VIRGINIA:

In the Court of Appeals of Virginia on **Wednesday** *the* **27th** *day of* **September, 2017.**

Leonard Burton Jones, Appellant,

against Record No. 1800-16-4
Circuit Court No. CR16-396

Commonwealth of Virginia, Appellee.

From the Circuit Court of Frederick County

Before Judges Annunziata, Clements and Haley

Counsel for the appellant has moved for leave to withdraw. The motion to withdraw is accompanied by a brief referring to the part of the record that might arguably support this appeal. A copy of this brief has been furnished to appellant with sufficient time for appellant to raise any matter that appellant chooses. Appellant filed a *pro se* supplemental petition for appeal. The Court has reviewed the petition for appeal and *pro se* petition for appeal, fully examined all of the proceedings, and determined the case to be wholly frivolous for the following reasons:

I. Appellant, by counsel, contends the trial court erred by denying his objection to statements being introduced into evidence in violation of Rule 3A:11.[1] During the Commonwealth's case in rebuttal, appellant

[1] Rule 5A:12(c)(1) requires that "[a]n exact reference to the page(s) of the transcript, written statement of facts, or record where the alleged error has been preserved in the trial court or other tribunal from which the appeal is taken shall be included with each assignment of error." Counsel did not refer to the pages of the record showing that the issue was preserved in the trial court. This Court generally "will not search the record for errors in order to interpret the appellant's contention and correct deficiencies in a [petition for appeal]." Yap v. Commonwealth, 49 Va. App. 622, 629, 643 S.E.2d 523, 526 (2007) (quoting Buchanan v. Buchanan, 14 Va. App. 53, 56, 415 S.E.2d 237, 239 (1992)). However, in this case, the Court finds that the defect was not so significant as to preclude the Court from addressing the merits. See Jay v. Commonwealth, 275 Va. 510, 520, 659 S.E.2d 311, 317 (2008) ("the Court of Appeals should . . . consider whether any failure to strictly adhere to the requirements of [the Rules of Court] is insignificant . . . ."); cf. Rules 5A:1A(a) (authorizing dismissal of appeal or "such other penalty" deemed appropriate); 5A:26 (authorizing additional dismissal remedy in appropriate cases); Moncrief v. Div. of Child Support, 60 Va. App. 721, 731, 732 S.E.2d 224, 229 (2012).

posed his objection during a series of questions pertaining to the same topic: police seizure of a rifle magazine four months prior to the instant offense. Deputy Jason Walker[2] testified that he was present when another deputy obtained the rifle magazine from appellant's home. Walker replied in the affirmative when the Commonwealth asked, "[[D]id the defendant indicate he was aware of [the rifle magazine] and had possession of it?" The Commonwealth next asked if Walker had the rifle magazine with him and if he could take it out of its packaging. At this juncture, appellant objected to the line of questioning, arguing the Commonwealth had not tendered this information during discovery. Appellant argued neither his statements nor the rifle magazine should be admitted in rebuttal. The trial court sustained the objection concerning any statements appellant made about the rifle magazine, but overruled the objection regarding the circumstances surrounding the presence of the rifle magazine in appellant's home four months prior to the rifle being found in appellant's storage unit.

The Commonwealth argues that appellant (1) did not timely object to the specific statement that came into evidence; (2) the trial court sustained his objections regarding all other statements; (3) appellant failed to ask for any corrective action; and (4) that the error, if any, was harmless. First, the Court finds that the objection was timely made.

> "The primary purpose of requiring timely and specific objections is to afford the trial judge a fair opportunity to rule intelligently on the issues presented, thus avoiding unnecessary appeals and reversals." Rodriguez v. Commonwealth, 18 Va. App. 277, 284, 443 S.E.2d 419, 424 (1994) (*en banc*) (citation omitted). Although we do not consider an issue on appeal for which no specific, contemporaneous objection was made in the trial court, see Rule 5A:18, "[i]t shall be sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objections to the action of the court and his grounds therefor." Code § 8.01-384(A).

[2] In some parts of the record, the deputy's name is stated as Jason "Walther." As the transcripts refer to him as "Walker," the deputy will be addressed herein as Walker.

Hazel v. Commonwealth, 31 Va. App. 403, 409, 524 S.E.2d 134, 137 (2000). Appellant lodged the objection in sufficient time and manner to alert the trial court to any error such that the trial court could take corrective action. Therefore, the objection was timely made.

However, the argument was not made with sufficient specificity and did not seek corrective action. In response to the objection, the trial judge and Commonwealth's attorney asserted the Commonwealth had not elicited any testimony concerning appellant's statements. Appellant failed to alert the trial court that Walker had already testified to a statement when he affirmed that appellant "indicated" he knew the rifle magazine was in the house and that he possessed it. Appellant did not ask for the response to be stricken from the record, a curative instruction, a mistrial, or any other corrective action from the trial court. When the Commonwealth asserted he had not asked about any statements, appellant's counsel responded, "That is fine." "The purpose of [Rule 5A:18] is to ensure that the trial court and opposing party are given the opportunity to intelligently address, examine, *and resolve* issues in the trial court, thus avoiding unnecessary appeals." Andrews v. Commonwealth, 37 Va. App. 479, 493, 559 S.E.2d 401, 408 (2002) (emphasis added). Appellant did not alert the trial court to the objectionable statement he now challenges on appeal. Therefore, Rule 5A:18 precludes further consideration of this assignment of error.

II. Appellant, in his *pro se* supplemental petition, raised the following assignments of error:

> (1) The trial court failed to recognize deputies invaded his residence without his consent;
>
> (2) The trial court failed to recognize deputies exercised an unreasonable search and seizure, confiscating a rifle magazine from his room without a search warrant under "non-exigent" circumstances;
>
> (3) The trial court failed to recognize a search warrant was invalid as it was not sworn out upon his person or personal property in conjunction to the storage unit lease in good standing;
>
> (4) The trial court failed to recognize no exigent circumstances existed with his storage unit or with him to warrant the storage facility owner exercising assistance to the police in the act of breaking and entering into his storage unit;

(5) The trial court failed to recognize the authorities exercised a narcotics search warrant but seized a rifle that was outside the scope of the search warrant and the rifle was not in plain sight;

(6) The trial court failed to recognize the narcotics K9s had no fundamental involvement in the initial activity of the search through appellant's personal property and his son's personal property;

(7) The trial court failed to recognize the authorities exercised an unreasonable search and seizure under the proscription of a "rummage and fishing" expedition;

(8) The trial court failed to recognize that the narcotics search warrant was not issued against his person or property, was a general warrant, and did not have any particularity;

(9) The trial court failed to recognize that the officer did not inform him of his Miranda rights;

(11) The rifle magazine was illegally confiscated from his residence and should not have been admitted at trial without compulsory process;

(12) The trial court failed to admit the incident report mentioned by Deputy Walker; and

(13) The trial court failed to bring to light the circumstances of how Deputy Walker came into possession of the rifle magazine.

Appellant failed to preserve these issues for appeal.

Rule 5A:18 provides, in pertinent part, that "[n]o 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." "One of the tenets of Virginia's jurisprudence is that trial counsel must timely object with sufficient specificity to an alleged error at trial to preserve that error for appellate review." Perry v. Commonwealth, 58 Va. App. 655, 666, 712 S.E.2d 765, 771 (2011). Rule 5A:18 requires that objections to a trial court's action or ruling be made with specificity in order to preserve an issue for appeal. See Nelson v. Commonwealth, 50 Va. App. 413, 420-21, 650 S.E.2d 562, 566 (2007). A trial court must be alerted to the precise issue to which a party objects. See Kelly v. Commonwealth, 42 Va. App. 347, 354, 592 S.E.2d 353, 356 (2004). "The purpose of this contemporaneous objection requirement is to allow the trial court a fair opportunity to resolve the issue at

trial, thereby preventing unnecessary appeals and retrials." Creamer v. Commonwealth, 64 Va. App. 185, 195, 767 S.E.2d 226, 231 (2015). "Rule 5A:18 applies to bar even constitutional claims." Ohree v. Commonwealth, 26 Va. App. 299, 308, 494 S.E.2d 484, 488 (1998).

Appellant raises all these arguments for the first time on appeal. Thus, Rule 5A:18 precludes our review of these assignments of error. Nevertheless, appellant asks this Court to consider these arguments pursuant to the ends of justice exception to the Rule. "The 'ends of justice' exception to Rule 5A:18 is 'narrow and is to be used sparingly.'" Pearce v. Commonwealth, 53 Va. App. 113, 123, 669 S.E.2d 384, 390 (2008) (quoting Bazemore v. Commonwealth, 42 Va. App. 203, 219, 590 S.E.2d 602, 609 (2004) (*en banc*)). "The record 'must affirmatively show that a miscarriage of justice has occurred, not that a miscarriage might have occurred.'" Akers v. Commonwealth, 31 Va. App. 521, 527 n.2, 525 S.E.2d 13, 16 n.2 (2000) (quoting Redman v. Commonwealth, 25 Va. App. 215, 221, 487 S.E.2d 269, 272 (1997)).

> Application of the ends of justice exception requires proof of an error that was "clear, substantial and material." Brown v. Commonwealth, 8 Va. App. 126, 132, 380 S.E.2d 8, 11 (1989). . . . Ordinarily, in the criminal context, application of the ends of justice exception is appropriate where "[the accused] was convicted for conduct that was not a criminal offense" or "the record . . . affirmatively prove[s] that an element of the offense did not occur." Id. at 221-22, 487 S.E.2d at 272-73. However, some procedures are so crucial that a court's failure to adhere to them constitutes error that is clear, substantial and material even in the absence of affirmative proof of error in the result. For example, a trial court in a criminal case has an affirmative duty properly to instruct the jury on the elements of the charged offense, even if the accused does not object or proffer a properly worded jury instruction, and the ends of justice exception permits the accused to raise this issue for the first time on appeal. See Johnson v. Commonwealth, 20 Va. App. 547, 553-54, 458 S.E.2d 599, 602 (1995) (*en banc*); see also Jimenez v. Commonwealth, 241 Va. 244, 250, 402 S.E.2d 678, 681 (1991).

Herring v. Herring, 33 Va. App. 281, 287, 532 S.E.2d 923, 927 (2000) (ellipses in original).

Appellant failed to establish a miscarriage of justice has occurred. The record supports the jury's finding that appellant was in possession of a firearm as a convicted felon. "On appeal, we will consider the evidence in the light most favorable to the Commonwealth, as it prevailed in the trial court." Whitehurst v. Commonwealth, 63 Va. App. 132, 133, 754 S.E.2d 910, 910 (2014). So viewed, the evidence adduced at trial

established that appellant told Walker that appellant's son placed the rifle in the storage unit. When Walker stated he would check the surveillance video to confirm appellant's statement, appellant conceded he himself put the rifle in the storage unit. Appellant's son testified that he and appellant went to the storage unit together, but he, not appellant, placed the rifle in the storage unit. Appellant's son stated he knew that appellant told the police that appellant put the rifle in the storage unit. The jury rejected appellant's son's testimony. "The trier of fact is not required to accept a party's evidence in its entirety, but is free to believe or disbelieve, in whole or in part, the testimony of any witness." English v. Commonwealth, 43 Va. App. 370, 371, 598 S.E.2d 322, 323 (2004) (citations omitted). "[D]etermining the credibility of the witnesses and the weight afforded the testimony of those witnesses are matters left to the trier of fact." Parham v. Commonwealth, 64 Va. App. 560, 565, 770 S.E.2d 204, 207 (2015). This Court will not disturb the jury's credibility findings. Thus, the jury convicted appellant of conduct that is a criminal offense, the Commonwealth having proved all the elements of the crime. Thus, no miscarriage of justice has occurred.

Further, the record does not demonstrate the trial court failed to exercise any procedures that adversely impacted the fairness of appellant's trial. It was appellant's duty to alert the trial court as to potential constitutional violations and trial error; the trial court need not independently "recognize" such violations or errors. Appellant had ample opportunity to present these arguments to the trial court, but failed to do so. Appellant has failed to affirmatively establish a miscarriage of justice occurred. Therefore, this Court will not apply the ends of justice exception to Rule 5A:18 and will not further consider these assignments of error.

III. Appellant, in his *pro se* supplemental petition, assignment of error 10, argues the trial court erred by allowing evidence of the rifle magazine into evidence in breach of the discovery order. "There exists no constitutional right to discovery in a criminal case in Virginia. However, Rule 3A:11 of the Rules of the Supreme Court of Virginia provides for limited pre-trial discovery by an accused in a felony case." Guba v. Commonwealth, 9 Va. App. 114, 118, 383 S.E.2d 764, 767 (1989). Rule 3A:11(b)(1) provides that the accused is entitled to discover his written, recorded, or oral statements and various written reports and tests. Rule 3A:11(b)(2) provides, in pertinent part, that

> *[u]pon written motion of an accused* a court shall order the Commonwealth's attorney to permit the accused to inspect and copy or photograph designated books, papers, documents, *tangible objects*, buildings or places, or copies or portions thereof, that are within the possession, custody, or control of the Commonwealth, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable.

(Emphasis added.) The record does not contain any such written motion by appellant seeking discovery of tangible objects in the possession of the Commonwealth that might be material to his defense. Further, the pretrial order, entered June 3, 2016, did not require the Commonwealth to tender any tangible objects, such as the rifle magazine, for preparation of the defense. Thus, because appellant did not comply with the rules of discovery, he was not entitled to the Commonwealth's disclosure of the rifle magazine pretrial. Therefore, the trial court did not err by admitting the rifle magazine into evidence.

Accordingly, we deny the petition for appeal and grant the motion for leave to withdraw. See Anders v. California, 386 U.S. 738, 744 (1967). This Court's records shall reflect that Leonard Burton Jones is now proceeding without the assistance of counsel in this matter and is representing himself on any further proceedings or appeal.

The trial court shall allow Christopher E. Collins 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.

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: 
Deputy Clerk

In The

Supreme Court Of The United States

Office Of The Clerk

Appendix (B)

Decision of State Trial Court

Appendix (B)

Decision of State Trial Court

Collins

VIRGINIA: IN THE CIRCUIT COURT OF FREDERICK COUNTY

(FIPS) CODE: 069

Hearing Date: August 19, 2016
Judge: Clifford L. "Clay" Athey, Jr.

COMMONWEALTH OF VIRGINIA

v. CRIMINAL DOCKET NO.: 16-396

LEONARD BURTON JONES
Defendant

ORDER

On the 19th day of August, 2016, came the defendant, in the custody of the Sheriff, with his Attorney, Christopher E. Collins, Esquire, the Commonwealth, by her Attorney, Ross P. Spicer, Esquire, and the duly sworn Court Reporter, pursuant to a previous Order of this Court setting this case this day for trial by felony venire.

WHEREUPON, both Counsel advised the Court that they were prepared for trial. The Court directed the Clerk to arraign the defendant and the Clerk read the indictment to the defendant and inquired as to how he did plead, to which the defendant responded "not guilty" to felony possessing or transporting a firearm after having been convicted of a violent felony in CR 16-396, as charged in the indictment.

WHEREUPON, a venire of twenty-three (23) were called, sworn and qualified according to the law. After voir dire examination by the Court and counsel, the Court struck certain panel members for cause. A list of twenty (20) panel members was submitted to counsel, without objection, and peremptory challenges were exercised alternately by the Commonwealth and by the defendant until there were twelve (12) jurors remaining, who were duly sworn and charged according to law.

WHEREUPON, on Motion of the Commonwealth, the Court ordered all witnesses excluded from the courtroom during the presentation of evidence.

WHEREUPON, the Attorney for the Commonwealth and Defense Counsel made opening statements to the jury and the Attorney for the Commonwealth proceeded to present evidence by the testimony of witnesses, the introduction of exhibits, and rested the Commonwealth's case. At the conclusion of the Commonwealth's evidence, Defense Counsel moved the Court to strike the Commonwealth's evidence.

WHEREUPON, Counsel for the defendant presented evidence by the testimony of a witness and rested the defendant's case. The Attorney for the Commonwealth then presented rebuttal evidence by the testimony of witnesses and rested her case.

WHEREUPON, the jury was excused from the Courtroom and the Court and counsel prepared jury instructions. When the jury returned to the Courtroom, the instructions were read in open Court. After hearing closing argument of counsel, the jury retired to the jury room to consider its verdict.

WHEREUPON, after thorough deliberation, the jury returned to the Courtroom and, in response to the inquiry of the Court, the Foreperson of the jury indicated that the jury had reached a verdict. The Foreperson of the jury handed the verdict to the Clerk, who read it as follows:

"We the jury, find the defendant guilty of possessing or transporting a firearm after having been convicted of a violent felony, as charged in the indictment.

/s/ Robynann Martin 08/19/2015
Foreperson (Date)"

WHEREUPON, there being no objection to the form of the verdict, the verdicts were recorded.

WHEREUPON, the case proceeded to the penalty phase. The Commonwealth presented evidence by the introduction of an exhibit. Counsel for defendant presented no evidence. The jury was excused from the Courtroom while the Court and counsel prepared jury instructions regarding sentencing. When the jury returned to the Courtroom, the instructions were read in open Court. After hearing closing argument of counsel, the jury retired to the jury room to consider its verdict regarding sentencing.

WHEREUPON, after thorough deliberation, the jury returned to the Courtroom and, in response to the inquiry of the Court, the Foreperson of the jury indicated that the jury had reached a verdict as to the sentences in this case. The Foreperson of the jury handed the verdict to the Clerk, who read it as follows:

"We the jury, having found the defendant guilty of felony possessing or transporting a firearm after having been convicted of a violent felony, fix his punishment at: five (5) years.

/s/ Robynann Martin 08/19/2015
Foreperson (Date)"

WHEREUPON, there being no objection to the form of the verdict, said verdict was recorded and the jury was excused from further service on this day.

On this day, the defendant was found guilty of the following offense:

CASE NUMBER	OFFENSE DESCRIPTION & INDICATOR (F/M)	OFFENSE DATE	VA. CODE SECTION
CR 16-396	(F) Possessing or Transporting a Firearm after Having Been Convicted of a Violent Felony, (WPN-5296-F6)	06/25/2015	18.2-308.2

WHEREUPON, the defendant waived a pre-sentence investigation and advised the Court he was prepared for sentencing. Pursuant to the provisions of Virginia Code Section 19.2-298.01, the Court has reviewed and considered 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 these cases.

No further evidence was presented nor was argument of counsel heard by the Court.

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 now be pronounced. The defendant said nothing in delay of sentencing.

The Court **SENTENCES** the defendant, pursuant to the plea agreement, to:
Five (5) years in the state penitentiary, of which all five (5) years are mandatory minimum, for felony possessing or transporting a firearm after having been convicted of a violent felony in CR 16-396. The total sentence imposed is five (5) years.

Costs. The defendant shall pay Court costs assessed against him to the Frederick County Circuit Court Clerk's Office.

Credit for time served. The defendant shall be given credit for time spent in confinement while awaiting this hearing, pursuant to Virginia Code Section 53.1-187.

Active Incarceration: If active incarceration is imposed, as part of the condition of the suspended sentence, the defendant shall comply with rules and regulations of any penal facility where defendant is incarcerated and the defendant shall violate no criminal laws of Virginia or any other jurisdiction while incarcerated.

WHEREUPON, the defendant is remanded into the custody of the Sheriff for service of the sentence imposed.

9/16/16
DATE

ENTER: _____
JUDGE

DEFENDANT IDENTIFICATION:
SS#: 002-36-2162 DOB: 02/20/1954 SEX: Male

SENTENCING SUMMARY:
Sentence imposed: Five (5) Years, Mandatory Minimum.
Sentence suspended: 0

Copy Collins, ga'l 9-21-16

In The

Supreme Court Of The United States

Office Of The Clerk

Appendix (C)

Decision of State Supreme Court Denying Review

Appendix (C)

Decision of State Supreme Court Denying Review

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 20th day of July, 2018.

Leonard Burton Jones, Appellant,

against Record No. 171583
Court of Appeals No. 1800-16-4

Commonwealth of Virginia, Appellee.

From the Court of Appeals of Virginia

Finding that the appeal was not perfected in the manner provided by law because the petition for appeal does not contain assignments of error as required by Rule 5:17(c)(1)(i), the Court dismisses the petition filed in the above-styled case.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: Deputy Clerk