Overview

2 published opinions from the Supreme Court of Virginia, outlined below. Further, the Court of Appeals issued 2 new published opinions, including a writ of actual innocence, which is an extremely rare occurrence. Most of the CAV cases this week are less impactful than one might hope, but such is the nature of the massive expansion of the CAV's jurisdiction over the last few years.

In Grimm v. Com., Record No. 0741-23-2, the CAV found sufficient evidence to determine that Grimm was in fact innocent of the abduction and murder of a three-year-old. It is too little, too late, but at least he has been exonerated. As far as the actual perpetrator, there is nothing in the opinion to suggest new evidence has come to light regarding their identity.

The other published case, Grady v. Blackwell, Record No. 1520-23-3, is a little foray into the Constitutional-avoidance doctrine, reminding circuit courts that they should not decide constitutional issues if there is a lesser dispositive issue. In this case, Grady's petition was untimely filed, and the circuit court should have dismissed the petition on those grounds. In fact, the CAV reminded circuit courts that just because there is an interesting issue to decide in a case, the doctrines of Judicial Restraint and Constitutional-avoidance require looking for a non-constitutional reason to decide a case and determine the best and narrowest grounds.

This week's unpublished cases are generally unimpactful. Many of them were affirmed without oral argument because they were wholly without merit. There is some interesting dicta in Torres v. Com., Record No. 0028-23-4, that may substantially affect proceedings if picked up by a published opinion. But, as of now, the question of sua sponte jury instructions will remain a purely academic argument.

There are 2 cases regarding the meaning of "shall" and a party's obligations under that meaning. See Bland-Henderson v. Com., Record No. 230327, and Torres v. Com., Record No. 0028-23-4, for those discussions.

SCV Opinions

Bland-Henderson v. Com., Record No. 230327: (Goodwyn, CJ.)
Jury sentencing; § 19.2-295; "Shall" meaning; § 19.2-262.01; Voir dire
The SCV confirmed that "shall" in the context of a defendant's request for jury sentencing is mandatory and must be followed strictly. The circuit court did not err in finding Bland-Henderson was not entitled to voir dire the panel on potential range of punishment because the jury was not sentencing him.

> Bland-Henderson was charged with possession of a firearm by a violent felon. Presumably because the mandatory minimum for that charge is identical to the statutory maximum, Bland-Henderson wished for jury sentencing. However, he did not file his request until only 13 days before trial. The requirement of § 19.2-295 is 30 days prior to trial. Bland-Henderson argued that there was no prejudice to the

Commonwealth, and that the Commonwealth could request a continuance if there was surprise or new preparation necessary.

The circuit court denied Bland-Henderson's request for jury sentencing, offering Bland-Henderson the option of moving forward with judge sentencing or requesting a continuance. Bland-Henderson opted to move forward and requested the ability to voir dire the jury venire regarding the mandatory minimum, citing § 19.2-262.01. The circuit court disagreed and did not permit Bland-Henderson to inform the jury about the range of punishment, stating it "would only serve to ask for a jury pardon." Bland-Henderson then moved for a continuance, and the circuit court denied the motion. Bland-Henderson was convicted as charged.

The CAV found that "shall" when directed at public officers, means "directory instead of mandatory" but that "shall" when directed at private litigants, means "must." The CAV then applied the definition and affirmed the circuit court's decision. The CAV also affirmed the circuit court's exclusion of sentencing information in voir dire.

The SCV conducted a lengthy discussion of the differences between the various interpretations of "shall," specifically mandatory vs. directory. Mandatory means that there is a specific, exclusive remedy, while directory does not. Exactly which interpretation is correct is contingent "entirely on the legislature's intended meaning as discerned from the nature, context, and purpose of the relevant statute." (citation and quotation marks omitted). The SCV found that the "shall" in § 19.2-295 is mandatory. In doing so, the SCV reversed the theory of the CAV, finding no reason to create a presumption that "a 'shall' command is mandatory when directed at private litigants."

The SCV also affirmed on the issue of voir dire, finding that § 19.2-262.01 abrogates Com. v. Hill, 264 Va. 315 (2002), only to allow parties to voir dire on sentencing issues if the jury will be sentencing the defendant. Specifically, the SCV stated, "this line of questioning remains irrelevant and improper when the jury will not be sentencing the defendant."

Commentary: I am curious about the holding on the voir dire issue as it relates to the following hypothetical. Defendant requests jury sentencing. Voir dire ensues, and the Defendant asks about the potential range of punishment. The jury convicts, and the Defendant withdraws his jury sentencing request. Code § 19.2-295 does not state when a Defendant may withdraw such a request. Certainly, a Defendant may do so prior to trial, just as a Defendant may waive the right to a jury at any point prior to trial. But, at what point does the request "lock in" so to speak. There is an argument that § 19.2-295 allows for the withdrawal of the request up to an including the point of jury sentencing, but the SCV's opinion would then make any line of voir dire questioning regarding punishment "irrelevant and improper," opening the case up to a mistrial or reversible error.

Board of Supervisors of Fairfax County v. Leach-Lewis., Record No. 230491: (McCullough, J.)
Board of zoning appeals; 4th Amendment; Zoning official search; Exclusionary rule; Canons of construction;
The SCV held that even if a search by a zoning official was unlawful, any evidence obtained would not be excluded from the zoning hearing, as it is not a criminal proceeding. Sufficient evidence existed for a violation.

A trust owns a number of houses (Houses) in Fairfax County, and the trustee, Leach-Lewis, is also the "Reverend, Matriarch, and President" of the New World Church of the Christ (Church). Members of the Church live in the Houses and work from the Houses, receiving a stipend for their work. "A significant portion of one of the Houses is configured for office space," including a sign labeled "office." The zoning designation "prohibits office uses."

Fairfax police alerted the zoning officials about the possible violation. An investigator with the Department of Code Compliance (Enos) arrived at the Houses while police were executing an unrelated search warrant. Enos stated that he obtained consent from Leach-Lewis to walk around the home. Leach-Lewis testified that she did not. Leach-Lewis contested the search as a violation of the 4th Amendment.

A zoning violation was issued, and the BZA upheld the citation. The circuit court also upheld the citation, finding that the constitutional issue was unnecessary. The CAV reversed the circuit court's decision, finding that the BZA "had a duty to interpret and apply § 18-901(4) of the zoning ordinance . . . to determine whether the zoning ordinance was violated by the search of the church's property."

The SCV dispensed with the 4th Amendment question by finding that even if there was a 4th Amendment violation, any evidence obtained by an unlawful search would still be admissible in the zoning violation hearing. The SCV reminded the CAV that "the exclusionary rule, which applies in criminal cases, does not apply in civil cases." The SCV recognized that the only exception to this is civil asset forfeiture cases based on criminal conduct because "a forfeiture proceeding is quasi-criminal in character." (quoting One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 700 (1965)).

The SCV found sufficient evidence to support the conclusion that the Houses were being used as an office in violation of the zoning ordinance. Therefore, it reinstated the zoning violation and entered judgment in favor of the Board of Supervisors.

CAV Published Decisions

Grimm v. Com., Record No. 0741-23-2: (Huff, AtLee, and Callins, JJ.)
Writ of Actual Innocence; DNA analysis; False confessions; Consent to error; Legal concessions; Reliability of scientific evidence; Original jurisdiction; Successive petitions; § 19.2-327.10
Nearly 30 years after his conviction, the CAV determined that "no rational factfinder" could have found Grimm guilty based on modern DNA analysis, modern toxicological analysis, and the lack of corroboration of Grimm's confession. The CAV did not answer the question of whether Grimm's confession was coerced and found that the confession was as consistent with innocence as it was with guilt.

In 1975, C.H. (3 years old) entered the woods behind his apartment alone. His body was found four days later with multiple drugs in his system, including alcohol. Grimm lived close to C.H. and had two isolated arguments with C.H.'s father regarding toys being left in the yard and C.H. playing outside without clothes. Based on his proximity and arguments with C.H.'s father, the FBI named Grimm as a possible suspect.

Officers interviewed Grimm after his 9-hour workday concluded around 5:00 pm until after 2:00 am. Grimm was advised of his Miranda rights around 9:00 pm. Around 11:00 pm, "Grimm purportedly told police what happened and guided officers as they retraced the steps of C.H.'s abduction, murder, and disposal." Around 2:20 am, officers recorded Grimm's full confession. None of his prior statements were recorded. Grimm's confession included no statement about the alcohol or drugs in C.H.'s system and provided no new information about the disposal of C.H.'s body.

Grimm recanted his confession after pleading guilty to murder, forcible sodomy, and abduction with the intent to defile C.H. Grimm filed multiple writs of habeas corpus and writs of innocence. The Commonwealth joined in his petition and conceded that Grimm met his burden. The CAV rejected the Commonwealth's concession, finding that the CAV was "required to independently review the record and reach its own conclusion."

In 2011, DFS tested 8 hairs collected from Grimm's cars which had been deemed "consistent with C.H.'s samples" at Grimm's plea hearing. However, the new DNA analysis "exclude[d] C.H. as the source of" 6 out of 8 hairs. The other two tests were inconclusive. In 2023, new DNA analysis could be conducted, and "C.H. was excluded as the source of both hairs."

In 2002, 2012, and 2017, DNA analysis "eliminated Grimm as a possible contributor of the genetic material detected in" the samples taken from C.H.'s body. In 2017, DNA analysis confirmed that "the observation of sperm on any of these same specimens in 1975 must be mistaken." More DNA analysis conducted on a towel which officers in 1975 testified as having "seminal fluid" found that "no human DNA was detected" and "no blood or seminal fluid" was observed.

> Because new evidence refuted all the evidence corroborating Grimm's confession, the CAV found that "the Commonwealth is left with a body and a man claiming responsibility without accurately describing any of this case's facts." The CAV granted Grimm's petition, ordering the expungement of his arrest and conviction.

Grady v. Blackwell, Record No. 1520-23-3: (Raphael, J., writing for Fulton and Causey, JJ.)
Administration of estates; Full faith and credit clause; § 64.2-445; Untimely petition; Injunction; Constitutional-avoidance doctrine; Best and narrowest grounds; Right result for a different reason doctrine

The CAV affirmed the decision to dismiss Grady's petition but reversed the theory, dismissing the petition for being untimely filed. In doing so, the CAV reminds the circuit courts that the best and narrowest grounds are the most appropriate way to resolve a case.

> Erin Baker (Grady's fiancé and Blackwell's daughter) was killed in a car crash on I-81. Baker died intestate, and Blackwell renounced her right to administer Baker's estate in Pennsylvania, and Grady assumed administration. Rockbridge Circuit Court appointed Blackwell as administrator of Baker's estate in Virginia, and Blackwell filed a wrongful-death suit in WDVA. Grady filed his own wrongful-death suit in the MDPA. MDPA transferred jurisdiction to WDVA. Grady then filed a motion in Rockbridge Circuit Court to remove Blackwell as administrator because of her renunciation of her administration rights in Pennsylvania, and Virginia ought to apply the full faith and credit clause.
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> The circuit court disagreed with Grady, stating that while Blackwell had renounced her right, Pennsylvania had to give full faith and credit to Virginia law, which allows for separate people to be administrators in different states. (citing Harmon v. Sadjadi, 273 Va. 184 (2007)).
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> The CAV reversed the circuit court's theory. "It is a 'fundamental and longstanding precept that unnecessary adjudication of a constitutional issue should be avoided.'" (quoting Com. v. Swann, 290 Va. 194, 196 (2015) (cleaned up)). The CAV found that there was no reason to reach the question of the full faith and credit clause because Grady's petition was untimely. The CAV determined that Grady's petition was untimely filed under § 64.2-445 and thus ought to be dismissed for that reason, using the right-result-for-a-different-reason doctrine.

CAV Unpublished Decisions

Webb v. Com., Record No. 1972-22-1: (Malveaux, J., writing for AtLee, J. Dissenting opinion by Causey, J.)
Competency; Pro se defendant; Faretta request; Right to counsel; Delayed appeal; Rule 5A:20; Waiver standard of review; Rule 5A:18
The CAV affirmed Webb's convictions, finding that Webb knowingly, voluntarily, and intelligently waived his right to counsel and proceeded *pro se*. The CAV declined to address whether there is a higher standard of competency for *pro se* defendants. Judge Causey dissented, finding that Webb did not clearly and unequivocally waive his right to representation.

> In 2017, Webb was charged with the murder of his mother. After his arraignment, court-appointed counsel moved for a competency evaluation. Webb was found incompetent and referred for restoration services at Central State Hospital. There, the psychologist found no diagnosable mental health issues "aside from Unspecified Personality Disorder." The psychologist found that Webb "was likely to be challenging to work with, but this was due to features of his personality rather than any serious mental illness" and reported that Webb was competent.
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> In January 2018, Webb requested to "represent [him]self with standby counsel as help." The circuit court asked Webb a series of questions to determine whether he understood the severity of his decision and cautioned Webb regarding standby counsel's restrictions on assisting Webb during trial. Webb affirmed he understood multiple times and "stated twice, "I will continue to represent myself." After reviewing the Waiver form DC-335, Webb stated "I don't waive the right to [a] lawyer. I do wish to represent myself." The circuit court informed him that he could "have his cake and eat it too." Webb said "he felt he needed to sign the waiver form under duress," so the circuit court denied Webb's request to proceed *pro se*.
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> A few weeks later, Webb's counsel moved to withdraw because Webb "consistently expressed the desire to represent himself" and was unwilling to work with counsel on counsel's preferred strategy. Webb "again asserted that he wished to represent himself" to the circuit court. The circuit court again advised Webb regarding standby counsel, and Webb "confirmed that he understood, asserted again that he wished to represent himself, and signed the waiver form." The circuit court accepted the waiver and assigned standby counsel.
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> In March, the circuit court ordered that standby counsel step in to represent Webb. In May, the circuit court "granted [second counsel's] motion to withdraw due to a conflict and appointed [third counsel]." In July, third counsel moved to "withdraw due to the parties' failure to agree on how to proceed." Webb also "asserted that he did not ask for an attorney to represent him, that he didn't want a lawyer, and that he wanted stand-by counsel." The circuit court asked if Webb wanted to represent himself, and Webb answered, "I already said that in February." The circuit court accepted the waiver and appointed new standby counsel.

Webb lost his trial and requested standby counsel to step in for sentencing. Fourth counsel moved for a mistrial due to competency. When the circuit court denied the motion, fourth counsel "moved for a mistrial based on [Webb's] purported lack of competence to represent himself under Indiana v. Edwards, 554 U.S. 164 (2008). Fourth counsel pointed out Webb's many deficiencies in conducting the trial, including misstating "witness names and the time of day" and that "the jury was frustrated and misunderstood why he was representing himself." The circuit court denied the motion.

The CAV granted a delayed appeal solely on the issue of self-representation. The CAV reiterated that while a waiver was subject to *de novo* review, the subsidiary factual determinations of the circuit court are reviewed only "for clear error." The CAV engaged with counsel's request for mistrial for lack of competency to act *pro se* finding that Edwards (cited above) found acting *pro se* may require "a somewhat higher standard that the minimal constitutional requirement that measures a defendant's ability to stand trial."

However, the CAV found that Edwards "**permits** States to insist upon representation by counsel" for those individuals and does not require it. (emphasis in opinion). The CAV found, then, that the circuit court did not abuse its discretion in finding that Edwards did not require a higher standard for Webb to act *pro se*, leaving for another day the question of what higher standard that might be in Virginia.

Further, the CAV found that Webb's request to represent himself was clear, unequivocal, and persistent. Webb repeatedly affirmed he understood the consequences, and the circuit court found that Webb waived his right to counsel knowingly, intelligently, and voluntarily. (The majority, in n.9, states the circuit court's finding was not timely challenged "and his assignment of error as granted in our order does not encompass that issue" finding the argument waived under Rule 5A:18 and barred by Rule 5A:20(c)).

Judge Causey dissented, finding that when applying the presumption against waiver standard, Webb's actions were ambiguous rather than clear and unequivocal. Causey also found that the circuit court failed to properly conduct a "fact-intensive inquiry" at the July hearing. Causey reminds us that vacillation between requesting counsel and requesting to proceed *pro se* may waive the individual's right to proceed *pro se*, citing Edwards v. Com., 49 Va. App. 727 (2007) and Stockton v. Com., 241 Va. 192 (1991). Causey

Commentary: *Footnote 9 confuses me, slightly. I have a hard time accepting the contention of the CAV that an individual who successfully moves to represent himself will timely object to the finding that that individual is knowingly, intelligently, and voluntarily waiving their right to counsel. Relying on Rule 5A:18 is odd here for that reason. Now, the CAV may be indicating that Fourth Counsel*

should have raised the issue in some sort of motion to reconsider, but that wouldn't be timely either, as it would have been after the trial, unless the CAV would rather have a motion to set aside the verdict on the issue of the waiver. Applying Rule 5A:18 is also confusing because Rule 5A:20(c) precluded review of the argument, as it was outside the AOE permitted by the CAV. So, why not just rely on Rule 5A:20, as the best and narrowest grounds?

Carmello v. Cockrill, Record No. 1818-22-4 and Carmello v. Cockrill, Record No. 1819-22-4 (Consolidated cases): (Chaney, J., writing for Callins and White, JJ.)
Demurrer; Negligence; Common law; Private enforceability; Duty to inspect
The CAV confirmed that personal property owners do not have a duty to passersby on roadways from natural conditions, affirming dismissal of a suit for wrongful death where a tree fell onto a motor vehicle. Criminal/citation statutes do not create private enforceability.

Carmello was driving in Loudoun County near property owned by Cockrill. A tree fell from Cockrill's property and onto Carmello's car. Carmello died as a result of his injuries, and a wrongful-death suit followed, as well as a personal injury claim, asserting various theories of negligence. Cockrill demurred (along with her sister), "arguing that she had no duty to prevent the tree from falling into the roadway" as "the tree was a natural growth on her property" and "Virginia law imposed no duty to regularly" inspect the property. The circuit court sustained the demurrer and dismissed the suits with prejudice.

The CAV found that Cline v. Dunlora South, LLC, 284 Va. 102 (2012), controls this case, "This Court has never recognized, nor do our precedents support, a ruling that a landowner owes a duty to protect travelers on an adjoining public roadway from natural conditions on his or her land."

The CAV rejected Carmello's claims that English Common Law allowed for a suit under this theory and reminded us that the incorporation of English Common Law under § 1-200 is only applicable when there is no conflict between the common law and Virginia law. "Where there is a conflict between English and Virginia common law, Virginia law controls."

The CAV also rejected Carmello's arguments that § 33.2-801 and Loudoun Ordinance § 648.07 allowed for private enforcement of the code sections and that Cockrill was in violation of the code. "However, a statute setting the standard of care does not create the duty of care." Steward v. Holland Fam. Props., LLC, 284 Va. 282, 286 (2012). These statutes may have allowed the County or the Commonwealth to cite Cockrill, but they do not allow private citizens to sue.

Robertson, et al. v. Loy, Record No. 1801-22-4: (Annunziata, SJ., writing for Chaney and White, JJ.)

Res judicata; Negligence; Breach of contract; Breach of warranty; Plea in bar; Economic-loss rule; Issue preclusion/Collateral estoppel; Claim preclusion; Rule 5A:18

The CAV affirmed in part and reversed in part the dismissal of Contract and Negligence claims, where a final divorce decree stated that the parties had no other agreements than the property settlement agreement. The CAV found that dismissal of the Contract claims was appropriate based on the PSA but that the Negligence claims should have been permitted.

Loy owned a construction company; Robertson was the sole member of BMW, an LLC. Loy and Robertson began a relationship, and Loy later filed for bankruptcy, with some of his property being foreclosed. Robertson purchased the property at auction and held it in BMW's name, so Loy retained possession/ownership of the property. A pre-marital agreement was executed in 2016, which, among other things, "settled the couple's financial, property and other rights, privileges, obligations and matters with respect to each other."

Loy initiated divorce proceedings in 2019, and after trial, a letter opinion was issued in 2021. Robertson appealed, and the CAV affirmed in part and reversed in part (Robertson v. Loy, Record No. 0232-21-4 (Jan. 25, 2022). The CAV remanded for a factual determination of BMW's debt.

During the divorce suit, BMW sued Loy and his construction company. The subjects of this suit were breach of contract, negligence, and breach of warranty related to work Loy performed on property BMW owned, pursuant to a contract entered into prior to the pre-marital agreement.

Loy filed a plea in bar asserting res judicata because the pre-marital agreement (incorporated into divorce decree) stated that they had no other contracts or agreements. The circuit court sustained the plea in bar as it related to negligence under the economic-loss rule but deferred ruling on the contract matters until the divorce appeal was finalized. When that occurred, the circuit court sustained the plea in bar as it related to the contract matters.

The CAV found that the circuit court properly dismissed the contract claims under res judicata, specifically claim preclusion, as Robertson and Loy could have litigated these matters during the divorce proceedings. However, because there was no contract in existence based on the pre-marital agreement, the CAV stated that the economic-loss rule did not apply to the negligence claims, as that requires an agreement. Therefore, the CAV reversed the circuit court's ruling on the negligence claims and remanded the case. The CAV also found that Rule 5A:18 barred review of one of the issues because BMW failed to preserve it.

Novia v. Com., Record No. 1449-23-3: (White, J., writing for Ortiz and Friedman, JJ.)
Sufficiency; Credibility of the witnesses
The CAV affirmed Novia's convictions and reiterated that when a jury is confronted with 2 or more versions of events, their evaluation of the credibility of the witnesses will not be overturned.

Novia lived with his grandparents, Albert and Mary Ann. One night, Novia came home to Albert and Mary Ann on the couch. Novia displayed his genitals and said, "This is what a man look like." Novia then went back outside and retrieved a shotgun. Mary Ann told him to leave, and Novia fired the shotgun into the wall. Novia then left the house and continued firing the shotgun. Albert called Poindexter, the mother of Novia's child, and relayed this information. Poindexter called the police and relayed the information.

Novia came back into the house, and Albert saw "a little red dot between [Mary Ann's] eyes." Albert "heard a pop" and Mary Ann fell over, blood coming from her forehead. Albert called Poindexter a second time and told her that Novia had killed Mary Ann. Poindexter again called the police and relayed the information.

Deputy Dillon arrived at the house responding to the earlier call for Novia's disorderly conduct and heard a gunshot in the house and saw "something running away from the house into the woods." Dillon approached the house until he "saw a vehicle riddled with bullet holes." Dillon waited for backup and then entered the house. Albert was alone, visibly upset, and told law enforcement that Novia had killed Mary Ann.

Novia's defense at trial was that Albert killed Mary Ann and confessed to Albert Jr. Albert Jr. was a 16-time convicted felon at the time of trial. Sheppard, Albert Jr.'s girlfriend, testified that she also heard Albert confess to the murder. Another individual, Holland, was purportedly at the confession, but Holland denied that Albert confessed to her. Neither Albert Jr. nor Holland told the police about the confession.

The CAV affirmed, reiterating that the credibility of the witnesses is entirely within the jury's purview. The fact that witnesses testified to different versions and at least one version provided sufficient evidence to find Novia guilty of murder provides no reversible error. The jury was within its right to disregard any and all of the testimony it did not find credible. No inherent incredibility.

Paone v. Com., Record No. 1426-22-3: (Chaney, J., writing for Huff and Malveaux, JJ.)
Brady material; Exculpatory evidence; Jury instructions; Self-defense; Justification or excuse; Credibility of witnesses
The CAV affirmed Paone's conviction and determined that Paone's proffered jury instruction was unnecessary. The CAV found that Paone did not explain how excluding exculpatory evidence would have made the outcome more favorable for Paone, and thus admitting the exculpatory evidence was not error.

> "Paone became verbally aggressive during an argument with D.M." D.M. left and told Paone to sleep downstairs. Paone went downstairs but shortly returned, angry, and "pounded on the door with a water bottle, making several holes." Paone told D.M. he would take his things and leave if she opened the door. Paone called D.M. several slurs, so "D.M. threw some of Paone's expensive suits and ties on the ground." Paone pushed D.M., bruising her arm in the process. D.M. shoved Paone in the chest. Paone then "grabbed her, pushed her to the ground, and punched her three times" in the eye, nose, and stomach. D.M. bled from her eye.
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> At trial, Paone objected to an EMT's testimony that Paone told the EMT that D.M. shoved Paone. Paone stated that this testimony was exculpatory, and Paone was not made aware of the testimony prior to trial. Paone presented a self-defense claim, and the circuit court instructed the jury on justifiable and excusable self-defense. However, the circuit court denied a finding instruction that Paone proposed because it "could be misleading."
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> The CAV found that Paone failed to demonstrate how the objected testimony was "material" one of the three required prongs under Brady. The CAV agreed with the circuit court that the admission of the exculpatory statements cleansed any error because "the jury would have considered the alleged exculpatory evidence." Further, the CAV stated that he failed "to explain how excluding evidence he claims was exculpatory would have yielded a more favorable result."
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> The CAV found no issue on the sufficiency of the evidence presented to support the Domestic A&B conviction. The CAV held that the jury instructions were appropriate and covered the law and that the circuit court did not abuse its discretion in refusing Paone's proposed finding instruction.

Wolfe v. Woolley, et al., Record No. 1086-23-4: (Per Curiam Opinion; Malveaux, Raphael, and Frucci, JJ.)
In forma pauperis; Nullity; Rule 1:1; Loss of jurisdiction
The CAV affirmed dismissal of a suit where the circuit court properly denied a petition to proceed in forma pauperis and Wolfe never paid his filing fee. Subsequent denial of the motion to reconsider was a nullity because it was entered more than 21 days after the dismissal order.

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

a petition to proceed in forma pauperis; however, he did not fully fill out the petition/form. The circuit court denied the petition, and Wolfe never filed his filing fee. The circuit court dismissed the complaint for failing to file the fee. Wolfe moved for reconsideration, and the circuit court denied the motion more than 21 days after the final order was entered.

The CAV found that the reconsideration denial was "a nullity" because it was entered more than 21 days after the final order, meaning the circuit court lost jurisdiction over the case. Further, the CAV found that the circuit court did not abuse its discretion in denying Wolfe's IFP petition because necessary information was missing from the form.

Luck v. Com., Record No. 0906-23-2: (Decker, CJ., writing for Beales and Lorish, JJ.)
Sufficiency; Inherent incredibility; Bodily injury; Rule 5A:20
The CAV affirmed Luck's conviction of strangulation, finding K.L.'s testimony was not inherently incredible, and when the factfinder is offered 2 versions of events and specifically finds one credible and one incredible, there is no appellate relief.

The CAV rejected Luck's appeal without oral argument, finding it was "wholly without merit." Code § 17.1-403(ii)(a); Rule 5A:27(a). The CAV also found that "the dispositive issue or issues have been authoritatively decided," and Luck failed to argue "that the case law should be overturned, extended, modified, or reversed." Code § 17.1-403(ii)(b); Rule 5A:27(b).

Luck and K.L. got into a heated argument. During it, Luck "put his left hand around her neck and pushed on it while covering her mouth and nose with his right hand." K.L. "could not breathe" and eventually "urinated on herself." She did not recall the length of time Luck was on top of her, and she appeared to lose consciousness, because "the next thing she knew, he was sitting in the chair across the room." Police arrived and noticed abrasions consistent with K.L.'s version of events. Law enforcement also observed that K.L. was slurring her words and had the odor of alcohol emanating from her breath. K.L. admitted to drinking alcohol.

Luck testified in his own defense and gave a much different version of events, challenging K.L.'s credibility. Luck also argued that K.L. did not suffer a bodily injury. The circuit court, in a bench trial, "expressly found that K.L.'s account was credible" referencing Luck's "two prior felony convictions" and his behavior during testimony.

The CAV found that K.L. was not inherently incredible and further "even though not required, there was corroborating evidence" in the photographs and law enforcement testimony of K.L.'s injuries. The CAV found there was sufficient evidence that a rational factfinder could conclude K.L. suffered a bodily injury.

Gusler v. Com., Record No. 0790-23-3: (Ortiz, J., writing for Friedman and White, JJ.)
Admissibility of evidence; Double jeopardy; Intent; Prior crimes, wrongs, and other acts
The CAV affirmed Gusler's conviction of use of a sawed off shotgun in a crime of violence, finding no abuse of discretion in admitting Gusler's prior threat towards the victim. Further, the CAV affirmed that where the same conduct meets multiple criminal acts with separate and distinct elements, there is no double jeopardy issue.

Gusler drove a truck to a neighbor's house (O'Brien). O'Brien was waiting for someone (Smith), so O'Brien went outside. Gusler had a shotgun in his lap and told O'Brien, "It's your day to die, motherfucker." Gusler pointed the shotgun at O'Brien's head for around 20 seconds, while O'Brien begged for his life. Smith arrived, distracting Gusler. O'Brien took the opportunity to run to his truck to get a pistol. Gusler attempted to leave, but O'Brien stopped Gusler and held him at gunpoint while Smith called law enforcement.

Gusler kneeled down and asked O'Brien to kill him before attempting to get in O'Brien's face. O'Brien hit Gusler with the barrel of the pistol and retrieved the shotgun and an AK-47 rifle from Gusler's truck. Gusler was able to get into his truck and flee the scene. The barrel of the smoothbore shotgun was 12.5 inches.

At trial, a firearms expert testified that the shotgun "appeared to have been cut or sawed." O'Brien testified that Gusler had threatened him before, including saying, "You know I'm going to kill you, you son of a bitch, I'm going to get you." Gusler objected to the admission of the prior threat. The circuit court ruled that the threat "showed a common scheme or plan or intent" under Rule 2:403. The circuit court convicted Gusler of using a sawed-off shotgun during a crime of violence, assault and battery, and brandishing a firearm.

The CAV confirmed that "all probative direct evidence generally has a prejudicial effect to the opposing party," thus it is "only with unfair prejudice" that courts should exclude evidence. Therefore, because it was appropriate evidence of a prior act to show intent or "conduct or attitude of the accused toward his victim" and was not unfairly prejudicial, the circuit court did not abuse its discretion in admitting the evidence.

The CAV also reiterated that "the Double Jeopardy Clause does not apply where the same conduct is used to support convictions for separate and distinct crimes." (quoting Sandoval v. Com., 64 Va. App. 398, 413 (2015) (citation omitted)). The CAV found that all of Gusler's convictions contain separate and distinct elements that are not wholly encompassed by any of the other convictions. The CAV found sufficient evidence for a rational factfinder to convict Gusler of all of his charges.

Stoner v. Com., Record No. 0762-23-1: (O'Brien, J., writing for Huff and Fulton, JJ.)
Conditional plea; Recuse Commonwealth's Attorney; 5th Amendment Suppression; Non-custodial requests for counsel; Judicial restraint; Best and narrowest grounds
The CAV found no issue in Stoner's confession to aggravated murder where he expressly waived his Miranda rights and his request for an attorney was pre-custodial interrogation.

Stoner entered a conditional plea to aggravated murder, murder, malicious wounding, statutory burglary, conspiracy, arson, four counts of using a firearm in a felony, and torturing a dog to death. His plea was conditioned on an appeal of his motion to suppress his confession.

In 2004, Christopher recruited Stoner to kill Lois (Christopher's wife). Stoner went to Lois's house. Stoner killed Lois's dog, Lois, and Lois's seven-year-old son. Stoner also shot Lois's brother multiple times. Stoner then set the house on fire, and somehow Lois's brother was able to crawl out of the house to get a neighbor to call law enforcement.

In 2018, Stoner, now living in Indiana, was approached by Virginia police for an interview. The Commonwealth's Attorney was offering to take the death penalty off the table for Stoner's cooperation. Stoner ended the first interview early, and for an unrelated reason the local police executed a search warrant on Stoner's house and arrested him. Later, Stoner met with Virginia police in Indiana and negotiated his demands with an Assistant Commonwealth's Attorney over the phone. Stoner agreed to give a statement in exchange for his demands. Stoner was advised of his Miranda rights, and he signed a written waiver of his rights. Stoner then confessed to the above.

The circuit court denied Stoner's motion to recuse the Commonwealth's Attorney's office and his motion to suppress his confession for coercion and violation of Miranda.

The CAV affirmed, finding that Edwards v. Arizona, 451 U.S. 477 (1981), did not assert that the police were not required to stop a voluntary interview and wait for Stoner to re-initiate contact, as they are required to do for a custodial interview. (citing Tipton v. Com., 18 Va. App. 832 (1994)). The CAV further found that Stoner's confession was not coerced.

The CAV also found that the prosecutors who drafted/signed the offer/proffer letter did not need to be recused from the case. The CAV determined that the circuit court did not abuse its discretion in finding that the Commonwealth's Attorneys were not **necessary** witnesses.

Ball v. Com., Record No. 0632-23-2: (Callins, J., writing for Beales, J., and Clements, SJ.)
Capital murder; Probation revocation; Admissibility of evidence; Alford plea; Victim impact statement
The CAV affirmed the revocation of Ball's suspended life sentence where he committed multiple felonies while incarcerated, and the evidence presented at the revocation was relevant to his potential for rehabilitation and lack of remorse for the murder of VSP Special Agent Walter.

> In 2018, Ball entered a plea pursuant to Alford v. North Carolina, 400 U.S. 25 (1971), to capital murder of VSP Special Agent Walter. The circuit court sentenced him to life in prison, but suspended a portion of his sentence, ordering Ball to serve 36 years and that he remain of good behavior while incarcerated. In 2022, Ball was convicted of malicious wounding of a fellow inmate, and in 2023, Ball was convicted of attempted malicious wounding by a mob and conspiracy.
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> At his revocation proceeding for his capital murder conviction, the Commonwealth introduced evidence of BWC footage of VSP Special Agent Walter's murder. Ball objected, stating that it was irrelevant to the revocation of the suspended portion of his sentence. Ball also moved to exclude a recorded video call of his time in jail, where he was shown "danc[ing] and flash[ing] gang hand signs." The Commonwealth introduced a victim impact statement from Jaime Walter, VSP Special Agent Walter's wife, and Ball objected to this evidence.
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> The circuit court overruled his objections and admitted the evidence. The Commonwealth also introduced evidence that Ball had a tattoo of roman numerals "corresponding to the date he killed Special Agent Walter." The circuit court revoked his suspended sentence and imposed his life sentence.
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> The CAV found no error in the admission of any evidence. On the issue of the victim impact testimony, the CAV reiterated that a probation revocation is still a criminal proceeding, even though it is not a full trial. Therefore, the prohibition of admission of a victim impact statement in a civil proceeding from § 19.2-299.1 does not apply to a revocation proceeding.

Bey v. Com., Record No. 0481-23-4: (Per Curiam Opinion: Friedman and Frucci, JJ., Humphreys, SJ.)
Sufficiency; Rule 5A:18
Bey failed to properly preserve some of his arguments under Rule 5A:18, and the evidence was sufficient for a rational factfinder to conclude Bey had the specific intent required for attempted malicious wounding of a law enforcement officer.

> The CAV rejected Bey's appeal without oral argument, finding it was "wholly without merit." Code § 17.1-403(ii)(a); Rule 5A:27(a). A jury convicted Bey of attempted malicious wounding of a law enforcement officer and maliciously shooting at an occupied law enforcement vehicle.

Bey was in a road rage incident wherein he attempted to strike El Nahas's vehicle multiple times. After El Nahas stopped at a traffic light, Bey exited his truck and "repeatedly struck the driver's side mirror of El Nahas's car." Bey returned to his truck and left, and El Nahas followed Bey while on the phone with law enforcement. Bey eventually stopped near a high school and pulled a pistol on El Nahas, firing at El Nahas's vehicle repeatedly before leaving.

Later that day, SWAT and multiple marked police cars/officers came to Bey's house. Bey locked himself in his house for hours while officers attempted to get Bey to come out through their public address systems. At night, officers breached the door with a vehicle in an effort to talk to Bey. Bey began shooting the vehicle many times. After officers stated they were not attempting to enter the house, Bey yelled, "You have no jurisdiction . . . Murder me . . . It's a time to kill." Bey's wife left the house and entered police custody. The officers "introduced chemical irritants into the home to force Bey to surrender." Bey continued to fire his weapons, but officers arrested him.

The CAV found no sufficiency issues in the jury's convictions, finding also that portions of Bey's arguments were not properly preserved for appeal under Rule 5A:18.

Black v. Woody, et al., Record No. 0445-23-2: (Fulton, J., writing for Decker, CJ., and Ortiz, J.)
Demurrer; Incarcerated plaintiff; Admissibility of expert testimony
The CAV affirmed the exclusion of expert testimony where Black's proffered expert was not familiar with the procedures regarding incarcerated persons' medical care. Black conceded that if the CAV affirmed on this issue, his other AOEs were moot.

Black was incarcerated and began experiencing significant pain and other medical issues because of his peripheral vascular disease. His issues included his "left leg turn[ing] black as coal" and not being able to walk normally. He requested medical attention multiple times including the ability to call his treating physician but did not obtain proper medical treatment for weeks. Eventually, he was transported to a hospital, and his left leg was amputated below his knee.

Black designated several experts for trial, and defendants filed multiple motions in limine to exclude certain testimony. Nurse Whitehead's testimony regarding the deficient performance of the medical professionals was excluded because "Nurse Whitehead did not testify to any familiarity with the procedures, the process" or other aspects of incarcerated persons' medical care.

On appeal, Black conceded that if the CAV found that the circuit court "properly excluded Nurse Whitehead's expert testimony, then [the CAV] need not consider any other arguments made on appeal." The CAV found that the circuit court did not abuse its discretion in excluding Nurse Whitehead's expert testimony, "because Black's pre-trial designation regarding Nurse Whitehead's testimony stated only that she would opine on the failure to send Black to the hospital."

Beltran v. Com., Record No. 0388-23-2: (Chaney, J., writing for White, J., and Annunziata, SJ.)
Nolo contendere plea; Rule 5A:18; Voluntariness of plea; Ends of justice
The CAV affirmed Beltran's convictions of rape and OSP, finding no manifest injustice to invoke the ends of justice exception to Rule 5A:18 to Beltran's unpreserved objections to the voluntariness of his plea or the admission of the victim's displeasure with the sentencing guidelines.

> Beltran pleaded to rape and object sexual penetration of a child under the age of 13 for assaults against his foster sister during 2011 to 2013. An oral plea agreement specified that "the Commonwealth would not seek an enhanced penalty of mandatory life imprisonment." At the plea hearing, Beltran affirmed he wished to enter the nolo contendere plea and that he was not coerced.
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> At sentencing, the Commonwealth proffered without objection that the guidelines were "much lower than [the Commonwealth] expected" at 7 years 2 months to 15 years and 6 months. The Commonwealth had advised the victims that the guidelines would be 15 years 7 months to 33 years and 5 months. The Commonwealth told the circuit court that the victims would not have agreed to the plea agreement if the Commonwealth had properly advised them of the sentencing range. The circuit court contemplated the mitigating evidence presented by Beltran, finding that he had taken responsibility for his actions and "overcome significant personal challenges" including MS-13 murdering his father.
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> On appeal, Beltran argued under Padilla v. Kentucky, 559 U.S. 356 (2010), his trial counsel failed to advise him that he would be registered as a sex offender, rendering his plea involuntary. Beltran admitted this objection was not preserved but asked the CAV to invoke the ends of justice exception. The CAV declined, finding that Padilla was not appropriate authority because it related to habeas corpus claims. The CAV found no manifest injustice or even error by the circuit court's decision.
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> The CAV also found that there was no manifest injustice in the Commonwealth's proffer at sentencing that the victims were dissatisfied with the sentencing range. Beltran's sentence was within the statutory maximum and thus not an abuse of discretion.

Torres v. Com., Record No. 0028-23-4: (Causey, J., writing for Athey and Callins, JJ.)
Jury instruction; Harmless error; Allen instruction; Sufficiency; "Shall" meaning
The CAV affirmed Torres's unreasonable refusal conviction, finding any error in the court's sua sponte Allen charge was harmless.

> Torres was driving a vehicle around 2:00 am when she stopped about 50 yards before a stop sign. Deputy Lloyd observed her improper stop and followed her onto I-66. Torres failed to maintain her lane multiple times, and Lloyd initiated a traffic stop. She displayed several signs of intoxication and performed poorly on SFSTs. She refused a PBT and refused to provide a BAC.

Torres was tried for DUI and unreasonable refusal. During deliberation, the jury asked, "What if we are not going to come to a unanimous decision on one of the charges?" The jury clarified that they had come to a decision on the unreasonable refusal charge but were deadlocked on the DUI. Torres agreed with the Commonwealth that an Allen charge was appropriate. Torres proposed the model instruction, and the circuit court rejected it, creating an instruction sua sponte. Torres objected to the sua sponte language. Subsequently, after her conviction of unreasonable refusal, Torres moved to set aside the jury verdict because the certificate of refusal was not attached to the warrant pursuant to Code § 19.2-268.3. The circuit court refused and imposed the verdict.

The CAV affirmed the circuit court's decision on the 19.2-268.3 issue, applying binding precedent of Com. v. Rafferty, 241 Va. 319 (1991), which had a nearly identical issue. The procedural deficiency did not give rise to the substantive remedy of dismissal. The CAV assumed there was error in the jury instruction and found any error to be harmless because the jury had indicated it had already reached a verdict on the unreasonable refusal charge, and Torres was found not guilty on the DUI.

Commentary: The Panel introduced some interesting dicta in Footnote 5, suggesting that circuit courts should not create an instruction sua sponte "when a specific instruction has been requested by one of the parties and correctly reflects the law." (citing Womack v. Circle, 70 Va. (29 Gratt.) 192 (1887)). This was a contentious point during oral argument, as Judge Causey (who wrote this opinion) and I discussed the impact of the fact that the Commonwealth did not provide a jury instruction. I also raised the question of whether it mattered that anyone requested a jury instruction given Poole v. Com., 211 Va. 262 (1970), wherein the Supreme Court stated that circuit courts may give instructions to the jury even if "unasked" because of the circuit court's obligation to properly instruct the jury on the law. Judge Causey seemed reticent to agree because of the fact that the Defendant presented a legally correct instruction, and it would be more appropriate for the court to create one if no party presented one.

Poole clearly states, "The accused has certainly no just cause of complaint if the law is properly expounded." Thus, I'm not sure that this dicta is going to withstand SCV review, but it is an interesting question regarding the circuit court's authority to disregard a Model Jury Instruction and introduce a non-model. Obviously, if the proposed jury instruction does not accurately state the law, the circuit court is obligated to refuse it. But, the Panel points out that "model jury instructions should seldom be disregarded."

My question would be, what is the result if the Commonwealth provided a lengthy Allen charge, the Defendant presents the Model, and the circuit court believes that the Commonwealth's is more appropriate, but wants to modify the language slightly because the Commonwealth's is too strong (even if it is accurate)? Another question

is whether the circuit court is required to give duplicate instructions, given the language cited from Womack "if either party desire any specific instruction . . . the court is bound to give it, provided it expounds the law correctly." The panel's reliance on a case from 1887 would require both instructions be given if they are legally correct.