wandemberg v. Com., 70 Va. App. 124 (2019) controlled Saunders's situation. Finding that Lisa "as both unable to breathe and also suffered redness and scratches on her neck," her situation was nearly identical to the victim in Wandemberg. The CAV found no merit to Saunders's argument that because his version of events conflicted, there was insufficient evidence of guilt because "the trial court credited Lisa's testimony over Saunders'[s] testimony." Likewise, there was no error in the circuit court's finding of bodily injury.

Burkard v. Com., Record No. 0302-23-4: (Raphael, J., writing for Malveaux and Frucci, JJ.)
Motion for new trial; After-discovered evidence; Jury sentencing
No error in denying motion for new trial because Burkard failed to prove each of the four prongs of the required test. CAV found reasonable diligence was not done to secure the testimony and that Burkard knew the substance of the testimony. Finally, no error in the circuit court's determination that the jury's sentence was fair.

> In 2021, Burkard and his friend, Guidinetti, began exchanging combative communications with Stoudemire, who was friends with Ersheen and Calvin. Ersheen, Calvin, and Stoudemire had started "One Way" a company that sold drugs and clothes. These two groups began several acts of abusive online communications, including Burkard posting a "video of himself in a car, pointing a handgun at Ersheen's residence." Guidinetti was also in the video, and both of them began "taunting Ersheen to come outside" and Burkard "threatened to shoot him 'right now.'"
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> Ersheen agreed to fight Guidinetti and asked Stoudemire to "back him up." Another friend, Mulugeta, picked Ersheen, Stoudemire, and Calvin up before driving to Guidinetti's house. Ersheen and his friends entered Guidinetti's garage, and Ersheen and Guidinetti began fighting, and the garage door was closed. Burkard was inside Guidinetti's house and messaged a friend, "They already here; they wanna scrap; we just gonna run they shit, and show em a real one way lifestyle."
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> Burkard entered the garage and aimed a handgun first at Ersheen, then at Calvin, Stoudemire, and Mulugeta. Guidinetti and Ersheen stopped fighting, and Guidinetti "yelled at everyone to get out of his garage." Burkard began shooting, and Ersheen collapsed on the ground. As the others opened the garage door and ran away, Calvin was shot and collapsed on the other side of the street. Guidinetti and Stoudemire called 911, and while one officer was rendering aid to Calvin, Guidinetti stated "there's somebody in my garage bleeding out." "Burkard was trying to help Ersheen, who was lying on the floor in a poll of blood." Burkard admitted he was the shooter.
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> Burkard testified in his own defense and stated that he was only trying to intimidate the others with his videos and use of the firearm. He wanted to "convince people to buy drugs from [Burkard and Guidinetti] instead of from One Way." Burkard also stated that the fight was not one-on-one, and "Ersheen, Calvin, Mulugeta, and Stoudemire were all swinging at Guidinetti." Burkard testified that he pulled the gun out to stop them. Each of them tried to "charge at him," but they would always stop when he pointed the gun at them individually. Burkard stated that eventually all three charged at the same time, and Burkard shot Ersheen. Burkard admitted that he knew he had shot Ersheen but not anyone else. Burkard also testified that he purchased the "ghost gun" online and that sometimes it would fire 2 times when the trigger was pulled only once.

The jury found Burkard guilty of 2 counts of voluntary manslaughter and sentenced him to 10 years' incarceration on each charge. While waiting for the circuit court to review the jury sentence and enter a final conviction order, Burkard moved for a new trial based on after-discovered evidence of Guidinetti's testimony. Guidinetti's mother refused to let Guidinetti discuss the case with defense counsel until after the trial. Defense counsel had not subpoenaed Guidinetti for any of the trial dates. Guidinetti testified at the motion for a new trial and corroborated much of Burkard's version of events. The circuit court denied the motion for a new trial, finding that the evidence was not new, that counsel had made a strategic choice not to subpoena Guidinetti, and that "Guidinetti's testimony lacked sufficient credibility to order a new trial."

The circuit court reviewed the jury's sentence and stated "there was no prescribed way to look at whether to suspend a portion of the jury verdict." The circuit court believed that to suspend a portion, the circuit court "had to decide whether there were reasons to deviate from that punishment" or that the punishment was "unfair or disproportional to the crimes." The circuit court found no such evidence and imposed the jury's sentence.

The CAV affirmed. The CAV stated found no abuse of discretion in denying the motion for a new trial, reiterating the four-prong test from Odum v. Com., 225 Va. 123, 130 (1983)). (1) the evidence is discovered after trial; (2) the evidence "could not have been secured for use at the trial in the exercise of reasonable diligence by the [defendant];" (3) the evidence "is not merely cumulative, corroborative or collateral;" and (4) the evidence is material and therefore "should produce opposite results on the merits at another trial." (quoting id.).

The CAV found Burkard failed to prove the first and second prongs, reiterating that even failing to prove one prong requires denial of the motion. (citing e.g. Avent v. Com., 279 Va. 175, 206-07 (2010)) Burkard knew the substance of Guidinetti's testimony, so it was not actually discovered after the trial, and counsel could have subpoenaed Guidinetti to appear at trial. "Failing to subpoena a witness who is known to possess exculpatory information is a failure to exercise reasonable diligence. (citing Mundy v. Com., 11 Va. App. 461, 483 (1990) (en banc)).

The CAV further found no abuse of discretion in the circuit court's determination that the jury sentence was fair. The CAV found that the circuit court properly reviewed the mitigating evidence and was sympathetic with Burkard's life and situation. The CAV rejected Burkard's correlation of the case to Bruce v. Com., 9 Va. App. 298 (1990) where the CAV reversed the circuit court that stated it could not interfere with a jury sentence. Here, the circuit court simply found that the jury's verdict was "not unfair, it's a fair sentence."

Commentary: This case is interesting because the CAV reminded us that a defendant must prove all 4 prongs of the after-discovered evidence test, and stated that in this case, the defendant affirmatively failed to prove 2 of those 4 prongs. But,

the circuit court also found that the evidence was not material (4th prong) ("The trial court found that Burkard failed to prove at least the first, second, and fourth prongs of the four-part test."). The Commonwealth conceded that the circuit court did not reach the 3rd prong, specifically arguing that the CAV "need not address the question of whether Guidinetti's testimony was merely cumulative or corroborative." But, the Commonwealth did argue on the materiality prong (4th).

The CAV, though, when stating that the defendant fails even if one prong fails, affirmed on 2 prongs, and specifically did not address the 4th prong, stating, "The correctness of the trial court's rulings on the first and second prongs suffices to resolve this appeal." But, why address a second or third prong at all. The doctrine of judicial restraint should govern, and the CAV should state, "Because this Court finds that the defendant failed to prove X prong of the test, this Court cannot find an abuse of discretion" or something like that. The fashion of the opinion here implicitly states that the circuit court was incorrect in finding that Guidinetti's testimony was immaterial. The CAV did not need to go that far, and so the fact that they did is a statement unto itself.

Carpenter v. Com., Record No. 0353-23-2: (Per Curiam Opinion: AtLee, Friedman, and Callins, JJ.)

Sufficiency; Reasonably hypothesis of innocence

Appeal rejected where the evidence clearly supported the jury's decision to reject Carpenter's proposed hypothesis of innocence.

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

Carpenter had an 8-month-old daughter in July 2021. Carpenter's girlfriend found a video on Carpenter's cell phone that was recorded on July 2, 2021. The video showed Carpenter with his shirt off and pants unbuttoned, "touching his genitalia as he directs his penis toward the child's mouth." Carpenter's girlfriend called the police, and Carpenter was charged with possession of child pornography, production of child pornography, indecent liberties, and forcible sodomy.

Carpenter testified in his own defense and claimed (similar to what he said in his police interview) that he was feeding his daughter a banana. Carpenter stated that "his girlfriend was angry with him" and that "others had access to his phone." The Commonwealth introduced an enhanced video without objection that clearly showed that Carpenter was the one in the video. Carpenter moved to strike the evidence, claiming that the video was merely "suspicious" and did not show any sodomy or other activity. The circuit court denied the motion, and the jury convicted Carpenter of taking indecent liberties and attempted forcible sodomy.

The CAV affirmed, reiterating that an appellate court reviews "video evidence not to determine what the court thinks happened, but for the limited purpose of determining whether any rational factfinder could have viewed it as the factfinder

did." (quoting Com. v. Barney, 302 Va. 84, 97 (2023)). The CAV stated that it had "no trouble concluding that that the trial court did not err in denying Carpenter's motion to strike," rejecting Carpenter's arguments regarding the clarity of the video.

Moncrea v. Com., Record No. 0398-23-2: (Beales, J., writing for AtLee and Malveaux, JJ.)
Conditional Guilty Plea; 4th Amendment motion to suppress; Void ab initio; Supervised probation duration
Sentence reversed where the circuit court imposed an indefinite period of supervised probation. But, no error in the search warrant where a sufficient nexus was demonstrated between the ammunition found in the car and possibility of additional firearms in Moncrea's apartment.

Officers were investigating Moncrea for narcotics distribution and observed Moncrea leave an apartment and enter a car. Officers knew that Moncrea did not have a valid license and conducted a traffic stop. Officers located a firearm and 2 types of ammunition that did not match the firearm found in the car. Moncrea was a convicted felon, and officers obtained a search warrant for the apartment to find firearms and other ammunition. Officers found evidence for PWID, including multiple types of narcotics and cash.

Moncrea moved to suppress the evidence obtained, claiming that the search warrant was invalid due to Cunningham v. Com., 49 Va. App. 605 (2007), which invalidated a search finding insufficient nexus between narcotics located in a vehicle and a search warrant for narcotics in a residence. The CAV rejected the argument, finding the search warrant "facially valid" and even if it wasn't, would have found that the good-faith exception applied. Moncrea entered a conditional guilty plea, and the circuit court sentenced Moncrea to a period of incarceration and then to serve an undefined or indefinite period of probation.

The CAV affirmed Moncrea's convictions. In doing so, the CAV distinguished Cunningham, finding the fact that Moncrea had ammunition that did not match the firearm in the car gave rise to the belief that Moncrea had firearms in the apartment. The CAV found pertinent that Moncrea had just left the apartment and went straight to the car and that a person in the apartment, who denied ownership of the apartment did not deny that Moncrea owned the apartment.

But, the CAV reversed the indefinite period of supervised probation, finding that it violated the plain language of § 19.2-303 and further finding that the sentencing order was void ab initio as it related to the term of supervised probation. (citing Rawls v. Com., 278 Va. 213, 221 (2009)). The CAV remanded the case "to readjust the length of Moncrea's supervised probation."

Spencer v. Com., Record No. 0668-23-3: (Decker, CJ., writing for O'Brien and Causey, JJ.)
Sufficiency; Abuse of discretion in sentencing
Evidence sufficient for rational factfinder to reject Spencer's claim that her burglary tools were for working on cars instead of breaking into a residence where Spencer and her brother had already stolen a surveillance camera. No abuse of discretion in sentencing

> Spencer and her brother, Philpott, were caught on security camera footage stealing a security camera from Harbour's property. Harbour delivered screenshots of the footage to law enforcement who came out to the property to investigate. Sheriff Smith arrived at the property and found no evidence of a break-in but as he was driving away, he noticed that Spencer and Philpott were in a truck close by.
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> Spencer admitted to taking the camera and stated they were bringing it back, but she admitted that they did not have the camera with them. Philpott volunteered that he had a pistol in a backpack, and Smith also found bolt cutters, work gloves, and a pry bar. Inside the backpack were five magazines of ammunition, tinsnips, garbage backs, wire cutters, binoculars, and a flashlight. They were both charged with possession of burglarious tools, conspiracy to commit burglary with a deadly weapon, and petit larceny.
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> The circuit court tried them both together and convicted them of all counts, rejecting their testimony that they did not have the intent to burglarize any house. The circuit court rejected their defense that they were looking for land to purchase. The circuit court sentenced Spencer to almost all suspended time, imposing a 10-day sentence for the petit larceny.
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> The CAV affirmed, conducting a thorough analysis of the language of the indictments, as well as the facts surrounding the burglary tools and conspiracy to commit burglary. Ultimately, though, the CAV's decision was primarily founded on the fact that the circuit court "was entitled to reject [Spencer's] assertions and conclude that Spencer lied to conceal the fact that she possessed those instruments with burglarious intent." (citing Rams v. Com., 70 Va. App. 12, 27 (2019)). On the conspiracy charge, the CAV found that there was sufficient evidence to determine a conspiracy and that the added language in the indictment of "with a deadly weapon" was surplusage and not required to be proved.

Petty, et al. v. Virginia Dep't of Environmental Quality, et al., Record No. 0928-23-3 and Scott, et al. v. Virginia Dep't of Environmental Quality, et al., Record No. 00929-23-3 (Consolidated Cases): (Ortiz, J., writing for Friedman and White, JJ.)
Public comment period; Harmless error; Rule 5A:20; Deference; Ambiguous language
No error in the circuit court affirming a permit modification to build taller wind turbines where the circuit court properly deferred to the Department's definition of language and the definition/decision of the Department was not arbitrary and capricious.

> The General Assembly directed the Department of Environmental Quality (DEQ) to develop permit by rule (PBR) regulations for small renewable energy projects to

generate 150 megawatts of electricity or less. In 2016, Rocky Forge submitted a permit request to DEQ to build a wind power facility, which was authorized. Appellants (owners of neighboring property) never contested this permit.

3 years later, Rocky Forge requested a modification of the permit to increase the height of each turbine from 550 feet to 680 feet among other things. Rocky Forge failed to resubmit all of the documentation requested, and Appellants filed a petition in the circuit court. The circuit court held that it was a procedural error but determined it was "unable to determine whether this procedural error was harmless." The circuit court remanded the case for DEQ to make the prior documents available for public comment. Appellants appealed this order, but the CAV dismissed it as an interlocutory order not subject to appeal.

DEQ had another public comment period, after which it affirmed the permit modification. Appellants filed another petition, but the circuit court affirmed the decision to modify the permit and entered final orders in both cases.

The CAV affirmed, finding that the language of "new documentation required under 9 VAC 15-40-30" is ambiguous. Because it is ambiguous, the circuit court correctly deferred to DEQ's discretion over the PBR regulations. (citing Mathews v. PHH Mortg. Corp., 283 Va. 723, 739 (2012)). Only if the decision is "arbitrary or capricious" can a circuit court find "a clear abuse of delegated discretion." (quoting PharmaCann Va., LLC v. Va. Bd. of Pharmacy, 77 Va. App. 208, 220 (2023)). The CAV found that the decision was not arbitrary and capricious.

The CAV found that Appellants' 2nd assignment of error was partially waived under Rule 5A:20 and the rest of the assignment of error was moot. The CAV further found that the circuit court properly applied the procedural error standard of review because "all three alleged errors are procedural." (citing J.B. v. Brunty, 21 Va. App. 300, 305 (1995)).

Commentary: While the Supreme Court of the United States (SCOTUS) has now removed/reversed deference to the agencies in interpreting legislation, the CAV has reiterated that principle in Virginia law. I'm not surprised by this, but it is always interesting to see when legal principles are exercised differently.

Dawson v. Com., Record No. 1051-23-3: (Causey, J., writing for Decker, CJ., and O'Brien, J.)
4th Amendment motion to suppress; Franks hearing; Rule 3A:9
No error in denying Dawson's request for a Franks hearing. Confidential informant's statement was specific and her history demonstrated her reliability to support probable cause to search.

In March 2021, a Confidential Informant (CI) told officer Green that Dawson had narcotics and a firearm in Room 118 at the Skyline Motel. The CI also delivered pictures of methamphetamine and told Green that Dawson was driving a red Kia.

Green relayed this information to officer Rosemeier, and Rosemeier obtained a search warrant.

In pertinent part, Rosemeier relayed exactly what the CI had said and also stated that the CI was "confidential and reliable" and had "provided information in the past that has led to prosecutable narcotics related arrests." Rosemeier requested that the search warrant include the red Kia and any other car associated with the residence. The magistrate granted the search warrant. Police waited for Dawson to return, and upon his return he parked "just a few feet from Room 118." Police searched the vehicle and found narcotics and a firearm.

Dawson moved to suppress all the evidence obtained as there was an "insufficient nexus between the items sought and the place to be searched." He alleged that there were errors in the affidavit "made with a reckless disregard for their truth." He requested a hearing pursuant to Franks v. Delaware, 438 U.S. 154 (1978) and stated that the good-faith exception did not apply but made no specific argument. The Commonwealth argued that Dawson failed to meet the specificity requirement of Rule 3A:9 and requested dismissal of the motion. The circuit court held a substantive hearing on the motion to suppress and denied the motion to suppress and the request for a Franks hearing. The circuit court held in the alternative that the motion to dismiss for failure to comply with Rule 3A:9 was proper and granted it.

The CAV affirmed, reiterating that CI tips can alone support the issuance of a warrant, if the CI is reliable. (citing McGuire v. Com., 31 Va. App. 584, 595 (2000)). The CI's specificity of information and her history of providing reliable information all corroborated her reliability in this case. (citing Polston v. Com., 24 Va. App. 738, 745 (1997)).

The CAV further affirmed the nexus between Room 118 and the red Kia and that the search did not exceed the scope of the search warrant. In doing so, the CAV stated, "Motels, by their nature, are transitory locations." (citing U.S. v. Agapito, 620 F.2d 324, 331 (2d Cir. 1980)). Therefore, there is a greater nexus between a motel/hotel and a vehicle than a permanent residence and a vehicle.

The CAV also affirmed the denial of the Franks hearing, finding that Dawson failed to provide any evidence to support his assertion that there was a false statement in the affidavit or omissions from the affidavit with intent to deceive. (citing Barnes v. Com., 279 Va. 22, 33 (2010) and U.S. v. Colkley, 899 F.2d 297, 300 (4th Cir. 1990)). The CAV reminds us that the defendant must make aa "substantial preliminary showing" to have the right to a Franks hearing.

Goodson v. Com., Record No. 1347-23-2: (Friedman, J., writing for AtLee and Callins, JJ.)
Jury instructions; Sentencing judge; Admissibility of evidence; Inter-panel accord doctrine
Inter-panel accord doctrine required affirmation of the denial of 2 clarifying jury instructions, where the model instructions properly covered the law. No abuse of discretion in sentencing or denying the motion to vacate the sentence.

Goodson drove his girlfriend, Ellis, to pick up her daughter from Jeffries at a police station. Ellis got her daughter and came back to Goodson's car, at which point Goodson exited his car and approached Jeffries. Jeffries "swung his fist at Goodson's face," and the two began fighting. The fistfight was caught on surveillance footage from the police station. After about 15-20 seconds, Goodson pulled out a firearm and shot Jeffries in the throat.

Goodson and Ellis testified that Jeffries was belligerent and aggressive. Goodson had walked towards Jeffries to tell him to "stop mouthing off to Ellis." Jeffries response was to punch Goodson. Goodson's version of events was that he pulled out his gun and ordered Jeffries to retreat. Jeffries continued to approach, so Goodson shot him. Goodson told police "I know I did wrong" but he "maintained that he tried to deescalate the conflict." Goodson had been convicted of 6 felonies.

Goodson proposed 2 jury instructions that "clarif[ied] the model instructions" on justifiable and excusable self-defense. The circuit court denied the clarification instructions and issued only the model instructions.

After his jury trial, a different judge presided over his sentencing. A witness testified as to the impact of Jeffries's death on the family and called Jeffries her "little brother." Goodson moved to vacate the sentence because the sentencing judge had not reviewed all the evidence prior to the hearing and permitting the witness to testify as to Jeffries being her "little brother" when in fact she was his "god-sister not his biological sister." The sentencing judge reviewed the exhibits Goodson claimed were not reviewed by the sentencing judge and then denied the motion, stating that "the exhibits did not change the court's mind one bit that the sentence was right and appropriate, given the defendant's actions.

The CAV affirmed, finding that the inter-panel accord doctrine bound the panel to affirm the denial of the jury instructions. (citing Taylor v. Com., 77 Va. App. 149, 166 (2023) (substantively the same as the instant case)). The inter-panel accord doctrine requires affirmation on nearly identical cases because a panel of the CAV cannot overturn or disagree with another panel. Only the CAV en banc or the SCV can reverse a panel decision.

On the sentencing/motion to vacate issue, the CAV affirmed because the circuit court did not abuse its discretion in sentencing. Because there was no abuse of discretion in sentencing, there can be no abuse of discretion in denying a motion to vacate the sentence.

Alam v. Com., Record No. 1366-23-4: (Raphael, J., writing for Malveaux and Frucci, JJ.)
Plea agreement; Probation violations; Withdrawal of plea; Harmless error
Alam not entitled to withdraw his plea where he violated the terms of the plea agreement. No error in the circuit court's requirement that Alam 100% comply with the technical terms of the agreement. Any error in admitting hearsay evidence was harmless error because Alam admitted the substance of the evidence.

> Alam pleaded guilty to raping M.P. pursuant to a plea agreement that allowed him to withdraw his plea of guilty if he abided by 9 conditions for 3 years. If he was successful, he would withdraw his plea to rape and instead plea guilty to assault and battery. The 9th condition "required Alam to follow all the terms and conditions of probation." At the conclusion of his 3-year term, the Commonwealth introduced evidence of travel outside of the Commonwealth without permission of the probation officer and unsupervised contact with minors. The circuit court refused to permit Alam to withdraw his plea, finding that he had violated his conditions.
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> The CAV affirmed, reiterating that "a circuit court's interpretation of a pela agreement is governed by the law of contracts." (quoting Bardales v. Com., 71 Va. App. 737, 743 (2020)). The CAV found that because § 19.2-306.1 did not exist at the time of the plea agreement, it was not incorporated into the agreement. (citing Smith v. Com., 286 Va. 52, 57 (2013)).
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> Next, the CAV affirmed that the circuit court did not abuse its discretion in holding Alam to 100% compliance with the plea agreement. Finally, the CAV found that there was no error in considering some hearsay evidence was harmless error because the substance of the hearsay were simply corroborations of what Alam himself admitted at the sentencing hearing. Therefore, there was no error in the circuit court's conviction or sentence.

Rivas-Castillo v. Com., Record No. 1681-22-4: (Chaney, J., writing for White, J., and Annunziata, SJ.)
Motion for mistrial; Motion to set aside the verdict; Brady violation; Admissibility of expert testimony; Approbate and reprobate; Harmless error
No Brady violation where Rivas-Castillo approbated and reprobated on 3 statements and the 4th statement was not favorable/material. No abuse of discretion in limiting the testimony, and any error in excluding the answer to a hypothetical was harmless.

> The facts of Rivas-Castillo's convictions are largely irrelevant to the analysis and are therefore omitted. Rivas-Castillo shot at Cabrera and Santana while they were drinking and using cocaine together. Santana was injured and received 5-6 surgeries. Rodriguez owned the residence where the shooting occurred.
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> Prior to trial, the Commonwealth interviewed Rodriguez several times, and the second time, Rodriguez gave statements relating to what Rivas-Castillo told her. The Commonwealth informed defense counsel of the statements but said that they did not record the interview. Rivas-Castillo objected to the admission of the

testimony related to these statements and subsequently moved for a mistrial when the objection was overruled. Rivas-Castillo claims that the Commonwealth violated Brady by failing to give exculpatory evidence before trial.

Rivas-Castillo testified on his own behalf and introduced testimony from Dr. Lisa Doll, a psychologist. The circuit court "limited Dr. Doll's testimony to (1) her clinical interviews with Rivas-Castillo (2) the medical records that she reviewed to prepare for those interviews, and (3) any of her personal observations." She opined that Rivas-Castillo was schizophrenic and gave descriptions of his symptoms. But, she could not opine whether Rivas-Castillo actually experienced any hallucinations that night. She further was not permitted to opine whether Rivas-Castillo could have pulled the trigger without intending to do so. The jury convicted Rivas-Castillo of aggravated malicious wounding, using a firearm in the commission of the same, and maliciously shooting in an occupied dwelling.

The CAV affirmed, finding, in part, that Rivas-Castillo had approbated and reprobated by admitting to the circuit court that the alleged Brady violations were ultimately disclosed to him prior to trial or were otherwise not material/favorable to him. Therefore, he "waived arguments about the admission of these statements on appeal." (citing Nelson v. Com., 71 Va. App. 397, 403 (2020)). The CAV found that the last statement contested was "not material to Rivas-Castillo's defense because it had no impeachment value." Therefore, "the alleged unavailability of Rodriguez's fourth statement does not undermine [the CAV's] confidence in the fairness of the trial." (citing Clay v. Com., 262 Va. 253, 259 (2001)).

Finally, the CAV found no abuse of discretion in limiting Dr. Doll's testimony, finding that her testimony related to what Rivas-Castillo told her was inadmissible hearsay. Further, the CAV found that any error in excluding an answer to a hypothetical was harmless error based on the overwhelming evidence against him.