

# COURT OF APPEALS OF VIRGINIA

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**Record No. 0476-25-1**

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JOHN ANTONIO FENNEL

v.

COMMONWEALTH OF VIRGINIA

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Present: Judges O'Brien, Chaney and Raphael

Argued at Williamsburg, Virginia

Opinion Issued October 13, 2026

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**FROM THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH**

Afshin Farashahi, Judge

Brett P. Blobaum, Senior Appellate Attorney (Virginia Indigent Defense Commission, on briefs), for appellant.

Andrew T. Hull, Assistant Attorney General (Jason S. Miyares, Attorney General; Jay Jones,<sup>1</sup> Attorney General, on briefs), for appellee.

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**PUBLISHED OPINION BY  
JUDGE STUART A. RAPHAEL**

Appealing the revocation of his suspended sentence, John Antonio Fennell contends that the trial court erred by imposing a seven-day active sentence for a second technical probation violation. He argues that the trial court committed an error of law when it interpreted Code § 19.2-306.1(C) to mandate the imposition of at least some jail time. But Fennell failed to raise that argument in the trial court, as required by Rule 5A:18. That omission normally forfeits the appellant's ability to raise the issue for the first time on appeal when, as here, the appellant does not argue for a "good cause" or "ends of justice" exception.

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<sup>1</sup> Jay C. Jones succeeded Jason S. Miyares as Attorney General on January 17, 2026.

Fennell claimed at oral argument, however, that the Commonwealth forfeited the Rule 5A:18 defect by failing to mention it in the Commonwealth’s brief. We invited supplemental briefing on that question, and the matter is now ripe for adjudication. We hold that an appellant’s failure under Rule 5A:18 to contemporaneously object in the trial court may be noticed by this Court sua sponte, and the procedural default is not forfeited by the appellee’s failure to assert it. Because Fennell failed to alert the trial court to his claim that it misinterpreted the statute, depriving the trial court of the opportunity to correct the error, Fennell’s claim is not preserved for appellate review. And because the record otherwise supports the trial court’s decision to impose a seven-day sentence, we affirm the judgment.

#### BACKGROUND<sup>2</sup>

In September 1997, John Antonio Fennell was convicted of two counts of robbery, one count of grand larceny, one count of receiving stolen property, and two counts of using a firearm in the commission of a felony. He was sentenced to 48 years’ incarceration with 23 years suspended. Fennell began supervised probation on August 7, 2019.

On multiple occasions between September 2020 and April 2022, Fennell tested positive for (or admitted to using) opiates, fentanyl, lysergic acid diethylamide (LSD), methadone, and cocaine. On April 12, 2022, Fennell’s probation officer filed a major violation report (MVR) based on Fennell’s repeated drug use. At the revocation hearing, Fennell stipulated that his positive drug screens violated the terms of his probation. The trial court revoked and resuspended Fennell’s entire sentence; he returned to supervised probation in November 2022.

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<sup>2</sup> “On appeal of the revocation of a suspended sentence, we review the evidence in the light most favorable to the Commonwealth, as the party [that] prevailed below.” *Thomas v. Commonwealth*, 77 Va. App. 613, 617 n.1 (2023) (citing *Jenkins v. Commonwealth*, 71 Va. App. 334, 339 n.2 (2019)).

In January 2023, Fennell tested positive for cocaine, fentanyl, and opioids. He completed a three-day “detox” in April 2023 and started a treatment program.<sup>3</sup> Fennell left the program in late 2023, claiming that it had been ineffective. On January 5, 2024, Fennell tested positive again for cocaine, fentanyl, and opioids, and he failed to report to a new treatment center as directed. The probation officer instructed Fennell to resume his addiction treatment and to participate in monthly check-ins. Fennell did not report for the February check-in.

In March, Fennell’s probation officer referred him to Master Center for intensive outpatient treatment. But Fennell did not report to Master Center in May or June as directed. After again failing to report in July, Fennell was referred to The November Foundation. The probation officer warned Fennell that failing to report for treatment could result in a probation violation.

In September 2024, Fennell tested positive for LSD and fentanyl, and he also failed to report to The November Foundation. He sought an assessment at another treatment center and began treatment there on October 8. Fennell’s probation officer filed an MVR the next week. Fennell was arrested for violating his probation on December 5 and released on bond the next day.

On February 4, 2025, Fennell’s probation officer filed an addendum to the October MVR, attaching a letter from Fennell’s counselor at Pinnacle. The addendum reported that since Fennell had started treatment at Pinnacle, his counselor had “not been available to confirm drug screens, methadone treatment, or his general compliance with treatment.”

At the revocation hearing on March 12, 2025, Fennell stipulated to violating his probation. The court received into evidence the October MVR and February addendum outlining

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<sup>3</sup> The MVR stated that Fennell began his 2023 treatment at the American Addiction Treatment Center (AATC), otherwise known as “Pinnacle.” But Fennell’s counsel stated at the revocation hearing that he received treatment through “BHG.”

Fennell’s various positive drug screens, failures to report to treatment, and inconclusive progress during treatment. The Commonwealth asked the court to sentence Fennell to 14 days’ incarceration—the maximum penalty under Code § 19.2-306.1(C).

Reading the statute from the bench, the court asked the Commonwealth why Fennell could not “be safely diverted from active incarceration.” The Commonwealth argued that Fennell’s underlying offenses included “two back-to-back robberies” and that Fennell’s first probation violations happened within a year of his starting supervision. It further argued that Fennell continued using drugs after his first violation, dropped out of his first drug-treatment program, and failed to report to subsequent treatment programs. In sum, having his suspended time revoked and resuspended would “not have the intended effect because [Fennell] . . . was continuing to use drugs.”

For his part, Fennell asserted that he had been attending Pinnacle’s treatment program since October 2024, was “receiving medical maintenance” and therapy, and had a job pouring concrete. His attorney posited that sentencing him to “any period of incarceration” would send the “wrong message” because Fennell was on the right path. Given his participation in treatment, Fennell argued that the court could not make the statutory finding that he could not “be safely diverted from active incarceration.” He asked the court to revoke and resuspend his entire sentence “with an order that he continue in the treatment that he’s doing.”

The trial judge remarked that it was his first time ruling on Code § 19.2-306.1(C) because, “typically, this is not something that’s argued.” In the judge’s experience, prosecutors and defense attorneys had “always agree[d] to 14 days if the [defendant is] in jail.”<sup>4</sup> But, the court continued, Fennell was there “on a second violation,” and despite defense counsel’s

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<sup>4</sup> Fennell was not in jail at the time of the revocation hearing. He was released on bond the day after his arrest in December 2024.

argument, “there ha[d] to be some kind of consequence.” The court acknowledged that incarceration required “a finding that [Fennell] cannot be safely diverted from active incarceration”; the court also said that “14 days is nothing.”

Then, interpreting Code § 19.2-306.1, the trial court said that the General Assembly was

asking the Court to impose some jail time as a message to the defendant that, you know, you just can’t keep going and keep violating. So first time, no jail time. Second time, *there has to be something if he cannot be safely diverted*, so that’s how I read the statute, so I think active incarceration is warranted.

(Emphasis added.) The court opined that Fennell “should get more than 14 days” but, given “the new statute,” the court imposed only 7 days’ incarceration. The court found that Fennell could not “be safely diverted from active incarceration . . . based on the current violation, the fact that this is a second violation, [and] the nature of the violation.” Fennell noted a timely appeal.

#### ANALYSIS

Fennell urges us to reverse his seven-day sentence because it was based on the trial court’s flawed interpretation of Code § 19.2-306.1(C). He also argues that the evidence failed to show that he could not be “safely diverted from active incarceration through less restrictive means.” Fennell Br. 1 (quoting Code § 19.2-306.1(C)).<sup>5</sup>

*A. Fennell failed to preserve his statutory-interpretation argument under Rule 5A:18.*

Fennell’s primary argument before this Court is that “Code § 19.2-306.1(C) never requires the imposition of active incarceration for a second technical violation,” and the trial court erred in concluding otherwise. Fennell Br. 15. He argues that “where the evidence is in

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<sup>5</sup> Although the parties represented at oral argument that Fennell has served the seven-day sentence, they agreed that this case is not moot because Fennell would be entitled to recover the \$25 jail fee if the Court vacates the sentence. *See Matheson v. Commonwealth*, 86 Va. App. 201, 212 (2025).

equipoise as to the viability of a safe diversion, a trial court is not authorized to impose active incarceration.” *Id.* at 17.

Code § 19.2-306.1(C) “limits the sentence a court may impose for first and second technical violations.” *Heart v. Commonwealth*, 75 Va. App. 453, 457 (2022). No “term of active incarceration” may be imposed for “a first technical violation.” Code § 19.2-306.1(C). There is also “a statutory presumption against the imposition of a term of active incarceration following a probationer’s second technical violation.” *Commonwealth v. Canales*, 304 Va. 200, 211 (2025). A trial “court may only impose up to 14 days of active incarceration based on a second technical violation ‘if the court finds, by a preponderance of the evidence, that the defendant . . . cannot be safely diverted from active incarceration through less restrictive means.’” *Id.* at 211-12 (alteration in original) (quoting Code § 19.2-306.1(C)).

The trial court concluded here, however, that the General Assembly had directed it to “impose some jail time as a message” to Fennell that he “can’t keep going and keep violating.” The court read the statute to require an active sentence if Fennell could not “be safely diverted.”

Fennell argues that the trial court’s authority to impose active time for a second technical violation under Code § 19.2-306.1(C) is permissive *even if* the court finds that a defendant cannot be safely diverted from active incarceration through less restrictive means. *See* Code § 19.2-306.1(C) (“However, if the court finds, by a preponderance of the evidence, that the defendant committed a second technical violation and he cannot be safely diverted from active incarceration . . . the court *may* impose not more than 14 days of active incarceration for a second technical violation.” (emphasis added)). Indeed, the General Assembly’s use of the word “may” in Code § 19.2-306.1(C) “presupposes that the [trial court] also ‘may not’” impose active time on a second technical violation. *See Wal-Mart Stores E., LP v. State Corp. Comm’n*, 299 Va. 57, 70 (2020) (discussing the use of “may” versus “shall”).

Even so, Fennell failed to raise that argument below, which deprived the trial court of the chance to correct its error. Fennell’s counsel instead argued that imposing an active sentence would “send[] the wrong message” because he was “now on the right path.” Fennell also argued that the evidence was insufficient for the court to find “by a preponderance that he can’t be safely diverted from active incarceration.” Those arguments do not encompass the one that Fennell raises here, which is that the court committed legal error by interpreting Code § 19.2-306.1(C) to mandate “active incarceration for a second technical violation” upon a finding that the defendant cannot be safely diverted. Fennell Br. 14.

“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.” Rule 5A:18. “The purpose of [this] contemporaneous objection rule is to alert opposing counsel to the issue and to provide the trial court an opportunity to intelligently rule on the issue.” *Commonwealth v. Carolino*, 303 Va. 399, 409 (2024). Virginia’s “[p]rocedural-default principles require that the argument asserted on appeal be the same as the contemporaneous argument at trial.” *Id.* (quoting *Bethea v. Commonwealth*, 297 Va. 730, 743 (2019)).

Fennell’s trial counsel did not speak up when the trial court said that the statute mandated an active sentence for a second technical violation. Nor did he object when the trial court ordered Fennell to serve the seven-day sentence. Fennell also did not ask in his opening brief to invoke the “good cause” or “ends of justice” exceptions under Rule 5A:18, and “we will not sua sponte raise them on his behalf.” *Hammer v. Commonwealth*, 74 Va. App. 225, 236-37 (2022) (quoting *Jones v. Commonwealth*, 293 Va. 29, 39 n.5 (2017)). So Fennell failed to preserve his primary argument on appeal.

*B. The Commonwealth did not forfeit the Rule 5A:18 defect.*

Because the Commonwealth had not raised the Rule 5A:18 problem on brief, we alerted the parties to be ready at oral argument to address it. During oral argument, Fennell contended that the Commonwealth had forfeited the argument by failing to assert it in the Commonwealth's brief. The Commonwealth disagreed. At our invitation, the parties filed supplemental briefs on whether an appellee may forfeit a procedural default under Rule 5A:18.

We agree with the Commonwealth that a Virginia appellate court properly raises sua sponte the appellant's failure to preserve an objection in the trial court. The appellant's procedural default is not cured simply because the appellee's brief failed to mention it. This conclusion flows from multiple considerations.

First, the contemporaneous-objection requirement in Rules 5A:18 and 5:25 is unambiguous and self-executing: "*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." (Emphases added.) In other words, an unpreserved objection *will not be considered*. There are only two exceptions, one for "good cause" and the other "to attain the ends of justice." There is no third exception for when the appellee overlooks it.

Second, our appellate courts have repeatedly rejected the idea that the appellee forfeits the contemporaneous-objection requirement by failing to mention it. In *Buck v. Commonwealth*, 247 Va. 449 (1994), the Court found that the appellant failed to preserve the error for review despite that the Commonwealth had not raised the preservation problem in the Court of Appeals. *Id.* at 453. Then-Justice Hassell dissented on the ground that the Commonwealth was playing "fast and loose" by asserting the "procedural bar argument for the first time in [the Supreme] Court, after Buck's appeal had been awarded." *Id.* at 456. But the rest of the Court saw "no

reason why our rule of appellate procedure that precludes a party from raising on appeal an issue which was not raised at the trial level, Rule 5:25, should not be applied in this case.” *Id.* at 453.

Similarly, our Court invoked Rule 5A:18 to affirm the trial court’s judgment in *Lee v. Lee*, 12 Va. App. 512, 514-15 (1991) (en banc), over the dissent of three judges that the appellee had “not asserted that Rule 5A:18 bar[red] our merit review of the issues,” *id.* at 518 (Koontz, C.J., dissenting). The dissent complained that “the majority of the panel, and now the majority of the court, *sua sponte* assert[ed] [the] procedural bar.” *Id.* Since that ruling 35 years ago in *Lee*, our Court has “regularly [found] that appellants have defaulted an issue by failing to have contemporaneously objected in the trial court, even when the appellee failed to point out the omission.” *C&A Sci. Co. v. Chenhua Yu*, 88 Va. App. 565, 587 n.9 (2026). Doing so does not offend the party-presentation principle. In *C&A*, we listed our *sua sponte* enforcement of the contemporaneous-objection requirement as one of several circumstances “in which a modest initiating role for a court is appropriate.” *Id.* at 587 & n.9 (quoting *United States v. Sineneng-Smith*, 590 U.S. 371, 375 (2020)).

Our Supreme Court also explicitly rejected the forfeiture idea in *Durham v. Commonwealth*, 303 Va. 310 (2024). The Supreme Court noted that when the case was before our Court, the dissenting judge thought that the Commonwealth had forfeited the procedural default because “the Commonwealth had not raised the Rule 5A:18 bar.” *Id.* at 322 n.2. The dissenting judge in *Durham* had relied on dictum in *Maust v. Commonwealth*, 77 Va. App. 687, 699 n.5 (2023) (en banc), where we said in passing that the appellant had failed to raise one of its arguments in the trial court, but the Commonwealth had “not argued” that the point was waived under Rule 5A:18. *See Durham v. Commonwealth*, No. 0650-22-1, slip op. at 21 n.14, 2023 Va. App. LEXIS 477, at \*28 n.14 (July 25, 2023) (Lorish, J., dissenting) (quoting *Maust*, 77 Va. App. at 699 n.5), *aff’d*, 303 Va. 310 (2024). The Supreme Court specifically rejected that

argument, however, making clear that an appellant’s procedural default is not excused by the appellee’s failure to affirmatively raise it:

Considering that one purpose of [the] contemporaneous objection rules is to protect the deliberative processes of trial courts by limiting the grounds of reversal to arguments actually raised, our longstanding and consistent interpretation and application of Rule 5A:18 and Rule 5:25 have allowed appellate courts the discretion to invoke the contemporaneous objection bar *even when a litigant has not*.

*Durham*, 303 Va. at 322 n.2 (emphasis added).<sup>6</sup>

Third, affirming a judgment on the ground that the appellant failed to preserve the error is implicit in the right-for-the-wrong-reason doctrine, which is sometimes “more accurately” called the right-for-a-different-reason doctrine. *Spinner v. Commonwealth*, 297 Va. 384, 391 (2019). “[I]t is the settled rule that how[ever] erroneous . . . may be the reasons of the court for its judgment upon the face of the judgment itself, if the judgment be right, it will not be disturbed on account of the reasons.” *Perry v. Commonwealth*, 280 Va. 572, 579 (2010) (second and third alterations in original) (quoting *Schultz v. Schultz*, 51 Va. (10 Gratt.) 358, 384 (1853)). That “doctrine has been a part of the law of Virginia for well over a century.” *Spinner*, 297 Va. at 391 (citing *Schultz*, 51 Va. at 384). If “there was no error in the *judgment* of the [lower] court, [then] the same should be affirmed . . . *whatever* may have been the reasons which led the [lower] court to pronounce it.” *Schultz*, 51 Va. at 383 (emphases added).

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<sup>6</sup> The Supreme Court reached a similar conclusion in *Carolino*, 303 Va. at 408, reversing our 9-7 decision in *Carolino v. Commonwealth*, 79 Va. App. 170 (2023) (en banc). The seven dissenting Court of Appeals judges—whose view was vindicated in the Supreme Court—would have defaulted the appellant’s argument under Rule 5A:18. *See Carolino*, 79 Va. App. at 206, 208 (Fulton, J., dissenting). The majority, by contrast, found the error adequately preserved, particularly since the Commonwealth had failed to argue waiver until after our Court had granted the petition for rehearing en banc. *Id.* at 203. In reversing our decision, the Supreme Court agreed with the dissenting judges on our Court that the error had not been preserved; the Supreme Court did not express any support for the idea that an appellant’s procedural default is forfeited when the Commonwealth fails to mention it. 303 Va. at 410.

Consistent with that longstanding principle, the Supreme Court in *Perry* overruled earlier precedents that had erroneously required the appellee to have actually raised the alternative ground in the trial court. 280 Va. at 580 (“Failure to make the argument before the trial court is not the proper focus of the right result for the wrong reason doctrine. Consideration of the facts in the record and whether additional factual presentation is necessary to resolve the newly[] advanced reason is the proper focus of the application of the doctrine.”). *Perry* thus corrected the earlier “misstep.” *Banks v. Commonwealth*, 280 Va. 612, 617 (2010).

Fourth, the contemporaneous-objection requirement protects important interests beyond those of the appellee alone. The rule’s purpose is not only “to alert opposing counsel to the issue” but also “to provide the trial court an opportunity to intelligently rule on the issue.” *Carolino*, 303 Va. at 409. The rule, in other words, “protect[s] the deliberative processes of trial courts.” *Durham*, 303 Va. at 322 n.2. The objection “must be made . . . at a point in the proceeding when the trial court is in a position, not only to consider the asserted error, but also to rectify the effect of the asserted error.” *Scialdone v. Commonwealth*, 279 Va. 422, 437 (2010).

While our dissenting colleague insists that “[t]he circuit court here had an opportunity to consider the statutory issue,” which served as “the legal premise” for the sentence it imposed, she overlooks that the trial court could have easily corrected its misreading of the statute had the legal error been mentioned below. Fennell’s counsel might have said, “Judge, you’re misreading the statute to mandate a jail sentence not to exceed 14 days because the statute says *may*, not *must* or *shall*. You don’t have to impose jail time even if you find that the defendant cannot be safely diverted.” The judge could have then corrected his legal mistake. After all, he candidly acknowledged that this was his “first time” interpreting the statute. The judge might have responded, “Yes, counsel, I see you’re right.” Perhaps the judge would then have said, “But I still think that seven days’ jail time is warranted here.” Or perhaps he would have imposed no

time at all. We will never know because Fennell’s counsel failed to alert the trial judge to the legal error.

“[I]t is unfair to reverse the trial court for an error which was not called to its attention in time for it to take corrective action.” *Lee*, 12 Va. App. at 514. “The consistent application of [this rule] advances the Rule’s purpose of avoiding unnecessary reversals and retrials.” *Townsend v. Commonwealth*, 270 Va. 325, 333 (2005). It would thwart those interests if an appellate court ignored the contemporaneous-objection requirement whenever the appellee failed to mention it.

Fifth, we reject the softer alternative advocated by Fennell that we have the *discretion* to reverse on the merits of an argument that was not raised below. Relying on *Durham*, Fennell argues that “Rule 5A:18 and Rule 5:25 have *allowed* appellate courts the *discretion* to invoke the contemporaneous objection bar even when a litigant has not.” Fennell Supp. Br. 6 (quoting *Durham*, 303 Va. at 322 n.2). Fennell argues that we should likewise exercise our discretion *not* to invoke the procedural default when the Commonwealth has overlooked it and the trial court’s legal error is clear. Our dissenting colleague adopts that position as well.

But a closer reading of *Durham* shows that the Court was discussing discretion in the context of invoking the procedural bar as *an alternative ground for affirmance*, not the discretion to ignore the procedural bar *by reversing on a ground that was not preserved*. Because the Court found that the defendant’s motion to suppress was properly denied on the merits, the Court elected not to rely on the defendant’s failure to preserve the argument in the trial court. *Durham*, 303 Va. at 322-23 & n.2. The Court explained that, “[a]lthough we have the discretion do so here, we decline to resolve the case on th[e] basis [of the procedural bar] because we conclude that . . . addressing the merits in this instance is the best way to resolve the issue.” *Id.* at 322 n.2. *Durham* thus applied the principle that “in cases where the ability of the Court to review an issue

on appeal is in doubt, we may ‘assume without deciding’ that the issue can be reviewed provided that this permits us to resolve the appeal on the best and narrowest grounds.” *McGinnis v. Commonwealth*, 296 Va. 489, 501 (2018).

It is only in the context of affirming on other grounds that our appellate courts have regularly invoked the discretion *not* to rely on a procedural default under Rule 5A:18. *E.g.*, *Antigone v. Taustin*, 88 Va. App. 56, 81 n.11 (2026) (“[W]e assume without deciding that [appellants] obtained a ruling on this question for the purposes of preservation because the trial court did not err as alleged.” (citing *McGinnis*, 296 Va. at 501)). To assume without deciding that an issue is preserved when *affirming* on the merits is the “best and narrowest grounds,” *McGinnis*, 296 Va. at 501, is a far cry from *reversing* on the merits of an argument not raised below. It is hard to see how reversing based on an unpreserved argument could ever be the “best and narrowest” ground for decision. Indeed, Fennell has not cited *any* published case where our appellate courts invoked the discretion not to rely on a procedural bar and then reversed the trial court on the merits of the unpreserved argument. The dissent has not come up with a published case either. Nor could we find one.

Sixth, to resolve this case, we need not (and therefore do not) foreclose the possibility that our appellate courts, in an extraordinary case, might reverse a trial court’s judgment based on an unpreserved argument. Even assuming that possibility, however, this case does not present an extraordinary or compelling reason to ignore the Rule 5A:18 default. What happened here is a run-of-the-mill procedural default that is difficult to distinguish from the myriad other cases in which we have sua sponte declined to reach the unpreserved issues.

Seventh, we think it unwise to permit unbridled judicial discretion to ignore an appellant’s Rule 5A:18 violation whenever the appellee has overlooked it. Our dissenting colleague offers no limiting principle to constrain our discretion. She would not require

extraordinary or compelling circumstances; apparently, each three-judge panel would decide for itself whether to enforce the default. We understand the impulse to correct a clear error by the trial court. But giving ourselves vast discretion to ignore a Rule 5A:18 default whenever the appellee fails to notice it, and then reversing on an unpreserved ground that the trial court never had the chance to consider, would amount to whimsical judicial review. The safer course, supported by decades of precedent, is to follow the Supreme Court’s admonition that the contemporaneous-objection rule should be “consistently applied.” *Townsend*, 270 Va. at 333.

Eighth, we disagree with the dissent that our approach here is “unnecessarily asymmetrical”; that asymmetry is baked into the rules governing appellate review. The dissent acknowledges (as it must) that the preservation obligations of an appellant are greater than those of an appellee. Indeed, “the procedural default principles of Rule 5A:18 apply only to grounds asserted as a ‘basis for reversal’ of the trial court’s judgment.” *Blackman v. Commonwealth*, 45 Va. App. 633, 642 (2005). That “disparity in treatment under Rule 5A:18 between appellants and appellees stems from the presumption of correctness of trial court rulings and the corresponding burden on appellants to rebut that presumption.” *Id.* at 643 (footnotes omitted).

Ninth, we likewise reject Fennell’s claim that the contemporaneous-objection requirement is forfeited when not asserted by the appellee on the ground that “Rule 5A:18 is not jurisdictional,” so the appellee’s failure to invoke the procedural bar should be treated as forfeiting it. That exact argument was rejected by the Supreme Court in *Durham*. See 303 Va. at 322 n.2. Describing Rule 5A:18 as a mandatory-claim-processing rule, the dissenting Court of Appeals judge in *Durham* cited federal caselaw to argue that, “[w]hen a party has waived reliance on Rule 5A:18, this Court should not raise it sua sponte absent a ‘threat[ to] the judiciary’s institutional interests to such an extent that intervening in the adversarial process by raising a forfeited or waived’ rule is necessary.” *Durham*, slip op. at 21 n.14, 2023 Va. App.

LEXIS 477, at \*28 n.14 (Lorish, J., dissenting) (second alteration in original) (quoting *United States v. Oliver*, 878 F.3d 120, 128 (4th Cir. 2017)). Our Supreme Court disagreed, calling out the dissenting judge’s view and rejecting it, stating that appellate courts may “invoke the contemporaneous objection bar even when a litigant has not.” *Durham*, 303 Va. at 322 n.2.

As *Durham* shows, the federal approach to claim-preservation is different from ours. Federal cases distinguish between (1) jurisdictional rules that are not waivable, and (2) mandatory-claim-processing rules that are.<sup>7</sup> The United States Supreme Court has said that a mandatory claim-processing rule that is not asserted by the party it benefits will not be the basis for affirming on that alternative ground. *See Cameron v. EMW Women’s Surgical Ctr.*, 595 U.S. 267, 275 (2022). “Such rules are not jurisdictional, and if a non-jurisdictional argument was not raised below, [federal courts] generally will not consider it as an alternative ground for affirmance.” *Id.*; *see also Fort Bend Cnty. v. Davis*, 587 U.S. 541, 549 (2019) (“But an objection based on a mandatory claim-processing rule may be forfeited ‘if the party asserting the rule waits too long to raise the point.’” (quoting *Eberhart v. United States*, 546 U.S. 12, 15 (2005) (per curiam))).

The federal version of the right-for-the-wrong-reason doctrine also differs from ours. It generally requires the appellee to have raised the issue below, except in “exceptional cases.” *Contrast Yeager v. United States*, 557 U.S. 110, 126 (2009) (“We recognize the Government’s right, as the prevailing party in the Court of Appeals, to ‘defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered

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<sup>7</sup> Compare *Bowles v. Russell*, 551 U.S. 205, 213 (2007) (holding that the failure to file the notice of appeal within the statutory deadline was jurisdictional), with *Hamer v. Neighborhood Hous. Servs.*, 583 U.S. 17, 20 (2017) (holding that a time extension for a notice of appeal that exceeded the 30 days allowed under Federal Rule of Appellate Procedure 4(a)(5)(C) was a mandatory-claim-processing rule that was waived by the opposing party who did not object to the extension until raising it for the first time on appeal).

by the District Court or the Court of Appeals.” (emphasis added) (quoting *Washington v. Confederated Bands & Tribes of Yakima Nation*, 439 U.S. 463, 476 n.20 (1979))), with *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 39 (1989) (“Although ‘we could consider grounds supporting [the] judgment different from those on which the Court of Appeals rested its decision,’ ‘where the ground presented here has not been raised below we exercise this authority ‘only in exceptional cases.’” (alteration in original) (quoting *Heckler v. Campbell*, 461 U.S. 458, 468-69 n.12 (1983))).

Virginia’s contemporaneous-objection requirement, by contrast, does not distinguish between exceptional cases and ordinary ones; the rule is one size fits all. “*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.” Rules 5A:18, 5:25 (emphasis added). *Durham* rejected the idea that the contemporaneous-objection requirement is a mere mandatory-claim-processing rule that is waived if not asserted by the appellee. 303 Va. at 322 n.2. And *Perry* and *Banks* rejected the idea that an appellate court may not affirm based on the correct reason if that reason had not been raised by the appellee in the trial court. *Perry*, 280 Va. at 580; *Banks*, 280 Va. at 617.

We also note the practical difficulties that would arise if the contemporaneous-objection requirement were excused whenever the appellee ignored it. We frequently consider appeals in which the appellant raises new arguments in violation of Rule 5A:18 and the appellee either does not file a brief or, as in this case, overlooks the procedural default. If the contemporaneous-objection requirement were simply a mandatory-claim-processing rule that is forfeited whenever missed by the appellee, we could regularly reverse on grounds raised for the first time on appeal. That is not our role. “Appellate courts are courts of review, not first view.” *Commonwealth v. Holland*, 304 Va. 34, 38 (2025).

Finally, in reaffirming here what has been our longstanding practice, we have considered the outlier scenario. Suppose we confront a case in which the benefit of protecting the deliberative process of the trial court by invoking the contemporaneous-objection requirement sua sponte is substantially outweighed by the peril of affirming a judgment that is clearly wrong and would result in a manifest injustice. Shouldn't appellate courts in that situation be allowed to excuse the procedural default? Of course they should. And that scenario is already governed by the good-cause and ends-of-justice exceptions in Rules 5A:18 and 5:25. For instance, “[w]hether the ends of justice provision should be applied involves two questions: (1) whether there is error as contended by the appellant; and (2) whether the failure to apply the ends of justice provision would result in a *grave injustice*.” *Gheorghiu v. Commonwealth*, 280 Va. 678, 689 (2010) (emphasis added).

Rule 5A:18 thus already contemplates outlier scenarios where forgiving the procedural default is necessary to avoid manifestly unfair results.<sup>8</sup> Even so, we have repeatedly held that the appellant waives the Rule 5A:18 exceptions by not asserting them in the “opening brief.” *E.g.*, *Fleming v. Commonwealth*, 85 Va. App. 27, 54 (2025) (“Although Rule 5A:18 has exceptions, Fleming does not invoke them in his opening brief, and we will not do so sua sponte.”). Here again, the procedural bar attaches when the “opening brief” is filed, not when the appellee’s brief

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<sup>8</sup> Our Supreme Court has also granted habeas relief in cases where the trial lawyer’s failure to contemporaneously object constituted ineffective assistance of counsel because the objection was required by settled law and the omission prejudiced the defendant. *See, e.g.*, *Jackson v. Washington*, 270 Va. 269, 277 (2005) (“The issue presented in this habeas proceeding is not whether Jackson waived an objection to being compelled to stand trial before the jury in jail clothes. Rather, the issue is whether the representation of Jackson’s counsel ‘fell below an objective standard of reasonableness’ and that counsel’s errors were ‘so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment,’ and, if so, whether that ‘deficient performance prejudiced the defense,’ meaning that ‘counsel’s errors were so serious as to deprive the defendant of a fair trial.’ Thus, the fact that counsel’s failure to object to Jackson’s appearing before the jury in jail clothes acted as a waiver of that issue on direct appeal does not preclude this habeas appeal.” (quoting *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984))).

affirmatively calls out the appellant's oversight. The procedural bar, having attached when the opening brief was filed, does not dissolve simply because the appellee failed to notice it.

*C. The record supports the trial court's finding that Fennell could not be safely diverted.*

Fennell's remaining assignment of error challenges the factual basis for the trial court's ruling that incarceration was required because he could not be safely diverted. "On appeal from a revocation proceeding, 'the trial court's "findings of fact and judgment will not be reversed unless there is a clear showing of abuse of discretion.'"" *Monroe v. Commonwealth*, 87 Va. App. 418, 428 (2026) (quoting *Jacobs v. Commonwealth*, 61 Va. App. 529, 535 (2013)). A trial court abuses "its discretion if its decision was affected by an error of law or was one with which no reasonable jurist could agree." *Id.* (quoting *Tomlin v. Commonwealth*, 74 Va. App. 392, 409 (2022)).

Fennell argues that the trial court erred by "failing to give significant weight to [his] conduct" following his arrest on the second technical violation. He highlights the fact that more than three months passed between his release on bond (December 6, 2024) and the revocation hearing (March 12, 2025), and there was "no indication[] that [he] had continued to use" drugs during that time. He thus contends that the trial court abused its discretion in finding that he could not be safely diverted from incarceration through less restrictive means.

"Criminal sentencing decisions are among the most difficult judgment calls trial judges face." *Commonwealth v. Delaune*, 302 Va. 644, 658 (2023) (quoting *Minh Duy Du v. Commonwealth*, 292 Va. 555, 564 (2016)). Though Code § 19.2-306.1 limits the sentence that may be imposed for a second technical violation, *e.g.*, *Heart*, 75 Va. App. at 457, it was within the trial "court's purview to weigh [the] mitigating factors" that Fennell advocated, *Burford v. Commonwealth*, 78 Va. App. 170, 185 (2023). Despite his progress in the three months leading up to the second revocation hearing, the evidence from that hearing also showed that Fennell:

- had a positive drug screen in January 2023;
- started participating in addiction treatment in April 2023, but ended that treatment prematurely in late 2023;
- had a positive drug screen in January 2024;
- failed to report for treatment in January, February, and May 2024;
- failed to report to a new treatment center in June 2024;
- failed to report for treatment in July 2024;
- failed to report to a new treatment center in September 2024; and
- had a positive drug screen in September 2024.

And according to the February 2025 addendum to the October MVR, Fennell’s counselor had not been able to confirm Fennell’s “drug screens, Methadone treatment, or his general compliance with treatment.”

We cannot say on this record that the trial court erred in finding that Fennell could not be safely diverted from incarceration through less restrictive means. Fennell repeatedly defied his probation officer’s orders to participate in addiction treatment. And he continued to test positive for drugs after his first revocation. Even crediting that Fennell was in treatment at the time of the revocation hearing, his progress was inconclusive. After finding that Fennell could not be safely diverted, the court sentenced him to seven days’ incarceration, well within the maximum penalty prescribed by Code § 19.2-306.1(C) for a second technical violation.

#### CONCLUSION

Fennell’s primary argument—that Code § 19.2-306.1(C) never mandates incarceration—was not raised below and is therefore defaulted under Rule 5A:18. The Commonwealth did not forfeit that procedural default by failing to raise it on brief. And the evidence sufficed for the trial court to find that Fennell could not be safely diverted from incarceration by less restrictive

means, as Fennell repeatedly defied orders to participate in drug treatment and continued using drugs following his first revocation. So there is no basis to disturb the judgment.

*Affirmed.*

Chaney, J., dissenting.

This appeal presents an error of law that the majority does not defend and declines to correct on a procedural ground the Commonwealth did not raise in its merits brief. The circuit court read Code § 19.2-306.1(C) to require some active incarceration once it found that Fennell could not be safely diverted through less restrictive means. In the court's words—"Second time, there has to be something if he cannot be safely diverted, so that's how I read the statute, so I think active incarceration is warranted." R. 100. The statute does not require that result. It provides that the court "may impose not more than 14 days." Code § 19.2-306.1(C). The statute and the circuit court's finding make active incarceration available; neither makes it mandatory.

The majority does not say otherwise. It agrees that the General Assembly's use of "may" presupposes that a circuit court also "may not" impose active incarceration. Maj. Op. at 7. It says that Fennell's failure to raise the point below "deprived the trial court of the chance to correct its error," and it describes what occurred as the circuit court's "misreading of the statute" and as "his legal mistake." Maj. Op. at 7, 11-12. Yet it leaves the error uncorrected, holding that Fennell did not preserve the distinction between what subsection (C) permits and what it requires. Maj. Op. at 7-8. At the same time, although the Commonwealth omitted Rule 5A:18 from its merits brief and defended the sentence on the merits, this Court raised preservation sua sponte and now holds, in a published opinion, that the Commonwealth's omission does not preclude reliance on the procedural bar.

The preservation inquiry under Rule 5A:18 depends on whether Fennell sufficiently made his legal position known to the circuit court while the court remained able both "to consider the asserted error" and "to rectify the effect of the asserted error." *See* Code § 8.01-384(A); *Brown v. Commonwealth*, 279 Va. 210, 217 (2010); *Scialdone v. Commonwealth*,

279 Va. 422, 437 (2010). If he did, counsel was not required to restate the same position after the court ruled merely to preserve it for appeal.

I would hold that Fennell preserved his statutory interpretation argument, that Code § 19.2-306.1(C) leaves active incarceration discretionary after the requisite findings, and that the circuit court abused its discretion by treating some incarceration as mandatory. I also disagree with the majority’s separate decision to invoke Rule 5A:18 sua sponte. Maj. Op. at 8-18. I, therefore, respectfully dissent.

I. Fennell preserved his statutory interpretation argument.

A. *The legal principles governing preservation*

The interpretation of Rule 5A:18 presents a question of law reviewed de novo. *Brown*, 279 Va. at 217. Rule 5A:18 provides 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 this Court to attain the ends of justice.”<sup>1</sup> “The purpose of the contemporaneous objection rule is to alert opposing counsel to the issue and to provide the trial court an opportunity to intelligently rule on the issue.” *Commonwealth v. Carolino*, 303 Va. 399, 409 (2024). An objection, therefore, “must be both specific and timely—so that the trial judge would know the particular point being made in time to do something about it.” *Bethea v. Commonwealth*, 297 Va. 730, 743 (2019) (quoting *Dickerson v. Commonwealth*, 58 Va. App. 351, 356 (2011)).

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<sup>1</sup> Rule 5A:18 was promulgated by order dated April 30, 2010, effective July 1, 2010, and last amended by order dated April 1, 2021, effective June 1, 2021. That version was operative at the March 12, 2025 revocation hearing. *Brown*, decided January 15, 2010, construed the predecessor text, which required that “the objection was stated together with the grounds therefor at the time of the ruling.” 279 Va. at 216 n.2. The amendment did not disturb the reasoning of *Brown*, which rests on Code § 8.01-384(A) and *Helms v. Manspile*, 277 Va. 1, 7 (2009).

Code § 8.01-384(A) provides that “[f]ormal exceptions to rulings or orders of the court shall be unnecessary.” A party sufficiently preserves an issue by making known to the court, when the ruling is made or sought, “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).<sup>2</sup> Accordingly, “if a trial court is aware of a litigant’s legal position and the litigant did not expressly waive such arguments, the arguments remain preserved for appeal.” *Brown*, 279 Va. at 217. Our Supreme Court cites this Court’s decision in *Lee v. Lee* for the proposition that “a litigant may satisfy Rule 5A:18 in multiple ways.” *Id.* (citing *Lee v. Lee*, 12 Va. App. 512, 515 (1991) (en banc)). *Scialdone* applies the same functional inquiry under Rule 5:25.<sup>3</sup> 279 Va. at 437. The Supreme Court explained that an objection must be made while the circuit court can both “consider the asserted error” and “rectify the effect of the asserted error.” *Id.* Applying that principle, the Court concluded: “In sum, however imprecise the vehicle by which the defendants raised their objections, their motions to stay presented their arguments squarely to the circuit court, which then ruled on them.” *Id.* at 441.

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<sup>2</sup> Code § 8.01-384(A) further provides that a party who has made an objection or motion known to the court need not “make such objection or motion again in order to preserve his right to appeal.” It also provides that arguments made through “oral argument reduced to transcript” are preserved unless “expressly withdrawn or waived.” Code § 8.01-384(A).

<sup>3</sup> Rule 5:25, the Supreme Court of Virginia’s counterpart to this Court’s Rule 5A:18, states:

No ruling of the trial court, disciplinary board, commission, or other tribunal before which the case was initially heard 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. A mere statement that the judgment or award is contrary to the law and the evidence is not sufficient to preserve the issue for appellate review.

*See, e.g., Brown*, 279 Va. at 217 (observing that Rule 5:25 is the “counterpart” to Rule 5A:18).

*Brown* also illustrates, through two different cases (Demetrious Brown and Dwayne Brown), the distinction between requesting a sentence and presenting the legal ground for that request. 279 Va. at 217-19. In Demetrious Brown’s case, the Commonwealth preserved its statutory argument because it made its legal position known and the circuit court acknowledged and addressed it. *Id.* at 217-18. In Dwayne Brown’s case, however, the Commonwealth requested the mandatory minimum without arguing that the court lacked discretion to impose a juvenile disposition; it affirmatively acknowledged that discretion. *Id.* at 218-19. Two features distinguish that case. The concession was explicit—the Commonwealth told the circuit court that “[o]bviously the Court has discretion to treat [Dwayne] as a juvenile.” *Id.* at 219. And the Court declined to carry the argument over from the earlier proceeding because Dwayne’s “was a separate proceeding in which he was represented by a different defense attorney.” *Id.* Neither feature is present here. Counsel asserted the opposite of a concession, asking the circuit court for a disposition carrying no additional active incarceration. Counsel did so in the same colloquy in which the court announced its construction, and counsel disputed whether the statutory prerequisite for active incarceration had been satisfied. R. 97-100. Fennell’s requested disposition, therefore, should not be considered alone.

The majority applies preservation principles too narrowly. Preservation does not depend on whether counsel articulated the appellate argument in precisely the same words later used on brief. It depends on whether the position asserted on appeal was sufficiently presented to give the circuit court an opportunity to understand and rule on it. *Brown*, 279 Va. at 217-18; *Scialdone*, 279 Va. at 436-37. The question is thus not whether counsel expressly contrasted Code § 19.2-306.1(C)’s use of “may” with mandatory language such as “must” or “shall.” Nor would the circuit court’s discussion of the statute, standing alone, preserve a legal argument that Fennell never presented. The relevant question remains what Fennell’s presentation made

known to the court. However, the court’s responses are relevant to that inquiry because they can demonstrate what the court understood counsel to be asking it to decide. Thus, the issue is whether counsel’s invocation of subsection (C), her request for no additional active incarceration, and the ensuing discussion sufficiently conveyed that position—not whether the court independently supplied an otherwise undisclosed ground.

The question is whether counsel’s arguments, the requested disposition, and the circuit court’s responses together made the court aware, with reasonable certainty, that Fennell maintained that Code § 19.2-306.1(C) preserved the option of imposing no additional active incarceration even after the requisite findings. In this case, the complete exchange supplied that notice—counsel requested that disposition under the statute, identified a range beginning at zero, and the court responded by explaining why it believed some incarceration was required after the prerequisite finding. R. 97-100.

*B. The circuit court’s sentencing colloquy preserved the issue.*

The majority improperly isolates defense counsel’s arguments from the court’s responses. Maj. Op. at 5-7. The complete sentencing colloquy shows that the circuit court understood both the requested disposition and the statutory question governing whether that disposition remained available.

At the March 12, 2025 revocation hearing, the circuit court itself raised Code § 19.2-306.1(C). R. 90-91. It recognized “a presumption against jail time on the second technical” violation and that a statutory prerequisite applied “before [it could] give any jail time.” R. 90. The court then read the operative language of subsection (C), including that, after the requisite findings, “the Court may impose” a limited term of active incarceration. R. 90-91. The court identified the safe-diversion requirement and asked the Commonwealth to explain what evidence showed that Fennell could not be safely diverted. R. 91.

The Commonwealth requested the maximum 14 days. R. 89. It emphasized Fennell's underlying robberies, his history of positive drug screens, his departure from an earlier treatment program, and his failures to report. R. 91-94. Defense counsel argued that "sentencing to any period of incarceration when he's now on the right path, really sends the wrong message." R. 95-96. Counsel also maintained that the court could not find, by a preponderance of the evidence, that Fennell could not safely be diverted through revocation and resuspension coupled with an order requiring continued treatment. R. 95-97. Counsel, therefore, asked the court to "revoke and resuspend, time served." R. 97.

Counsel thus did more than make a generalized plea for leniency. After arguing that incarceration would "send[] the wrong message," counsel expressly shifted to what was "more important[], under the statute," identifying revocation and resuspension with continued treatment as the less restrictive alternative, and requesting that disposition. R. 95-97. As the majority emphasizes, that argument primarily challenged whether the Commonwealth had established the safe-diversion prerequisite by a preponderance of the evidence, and counsel did not separately state that zero remained available even if the court made that finding.

However, the statutory argument and requested disposition provided the context for what followed. Just before announcing its ruling, the court asked, "Did the guidelines print out?" After a brief exchange about the guidelines, Fennell's counsel stated, "I think the Court will just need to check off that 0 to 14." The court replied, "I think I got it. Thank you." Counsel offered, "Anything I can do to help," and the court added, "I'm the one that pointed out the 306.1." R. 98. Taken by itself, that exchange could be understood as assistance with completing the revocation guidelines form, rather than presentation of the statutory argument Fennell now advances.

The exchange matters because of what preceded and followed it. Counsel had just asked the court to “revoke and resuspend, time served” under subsection (C), a disposition carrying no additional active incarceration. R. 97. The court then rejected that disposition on the ground that, under its reading of Code § 19.2-306.1(C), “there has to be something” if Fennell could not be safely diverted. R. 99-100. The request for no additional incarceration, considered with the court’s stated reason for rejecting it—not the reference to the guidelines range alone—shows the position the court understood and rejected. The court’s explanation addressed the legal availability of the requested disposition, not merely whether that disposition was appropriate on these facts.

The court’s explanation confirms that this was not merely a disagreement about the weight of the mitigating evidence. The court began by stating that, despite counsel’s argument, Fennell was before it “on a second violation,” and “there has to be some kind of consequence.” R. 99. The court explained that this was “the first time” it had been asked to rule on this portion of the statute. R. 99. After discussing the safe-diversion language, the court stated that it was looking to “what the words indicate” and reasoned that “the general assembly is asking the Court to impose some jail time as a message to the defendant that, you know, you just can’t keep going and keep violating.” R. 100. The court then summarized its interpretation: “So first time, no jail time. Second time, there has to be something if he cannot be safely diverted, so that’s how I read the statute, so I think active incarceration is warranted.” R. 100. The court thereafter imposed seven days of active incarceration. R. 100-01.

Therefore, the court’s express resolution of the statutory question, considered with counsel’s preceding argument, demonstrates that the issue of statutory interpretation of Code § 19.2-306.1(C) was sufficiently before it.

*C. Fennell’s appellate argument is not a different ground or a “different twist.”*

The majority relies on the proposition that “[p]rocedural-default principles require that the argument asserted on appeal be the same as the contemporaneous argument at trial.” Maj. Op. at 7. It concludes that counsel’s challenge to the safe-diversion finding and request for no additional incarceration “do not encompass” Fennell’s present argument because counsel never expressly corrected the court’s interpretation of “may.” At oral argument, Fennell’s appellate counsel acknowledged that trial counsel did not expressly contrast the statutory terms “may” and “shall.” That acknowledgment does not resolve whether the substance of the statutory argument was sufficiently presented. *See Brown*, 279 Va. at 217-18; *Scialdone*, 279 Va. at 441. The disagreement is not over whether the same legal ground must be presented below. It is over whether the complete exchange sufficiently presented that ground, even though counsel did not formulate it in the same words used on appeal.

*Bethea* cautions against placing “a different twist on a question that is at odds with the question presented to the trial court.” 297 Va. at 743-44. There, the defendant challenged the prosecutor’s use of a peremptory strike but did not contemporaneously assert the factual premise later advanced on appeal—that the prosecutor had mistakenly recalled what occurred during voir dire. *Id.* at 745-46. The Supreme Court observed that, had counsel made the omitted assertion, “it is likely that the court would have engaged the *Batson* challenge differently.” *Id.* at 746. Since counsel omitted that factual premise, the trial court lacked the opportunity to determine what occurred, question the relevant participants, or take corrective action while jury selection remained ongoing. *Id.* at 743-47.

*Commonwealth v. Carolino*, 303 Va. 399, similarly involved a distinct legal ground that the trial objections never presented. The defendant objected on grounds of relevance, prior bad acts or propensity, and scope of direct examination but argued on appeal that the evidence

violated the separate *McGowan* collateral-impeachment rule. *Id.* at 410-12. The Supreme Court stressed that “none of these objections would have alerted the trial court to an argument that it was necessary to apply the *McGowan* rule.” *Id.* at 410.

Unlike the omitted factual premise in *Bethea* and the distinct evidentiary rule in *Carolino*, the statutory interpretation challenged here formed the circuit court’s express basis for rejecting the requested disposition. That circumstance does not alone establish preservation. Counsel asked the circuit court for a disposition carrying no additional active incarceration, under the very provision the court had read aloud from the bench. That request carried its legal ground with it, and the court’s construction of the statute shows what the court understood counsel to be asking it to decide. The court thus had both the question and the opportunity to correct the asserted error. That is what Rule 5A:18 requires.

Here, the court expressly construed the governing provision to require incarceration in response to counsel’s request for a disposition imposing no additional active time. R. 97-100. Fennell’s appellate argument also does not rely on a new factual premise or invoke a different legal doctrine that the circuit court never considered. The issue throughout the colloquy was the operation of Code § 19.2-306.1(C) and the sentencing choices available for this second technical violation. Counsel sought no additional active incarceration under subsection (C), and the circuit court then explained why its reading of that same statute required “something” once the prerequisite finding was made. R. 97-100.

Considered together, those arguments and responses sufficiently presented the question whether the statute required some incarceration after that finding.

D. *Fennell did not need to renew the objection after the court pronounced his sentence.*

The majority also faults Fennell for failing to object again after the circuit court announced its interpretation and imposed the seven-day sentence. By then, however, the purpose

of Rule 5A:18 had already been fulfilled. Counsel had asked the circuit court to “revoke and resuspend, time served,” and the court had rejected that request as a matter of statutory interpretation. R. 97, 99-100. The objection the majority says counsel should have made—“You don’t have to impose jail time even if you find that the defendant cannot be safely diverted”—is that request in different words. Maj. Op. at 11-12. Preservation does not turn on the words counsel used. *Brown*, 279 Va. at 217-18. Code § 8.01-384(A) relieves counsel of repeating a position made known when the ruling was sought. This does not mean that Code § 8.01-384(A) eliminates Rule 5A:18’s requirement that the legal ground itself be sufficiently presented. Rather, the complete colloquy supplied that notice before the ruling.

Code § 8.01-384(A) makes formal exceptions unnecessary, and *Brown* holds that when the circuit court is aware of a litigant’s legal position and the position has not been expressly waived, the argument remains preserved. 279 Va. at 217. *Scialdone* focuses on whether the court had an opportunity to consider and rectify the asserted error. 279 Va. at 437. Here, the court had that opportunity before imposing sentence and ruled on the statutory question. Requiring counsel, after the court stated, “that’s how I read the statute,” to repeat that zero remained legally available would add a formalistic step without improving the court’s opportunity to consider or correct the asserted error.

On this record, Fennell sufficiently preserved the statutory question.

II. Code § 19.2-306.1(C) permits, but does not mandate, active incarceration for a second technical violation.

“[A] court’s interpretation of a statute is a pure question of law, reviewed de novo.” *Hughes v. Commonwealth*, 87 Va. App. 136, 154 (2026) (alteration in original) (quoting *Wallace v. MJM Golf, LLC*, 86 Va. App. 663, 675 (2026)). “[W]hen interpreting a[] . . . [statute], ‘our primary objective is to “ascertain and give effect to legislative intent,” as expressed by the language used.’” *Id.* (alterations in original) (quoting *Corzine v. Alexandria City Council*, 86

Va. App. 623, 630 (2026)). “[W]e must assume that ‘the legislature chose, with care, the words it used when it enacted the relevant statute,’” *id.* (quoting *City of Virginia Beach v. ESG Enters., Inc.*, 243 Va. 149, 153 (1992)), and “we are bound by those words as we interpret the plain language,” *id.* (quoting *Wallace*, 86 Va. App. at 676).

Code § 19.2-306.1(C) provides that “there shall be a presumption against imposing a sentence of a term of active incarceration for any second technical violation of the terms and conditions of a suspended sentence or probation.” It then provides: “However, if the court finds, by a preponderance of the evidence, that the defendant committed a second technical violation and he cannot be safely diverted from active incarceration through less restrictive means, the court may impose not more than 14 days of active incarceration for a second technical violation.” Code § 19.2-306.1(C).

Subsection (C) separates the findings necessary to make active incarceration available from the court’s ultimate sentencing choice. Our Supreme Court’s description of Code § 19.2-306.1(C) is consistent with that reading. It has explained that a circuit court “may only impose up to 14 days of active incarceration based on a second technical violation ‘if the court finds, by a preponderance of the evidence, that the defendant . . . cannot be safely diverted from active incarceration through less restrictive means.’” *Commonwealth v. Canales*, 304 Va. 200, 211-12 (2025) (alteration in original) (quoting Code § 19.2-306.1(C)). The findings, therefore, authorize consideration of incarceration; they do not require its imposition. Subsection (C) uses “may impose” in consecutive sentences. The sentence following the one just quoted provides that a court “may impose whatever sentence might have been originally imposed for a third or subsequent technical violation.” Code § 19.2-306.1(C). Our Supreme Court reads that second use as setting a range rather than a floor. *See Canales*, 304 Va. at 212. No one supposes it obliges a court to impose the maximum on a third technical violation. Reading “may impose” as

mandatory for a second technical violation but permissive for a third would give the same phrase different meanings in adjacent sentences.

The majority recognizes that the General Assembly’s use of “may” preserves a choice whether to impose active incarceration. Maj. Op. at 7. In *Wal-Mart Stores East, LP v. State Corp. Commission*, 299 Va. 57, 70 (2020), the Supreme Court explained that “[m]ay” presupposes that the Commission also ‘may not’” and declined to “repurpose ‘may’ as a polite form of ‘shall.’” See also *Bd. of Supervisors v. State Corp. Comm’n*, 292 Va. 444, 454 (2016).

The same reasoning governs Code § 19.2-306.1(C), which similarly authorizes a sentencing choice after the prescribed findings; it does not command a particular outcome. The safe-diversion finding is a condition on the court’s authority to impose incarceration. “May” identifies the discretionary authority that follows. The finding satisfies the statutory condition for considering incarceration but does not convert “may” into “shall.” Interpreting “may” to require at least one day would insert a minimum sentence the General Assembly did not enact—a construction “that amounts to holding that the General Assembly meant to add a requirement to the statute that it did not actually express.” *Canales*, 304 Va. at 213 (quoting *Jones v. Commonwealth*, 296 Va. 412, 415 (2018)).<sup>4</sup>

The contrast within subsection (C) reinforces this reasoning. In subsection (C), the General Assembly directed that “there shall be” a presumption against incarceration for a second technical violation, but provided that the court “may” impose not more than 14 days after the requisite findings. Code § 19.2-306.1(C). *Wal-Mart* characterizes the legislature’s use of “shall” and “may” within the same statute as a meaningful distinction. See 299 Va. at 70-71. Similarly, under subsection (C), the mandatory language establishes the presumption; the permissive

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<sup>4</sup> The Commonwealth acknowledges that Code § 19.2-306.1(C) “limits the period of incarceration . . . to a maximum of fourteen days and does not set a minimum.” A’ee Br. 13.

language preserves the ultimate sentencing choice. Rebutting that presumption permits what the presumption disfavors; it does not compel it. By treating incarceration as mandatory once the requisite findings were made, the circuit court converted permission to depart from the statutory presumption into an obligation to do so.

That reading also accords with *Heart v. Commonwealth*, 75 Va. App. 453, 466, 471 (2022), which recognizes that Code § 19.2-306.1 contains “specific limitations on sentencing” for technical violations and establishes a “gradual penalty scheme.” *Heart* explains that the statutory changes were intended to treat technical violations less harshly than nontechnical violations. *Id.* at 470. Subject to the statutory exceptions, a first technical violation carries no active incarceration; a second carries a presumption against active incarceration and, after the requisite findings, a maximum of 14 days; a third or subsequent technical violation permits whatever sentence could originally have been imposed. *See* Code § 19.2-306.1(C). That structure reinforces the plain text’s distinction between permitting incarceration for a second technical violation and requiring it.

The remaining question is whether the circuit court exercised its sentencing discretion with an accurate understanding of those choices.

### III. The circuit court abused its discretion by treating active incarceration as mandatory.

The fact that seven days falls below the statutory maximum does not end appellate review. *See Lawlor v. Commonwealth*, 285 Va. 187, 213 (2013) (“[T]he law often circumscribes the range of choice available to a court in the exercise of its discretion.”). In *Lawlor*, the Supreme Court explained that “a court also abuses its discretion if it inaccurately ascertains its outermost limits.” *Id.* Such an error “may occur when the court believes it lacks authority it possesses, when it believes the law requires something it does not, or when it fails to fulfill a condition precedent that the law requires.” *Id.* (citations omitted); *see LaCava v.*

*Commonwealth*, 283 Va. 465, 472 (2012) (circuit court abused its discretion by denying a motion to extend the transcript deadline on a flawed reading of the governing rule). *Lawlor* further explained—“But whether a court possesses or lacks authority, and whether it has correctly identified and fulfilled the legal prerequisites to a discretionary act, are themselves significant factors in its consideration.” 285 Va. at 213-14. Therefore, an erroneous understanding of the available sentencing choices is an abuse of discretion even when the sentence ultimately imposed falls within the numerical statutory maximum.

*A. The circuit court misinterpreted the extent of its sentencing discretion.*

The circuit court did not merely select seven days from a range it understood to include no additional active incarceration. Its explanation reveals that it considered some incarceration legally necessary once it made the safe-diversion finding.

In announcing its ruling, the court stated that because Fennell was before it “on a second violation,” “there has to be some kind of consequence.” R. 99. The competing requests clarify what the court meant by “consequence.” The Commonwealth requested 14 days of active incarceration. R. 89, 94. Fennell requested that the court “revoke and resuspend, time served,” coupled with an order requiring continued treatment. R. 97. Counsel also proposed making continued treatment with Pinnacle a special condition. R. 97. Thus, Fennell sought a disposition that imposed no additional active incarceration but included a requirement that he continue treatment. The court nevertheless stated that it could not simply tell Fennell, “Okay. You know, you’re good. Just walk out those doors.” R. 99.

The court then expressly connected its conclusion to the statutory words of Code § 19.2-306.1(C). It explained that, when discussing what the General Assembly “meant,” it was “not going beyond the words of the statute,” but was considering “what the words indicate.” R. 100. Those words, the court reasoned, showed that the General Assembly was “asking the

Court to impose some jail time as a message to the defendant.” R. 100. It then summarized its interpretation: “Second time, there has to be something if he cannot be safely diverted, so that’s how I read the statute.” R. 100.

The phrase “that’s how I read the statute” identifies the legal premise of the court’s reasoning. The court considered Fennell’s history in making the safe-diversion finding and determining the length of incarceration. However, its explanation shows that it did not understand that the decision whether to impose incarceration remained discretionary after making that finding. It instead explained that the General Assembly required “some jail time” to send a message and that, after the prerequisite finding, “there has to be something.” R. 100. The statements, therefore, describe the court’s interpretation of the statute, not simply its discretionary conclusion that seven days was appropriate on these facts.

After the requisite findings, the court could impose up to 14 days of active incarceration, but it retained the discretion to impose no additional active incarceration. *See* Code § 19.2-306.1(C). The court instead treated the range as requiring at least some incarceration. It, therefore, exercised discretion only after removing a legitimate choice the General Assembly had left available.

The court’s statements that Fennell “should get more than 14 days” and was receiving 7 rather than 14 days demonstrate that it assessed the appropriate amount of incarceration. R. 100. However, choosing 7 rather than 14 days does not establish that the court understood it could impose no additional active incarceration. A court may exercise discretion over the length of incarceration while mistakenly believing that some incarceration is legally required. *Lawlor* requires an accurate understanding of the available choices, not merely a sentence below the statutory maximum. 285 Va. at 213. Therefore, the circuit court abused its discretion.

B. *The full context does not dispel the legal error.*

The Commonwealth reads the court’s remarks about the statutory language as “critiquing the General Assembly’s drafting,” not as reflecting a mistaken belief that the court could incarcerate Fennell for several years. A’ee Br. 10. The court criticized the statutory phrase “safely diverted from active incarceration,” reasoning that the phrase implied authority to impose “several years in the penitentiary” even though subsection (C) permitted no more than 14 days. R. 100. The court immediately recognized that it lacked such authority: “Clearly, the Court does not [have that authority].” R. 100. Those remarks demonstrate the court’s awareness of the statutory ceiling. They do not establish that the court understood that imposing no additional active incarceration remained an option after the safe-diversion finding.

The Commonwealth relies on the presumption articulated in *Yarborough v. Commonwealth*, 217 Va. 971 (1977), that “[a]bsent clear evidence to the contrary in the record,” a circuit court’s judgment comes to the appellate court with a presumption that the law was correctly applied. *Id.* at 978. *Yarborough* also cautions against fixing upon “isolated statements of the trial judge taken out of the full context in which they were made.” *Id.*

This Court has applied *Yarborough* in an analogous context involving the exercise of discretion. In *May v. Commonwealth*, No. 0083-22-3, slip op. at 4, 2023 Va. App. LEXIS 49, at \*5 (Jan. 24, 2023) (Causey, J.), after quoting *Yarborough*’s presumption and its caution against relying on isolated statements, this Court concluded that the record presented “the rare case where the trial court’s statements are ‘clear evidence’ that the court incorrectly applied the law to the facts.” The trial court acknowledged that a deferred disposition was “available under certain circumstances,” but declined to consider that disposition based on its view that it should not be available for an assault and battery offense. *Id.*, slip op. at 2, 4-5, 2023 Va. App. LEXIS 49, at \*2-3, \*5-6. In holding that ruling an abuse of discretion, *May* relied on *Bruce v. Commonwealth*,

9 Va. App. 298, 302-03 (1990) (Benton, J.), where the trial judge’s comments “reflect[ed] misunderstanding of the trial judge’s role as final arbiter.” Slip op. at 5, 2023 Va. App. LEXIS 49, at \*6 (citing *Bruce*, 9 Va. App. at 303). In *Bruce*, this Court held that “[f]ailure to consider whether a jury sentence should be mitigated because of a belief that the jury sentence is inviolable is an abuse of discretion.” 9 Va. App. at 303.

Those two cases illustrate why *Yarborough* does not resolve this case. The presumption of correctness gives way when the court’s own explanation demonstrates that it excluded a legally available sentencing choice because it misunderstood the scope of its discretion.

The record must be read as a whole, including the court’s recognition of the presumption against incarceration, its reading of the words “may impose,” the completed report’s identification of a “0 to 14 days” range, and the court’s explanation of the sentence. R. 65, 90-91, 100. Those portions of the record show that the court recognized zero as an available outcome under subsection (C). They do not establish that it understood zero remained available after the safe-diversion finding. Nor did the court stop at criticizing the statutory wording. It proceeded to explain what it believed “the words indicate”—that the General Assembly was “asking the Court to impose some jail time as a message to the defendant.” R. 100. On that point, the court expressly stated that “there has to be something if he cannot be safely diverted, so that’s how I read the statute, so I think active incarceration is warranted.” R. 100. The conclusion that incarceration was “warranted” thus followed directly from the court’s stated understanding that some incarceration was required.

*Yarborough* does not carry the Commonwealth’s presumption of correctness argument. There, the Supreme Court construed the trial judge’s statements as “furnishing alternative bases, one correct and one erroneous, for his finding of defendant’s guilt,” and held that “where, as here, we can be satisfied the conviction was based on a correct application of the law, we will not

reverse the judgment, even though an incorrect theory may also have been considered by the court.” 217 Va. at 978-79.

Two features in *Yarborough* are absent here. First, the alternative bases in *Yarborough* were alternatives for the same determination—whether self-defense had been sustained—so the factual finding disposed of the defense on its own. Here the safe-diversion finding and the sentencing choice are sequential rather than alternative. The finding is a precondition to the court’s authority; by its own terms it only makes incarceration available. *See Canales*, 304 Va. at 211-12. That finding cannot provide an independent basis for the sentence because the court explicitly stated what the sentence rested on—“that’s how I read the statute, so I think active incarceration is warranted.” R. 100. Second, *Yarborough* applied its full-context caution to a fragmented record. The transcript there “contain[ed] only excerpts from the colloquy between court and counsel” and did not fully set forth either side’s argument on the law. *Yarborough*, 217 Va. at 978. Here, the entire hearing is transcribed so the court’s statements may be assessed in their full context, leaving no gaps into which regularity must be presumed. R. 88-103.

*C. The evidence supporting the safe-diversion finding does not cure the sentencing error.*

The majority separately concludes that the record supports the circuit court’s finding that Fennell could not be safely diverted through less restrictive means. Maj. Op. at 18-20. Even assuming that conclusion is correct, it does not resolve the dispositive legal error. The safe-diversion finding was a statutory prerequisite to the court’s authority to impose active incarceration. It did not compel incarceration. Once the prerequisite was satisfied, subsection (C) still provided that the court “may impose not more than 14 days.” Code § 19.2-306.1(C).

The majority describes the circuit court’s ruling as one “that incarceration was required because [Fennell] could not be safely diverted.” Maj. Op. at 18. That description captures the legal error rather than cures it. The safe-diversion finding made incarceration permissible; it did

not make incarceration required. Evidence supporting that finding, therefore, cannot establish that the court properly understood the separate discretionary choice whether to impose any active incarceration.

Thus, the evidence supporting the prerequisite finding may establish that seven days was a legally available sentence. However, it cannot establish that the court properly exercised its discretion when the court understood *some* active incarceration to be *required*. Nor can I conclude that the error “could not have affected the court’s result.” *Loan Funder LLC, Series 715 v. Farm Life, LLC*, 86 Va. App. 552, 567 (2026) (quoting *Ferrara v. Commonwealth*, 299 Va. 438, 450 (2021)); *see also* Code § 8.01-678. The court’s decision to impose 7 rather than 14 days does not establish that it would have imposed the same sentence had it understood that imposing no additional active incarceration remained an option. Its statements about the appropriate length of incarceration followed its explanation that “there has to be something if he cannot be safely diverted, so that’s how I read the statute, so I think active incarceration is warranted.” R. 100. The error concerned the lower limit of the court’s sentencing discretion, not merely its selection of a sentence within the range it believed available. The proper course is, therefore, to remand for the circuit court to exercise its discretion with an accurate understanding of the available sentencing choices.

IV. The majority’s discussion of sua sponte invocation of Rule 5A:18 extends beyond what this appeal requires.

Since I would hold that Fennell preserved his statutory interpretation argument, reversal does not depend on any discretion to overlook an established Rule 5A:18 default. Maj. Op. at 12-13. Nor does it require recognizing authority to reverse on an unpreserved argument without applying a recognized exception. *Durham v. Commonwealth*, 303 Va. 310, 322 n. 2 (2024), addresses a distinct question—whether an appellate court may invoke the contemporaneous objection bar sua sponte when the appellee has not raised it. That authority is not disputed. The

majority's treatment of that question nevertheless warrants discussion because its published reasoning extends beyond this appeal.

The procedural history warrants precision. The Commonwealth did not invoke Rule 5A:18 in its merits brief. Maj. Op. at 8. It instead answered Fennell's statutory argument on the merits and expressly acknowledged that subsection (C) "does not set a minimum." A'ee Br. 13. Before oral argument, this Court directed the parties to be prepared to address whether Fennell had preserved his statutory argument. Maj. Op. at 8.

The majority states that Fennell "claimed at oral argument" that the Commonwealth forfeited reliance on Rule 5A:18. Maj. Op. at 2. The opinion elsewhere supplies the fuller account—"Because the Commonwealth had not raised the Rule 5A:18 problem on brief, we alerted the parties to be ready at oral argument to address it." Maj. Op. at 8. This Court itself raised both procedural questions—Fennell's preservation and the effect of the Commonwealth's failure to invoke a preservation bar. Fennell answered the question this Court posed and did not independently inject the Commonwealth-forfeiture issue into the appeal.

This Court then directed supplemental briefing. In its supplemental brief, the Commonwealth maintained that the Court "may, in its discretion," rely on Rule 5A:18 despite the omission from its merits brief. A'ee Supp. Br. 2. It argued that Fennell had not preserved his statutory claim and that this Court could apply the rule to affirm the judgment. A'ee Supp. Br. 3-4. Its conclusion likewise stated that this Court "may apply Rule 5A:18 to resolve this case." A'ee Supp. Br. 7. However, the Commonwealth also defended the sentence on the merits should the Court determine that addressing the merits was the best and narrowest ground for decision. A'ee Supp. Br. 6.

Fennell, in turn, disclaimed a categorical position that the Commonwealth's omission must prevent application of Rule 5A:18 and asked the Court to decline to invoke the bar here.

Appellant Supp. Br. 6. I do not treat the Commonwealth’s alternative merits argument as a concession. Nevertheless, the Commonwealth’s supplemental submission recognizes that invoking the bar is discretionary. Establishing the Court’s authority to consider that procedural ground does not itself resolve whether the Court should rely on it in this appeal.

A. *Durham recognizes discretion to invoke the contemporaneous objection bar sua sponte.*

In *Durham v. Commonwealth*, the Supreme Court explained that, because contemporaneous objection rules protect the deliberative processes of trial courts, Virginia’s precedents “have allowed appellate courts the *discretion* to invoke the contemporaneous objection bar even when a litigant has not.” 303 Va. at 322 n.2 (emphasis added). However, the Court did not invoke the bar and stated:

Although we have the discretion [to] do so here, we decline to resolve the case on that basis because we conclude that, given the incongruities in the Court of Appeals’ decisions between *Branch* and *McEachin* and this case, addressing the merits in this instance is the best way to resolve the issue.

*Id.* *Durham*, therefore, forecloses a categorical claim that the Commonwealth’s silence deprives an appellate court of authority to notice Rule 5A:18. However, it does not treat invocation of the bar as automatic. *Durham* treated the matter as a choice and exercised that choice in favor of reaching the merits.<sup>5</sup> *Id.*

This Court has recognized the same discretionary authority. In *Lee v. Lee*, 12 Va. App. at 514-17, this Court applied Rule 5A:18 although the appellee had not invoked it. *See also id.* at

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<sup>5</sup> The majority’s discussion of *Durham* warrants clarification. *Durham* ultimately affirmed after reaching the merits and, therefore, did not decide whether an appellate court may reverse on an unpreserved ground without applying a recognized exception. Rather, *Durham* recognized that appellate courts have “the discretion to invoke the contemporaneous objection bar even when a litigant has not,” and then declined to invoke that bar because, “given the incongruities” among this Court’s decisions, “addressing the merits in this instance [was] the best way to resolve the issue.” 303 Va. at 322 n.2. *Durham* thus confirms the proposition relevant here—*sua sponte* invocation of the procedural bar is discretionary, not automatic.

518 (Koontz, C.J., dissenting). More recently, *C&A Scientific Co. v. Chenhua Yu*, 88 Va. App. 565 (2026), confirmed that sua sponte enforcement of the contemporaneous-objection rule can fall within the “modest initiating role” sometimes appropriate for an appellate court. *Id.* at 587 & n.9 (quoting *United States v. Sineneng-Smith*, 590 U.S. 371, 376 (2020)). *C&A Scientific* recognizes that Virginia appellate courts have enforced the rule when the appellee did not identify the omission. *Id.* at 587 & n.9. That discussion recognizes this Court’s authority to invoke Rule 5A:18 on its own initiative. It does not determine whether that authority should be exercised on the particular record before us.<sup>6</sup> See *Durham*, 303 Va. at 322 n.2.

The majority answers that this Court has regularly enforced Rule 5A:18 in the 35 years since *Lee*. Maj. Op. at 9-10. However, that observation does not establish that this Court should invoke the bar on this record. *Durham* recognizes both the authority to invoke the contemporaneous objection bar and the discretion to decline to do so. 303 Va. at 322 n.2. A history of sua sponte invocation does not make such invocation obligatory.

The majority’s reliance on *Buck v. Commonwealth*, 247 Va. 449 (1994), also does not convert discretion into obligation. Maj. Op. at 8-9. *Buck* applied Rule 5:25 after concluding that

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<sup>6</sup> Federal decisions addressing analogous sua sponte authority similarly distinguish the existence of discretion from its exercise. See *Day v. McDonough*, 547 U.S. 198, 209-10 (2006) (holding that the district courts are “permitted, but not obliged,” to consider timeliness sua sponte, and should “determine whether the interests of justice would be better served” by addressing the merits or dismissing the petition as time barred). In *Wood v. Milyard*, 566 U.S. 463, 473 (2012), the United States Supreme Court held that courts of appeals have “the authority—though not the obligation—to raise a forfeited timeliness defense on their own initiative.”

The Court cautioned that appellate courts “should reserve that authority for use in exceptional cases” and that restraint is “all the more appropriate when the appellate court itself spots an issue the parties did not air below.” *Id.* It further explained that when an appellate court raises a procedural impediment and disposes of the case on that ground, “the appellate court acts not as a court of review but as one of first view.” *Id.* at 474. *Day* and *Wood* arose under habeas law and do not govern Rule 5A:18. Their treatment of sua sponte authority as permissive rather than mandatory parallels *Durham*’s recognition that Virginia appellate courts have discretion to invoke the contemporaneous objection bar. 303 Va. at 322 n.2.

the defendant had not presented his specific *Batson* arguments at trial. 247 Va. at 452-53.

However, the Commonwealth asserted the procedural bar in the Supreme Court, even though it failed to raise it before either the panel or the en banc Court of Appeals. *Id.* at 454-56 (Hassell, J., dissenting). *Buck* thus demonstrates that a late preservation argument may be considered, but it was not a case in which the appellate court originated the preservation objection and then invited the appellee to adopt it.

B. *The justification for safeguarding the circuit court's deliberative process does not warrant sua sponte intervention.*

The contemporaneous-objection rule protects more than just the litigants. It protects the circuit court from reversal on a ground it never had an opportunity to consider, prevents parties from building error into the record, and avoids unnecessary retrials. *Carolino*, 303 Va. at 409; *Bethea*, 297 Va. at 743. Those purposes must be applied to the present record.

The circuit court here had an opportunity to consider the statutory issue. The court itself introduced Code § 19.2-306.1(C), read its operative language, heard competing requests for 14 days and no additional active incarceration, and then announced its own statutory interpretation. R. 90-91, 97-100. The asserted error was not an appellate afterthought; it was the legal premise the court supplied for its sentence.

Nor was the Commonwealth denied notice of the merits. The Commonwealth defended the sentence on the merits and expressly acknowledged that the statute contains no minimum sentence. A'ee Br. 5-10, 13. Deciding the statutory question would require no additional factual development, would not surprise either litigant, and would not subject the judgment to review on an issue the circuit court never confronted.

These circumstances explain why this Court should reach the statutory issue. They also diminish the institutional justification for raising the procedural bar on the Court's own initiative: the circuit court actually considered the statutory question, and the Commonwealth defended the

sentence on the merits. R. 90-91, 97-100; A’ee Br. 5-10, 13. Since the argument was preserved, deciding this appeal does not require expanding *Durham* or recognizing an additional exception to Rule 5A:18.

C. *The right-result-wrong-reason doctrine does not answer how discretion should be exercised.*

The majority treats sua sponte enforcement of Rule 5A:18 as implicit in the right-result-wrong-reason doctrine. Maj. Op. at 10. That doctrine permits an appellee to defend a judgment on a legal ground the trial court did not adopt, provided the record contains the facts necessary to decide it. In *Perry v. Commonwealth*, the Supreme Court explained:

Failure to make the argument before the trial court is not the proper focus of the right result for the wrong reason doctrine.  
Consideration of the facts in the record and whether additional factual presentation is necessary to resolve the newly-advanced reason is the proper focus of the application of the doctrine.

280 Va. 572, 580 (2010). *Collins v. Commonwealth*, 297 Va. 207, 212 n.1 (2019), similarly states that “an appellee may assert for the first time on appeal a purely legal ground for upholding the challenged judgment.”

However, *Perry* and *Collins* concern a different omission. They eliminate the requirement that an appellee’s alternative ground for affirmance be raised in the trial court; they do not require an appellate court to originate a ground that the appellee failed to present on appeal. In *Perry*, the Commonwealth defended the lower court’s judgment on the alternative ground, and the Supreme Court held that the proper inquiry was whether the record contained all facts necessary to resolve it—not whether the Commonwealth preserved the argument below. 280 Va. at 579-80. *Collins* similarly addressed a purely legal ground that the Commonwealth itself asserted. 297 Va. at 211-12 & n.1. Neither decision makes a party-presented alternative ground equivalent to a court-originated one, and neither eliminates the discretion recognized in *Durham*.

The right-result-wrong-reason doctrine also does not make Rule 5A:18 “self-executing” in the sense that the majority suggests. Maj. Op. at 8. *Durham* expressly declined to resolve the appeal on the procedural bar. 303 Va. at 322 n.2. In *McGinnis v. Commonwealth*, 296 Va. 489, 501 (2018), the Supreme Court stated more generally that when the ability to review an issue is in doubt, an appellate court may “assume without deciding” that the issue is reviewable when doing so permits resolution on “the best and narrowest grounds.”<sup>7</sup>

As explained above, my proposed reversal rests on preservation, not on an exception to Rule 5A:18 or an extension of *Durham*. My separate disagreement concerns the majority’s decision to resolve this appeal through a court-raised procedural objection and to announce broader reasoning about the Commonwealth’s omission. The right-result-wrong-reason doctrine authorizes consideration of an alternative ground for affirmance, but it does not itself require the Court to originate and decide that ground. Here, the complete circuit court colloquy establishes preservation, and the merits can be resolved without treating the Commonwealth’s omission as either an absolute forfeiture or a reason to supply an otherwise unnecessary procedural defense.

D. *The majority’s exercise of discretion is unnecessarily asymmetrical.*

Our cases decline to supply an omitted Rule 5A:18 exception for an appellant. “Although Rule 5A:18 has exceptions,” this Court has said, when an appellant “does not invoke them in his opening brief, . . . we will not do so sua sponte.” *Fleming v. Commonwealth*, 85

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<sup>7</sup> Although *May* is unpublished, its procedural posture is instructive. There, the Commonwealth argued that Rule 5A:18 barred the appellant’s specific abuse of discretion rationale. Slip op. at 2 n.2, 2023 Va. App. LEXIS 49, at \*4 n.2. This Court concluded that “resolution of the merits constitutes the best and narrowest ground” and “decline[d] to decide whether Rule 5A:18 preclude[d]” the appellate argument. *Id.* The Court then reversed, vacated the conviction and sentence, and remanded on the merits. *Id.*, slip op. at 5, 2023 Va. App. LEXIS 49, at \*6.

*May* thus did not reverse on an acknowledged unpreserved claim. Preservation was left undecided. However, *May* demonstrates that this Court has declined to resolve a disputed Rule 5A:18 question and then reversed on the merits.

Va. App. 27, 54 (2025). The doctrines governing an appellant’s exceptions and an appellee’s alternative grounds are not the same, and I do not suggest otherwise. That distinction, however, does not eliminate the concern this record raises.

The majority observes that sua sponte enforcement “does not offend the party-presentation principle.” Maj. Op. at 9. The majority cites *Blackman v. Commonwealth*, 45 Va. App. 633 (2005), to explain the different preservation obligations imposed on appellants and appellees. Maj. Op. at 14. *Blackman* explains that asymmetry. Rule 5A:18 limits the grounds an appellant may assert as a “basis for reversal,” while an appellee may, for the first time on appeal, assert an alternative legal ground supporting the judgment, provided among other things, its resolution requires no additional factual determinations. 45 Va. App. at 642-43. However, *Blackman* does not hold that this appellant-appellee asymmetry requires an appellate court to impose a Rule 5A:18 bar that the appellee did not invoke. *Durham* recognizes the Court’s authority to raise the bar sua sponte but describes its exercise as discretionary. 303 Va. at 322 n.2.

In *Blackman*, the Commonwealth advanced an alternative ground on appeal; the question was whether the prosecutor’s alleged failure to raise that ground in the trial court precluded its consideration. 45 Va. App. at 641-43, 643 n.6. Here, by contrast, the Commonwealth omitted Rule 5A:18 from its merits brief. This Court independently identified the potential preservation defect before oral argument and later invited supplemental briefing on whether the Commonwealth had forfeited the objection. Maj. Op. at 8. *Blackman* does not address the circumstances present here.

The distinction recognized in *Blackman* also does not eliminate the discretion identified in *Durham*. The majority reasons that an appellate court “properly raises sua sponte the appellant’s failure to preserve an objection” and that the default “is not cured simply because the

appellee's brief failed to mention it." Maj. Op. at 8. The first establishes that this Court may notice a default; the second, that an appellee's silence does not eliminate it. Neither establishes that this Court must invoke Rule 5A:18 whenever it identifies a default. Such a rule would leave no room for the discretion recognized in *Durham*, where the Supreme Court acknowledged "the discretion to invoke the contemporaneous objection bar even when a litigant has not," yet declined to resolve the appeal on that basis. 303 Va. at 322 n.2.

The majority also emphasizes that an appellant must invoke Rule 5A:18's exceptions in the opening brief and that the appellee's silence does not cure the omission. Maj. Op. at 17-18. However, it does not resolve whether this Court should exercise its discretion to raise the underlying preservation bar on its own initiative.

Here, the Commonwealth omitted the preservation issue from its merits brief, and this Court raised it: because the Commonwealth did not raise the issue on brief, this Court "alerted the parties to be ready at oral argument to address it." Maj. Op. at 8. The Commonwealth later maintained that the Court could apply the bar to affirm, but that response does not change how the issue entered the appeal. A'ee Supp. Br. 4. The circuit court considered and decided the statutory question, and the Commonwealth defended the sentence on the merits. R. 97-100; A'ee Br. 5-10, 13.

That discretionary choice carries added significance in a published opinion. The majority's published reasoning addresses when this Court may sua sponte raise a preservation default that no party raised. *Durham* did decline to invoke the bar, explaining that incongruity among this Court's decisions and the judgment that reaching the merits was the better way to resolve the issue counseled against doing so. 303 Va. at 322 n.2.

The majority's concern about a limiting principle rests on a premise this dissent does not adopt. I do not propose that an appellate court may disregard an acknowledged Rule 5A:18

default whenever it finds the merits compelling, nor do I propose a new exception to the rule. I conclude that Fennell preserved his statutory argument. The separate discussion above addresses only the majority’s broader reasoning about this Court’s authority to originate and rely on a preservation bar the appellee omitted. *Durham* establishes that the Court possesses that authority; it does not make sua sponte invocation automatic. 303 Va. at 322 n.2. Nothing more is necessary to decide this case. Although the majority describes its action, quoting *Sineneng-Smith*, as a “modest initiating role,” that role is not modest when this Court supplies a dispositive issue, calls for briefing on it, and resolves the appeal on that basis. Maj. Op. at 9.

## V. Conclusion

Since Fennell preserved his statutory argument and the circuit court imposed active incarceration based on an erroneous interpretation of its discretion under Code § 19.2-306.1(C), I would reverse the judgment insofar as it imposed seven days of active incarceration and remand for resentencing under the correct statutory framework.<sup>8</sup> On remand, the court would remain free to impose any sentence Code § 19.2-306.1(C) permits, including no additional active incarceration.

For the foregoing reasons, I respectfully dissent.

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<sup>8</sup> The parties agree that this appeal is not moot. Maj. Op. at 5 n.5. In supplemental briefing directed by this Court, the Commonwealth represented that Fennell has not yet served the seven-day sentence and that the appeal is live for that reason rather than because of any jail fee. A’ee Supp. Br. 4. Fennell contends that the processing and room-and-board fees imposed on him would be subject to refund. Appellant Supp. Br. 2-5; see *Matheson v. Commonwealth*, 86 Va. App. 201, 212 (2025).