

NO. _____

In The
Supreme Court of the United States

SCOTT NICHOLAS SANFORD,

Petitioner,

v.

THE COMMONWEALTH OF VIRGINIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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Counsel for Petitioner

Dated: August 23, 2021

QUESTIONS PRESENTED

- I. What are the minimum requirements and procedures for establishing that a defendant's fundamental right to a jury trial is waived in an intelligent, knowing, and voluntary manner consistent with the United States' Constitution?
- II. Was the Petitioner's 6th Amendment right to a jury trial unlawfully abridged where the Court of Appeals relied on a "contemporaneous objection" rule and found a waiver-by-forfeiture despite there no evidence of a knowing, intelligent and voluntary waiver of Petitioner's fundamental right to a jury trial?

PROCEEDINGS IN STATE TRIAL AND APPELLATE COURTS

Scott Nicholas Sanford v. Commonwealth of Virginia, Record No. 200740, Supreme Court of Virginia. Petition for Appeal refused on February 3, 2021. Petition for Rehearing denied on March 26, 2021.

Scott Nicholas Sanford v. Commonwealth of Virginia, Records No. 1231-19-4, Court of Appeals of Virginia. Petition for Appeal denied by *per curiam* opinion dated February 24, 2020. Petition for Rehearing denied on April 30, 2020.

Commonwealth of Virginia v. Scott Nicholas Sanford, Case Nos. CR31582-00, CR02025194-00 through CR02025194-02 and CR03022635-00, Circuit Court for Loudoun County, Virginia. Judgement entered March 15, 2019 (final Sentencing Order entered May 28, 2019 and “Amended Sentencing Order entered July 29, 2019).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Scott Sanford respectfully petitions for a writ of certiorari to the Virginia Supreme Court to review the judgment against him in Scott Nicholas Sanford v. Commonwealth, Record No. 1231-19-4 (March 26, 2020), which upheld the per curium opinion of the Court of Appeals of Virginia issued in Scott Nicholas Sanford v. Commonwealth of Virginia, Records No. 1231-19-4 (February 24, 2020).

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals of Virginia denying the petition for appeal, No. 1231-19-4, is the substantive opinion at issue. That opinion is unpublished and is reproduced in the Appendix at 3a. The decision of the Virginia Supreme Court denying the petition is unpublished and is reproduced in the Appendix at 1a. The decision of the Virginia Supreme Court refusing the petition for rehearing is the final order from the state court. That decision is unpublished and is reproduced in the Appendix at 16a. The decision of the Court of Appeals of Virginia denying the petition for rehearing is unpublished and is reproduced in the Appendix at 2a.

JURISDICTION

The Virginia Supreme Court issued its decision denying Petitioner's petition for rehearing on March 26, 2021. The central issue in this case relates to an accused's knowing, intelligent, and voluntary waiver of his right to a jury trial, and various state court rules and state statutes that require a "contemporaneous objection" when a trial court errs, including when a trial court fails ensure a valid "jury waiver". So,

the validity of those rules and statutes are “drawn in question” as being repugnant to the Constitution and the right to a jury trial claimed under the Constitution. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides, in relevant part: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...”

Article 3, § 2, cl. 3, of the United States Constitution also provides, in relevant part: 'The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury...'

Va. R. Sup. Ct. Rule 3A:13, states in relevant part: “(b)Waiver of Jury in Circuit Court. If an accused who has pleaded not guilty in a circuit court consents to trial without a jury, the court may, with the concurrence of the Commonwealth's attorney, try the case without a jury. The court may determine before trial that the accused's consent was voluntarily and intelligently given, and his consent and the concurrence of the court and the Commonwealth's attorney must be entered of record.”

Va. R. Sup. Ct. Rule 5A:18, states in relevant part: “No ruling of the trial court...will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice...”

STATEMENT OF THE CASE

The facts underlying the Petitioner's arrest and prosecution are immaterial to the questions presented. The relevant facts are restricted to the procedure observed by the trial court and the reasoning of the Court of Appeals in denying the petition for appeal. The federal question sought to be reviewed was raised before the trial court in the form of a motion to set aside the verdict, described in more detail below.

Mr. Sanford represented himself from the time of indictment through trial, where he was tried by a judge sitting without a jury on a charge of felony larceny. He was promptly (in less than 2 hrs, 53 minutes) convicted. At no point did he sign a jury waiver, or engage in a colloquy with the trial court regarding waiving jury trial, or otherwise manifest a knowing, intelligent, and voluntary waiver of his fundamental right to a jury trial.

There were a number of proceedings below. Among the material proceedings to this appeal are the initial arraignment on January 9, 2018, the trial on September 14, 2018, the hearing on the motion to vacate on January 28, 2019 and the sentencing and probation violation hearing on March 15, 2019.

On January 9, 2018, the case was called for an arraignment and scheduling after the return of the indictment. Mr. Sanford appeared without counsel stated that he would represent himself. He was provided with and signed a "waiver of right to representation by an attorney" form.

The following dialog then occurred:

THE COURT: All right. And I'll sign it, sir acknowledging that you've been advised as to your rights with regard to counsel and have voluntarily and knowingly and intelligently waived counsel in this case.

All right. Mr. Nick — Mr. Sanford, excuse me, what are we scheduling?

MR. SANFORD: Bench trial, Your Honor.

THE COURT: Bench trial. Commonwealth comfortable with a bench trial?

COMMONWEALTH'S ATTORNEY: Yes, sir. We concur in a bench trial.

THE COURT: All right. Non-jury trial time estimate?

COMMONWEALTH'S ATTORNEY: Commonwealth would estimate two hours. I don't know if Mr. Sanford has a different - -

MR. SANFORD: I would say about four, Your Honor.

THE COURT: Four hours, non-jury. So four-hour half day, Ms. Bain.

...

THE COURT: 13th of July, 2019, 1 p.m. That will be for a non-jury trial...

On June 22, 2018 the parties appeared on the Commonwealth Attorney's motion to continue. When asked whether he objected to setting the matter for trial on September 14, 2018, Mr. Sanford posed no objection. The following dialogue occurred:

THE COURT: We need to reschedule this. It's a four-hour bench trial. This is set for a four-hour bench trial?

COMMONWEALTH'S ATTORNEY: That's correct, Judge. And speedy trial is October 1.

The trial of this matter was heard on September 14, 2018. After the case was called, the Petitioner first moved for a continuance, explaining that a necessary witness - who was not subpoenaed but had agreed to appear voluntarily - had recently undergone surgery and could not appear. The trial court denied the request, then asked "other than that, you're ready to go, right?" Mr. Sanford responded: "The other thing I'm dealing with, Your Honor, is, I was diagnosed with a hernia earlier this

week. I'm on painkillers, with a pain level of, like, 8 out of 10; I can hardly stand." The court responded: "- - okay. You seem to be well, so we're going forward."

After a short trial, Mr. Sanford was convicted. Only after convicting Mr. Sanford did the trial court then appointed counsel, who was not present at the time of the appointment.

On January 14, 2019 the matter was called for sentencing. At that time, Mr. Sanford's counsel addressed the apparent lack of a jury waiver in the record. The trial court continued the matter to look into the issue further. On January 28, 2019 the court heard argument on the issue of whether there was a knowing, intelligent and voluntary waiver of the Mr. Sanford's fundamental right to a jury trial. Written briefs had been submitted by both parties prior to the hearing. Upon hearing hearing additional argument by the parties, the trial court denied the motion.

On March 15, 2019 the trial court sentenced Mr. Sanford for the new conviction and then proceeded to hear several probation violation matters, as Mr. Sanford was on probation at the time of the new offense. He conceded that the new conviction was grounds for finding him in violation, but preserved his objection based on the trial court's denial of his motion to vacate the conviction.

The case was timely appealed to the Court of Appeals of Virginia. That court denied the petition for appeal in a *per curiam* opinion. The Court of Appeals of Virginia denied Mr. Sanford's request for rehearing. The Virginia Supreme Court refused Mr. Sanford's petition for appeal, and denied his request for rehearing. There

were no collateral attacks on the conviction. This petition followed the refusal by the Virginia Supreme Court.

REASONS FOR GRANTING THE WRIT

I. The decision of the Court of Appeals of Virginia in this case affects a question of federal law that has not been, but should be, settled by this Court.

This Court now has the opportunity to define the minimum requirements and set out guidance - for state courts in particular - for determining whether a defendant knowingly, intelligently, and voluntarily waives their fundamental right to a jury trial. This Court has had a number of occasions to instruct federal courts regarding proper procedure regarding jury waivers, but has offered little guidance to state courts and has not decided a substantive “jury waiver” case since Patton v. United States, 281 U.S. 276, 50 S. Ct. 253, 74 L. Ed. 854 (1930). However, it appears from a review of cases that this Court has never specifically decided what the minimum requirements or procedural safeguards are required to assure a knowing, intelligent, and voluntary waiver of a defendant’s right to a jury trial in state courts.

The United States Constitution contains two provisions relating to the subject of jury trials. Article 3, § 2, cl. 3, provides: 'The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury...' The Sixth Amendment provides, in relevant part: 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...' The right to a jury trial on criminal cases is “fundamental to the American scheme of justice” and is applicable to the states by way of the

Fourteenth Amendment. Duncan v. Louisiana, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968)

This Court’s prior decisions have offered guidance regarding waivers of other fundamental rights. See Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981) (waiver of right to counsel during custodial interrogation); Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019 1023, 82 L. Ed. 1461 (1938) (waiver of right to counsel at trial); Patton, 281 U.S. 276 (1930) (waiver of right to unanimous jury). And this Court has offered guidance for trial court’s in determining what constitutes a knowing, intelligent, and voluntary waiver various fundamental rights.

Examples of such guidance include the following: “It is reasonably clear under our cases that waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case ‘upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.’” Edwards v. Arizona, 451 U.S. 477 (quoting Johnson v. Zerbst, 304 U.S. 458. There is a presumption against the waiver of constitutional rights. See, e.g., Glasser v. United States, 315 U.S. 60, 70—71, 62 S. Ct. 457, 86 L. Ed. 680 (1942). For a waiver to be effective it must be clearly established that there was 'an intentional relinquishment or abandonment of a known right or privilege. Johnson v. Zerbst, 304 U.S. at 464. “What suffices for waiver depends on the nature of the right at issue. ‘[W]hether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the

defendant's choice must be particularly informed or voluntary, all depend on the right at stake.' United States v. Olano, 507 U.S. 725, 733, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993). For certain fundamental rights, the defendant must personally make an informed waiver. See Johnson v. Zerbst, 304 U.S. at 464–465 (right to counsel); Brookhart v. Janis, 384 U.S. 1, 7–8, 86 S. Ct. 1245, 16 L. Ed. 2d 314 (1966) (right to plead not guilty). “Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.” Brady v. United States, 397 U.S. 742, 748, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970).

In Patton v. United States, this Court observed the following: “Trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact in criminal cases above the grade of petty offenses. In such cases the value and appropriateness of jury trial have been established by long experience, and are not now to be denied. Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact-finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant. And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential

elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity.” 281 U.S. at 313-14 (1930)

The guidance that this Court has previously given regarding waiver of the fundamental right to counsel is a good starting point, but this Court should now take up this cause and pronounce the minimum requirements a trial court must observe when determining whether there is a knowing, intelligent, and voluntary waiver of a defendant’s fundamental right to a jury trial. Such minimum requirements ought to include those named in regards to waiver of counsel in Johnson v. Zerbst: “This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused....whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.” 304 U.S. at 465. In this case, the trial judge’s total abandonment of his “serious and weighty responsibility” is evident: Not only was there no waiver on the record, but the trial judge steadfastly refused to set aside the verdict even when advised of the lack of a knowing, intelligent, and voluntary waiver.

II. The appellate courts of Virginia has decided an important federal question in a way that conflicts with relevant decisions of this Court.

At the center of the holding by the Court of Appeals of Virginia is the assertion that a rule of criminal procedure can nullify a defendant’s fundamental right to a jury trial. They reason that, because Mr. Sanford did not speak up at the time his bench trial commenced, he forfeited his right to complain of the result later under Virginia’s “contemporaneous objection” rule. But that conclusion is patently absurd: How could

Mr. Sanford - proceeding without counsel - possibly waive-by-forfeiture a fundamental right to jury trial when there is no evidence on the record that he was aware of such right, much less evidence that he made a knowing, intelligent, and voluntary waiver of such right?

This Court has long held that that any act of a legislature which alters any “substantial and essential feature” of a defendant’s right to a jury trial “is one abridging the right.” See Patton v. United States, 281 U.S. 276 (1930); American Pub Co v. Fisher, 166 U.S. 464, 467-68 (1897) (“Therefore, either the seventh amendment to the constitution, or these acts of congress, or all together, secured to every litigant in a common-law action in the courts of the territory of Utah the right to a trial by jury, and nullified any act of its legislature which attempted to take from him anything which is of the substance of that right.”) This holding obviously ought to apply to a rule of procedure, such as the “contemporaneous objection” rule at issue in this case. In this case, the Court of Appeals of Virginia reached an absurd result in applying a Virginia rule of procedure at the cost of Mr. Sanford’s fundamental right to a jury trial.

The Court of Appeals relied on the Virginia Supreme Court’s decision in Williams. The Court of Appeals relied on the Virginia Supreme Court’s decision in Commonwealth of Virginia v. Williams, 262 Va. 661 (2001). However, understanding the relevant facts in Williams is critical for also understanding that the holding is much more nuanced than forfeiting an issue on appeal because of delay in moving to vacate a conviction. The underlying facts in Williams involved a defendant -

represented by counsel - who signed a written jury waiver form, which was accepted with the concurrence of the prosecutor and the trial judge. He then failed to appear and became a fugitive. On the day of his bench trial, he moved to continue the case. When that motion was denied, he asserted that he had “changed his mind” and wanted a jury trial. His lawyer moved to continue the case, stating that he wasn’t ready to proceed with a jury trial. The trial judge denied the request for a jury and the request to continue the case. The case proceeded to a bench trial. Four months after the defendant was convicted, he moved to set aside the verdict and the motion was denied.

Although the holding in Williams was a broad pronouncement that a defendant must timely object if he wishes to challenge the voluntary and intelligent nature of his jury trial waiver, the reasoning of the Virginia Supreme Court was very nuanced and narrow. Rule 3A:13 of the Rules of the Supreme Court provides, in relevant part: “(b) ... If an accused who has pleaded not guilty in a circuit court consents to trial without a jury, the court may, with the concurrence of the Commonwealth's attorney, try the case without a jury. The court shall determine before trial that the accused's consent was voluntarily and intelligently given, and his consent and the concurrence of the court and the Commonwealth’s attorney shall be entered of record.” See also Williams, 553 S.E.2d at 762-63, 262 Va. 661 (2001). “This provision requires the circuit court to determine whether a defendant voluntarily and intelligently waives his right to a jury trial before proceeding to trial of the case. Once the circuit court has made the determination that the defendant's waiver is voluntarily and

intelligently made, the court is required to enter in the record the defendant's consent to be tried without a jury....By its terms, therefore, Rule 3A:13(b) does not require that the circuit court memorialize by order its determination that the defendant's jury trial waiver is voluntary and intelligent. Instead, Rule 3A:13(b) requires that once the court has made this determination, the court shall enter in the record the defendant's agreement to be tried without a jury.” *Id.* at 763.

The Virginia Supreme Court, after explains here that - since Rule 3A:13(b) was complied with and the trial judge entered the written jury waiver onto the record - there was, in essence, a *presumption* of a knowing, intelligent, and voluntary waiver. The “contemporaneous objection” rule did apply under those facts to prevent Williams from attempting to make additional arguments four months after he first raised the issue before the trial court. *Id.*

Of course, those facts are far different than what occurred with Mr. Sanford. He didn’t have counsel. He didn’t sign a written waiver form. And, although at the initial arraignment the trial court noted the concurrence of the prosecutor and the court, there was obviously no compliance with Rule 3A:13(b) - and there could be no presumed knowing, intelligent, and voluntary waiver. So, the rational of Williams should not have applied.

The Williams opinion relied on various rules of procedure, including Virginia Supreme Court Rule 5:25 - a so-called “contemporaneous objection” rule - which bars raising an issue on appeal where the issue was not preserved in a timely matter before a trial court. That rule is similar to Rule 5A:18, which was relied on by the

Court of Appeals of Virginia. In relying on the contemporaneous objection rule, without noting the failure of the trial court to observe the prerequisites set out in Rule 3A:13(b), the Court of Appeals erroneously determined that Mr. Sanford had waived his right to a jury trial by forfeiture, even though he had never formally waived his right to a jury.¹

This Court has recognized that a defendant's failure to object under similar circumstances did not result in waiver or forfeiture to appeal the issue. Again, in Patton, this Court noted: "It is said that the accused did not object, until after verdict, to a trial jury composed of eight persons, and therefore he should not be heard to say that his trial by such a jury was in violation of his constitutional rights. It is sufficient to say that it was not in the power of one accused of felony, by consent expressly given or by his silence, to authorize a jury of only eight persons to pass upon the question of his guilt. The law in force when this crime was committed did not permit any tribunal to deprive him of his liberty, except one constituted of a court and a jury of twelve persons." 281 U.S. at 276.

¹ On direct appeal, Mr. Sanford did argue that the trial court lacked jurisdiction to try the case since there was no valid jury waiver. This Court has previously held that a trial court does not have jurisdiction under similar circumstances: "If the accused, however, is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty. A court's jurisdiction at the hearing of trial may be lost 'in the course of the proceedings' due to failure to complete the court—as the Sixth Amendment requires—by providing counsel for an accused who is unable to obtain counsel, who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake. If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus. A judge of the United States—to whom a petition for habeas corpus is addressed—should be alert to examine 'the facts for himself when if true as alleged they make the trial absolutely void.'" Johnson v. Zerbst, 304 U.S. 458 (1938)

This Court should take up this cause and explicitly hold that the “contemporaneous objection” rule in this case cannot abridge Mr. Sanford’s right to a jury trial where he merely was silent at the commencement of the bench trial. The application of the rule by the Court of Appeals of Virginia amounts to an abridgment of Mr. Sanford’s fundamental right.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted this 23rd day of August, 2021.

/s/ Ryan P. Campbell
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APPENDIX

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VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 3rd day of February, 2021.

Scott Sanford,

Appellant,

against

Record No. 200740

Court of Appeals No. 1231-19-4

Commonwealth of Virginia,

Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court refuses the petition for appeal.

The Circuit Court of Loudoun County shall allow court-appointed counsel the fee set forth below and also counsel's necessary direct out-of-pocket expenses. And it is ordered that the Commonwealth recover of the appellant the costs in this Court and in the courts below.

Costs due the Commonwealth
by appellant in Supreme
Court of Virginia:

Attorney's fee

\$950.00 plus costs and expenses

A Copy,

Teste:

Douglas B. Robelen, Clerk

By:


Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on Thursday the 30th day of April, 2020.

Scott Nicholas Sanford,

Appellant,

against

Record No. 1231-19-4
Circuit Court Nos. CR31582-00, CR02025194-00 through CR02025194-02
and CR03022635-00

Commonwealth of Virginia,

Appellee.

From the Circuit Court of Loudoun County

Before Judges Petty, AtLee and Senior Judge Annunziata

For the reasons previously stated in the order entered by this Court on February 24, 2020, the petition for appeal in this case hereby is denied.

It is ordered that the trial court allow court-appointed counsel for the appellant an additional fee of \$100 for services rendered the appellant on this appeal, in addition to counsel's costs and necessary direct out-of-pocket expenses. In addition to the costs incurred in this Court's February 24, 2020 order, the Commonwealth shall also recover of the appellant the costs reflected in this order.

This order shall be certified to the trial court.

Additional costs due the Commonwealth
by appellant in Court of Appeals of Virginia:

Attorney's fee \$100.00 plus costs and expenses

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By:

Kristen M. McKenzie

Deputy Clerk

This order is sent only for the purpose of paying court appointed counsel. The circuit court is directed to take no action at this time other than pay of counsel.

VIRGINIA:

In the Court of Appeals of Virginia on Monday the 24th day of February, 2020.

Scott Nicholas Sanford,

Appellant,

against

Record No. 1231-19-4

Circuit Court Nos. CR31582-00, CR02025194-00 through CR02025194-02
and CR03022635-00

Commonwealth of Virginia,

Appellee.

From the Circuit Court of Loudoun County

Per Curiam

This petition for appeal has been reviewed by a judge of this Court, to whom it was referred pursuant to Code § 17.1-407(C), and is denied for the following reasons:

I. In a bench trial, appellant was convicted for the unlawful concealment of merchandise as a third or subsequent offense of larceny under Code § 18.2-104. Appellant contends that the trial court erred in denying his motion to set aside his conviction because he did not knowingly and intelligently waive his right to a jury trial.

At a post-indictment hearing on January 9, 2018, appellant advised the trial court that he did not intend to hire counsel and that he was "comfortable" representing himself. Appellant executed a form indicating that he waived his right to be represented by counsel. The trial court then asked appellant, "What are we scheduling?" Appellant responded, "Bench trial, Your Honor." When the trial court asked if the Commonwealth concurred in a bench trial, the prosecutor agreed. The trial court then stated, "All right. Non-jury time estimate?" Upon appellant's request for four hours, the trial court scheduled the matter for a "non-jury" trial on July 13, 2019. Before the hearing ended, the trial court reminded appellant of the date and stated "That will be for a non-jury trial."

On June 22, 2018, the trial court held a hearing on the Commonwealth's motion for a continuance of the trial date due to an unavailable witness. When asked by the trial court, appellant did not object to a continuance until September 14, 2018. The trial court stated that the matter was set for a "four-hour bench trial." Before appellant's trial began on September 14, 2018, he requested a continuance to obtain the presence of an unsubpoenaed witness and because of a medical condition he was experiencing. The trial court refused to continue the matter, and the trial proceeded with appellant representing himself. The trial court found appellant guilty as charged in the indictment.

On December 12, 2018, the trial court granted appellant's motion to have counsel appointed for him. Appellant later moved to set aside the conviction, arguing that he did not knowingly and intelligently waive his right to a jury trial. He filed his motion on January 23, 2019. The trial court denied appellant's motion.

"[I]n criminal prosecutions . . . [the accused] shall enjoy the right to a speedy and public trial, by an impartial jury of his vicinage." Va. Const. art. 1, § 8. "If the accused plead not guilty, he may, with his consent and the concurrence of the Commonwealth's Attorney and of the court entered of record, . . . waive a jury." *Id.*; see also Code § 19.2-257. Under Rule 3A:13(b),

If an accused who has pleaded not guilty in a circuit court consents to trial without a jury, the court may, with the concurrence of the Commonwealth's attorney, try the case without a jury. The court shall determine before trial that the accused's consent was voluntarily and intelligently given, and his consent and the concurrence of the court and the Commonwealth's attorney shall be entered of record.

In Commonwealth v. Williams, 262 Va. 661, 666 (2001), the defendant did not challenge the voluntary nature of his jury trial waiver until four months after his conviction. Citing Rule 5:25, the Court held:

If a defendant wishes to challenge the voluntary and intelligent nature of his jury trial waiver, he must state a timely objection on that basis in the circuit court. Because [the defendant] did not question the voluntary nature of that

waiver until four months after he was tried and convicted of the present offenses, we conclude that he has not preserved that issue for appeal.

Id. at 669.¹

Just as in Williams, appellant did not challenge the voluntary and intelligent nature of his waiver of a jury trial until four months after he was tried and convicted. “No ruling of the trial court . . . will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable the Court of Appeals to attain the ends of justice.” Rule 5A:18. “Rule 5A:18 requires a litigant to make timely and specific objections, so that the trial court has ‘an opportunity to rule intelligently on the issues presented, thus avoiding unnecessary appeals and reversals.’” Brown v. Commonwealth, 279 Va. 210, 217 (2010) (quoting West v. Commonwealth, 43 Va. App. 327, 337 (2004)). “To be timely, an objection must be made when the occasion arises -- at the time the evidence is offered or the statement made.” Marlowe v. Commonwealth, 2 Va. App. 619, 621 (1986). If a party fails to timely and specifically object, he waives his argument on appeal, as he has denied the trial court the opportunity to consider and resolve the issue in question. Arrington v. Commonwealth, 53 Va. App. 635, 641 (2009).

We conclude that appellant did not preserve this issue for appellate review because he did not raise a timely objection in the trial court. Williams, 262 Va. at 669; Rule 5A:18. Appellant does not invoke the good cause or ends of justice exceptions to Rule 5A:18, and the Court will not apply the exceptions *sua sponte*. Edwards v. Commonwealth, 41 Va. App. 752, 761 (2003) (*en banc*). Accordingly, Rule 5A:18 bars our consideration of this assignment of error on appeal.

II. Appellant argues that the trial court erred in admitting hearsay testimony that violated his constitutional right to confront the evidence against him. At the time that the testimony was elicited,

¹ The Court also rejected the defendant’s assertion that “Rule 3A:13 imposes a jurisdictional requirement that the voluntary nature of a jury trial waiver be memorialized in a court order.” Williams, 262 Va. at 667.

appellant did not object to the statements the store manager in question made to the police officer who investigated the incident. Not until closing argument did appellant assert that the testimony was hearsay.

As noted above, Rule 5A:18 requires that an appellant make a contemporaneous objection at trial in order to preserve that issue for appellate review. “[A]n objection to the admissibility of evidence must be made when the evidence is presented. The objection comes too late if the objecting party remains silent during its presentation and brings the matter to the court’s attention by a motion to strike made after the opposing party has rested.” Wells v. Commonwealth, 65 Va. App. 722, 729 (2016) (quoting Kondaurov v. Kerdasha, 271 Va. 646, 655 (2006)).

Appellant waived his objection to the testimony about the store manager’s statements because he did not make a contemporaneous objection. Rule 5A:18. Appellant does not invoke either exception to Rule 5A:18, and we do not consider them *sua sponte*. Edwards, 41 Va. App. at 761. The fact that appellant represented himself is of no import. Even *pro se* litigants must comply with the rules of court. Francis v. Francis, 30 Va. App. 584, 591 (1999). Therefore, we do not consider this issue on appeal.

III. In his third assignment of error, appellant contends that “[b]ecause [his] conviction was invalid, [appellant’s] probation violations were unfounded.” Having found no basis to reverse appellant’s conviction for unlawful concealment, and limiting our review of appellant’s argument to that fairly encompassed by the assignment of error, we need not further consider this contention.²

This order is final for purposes of appeal unless, within fourteen days from the date of this order, there are further proceedings pursuant to Code § 17.1-407(D) and Rule 5A:15(a) or 5A:15A(a), as appropriate. If

² In his argument on appeal, appellant contends that the trial court erred in finding him in violation of his probation for failing to pay restitution. However, the assignment of error relates only to the trial court’s finding of a probation violation due to appellant’s conviction of another crime, not his failure to pay restitution. “Only assignments of error assigned in the petition for appeal will be noticed by this Court.” Rule 5A:12(c)(1)(i). “This Court is limited to reviewing the assignments of error presented by the litigant. . . . Consequently, we do not consider issues touched upon by the appellant’s argument but not encompassed by his assignment of error.” Banks v. Commonwealth, 67 Va. App. 273, 289-90 (2017). Therefore, we do not consider whether the trial court properly concluded that appellant violated the terms of his probation by failing to pay restitution.

appellant files a demand for consideration by a three-judge panel, pursuant to those rules the demand shall include a statement identifying how this order is in error.

The trial court shall allow court-appointed counsel the fee set forth below and also counsel's necessary direct out-of-pocket expenses. The Commonwealth shall recover of the appellant the costs in this Court and in the trial court.

This Court's records reflect that Ryan Campbell, Esquire, is counsel of record for appellant in this matter.

Costs due the Commonwealth
by appellant in Court of
Appeals of Virginia:

Attorney's fee \$400.00 plus costs and expenses

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By:

Mary K.P. Ring

Deputy Clerk

AMENDED SENTENCING ORDER

VIRGINIA: IN THE CIRCUIT COURT OF LOUDOUN COUNTY

FEDERAL INFORMATION PROCESSING
STANDARDS CODE: 107Hearing Date: **March 15, 2019**Judge Designate: **J. HOWE BROWN JR.**

COMMONWEALTH OF VIRGINIA :

v. : Criminal No(s). **31582-00, 02025194-00, -01,
-02 & 03022635-00****SCOTT NICHOLAS SANFORD** :
DEFENDANT

These cases came before the Court for sentencing of the Defendant, who appeared before the bar of this Court in the custody of the Deputy Sheriff, and with his attorney, **Ryan Campbell**. The Commonwealth was represented by **Sean P. Morgan**, Deputy Commonwealth's Attorney.

On **October 2, 2018** the Defendant was found guilty of the following offense:

<u>CASE NUMBER</u>	<u>OFFENSE DESCRIPTION AND INDICATOR (F/M)</u>	<u>OFFENSE DATE</u>	<u>VA. CODE SECTION</u>
31582-00	Concealment Third or Subsequent Offense (F)	10/20/17	18.2-104

The pre-sentence report was received by this Court in the manner prescribed by law together with additional evidence in mitigation and extenuation, if any; the Court heard argument by counsel for the Defendant and by the attorney for the Commonwealth.

Pursuant to the provisions of Code §19.2-298.01, the Court has considered and reviewed the applicable discretionary sentencing guidelines and the guidelines worksheets. The sentencing guidelines worksheets and the written explanation of any departure from the guidelines are ordered filed as a part of the record in this case.

Commonwealth of Virginia vs. Scott Nicolas Sanford
Criminal Numbers 31582-00, 02025194-00, -01, -02 & 03022635-00
Page 2 of 4

Before pronouncing the sentence, the Court inquired if the Defendant desired to make a statement and if the Defendant desired to advance any reason why judgment should not be pronounced.

The Court **SENTENCES** the Defendant to:

In **Criminal Number 31582**, incarceration with the **Virginia Department of Corrections** for the term of: **One (1) Year** for the *felony* conviction **Concealment Third or Subsequent Offence**, as contained in the Indictment.

In addition to the above sentence of incarceration, the Court imposes an additional sentence pursuant to Virginia Code §19.2-295.2 (A), the Court sentences the Defendant to an additional term of One (1) Year incarceration. The Court suspends the aforesaid One (1) Year and places the Defendant on One (1) Year Post Release Supervision to commence upon release from incarceration. The period of Post Release Supervision shall be under the supervision and review of the Virginia Parole Board.

Further, the Court finds that the Defendant is *guilty* of violating of the terms and conditions of his supervised probation, therefore,

the Court revokes the suspension of the execution of the balance of the penitentiary sentence in **Criminal Number 02025194-00** of: **One (1) Year and Five (5) Months**, be imposed upon the Defendant, and hereto not served, be vacated and **IMPOSED** and

the Court revokes the suspension of the execution of the balance of the penitentiary sentence in **Criminal Number 02025194-01** of: **Nine (9) Months**, be imposed upon the Defendant, and hereto not served, be vacated and **IMPOSED** and

the Court revokes the suspension of the execution of the balance of the penitentiary sentence in **Criminal Number 02025194-02** of: **Two (2) Months**, be imposed upon the Defendant, and hereto not served, be vacated and **IMPOSED** and

the Court revokes the suspension of the execution of the balance of the penitentiary sentence in **Criminal Number 03022635-00** of: **Two (2) Years and Seven (7) Months**, be imposed upon the Defendant, and hereto not served, be vacated and **IMPOSED**.

Commonwealth of Virginia vs. Scott Nicolas Sanford
Criminal Numbers 31582-00, 02025194-00, -01, -02 & 03022635-00
Page 3 of 4

The Court **ORDERS** that the above sentences run *consecutively* to each other and all other sentences.

The Defendant shall be given credit for time spent in confinement while awaiting trial pursuant to Code § 53.1-187.

The Court *does authorize*, but does not direct, the Defendant's participation in the **Work Force and Work Release Program**. The Defendant's eligibility is to be determined by the Administrator of said programs.

The Court **ORDERED** that the balance of the restitution owed in **Criminal Numbers 22635-00, -01, -02 and 22635-00** plus any interest accrued is to be entered against the Defendant as a civil judgment and removed from the Loudoun County Circuit Court Financial Accounting System (FAS).

The remaining restitution is converted to a civil judgment in the amount of \$60.00 to the *BB&T* located at *4117 Chain Bridge Road, Fairfax, Virginia 22030*, for *Chase Credit Card Number 5489-5551-1803-8787*, in the amount of \$79.86 to the *BB&T* located at *4117 Chain Bridge Road, Fairfax, Virginia 22030*, for *Credit Card Number 0005156031463*, in the amount of \$279.95 to the *BB&T* located at *4117 Chain Bridge Road, Fairfax, Virginia 22030*, for *Chase Credit Card Number 4185-5060-0436-8150*, in the amount of \$284.65 to the *BB&T* located at *4117 Chain Bridge Road, Fairfax, Virginia 22030*, and in the amount of \$880.81 for the *Amazon Credit Card* and \$4,400.00 for the benefit of: *Kathy Weil 43319 Parlor Square, Ashburn, VA 20147*.

Commonwealth of Virginia vs. Scott Nicolas Sanford
Criminal Numbers 31582-00, 02025194-00, -01, -02 & 03022635-00
Page 4 of 4


It is further **ORDERED** that *all* additional costs of these proceedings (all of the Defendant's criminal cases), plus any Court Appointed Attorney fees that may be assessed, are converted to a civil judgment.

The Court having previously found that the Defendant was indigent, appoints **Ryan Campbell**, to represent the Defendant in this cases for any post-trial motions and any appeal.

And the Defendant is remanded to the custody of the Sheriff.

The Clerk is directed to forward a copy of this Order, forthwith, to the Office of the Commonwealth's Attorney; to counsel for the Defendant; to the Loudoun County Adult Detention Center and to the Loudoun County Circuit Court Clerk's Office, Accounting Department.

ENTERED this 29 day of ^{JULY}~~MAY~~, 2019


J. HOWE BROWN JR., JUDGE DESIGNATE

DEFENDANT IDENTIFICATION:

Alias: unknown

SSN: 227-27-8762

DOB: 09/11/1980

Sex: Male

SENTENCING SUMMARY:

TOTAL SENTENCE IMPOSED: Four (4) Years, Twenty three (23) Months and One (1) Year Post Release

TOTAL SENTENCE SUSPENDED: One (1) Year Post Release

TOTAL SENTENCE TO SERVE: **FOUR (4) YEARS AND TWENTY THREE (23) MONTHS**

* Amended to reflect the sentences are to run consecutively, not concurrently.

A COPY-TESTE

Gary M. Clemens, Clerk

By Susan Shields

Deputy Clerk

SENTENCING ORDER

VIRGINIA: IN THE CIRCUIT COURT OF LOUDOUN COUNTY

FEDERAL INFORMATION PROCESSING
STANDARDS CODE: 107Hearing Date: **March 15, 2018**Judge Designate: **J. HOWE BROWN JR.**

COMMONWEALTH OF VIRGINIA :

v. : Criminal No(s). **31582-00, 02025194-00, -01,
-02 & 03022635-00****SCOTT NICHOLAS SANFORD** :
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The pre-sentence report was received by this Court in the manner prescribed by law together with additional evidence in mitigation and extenuation, if any; the Court heard argument by counsel for the Defendant and by the attorney for the Commonwealth.

Pursuant to the provisions of Code §19.2-298.01, the Court has considered and reviewed the applicable discretionary sentencing guidelines and the guidelines worksheets. The sentencing guidelines worksheets and the written explanation of any departure from the guidelines are ordered filed as a part of the record in this case.

Commonwealth of Virginia vs. Scott Nicolas Sanford
Criminal Numbers 31582-00, 02025194-00, -01, -02 & 03022635-00
Page 2 of 4

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Further, the Court finds that the Defendant is *guilty* of violating of the terms and conditions of his supervised probation, therefore,

the Court revokes the suspension of the execution of the balance of the penitentiary sentence in **Criminal Number 02025194-00** of: **One (1) Year and Five (5) Months**, be imposed upon the Defendant, and hereto not served, be vacated and **IMPOSED** and

the Court revokes the suspension of the execution of the balance of the penitentiary sentence in **Criminal Number 02025194-01** of: **Nine (9) Months**, be imposed upon the Defendant, and hereto not served, be vacated and **IMPOSED** and

the Court revokes the suspension of the execution of the balance of the penitentiary sentence in **Criminal Number 02025194-02** of: **Two (2) Months**, be imposed upon the Defendant, and hereto not served, be vacated and **IMPOSED** and

the Court revokes the suspension of the execution of the balance of the penitentiary sentence in **Criminal Number 03022635-00** of: **Two (2) Years and Seven (7) Months**, be imposed upon the Defendant, and hereto not served, be vacated and **IMPOSED**.

Commonwealth of Virginia vs. Scott Nicolas Sanford
Criminal Numbers 31582-00, 02025194-00, -01, -02 & 03022635-00
Page 3 of 4

The Court **ORDERS** that the above sentences run *concurrently* to each other and all other sentences.

The Defendant shall be given credit for time spent in confinement while awaiting trial pursuant to Code § 53.1-187.

The Court *does authorize*, but does not direct, the Defendant's participation in the **Work Force and Work Release Program**. The Defendant's eligibility is to be determined by the Administrator of said programs.

The Court **ORDERED** that the balance of the restitution owed in **Criminal Numbers 22635-00, -01, -02 and 22635-00** plus any interest accrued is to be entered against the Defendant as a civil judgment and removed from the Loudoun County Circuit Court Financial Accounting System (FAS).

The remaining restitution is converted to a civil judgment in the amount of \$60.00 to the *BB&T* located at *4117 Chain Bridge Road, Fairfax, Virginia 22030*, for *Chase Credit Card Number 5489-5551-1803-8787*, in the amount of \$79.86 to the *BB&T* located at *4117 Chain Bridge Road, Fairfax, Virginia 22030*, for *Credit Card Number 0005156031463*, in the amount of \$279.95 to the *BB&T* located at *4117 Chain Bridge Road, Fairfax, Virginia 22030*, for *Chase Credit Card Number 4185-5060-0436-8150*, in the amount of \$284.65 to the *BB&T* located at *4117 Chain Bridge Road, Fairfax, Virginia 22030*, and in the amount of \$880.81 for the *Amazon Credit Card* and \$4,400.00 for the benefit of: *Kathy Weil 43319 Parlor Square, Ashburn, VA 20147*.

Commonwealth of Virginia vs. Scott Nicolas Sanford
Criminal Numbers 31582-00, 02025194-00, -01, -02 & 03022635-00
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The Court having previously found that the Defendant was indigent, appoints **Ryan Campbell**, to represent the Defendant in this cases for any post-trial motions and any appeal.

And the Defendant is remanded to the custody of the Sheriff.

The Clerk is directed to forward a copy of this Order, forthwith, to the Office of the Commonwealth's Attorney; to counsel for the Defendant; to the Loudoun County Adult Detention Center and to the Loudoun County Circuit Court Clerk's Office, Accounting Department.

ENTERED this 28 day of MAY, 2019


J. HOWE BROWN JR., JUDGE DESIGNATE

DEFENDANT IDENTIFICATION:

Alias: unknown

SSN: 227-27-8762

DOB: 09/11/1980

Sex: Male

SENTENCING SUMMARY:

TOTAL SENTENCE IMPOSED: Four (4) Years, Twenty three (23) Months and One (1) Year Post Release

TOTAL SENTENCE SUSPENDED: One (1) Year Post Release

TOTAL SENTENCE TO SERVE: **FOUR (4) YEARS AND TWENTY THREE (23) MONTHS**

ACOPY-TESTE

Gary M. Clemens, Clerk

By Gale Dunn 8/2/21

Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 26th day of March, 2021.

Scott Sanford,

Appellant,

against

Record No. 200740

Court of Appeals No. 1231-19-4

Commonwealth of Virginia,

Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on February 3, 2021 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Douglas B. Robelen, Clerk

By:



Deputy Clerk