RECORD NUMBER: 20-1401

United States Supreme Court

JAMES DENNIS,

Petitioner,

- V. -

COMMONWEALTH OF VIRGINIA,

Respondent

ORIGINAL

PETITION FOR CERTIORARI FROM JUDGMENT OF THE VIRGINIA SUPREME COURT

PETITION FOR CERTIORARI

JAMES DENNIS, *Pro Se*
SFCC 1397669
3500 WOODS WAY,
STATE FARM, VA 23160

Questions Presented for Review

A. Does any Court have the authority to extinguish a defendant's due process rights via the Fifth and Fourteenth Amendment by allowing the prosecutor to proffer false evidence?

B. Does a Virginia Court have the authority to violate the Confrontation Clause of the Constitution by allowing any hearsay testimony?

C. Can a Virginia Court subject a defendant to cruel and unusual punishment based on an erroneous proffer by the prosecution?

D. Does a Virginia Court have the authority to extinguish a defendant's post commitment First Amendment Rights?

List of All Parties to the Proceeding

All parties are as listed in the caption hereof. James Dennis is an individual for which no corporate disclosure statement is required by Rule 29.6.

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I. **Citations of the Official and Unofficial Reports of the Opinions and Orders Entered in this Case by Courts**

On or about January 15, 2019 Dennis pled no contest to two misdemeanor charges, keeping a bawdy place, pursuant to Va. Code § 18.2-347.

On or about February 6, 2019 Dennis was found guilty of a probation violation and sentenced to the revocation of five years of a suspended sentence for that violation from a total of 21 years and 138 months of suspended time.

On March 9, 2020 the Virginia Court of Appeals denied Dennis' Petition for Appeal.

Dennis timely noticed his appeal to the Order of the Virginia Court of Appeals. The Virginia Court of Appeals entered its Order finally dismissing the Petition for Appeal on March 9, 2019.

The Virginia Supreme Court entered its Order

finally dismissing the Petition for Appeal on March 1, 2021.

II. Statement of the Basis of Appellate Jurisdiction

The Virginia Supreme Court entered its Judgment on February 25, 2020.

This Court has appellate jurisdiction in this appeal pursuant to 28 U.S.C. § 1257.

III. Constitutional Provisions and Statutes Involved in the Case

The First, Fifth, Eighth and Fourteenth Amendments to the United States Constitution are involved in this case.

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or

> prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property,

> without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws ...

Dennis was charged with a set of probation violations based on a 2008 conviction pursuant to Va. Code §18.2-347, which is involved in this case.

IV. Statement of the Case

A. Procedural Posture

On July 25, 2008, Dennis entered Alford pleas to the Albemarle County Circuit Court for single counts of sexual battery, carnal knowledge, and computer solicitation. In addition, Dennis entered guilty pleas to each of 20 counts of possession of child pornography with the Circuit Court.

On November 12, 2008, Dennis was sentenced by the Albemarle County Circuit Court to an active sentence of eleven (11) years in prison with an

additional 21 years plus 138 months of suspended time.

Dennis was released from incarceration for the 2008 sentences on or about August 1, 2017.

On or about June 23, 2018 Dennis was arrested on charges of rape and abduction by force. Each of those charges was subsequently dismissed via orders of Nolle Prossequi after Dennis subpoenaed ankle monitoring records that proved his accuser's accusations false. Dennis was subsequently indicted on two counts of sex trafficking and two counts of pandering. Pursuant to a plea agreement, Dennis entered two Alford pleas to residing in a bawdy place in violation of Va. Code 18.2-347 in the Circuit Court for the City of Winchester. Remaining charges were dismissed via orders of Nolle Prossequi. Dennis was sentenced to 12 months for each of the charges for which Alford

pleas were entered with all of the sentences suspended.

On April 12, 2019, Dennis appeared before the Albemarle County Circuit Court. He was charged with set of probation violations based upon the two misdemeanor counts for which he entered Alford pleas in the Circuit Court for the City of Winchester.

Pursuant to the probation violation hearing, Albemarle County Circuit Court revoked five (5) years of Dennis' previously suspended sentence. Tr. 42.

Dennis timely appealed his convictions, which appeals were denied by the Virginia Court of Appeals and the Virginia Supreme Court. Each federal question referenced herein was raised in Dennis' Petitions for Appeal to the Court of Appeals of Virginia and the Virginia Supreme Court. Exh. C; Exh. D. All constitutional rights violations by the

courts of Virginia were dismissed on procedural grounds. Exh. A; Exh. B. However, such constitutional violations cannot be cured by any procedural grounds that may occur in a state court proceeding. *Jackson v. Denno*, 378 U.S. 368, 370 n.1, 84 S. Ct. 1774, 1777 (1964) (citing *Fay v. Noia*, 372 U.S. 391, 426-27, 83 S. Ct. 822, 842 (1963)).

This Petition for Writ of Certiorari is filed seeking reversal of the decisions of the Circuit Court, the Virginia Court of Appeals and the Virginia Supreme Court.

B. Statement of Facts

In 2008 Dennis pled guilty to twenty (20) counts of possessing child pornography, one (1) count of carnal knowledge, one (1) count of computer solicitation, and one (1) count of sexual assault. The computer solicitation and sexual assault charges

were entered a based upon a 17-year-old female lying about her age being 21, and the sodomy was consensual, but Dennis only pled on that because of the child porn charges. Tr. 35.

The abduction and rape charges for which Dennis was arrested on in June 2018 dismissed via orders of nolle prossequi because the GPS worn by Dennis proved he was not where the complainant claimed that he was. Tr. 36. The sex trafficking charges that were brought in Winchester were dismissed in large measure because the Commonwealth represented to the Circuit Court for the City of Winchester:

> In this case, as in many cases with human trafficking, we do rely heavily on the testimony of the human trafficking victims. Those human trafficking victims also happen to be in most of the cases prostitutes. Since the time that this was indicted one of the individuals has been arrested on drug-related charges. One of them has moved to another state.

> Now, we are in contact with her and we could bring her back. It would be at significant cost to the Commonwealth. But, most importantly, there is information with this individual that could have been used for impeachment and we would have had to have dealt with that in front of a jury.

Exh. 1 at p. 7-8.

Significantly, there was no proffer of facts about Dennis in the Circuit Court for the City of Winchester concerning the charges for which Alford pleas were entered.

As to hearsay, at the probation violation hearing, the Albemarle County Circuit Court erroneously stated, "hearsay is always admissible in a probation violation hearing. The Court of Appeals has made that abundantly clear on more than one occasion." Tr. 12-13.

At the probation violation hearing the Commonwealth presented hearsay testimony of one Zachary Zwahl, a probation officer that admittedly

had never met Dennis and had no personal knowledge about his conduct. Tr. 8. Significantly, the Commonwealth offered no reason as to why someone with personal knowledge was not present. An underlying reason why the testimony of Mr. Zwahl should not have been admitted and Dennis's actual probation officer should have been made to appear and testify was the actual nature of a single interaction that Dennis had with the seekingarrangements.com website. Had Dennis's actual probation officer testified, it would have been made clear that shortly after Dennis was released on probation in 2017, Dennis received an unsolicited e-mail from the seekingarrangements.com website. Dennis made a single visit to that website in order to unsubscribe to that website. On that visit, Dennis had no interaction with anyone. The references to Dennis's single interaction with that

website and the gross mischaracterizations of that interaction by the Trial Court and the Court of Appeals underscore the manifest unjustness of Dennis sentence in this case.

The referenced one-time visit seekingarrangements.com is emblematic of a facially unconstitutional probation condition that forbade access to any social media website.

The Commonwealth further presented testimony of one Teresa Hudson, a special agent with the F.B.I. Tr. 11. Ms. Hudson alleged that she had listened to telephone calls from Dennis. Notably, Ms. Hudson did not produce or play the actual recordings that she alleged that the F.B.I. had. The Commonwealth offered not testimony about why the tapes themselves were not played at the hearing or the other party to the alleged conversation did not testify at the hearing.

In characterizing the phone conversation with someone alleged to be one "K.P", which conversation apparently was never even transcribed, Hudson stated:

> He [Dennis] told her that he loved her, that he would take care of her, at one point, he, in one of the conversations he asks if he could---if she would marry him, or did she want to marry him, and she responded yes, and as an aside he was already married at that point. He talked about providing cell phones to her so that he could continue to communicate with her, and he was going to try and --- he would provide money for her to leave the other state, and fly back to---to Virginia or fly back east to---was close to where he was.

Hudson was then asked to speculate what "K.P." was thinking, which speculation should never been allowed in evidence for reasons of both hearsay and lack of personal knowledge on the part of Hudson:

> Well, she thought he was in another country. She thought he was---I---I can't remember if it was Indonesia or Thailand. She thought he was in the hospital with a brain tumor and was

> receiving medical treatment. She did not realize he was in prison at that time.

During sentencing, third party hearsay testimony was also allowed over objection that implied that Dennis had not been fully truthful with his probation officer. Tr. 25-26.

The Albemarle County Circuit Court relied upon the inadmissible evidence and mischaracterizations of Dennis' actions proffered by the Commonwealth and commented "Well jail doesn't slow him down." Tr. 34.

In sum, the Albemarle County Circuit Court imposed a very harsh sentence of five years based upon hearsay statements and statements referenced hereinafter by the Commonwealth that were either false or misleading. Tr. 42.

V. Argument

A. Discussion of Questions Presented

The Virginia Supreme Court erred by failing to correct the Constitutional errors of this case and denying Dennis' appeal on procedural grounds.

An unconstitutional restraint cannot be cured by any procedural grounds that may occur in a state court proceeding. *Denno*, 378 U.S. at 370 n.1, 84 S. Ct. at 1777 (citing *Fay v. Noia*, 372 U.S. at 426-27, 83 S. Ct. at 842.

1. Does any Court have the authority to extinguish a defendant's due process rights via the Fifth and Fourteenth Amendment by allowing the prosecutor to proffer false evidence?

The Fourteenth Amendment to the United

States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The right to due process conferred by the Fourteenth Amendment to the United States Constitution should require prosecutors to present only purely factual evidence in order to ensure a fair trial. A misrepresentation of facts within the case brought to trial should be considered a violation of the defendant's right to due process. It should not be the case that state courts, such as those of Virginia in this case, allow prosecutors to proffer erroneous evidence to be used against the defendant. A prosecutor should not have to lie in order to get a conviction.

In the case of *Berger v. United States*, the

United States Supreme Court held that a "Prosecutor's duty is not only to use every legitimate means to bring about a just conviction, but to refrain from improper methods calculated to produce a wrongful conviction." 295 U.S. 78, 79 L.Ed. 1314, 55 S.Ct. 629 (1935).

Following the reasoning presented by the Supreme Court in *Berger* the Commonwealth's Attorney is the representative of the sovereignty of the Commonwealth of Virginia and had obligation to govern impartially. Therefore, the interest of the Commonwealth's Attorney is not that he shall "win a case," but that justice shall be done. As the Court eloquently stated, "As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer ... while he may strike hard blows, he is not at liberty to strike foul ones. It is as much

his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Id. 295 U.S. at 88.

Berger is binding and dispositive in this case. In *Berger*, the Court noted prosecutorial behavior that is strikingly similar to this case (emphasis added):

> That **the** United States **prosecuting attorney overstepped the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense is clearly shown by the record. He was guilty of misstating the facts** in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they had not said; of suggesting by his questions that statements had been made to him personally out of court, in respect of which no proof was offered; of pretending to understand that a witness had said something which he had not said and persistently cross-examining the witness upon that basis; of **assuming prejudicial facts not in evidence**; of bullying and arguing with witnesses; and in general, of conducting himself in a thoroughly indecorous and improper manner. We excerpts from the record illustrating some of

> the various points of the foregoing summary. It is impossible, however, without reading the testimony at some length, and thereby obtaining a knowledge of the setting in which the objectionable matter occurred, to appreciate fully the extent of the misconduct. The trial judge, it is true, sustained objections to some of the questions, insinuations and misstatements, and instructed the jury to disregard them. But the situation was one which called for stern rebuke and repressive measures and, perhaps, if these were not successful, for the granting of a mistrial. It is impossible to say that the evil influence upon the jury of these acts of misconduct was removed by such mild judicial action as was taken.

Id. 295 U.S. at 84-85. Just as in *Berger*, the judgment against Dennis should be reversed.

Due process considerations as stated in cases such as *Berger* trump procedural cases relied upon by the Court of Appeals. The fundamental unfairness of Dennis's sentencing hearing simply cannot be affirmed on procedural grounds (e.g., because Dennis's prior counsel failed to object to the horrible and highly prejudicial conduct of the prosecuting attorney). The Prosecutor violated his constitutional duty to refrain from improper methods

calculated to produce a wrongful conviction.

A. **The Prosecutor Made Materially False Statements to the Court**

In final arguments, the Prosecutor made a particularly damaging and materially false or highly misleading statements to the Albemarle County Circuit Court. The following proffer took place (emphasis added):

> MS. LOWE: So Judge, Mr. Dennis was convicted in Albemarle County for sodomy. I believe its twenty-five (25) counts of child pornography, carnal knowledge, use of computer---use of computer to commit certain sex offenses with a minor, and possess obscene material with a minor. He has a twenty-one (21) and one hundred and eighty (180)---one hundred thirty eight (138) month suspended sentence with four years of supervised probation upon release. **Extremely important were the conditions upon which he was put on probation**, specifically good behavior, specifically ***conditions with respect to his contact with women***,

with internet websites and we have him now back in front of the Court for convictions of either frequenting or sustaining a body [sic] house. They're misdemeanors, and they'll argued by counsel that these are misdemeanors, but important, and what I think the thrust of our sentencing hearing was, they're part of a much bigger problem on the part of Mr. Dennis. First of all, ***we clear evidence that he continues to make contact with young women whether nineteen (19) versus seventeen (17), out of state***. ***He continues to be involved in a human trafficking*** situation because he has made an agreement with the Commonwealth in Winchester in---by which ***they reduced human trafficking charges to body house charges in an effort to attempt to crack down on the bigger scheme or the bigger--- conspiracy in which he was involved in involving human trafficking*** and he didn't even cooperate with that appropriately. We have evidence from his own mouth where he was heard by an agent talking with ***young females*** out of state, **trying to convince them to come to where he is**, which is so highly dangerous and concerning given the facts in the initial probation report that relate to the facts of the case in Albemarle County, where he had made contact with a seventeen (17) year old female that he met online using the

exact same website that he continued to use after he was released, nine days after release in Winchester, continued to use the same website there that he used to get the victim in Albemarle County, and he then back in 2008 had met her, sent her a plane ticket to travel to her, and then committed the offenses against her. And we have him doing the same kind of conduct now based on the investigation in Winchester, **where he's continuing to contact now a nineteen (19) year old**, out of state young woman, trying to get her to come to him with, again, lies. That's part of an overall case that they then make the deal in Winchester over, and then we clearly then see him making continued manipulations and false cooperation or false statements there. His dangerousness level is still extremely high. He's a sex offender--- convicted sex offender with multiple child porn---

THE COURT: Well jail doesn't slow him down.

MS. LOWE: Not a bit. A ***child porn, and he's still doing it***.

THE COURT: ***Right***.

MS. LOWE: And so I---that so---so I---I put on a bigger case than just the convictions themselves for that reason,

so the Court can see understanding that Winchester convicted him of something of a sexual nature trying to stop a bigger problem, I suppose, but his actual dangerousness, and what we're facing here is a man in Albemarle County, who lured a young person out of state to Albemarle ***to offend against her***, doing the same kind of behavior and even using the same website nine days after his release. Judge, he's a man who has a significant dangerous risk--- dangerousness risk to this community. He has a very significant suspended sentence---twenty-one (21) years and one hundred thirty-eight (138) months suspended, and I'd ask the Court to consider pulling a significant period of that---at least ten years of that to protect this community and others. Thank you ...

Briefly stated:

1. It is facially apparent from Dennis's sentencing order that there were no restrictions on his contacting women. The prosecuting attorney simply lied by saying otherwise. In Dennis's case the judge believed the

prosecutor's lies about such restrictions and used that belief in sentencing Dennis.

2. The telephone calls with young woman that Dennis talked to that was alleged to be nineteen year old were fully legal and did not violate his probation in any manner whatsoever. Lies of the prosecuting attorney to the contrary should be grounds for reversal by this Court.

3. Dennis has never been convicted of human trafficking. The lies of the prosecuting attorney to the contrary were highly violative of Dennis due process rights. See, e.g., *Martin v. Ohio*, 480 U.S. 228, 230, 107 S. Ct. 1098, 1100 (1987). To reiterate,

Dennis was never convicted of being involved in human trafficking and certainly was not "continuing" to be involved in any such trafficking. Again, as a matter of due process, a sentence invoked based upon lies should be reversed.

4. There was nothing illegal or violative of Dennis's probation to communicate with the young woman alleged to be nineteen years old. Lies to the contrary are also grounds for reversal.

5. There was no evidence in this case that Dennis had any involvement with child porn after his original charges in 2008. The prosecuting lied again when she told the judge

that Dennis was still "doing it". It is indeed alarming that the Judge that sentenced Dennis did not recognize this lie and simply affirmed "Right" in response to the prosecutor's lies.

6. The prosecutor lied when she said that Dennis "lured" a young person to Albemarle County "to offend against her". That is simply not what happened. Instead, Dennis invited a young woman that he believed to be of age to visit him. That young woman came to Albemarle County of her own free will and never told Dennis the truth about her age. There was never any evidence that Dennis intended "to offend" against the young woman.

Lies should be grounds for reversal.

The Court of Appeals simply ignored these outright lies of the prosecuting attorney and pretended that they were not important. The manifestly unjust response of the Court of Appeals concerning these lies was to state that relief would be denied as a matter of law because Dennis's former attorney failed to object at the sentencing hearing and cited *Russo v. Commonwealth*, 207 Va. 251, 257 (1966) as authority.

Dennis avers that *Russo* should be overruled at least to the extent that it has been used by the Court of Appeals in this case to justify extensive lying by a prosecuting attorney. The integrity of the courts of Virginia should require a higher standard on the part of members of the bar in general and prosecuting attorneys in particular.

B. The materially false statement, "**Extremely important were the conditions upon which he was put on probation**, specifically good behavior, specifically ***conditions with respect to his contact with women"*** was highly prejudicial

Dennis had no conditions with respect to his contact with women beyond being ordered not to have contact with the "victim" that resulted in Dennis' sentences from 2008. Exh. 2. Dennis' Sentencing Order is completely silent as to ***"conditions with respect to his contact with women"***.

The statement of the Prosecutor was not supported by any testimony or evidence and was simply false.

Dennis' unduly harsh probation violation sentence was predicated in part upon this false statement and should be reversed and remanded for

that reason alone.

C. The highly misleading statement that Dennis continues "***to make contact with young women whether nineteen (19) versus seventeen (17), out of state***" was highly prejudicial

Testimony at the hearing did not evidence an age of the person that Dennis was alleged (solely via hearsay testimony) to have contacted from jail. Instead, Agent Hudson merely speculated (emphasis added), "she ***may*** have been nineteen". Tr. 15. Such speculation is not evidence and the age of the young woman was not proved. Consequently, representing to the Albemarle County Circuit Court the age of the person was improper and prejudicial.

More significantly, the repeated reference to the age of the "victim" from the original cases is

highly misleading as well. While it is true that the "victim" from that case was seventeen at the time of her trip to Charlottesville. In Dennis' 2008 plea hearing, the Commonwealth admitted (emphasis added) "***the female [victim] specifically had misrepresented her age***". Exh. 3 10. Dennis' trial attorney made an uncontroverted clarification of this misrepresentation of the "victim" by stating (emphasis added):

> QUAGLINA [DEFENSE ATTORNEY]: "Ms. Fafard had misrepresented information about her age, to be more specific ***in her profile she identifies herself as a twenty-one (21) year-old***. Let me be clear that ***there was no evidence or information in this case to suggest that Mr. Dennis had any other information about this person except what he learned on this website, that there was no information to suggest that he knew that this young lady was not twenty-one (21)***. She looks like somebody who is in her late teens, early twenties. She doesn't look like she's, you know, thirteen (13) or twelve (12). She identifies herself as a high school graduate, she says that she's a

> waitress, and she provides other information in here. One of the things that she talks about are the circumstances under which she would be willing to meet somebody. She says that she expects, and then it says open, amount negotiable.... I'll represent to the Court that I listened to a 911 call that the young lady placed when she was still in Mr. Dennis' apartment. In that 911 call she initially alleges that Mr. Dennis came to Connecticut and brought her here, and we know that that's not true. He provided money for her to obtain a ticket and get herself on the plane and get herself to Virginia, and then he picked her up at the airport. I don't want to belabor the point Ms. Lunsford has made, but in our view this was case in which there were substantial issues regarding this person's credibility."

Exh. 3 25-26.

The proffers of the Prosecutor that led the Albemarle County Circuit Court to believe that Dennis knew that the young woman that visited him from Connecticut was underage was highly misleading and highly prejudicial.

Dennis' unduly harsh probation violation

sentence was predicated in part upon these highly misleading statements and should be reversed and remanded for those reasons as well.

D. The materially false statement, "***He continues to be involved in a human trafficking*** situation" was highly prejudicial

Dennis has never been convicted of a human trafficking charge and false factual proffers to the contrary had no place in the probation violation hearing.

To be clear, the primary reasons that the Commonwealth did not pursue the human trafficking charges in the Winchester Circuit Court was because the Commonwealth did not believe that it could prove the charges. The Commonwealth admitted that, had the charges been pursued, the testimony would have been from witnesses that would have

been highly impeachable. Exh. 1 at p. 7-8.

Equally important is that the alleged telephone call that Dennis had with K.P. cannot legally be characterized by human trafficking. By definition, human trafficking requires that there be some intent to "receive money or other valuable thing or to assist another in receiving money or other valuable thing from the earnings of a person from prostitution or unlawful sexual intercourse". Va. Code § 18.2-357.1. There was no evidence that the interaction with K.P. involved any "money or other valuable thing from the earnings of a person from prostitution or unlawful sexual intercourse".

The Prosecutor knew that making false representations about Dennis being involved in human trafficking would be highly prejudicial and result in a harsher sentence at his probation violation hearing.

The fact is that Dennis has never been convicted of human trafficking and there was no evidence of any involvement in human trafficking, much less "continued involvement in human trafficking".

Dennis' unduly harsh probation violation sentence was predicated in part upon these materially false statements and should be reversed and remanded for those reasons as well.

E. The highly misleading statement, "he was heard by an agent talking with ***young females*** out of state, **trying to convince them to come to where he is**, which is so highly dangerous and concerning given the facts in the initial probation report that relate to the facts of the case in Albemarle County, where he had made contact with a seventeen (17) year old

female that he met online" was highly prejudicial

As an initial matter, there was no evidence at the probation violation hearing of Dennis talking with anyone other than K.P. So, to state that Dennis was talking with the plural "young females" was highly misleading and not proved at trial. Moreover, even if the testimony about K.P was admissible (a premise that Dennis strongly contests), there was nothing in that conversation that was illegal. The Commonwealth simply should not be attempting to incarcerate people, or extend their incarceration, unless they have acted illegally.

In addition, the repeated reference to the "victim" in the 2008 cases is highly misleading because the uncontroverted factual proffers from that case, *supra*, clearly show that Dennis believed her to be twenty-one years old and his brief

relationship with her lawful.

Dennis' unduly harsh probation violation sentence was predicated in part upon these highly misleading statements and should be reversed and remanded for those reasons as well.

F. The highly misleading statement, "And we have him doing the same kind of conduct now based on the investigation in Winchester, **where he's continuing to contact now a nineteen (19) year old**, out of state young woman, trying to get her to come to him with, again, lies" was highly prejudicial

As stated, supra, there was no evidence, beyond rank speculation, that K.P. was nineteen years old.

More importantly, since K.P. was never alleged to be a minor, even if the contents of the

alleged phone call was admissible (a premise strongly disputed by Dennis), there was nothing illegal about the phone call. Because there was nothing illegal about the phone call, it had no relevance to any probation violation or any sentence for a probation violation.

Dennis' unduly harsh probation violation sentence was predicated in part upon this highly misleading statement and should be reversed and remanded for those reasons as well.

G. The false statement that Dennis was "**still doing" child porn** was highly prejudicial

The Prosecutor made a highly prejudicial statement that Dennis was "still doing" child porn. Tr. 34. This statement was contrary to any evidence presented at the probation violation hearing. It is particularly egregious that the Court indicated

agreement with that statement by stating "Right" in response. Tr. 34.

Dennis' unduly harsh probation violation sentence was predicated in part upon this materially false statement and should be reversed and remanded for those reasons as well.

H. The highly misleading statement that Dennis "lured a young person out of state to Albemarle ***to offend against her***, doing the same kind of behavior and even using the same website nine days after his release" was highly prejudicial

There was no evidence in the underlying case that Dennis had any intention to "offend against" the female that misrepresented her age in the 2008 cases. Dennis had no reason to believe that she was under the age of 18 or that her coming to see him

from Connecticut would in be an offense in any manner whatsoever.

The Commonwealth should have clearly communicated the facts of the 2008 case to the Albemarle County Circuit Court and should not have made misleading statements implying that Dennis ever attempted to lure underage girls to meet him in any manner whatsoever.

Dennis' unduly harsh probation violation sentence was predicated in part upon this highly misleading statement and should be reversed and remanded for those reasons as well.

To reiterate, the denial of relief by the Court of Appeals on procedural grounds is manifestly unjust.

The Prosecutor was allowed to make prejudicial and outright erroneous statements at the cost of Dennis' Constitutional right to due process secured by the Fourth and Fifteenth Amendments.

No state court should have the authority to allow prosecutorial misconduct to take place in this form. A miscarriage of justice has occurred in this case and more than justifies a reversal of the original judgement to obtain the ends of justice even though Dennis's trial attorney failed to properly object at his sentencing hearing.

2. **Does a Virginia Court have the authority to violate the Confrontation Clause of the Constitution by allowing any hearsay testimony?**

At the probation violation hearing, the Albemarle County Circuit Court erroneously stated "hearsay is always admissible in a probation violation hearing. The Court of Appeals has made that abundantly clear on more than one occasion." Tr. 12-13.

That statement concerning hearsay testimony is erroneous as a matter of law. The Virginia Supreme Court has stated (emphasis added):

> Because parole revocation proceedings occur after a criminal prosecution has ended in a conviction, a parolee is not entitled to the "full panoply" of constitutional rights to which he was entitled at trial. Morrissey v. Brewer 408 U.S. 471, 480, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972). Following Morrissey, in Gagnon v. Scarpelli, 411 U.S. 778, 782, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973), the Supreme Court of the United States held that the same constitutional principles applied in probation revocation hearings. Although the Sixth Amendment right of confrontation applies only in criminal trials, **a more limited right of confrontation was included in the Due Process Clause of the Fourteenth Amendment, applicable to parole and probation revocation proceedings. The Supreme Court expressed the Fourteenth Amendment's "minimum requirements of due process" as providing**: (a) written notice of the claimed violations of [probation]; (b) disclosure to the [probationer] of evidence against him; (c) opportunity to be heard in

> person and to present witnesses and documentary evidence; **(d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)**; (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking [probation].
> Morrissey, 408 U.S. at 489 (emphasis added).

Henderson v. Commonwealth, 285 Va. 318, 325-26, 736 S.E.2d 901, 905 (2013).

Hearsay that is testimonial in nature is subject to the limited confrontation right provided by the Fourteenth Amendment. Such hearsay may be admitted only when "the hearing officer specifically finds good cause for not allowing confrontation." *Henderson*, 285 Va. at 326, 736 S.E.2d at 905 (citing, *Morrissey*, 408 U.S. at 489, 92 S. Ct. at 2604).

Two tests have emerged for determining whether the denial of the right to confrontation in that context will comport with constitutional due process. The first, the "reliability test," permits admission of testimonial hearsay in revocation proceedings if it possesses substantial guarantees of trustworthiness. See Crawford v. Jackson, 323 F.3d 123, 130, 355 U.S. App. D.C. 282 (D.C. Cir. 2003). Some guarantees include (1) detailed police reports (**as opposed to mere summaries of such reports by probation officers**), (2) affidavits or other hearsay given under oath, (3) statements by the probationer that directly or circumstantially corroborate the accusations, (4) corroboration of accusers' hearsay by third parties or physical evidence, (5) statements that fall within a well-established exception to the hearsay rule, (6) evidence of substantial similarities between past offenses and the new accusations that bolsters the accuser's credibility, and (7) a probationer's failure to offer contradictory evidence. Id.; United States v. Jones, 299 F.3d 103, 113 (2d Cir. 2002); United States v. Kelley, 446 F.3d 688, 692 (7th Cir. 2006); United States v. Lloyd, 566 F.3d 341, 345, 51 V.I. 1244 (3d Cir. 2009); Curtis v. Chester, 626 F.3d 540, 547 (10th Cir. 2010). Evidence which alone would not be reliable would be bare out-of-court

> statements reflecting an adversarial relationship with the accused or statements contained within multiple layers of hearsay. Lloyd, 566 F.3d at 345.
> The second test, the "balancing test," requires the court to weigh the interests of the defendant in cross-examining his accusers against the interests of the prosecution in denying confrontation. Id. at 344-45.

Henderson v. Commonwealth, 285 Va. 318, 327-28, 736 S.E.2d 901, 906 (2013) (emphasis added).

During the Zachary Zwahl's ("Zwahl") testimony in response to the prosecutor's questions, on page 25 of the probation violation hearing transcripts, the following testimony was significant:

> A: Detective Ivens from Winchester Police – police department was communicating with his supervising of – the defendants supervising officer with Winchester P.N.P., Michelle Getts. Detective Ivens had spoken with – with a female that the defendant was taking to a jewelry store.
> [DEFENSE ATTORNEY]: Yeah ... I understand and I don't mean to keep objecting, but I would object on confrontation clause at this time. I

understand sometimes the detective, they could say for reasons of confrontations we don't have the ability to confront this witness, and this is not just coming from a detective, its coming from a third party hearsay. **It has to show why that persons not here and good cause for that**, and we have no right, it sounds like this is for testimonial purposes that it was designed, since it was an investigator talking to this individual which would all meet within the confrontation clause.

In addition, the testimony of Ms. Hudson regarding the allegedly recorded telephone conversation should never have been admitted either. The following colloquy took place (emphasis added):

> Q ---in prison---prison. And so, my next question, did you listen to phone calls that were made by Mr. Dennis from prison?
> A Yes.
> Q And with another person in another state?
> A Yes.
> MR. SHAPIRO: And Your Honor, I would just after that, I told Ms. Lowe I probably would object to this regarding

number one, I understand it mean to say this, Mr. Dennis's statements on there, but we're not trying that case today. The allegation---just---r---I---Ms. Lowe, we admit the violations that are alleged---the two misdemeanor convictions. There's no question about that this day. I understand its part of the proffer, but regarding the actual statements that remain that Mr. Dennis made on these alleged recorded calls really doesn't make a difference. It's not relevant to this hearing itself, today. And I don't believe it's admissible.

Q Judge---

THE COURT: Well what if---**hearsay is always admissible at a probation revocation hearing**. The Court of Appeals made that abundantly clear on more than one occasion. Go ahead, Ms. Lowe, what were you going to say?

Q So, all I was going to say is, Judge, important to this case is, he was convicted of misdemeanors and I am sure that question at sentencing will be how much violation should misdemeanors contain. And because those were misdemeanors as a result of an agreement, wherein he was to proffer, and he has proffered non-cooperatively, that is an important fact.

THE COURT: Well his proffer is as I understand it, Special Agent can just (unintelligible) him the most and he

just proffered---I---things that weren't true.
Q Right, and the final piece I think, and the relevance to the piece regarding the manipulation of the other person from prison and it may be more appropriate at sentencing. I had her on and I wanted to ask her now, simply was, some of the information that she received and heard from his own voice is in for---conversations with a person in a---in a trafficking sense, and I think that is relevant, because the Courts [sic] going to have determine how significant this violation is, and what his sentence should be, and for that reason I offer that. It's his statement so it's not hearsay and that's why its relevant because you're going to look at it at sentencing issues. These are misdemeanors for bawdy place keeping or frequenting, but there's certainly conduct underlying that---those convictions that her hearing these statements made---
THE COURT: Go ahead.
Q ---by him while still in jail shows his dangerousness.
THE COURT: Go ahead.
Q Thank you.
THE COURT: I'll overrule the objection.

The Albemarle County Circuit Court then

allowed Agent Hudson to testify not about the actual statements made by Dennis, but rather her own characterizations of telephone conversations between Dennis and K.P. Such characterizations, without the recorded conversations themselves or transcripts of those conversations, do not have the proper indicia of reliability required to pass constitutional muster. In addition, there were no actual statements of Dennis that were cited by Agent Hudson, only inadmissible characterizations of those statements.

More egregiously, Agent Hudson was allowed to "testify" about what K.P. thought. Any "testimony" by Agent Hudson about what K.P. thought was pure speculation and any statements allegedly made by K.P. should not have been allowed without her actual testimony. There was no reason given as to why K.P. was not called to testify about the calls herself. Although the testimony about the

telephone calls did not evidence any illegal action on the part of Dennis, the "testimony" turned out to be highly prejudicial because of the manner in which the Commonwealth relied on that "testimony" was critical to the unduly harsh sentence that Dennis received.

Dennis was denied the ability to confront key witnesses pursuant to the confrontation clause. The Court made a serious error by allowing that testimony without any regard for any determination of good cause as required by law. Neither the reliability test nor the balancing test were applied by the Albemarle County Circuit Court. Indeed, had these tests been applied, the testimony would not have been allowed. There is simply no reason of record why Detective Ivens, Michelle Getts, and K.P. were not called and Dennis was not allowed to confront them.

The legally erroneous rule applied at the probation violation hearing that "hearsay is always admissible in a probation violation hearing" (Tr. 12-13) is constitutionally erroneous and the judgment of the Albemarle County Circuit Court should be reversed.

The Virginia Supreme Court and Court of Appeals erred in viewing the aforementioned testimony properly admitted. There stated "indicia of reliability" test is not a test approved by this Court and cannot trump the aforementioned requirements of *Henderson*. There was not stated cause whatsoever, much less good cause shown, why actual witnesses with personal knowledge did not appear at Dennis's trial.

Accordingly, the Virginia Supreme Court and Court of Appeals denial of relief should be reversed.

3. **Can a Virginia Court subject a defendant to cruel and unusual punishment based on an erroneous proffer by the prosecution?**

The Eighth Amendment, in only three words, imposes the constitutional limitation upon punishments: they cannot be "cruel and unusual." The Court has interpreted these words "in a flexible and dynamic manner," *Gregg v. Georgia*, 428 U.S. 153, 171 (1976) (joint opinion), and has extended the Amendment's reach beyond the barbarous physical punishments at issue in the Court's earliest cases. See *Wilkerson v. Utah*, 99 U.S. 130 (1879); *In re Kemmler*, 136 U.S. 436 (1890). Today the Eighth Amendment prohibits punishments which, although not physically barbarous, "involve the unnecessary and wanton infliction of pain," *Gregg*, supra, 428 U.S. at 173, or are grossly disproportionate to the severity of the crime, *Coker v. Georgia*, 433 U.S. 584,

592 (1977) (plurality opinion); *Weems v. United States*, 217 U.S. 349, 30 S. Ct. 544 (1910).

Among "unnecessary and wanton" inflictions of pain are those that are "totally without penological justification." *Gregg*, 428 U.S. at 183; *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). *Rhodes v. Chapman*, 452 U.S. 337, 345-46, 101 S. Ct. 2392, 2398-99 (1981).

The Eighth Amendment to the United States Constitution prohibits "excessive" sanctions. U.S. Const., Amend. VIII; *Atkins v. Virginia*, 536 U.S. 304, 311, 122 S. Ct. 2242, 2246, 153 L. Ed. 2d 335, 343 (2002). The Eighth Amendment is applicable to Virginia through operation of the Fourteenth Amendment to the United States Constitution. *Estelle*, 429 U.S. at 101; *Edwards v. Whitlock*, 57 Va. Cir. 337 (2002).

In *Weems*, 217 U.S. at 349, the Supreme Court held that a punishment of 12 years jailed in irons at hard and painful labor for the crime of falsifying records was excessive. The Court explained, "that it is a precept of justice that punishment for crime should be graduated and proportioned to the offense." *Id.* at 367. Thus, even though "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual," it may not be imposed as a penalty for; "'the status' of narcotic addiction," *Robinson v. California*, 370 U.S. 660, 666, 8 L.Ed.2d 758, 82 S.Ct. 1417 (1962), because such a sanction would be excessive. As Justice Stewart explained in *Robinson*: "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Id.* at 667.

Dennis plead no contest on January 15, 2019

to two charges of misdemeanor, keeping a bawdy place, pursuant to 18.2-347. The Sentencing Order from the Winchester case states: "You will receive a sentence of twelve (12) months incarceration, which will be suspended on each Count. Receive twelve (12) months incarceration on both Counts" (Winchester 2019 T.T. page 12). This is the original Sentencing Order that set the foundation for the probation violation conviction. The Sentencing Order for the probation violation states: "I'll impose five years. I'm going to extend his probation... I'm going to extend his MED to 8-1-2025." The Sentencing terms between the two hearings are grossly disproportionate, constituting a violation of Dennis' eighth amendment rights. Allowing the sentencing order for a probation violation to be 5 times the duration of the original is unnecessary, cruel and unusual. Imposing a sentence grossly

disproportionate to the crime is a direct violation of Dennis' Eighth Amendment rights. As a result, the Sentencing Order for Dennis' probation violation should be declared void.

4. **Does a Virginia Court have the authority to extinguish a defendant's post commitment First Amendment Rights?**

The Commonwealth argued in court that Dennis being on the seekingarrangements website was a violation of his probation; however this is a violation of Dennis' First Amendment rights. The aforementioned provision of the probation is unconstitutional and should not stand as a basis for a probation violation. Such overly broad restrictions on access to "computers, electronics, smart phones, or social media" was recently found to be violative the First Amendment and, therefore, unconstitutional.

Packingham v. North Carolina, 137 S. Ct. 1730, 1738 (2017) (holding "[i]t is well established that, as a general rule, the Government "may not suppress lawful speech as the means to suppress unlawful speech"). Yet, that is exactly what Dennis' Sentencing Order from 2008 purports to do. The Sentencing Order purports to completely bar Dennis from ever using the Internet outside of work applications or ever using any social media website. Exh. 2.

Packingham is binding authority that applies here (8-0 decision). *Packingham* focused on First Amendment issues – applied to the states through the due process clause of the Fourteenth Amendment.

A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after

reflection, speak and listen once more. *Packingham*, 137 S. Ct. at 1735. The United States Supreme Court has sought to protect the right to speak in this spatial context. *Id.* A basic rule, for example, is that a street or a park is a quintessential forum for the exercise of First Amendment rights. *Id.* (citing, *Ward v. Rock Against Racism*, 491 U. S. 781, 796, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989)). Even now, these places are still essential venues for public gatherings to celebrate some views, to protest others, or simply to learn and inquire. *Packingham*, 137 S. Ct. at 1735.

In sum, to foreclose access to the Internet altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights. *Packingham*, 137 S. Ct. at 1737. The *Packingham* Court found it unsettling to suggest that only **even persons who have completed their sentences could**

use a limited set of websites. *Id.* Even convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives. *Id.*

It is well established that, as a general rule, the Government "may not suppress lawful speech as the means to suppress unlawful speech." *Packingham*, 137 S. Ct. at 1738 (citing, *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255, 122 S. Ct. 1389, 1404 (2002)).

The Sentencing Order violates Dennis' First Amendment rights by suppressing his lawful speech and should not have been considered as a factor in sentencing Dennis.

The Court of Appeals relied upon rulings that have never been adopted by this Court that are

clearly contrary to *Packingham*. See, e.g., *Fazili v. Commonwealth*, 71 Va. App. 239, 251 (2019). To the extent that cases like *Fazili* are violative of the doctrines of *Packingham*, such cases should be reversed.

The statute invalidated in *Packingham* applied to all convicted sex offenders including those that remained on probation. Had the United States Supreme Court believed that an exception existed for sex offenders still on probation, it would have said so. It did not.

Instead, *Packingham* ruled the North Carolina statute unconstitutional and inferior courts, such as the Virginia Court of Appeals have no authority to eviscerate its plain holdings.

Because the ruling concerning the unconstitutional probation provision was and is

manifestly unjust, Rule 5:25 should be invoked and relief granted to Dennis.

VI. Overall Conclusion

For all of the reasons stated herein, Dennis' Petition for Certiorari should be granted and his convictions vacated.

Dated: April 1, 2021

by

James Dennis, *pro se*