Overview

The Supreme Court of Virginia (SCV) granted 5 appeals last week and already issued an unpublished order granting relief in 1 of them (Thomas v. Com., Record No. 230759). The other 4 will be set for briefing and oral arguments sometime in the coming months.

3 of the appeals are criminal in nature and revolve around whether the Court of Appeals of Virginia (CAV) erred by: (1) not answering all parts of an assignment of error (Poulson v. Com., Record No. 240081); (2) finding that the appellant was not seized in the curtilage of his home (Poulson v. Com., Record No. 240081); (3) finding that the circuit court abused its discretion in refusing a jury instruction (Com. v. Kartozia, Record No. 240294); (4) finding more than a scintilla of evidence in the absence of affirmative evidence (Com. v. Kartozia, Record No. 240294); (5) applying the incorrect standard of review in a harmless error analysis and finding any error was not harmless (Com. v. Kartozia, Record No. 240294); (6) finding that exigent circumstances did not justify a strip search of the appellant (Com. v. Hubbard, Record No. 240310); and (7) finding that the right-result-for-a-different-reason doctrine did not apply in a case (Com. v. Hubbard, Record No. 240310).

The civil appeal is Eye Consultants of Northern Virginia, P.C., et al. v. Shaw-McDonald, Record No. 240166, and is going to review whether the CAV erred by transferring claims to a bankruptcy estate when a plaintiff filed for bankruptcy. The issue, apparently, is that the plaintiff lost standing to sue when this occurred.

The CAV issued several published opinions this week, including a 114-page opinion in the criminal context, in Thomas v. Com., Record No. 1429-22-4.

SCV Opinions and Orders

Thomas v. Com., Record No. 230759: (Unpublished Order)
Rule 1:1; Suspension of the Entry of the Final Order

> Thomas was convicted of murder, attempted robbery, use of a firearm (x2), and conspiracy to commit robbery, with a final order entered on May 9, 2023. Pursuant to Thomas's request at the sentencing hearing, the circuit court agreed to suspend the entry of the final order for 120 days and entered an order doing the same on May 11, 2023. Thomas filed his notice of appeal on August 3, 2023. The CAV dismissed the appeal *sua sponte* before the record was even delivered from the circuit court.
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> The SCV reversed the dismissal of the appeal, reiterating that "[a] trial court speaks through its written orders." (citing McMillion v. Dryvit Systems, Inc., 262 Va. 463, 469 (2001)). The SCV also clarified that "[t]here is a distinction between the rendition of a judgment and the entry of a judgment." (McDowell v. Dye, 193 Va. 390, 393 (1952)). The SCV remanded the case to the CAV.

Commentary: I know that the Commonwealth consented to error in this case and requested that the SCV remand the case to the CAV because I recommended that position and drafted/filed the consent motion. I don't know why the SCV forced Thomas's counsel to argue what was, essentially, a foregone conclusion.

As far as why the CAV dismissed the appeal without the record, I believe they did so based solely on the notice of appeal. If I remember correctly, the notice of appeal used the form notice available on the Virginia Courts Website: vacourts.gov. That notice is a fill-in-the-blank form that states: "[The party appealing] hereby appeals to the Court of Appeals of Virginia from the [final order] of this court entered on [date of entry] in case no(s) [_________]." As most (if not all) would use, this notice used the date of signature of May 9, 2023. I believe the CAV clerk/staff attorney saw this and immediately said that this is a late appeal and needed to be dismissed. Normally, the CAV will wait for the Appellee to file a motion to dismiss for untimely filed notice of appeal or raise that argument in the Appellee's brief before ultimately dismissing the case. I don't know why they did not do so in this case.

This case brings up several extremely technical and seemingly minor (but actually major) issues when perfecting an appeal from the circuit court to the Court of Appeals. (1) Suspension of the entry of the order and suspension of the execution of the sentence/judgment are fundamentally different ideas; (2) Regardless of the language utilized in the request/argument, a court speaks through its written orders (unless it is clearly a typographical or transpositional error); and (3) what constitutes the date of entry?

(1) Suspension of the execution of the judgment allows the judgment(!) to be stayed, generally pending the appeal and is governed by either §§ 8.01-676.1(C) or 19.2-319, depending on whether it's civil or criminal. In the civil context, it precludes the prevailing party at trial from executing garnishments or other proceedings to obtain damages (or property in certain cases). In the criminal context, it permits the defendant to remain on bond during the appeal (although this is rarely permitted and generally allowed only in misdemeanor cases). Suspension of the entry of the order generally does not stop the execution of the sentence (although it can be read to do so) and primarily applies to the tolling of the deadlines to file a notice of appeal or other post-judgment motions. This type of suspension is governed under Rule 1:1.

(2) The language you use in requesting a suspension is important because the CAV will reject/dismiss your appeal if you are only asked for suspension of the execution and relied upon such an order to suspend the entry of the final order. The CAV did so in Orellana v. Com., Record No. 1249-22-4 (Mar. 21, 2023 Order). In that case, the circuit court suspended the entry of the order until June 15, 2022, but suspended the execution of the sentence until July 30, 2022. Orellana filed a notice of appeal on August 17, 2022, and the CAV found that it was not timely because it was after 30 days from June 15, 2022. While I must stress timely filing your notice of appeal,

I must also be candid and state that the Attorney General's office is quite liberal with agreeing to delayed appeals in criminal cases. Civil cases are much less forgiving, though.

(3) The date of the entry of an order is important. Some believe that an order becomes effective on the oral ruling of the judge, but that is not quite the case. Parties may operate under that assumption, but until a judge actually endorses the order, Rule 1:1 permits the modification/reconsideration of any oral ruling. There is also the unique circumstance of when a circuit court enters a stay order on September 10 and then subsequently orders the final order on September 25, thinking the stay order from September 10 will control and stay the entry of the final order. The CAV has determined that it ***not*** *the case. When a circuit court enters an order after a stay order (and I believe this includes an amended final order nunc pro tunc to a prior date), the stay order is overwritten, and the final order becomes effective on September 25. It is, in my opinion, best practice to wait until a final order has been entered, then petition for a suspension under Rule 1:1. That way the circuit court doesn't inadvertently overrule itself and enter a final order.*

CAV Published Decisions

Cowherd, et al. v. City of Richmond, Record No. 0193-23-2: (Callins, J., writing for Beales, J., and Clements, SJ.)
Statutory interpretation; Rule 5A:20; Right-result-for-a-different-reason doctrine
City of Richmond the only entity who could decide where to move monument to A.P. Hill because Hill's descendants did not object to the removal of his remains and did not have any ownership or control over the monument.

A.P. Hill died in 1865, and his remains were initially in Chesterfield County, in a family cemetery. 2 years later, Hill's remains were moved to Richmond in another cemetery. In 1891, though, Hill's remains were "reinterred at the intersection of Laburnum Avenue and Hermitage Road. Shortly thereafter, a statue of Hill was erected overtop of his remains. Since then, Richmond "has exclusively owned and maintained the monument site" while the descendants of Hill have not paid toward the maintenance or upkeep.

In 2020, Richmond was authorized to remove Confederate statues from Richmond-owned property, and the ordinance from the city council "specifically included the "General A.P. Hill monument." Richmond developed a plan and petitioned the circuit court to "disinter A.P. Hill's remains from the monument site." Richmond planned on moving the remains to a cemetery in Culpeper and the monument to the Black History Museum and Cultural center. Richmond notified Hill's descendants (Appellants) of the petition.

Appellants did not contest the movement of Hill's remains to Culpeper because Hill was born there. But, Appellants argued that the monument was a grave marker and thus Appellants had the ultimate say of where the monument was moved.

Appellants requested that the monument be delivered to the Cedar Mountain Battlefield. The circuit court disagreed because "the A.P. Hill statue cannot belong to A.P. Hill's descendants because it never belonged to A.P. Hill." Therefore, the circuit court found that only Richmond had the authority to determine where the monument should go.

The CAV affirmed under the right-result-for-a-different-reason doctrine, finding that because Appellants did not object to the movement of Hill's remains or the monument, then the claimed "publicly owned cemetery" exception to § 15.2-1812 did not apply. Therefore, the only entity that could direct the monument's removal was Richmond because Appellants never demonstrated any ownership or control over the monument since its erection in 1891. The CAV dispensed with several other assignments of error under Rule 5A:20 for failure to support with argument/law

Commentary: There is an interesting part of the standard of review in this case that is rarely discussed or cited (at least in my knowledge). "We do not concern ourselves with 'what the legislature intended to act, but rather, what is the meaning of that which it did enact.'" (quoting Carter v. Nelms, 204 Va. 338, 346 (1963)). The CAV reiterated that it does not necessarily matter if the general assembly enacted something it did not intend and that the starting point of every statutory interpretation analysis is simply the plain language of the statute.

Roberts v. Com., Record No. 1427-23-2: (Raphael, J., writing for Decker, CJ., and White, J.)
4th Amendment motion to suppress; Emergency-aid exception; Conditional guilty plea; Best and narrowest grounds
Denial of suppression affirmed where officer reasonably believed that Roberts was experiencing an overdose and was in need of emergency aid. Incriminating evidence was in plain view when Shetler acted reasonably to provide emergency aid.

Officer Shetler was conducting a patrol in a location known for "overdose incidents." Shetler observed Roberts "either asleep or unconscious in the passenger seat" of a car. Roberts's eyes were closed, mouth open, and head leaning against the window. Shetler observed that Roberts was holding a handgun that was tucked into his waistband.

Shetler knocked on Roberts's window, but Roberts did not stir at first. Roberts woke on the second knock but appeared "startled and a little dazed." "Roberts's eyes were glazed over, his speech was slow and slurred and his eyes were having difficulty tracking." Roberts was unable to communicate well and did not answer Shetler's questions. Shetler opened the door and informed Roberts that Shetler was going to take the gun for everyone's safety. While doing so, Shetler saw "a plastic baggie sticking out of Roberts's right-side pants pocket" that contained a white substance. Body-worn camera footage confirmed that the baggie was in plain view.

After retrieving the gun, Shetler put gloves on and told Roberts that he was going to take the baggie. He asked Roberts to exit the car, and Roberts tried to flee but Shetler took Roberts to the ground and arrested him. Roberts admitted to being a felon and that the baggie contained heroin.

Roberts moved to suppress the evidence as the subject of an illegal search. The circuit court found that Shetler's actions were not "pretextual" and that while Roberts could have been sleeping, "it also was reasonably consistent with someone who had been using illegal substances or was under the influence." Therefore, it was reasonable that Shetler was concerned for Roberts's safety. The circuit court denied the motion to suppress, and Roberts entered a conditional guilty plea.

The CAV affirmed, conducting a thorough review of the development of the emergency-aid exception. (citing Mincey v. Arizona, 437 U.S. 385 (1978)). When the officers "reasonably believe that a person within is in need of immediate aid" they can make "warrantless entries and searches." (quoting id.). "[T]he emergency-aid exception 'recognizes the right of the police to enter and investigate when someone's health or physical safety is genuinely threatened.'" (quoting Kyer v. Com., 45 Va. App. 473, 480 (2005) (en banc)).

The CAV clarified that the emergency-aid exception is an objective standard that "does not depend on the officers' subjective intent or the seriousness of any crime they are investigating when the emergency arises." (quoting Michigan v. Fisher, 558 U.S. 45, 49 (2009) (per curiam)). But, the "objective inquiry into appearances must not be replaced with a hindsight determination that there was in fact no emergency." (quoting id.).

The CAV distinguished the emergency-aid doctrine from the community-caretaker doctrine, finding that it had been "less than clear in the past when discussing the [two doctrines], often conflating the two." (quoting Merid v. Com., 72 Va. App. 104, 112 n.3 (2020)). The CAV partially blamed the "lack of doctrinal clarity" on the Supreme Court of the United States (SCOTUS), and referenced several opinions from SCOTUS that muddied the waters of the two doctrines.

Ultimately, the CAV found that the emergency-aid doctrine provided the best and narrowest grounds to decide the case and found that Shetler's actions fell within the bounds of the doctrine. Because Shetler's actions were reasonable, there was no violation of the Fourth Amendment, and thus no error in denying the motion to suppress.

Commentary: I do not always agree with Judge Raphael, and in fact the first opinion on one of my cases was a published opinion that he wrote against my position. But, I always understand his rationale and perspective because he takes the time to conduct a thorough review of the history of a doctrine or to explain why he is determining something as a matter of first impression.

In a way (and they both may disagree with this), Judge Raphael reminds me of Justice Kelsey. They are both always ready with either obscure or technical precedent/questions and will write pages upon pages of the history of an issue or question before the court.

Town of Iron Gate v. Simpson, Record No. 1588-23-3: (O'Brien, J., writing for Ortiz, J., and Humphreys, SJ.)
Inverse condemnation; Eminent domain; Just compensation; Judge recusal; Rule 5A:8; Attorney fees
Town liable for inverse condemnation where it used Simpson's property as "a storm water drainage overflow site." Simpson entitled to recover attorney fees even though her attorneys did not force her to pay because she was legally responsible for them, thus they were included in the statutory language of § 25.1-420.

> The Town of Iron Gate has a drainage pipe underneath Simpson's property, which Simpson purchased in 2013. Iron Gate knew that there was an issue with the pipe that caused it to flood Simpson's property whenever the "VDOT's system clogged." After several years of intermittent flooding, Simpson reported the issue to Iron Gate, who removed a portion of the pipe and left an open ditch and never replaced the pipe nor restored the yard. Simpson's property continued to flood.
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> Simpson filed a declaratory judgment action, asking for just compensation. Iron Gate demurred, arguing that Simpson was merely alleging negligent repair and that there was no allegation of "public use." The circuit court overruled the demurrer, finding that Simpson alleged "purposeful acts and omissions" that led to the damaging of her property based on a public use.
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> The circuit court held a liability bench trial, and the circuit court found Iron Gate liable, finding that "the Town has intentionally and knowingly allowed Simpson's property to serve as a storm water drainage overflow site." At the just compensation jury trial, the jury returned a verdict for the full amount sought, $37,586, and the circuit court awarded attorney fees. Iron Gate appealed based on the demurrer ruling, the failure of the trial judge to recuse himself, and that as a matter of law Simpson failed to mitigate damages.
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> The CAV affirmed the jury award. The CAV first found that Iron Gate waived any argument on the recusal assignment of error for failing to provide a necessary and indispensable transcript of the hearing on its motion to recuse. (citing Rule 5A:8). On the demurrer, the CAV reiterated that "[i]n the context of flooding, the Supreme Court [of Virginia] has found the public use element satisfied based on allegations that the government failed to maintain a water-discharge system and in essence . . . elected to use the private property as makeshift storage sites for excess stormwater." (quoting Livingston v. Va. Dep't of Transp., 284 Va. 140, 159 (2012)).
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> The CAV further found that the circuit court did not abuse its discretion in limiting the evidence related to mitigation of damages. Iron Gate was permitted to ask about

mitigation, but the CAV found that their "offer to fix the pipe and Simpson's refusal to sign the deed of gift without a lawyer constitute[d] evidence of settlement negotiations inadmissible at trial." (citing Rule 2:408).

On the issue of attorney fees, the CAV found that § 25.1-420 required the payment of attorney fees in this case, even though Simpson had not actually paid her attorneys yet. The CAV determined that because Simpson was "legally responsible" for the fees, she was entitled to attorney fees under the statute. (citing Com. v. Puckett, 302 Va. 455 (2023) (holding that a victim was entitled to medical expenses even though he did not pay his bills)). The CAV remanded the case to the circuit court for an evaluation of what reasonable appellate attorney fees should be ordered.

Northern Neck Insurance Co. v. Virginia Farm Bureau Mutual Insurance Co., et al., Record No. 1954-23-2: (AtLee, J., writing for Friedman and Callins, JJ.)
Insurance dispute; Cancellation of policy; Summary judgment; Contract interpretation
Insurance dispute remanded to the circuit court and summary judgment reversed where plain language of the contract did not permit an effective date of cancellation of insurance prior to the client's signature. Circuit court impermissibly relied upon external documents when interpreting the contract.

Michael and Kira Shifflett had insurance through Farm Bureau for real property. The Shiffletts later divorced and effectuated a property settlement agreement giving the property to Kira free and clear. On October 5, 2020, Kira obtained an insurance policy through Northern Neck and submitted a cancellation request form to Farm Bureau, but Michael did not sign the cancellation as required. Farm Bureau tried to obtain Michael's written consent to cancel the policy, but was unsuccessful at first.

On November 6, 2020, a fire damaged the property, and Kira filed a claim through Northern Neck. Northern Neck required her to submit a claim to Farm Bureau, as well. She did, but on December 3, 2020, Michael filed a cancellation notice, with an effective date of October 5, 2020. Farm Bureau processed the cancellation, and Northern Neck paid for the damages and sued Farm Bureau for their cancellation and coverage denial.

At the circuit court, Farm Bureau argued that the policy was effectively cancelled on October 5, 2020. Northern Neck argued that because Michael did not sign the cancellation until after the loss, the policy was still in effect at the time of the fire. The circuit court agreed with Farm Bureau, looking to both the property settlement agreement and Kira's intent to cancel the policy. The circuit court granted summary judgment in favor of Farm Bureau and dismissed the suit.

The CAV reversed, finding that the plain language of the contract did not permit Michael to effectuate the cancellation on a past date. The plain language required a "future date" of effective cancellation. The CAV cited to State Farm Ins. Co. v. Pederson, 185 Va. 941 (1947), for the proposition that the purpose of these

provisions was to "forestall a retroactive notice." The CAV found that the circuit court erred in relying on the property settlement agreement and effectively "add[ing] terms the parties themselves did not include." (quoting Landmark HHH, LLC v. Gi Hwa Park, 277 Va. 50, 57 (2009)).

Thomas v. Com, Record No. 1429-22-4: (En Banc: Raphael, J., writing for the court; Dissenting opinion by Causey, J., writing for Chaney, J.)
5th Amendment motion to suppress; Waiver of Miranda; Coercion
Panel opinion reversed, in part, where the CAV, en banc, found that the evidence supported the circuit court's finding that Thomas voluntarily waived his Miranda rights. Circuit court did not abuse its discretion in excluding evidence relating to Thomas's developmental difficulties and impressionability as a child because it was too speculative to relate to the confession. Unanimous portions of Panel opinion reinstated relating to guilty pleas and admission of expert testimony relating to behavior of individuals who delay disclosure of sexual abuse.

The facts of the offense are largely irrelevant to the analysis and thus the specifics are omitted from this synopsis.

Between 2008 and 2012, Thomas abused several minor children. In 2013, Thomas pleaded guilty to aggravated sexual battery to one victim. Officers were aware of other victims but did not fully investigate the other charges. Thomas gave a statement to the police after being advised of his Miranda rights, including a confession that he "touched" A.R. Thomas was placed on supervised probation following his release from incarceration.

In 2019, A.R. disclosed to her mother that she was abused. Police investigated her disclosure and obtained warrants for Thomas's arrest. Officers arranged for Thomas's probation officer (Samluk) to call Thomas in for a meeting for the arrest because the officers "wanted a location that could be controlled and secured for safety." This was a relatively normal procedure for the probation officer in the jurisdiction.

Thomas was arrested without incident and transported to the department for a recorded interview. Prior to the interview, Samluk entered the interview room and introduced the detectives to Thomas and stated, "They need to talk to you about some things. I'm going to be here for a little bit, but just go ahead and chat with them today. Okay?" The detectives advised Thomas of his Miranda rights and explained them. Thomas signed a form that stated he understood his rights and verbally affirmed it. Thomas then waived his rights and discussed the investigation with the detectives, giving several incriminating statements. He moved to suppress the incriminating statements, but the circuit court denied the motion to suppress based on his waiver of his Miranda rights.

Thomas was tried by a jury for his charges related to A.R. During the trial, the circuit court admitted expert testimony related to delayed disclosure, permitting

Anissa Tanksley to testify about behaviors exhibited by individuals who have delayed disclosures. The circuit court excluded evidence from Thomas's mother regarding his developmental issues and his susceptibility, finding the evidence was "too speculative." The jury convicted Thomas of six counts of sexual assault against A.R. He later pleaded guilty to one count each against 2 other minor victims.

A divided panel of the CAV reversed Thomas's jury convictions (affirming his pleas), finding that the circuit court improperly denied the motion to suppress and that under the totality of the circumstances Thomas was coerced to waive his Miranda rights. (citing Minnesota v. Murphy, 465 U.S. 420 (1984)). After reversing the jury convictions, the Panel reviewed the other assignments of error that would arise at a new trial.

The Panel unanimously determined that the circuit court did not err in admitting Tanksley's testimony, finding that she was properly qualified as an expert in child-forensic interviewing and delayed disclosures. The Panel found that Tanksley's testimony did not go to the ultimate issue or improperly comment on another witness's credibility. The Panel sought to "clarify [the CAV's] case law." The Panel determined that "[a]n expert may provide general testimony about memory formation and common post-abuse behavior." Further, the Panel found that while "[e]xpert testimony that child abuse victims often delay disclosing their abuse may make it more likely that the jury believes a victim's testimony, but that consequence is different from an expert opining that the victim is credible." (See pages 83-87 for the full discussion in the 114-page opinion, or pages 27-31 of the Panel opinion alone).

The Commonwealth petitioned for a rehearing en banc, and 15 judges sat for oral argument. 13 voted to affirm the convictions, reversing the Panel decision. Pertinently, the Commonwealth did not petition for a review of the Panel decision relating to Tanksley's opinion, and upon the rehearing, that portion was reinstated. *This is an interesting quirk, as the Panel opinion was not published, and this opinion was. But, the Tanksley part of the Panel opinion was not incorporated and simply reinstated. It is still good law and will likely be utilized by Commonwealth's attorneys and defense attorneys throughout the Commonwealth, but it is not actually published law.*

The CAV found that Thomas's waiver was, under the totality of the circumstances, voluntary, affirming that even a review of the voluntariness of a confession is owed deference. (citing Harrison v. Com., 244 Va. 576, 580-81 (1992) (*the CAV mis-cites this as 1982*)). The CAV distinguished the voluntariness of a statement from voluntariness of a waiver. The CAV found that when a Miranda warning/advisement is given, and it was understood, any "uncoerced statement establishes an implied waiver." (quoting Berghuis v. Thompkins, 560 U.S. 370, 384 (2010)).

The CAV found that the detectives thoroughly reviewed Thomas's Miranda rights. Thomas's statements were voluntary and uncoerced (which was relatively unquestioned and only the waiver was contested). The CAV specifically found that the police did not take advantage of any learning disability that Thomas had when advising him of his rights.

The CAV rejected Thomas's arguments that Samluk's involvement made his waiver coerced. The CAV found that Samluk's statement of "chat with them a little bit" did not order Thomas to "[a]nswer their questions truthfully" or have any other effect. (distinguishing Minnesota v. Murphy, 465 U.S. 420 (1984)). The CAV expressly rejected the idea that an investigating officer had to add supplemental advisements when questioning a probationer.

The CAV then found that the circuit court did not abuse its discretion in excluding Thomas's mother's testimony as speculative. The CAV distinguished Thomas's mother's lay person testimony from the expert testimony in Crane v. Kentucky, 476 U.S. 683 (1986).

Commentary: While I am nearly positive that the SCV will affirm this decision, I believe that the SCV would grant an appeal to clarify the appropriate standard of review of voluntariness. I believe that it is a higher standard than whether or not the waiver/confession is knowing and intelligent. Those are purely factual questions, but the SCV has affirmed that "[w]hether a statement is voluntary is ultimately a legal rather than a factual question" (Gray v. Com., 233 Va. 313, 324 (1987)) and "[v]oluntariness is a question of law, subject to independent appellate review." (Midkiff v. Com., 250 Va. 262, 268-69 (1995)).

Voluntariness occupies a weird place in 5th Amendment appellate review. "[F]ollowing a trial court's finding of voluntariness, the scope of [an appellate court's] review is limited to determining whether the evidence supports the finding." (Williams v. Com., 234 Va. 168, 172 (1987)). But, the voluntariness of a waiver is similar to "that conducted to determine the voluntariness of a confession." (Sellers v. Com., 41 Va. App. 268, 273 (2003)). And, that analysis is a de novo review. The CAV found that a statement's voluntariness is different than the waiver analysis (citing Gray v. Com., 233 Va. at 324). But, I don't think that's the case.

The CAV opinion cites to several recent cases that affirm the deferential review of confessions/waivers, but those cases are clear that they are reviewing "whether the waiver was made knowingly and intelligently [which] is a question of fact that will not be set aside on appeal unless plainly wrong." (quoting Angel v. Com., 281 Va. 248, 258 (2011)).

Voluntariness, then, is somewhat different than whether a waiver was knowing or intelligently made. Whether it is actually a de novo review is unclear, and I made a point of that in my brief and (I think) in oral argument at the Panel of this case. I

think that even under a de novo review, the CAV and SCV should find that Thomas voluntarily waived his Miranda rights because Samluk's statement was not coercive and any coercive effect was cleansed by the thorough review of Thomas's Miranda rights by the detectives.

On the same date that the Panel opinion was delivered, unpublished, the CAV delivered a published opinion on the 5th Amendment. In Paxton v. Com., Record No. 0910-22-2, the CAV determined that the officers impermissibly continued questioning a defendant after he stated, "I don't wanna talk no more." Importantly, invocation is reviewed de novo. (id. citing Berghuis v. Thompkins, 560 U.S. 370, 381 (2010) and Thomas v. Com., 72 Va. App. 560, 574 (2020)).

I find it interesting that the CAV, on the one hand, affirmed that some elements of a 5th Amendment claim are reviewed de novo but not others. Legal questions should be reviewed de novo, and factual questions afforded deference. Just as the determination of a statement being unequivocal and an invocation is a legal question, so should the CAV find that the voluntariness of a waiver (as the SCV has already stated) is a legal question and afforded de novo review.

CAV Unpublished Decisions

Yancey v. Com., Record No. 0289-23-2: (White, J., writing for Chaney, J., and Annunziata, SJ.)
Admissibility of evidence; Inconsistent verdicts; Mistake on verdict form
No error in convicting Yancey of a second or subsequent charge of possession of child pornography, even though Yancey did not have a prior conviction of child pornography, because Virginia does not permit peering behind the veil of jury deliberations and the Commonwealth presented sufficient evidence for a conviction of second or subsequent possession of child pornography.

Police received a tip from the National Center for Missing and Exploited Children about an email address that was associated with animated depictions of child pornography. Police conducted an investigation into the email address and connected it to Yancey's residence. They conducted a consensual encounter with Yancey, who confirmed the email address as his own, and stated that his online nickname was "Sho." Yancey also confirmed the illustrator of the images in question and that there were several electronic devices in his room that would have similar images on them. Yancey consented to the removal of 15 electronic devices for investigation.

Officers located a large number of animated depictions of sexual abuse of children, including "prepubescent females being vaginally penetrated by seemingly adult males." Officers also located 16 files of suspected child pornography, located under a file folder tiled "ShoDrop." Officers found another file of child pornography in the deleted files of one of Yancey's laptops.

Yancey moved pretrial to prohibit the Commonwealth from introducing evidence related to the animated images. The circuit court disagreed, finding that "the evidence of the cartoon or drawn child pornography is relevant and probative to the issue of intent and of knowingly possessing such child pornography, as opposed to possession by mistake or accident." The circuit court further found that any incidental prejudice was outweighed by the probative value.

The circuit court granted several limiting instructions, Instructions 12A and 12B, which cautioned the jury that they could not consider the animated images as child pornography and could only consider them as evidence of Yancey's intent. But, the circuit court granted the Commonwealth's modification in 12A, so that it read as follows: "You cannot find Mr. Yancey guilty of possession of child pornography based **solely** on his possession of cartoon images of sexually explicit material involving minors." The circuit court denied a third cautionary instruction, stating, "I think we have covered adequately these cartoon images in the instruction we just decided to give."

The jury was given 4 verdict forms for possession of child pornography, which were identical with the exception that 3 of the forms stated that they were for second or subsequent convictions. The jury asked a question about the verdict forms: "What happens [if] we aren't unanimous for all? . . . What if we have a verdict on one, but not all? The circuit court told the jurors that "You must return four separate verdicts. Any verdict of guilty must be unanimous. You are not required to reach the same verdict on each." The jury convicted Yancey of 1 count of second or subsequent possession of child pornography. The circuit court denied Yancey's motion correct a clerical error in the verdict form, which included an affidavit from the jury foreman that the second or subsequent language was a mistake.

The CAV affirmed. The CAV found no abuse of discretion in the circuit court's determination that the animated images were probative of Yancey's knowledge or intent. (citing Rule 2:404(b) and Castillo v. Com., 70 Va. App. 394, 414 (2019)). Because "the Commonwealth must point to evidence of acts, state ents, or conduct of the accused or other facts or circumstances which tend to show that the defendant was aware of both the presence and character of the contraband and that it was subject to his dominion and control," the Commonwealth was permitted to introduce evidence of other images that directly related to that element. (quoting Terlecki v. Com., 65 Va. App. 13, 24 (2015)). The circuit court took appropriate steps to caution the jury and limit the Commonwealth's evidence.

Further, the CAV found no abuse of discretion in denying the third cautionary instruction, finding the other two instructions left "nothing unsaid which needed to be said, while saying no more than necessary." (quoting Kennemore v. Com., 50 Va. App. 703, 712 (2007)).

On the verdict form issue, the CAV reiterated that "Virginia has been more careful than most states to protect the inviolability and secrecy of jurors' deliberations and

has adhered strictly to the general rule that the testimony of jurors should not be received to impeach their verdict, especially on the ground of their own misconduct." (quoting Caterpillar Tractor Co. v. Hulvey, 233 Va. 77, 82 (1987)). In the instant case, Yancey had the opportunity to poll the jury, but Yancey chose not to do so.

"[O]nce a jury is discharged and leaves the presence of the court, it cannot be reassembled to correct a substantive defect in its verdict." (quoting LeMelle v. Com., 225 Va. 322, 324 (1983)). "If there is doubt as to the meaning of the jury's verdict the question should have been raised by counsel before the jury was discharged, thus permitting the verdict to be corrected." (quoting Rakes v. Fulcher, 210 Va. 542, 549 (1970)). Because Yancey did not raise it prior to the discharge of the jury, the circuit court did not err in denying the motion to correct the clerical error.

Finally, the CAV found sufficient evidence for a rational factfinder to conclude that Yancey had committed a second or subsequent act of possession of child pornography. The Commonwealth introduced multiple images of child pornography and introduced sufficient circumstantial evidence that Yancey knew of the images on his electronic devices.

Oakey v. Oakey, Record No. 0910-23-3: (Causey, J., writing for Fulton and Raphael, JJ.)
Material change in circumstances; Spousal support; Defined duration; Reservation of spousal support
No error in the circuit court's determination that there was a material change in circumstances or in the circuit court's order that Husband's spousal support end the day after his 70th birthday.

Husband and Wife divorced in 2013 after 13 years of marriage, and Husband was ordered to pay $8,500 in spousal support indefinitely. In 2022, Husband petitioned for a modification of spousal support based on his impending retirement. Wife counter-claimed for an increase in spousal support to $9,500.

At the hearing in 2023, he acknowledged that his income had increased in the 10 years since the divorce, but that much of his income would disappear upon his retirement, and that he would be unable to pay the $8,500 monthly support payments. Husband also showed that Wife's income had increased in the 10 years and that Wife was no longer a full-time caregiver for her adult son from a prior marriage.

The circuit court agreed with Husband that there was a material change in circumstances and that his impending retirement would limit his income and that Wife's income had changed significantly. The circuit court noted that Husband had been paying support for 14 years, which was longer than their marriage. Thus, the circuit court ordered that Husband pay $6,000 per month, but the day after his 70th birthday, the support would end.

The CAV affirmed, finding that the circuit court's decisions were not plainly wrong or without evidentiary support. (citing Nielsen v. Nielsen, 73 Va. App. 370, 379 (2021)). The CAV found no error in the circuit court's determination that a material change in circumstances had occurred. Further, the CAV determined that there was no error in the circuit court's decision in reducing the spousal support, setting a defined duration, and refusing to grant Wife a reservation of spousal support.

Brown v. Com., Record No. 0947-23-2: (Per Curiam Opinion: AtLee, Friedman, and Callins, JJ.)
Admissibility of evidence; Hearsay; Sufficiency; Harmless error; Rule 5A:18
CAV affirmed Brown's convictions of malicious wounding (etc.) without oral argument, finding that his arguments on admissibility of evidence were wholly without merit. Any error in the admission of evidence related to a victim's out-of-court identification was harmless because the same victim identified Brown as the shooter in-court.

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

Brown was friends with Myres and Morris, who lived together in an apartment. Brown would sell Myres and Morris cocaine, and they would all hang out together. They had known Brown since 2017. In March 2020, Brown, armed with a gun, robbed Morris of between $900 and $1400. Brown threatened to kill Morris if he went to the police. Morris called 911, and police investigated the robbery.

In 2021, Morris and Myres were asleep in their apartment, when Myres woke up to a knock on the front door. She opened the door to a man in a gray hoodie. Her dog ran after the man, but Myres collected her dog and returned to the apartment. She did not lock the door. The man came into their home and shot Myres and Morris multiple times. The man had his face covered with a mask.

While Myres was still in the hospital and on pain medication, officers showed her a picture from a doorbell camera from another apartment of the man in the gray hoodie without a mask on. Myres identified the man as Brown. Officers found Brown 2 days later in a different county, and he gave the officer false information as to his identity.

At trial, an officer testified as to Myres's behavior at the identification in the hospital. Brown objected, and the circuit court ruled that his objection was premature because the Commonwealth was introducing evidence of a "non-verbal reaction, not her statements." Myres identified Brown in-court as the person in the photograph. The jury convicted Brown of 2 counts of malicious wounding, 1 count of maliciously shooting within an occupied dwelling, and 1 count of using a firearm in the commission of a felony.

Brown moved to set aside the verdict based on insufficient evidence of identification, arguing "an unduly suggestive identification procedure" and inherent unreliability based on the pain medication. The circuit court denied the motion.

The CAV affirmed Brown's convictions, finding that any error in the admission of testimony about Myres's behavior during the out-of-court identification was harmless because Myres identified Brown in-court. The CAV also found that Brown failed to properly preserve his argument about the out-of-court identification under Rule 5A:18. Finally, the CAV determined that there was sufficient evidence for a rational factfinder to convict Brown.

Barr, et al. v. Garten Development, LLC, Record No. 1106-23-3: (O'Brien, J., writing for Decker, CJ., and Causey, J.)
Easements; Right-of-way; Deeds; Improvement of existing easement
Garten's right-of-way under the 1914 deed for the purpose of developing timber or mineral rights was not released by the 1979 deeds. Garten's proposed expansion of the road was permissible for the purpose of developing the timber rights, as contemplated by the 1914 right-of-way. Thus, no error in the circuit court's decision in Garten's favor.

This case deals with a number of deeds over the course of the last 100 years. Barr and Garten own adjacent property in Alleghany County, and Garten has a right-of-way for ingress and egress onto its property, with Barr's lot as the subservient estate. This right-of-way is a simple gravel road, and Garten sought to improve the road to a sturdier material, as well as widen it, to improve Garten's ability to conduct timbering on its own lot.

Barr filed suit for declaratory judgment prohibiting Garten from improving its right-of-way. In particular, Barr argued that the 1979 deeds of the properties rescinded and revoked all prior rights of way on the properties and issued new ones, and thus the 1979 deeds control and prohibit Garten's proposal. The circuit court disagreed and found that the improvement was reasonable and proper according to the deeds granting Garten the right-of-way.

The CAV affirmed. The CAV reiterated that "a trial court's interpretation of a deed is reviewed de novo." (quoting Ettinger v. Oyster Bay II Cmty. Prop. Owners' Ass'n, 296 Va. 280, 284 (2018)). Only when a deed is ambiguous does the court "look to parol evidence to discern the parties' intent." (quoting Marble Techs., Inc. v. Mallon, 290 Va. 27, 33 (2015)). Therefore, if the language of the deed is plain, courts should not look to external evidence.

The CAV determined that the plain language of the 1979 deeds did not release all the rights-of-way that existed in the 1914 deeds. Instead, the 1979 deed granted certain rights and released certain rights-of-way/easements, and specifically did not release all rights-of-way/easements. In particular, the 1979 deed did not discuss "rights of way for ingress and egress" which were carved out in the 1914 deeds.

The CAV also stated, "to the extent there is any ambiguity in how these terms are used," the external documents make it even more clear that the 1979 deed did not extinguish the prior right-of-way of the road.

The CAV finally reviewed the scope of the improvements, and determined that the expansion was proper. "Where no dimension is specified in a deed creating an easement, the easement's scope is determined by circumstances existing at the time of the grant." (citing Waskey v. Lweis, 224 Va. 206, 211 (1983)). When "no dimensions of a right of way are expressed, but the object is expressed, the dimensions must be inferred to be such as are reasonably sufficient for the accomplishment of that object." (quoting Hamlin v. Pandapas, 197 Va. 659, 664 (1956)).

In the instant case, the CAV found that Garten sought "to make only modest improvements that would bring the Road into compliance" for its foresting needs. Therefore, there was no error in the circuit court's conclusions that the expansion was reasonable and "for the accomplishment of that object." (quoting Waskey, 224 Va. at 211).

Stonewall v. Com., Record No. 1282-23-1: (White, J., writing for Fulton and Lorish, JJ.)
Permanent and significant injury; Sufficiency; Reasonable hypothesis of innocence; Self-defense
CAV affirmed Stonewall's conviction of murder and aggravated malicious wounding, where there was sufficient evidence to rebut Stonewall's claim of self-defense. Further, there was sufficient evidence to find that Adams suffered a permanent and significant injury, even without expert testimony.

Stonewall and Moore were in romantic relationships with the same woman, Roberts. Moore was also in a relationship with Adams, who was Stonewall's cousin. One day, Moore and Roberts had an argument about infidelity, and Moore went to Stonewall's apartment and "pistol whipped" Stonewall, chipping his teeth and gashing his mouth. Moore then left. Another of Stonewall's cousins told him that Adams left the apartment unlocked for Moore to attack him.

Stonewall began carrying a gun with him for self-defense. Over the next 2 days, Stonewall exchanged numerous texts with Roberts about the incident. Stonewall stated, "I'm just all over the place . . . so if anything happen don't act surprised."

On the day of the shooting, Moore was in Adams's apartment, and Stonewall was lying in wait. Stonewall got Roberts to get Moore out of the apartment. Moore began beating Roberts, but she was able to get away. Shortly after the altercation, Moore and Adams were walking, and "Stonewall confronted them." Stonewall then shot Moore and Adams multiple times. Stonewall shot ten times in all before he ran away. Moore shot at Stonewall as Stonewall was running away. Moore died as a result of his injuries, but Adams survived several gunshot wounds, one of which "exited the back of her neck, near her brain stem."

"Adams's mother testified that the gunshot wound left a scar the size of a quarter and that Adams still experienced debilitating pain in her jaw over a year and a half after the shooting." The Commonwealth introduced a video that showed "that Stonewall was waiting outside the apartment and in front of Moore's car, a silver Nissan Altima."

Stonewall did not contest that he was the shooter. He only argued that he shot Moore in self-defense and that the Commonwealth could not prove aggravated malicious wounding because Adams did not receive a "permanent and significant injury." The circuit court denied his motion to strike, and the jury convicted Stonewall of first-degree murder, aggravated malicious wounding, and 2 counts of using a firearm.

The CAV affirmed Stonewall's convictions. The CAV reiterated that there are two types of self-defense: "justifiable and excusable" but only reviewed justifiable because the jury was not instructed on excusable self-defense. (quoting Bell v. Com., 66 Va. App. 479, 487 (2016)). "Justifiable homicide in self-defense occurs where a person, without any fault on his part in provoking or bringing on the difficulty, kills another under reasonable apprehension of death or great bodily harm to himself." (quoting Bailey v. Com., 200 Va. 92, 96 (1958)).

The CAV found that "neither Adams or Moore acted in an overly threatening way towards Stonewall." As such, Stonewall was not in reasonable "apprehension of death or great bodily harm." The CAV reiterated that the jury was presented with the affirmative defense of self-defense and rejected it, which is a factual question. Because a reasonable juror could have rejected Stonewall's claim of defense, the circuit court did not err in denying the motion to strike.

The CAV also rejected Stonewall's argument that the Commonwealth needed to "provide medical testimony or victim testimony" to prove permanent and significant physical impairment. (citing Martinez v. Com., 42 Va. App. 9, 24-25 (2003)). Adams's mother's testimony that Adams was shot and had continuing pain was sufficient for the jury to conclude that she had a permanent and significant injury.

Ashley v. Com., Record No. 1350-23-1: (White, J., writing for Fulton and Lorish, JJ.)
Admissibility of evidence; Heat of passion; Harmless error
Ashley not entitled to a finding of manslaughter where the Commonwealth demonstrated sufficient evidence for a rational factfinder to conclude that Ashley was not provoked. Any error in admitting Page's dying declaration was harmless because Ashley did not contest identity and only intent.

Ashley (known as Skip) occasionally stayed with Hughes and Hughes's boyfriend, Page, and a few others. One day (Halloween), Page told Ashley that Ashley would not be able to stay at the house any more. Even though he knew not to return, Ashley went back to the house. Hughes told Ashley to leave, but he refused.

Page then approached Ashley and was "stern but loud" and told Ashley to leave the house. Ashley "grabbed a knife" and stabbed Page. Page fled, asking "are you stabbing me?" Ashley pursued Page, and Hughes fled the house to call 911. She observed Ashley leave the house and "put an unidentified object in [his] backpack."

Police arrived and found Page "pale and unresponsive." He had 3 stab wounds to his chest and 2 to his back. Page identified the aggressor as either "Skip or Skiff." Page died shortly afterwards, "despite emergency surgery at the hospital." Officers found Ashley, "who matched the suspect's description" and searched his backpack, finding "a bloody knife, flashlight, and [a] towel inside." Officers also collected Ashley's shoes, which had Page's blood on them.

Ashley objected to the Commonwealth's pretrial motions to admit "Page's dying declaration that Skip had stabbed him" and Ashley's shoes. Ashley argued that the statement was not a dying declaration "because there was no evidence that Page perceived that he was dying" because the paramedics told him he was going to be "okay." The circuit court granted the Commonwealth's motions, finding that Page's "subjective state of mind . . . was that he was under a sense of impending death." On the issue of the shoes, the circuit court granted the motion, finding that "the [40-minute] gap in the chain of custody did not render the shoes inadmissible." The jury convicted Ashley of second-degree murder.

The CAV affirmed Ashley's conviction, reiterating the distinction between first- and second-degree murder, which is premeditation, and the distinction between second-degree murder and voluntary manslaughter is malice. (citing Turner v. Com., 23 Va. App. 270, 274 (1996) and M'Whirt's Case, 44 Va. (3 Gratt.) 594, 604-05 (1846)). While the CAV reminds us that "a killing done in the heat of passion and upon reasonable provocation will reduce a homicide from murder to voluntary manslaughter," "malice and heat of passion are mutually exclusive." (quoting first Rhodes v. Com., 41 Va. App. 195, 200 (2003) and second Barrett v. Com., 231 Va. 102, 105-06 (1986)). The CAV found that there was sufficient evidence for a factfinder to determine that Ashley had malice and thus there was no error in denying the motion to strike.

On the evidentiary objections, the CAV found no abuse of discretion in admitting the evidence because the purpose of the chain of custody burden on the Commonwealth is to "afford reasonable assurance that the exhibits at trial are the same and in the same condition as they were when first obtained." (quoting Pope v. Com., 60 Va. App. 486, 511 (2012)). The CAV determined that any gaps in the chain of custody were waived because Ashley agreed to the chain of custody.

Finally, the CAV found no abuse of discretion in admitting Page's "dying declaration" because under Rule 2:804(b)(2), the circuit court did not err in finding that Page's statement was a dying declaration. The CAV reiterated that "the victim's statement must be made under a sense of impending death without any expectation or hope of recovery." (quoting Satterwhite v. Com., 56 Va. App. 557, 562 (2010)).

But, "the victim's consciousness of impending death may be established by the character and nature of the wound, his appearance and conduct" as opposed to his own statements or subjective belief. (quoting id.). In this case, the CAV assumed that the circuit court erred and found that any error was harmless because the statement went only to the identity of the perpetrator, and Ashley did not contest that he was the one who stabbed Page.

Fisher v. Com., Record No. 2144-23-3: (Ortiz, J., writing for O'Brien, J., and Humphreys, SJ.)
Jury instructions; Sufficiency; 4th Amendment motion to suppress
CAV affirmed conviction of possession of Schedule I or II substance where Fisher admitted to the nature/character of the item, and the search of the vehicle was supported by the automobile exception to the 4th Amendment.

Officers were dispatched to the parking lot of a hotel/motel because a front desk clerk reported that there was a female who was not a guest of the hotel who had been loitering in a blue Chevrolet Suburban in the parking lot for several days. Officers located Fisher inside the Suburban, and she stated that she was waiting for her husband. The Suburban had "Farm Use" license plates on it, and was thus inappropriate to drive on the highway.

Officers asked Fisher if there was anything in the car that a K9 would alert to, and Fisher admitted that there was a glass smoking device in the car. The device tested positive for methamphetamine. Fisher was charged with possession of a schedule I or II substance.

Fisher proposed Instruction K.1, which related to the Commonwealth's burden of proof. The circuit court refused to give Instruction K.1 but granted Instruction 9, which also discussed the Commonwealth's burden of proof. The circuit court also granted Instructions 1 (presumption of innocence) and 10 (definition of knowingly and intentionally). The jury convicted Fisher of possession of a schedule I or II substance.

The CAV affirmed, finding that Fisher was "not entitled to duplicative or repetitive instructions covering the same principle of law." (quoting King v. Com., 64 Va. App. 580, 587-88 (2016)). The circuit court did not abuse its discretion in denying Instruction K.1, when the rest of the instructions covered the law and K.1. was only duplicative.

Further, the CAV found no error in denying the motion to strike. The Commonwealth provided sufficient evidence for a rational factfinder to conclude that Fisher knew of the methamphetamine residue based on her statements in response to the officers' questions.

Finally, the CAV affirmed the denial of Fisher's suppression motion, finding that the search of the vehicle fell within the automobile exception of the 4th Amendment. (citing California v. Carney, 471 U.S. 386, 392 (1985)). The CAV found that the

Commonwealth had probable cause, and because "the location being searched qualifie[d] as a vehicle, the Commonwealth need only prove probable cause." (citing id. and U.S. v. Johns, 469 U.S. 478, 484 (1985)). Because Fisher did not contest probable cause, there was no error in the circuit court's denial of Fisher's motion to suppress.