Overview

The Supreme Court of Virginia (SCV) finished its break and has conducted its first writ panel of its new session. The SCV will conduct its first merit panel on September 10 and 11, with 6 cases on the docket. Three of the cases are criminal in nature, one is a disciplinary case, and there are two civil cases on the docket.

This week, the Court of Appeals of Virginia (CAV) focused on criminal cases, with 2 of the 3 published opinions being criminal in nature, as well as 10 of the 12 unpublished cases. We also learned that 7 published cases between June 25 and July 16 were appealed to the SCV. I will obviously keep you updated on how those turn out, and we'll see what the SCV does in those cases.

In civil cases, the CAV issued opinions on a Board of Zoning Appeals (BZA) case, a Workers' Compensation Commission case, and a general negligence case. Nothing major occurs, even though the CAV issued a published opinion on the BZA's statutory authority in Avonlea LLC v. Moritz, Director, et al., Record No. 0952-23-4. The CAV affirmed a circuit court's decision finding that the BZA had overextended its statutory authority. I am curious how the SCV may view the CAV's opinion in Jones, et al. v. Kim, Record No. 1348-22-4, in terms of whether Kim was a trespasser or a licensee. Otherwise, nothing the CAV did was groundbreaking.

In criminal cases, the CAV likewise did not break new ground. The published opinions clarified the definition of sex trafficking in Seat v. Com., Record No. 1826-23-2, and the requisite corroboration of a co-conspirator for convicting an individual involved in a conspiracy in Barnes v. Com., Record No. 0372-23-2.

The CAV issued several unpublished opinions on motions to suppress, so I'd remind our criminal practitioners to review those cases. As always, there are opinions on Rule 5A:18 and Rule 5A:8, which remind our appellants to argue everything to the circuit court, lest you waive your client's arguments or fail to present a complete record to the appellate courts.

SCV Opinions and Orders

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

CAV Published Decisions

Seat v. Com., Record No. 1826-23-2: (Decker, CJ., writing for Raphael and White, JJ.)
Sufficiency; Definition of "sex trafficking"; Intent
Evidence sufficient to find Seat guilty of commercial sex trafficking where Seat repeatedly texted "Britt" about the potential money she could earn as a sex worker. Factfinder entitled to reject Seat's self-serving testimony and his hypothesis of innocence.

> In 2022, Detectives posted an ad posing as a new female sex worker, "Britt," on an "escort website" to find "someone interested in acting as [her] pimp." Detectives received text messages from someone that stated the sender "was NOT a pimp" but

would help her out. The sender identified himself as "Will" and asked for photographs.

Detectives continued to text "Will" for several weeks. "Will" repeatedly stated that he would help "Britt" find higher end clients and "create content and an alter ego" that would "help her grow a safe and prosperous business." Detectives had a recorded phone conversation with "Will" and talked about a possible face-to-face meeting. But, "Will" eventually stopped texting with the detectives, suspecting "it was all bullshit or a set up for a robbery." "Will" did state that the "interaction inspired some great ideas that would benefit him and the right girl greatly." Detectives found that Seat was the owner of the phone number and obtained his photograph. The photograph matched the ones sent by "Will."

Seat was arrested and charged with a single count of commercial sex trafficking. At his jury trial, Seat and his friend, Ashworth, testified. Seat and Ashworth admitted that Seat sent the text messages but stated that the intent was simply to "troll" whoever posted the ad. They thought that the ad was a scam and that "Seat was trying to scam a scammer by wasting the person's time." The jury convicted Seat.

The CAV affirmed, reiterating that "if there is evidentiary support for the conviction, the reviewing court is not permitted to substitute its own judgment, even if its opinion might differ from the conclusions reached by the finder of fact at the trial." (quoting Chavez v. Com., 69 Va. App. 149, 161 (2018)). The CAV found that there was evidence to support the jury's implicit finding that Seat had the intent to profit as required by § 18.2-357.1(A). The jury was well-within its authority to disregard Seat's and Ashworth's testimony and "consider such perjured testimony as affirmative evidence of guilt." (quoting Camann v. Com., 79 Va. App. 427, 443 (2024) (en banc)).

Avonlea LLC v. Moritz, Director, et al., Record No. 0952-23-4: (Annunziata, SJ., writing for Chaney and Frucci, JJ.)
Board of Zoning Appeals; Admissibility of Evidence; Variance; Statutory authority; Statutory interpretation
BZA did not have authority to grant a variance under an ordinance that did not "regulate the shape, size, or area of a lot or parcel of land or the size, height, area, bulk or location of a building or structure."

Alexandria has a zoning ordinance that states "access to all parking within the Old and Historic Alexandria District shall be provided from an alley or interior court." § 8-200(C)(6)(A). Avonlea owned 2 lots within that district and applied for a variance, "claiming that it prevented reasonable use of their property because it could not be accessed from an alley or interior court." Avonlea wished to "construct a landscaped parking area located behind a gated fence." The Board of Zoning Appeals (BZA) approved the variance.

Alexandria appealed to the circuit court. The circuit court prohibited Avonlea from introducing testimony from two witnesses, including one who had testified at the BZA hearing. The circuit court issued a letter opinion reversing the BZA's decision, finding that the BZA did not have authority to grant a variance "because that ordinance did not regulate the types of activities that are subject to a variance."

The CAV affirmed, reiterating that "[t]he BZA 'is a creature of statute possessing only those powers expressly conferred upon it.'" (quoting Adams Outdoor Advert., Inc. v. Bd. of Zoning Appeals of the City of Va. Beach, 261 Va. 407, 415 (2001)). The BZA is only permitted to grant a variance to allow "a property owner to do what is otherwise not allowed under the ordinance." (quoting Sinclar v. New Cingular Wireless PCS, LLC, 283 Va. 198, 204 (2012)). A variance, by statute, is permitted only if the ordinance "regulates the shape, size, or area of a lot or parcel of land or the size, height, area, bulk or location of a building or structure." (quoting Code § 15.2-2201).

Because the ordinance herein regulated "access to parking" a variance, as defined by § 15.2-2201, is not permitted. Avonlea had to seek some relief other than a variance. The BZA in this circumstance did not have the statutory authority to grant a variance. Therefore, the CAV agreed with the circuit court and affirmed, without reference to Avonlea's other assignments of error.

Barnes v. Com., Record No. 0372-23-2: (Raphael, J., writing for Decker, CJ., and White, J.)
Corroboration of testimony
Barnes not entitled to a cautionary instruction on convicting on uncorroborated testimony of a co-conspirator where evidence corroborated that Barnes had the occasion and opportunity to commit the crime.

Barnes and four other individuals (Oliver, Bynum, Stephens, and Carpenter) plotted to kill and killed Johnson in 2021. The only question at issue in this appeal was whether sufficient evidence was presented to the jury to corroborate Stephens's and Carpenter's testimony that Barnes, Oliver, and Bynum all agreed to kill Johnson. Barnes's theory of the case was that Bynum was the sole perpetrator of the murder and that Barnes was merely present.

Carpenter testified that she "live-streamed herself to her Instagram followers" while on spring break. Johnson joined the stream and suggested they meet up. Barnes also joined, and "Carpenter immediately shut it down because she knew that Barnes and Johnson didn't like each other." Barnes messaged Carpenter, and the five co-conspirators met up. Barnes, Oliver, and Bynum discussed "setting Johnson up" and were trying to convince Stephens and Carpenter to agree. Carpenter testified that all three had guns. Eventually, Carpenter and Stephens texted Johnson to meet up in an alley, and did not mention Barnes, Oliver, and Bynum were waiting with guns. Johnson came to the alley and was murdered.

Bynum testified on Barnes's behalf, stating that he was the only one to shoot Johnson and that "Barnes definitely did not have a gun." Barnes requested an instruction "about the danger of convicting a person based on the uncorroborated testimony of an accomplice." The circuit court denied the instruction, finding sufficient evidence of corroboration. The jury convicted Barnes of first-degree murder and using a firearm.

The CAV affirmed, also finding sufficient corroboration of Stephens's and Carpenter's testimony. While "a jury may convict a defendant based solely on accomplice testimony, . . . if the accomplice testimony is uncorroborated, the trial court must 'warn the jury against the danger of convicting upon such uncorroborated testimony.'" (quoting Dillard v. Com., 216 Va. 820, 821 (1976)). However, the corroboration "need not be sufficient either to support a conviction or to establish all the essential elements of an offense." (quoting id. at 823).

In fact, "[t]he evidence is sufficiently corroborating when it connects the defendant to the crime and corroborates the defendant's 'occasion and opportunity for the crime.'" (quoting Holmes v. Com., 76 Va. App. 34, 57 (2022)). The CAV found that "while every piece of Stephens's and Carpenter's testimony may not have been corroborated, that was not required." The testimony was corroborated "to show Barnes's "occasion and opportunity" to commit the crime and was thus sufficient for the circuit court to refuse the cautionary instruction.

CAV Unpublished Decisions

Healthsouth Corp., et al. v. Hawthorne., Record No. 2058-23-3: (O'Brien, J., writing for Decker, CJ., and Causey, J.)
Workers' Compensation Commission; Burden of proof; Causal connection
No evidence of causal connection between Hawthorne's 2011 compensable injury and an identical injury in 2022. Commission cannot rely on Hawthorne's bare assertion of connection without some evidence.

Hawthorne sustained a compensable injury to her right foot in 2011. The record did not indicate that "Hawthorne had any lasting disability from the 2011 injury," with Hawthorne admitting that the worst lasting issue was a little pain "but nothing major." In 2022, Hawthorne was walking and "she felt a snap in that right foot." Her foot was broken in the exact same place as it was in 2011, but her physician was different, and the 2022 physicians did not have access to Hawthorne's 2011 medical records.

A split Commission found "that Hawthorne's 2022 injury was identical to the original 2011 injury and therefore compensable." A dissenting commissioner found that "Hawthorne failed to carry her burden of proving that the 2022 injury was causally related to the 2011 incident."

> The CAV reversed the Commission's finding, reiterating that the question "is essentially one of whether the medical evidence proves a causal connection between the primary injury and the subsequent occurrence." (quoting Williams Indus., Inc. v. Wagoner, 24 Va. App. 181, 188 (1997)). While the "'claimant is not required to produce a physician's medical opinion in order to establish causation,' causation must be still proved by direct or circumstantial evidence." (quoting Farmington Country Club, Inc. v. Marshall, 47 Va. App. 15, 26 (2005)). The CAV found that there was no evidence supporting the bare assertion that the 2022 injury was causally connected to the 2011 injury and reversed. Hawthorne's "non-medical and speculative opinion . . . was uncorroborated by any medical records." (distinguishing Dollar Gen. Store v. Cridlin, 22 Va. App. 171, 177 (1996)).

Edmonds v. Com., Record No. 1584-23-1: (Per Curiam opinion: Beales and Causey, JJ., and Petty, SJ.)

Sufficiency; Possession

Evidence sufficient to prove possession where a firearm was located along Edmonds's path of flight, and jury could interpret Edmonds's flight as evidence of guilt.

> The CAV rejected Edmonds's appeal without oral argument, finding "the dispositive issue or issues have been authoritatively decided, and the appellant has not argued that the case law should be overturned, extended, modified, or reversed." (quoting Code § 17.1-403(ii)(b); Rule 5A:27(b)).
>
> Police executed an arrest warrant for Edmonds for use of a firearm in the commission of a felony. Edmonds was initially evasive, stating "he had a twin," and when the officers told him that the warrant involved a firearm, he fled from the officers. Officers located Edmonds about 30 minutes later, hiding under a deck nearby. A K-9 unit was dispatched to walk the route from the initial encounter to Edmonds's hiding spot, and the K-9 alerted to a pile of leaves along the path. Police collected a "green and black Taurus handgun."
>
> Edmonds was charged with possession of a firearm by a violent felon. At his trial, Edmonds moved to strike the evidence because of insufficient evidence to demonstrate his possession of the firearm. The circuit court denied the motion, relying upon the K-9's behavior, the location of the firearm, and Edmonds's flight.
>
> The CAV affirmed for the same reasons. "It is today universally conceded that the fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct are admissible as evidence of consciousness of guilt, and thus of guilt itself." (quoting Langhorne v. Com., 13 Va .App. 97, 102 (1991)). The CAV found that "a reasonable finder of fact could conclude beyond a reasonable doubt that Edmonds was guilty of possessing a firearm."

Martin v. Com., Record No. 1569-23-2: (Per Curiam opinion: O'Brien, Malveaux, and Raphael, JJ.)

Sufficiency; Inconsistent verdicts; Rule 5A:18; Abuse of discretion in sentencing; Inherent incredibility

Martin's appeal was wholly without merit where eyewitnesses identified Martin as a shooter and Martin admitted he was there. Martin's inconsistent verdict argument defaulted under Rule 5A:18. No abuse of discretion in sentencing where the sentence was within statutory limits.

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

Caleb, Triston, and Rachel drove to King William County to "trade a gun." Triston had a shotgun and a .22 caliber rifle. Caleb had an AR-12 shotgun, which he was trading for a handgun, and Caleb also had another handgun. They arrived at their destination and began the trade. Caleb gave the shotgun to one of three men outside the car. Caleb then received a handgun without any ammunition. The men then tried to grab the handgun back, and "a scuffle ensued." Triston and Caleb began firing guns at the men, but the men outside the car got away with the shotgun and the handgun.

Triston suffered 5 "gunshot wounds to his face, back, side, and arm," as well as a collapsed lung. Caleb was paralyzed because of his injuries. Several eyewitnesses identified Martin as one of the men outside the car. Martin was charged with robbery, aggravated malicious wounding, use of a firearm, and shooting at an occupied vehicle. Martin testified in his own defense, admitting he was there but stated that Caleb and Triston were the aggressors. The jury found Martin guilty of robbery with serious bodily injury, use of a firearm, unlawful wounding, and shooting into an occupied vehicle. Martin never moved to set aside the verdicts or objected to them. The circuit court sentenced him to 43 years, with 21 suspended.

The CAV affirmed. First, the CAV reviewed the sufficiency arguments, finding that the jury's conviction was not plainly wrong or without evidentiary support. Caleb and Triston's testimony was not inherently incredible, and several eyewitnesses identified Martin as one of the shooters. The CAV then rejected Martin's inconsistent verdict theory as procedurally defaulted under Rule 5A:18 because Martin did not raise it to the circuit court. Finally, the CAV found no abuse of discretion in the sentence as it was within the statutory maximum.

Harris v. Com., Record No. 1438-23-1: (Fulton, J., writing for Lorish and White, JJ.)
4th Amendment motion to suppress; Warrant exceptions; Exigencies; Exclusionary rule; Community caretaker exception
No error in denying motion to suppress where Officers properly acted under the "emergency aid" exigency where Evron was screaming for help and had called 911 for a domestic assault.

> Police received a call for a domestic dispute at a residence. When the police arrived, they heard a woman, Evron, "repeatedly shout 'he's pulling my hair, come in, he's pulling my hair, open the door.'" Police entered by forcing their way through the door as Harris attempted to stop them. Harris had blood on his lip, and when he turned away from the officers, "his hands immediately went to his waistband area." Police detained Harris and eventually arrested him for domestic A&B. A search of his person located "crack cocaine and a gun."
>
> Harris moved to suppress the physical evidence obtained under the Fourth Amendment, arguing that it was a result of an illegal entry into the house. The circuit court disagreed and found that Evron's shouts were sufficient to apply an "emergency aid exception applied." The circuit court then convicted Harris of possession of cocaine and possession of a firearm by a felon.
>
> The CAV affirmed, specifying that Harris was not challenging the subsequent search of his person, finding any arguments related to that issue waived. On the entry into the house, the CAV found that "the officers' entry into Evron's home was justified under the emergency aid exception to the Fourth Amendment.

Jones, et al. v. Kim, Record No. 1348-22-4: (Chaney, J., writing for O'Brien and AtLee, JJ.)
Punitive damages; Compensatory damages; Duty of care; Willful and wanton conduct; Causation; Contributory negligence; Doctrine of judicial restraint
Political canvasser is a licensee owed several duties of care. Willful and wanton conduct found where the Joneses' dog had 8 prior biting incidents, and the Joneses did not take sufficient precautions to prevent attacks.

> Kim was a part-time political canvasser and was conducting his business in an open neighborhood. There were no signs on the Joneses' house forbidding entry or solicitation, and Kim's view of the Joneses' "beware of dog" sign was obscured. Kim approached the door, but when he reached halfway, the unrestrained dog attacked him. For 3-5 minutes, Kim struggled with the dog before Barbara Jones came outside and pulled the dog away. Kim suffered injuries to his arm, back, head, ear, thigh, and hand, some of which required surgery. The Joneses' dog had 8 recorded biting incidents, six of which "involved visitors at the Joneses' residence, and three occurred within the last year."
>
> Kim sued for negligence, and the Joneses responded with arguments of contributory negligence and a defense that Kim was not owed a duty of care as a "trespasser or bare licensee." The circuit court disagreed and awarded compensatory and punitive damages, finding willful and wanton conduct.

The CAV affirmed. First, the CAV determined that "[v]isits by political canvassers to residential properties are not uncommon and well within the scope where a stranger's general license to enter the land is presumed, comparable to 'brush salesmen, newspaper boys, postmen, Girl Scout cookie sellers, distressed motorists, neighbors, and friends.'" (quoting Robinson v. Com., 47 Va. App. 533, 545-46 (2006)). The CAV found that a jury could reasonably find that Kim "was a licensee and not a trespasser."

Because Kim was a licensee, there were 3 basic duties owed to him: (1) duty to exercise reasonable care arising from affirmative conduct; (2) duty to avoid wantonly or willfully injuring the licensee; and (3) duty to warn the licensee about "latent dangers arising from conditions on the land." (citing Busch v. Gaglio, 207 Va. 343, 348-49 (1966)). The CAV found sufficient evidence for a jury to find a violation of both the first and second duties and specifically did not review whether the third duty applied here.

The CAV then rejected the Joneses' arguments and affirmative defenses regarding causation and contributory negligence. The CAV found no evidence to support the assertion that Kim acted "with reckless indifference to the consequences."

Commentary: I could see this being granted an appeal to the SCV to clarify one point: trespasser vs. licensee. The CAV cited to a criminal case to find that Kim was a licensee and not a trespasser, but Robinson dealt with what expectation of privacy one has in the curtilage of a home, finding that police officers without a warrant enjoy the same "implied invitation" that passersby enjoy when confronted with an open walkway to the front door. I think that this is potentially confusing the issue, as I don't think licensees are those who have an "implied invitation." Although, I could be wrong in that reasoning.

Personally, I would state, "Even assuming that Kim was a trespasser, there is no error in the circuit court's decision because even a trespasser is owed a duty to protect from injury resulting from willful and wanton conduct." The CAV already found that the Joneses acted with willful and wanton conduct, so Kim's status as a trespasser or licensee does not appear to make a difference in the result of the opinion. Let me know your thoughts on this. Is he a civil trespasser or licensee? Do all individuals who are on the street licensees on your property unless you put up fences? He certainly is not a criminal trespasser, but there must be some distinction between a civil trespasser and a criminal one.

White v. Com., Record No. 1341-23-4: (Malveaux, J., writing for Raphael and Frucci, JJ.)
Trespassing; Authority to exclude; Intent
White's brother had sufficient authority to exclude White from their mother's property where he had a durable general power of attorney and was a custodian of the property. Sufficient evidence presented for a factfinder to conclude willfulness/intent.

> White and Jeffrey are brothers, and their mother, Lillian, lived in Alexandria. Lillian was having memory difficulties and was unable to take care of the house. Jeffrey began helping out with the house, and Lillian executed a durable general power of attorney giving Jeffrey "full power to handle and manage her affairs," specifically "the authority to manage Lillian's real property." White and the family had a falling out, and upon Jeffrey's order, White returned his copies of the keys to the Alexandria property.
>
> In 2022, White told Jeffrey that White was going to Alexandria. Jeffrey reminded White that White was not permitted to be on the property, and White responded that he was going to go elsewhere. A security camera on the property recorded White being present and Lillian warning White that she was going to call the cops. Jeffrey told Lillian to tell White to leave "because he was not supposed to be there." Jeffrey sought warrants for trespass.
>
> At his trial, White admitted he was at the house but stated that Jeffrey did not have the authority to exclude him from the property. The jury convicted White of trespassing on the property.
>
> The CAV affirmed Jeffrey's authority to exclude on two separate grounds. The CAV found that the durable power of attorney provided all rights to manage the property as Lillian could do, and "the right to exclude others is generally one of the most essential sticks in the bundle of rights that are commonly characterized as property." (quoting Palmer v. Atl. Coast Pipeline, LLC, 293 Va. 573, 581 (2017)). The second theory was that Jeffrey was a custodian of the property and therefore maintained independent rights to exclude White. The CAV rejected White's argument that he did not willfully trespass.

Bates v. Com., Record No. 1319-23-4: (Raphael, J., writing for Malveaux and Frucci, JJ.)
Sufficiency; Motion for new trial; Admissibility of evidence; Rule 5A:18
No abuse of discretion in excluding speculative evidence related to possible motive to fabricate. Jury entitled to disregard Bates's version of events as lying in an attempt to conceal his guilt.

> Bates and a group of friends went to a New Year's Eve party in 2021, and Bates volunteered to be the designated driver. W.M. passed out before midnight, and later, Bates, W.M., and Robert left the party about 1:30 am and traveled to Robert's house. Bates and W.M. stayed in the car. Later, Robert and Nolan saw that Bates's car was still in the driveway and found Bates having anal sex with W.M. "W.M.'s body showed no sign of movement."

Bates finally took W.M. home around 3:00 am. "W.M. was very disheveled" and was missing his shirt. W.M. had no recollection of what happened after the party and felt "significant pain in and around his anus." A sexual-assault examination found abrasions consistent with penetration. During a recorded call, Bates stated that W.M. had "prompted the sexual contact." A third party stated that Bates had been interested in W.M., but W.M. had never been interested in Bates and had rejected Bates's advances before.

Prior to trial, the Commonwealth moved to exclude any reference to W.M.'s sexuality. Bates was intending to introduce evidence that W.M. had been in a 2-week same-sex relationship "though there was no sexual contact." The circuit court excluded the evidence, unless the Commonwealth introduced evidence that W.M. was heterosexual because then the Commonwealth would have "open[ed] the door for the defense to offer evidence to the contrary." During the trial, the circuit court held a closed hearing outside the presence of the jury on W.M.'s sexuality, and Bates introduced evidence of the 2-week relationship when W.M. was 12 years old. The circuit court excluded the evidence, finding that it "lacked relevance and probative value" because it was related to "affection between 12-year-old boys for a 2-week period 7 years earlier." The jury convicted Bates of oral sodomy and attempted anal sodomy.

The CAV affirmed his convictions. On the exclusion of the evidence, the CAV found that the circuit court did not abuse its discretion in finding that the proffered evidence was too speculative to be relevant. (citing Barnes v. Com., 33 Va. App. 619 (2000)). The CAV also rejected an argument raised for the first time on appeal because it was procedurally defaulted under Rule 5A:18.

The CAV rejected Bates's jury instruction argument that he could not be convicted of attempted forcible sodomy because he was not charged with attempted. The CAV reiterated that § 19.2-286 "specifically allows for a jury to find an accused not guilty of the particular felony charged 'but guilty of an attempt to commit such felony.'" The CAV found that Bates's constitutional argument regarding this issue was also defaulted under Rule 5A:18 because he did not object to the instruction at the time it was proffered. The CAV refused to apply the ends of justice exception.

Finally, the CAV dispensed with Bates's sufficiency argument, finding evidence supported the jury's conclusion that Bates was guilty. "[T]he jury was 'entitled to disbelieve the self-serving testimony of the accused and to conclude that the accused is lying to conceal his guilt.'" (quoting Speller v. Com., 69 Va. App. 378, 388 (2018)).

Thomas v. Com., Record No. 1213-23-4: (Friedman, J., writing for Frucci, J., and Humphreys, SJ.)
4th Amendment motion to suppress; 5th Amendment motion to suppress; Admissibility of evidence; Abuse of discretion in sentencing; Rule 5A:8; Harmless error
CAV reiterated that a K-9 sniff, on its own, is not a search. No error in denying motions to suppress where Thomas was not subjected to custodial interrogation nor denied his right to counsel. Search warrant was not invalid simply because of one typographical error where the substance of the affidavit was not related to the error, and the affidavit as a whole was clear.

The DEA conducted a drug interdiction operation at Dulles Airport. A K-9 unit alerted at "two suitcases belonging to Thomas." Law enforcement permitted Thomas to retrieve one of his bags before approaching and asking to speak with him. Thomas refused consent to search, and officers detained him and advised that they would obtain a search warrant. Thomas asked for his attorney but refused to name of an attorney.

Officers obtained a search warrant for Thomas's bags. The search warrant had a few typographical errors, including that the "affiant" was the K-9 officer, when in fact the affiant was not the K-9 officer. While law enforcement was executing the search warrant, Thomas stated, "It's only Delta-8." Law enforcement located more than five pounds of marijuana and determined that it was inconsistent with personal use.

Thomas filed multiple motions to suppress. The circuit court denied the 4th Amendment motion to suppress because the typographical errors did not defeat the substance of the affidavit. The 5th Amendment motion to suppress was set for January, but Thomas did not subpoena any witnesses for the hearing. Two detectives still appeared at the hearing, and the circuit court denied the motion because the statements were not made in response to police questioning.

Thomas filed several motions to dismiss the case based on "selective prosecution" which were denied. During the trial, one of the detectives testified that Thomas refused to consent to a search. Thomas moved to dismiss on the grounds that the statement was substantially more prejudicial than probative. The circuit court denied the motion, but offered a curative instruction. Thomas did not request a curative instruction. The jury convicted Thomas, and Thomas challenged "the constitutionality of the sentence for his convictions. The circuit court again denied the motion.

The CAV affirmed Thomas's convictions. On the issue of the 5th Amendment motion, the CAV confirmed that law enforcement did not subject Thomas to the equivalent of custodial interrogation. Thomas's statement "was a spontaneous remark and not a response to any question by the police. (citing Thomas v. Com., 72 Va. App. 560, 578 (2020)).

The CAV also reiterated "that a canine sniff, standing alone, is not a search for purposes of the Fourth Amendment." (quoting Sanders v. Com., 64 Va. App. 734, 753 (2015)). The CAV also found that the search warrant was not defective, reviewing the affidavit in its entirety and finding that a single type mislabeling the affiant did not defeat the several other proper references to the detective and his K-9 partner, nor did it defeat the substance of the affidavit that the K-9 alerted to Thomas's bags.

The CAV dispensed with each of Thomas's motions to dismiss in turn, finding some were precluded from appellate review based on Thomas's failure to provide a necessary and indispensable transcript, required by Rule 5A:8. The CAV found any error in the admission of the detective's statement at trial was harmless. Finally, the CAV found that Thomas's sentence was not unconstitutional.

Bottoms v. Com., Record No. 1132-23-1: (Lorish, J., writing for Fulton and White, JJ.)
Sufficiency; Jury instruction; Juror strike for cause; Abuse of discretion in sentencing; Harmless error
No error in denying a motion to strike Juror 11 where juror was being represented by another member of defense counsel's law firm in an unrelated proceeding. Sufficient evidence presented for a factfinder to conclude Bottoms abducted M.B. with the intent to defile.

Bottoms and his wife, Renita, had an 11-year-old daughter, M.B. One night, Bottoms became intoxicated and told Renita to get M.B. ready to go out. Bottoms told Renita where to drive, but Renita did not know where they were going. Bottoms ordered M.B. to remove her clothes. Renita continued driving, and Bottoms went into the backseat and removed his pants.

Bottoms sexually abused M.B. Bottoms also ordered M.B. to "hit Renita." "Bottoms said he was going to put his penis inside M.B." "Eventually, Bottoms got irritated with M.B.'s crying, returned to the front seat, and told Renita to drive home." Bottoms threatened them, stating "he was going to find the biggest knife in the kitchen and slit their throats." When Bottoms exited the car at the house, Renita and M.B. drove away and reported the assault to the police. Bottoms was charged with aggravated sexual battery, indecent liberties, and abduction with the intent to defile.

During voir dire, "Juror 11 revealed that a different attorney in the defense counsel's law firm was currently representing her on a [DUI] charge." Juror 11 affirmed that it would not affect her ability to be impartial. The circuit court denied a motion to strike Juror 11 for cause.

The CAV affirmed. On the voir dire issue, the CAV found that "the mere label of client was insufficient to require exclusion." Only when combined with other factors could "a strong risk of perceived unfairness requir[e] disqualification." (citing Townsend v. Com., 270 Va. 325, 331 (2005)). Here, any "potential bias towards that law firm increases the confidence in the verdict."

The CAV also found sufficient evidence for a rational factfinder to conclude that Bottoms abducted M.B. with the intent to defile her. On a supposed jury instruction issue including "sodomy" on the charging instruction for the indecent liberty charge, the CAV found that any error was harmless because of the overwhelming evidence of Bottoms's guilt. (citing Conley v. Com., 74 Va. App. 658, 684 (2022)). Finally, the CAV reiterated that when a sentence is within the statutory maximum "appellate review is at an end." (quoting Thomason v. Com., 69 Va. App. 89, 98-99 (2018)).

Commentary: This is an interestingly structured opinion from Judge Lorish. Generally, the background facts include the circuit court proceedings, but Judge Lorish chose not to do that here. Instead, Judge Lorish simply relayed the facts of the offense and then incorporated the procedural facts in the analysis section. I don't recall her doing this type of structure in her last few opinions, so it may just be that a section was inadvertently deleted, or she could have made a conscious choice to structure the opinion this way only in this case. It is also possible that this is caused by the change in law clerks, but I am not sure. I suppose we shall see in the next few weeks.

Anthony v. Com., Record No. 1000-23-1: (Fulton, J., writing for Lorish and White, JJ.)
Conditional guilty plea; 4th Amendment motion to suppress; Confidential informant
No error in denying the motion to suppress where officers had probable cause to arrest Anthony based on the totality of the circumstances.

A confidential informant (CI) relayed "that there were two armed men in a car" and identified the car's color, license plate. The CI informed police that one of the men was a convicted felon and that both had firearms. Officers reported to the area and found the car occupied by a single individual, a black male. Officers went inside the nearby store to locate the passenger.

Officers saw Anthony "repeatedly glancing at them out of the corner of his eyes." They saw Anthony's hand "move toward a shelf . . . and the officers heard a loud clanking sound." Officers located a firearm there and detained Anthony. Officers advised Anthony of his Miranda rights, which he understood, and he admitted he had previously been convicted of robbery. Officers conducted a search of his person and found heroin.

Anthony moved to suppress the evidence obtained because the officers had no knowledge that Anthony was the individual from the car, that he was a felon, or any other information about him that would lead them to believe he was doing anything illegal. The circuit court denied the motion, finding that "once he laid that gun on the shelf, Anthony" had committed reckless handling of a firearm. Therefore, officers had probable cause to arrest on those grounds. Anthony entered a conditional guilty plea.

> The CAV affirmed, assuming that the interaction was a "full-scale arrest." In doing so, the CAV found that the officers had probable cause to arrest Anthony for unlawfully concealing a handgun. The CAV reiterated that "the probable cause standard is a practical, nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act." (quoting Doscoli v. Com., 66 Va. App. 419, 427 (2016)). "It deals with probabilities and depends on the totality of the circumstances" and "reasonable law officers need not resolve every doubt about a suspect's guilt before probable cause is established." (quoting id.).
>
> Based on the tip, Anthony's furtive actions, and "his futile attempt to discard and conceal the firearm" reasonably led the officers to believe Anthony was illegally carrying the firearm. Further, the search of Anthony's person was a lawful search incident to arrest.

Childress v. Com., Record No. 0992-23-3: (Friedman, J., writing for Ortiz and White, JJ.)
Admissibility of evidence; Expert testimony; Constitutionality of a statute; Harmless error
No error in excluding a proposed expert's testimony at sentencing where the circuit court found that the individual was not qualified as an expert in the proffered field. Childress waived his right to contest the constitutionality of the charges.

> Childress was convicted of distributing methamphetamine. The facts related to the offenses are omitted from this synopsis as irrelevant to the analysis.
>
> When it came to sentencing, Childress argued that the mandatory minimums that related to a quantity without concentration analysis are unconstitutional "because the actual weight of the illegal substance is capable of being calculated." Childress also attempted to present evidence from a proposed expert, Richard McGarry, who was precluded from testifying because the circuit court found that "McGarry was not qualified as an expert in forensic science." The circuit court also denied Childress's constitutionality motion, finding it "a little late to challenge the constitutionality" of the charges.
>
> The CAV affirmed. The CAV found that Childress failed to preserve his constitutionality arguments by failing to timely raise it under § 19.2-266.2, which requires a defendant to raise the issue 7 days before trial. The CAV found no good cause for Childress's failure to do so, and thus his argument was waived. The CAV further found that any error in precluding McGarry's testimony was harmless.

Johnson v. Com., Record No. 0721-23-1: (Fulton, J., writing for Lorish and White, JJ.)
Sufficiency; Rule 5A:18
Evidence sufficient to find Johnson committed maiming by a mob. Johnson's argument of sufficiency related to the possession of the firearm conviction was procedurally defaulted.

> Devron, Davis, and their one-year-old son were driving to look at a prospective residence. They saw a black Crown Victoria operating suspiciously. Devron said

that he wasn't comfortable and began preparing to leave. They approached the highway, but the Crown Victoria was already there, and Jadeen got out of a passenger door and fired a rifle at Devron and Davis, striking Davis in the arm. They called 911 and drove away, and the Crown Victoria "led multiple law enforcement vehicles on a high-speed chase."

The Crown Victoria finally crashed in a ditch, and Johnson jumped out of the vehicle and fled into the trees. 2 other occupants also fled, but Jadeen was arrested before he could exit the car. Eventually, all the occupants were identified and arrested. Johnson was charged with possession of a firearm by a violent felon, maiming by a mob, and use of a firearm. At the trial, the circuit court agreed that there was insufficient evidence that Johnson used a firearm in the commission of the maiming by mob and struck the charge. The jury then convicted Johnson of the other two charges.

The CAV affirmed, reiterating that an appellate court "does not ask itself whether it believes the evidence at the trial established guilt beyond a reasonable doubt." (quoting McGowan v. Com., 72 Va. App. 513, 521 (2020)). The CAV found sufficient evidence for a rational factfinder to conclude that Johnson committed maiming by mob and further found that Johnson's arguments regarding his possession of firearm conviction were procedurally defaulted under Rule 5A:18.