Overview

The Supreme Court of Virginia (SCV) made no moves this week but will hear a writ panel next week. The writ panel is a set of oral arguments on the petitions for appeal. Petitioners are entitled to these oral arguments, but they are short and in front of a panel of 3 justices from the SCV rather than the full court. If a majority of the panel believe the case should be heard on the merits, then the SCV will order full briefing of the case on the set of issues it believes should be argued. However, historically, if a single justice believes a case has merit, then the entire panel will defer to that justice's position and support the petition. Thus, as an attorney, you really need to convince only one justice. That is easier said than done, and most cases are dismissed without full briefing on the merits of the case.

The Court of Appeals of Virgina (CAV) focused its published and unpublished opinions on a few issues, primarily voir dire and juror strikes. The CAV published Grimaldo v. Com., Record No. 0449-23-2, in which it reversed a conviction based on a prospective juror's equivocal answers to partiality questions. The CAV also delivered unpublished opinions in Moyers v. Com., Record No. 1286-23-3, reversing a conviction where the juror made unequivocal statements of his inability to be impartial, and in Moorman v. Com., Record No. 1182-23-3, affirming the peremptory strike of a prospective juror where she made unequivocal statement that she would "fight for" Moorman, regardless that she was 1 of 4 African-American female jurors struck by the Commonwealth.

SCV Opinions and Orders

No new opinions or orders this week.

CAV Published Decisions

Grimaldo v. Com., Record No. 0449-23-2: (Callins, J., writing for Beales, J., and Clements, SJ.)
Motion to set aside the verdict; Juror strikes; Sufficiency; Double jeopardy; Inherent incredibility
Convictions reversed because the circuit court failed to strike a juror for cause where the juror was "equivocal" as to whether she could be impartial. The CAV found that the circuit court abused its discretion in denying Grimaldo's motion to strike for cause because "any reasonable doubt as to a juror's qualifications must be resolved in favor of the accused."

> The facts of Grimaldo's offense are somewhat irrelevant to the CAV's analysis and are thus omitted from this synopsis. Grimaldo was charged and subsequently convicted of rape, but the CAV's analysis was primarily focused on the voir dire and strikes for cause. The CAV did assess the sufficiency of the evidence, but it was mostly regarding the credibility of the complaining witness.
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> In voir dire, there were 3 jurors who posed potential biases/concerns. Juror 36 indicated a familiarity with the Commonwealth's attorney and worked with victims of sexual abuse and mental health patients. But, Juror 36 averred that she would be neutral and "not bring extraneous information into the jury room."

But, Jurors 14 and 17 indicated affirmatively to Grimaldo's question: "Is there anyone who knows someone who has been the victim of a sexual assault?" Juror 17, after further questioning, explained that she "would want to believe that [she] could" be impartial. Grimaldo further inquired, and Juror 17 stated, "It's hard to know without hearing the evidence because obviously I don't know what kind of emotional reaction I will have. Yes, I would try. I would be—I know it might be difficult, but that's my goal." Juror 17 was ultimately seated on the juror panel.

Juror 14 was asked, "Do you feel like that experience will influence your decision-making today?" Juror 14 "nodded her head up and down" to indicate in the affirmative. When asked, "You do?", Juror 14 responded, "I mean, I would hope not, but I don't know. It's hard. I would rather go in the back." The CAV remarked that "in the back" meant to a room without the rest of the venire to answer questions privately. No further questions were asked, and Grimaldo moved to strike Juror 14 for cause. The circuit court denied the motion, stating that "she did very well with the level of commitment to try to do the right thing." The circuit court also noted that "a lot of people were in tears" not just Juror 14.

At trial, Grimaldo attacked the complaining witness's credibility, arguing that she had a financial motive to fabricate, specifically, $93,000 missing from her business account. The complaining witness alleged that Grimaldo had embezzled money from her business, so Grimaldo alleged that the complaining witness was inherently incredible based on her motives. The complaining witness described the rape and Grimaldo's reaction in the days after the rape to the police and the jury. The circuit court denied Grimaldo's motion to strike and the motion to set aside the guilty verdict.

The CAV reversed, finding that Juror 14 should have been excused for cause. The CAV reiterated that juror strikes are "committed to the sound discretion of the trial court." (quoting Warren v. Com., 76 Va. App. 788, 799 (2023)). But, the CAV determined that the circuit court abused its discretion in the instant case because "[a]ny reasonable doubt as to a juror's qualifications must be resolved in favor of the accused." (quoting DeLeon v. Com., 38 Va. App. 409, 412 (2002)).

The CAV found that Juror 14's statements were equivocal and indicated potential bias. Further, the CAV found that the Commonwealth did not attempt to rehabilitate her. The CAV stated that there was a distinction between Juror 14's and Juror 17's statements, finding that Juror 17 was clear that her goal was to be impartial, whereas Juror 14 did not do so. "Because such a doubt must be resolved in favor of the accused, [the CAV held] that the trial court's refusal to grant Grimaldo's motion to strike Juror 14 for cause was manifest error."

The CAV then reviewed the sufficiency of the evidence and found no evidence that the complaining witness was inherently incredible. "[A] witness's ulterior motive and bias are factors to be weighed by the factfinder." (quoting Kelley v. Com., 69 Va. App. 617, 627 (2019)). The CAV also rejected an argument that the complaining

witness's testimony was "belied by the photographs purporting to show her injuries from the rape." Specifically, the CAV stated that "believable and credible are synonymous." Thus, the jury was properly the determiner of the facts, and they had all the information they needed to evaluate the facts of the case. "The jury permissibly rejected Grimaldo's versions of the events and convicted him of rape." (citing Speller v. Com., 69 Va. App. 378, 388 (2018)).

Commentary: It's interesting that this is a published case, which means the entire CAV reviewed the opinion. This is an extremely close decision, and I expect that the Commonwealth will be petitioning the SCV for an appeal. The record isn't exactly clear that Juror 14 could not be impartial. I think that the attorneys (both for the Commonwealth and Grimaldo) failed to fully explore Juror 14's bias. To that end, the CAV declared authoritatively that the attorneys must do so or the circuit court must dismiss the juror because "[a]ny reasonable doubt as to a juror's qualifications must be resolved in favor of the accused."

It is obviously difficult to probe into the bias of a juror, especially in a sexual assault case, but it is a necessary complication of trial. Sitting on a jury is one of the worst days of the year for many people. Dredging up an individual's sexual assault or even a physical assault only makes that day worse. But, it is our duty to serve our clients, whether they are the Commonwealth or an individual. In service to our client, we are obligated to ask the difficult questions.

Zeng, et al. v. Wang, Record No. 0523-23-4: (Friedman, J., writing for Frucci, J., and Humphreys, SJ.)
Fraud; Constructive fraud; Statute of limitations; Rule 1:1; Jurisdiction; Rule 5A:18
Dismissal affirmed where Appellants failed to demonstrate that due diligence would not have uncovered the alleged fraud back in 2012/2013 and failed to prove that Appellees obstructed Appellants from filing a suit. Thus, the statute of limitations barred the suit.

Appellants alleged that they had invested $500,000 plus fees into the Greentech Automotive Project (Project) which was owned and controlled by Wang. Appellants invested under the Employment-Based Immigration Fifth Preference Program, which grants investors a permanent green card if they create 10 jobs in the US. Appellants alleged fraud based on deceptive practices and that Wang took advantage of their inexperience in investing, describing the Project as less risky than it actually was.

Appellants alleged that they discovered the fraud in August 2017, and the Project filed for bankruptcy in 2018. Appellants lost their investments. Appellants filed suit in July 2019. Wang filed a plea in bar, arguing that Appellants should have known that the marketing materials were not wholly accurate. Notwithstanding that, Wang argued that their suit was barred by the 2-year statute of limitations because the fraud actions accrued when they signed the investment documents.

The circuit court found that "even the simplest of [due] diligence" would have uncovered any fraud that existed in the investment. "[A]ppellants took no steps to become informed as to the nature of the investment. Nor did they ask for financials or corroboration of the marketing materials." The circuit court granted the plea in bar. After a motion to reconsider, the circuit court determined that the statute of limitations had expired and entered a final order in the case.

The CAV affirmed. First, the CAV reviewed Wang's motion to dismiss, which argued that the "final order" after the motion to reconsider was entered well after the order granting the plea in bar and that the circuit court had lost jurisdiction after 21 days, pursuant to rule 1:1. Since the "final order" was purportedly invalid, and the notice of appeal was filed long after the 30-day deadline from the initial order, Wang argued that the CAV did not have jurisdiction over the case. The CAV disagreed, finding that while the first order indicated its judgment, "the trial court emphasized its judgment was not yet final" and established a briefing schedule for post-verdict motions.

While the memorandum opinion and order did not expressly retain jurisdiction, as would be preferred, "the order did not conclusively sustain the plea in bar" and instead "stated that the plea **will** be sustained." "Where further action of the court in the cause is necessary to give completely the relief contemplated by the court, the decree is not final but interlocutory." (quoting Kellogg v. Green, 295 Va. 39, 45 (2018)). Thus, the CAV denied Wang's motion to dismiss.

The CAV then reviewed the merits of the plea in bar, finding that the circuit court did not err in finding that the cause of action accrued in 2012 or 2013, whenever each individual plaintiff signed the offering documents and delivered their investment. The CAV determined that "[A]ppellants could not simply wait to see if the risks [demonstrated in the marketing materials and PPM] materialized before filing suit." (quoting Brumbaugh v. Princeton Partners, 985 F.2d 157, 163 (4th Cir. 1993)). The risks were evident in the materials, and Appellants did not conduct reasonable diligence in uncovering those risks and taking action.

Additionally, Appellants had raised new arguments on appeal that they did not raise to the circuit court, and the CAV held that these arguments were precluded from appellate analysis under Rule 5A:18. "On appeal, though taking the same general position as in the trial court, an appellant may not rely on reasons which could have been but were not raised for the benefit of the lower court." (quoting Moison v. Com., 302 Va. 417, 419 (2023)).

Finally, the CAV determined that Appellants failed to prove that the statute of limitations were tolled or that they could not have uncovered any fraud through the exercise of due diligence. The CAV found no evidence supporting Appellant's bare assertion that the "filing of an action [was] obstructed by a defendant's [use of] direct or indirect means to obstruct the filing of an action." (quoting § 8.01-229(D)(ii)). "The record overwhelmingly supports [the] conclusion" that

"Appellants failed to exercise even the simplest of diligence." So, the circuit court did not err in dismissing the suit.

Woodrock River Walk, LLC v. Rice, et al., Record No. 1860-23-3: (Ortiz, J., writing for O'Brien, J., and Humphreys, SJ.)

Landlord/Tenant law; CARES Act; Unlawful detainer; Statutory interpretation

Dismissal of unlawful detainer act reversed where CARES Act only prohibits the actual eviction of an individual within 30 days of notice, not instituting the legal process to evict an individual.

Woodrock (Landlord) issued a notice of failure to pay rent to Appellees (Tenants and named Appellees - Rice and Andrade) on December 7, 2022. The notice informed Tenants that they needed to pay the full amount within 5 days or the lease would be terminated. "The notice, however, also explained that Rice was not required to vacate the dwelling during the 30-day CARES Act notice period." When Tenants failed to timely pay, Landlord filed a summons for unlawful detainer in the GDC court on January 5, 2023, 29 days after notice was given.

GDC dismissed the unlawful detainer without prejudice, and Landlord appealed to the circuit court. Tenants filed a motion to dismiss, arguing that "under the CARES Act, a landlord cannot require a tenant to leave their property until 30 days after the tenant receives notice." Since the summons was issued 29 days after, Tenants argued the summons was unlawful. The circuit court agreed and dismissed the unlawful detainer.

The CAV reversed and remanded the case for further proceedings. The CAV found that the circuit court erred in its application of the CARES Act, first and foremost because "a summons does not require a tenant to leave their premises." The CARES Act only precludes landlords from requiring a tenant to leave the premises within 30 days. Thus, "[i]t is only when an officer executes a writ [of eviction] during the 30-day window that the CARES Act is violated."

The CAV also found that terminating a lease did not violate the CARES Act. § 55.1-1245 permits a landlord to terminate a lease, and § 55.1-1233 permits a landlord to order a tenant to leave the property upon the termination of the lease. The CAV held that the CARES Act preempts § 55.1-1233 and prohibits removal of the tenant, but it does not preclude the termination of the lease. Therefore, the circuit court erred in granting the motion to dismiss the unlawful detainer petition.

Womack v. Com., Record No. 2108-23-3: (Athey, J., writing for White and Frucci, JJ.)
Sufficiency; Constructive possession
Conviction for concealed weapon affirmed where there was sufficient evidence to infer that Womack knew of the firearm under his seat/feet. The CAV distinguished prior precedent and applied SCV precedent.

While on patrol, police observed a white Nissan Maxima traveling without a front license plate. A traffic stop was initiated and Womack was identified as the front-seat passenger. The driver denied having a firearm in the car and complied with the officer's instructions, exiting the car while another officer questioned Womack.

Officers asked Womack if he had a weapon, which he denied. Womack lifted up his "puffy coat" to show that there was nothing under it. In doing so, he moved his feet, and, immediately, officers "could then see a Glock 19 . . . that was where his foot had been." Womack was removed from the vehicle without incident, and the firearm was secured. The firearm was loaded with a cartridge in the chamber and 27 rounds in the extended magazine.

At trial, Womack's mother testified in Womack's defense. She testified that the firearm was hers and that she had placed it under the front-passenger seat. But, on cross-examination, she could not answer how many rounds the magazine held, answering "9 rounds." The circuit court denied Womack's motion to strike the evidence and convicted Womack of carrying a concealed weapon.

The CAV affirmed, reiterating that "[i]f 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 McGowan v. Com., 72 Va. App. 513, 521 (2020)).

Concealed carry violations "may be based solely on evidence of constructive possession." (quoting McArthur v. Com., 72 Va. App. 352, 368 (2020)). Constructive possession requires "proving that the defendant was aware of the presence and character of the firearm and that the firearm was subject to his dominion and control." (quoting Raspberry v. Com., 71 Va. App. 19, 30 (2019)).

The CAV considered 2 major cases that applied to this situation, Bolden v. Com., 275 Va. 144 (2008) and Hancock v. Com., 21 Va. App. 466 (1995). In Hancock, the CAV reversed a conviction where Hancock was in the rear of a vehicle and a revolver was found under the driver's seat. The CAV therein reasoned that because it was nighttime and there were 5 total occupants of the vehicle (4 of whom fled the scene), there was insufficient evidence to show that Hancock knew of the revolver and exercised any dominion and control over it.

In contrast, in Bolden, the SCV upheld a conviction for possession of a firearm where Bolden was the driver of a car. Bolden exited the car before the officer approached it and was arrested for narcotics on his person. The officer then

searched the car and found a grocery bag in plain view in the driver's seat with a firearm inside. The evidence showed that the bag "was right beside Bolden or he was sitting on it."

The CAV found that Hancock was distinguishable, in part because a reasonable inference was that Womack was concealing the Glock with his foot. Based on the distinguishability of Hancock and the precedential value of Bolden, the CAV affirmed Womack's conviction.

CAV Unpublished Decisions

Francis v. Com., Record No. 0213-24-3: (Per Curiam Opinion: Athey, White, and Frucci, JJ.)
Construction fraud; Intent
Conviction affirmed without oral argument where there was sufficient evidence for a factfinder to reject Francis's self-serving statements that he intended to complete the construction job but was unable to do so. The circumstantial evidence supported a finding that Francis never intended to complete the project.

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

Francis signed a contract with Delong to build a front porch on a residence in July 2017. Delong paid the initial fee of $1400 and a second payment of $1200. Francis removed the gutter and soffit from the front of the house and delivered materials for the project. A few weeks later, Delong obtained the building permit for the porch, and Francis signed an additional agreement that if his work did not meet the code, he would pay someone to remedy the work at no cost to Delong. Francis never returned to the house or completed the porch.

Delong and her daughter repeatedly called Francis to complain about the lack of progress, but Francis only said that he would be back "in about two or three days or maybe the next day." Delong contacted the police, who reached out to Francis in person and on the phone. Each time, Francis gave several excuses as to why he had not completed the project. Police informed Francis that he needed to either complete the project or return the money Delong paid, or else police would initiate charges. Francis never returned the funds.

At trial, Francis testified that he intended to do the work but was unable to do so because of circumstances outside his control. He also stated that he could not return the money because he spent it on labor and materials he was intending to use on the project. Francis admitted that he had several felony convictions and a misdemeanor of moral turpitude. The circuit court convicted Francis of construction fraud.

The CAV affirmed, stating, "The judgment of the trial court is presumed correct and will not be disturbed unless it is plainly wrong or without evidence to support it." (quoting Pijor v. Com., 294 Va. 502, 512 (2017)). "In construction fraud cases,

as in all other fraud cases, fraudulent intent can be inferred from the conduct and representations of the defendant." (quoting Dennos v. Com., 63 Va. App. 139, 145 (2014)).

Because the circuit court "is entitled to disbelieve the self-serving testimony of the accused and to conclude that the accused is lying to conceal his guilt" the CAV found that there was sufficient evidence supporting Francis's intent to defraud. (quoting Flanagan v. Com., 58 Va. App. 681, 702 (2011)).

Tran, et al. v. Industrial Development Authority of Front Royal and Warren County, Record No. 0277-23-4: (Malveaux, J., writing for Raphael and Frucci, JJ.)
Ultra vires; Conversion; Unjust enrichment; Breach of contract; Statutory interpretation; Rule 5A:18
Jury's finding of fraud/conversion/ultra vires, etc., affirmed where there was sufficient evidence for the jury to find each of the claims presented, and additional arguments raised to the CAV were barred from appellate review under Rule 5A:18.

Appellee is referred to as the Economic Development Authority or EDA throughout the opinion. Further, the opinion segments the facts into several sections.

The EDA is designed to bring business into Front Royal and Warren County, is governed by a board of 7 directors, and employs an executive director. The EDA is technically "a political subdivision of the Commonwealth." The executive director of the EDA, McDonald, embezzled funds in 2018 and 2019.

In 2000, the EDA obtained a previously contaminated property that had been cleared and remediated by the Environmental Protection Agency. The EDA subsequently created a commercial property called Lot Six.

In 2014, Tran created IT Federal, an LLC, to raise foreign investment to build an information technology project on Lot Six, through conversations with McDonald. A year later, IT Federal purchased Lot Six. "IT Federal was to pay $1 for the property and secure a $2 million promissory note." IT Federal was obligated to spend at least $5 million in construction costs to improve Lot Six. The EDA later amended this to $2 million in costs. A second promissory note was also executed, and EDA loaned IT Federal $10 million, repayable over 30 years.

McDonald then reached out to Tran and told him that IT Federal would qualify for a grant from the Virginia Economic Development Partnership (VEDP). Tran met with the VEDP, who requested additional information. Tran did not deliver any information, so VEDP did not give any grant money. But, in 2016, McDonald emailed Tran to inform him that EDA had been approved for a grant to develop the site. McDonald did not give documentation of the grant money but "signed a memorandum of understanding between IT Federal and the EDA" that the EDA received a grant and was making $1.5 million available to IT Federal for developing Lot Six.

The EDA board had no knowledge of the memorandum of understanding. Further, the board did not vote on the memorandum or the $1.5 million grant to IT Federal. McDonald told the board that the EDA had received a grant from VEDP and that the EDA was not paying any of its own funds for the project.

The building was completed in 2020. Prior to this, though, the EDA filed suit against IT Federal and Tran, alleging fraud, fraud in the inducement, conversion, conspiracy, unjust enrichment, ultra vires transactions, and breach of contract. After a trial, the jury entered a verdict for the EDA against Tran in his individual capacity for approximately $1.5 million in damages. The jury entered a verdict against IT Federal for approximately $10.5 million. The circuit court denied Tran's motion to set aside the verdict.

The CAV affirmed. Reviewing the ultra vires argument, the CAV reiterated, "A contract of a corporation is ultra vires when it is outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature." (quoting Norton Grocery Co. v. People's Nat'l Bank, 151 Va. 195, 202 (1928)). "Accordingly, a 'corporation is bound only when its officers or agents by whom it can alone act, if it acts at all, keep within the limits of the chartered authority of the corporation." (quoting Norfolk City v. Chamberlaine, 70 Va. 534, 541 (1877)). But, the CAV then found that Tran failed to preserve this argument under Rule 5A:18 because he consented to the jury instruction on the ultra vires doctrine.

The CAV then reviewed the unjust enrichment and conversion claims, finding sufficient evidence for a rational factfinder to conclude that both IT Federal and Tran, in his individual capacity, committed the torts. The CAV also upheld the promissory note and breach of contract claims, finding no error in the jury's conclusions.

Hensley v. Com., Record No. 1191-23-3: (Causey, J., writing for Fulton and Raphael, JJ.)
4th Amendment motion to suppress; Statutory exclusionary rule; Conditional guilty plea
Statutory exclusionary rule did not prohibit evidence obtained because the officer did not initiate a stop for defective equipment but for failure to signal a turn/merge.

Hensley was driving her car and merged from the left to the right lane. When merging, her rear turn signal "never flashed to indicate her lane change," and police initiated a traffic stop for failure to signal under § 46.2-848. Police informed Hensley that she did not indicate her turn and also that her rear tail-light was not on. Hensley wondered whether her turn signal was also out and tested it with the officer. The officer confirmed that her right-turn signal was not working. Hensley consented to a search of her car, and the officer found methamphetamine in a handbag.

The circuit court denied Hensley's motion to suppress, and Hensley entered a conditional guilty plea to possession with the intent to distribute a schedule II substance.

The CAV affirmed. Hensley argued that the stop was in violation of § 46.2-1003's exclusionary rule, excluding any evidence for a seizure for defective equipment. But, the CAV found that the stop was supported by the facts for a violation of § 46.2-848, which is failing to indicate/signal a turn/merge. In turn, Hensley argued that the stop under 848 failed because her turn did not impact any other vehicles. The CAV rejected this argument, finding that "Hensley's failure to use her turn signal **may** have impacted the officer's vehicle on the road [and] whether it actually impacted the vehicle or not was not material for a violation of the statute." Therefore, the circuit court did not err in denying the motion to suppress.

Moyers v. Com., Record No. 1286-23-3: (Huff, J., writing for Athey and Fulton, JJ.)
Judicial restraint; Best and narrowest grounds; Juror strike for cause
Convictions of child pornography reversed where a prospective juror made unequivocal statements of bias/inability to be impartial.

The facts of Moyers's convictions are irrelevant to the CAV's analysis and thus omitted from this synopsis. Moyers was charged and tried by a jury for 20 counts of possession of child pornography (1 first and 19 second or subsequent).

During voir dire, Moyers asked whether the jury would be able to view "explicit, sexual type pictures" without being "so concerned with the explicit nature of the evidence that they couldn't provide the parties, the defendant, with a fair trial." Juror 2 hesitated and stated, "I have feelings about children because I was an elementary teacher and a principal, and as such that bothers me." Moyers asked, "[W]ould it bother you so much to hear . . . the evidence that would taint your ability to give this man . . . who pleaded not guilty . . . [a fair trial]? Are you concerned that your background and your feelings in that area could possibly taint . . . your fairness?" Juror 2 stated, "That's a question I'm not sure I can answer."

Later on, Moyers asked, "[I]s that a closely held personal belief that you have a concern could affect your ability to provide . . . the defendant a fair trial in this particular setting with these particular charges?" Juror 2 answered, "I'm going to have to say yes." Moyers moved to strike Juror 2 for cause. The circuit court found that "while he did say he was a former teacher so obviously the nature of the offense bothers him, he couldn't say whether he would be tainted or not." After the evidence, the circuit court granted Moyers's motion to strike on 8 of the charges, and granted a nolle prosequi in 2 others. The jury convicted Moyers of 10 charges.

The CAV reversed. The CAV reiterated that "the decision to retain or exclude a prospective juror 'will not be disturbed on appeal unless there has been manifest error amounting to an abuse of discretion.'" (quoting Barrett v. Com., 262 Va. 823, 826 (2001)). The CAV stated that "when reviewing a court's determination whether

to excuse a juror for cause, [appellate courts] consider the juror's voir dire in its entirety." (quoting Keepers v. Com., 72 Va. App. 17, 42 (2020)).

The CAV found that while Juror 2 responded to both the circuit court's and Commonwealth's questions that he could be impartial, when asked by Moyers, Juror 2 "unequivocally answered that his fixed personal beliefs would affect his ability to provide appellant a fair trial." The CAV reversed his convictions and remanded them for a new trial.

Commentary: It is interesting that this is the unpublished opinion and Grimaldo is the published opinion. This is a much clearer case of an unequivocal answer of bias/partiality than the published opinion. Perhaps the CAV wanted to take a stance and advise the circuit courts that they need to be more liberal in granting strikes for cause. Or, perhaps this panel just did not wish to submit this case to the full court for publishing.

Gates v. Com., Record No. 1333-23-3: (Ortiz, J., writing for O'Brien, J., and Humphreys, SJ.)
Bill of particulars; Admissibility of evidence
Indecent liberties conviction affirmed where the circuit court did not abuse its discretion in admitting Gates's prior conviction of carnal knowledge under Rule 2:413.

Gates and Morgan married in 2021, 2 days after Gates was released from prison. Gates, as part of his probation, required that he had to be supervised around children. Morgan's daughter, C.M. lived in the house and considered Gates her step-dad. In January 2022, Gates's electronic monitoring was stopped, and he began living with Morgan. While there, he "touched C.M.'s buttocks" multiple times. Gates also commented that "she had a sexy butt" and "would have abut like her mother's."

One day, Gates offered to give C.M. "an ounce of marijuana and a smoking device if she would suck his dick." C.M. refused. Gates then offered a half-ounce if C.M. watched him masturbate. C.M. agreed, and Gates told her not to tell her mother. Gates's and Morgan's relationship fell apart later that year, and Morgan kicked Gates out of the house. During an argument, Morgan's eldest daughter stated "at least Gates didn't swing his dick at C.M."

C.M. disclosed the abuse to police, and Gates, in an interview, denied the allegations. When charged, Gates requested a bill of particulars, asking for the dates of each of the offenses alleged. The circuit court denied the motion, and the case proceeded to trial. The Commonwealth, at trial, "introduced a redacted copy of Gates's 2014 conviction of carnal knowledge of a minor." The circuit court instructed the jury that this evidence was "offered for proof of some surrounding circumstances," and not as "proof that he did anything he's charged with in these matters." The jury convicted Gates of indecent liberties with a child by a custodian and aggravated sexual battery.

The CAV affirmed, stating "A defendant is not entitled to a bill of particulars as a matter of right." (quoting Quesinberry v. Com., 241 Va. 364, 372 (1991)). The circuit court has discretion whether to grant a request for a bill of particulars. "Where the indictment gives the accused notice of the nature and character of the offense charged so he can make his defense, a bill of particulars not required." (quoting Rams v. Com., 70 Va. App. 12, 42 (2019)). The CAV also stated, "In sexual offenses, where there is no dispute that the crime, assuming it occurred, involved a minor child or a child beneath the age specified by the applicable statute, the allegation of time is not of such constitutional import because time was not of the essence of the offense charge." (quoting Clifford v. Com., 48 Va. App. 499, 516 (2006)). The CAV then affirmed the denial of the bill of particulars.

On the issue of the admission of Gates's 2014 conviction, the CAV found that the circuit court did not abuse its discretion in admitting the redacted copy and giving the limiting instructions. The CAV reiterated that "in a criminal case in which the defendant is accused of a felony sexual offense involving a child victim, evidence of the defendant's conviction of another sexual offense or offenses is admissible and may be considered for its bearing on any matter to which it is relevant." (quoting Rule 2:413(a)). The CAV further found that the redacted version of the conviction order and the limited instruction made it so that the probative value of the conviction was not substantially outweighed by its prejudicial nature. (citing Rule 2:403)).

The CAV stated, "Under Rule 2:413(a), Gates's prior conviction could permissibly have been introduced to show that he had a propensity to commit sexual offenses." Further, appellate courts "presume juries follow the instructions of the trial court." (quoting Couture v. Com., 51 Va. App. 239, 247 (2008)). The CAV found that in context, the prior conviction was prejudicial, but "the incremental prejudice of introducing the conviction record itself was relatively minor." Therefore, the circuit court did not abuse its discretion in admitting the conviction order.

Kennedy v. Com., Record No. 1737-23-1: (Petty, SJ., writing for Beales and Causey, JJ.)
4th Amendment motion to suppress; Conditional guilty plea
Suppression of evidence affirmed where officers observed a firearm in plain view, then Kennedy lied about the existence of a firearm. Reasonable, articulable suspicion existed based on those facts, and the officer's actions were reasonable under the Fourth Amendment.

Officers responded to a investigate a pickup truck that was blocking a resident's driveway. Kennedy was the driver of the pickup truck, and he was asleep in the driver's seat "with a blue and silver pistol in plain view on his lap." The police called for backup, and during this time, Kennedy woke up and began making movements. The officer came back to the driver's side door and could not see the gun. The officer asked where the gun was, and Kennedy denied having a gun in the truck.

The police detained Kennedy, who refused to open the door or exit the truck. After Kennedy exited the truck, officers confirmed that he was a convicted felon and that the pistol was still in the car, specifically the center console. The circuit court denied Kennedy's motion to suppress, and Kennedy entered a conditional Alford plea.

The CAV affirmed Kennedy's conviction, rejecting Kennedy's assertion that the officers did not have reasonable and articulable suspicion. "At a minimum, reasonable, articulable suspicion requires an officer to possess 'a particularized and objective basis for suspecting the particular person stopped of breaking the law' when he detains a citizen." (quoting Heien v. North Carolina, 574 U.S. 54, 60 (2014)). "The possibility that an officer ultimately may be mistaken or that there could be an innocent explanation for the facts causing the officer's suspicion does not negate the officer's reasonable, articulable suspicion." (citing Shifflett v. Com., 58 Va. App. 732, 736 (2011)).

The CAV found that the officer clearly observed a firearm in plain view in Kennedy's lap while he was asleep. Then, when Kennedy woke up and the officer returned, Kennedy "falsely insisted that there was no firearm" then "refused to open the door as instructed." The CAV determined that the officer's instructions were reasonable because "he did not know the firearm's location but knew it was still in play." "[T]he Fourth Amendment does not require a policeman to simply shrug his shoulders and allow a crime to occur or a criminal to escape." (quoting Christian v. Com., 33 Va. App. 704, 713 (2000)). Therefore, the circuit court did not err in denying Kennedy's motion to suppress.

Jones v. Com., Record No. 1687-23-3: (Decker, CJ., writing for O'Brien and Causey, JJ.)
Admissibility of evidence; Sufficiency; Procedural vs. substantive; Medical records; Criminal negligence; Law of the case doctrine
Aggravated manslaughter and related convictions affirmed where the circuit court did not abuse its discretion in admitting the certificate of analysis of Jones's blood, the toxicologist's testimony, or the hospital records. Evidence was sufficient to demonstrate criminal negligence.

Jones was driving her car when she veered into another lane and crashed into another vehicle. The driver of the vehicle was killed, and his 2 daughters suffered significant injuries as a result of the crash. Jones was transported to a hospital, and officers obtained her blood through implied consent. Her blood test indicated the presence of buprenorphine, fentanyl, and morphine.

Jones was charged with aggravated manslaughter, DUI, maiming an individual while DUI, and other related charges. Prior to trial, Jones moved to suppress her medical records and the results of her blood test, arguing that it was not properly taken under § 18.2-268.5, which outlines the requirements for those who can take blood samples. The circuit court denied both motions and further allowed the forensic toxicologist to opine that the levels of narcotics in her system would have

certain effects on one's ability to drive a motor vehicle. The jury convicted Jones as charged.

The CAV affirmed, reiterating that the admissibility of evidence is reviewed only for abuse of discretion. (citing Jefferson v. Com., 298 Va. 1, 10 (2019)). On the opinion testimony issue, the CAV rejected Jones's argument that the certificate of analysis and notice provided by the Commonwealth did not permit the toxicologist to testify about general effects of each of the drugs. Jones argued that Rule 3A:11 required the Commonwealth to submit additional notice for expert opinion testimony about the impacts of the drugs, rather than simply their presence. The CAV found no merit in the argument, stating that "just as an appellate court may not add words when interpreting a statute, it cannot add words when interpreting the Rules of the Supreme Court." (citing Kenner v. Com., 299 Va. 414, 430 (2021)). The plain language permitted what the Commonwealth did, and thus the circuit court did not abuse its discretion in admitting the testimony.

On the admissibility of the blood draw results, the CAV affirmed that § 18.2-268.5 is "procedural" and "is not substantive in nature." (citing § 18.2-268.11). Because of that "substantial compliance with the statute is sufficient." The CAV found sufficient evidence that "the Commonwealth established that either Manns drew the blood in compliance with Code § 18.2-268.5 or Strowbridge drew the blood in substantial compliance with the statute."

The CAV also affirmed the admission of the medical records, finding that sufficient evidence supported the finding that the records were trustworthy and admissible as business records. Further, the CAV affirmed the denial of the motion to suppress the medical records pretrial. While the circuit court had initially granted the motion to suppress based on a deficient search warrant, the officer obtained a second search warrant for the records. This warrant was upheld by the circuit court, and the motion to suppress was denied. The CAV found no error because a circuit court can "change its mind while the matter is still pending." (quoting Pinkard v. Pinkard, 12 Va. App. 848, 853 (1991)). Specifically, the CAV stated that "the law-of-the-case doctrine has no binding effect on a trial court prior to an appeal." (quoting Robbins v. Robbins, 48 Va. App. 466, 474 (2006)).

Finally, the CAV reviewed the sufficiency of each of the charges, finding evidence supported the convictions. Therefore, the CAV did not reverse the findings of the jury.

Moorman v. Com., Record No. 1182-23-3: (Humphreys, SJ., writing for O'Brien and Ortiz, JJ.)
Batson motion; Speedy trial; Sufficiency; Jury instructions; Rule 5A:18; Ends of justice exception; Harmless error
Convictions affirmed where sufficient evidence existed to find that Moorman knew of the narcotics/firearms in a laundry room, where his DNA was on a firearm in the backpack with the narcotics and narcotics residue was in his bedroom and on his dresser. Rule 5A:18 precluded appellate review of several arguments that were not timely raised to the circuit court.

> Moorman lived with his girlfriend, Branch, and two minor children. One night, Branch "heard rumbling" in the bedroom and called the police. When police arrived, Moorman exited the house and told them that he had been shot by an intruder. Officers conducted a protective sweep and did not find an intruder but did find "green plant material, suspected hash oil, and drug packaging materials in Moorman's bedroom."
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> Officers obtained a search warrant for the residence and located cartridge casings in the kitchen, as well as ammunition, a magazine, and a rifle in the laundry room. There were four other firearms in the laundry room inside of a backpack. Also in the backpack was around 150grams of cocaine. DNA testing demonstrated that Moorman had contributed to DNA on one of the handguns. Cocaine residue was located on Moorman's dresser and the bedroom floor.
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> Moorman moved to suppress the evidence and filed a motion for a hearing on the search warrant pursuant to Franks v. Delaware, 438 U.S. 154 (1978). But, the witnesses were unavailable prior to the day of trial. Moorman did not want to waive his speedy trial rights, but the circuit court found that a continuance was necessary and that the delay was caused by Moorman's motion. The circuit court tolled speedy trial from the date Moorman filed his motion until the circuit court ruled on it. The circuit court later denied the motion to suppress.
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> During voir dire, Moorman asked "whether there was anything that would affect [the jurors'] ability to hear the case." Juror K.T. stated that Moorman "could be my son" and "I'm not saying I'm biased but . . . I want to be here and fight for him like he's my son." The Commonwealth used all four of its peremptory strikes on African-American women, including K.T., and Moorman raised a motion under Batson v. Kentucky, 476 U.S. 79 (1986). The Commonwealth stated that K.T.'s response to Moorman's question was the reason for her dismissal. The circuit court found that this was a race-neutral reason and overruled the motion.
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> At the conclusion of the trial, Moorman renewed his motion to strike, arguing that there was insufficient evidence to demonstrate that Moorman knew of or possessed the items in the laundry room. Moorman also argued that the Commonwealth failed to prove that the firearms were operational and thus the Commonwealth did not prove that they were actually firearms. The circuit court denied the motion to strike.

The circuit court moved on to jury instructions. Instruction J discussed possession at length, including a statement, "Ownership or occupancy of the premises in which a controlled substance is found does not create a presumption that the owner or occupant either knowingly or intentionally possessed such substance." Moorman presented Instruction K, which simply reiterated that ownership was insufficient to establish possession. The circuit court rejected Instruction K as duplicative of J. The circuit court also gave Instruction I, to which Moorman did not object, which had a typographical error in its definition of constructive possession, having "domain and control" instead of "dominion and control." After the jury convicted Moorman, he moved to set aside the verdict based on the instruction issue and his speedy trial claim. The circuit court denied his motion.

The CAV affirmed. On the Batson issue, the CAV reiterated the three-step process of (1) defendant must demonstrate prima facie case of discrimination; (2) government must proffer a substantive race-neutral reason for striking the jurors; (3) defendant must overcome the race-neutral reason to prove "purposeful racial discrimination." (quoting Bethea v. Com., 297 Va. 730, 748 (2019)). In this case, the first two prongs were satisfied, but Moorman "failed to prove that the Commonwealth purposefully discriminated on the basis of race when it struck K.T. from the jury." (citing Hernandez v. New York, 500 U.S. 352, 360 (1991)). This was, in part, because K.T. expressly stated that she was partial toward Moorman.

On the speedy trial issue, the CAV determined that "his speedy trial motion came too late." Thus, it was barred from appellate review under Rule 5A:18. The CAV found that § 19.2-266.2 "requires defendants—absent good cause—to make motions for dismissal of charges for constitutional and statutory speedy trial violations in writing within the later of seven days before trial or as soon as the grounds for the motion arise prior to trial." (quoting Bass v. Com., 70 Va. App. 522, 534 (2019)).

On the jury instructions issue, the CAV likewise found that Rule 5A:18 barred review of Instruction I, since Moorman agreed to it at trial. The CAV found no reason to apply the ends of justice exception. Further, the CAV found that any error in refusing Instruction K was harmless error.

Finally, the CAV reviewed the sufficiency of the evidence and found no error in the jury's judgment. The Commonwealth presented sufficient evidence for a rational factfinder to conclude that Moorman knew of the presence and character of the firearms/narcotics in the laundry room.

Commentary: I don't fully know why the CAV did not fully review all of the Batson challenges and only reviewed the one regarding K.T., but without exploring the briefing, I will not be able to determine why. The rest of the issues in the case are interesting, but the main issue will be this Batson challenge and K.T.'s strike in particular. I would also be interested in learning why the circuit court did not strike K.T. for cause.