Overview

In the Supreme Court of Virginia (SCV) this week, 3 cases were granted appeal (2 criminal and 1 civil). In the civil case (Harris et al. v. Howard, Record No. 240378), the SCV granted review of the Court of Appeals of Virgina's (CAV) reversal of summary judgment where it found that (1) the doctrine of illegality did not apply in a case and (2) the circuit court improperly granted summary judgment on a gross negligence claim. There appears to be at least one other assignment of error that was not granted review.

The SCV granted the Commonwealth's petition for appeal in Com. v. Paxton, Record No. 240326, on 4 assignments of error. The SCV will determine whether the CAV erred in (1) its evaluation of Paxton's 5th Amendment rights in a police interrogation; (2) reviewing whether Paxton reinitiated questioning under a de novo standard; (3) finding that the admission of Paxton's statements was not harmless error; and (4) holding that the same-evidence principle did not apply because Paxton testified and contradicted his statements in the interrogation, thus holding that Paxton did not waive any argument about the introduction of his prior statements in the Commonwealth's case-in-chief. This case may lead to some clarity in the SCV's potential review of the recent Thomas v. Com., Record No. 1429-22-4 en banc opinion, which is likely to be petitioned for an appeal to the SCV.

The SCV also granted another criminal appeal in Shaw v. Com., Record No. 240212, reviewing wither the CAV erred in (1) affirming the circuit court's finding that the proffered mental health evidence under § 19.2-271.6 was speculative and inadmissible; (2) affirming the exclusion of mental health evidence as insufficiently exculpatory and therefore inadmissible; and (3) reviewing the exclusion of mental health evidence under a de novo standard of review.

The CAV issued several opinions without permitting oral argument this week, which is not necessarily an aberration, but it was more than normal. The real abnormality this week was 3 domestic opinions. 2 on termination of parental rights (Helton v. Henry-Martinsville DSS, Record No. 0039-24-3 and Helton v. Henry-Martinsville DSS, Record No. 0355-24-3), and 1 on the modification of child custody (Garrett v. Hanna, Record No. 1276-23-3).

The only published opinion this week was in Cisneros v. Com., Record No. 1385-23-3, which reiterated the position that probation revocation orders entered outside of their statutory limitations are voidable and not void ab initio. Therefore, they are subject to the limitations of Rule 5A:18 and are also not subject to collateral attack.

SCV Opinions and Orders

Medeiros, et al. v. Virginia Department of Wildlife Resources, Record No. 230691: (Unpublished Order)

> The SCV simply found that there was "no reversible error in the judgment of the Court of Appeals." The SCV did not offer any substance in support of its findings or conclusions of law.

CAV Published Decisions

Cisneros v. Com., Record No. 1385-23-3: (Huff, J., writing for Athey and Fulton, JJ.)
Probation revocation; Voidable vs. void ab initio; Rule 5A:18; Collateral attack; Miscarriage of justice; Doctrine of judicial restraint
Any error in revoking Cisneros's probation after the newly enacted statute limiting the time-frame in which a circuit court may revoke an individual's probation renders the orders merely voidable and not void ab initio. Because the orders are not void ab initio, they are not subject to collateral attacks and are further subject to the requirements of Rule 5A:18. Thus, failure to raise the argument with particularity to the circuit court waives the argument on appeal.

Cisneros pleaded guilty to felony shoplifting in 2014. Upon his release from incarceration, he was placed on supervised probation for 18 months and 4 years of general good behavior after that. He was also required to submit for DNA testing and fingerprinting, paying $1,142.77 in restitution, and drug/mental health counseling.

In 2016, a major violation report was filed in his case, and he was arrested and subsequently released on a bond. Cisneros was ultimately charged and convicted with a petit larceny (felony) in 2018, and his probation officer filed an addendum to the major violation report. In a joint sentencing hearing, Cisneros was sentenced to a term of incarceration plus probation and good behavior in his petit larceny case, and his probation was revoked and a new term of incarceration, supervision, and general good behavior was sentenced in that case.

Cisneros's probation was revoked 4 more times in 2019-2023, in part due to absconding from supervision. In 2023, probation filed another major violation report, and the circuit court simply revoked Cisneros's probation and imposed the remainders of his sentences, totaling approximately 5 years and 5 months.

Cisneros appealed, arguing that the 2022 and 2023 orders were void ab initio because of the newly enacted limitation of extending supervision past the statutory maximum penalty of a felony. Because his convictions were class 6 felonies, that maximum was 5 years, thus making the orders improper.

The CAV affirmed his sentences, articulating that when it comes to sentencing revocations (as opposed to initial sentencings) the orders are at most "voidable rather than void ab initio." (citing Hannah v. Com., 303 Va. 106 (2024) and distinguishing Rawls v. Com., 278 Va. 212 (2009)).

The CAV reiterated that "a simple misapplication of the statute does not render a judgment void ab initio because imposing a term of incarceration after revocation of a suspended sentence is not the imposition of a new punishment." (quoting Terry v. Com., 81 Va. App. 250, 252-53 (2024)). So, while there may have been error in

the imposition of the revoked sentences, they were merely voidable, and Cisneros should have articulated that to the circuit court/CAV at the appropriate time.

Cisneros conceded that he never raised these arguments to the circuit court, at any of his revocation hearings. As such, CAV further held that Rule 5A:18 barred appellate review of his instant probation revocation. (citing Barrow v. Com., 81 Va. App. 535 (2024)). The CAV found that the ends of justice exception did not apply because Cisneros failed to demonstrate a miscarriage of justice.

CAV Unpublished Decisions

Sotherly Hotels Inc., et al. v. Fireman's Fund Insurance Company, et al., Record No. 1981-22-1: (Huff, J., writing for O'Brien and Fulton, JJ.)
Demurrer; Breach of contract; Sufficiency of allegations; Contract interpretation
Dismissal affirmed where hotel chain not entitled to insurance compensation based on loss of income because the plain language of the contracts did not cover "the impact of the virus droplets on the property." Appellants failed to show how there was a physical change to the property.

Appellants operate several hotels across the United States. In 2020 and 2021, Appellants experienced a significant decrease in business because of the COVID-19 pandemic. Appellants filed with their insurance companies for compensation for the decrease in revenue. Their allegation was that they had a "direct physical loss or damage to property and business interruption" cause by COVID-19. When they were denied compensation, Appellants sued for breach of contract.

The physical damage they claimed were "the presence of COVID-19 droplets in the air and on the surfaces" as well as needing to mitigate the presence of COVID-19 on "door handles, bathrooms faucets," and other surfaces. Appellees demurred, arguing there was no cognizable legal claim. The circuit court agreed, stating that "direct physical losses do not encompass the impact of the virus droplets on the property." Instead, there needed "to be a more physical alteration of the property or it must be physically lost."

The CAV affirmed, reiterating that "the purpose of a demurrer is to determine whether a pleading states a cause of action upon which relief can be given." (quoting Steward v. Holland Family Props., LLC, 284 Va. 282, 286 (2012)). The CAV found that the Appellants did not sufficiently plead a claim for breach of contract. Specifically, Appellants did "not adequately allege coverable harms under either the general physical loss or damage requirement or the specified additional coverage provisions in the insurance policy." Therefore, the circuit court did not err in sustaining the demurrer.

Helton v. Henry-Martinsville DSS, Record No. 0039-24-3: (Malveaux, J., writing for Fulton and White, JJ.)
Termination of Parental Rights; Continuance denial; Rule 5A:18
Termination of parental rights affirmed where Mother failed to preserve her arguments. Mother did not object to the termination of her residual rights, and the record did not include the basis of her request for a continuance, so Rule 5A:18 precluded appellate review.

> Appellant is biological Mother of S.H., K.H., and Z.H. DSS became involved in the family after complaints of permitting minor children to "wander away from home unsupervised" including one incident where K.H. (4 years old) was found at 4:30 am on the side of the road, barefoot and wearing only a tee shirt. When questioned, both Mother and Father stated that they could not pass drug tests.
>
> In 2021, Z.H. (2 years old) was found in the roadway on 2 separate occasions, and DSS removed the children and created a safety plan. The 3 children were placed into foster care with the ultimate goal of returning them to Mother and Father. In 2022, DSS petitioned to terminate Mother's parental rights after she was charged with sexually abusing K.H. The juvenile and domestic relations district court denied the petition, and DSS appealed to the circuit court.
>
> In the circuit court, Mother moved to continue the trial because her felony charge of sexual assault was still pending and proceeding to trial would "limit her ability to defend herself at the hearing." The circuit court granted Father's request for a continuance and ordered that Mother's case "shall be continued generally until father's criminal proceedings are concluded."
>
> At a later trial date, the circuit court denied Mother's continuance request, but a transcript of that hearing was not provided to the CAV. The statement of facts submitted only stated that Mother made a motion to continue, which was denied. The circuit court terminated Mother's residual rights under § 16.1-283(C)(2), finding that Mother "had not remedied the circumstances that led to the children's continued foster care placement."
>
> The CAV affirmed, finding that Rule 5A:18 precluded her from appealing both the issue of the termination of her parental rights and the denial of her continuance. The CAV found no evidence to apply the ends of justice exception to either situation.

Helton v. Henry-Martinsville DSS, Record No. 0355-24-3: (Malveaux, J., writing for Fulton and White, JJ.)
Termination of parental rights; Best interests of the child; 14th Amendment Due Process; Rule 5A:18
Termination of parental rights under § 16.1-283(C)(2) where the best interests of the children were served by termination because Father failed to remedy the situation that caused the danger to the children. Appellate review of the denial of the continuance was precluded

because the record did not include the basis for the continuance, so it was not properly preserved under Rule 5A:18.

> Appellant is biological Father of S.H., K.H., and Z.H. DSS became involved in the family after complaints of permitting minor children to "wander away from home unsupervised" including one incident where K.H. (4 years old) was found at 4:30 am on the side of the road, barefoot and wearing only a tee shirt. When questioned, both Mother and Father stated that they could not pass drug tests.
>
> In 2021, Z.H. (2 years old) was found in the roadway on 2 separate occasions, and DSS removed the children and created a safety plan. The 3 children were placed into foster care with the ultimate goal of returning them to Mother and Father. In 2022, DSS petitioned to terminate Father's parental rights after he was charged with sexually abusing S.H. and K.H. The juvenile and domestic relations district court denied the petition, and DSS appealed to the circuit court.
>
> At a later trial date, the circuit court denied Father's continuance request, but a transcript of that hearing was not provided to the CAV. The statement of facts submitted only stated that Father made a motion to continue, which was denied. The circuit court terminated Father's residual rights under § 16.1-283(C)(2), finding that Father "had not remedied the circumstances that led to the children's continued foster care placement."
>
> The CAV affirmed, reiterating that termination under 283(C)(2) revolves "not so much on the magnitude of the problem that created the original danger to the child, but on the demonstrated failure of the parent to make reasonable changes." (quoting Yafi v. Stafford DSS, 69 Va. App. 539, 552 (2018)). The circuit court had found that the "the children were thriving in foster care and felt safe and secure there." Further, the circuit court had found that "they were fearful of returning home." The CAV determined that there was no error in the circuit court's conclusion that it was in the best interests of the child to terminate Father's parental rights.
>
> Just as in Mother's case, the CAV determined that Rule 5A:18 precluded review of the continuance issue. In this case, though, Father did not raise either exception to Rule 5A:18, and the CAV does not exercise them sua sponte.

Payne v. Com., Record No. 0824-23-4: (Annunziata, SJ., writing for Chaney and Frucci, JJ.)
Certificates of analysis; Chain of custody; Abuse of discretion in sentencing; Admissibility of evidence; Harmless error; Sufficiency
Aggravated involuntary manslaughter conviction affirmed where arguments related to chain of custody went to the weight of the evidence and not the admissibility. No abuse of discretion in sentencing Payne where the circuit court reviewed the mitigating evidence, and the record did not show the circuit court made an error of judgment.

> Payne was driving on a 35-mph road, and Hussein and his family were crossing the road at a cross walk. Hussein and his brother properly looked in the roadway for

cars and began crossing the street. Payne struck Hussein with his truck, throwing Hussein into a nearby ditch. Hussein's brother was several feet behind Hussein and was unharmed. Hussein died from his injuries.

Police arrived and observed that Payne "had difficulty maintaining his balance or walking, and smelled a strong odor of alcohol on his breath." Payne admitted to drinking and displayed indicators of impairment on field sobriety tests. Payne admitted that "two pedestrians walked across the walkway out of my reach, and I struck" one. Officers obtained a search warrant for Payne's blood, which was executed by a hospital nurse. Officers also obtained a search warrant for hospital blood from the night before, after learning Payne had sought hospital treatment that night.

Payne's blood draw tested at .25 BAC. The forensic toxicologist testified that the BAC at the time of the offense was between .27 and .31, using retrograde extrapolation. Payne's blood from the hospital tested at .32 BAC. Payne presented expert testimony relating to the crash, opining that Hussein was running at approximately 9 miles an hour when Payne struck him, based on the damage to the truck. The expert admitted that he did not manipulate the speed of Payne's truck and took Payne at his word that he was traveling at 35 mph.

The jury convicted Payne of aggravated involuntary manslaughter. He pleaded guilty to DUI 3rd in 10 years. The circuit court noted that Payne was on bond for a similar offense when he killed Hussein. The circuit court sentenced Payne to 25 years' incarceration, with 10 years suspended.

The CAV affirmed, finding that Payne's arguments on the admission of the certificates of analysis were meritless. On the chain of custody, the CAV reiterated that "where there is mere speculation that contamination or tampering could have occurred, it is not an abuse of discretion to admit the evidence and let what doubt there may be go to the weight of the evidence." (quoting Jeter v. Com., 44 Va. App. 733, 739 (2005)). Further, the CAV held that any error relating to the hospital blood was harmless because Payne did not object to the toxicologist's testimony of the hospital's own testing, which corroborated his own.

The CAV rejected Payne's sufficiency arguments, finding no reason to disturb the jury's verdict. Based on Hussein's brother's testimony that Hussen was walking and that the truck was traveling very fast, the jury was permitted to reject Payne's self-serving statement that he was only traveling at 35mph. The jury was likewise able to reject the expert's evidence relating to Hussein's travel speed.

The CAV also found no abuse of discretion in the sentencing. The circuit court properly reviewed the mitigating and aggravating evidence and "acknowledged Payne's struggle with alcoholism." There is no evidence that the circuit court committed an error of judgment, and the sentence was within the statutory maximum. Therefore, no abuse of discretion.

Sawyer v. Com., Record No. 1048-23-1: (Per Curiam Opinion: Beales and Causey, JJ., and Petty, SJ.)
Sufficiency
Convictions affirmed without oral argument where there was sufficient circumstantial evidence for a rational factfinder to find intent to distribute.

> The CAV rejected Sawyer's appeal without oral argument, finding "the dispositive issue or issues have been authoritatively decided, and the appellant has not argued that the case law should be overturned." Code § 17.1-403(ii)(b); Rule 5A:27(b).
>
> Sawyer was driving a car when he was pulled over by police because he did not have a front license plate. Officers observed Sawyer was displaying unusual behavior and physically abnormal behaviors. Sawyer provided 2 false names and addresses, and based on that, officers detained the vehicle. The passenger was cooperative and had a firearm on the dashboard.
>
> When Sawyer left the car, officers noticed a firearm in the center console. Also in the center console was 23 grams of cocaine. Sawyer had $3,230 in cash in his pocket. At the motion to strike, Sawyer argued that there was only one baggie of cocaine and no indicia of distribution. Sawyer was convicted of PWID Schedule I or II and possessing a firearm with PWID, possession of a firearm by a felon, and 2 misdemeanors.
>
> The CAV affirmed, reiterating that "direct proof of intent to distribute drugs is often impossible, it must be shown by circumstantial evidence." (quoting Scott v. Com., 55 Va. App. 166, 172 (2009) (en banc)). The CAV found sufficient evidence to support the jury's findings of guilt.

Medrano v. Com., Record No. 1231-23-4: (Per Curiam Opinion; Malveaux, Friedman, and Lorish, JJ.)
Probation revocation; Abuse of discretion in sentencing; Rule 5A:20
Probation revocation affirmed without oral argument where Medrano failed to pay restitution for years without explanation. Circuit court expressly stated it did not rely on impermissible grounds for revocation.

> The CAV rejected Medrano's appeal without oral argument, finding it was "wholly without merit." Code § 17.1-403(ii)(a); Rule 5A:27(a).
>
> Medrano was convicted in 2003 of grand larceny and burglary. In 2010, he was released from incarceration and deported, never starting probation/supervision. In 2021, he was arrested and convicted for reentering the U.S. after being deported. He was transferred to local custody in Virginia for a revocation hearing on a warrant from 2015.

In 2023, the circuit court held a hearing on Medrano's failure to pay restitution and new conviction. Medrano admitted he did not pay restitution but argued it was not willful. Medrano also argued that the circuit court could not revoke his probation for the federal conviction because it "occurred in April 2021, a year after his ten-year period of probation and suspension had expired." The circuit court found Medrano in violation, convicting him of 20 counts but stated that the federal conviction was not part of the violative acts because it was outside of the permitted time frame.

The CAV affirmed, finding no evidence that the circuit court abused its discretion in finding Medrano in violation. The CAV reiterated the distinction between subject-matter jurisdiction and active jurisdiction. "Subject matter jurisdiction refers to a court's power to adjudicate a class of cases or controversies." (quoting Riddick v. Com., 72 Va. App. 132, 141 (2020)). Active jurisdiction, "pragmatically called the jurisdiction to err – involves not the power of the court but the proper exercise of its authority consistent with settled principles of the unwritten law." (quoting Cilwa v. Com., 298 Va. 259, 266 (2019)).

In this case, while stating subject-matter jurisdiction, the CAV found that Medrano's arguments were only related to active jurisdiction. And, the CAV found that Medrano conceded that process was issued within 3 years of the end of his probationary period. The CAV accepted his "factual concession that process was issued" and found that Medrano did not "challenge the trial court's finding that such notice was legally sufficient." As such, the CAV cited Rule 5A:20 and found that any argument on that issue was waived.

Fitch v. Com., Record No. 1981-23-2: (Ortiz, J., writing for O'Brien, J., and Humphreys, SJ.)
4th Amendment motion to suppress; Sufficiency; Exclusionary rule; Good-faith exception; Premeditation; Intoxication
Denial of suppression affirmed where officer had probable cause to believe incriminating evidence was on Fitch's cell phone and the officers had reason to believe that Fitch would destroy the evidence. 1st degree murder conviction affirmed where sufficient evidence existed for a rational factfinder to conclude Fitch premeditated before shooting his wife 2 times.

Fitch and his wife, Yvette, "had a tumultuous marriage." In 2020, after they had separated, Yvette worked in-home at the Hoffmans' residence, providing healthcare to the husband. One night, Yvette took a break outside to smoke a cigarette. Yvette was shot 2 times in the head. The wife saw the shooting but could not identify the shooter. Several cans of Michelob Ultra (Fitch's beer of choice) were next to Yvette's body. No cartridge casings were located.

Fitch was developed as a suspect and interviewed. Fitch admitted that he was angry with Yvette because she had cheated on him and sent him videos of the adultery on his phone. Police seized his phone at the end of the interview pursuant to a search warrant being executed at his house during the interview. Police obtained a second search warrant to search the phone's contents.

Fitch's sister (who later testified) picked Fitch up from the police station. Fitch told his sister that he hid his revolver and asked her to retrieve it and hide it somewhere else. His sister told the police, who recovered the .22 caliber revolver and found that 2 of the cartridges in the revolver had been spent.

In an analysis of Fitch's phone, they determined that he had messaged Yvette hundreds of times between August and November. Phone records showed that Fitch had messaged Yvette on the date of the murder but that they had been deleted. Officers recovered the messages, which included a statement that "karma was going to get her." Officers also found that Fitch had searched for "breaking news in Charlottesville" around the time of the murder.

Police obtained historical cell site data and found that on the date of the murder, Fitch was initially at his residence when texting Yvette. But, at the time of the murder, Fitch's phone was near the Hoffman's residence. Then, half an hour later, Fitch's phone was back at his residence. These residences were "fifteen miles" apart.

Fitch moved to suppress evidence obtained from his cell phone, which the circuit court denied, finding that there was probable cause to believe that evidence about Yvette's murder was likely on the phone. Further, the circuit court found that seizure was reasonable and that any error did not require suppression under the good-faith exception to the exclusionary rule. The jury convicted Fitch of murder, using a firearm in the commission of murder, and possession of a firearm by a felon.

The CAV affirmed. The CAV determined that the search warrant for the residence did not permit the seizure of the phone at the police station because "Fitch's phone was not present at" Fitch's residence. But, the CAV found that the warrantless seizure of the phone was permissible because of the potential for the destruction of evidence. (citing White v. Com., 73 Va. App. 535, 553 (2021)). "By the end of the interview, both Fitch and Holmes were aware of the incriminating evidence likely present on Fitch's phone." Therefore, Fitch could have been "aware that the police may have been on his trail." (citing Com. v. Campbell, 294 Va. 486, 495 (2017)). It was reasonable for the officers to believe that Fitch would have destroyed evidence on the phone and for the officers to act to stop Fitch from doing so.

The CAV further found sufficient evidence of premeditation. The CAV reiterated that "The intent to kill must come into existence at some time before the killing; it need not exist for any particular length of time." (quoting Avent v. Com., 279 Va. 175, 208 (2010)). "Premeditation is an intent to kill that needs to exist only for a moment." (quoting Jackson v. Com., 267 Va. 178, 204 (2004)). The CAV rejected Fitch's argument that he could not have premeditated because he was intoxicated because whether he was intoxicated was a question of fact. Sufficient evidence existed for a finding of premeditation.

Booker v. Com., Record No. 1389-23-2: (AtLee, J., writing for Friedman and Callins, JJ.)
Plea agreement; Alford plea; Motion to withdraw guilty plea
Circuit court did not abuse its discretion in denying Booker's motion to withdraw his Alford plea where Booker was not acting in good faith and there was prejudice to the Commonwealth.

> Booker was charged with 6 counts of sexual abuse against a minor under the age of 13, including rape. On the day of trial, Booker's counsel arrived late due to "blocked roads" and requested time to discuss the case with Booker. The circuit court recessed, and the parties reached a plea agreement.
>
> Booker informed the circuit court that 2 witnesses for the defense were unavailable, with 1 being out of contact, and the other under medical restrictions. The circuit court offered to permit the medically restricted witness to testify remotely, but Booker "did not ask the court to act upon that suggestion." Instead, Booker moved forward with the plea agreement to a single count of rape by force. Booker complained about his counsel but continued with the plea. The circuit court accepted the plea and denied Booker's counsel's motion to withdraw from the case.
>
> Shortly after the plea, Booker retained new counsel, who substituted in and moved to withdraw Booker's plea. Booker argued that because the circuit court had continued the matter for a sentencing date, even though there was an agreed upon sentence, the plea agreement was not complete. Booker claimed he had a valid defense and wished to assert his right to trial. The circuit court denied the motion, finding that there was no evidence that Booker misunderstood the plea agreement and that there was prejudice to the Commonwealth because the "child victim . . . could become more hesitant with the passage of time."
>
> The CAV affirmed, finding that the circuit court did not abuse its discretion in denying Booker's motion to withdraw his guilty plea. The CAV reiterated that "[a] motion to withdraw a guilty plea made after sentencing is governed by the manifest injustice standard." (quoting Brown v. Com., 297 Va. 295, 300 (2019)). The CAV found no error in the circuit court's findings that Booker's motion "was frivolous, unwarranted, and unfounded." The CAV reminds us that a circuit court's "finding on the issue of good faith is a finding of fact." (quoting Branch v. Com., 60 Va. App. 540, 547-48 (2012)).

Garrett v. Hanna, Record No. 1276-23-3: (Per Curiam Opinion: Athey, White, and Frucci, JJ.)
Custody modification; Best interests of the child; Undue influence; Interference with relationship; Material change in circumstances
Custody appeal rejected without oral argument where the record clearly showed the circuit court properly evaluated the statutory factors in determining best interests of the child, and there was evidence to support the circuit court's conclusions.

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

A.H. is the daughter of Garrett (Mother) and Hanna (Father). Mother and Father divorced, and in 2017, Mother was given primary physical custody with joint legal custody. Father received regular visitation rights. Mother lives in Virginia, and Father lives in Florida. Mother petitioned to modify Father's visitation rights, and Father cross-petitioned to amend the physical custody.

The circuit court conducted an ore tenus hearing and received evidence consistent with the Father's allegations that A.H.'s mental and emotional health were negatively impacted being in Mother's custody. A.H. was diagnosed with Adjustment Disorder, Depression, and Generalized Anxiety Disorder. Father also alleged that Mother had interfered with his relationship with A.H. and refused to permit him visitation.

A.H.'s guardian-ad-litem (GAL) testified that when preparing to see Father, A.H. was "mournful in Mother's presence, but when interacting with Father outside of Mother's presence, A.H. appeared happy." The GAL went further, opining that "mother's control over A.H. was not only creating anxiety [and] affecting any meaningful relationship [she could have with] the father." The GAL "concluded that the child was healthiest while with Father in Florida."

The circuit court found a material change in circumstances since the 2017 custody order. Reviewing the factors in § 20-124.3, the circuit court found that A.H.'s best interests were served by living with Father. The circuit court entered an order giving primary physical custody to Father and visitation to Mother, with joint legal custody.

The CAV affirmed without oral argument, reiterating that the standard on appellate review is an abuse of discretion in determining the best interests of the child. (citing Wynnycky v. Kozel, 71 Va. App. 177, 192 (2019)). "The phrase abuse of discretion means that the circuit court has a range of choice and that its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law." (quoting Sauder v. Ferguson, 289 Va. 449, 459 (2015)).

The CAV determined that there was sufficient evidence for the circuit court's conclusions on material change in circumstances and the best interests of the child. "[T]he circuit court provided a detailed explanation, based on its evaluation of the statutory factors." "Because evidence supported the circuit court's factual findings that underlie the circuit court's weighing of the factors and there si nothing inherently unreasonable in its weighing of those factors, its ruling must be affirmed on appeal." (quoting Wynnycky, 71 Va. App. at 201).

Contreras v. Com., Record No. 0923-23-4: (Frucci, J., writing for Chaney, J., and Annunziata, SJ.)
5th Amendment motion to suppress; Sufficiency; Inherent incredibility
Denial of suppression affirmed where there was no evidence of coercive act by the police. Even assuming the alleged actions were intentional, the combination of the allegations did not overbear Contreras's will. T.M.G.'s testimony not inherently incredible where she explained her recantation, and her credibility was properly within the jury's purview.

> Contreras had four children, including Bayron and T.M.G. When T.M.G. was 9 years old, Bayron raped her several times. Contreras learned of this and beat Bayron with a belt and barred him from the house. Eventually, Bayron was permitted to return to the house but was confined to his room. Bayron did not abuse T.M.G. again.
>
> But, Contreras began abusing T.M.G. when she was 10 or 11. Contreras raped T.M.G. up to 3 times a week. T.M.G. reported the abuse to her mother but later stated that she lied about the abuse. T.M.G. again reported the abuse a few weeks later, and her mother took her to Pennsylvania for a few days before returning. Later, T.M.G. reported the abuse to a friend and her school counselor, and the police began investigating the case.
>
> Contreras interviewed with the police and eventually made incriminating statements that he raped T.M.G. The interview started around 10:00 pm, and Contreras made the admissions around 2:00 am. They had taken several breaks, including a 1-hour-long break around 12:30 am. Contreras moved to suppress his statements arguing that the interrogation "broke his will" and that the officers coerced him to confess by having his family in the next room. The circuit court found no coercive conduct and denied the motion.
>
> At trial, T.M.G. testified to 3 specific incidents when she was in 8th grade. When asked about her statement to her mother about lying about the abuse, T.M.G. explained that she didn't want her mother to be sad. The jury convicted Contreras of 3 counts of rape.
>
> The CAV affirmed. On the suppression issue, the CAV found that none of Contreras's allegations rose to the level of coercive conduct, even in combination. The CAV rejected the notion that the officers were holding Contreras's family or that they gave Contreras the impression that they were holding Contreras's family. "All police interviews of suspects have coercive aspects to them by virtue of the fact that the interrogating officer is part of a system that may ultimately charge the suspect with a crime." (quoting Midkiff v. Com., 250 Va. 262, 269 (1995)). The question is whether there were facts that exceed those "inherent in custodial interrogations." Finding no evidence to support that conclusion, the CAV affirmed denial.
>
> The CAV further found no evidence to support the allegation that T.M.G. was inherently incredible based on the recantation. The CAV reiterated that "testimony

'may be contradictory or contain inconsistencies without rising to the level of being inherently incredible as a matter of law.'" (quoting Kelley v. Com., 69 Va. App. 617, 626 (2019)). Further, "a motivation to lie does not render a witness's testimony unworthy of belief." (quoting id.). The jury heard evidence of T.M.G.'s recantation and rejected Contreras's arguments, which was within their purview.

Burke v. Young, et al., Record No. 0911-23-3: (O'Brien, J., writing for Ortiz, J., and Humphreys, SJ.)
Demurrer; Adequately pleading claims; Excessive force; 8th Amendment; Qualified immunity; Doctrine of judicial restraint
Reversal of circuit court's finding that qualified immunity applied at the pleading stage. Burke had properly alleged facts that, if proved and believed, would entitle him to relief. CAV applied and used the Fourth Circuit's tests for Eighth Amendment violations and found that Burke had properly pleaded each of his claims.

Burke was an inmate and reported a grievance officer against a correctional officer, Poore. Poore "retaliated against Burke" by making false claims. The false claims were "dismissed as having no merit." Several officers came to place Burke "in ambulatory restraints at" Warden Young's direction. The order came, in part, based on Poore's false claims. The officers forced "Burke to remove his clothing but permitted him to leave his underwear on." They "hog-tied" him in the restraints, which caused "extreme pain" and did not permit "Burke to straighten his back."

Pertinent to this case, Burke has "severe thoracic scoliosis, degenerative disc disease, and congenital hip dysplasia" and was transferred to this facility specifically "so he could be housed in a special medical cell." The officers knew of his disability, and they left him in the restraints for 21 hours.

Burke filed suit under 42 U.S.C. § 1983 arguing excessive force and violation of his 8th Amendment right against cruel and unusual punishment. The Appellees demurred based on qualified immunity. The circuit court sustained the demurrer and dismissed the claims, finding Burke did not adequately plead his constitutional claim, nor did he plead "sufficient facts to overcome qualified immunity."

The CAV reversed, reiterating that "a claim of excessive force in violation of the Eighth Amendment has 'both an objective and a subjective component.'" (quoting Dean v. Jones, 984 F.3d 295, 302 (4th Cir. 2019)). The objective prong asks only whether the force is above "de minimis or trivial force." (quoting id.). The subjective component asks "whether the officers acted with a sufficiently culpable state of mind." (quoting id.). The crux is whether "the officer acted in a good faith effort to protect safety or maintain discipline, or maliciously and sadistically for the very purpose of causing harm." (quoting id.).

When reviewing the case in the light most favorable to Burke, which is the appropriate review at the demurrer stage, the allegations met both the objective and subjective prongs. (citing Taylor v. Aids-Hilfe Koln, e.V., 301 Va. 352, 357 (2022)).

> The CAV reminds us that at a demurrer, a circuit court's "inquiry does not test the strength of proof, but the legal sufficiency of the facts alleged." (quoting id.).
>
> The CAV also reiterated that the Constitution "does not mandate comfortable prisons, but neither does it permit inhumane ones." (quoting Farmer v. Brennan, 511 U.S. 825, 832 (1994)). Claims of unconstitutional conditions also have an objective prong of "a serious deprivation of a basic human need" and a subjective prong of "deliberate indifference to prison conditions on the part of prison officials." (quoting King v. Rubenstein, 825 F.3d 206, 218 (4th Cir. 2016)). The CAV found that Burke had sufficiently alleged both prongs.
>
> The CAV rejected the qualified immunity defense at this stage. The CAV reminds us that "the Fourth Circuit has largely collapsed the subjective intent component of an Eighth Amendment claim and a qualified immunity analysis into a single inquiry because an officer 'could not believe that their actions comported with clearly established law while also believe that there is an excessive risk to the plaintiffs and failing to adequately respond to that risk.'" (quoting Thorpe v. Clarke, 37 F.4th 926, 939 (4th Cir. 2022)). The CAV stated that, where the complainant has alleged sufficient facts to prove a "wrongful and punitive motive," the officers "are not entitled to qualified immunity at the pleadings stage of the litigation." (citing Dean v. Jones, 984 F.3d 295, 310 (4th Cir. 2021)).

Terry v. Com., Record No. 0889-23-3: (Chaney, J., writing for Friedman and Lorish, JJ.)
Jury instructions; Horizontal gaze nystagmus; Motion to set aside the verdict; Motion for new trial; Rule 5A:18; Rule 1:1
DUI conviction affirmed where Terry failed to properly preserve her argument regarding an impermissible statement about Horizontal Gaze Nystagmus by the Commonwealth in closing argument. No abuse of discretion in denying Terry's request for a mistrial on the Commonwealth's statement about Terry being DUI under the influence of either alcohol alone or the combination of drugs and alcohol because the Commonwealth properly articulated the law. Circuit court did not have jurisdiction to enter an order on the motion to set aside after 21 days, so the CAV did not have jurisdiction to review the denial.

> Around 1:00 am, police noticed Terry driving erratically, "drifting over the broken center line repeatedly." Officers initiated a traffic stop and ordered Terry out of the car after noticing the odor of alcohol in the vehicle. Terry admitted to drinking alcohol and performed poorly on field sobriety tests, demonstrating 6 clues/indicators of impairment on the horizontal gaze nystagmus test. Terry also admitted that she took Depakote, a seizure medication, and that alcohol could "probably" affect the medication. Terry's BAC was .07.
>
> Terry testified that she was trying to get her phone while driving and that caused her poor driving behavior. She admitted, though, "that the Depakote label warned against consuming alcohol while taking the medication." Terry "argued that the jury should not be instructed that it could find her guilty if it determined that her driving was impaired by a combination of alcohol and drugs." Terry further stated that she

would move for a mistrial if the Commonwealth argued that possibility during closing argument.

The Commonwealth argued that Terry was guilty of DUI "either because her driving was impaired by alcohol alone, or because it was impaired by a combination of alcohol and Depakote." The Commonwealth also argued that the HGN test alone demonstrated impairment. While Terry objected, she did not request a mistrial or curative instruction, and the circuit court overruled the objection. The jury convicted Terry of DUI. Terry moved to set aside the verdict and order a new trial, but the motion was denied.

The CAV affirmed. The CAV found that Terry did not preserve her argument on the impermissible HGN statement during closing argument because she did not "timely move[] for a cautionary instruction or for a mistrial." (quoting Harvey v. Com., 76 Va. App. 436, 458 (2023)). The CAV also expressly held that whether she was under the influence of alcohol alone or the combination of alcohol and "any drug," Terry was still guilty of DUI. (citing Code § 18.2-266(ii) and (iv)). Therefore, there was no abuse of discretion in denying the motion for a mistrial for the Commonwealth's argument on that issue.

The CAV dismissed the portion of Terry's appeal relating to the motion to set aside the verdict and order a new trial because the circuit court lost jurisdiction over the case prior to entering the order. The circuit court entered a final order on Terry's DUI on May 12, 2023. On May 19, 2023, the circuit court heard Terry's motion, but it did not enter an order on the motion until June 13, 2023, which was well after the 21-day limit of Rule 1:1. Because the circuit court had no jurisdiction to enter the order, the CAV had no jurisdiction to review the order.

Burgess v. SYP Hospitality, LLC, Record No. 0877-23-2: (AtLee, J., writing for Huff and Callins, JJ.)

Premises liability; Jury instructions; Contributory negligence

Jury finding in favor of SYP affirmed where the jury was properly instructed on the qualified duties of innkeepers to their clients. Verdict form did not explain whether jury found Burgess contributorily negligent or simply that Burgess failed to meet his burden, so no error in denying the motion to set aside. Sufficient evidence supported a finding of contributory negligence, though, so the circuit court properly denied the motion to strike the affirmative defense.

In 2018, Burgess checked into a hotel room owned by SYP. He fell in the bathtub, which had no bathmat, grab bar, or nonskid strips. It did have "a gritty surface that felt like grains of sand." He suffered "a cut to his right foot, which bled profusely." An urgent care doctor cleaned his cut and gave him a walking boot." About a month later, Burgess noticed "that his right foot was puffy and warm to the touch." The next day, his "little toe had begun to turn black and purple." He sought medical treatment and "doctors amputated the toes and two-thirds of his right foot because of an infection."

Burgess filed a personal injury suit against SYP, arguing that they "negligently failed to remove a thin and invisible layer of soap from the bathtub." Burgess also claimed that the failure to "install a grab bar or anti-slip bathmat in the bathtub" also caused the fall. SYP claimed contributory negligence and cited Burgess's preexisting medical conditions, which included "diabetes, neuropath, and Charcot arthropathy in his left foot."

Burgess moved to exclude expert testimony related to his preexisting medical conditions and to prohibit argument of contributory negligence. The circuit court denied both motions. After hearing all the evidence, Burgess objected to Instruction 16, which stated that "negligence is the failure to use ordinary care." Burgess argued that SYP "owed its guests an absolute duty rather than a duty of ordinary care." The circuit court overruled the objection, but did issue Instruction 15, which said "an innkeeper has an absolute duty of care."

The jury returned a verdict for SYP, but the form did not specify whether the jury found Burgess was contributorily negligent or whether Burgess simply failed to prove negligence. Burgess moved to set aside the verdict, which the circuit court denied.

The CAV affirmed. On the jury instruction issue, the CAV found that while "no instruction should be given which would be confusing or misleading to the jury," the CAV did not abuse its discretion in giving both Instructions 15 and 16. (quoting Bista v. Com., 76 Va. App. 184, 227 (2022)). The CAV determined that the instructions properly covered the law because "an innkeeper's 'qualified duty of ordinary care may become an absolute duty and does become an absolute duty when a proprietor knew or should have known of a danger that might have been easily removed.'" (quoting Kirby v. Moehlman, 182 Va. 876, 885 (1994)). Therefore, the jury was properly instructed on the duty of ordinary care and then properly instructed that if they find that SYP knew or should have known about the danger, then they owed a duty of absolute care. (citing id. and Taboada v. Daly Seven, Inc., 271 Va. 313 (2006)).

On the contributory negligence question, the CAV determined that "a reasonable factfinder could find that Burgess was negligent" in his actions, and thus the circuit court correctly denied the motion to strike the evidence as it related to the contributory negligence affirmative defense. Finally, the CAV held that Rule 5A:18 precluded appellate review of Burgess's assignment of error on whether the circuit court erred in permitting SYP to discuss his comorbidities as it related to his "increased risk of infection." Because Burgess failed to raise this argument to the circuit court, he was precluded from raising it on appeal.