VIRGINIA:

In the Court of Appeals of Virginia on **Monday** the **9th** *day of* **March, 2020.**

James Gardner Dennis, Appellant,

against Record No. 0497-19-2
Circuit Court Nos. CR08-20,245-01 through CR08-20,264-01, CR08-20,334-01 and CR08-20,335-01

Commonwealth of Virginia, Appellee.

From the Circuit Court of Albemarle County

Counsel for appellant has moved for leave to withdraw. The motion to withdraw is accompanied by a brief referring to the part of the record that might arguably support this appeal. A copy of this brief has been furnished to appellant with sufficient time for appellant to raise any matter that appellant chooses.

The Court has reviewed the petition for appeal and appellant's *pro se* supplemental petition for appeal, fully examined all of the proceedings, and

determined the case to be wholly frivolous for the following reasons:

In 2008, the trial court convicted appellant under a written plea agreement of sexual battery, carnal knowledge, use of a computer to solicit a minor, and twenty counts of possession of child pornography. The trial court sentenced appellant to a total of forty-two years and eighteen months of incarceration with twenty-one years and one hundred and thirty-eight months suspended, conditioned on the successful completion of supervised probation.

In August 2017, appellant finished his active term of incarceration and began supervised probation. Approximately a year later, his probation officer reported that appellant had been charged with two counts of sex trafficking to receive money. In an addendum, the probation officer reported that under

a plea agreement appellant had been convicted of two amended charges of residing in a bawdy place and sentenced to a total of twelve months of suspended incarceration. As part of the plea agreement, appellant agreed "to give a proffer to law enforcement" regarding " information pertaining to other bawdy houses where human trafficking could be occurring in Virginia and that he would provide information pertaining to the involvement of his employer... in human trafficking." Appellant gave the proffer to Federal Bureau of Investigations Special Agent Teresa Hudson in January 2019.

At appellant's probation violation hearing, he conceded that he was in violation of his suspended sentences based on the misdemeanor convictions. Hudson testified that she had been investigating appellant's "proffer" and had "[f]ound multiple inconsistencies." Appellant made several allegations

against his employer that were "fabricated and based on [appellant's] own interactions with the women he accuse[d]" his employer of trafficking. First, Hudson discovered that appellant, not his employer, had been communicating with K.P., a nineteen-year-old woman from another state, while he was incarcerated. During phone calls, appellant misrepresented his circumstances to K.P. and offered to marry her even though he was married at the time. Appellant objected to the admission of his statements to K.P. He argued that his statements to K.P. were not relevant because he had admitted that the violated the terms of his suspended sentences. The Commonwealth responded that his "manipulation of [K.P.] from prison" was relevant for sentencing because it "show[eel] his dangerousness." The trial court overruled appellant's objection.

In his proffer to Hudson, appellant also

alleged that his employer had engaged in " inappropriate [and] illegal activity" with appellant's estranged wife, B.W. But B.W. stated that appellant, not his employer, had "manipulated her from prison using the attorney line." Lastly, appellant alleged that his employer "expected sexual favors" from a woman identified as K.H. " in return for co-signing for her car loan." K.H., however, denied that allegation.

Hudson also testified that appellant had been using an internet website called "Seeking [A]rrangements" as part of his sex trafficking activities. Appellant objected to this testimony as irrelevant "for this hearing," arguing that it is "not a crime to go on a website ... of aged females" and that doing so did not make appellant "more dangerous or not dangerous." The trial court overruled the objection.

Appellant's probation officer, Zachary Zwahl, testified that the conditions of appellant's probation limited his use of a computer to "employment purposes or employment related needs." Within nine days of beginning supervised probation, however, appellant accessed the "Seeking Arrangements" website. Appellant admitted that the website was "the same website he was using in his underlying offense" and that he had been "instructed that he was not permitted to access that website." There were "multiple [other] instances" of appellant "accessing the [Seeking Arrangements] website and communicating with women."

Appellant's mother, Linda Dennis, testified that her younger son is "mentally handicap" and the "age of an eight year old mentally." Dennis also testified that appellant's father, a Vietnam veteran

who suffered from chronic PTSD, killed himself after appellant was arrested.

The Commonwealth argued that the trial court should impose "at least ten years" of active incarceration "to protect [the] community." It contended that due to the nature of his underlying convictions, it was "[e]xtremely important" that appellant comply with the conditions of his probation, especially the "conditions with respect to his contact with women" and "internet websites." The Commonwealth argued that appellant's convictions for residing at a bawdy house were the consequence of a plea agreement whereby the Commonwealth reduced two charges of human trafficking "in an effort ... to crack down on the bigger scheme ... in which he was involved," but appellant "didn't even cooperate with that appropriately" by giving a fabricated proffer. The Commonwealth maintained

that appellant was "extremely" "dangerous[]" as demonstrated by his persistent efforts to manipulate young women over the phone, even while incarcerated, and through the Seeking Arrangements website while on probation.

Appellant asked the trial court to sentence him to a year of active incarceration and extend his term of probation. During argument, appellant's counsel proffered, without objection, that his convictions for residing at a bawdy place arose from appellant's visits to "a standard massage parlor" that involved payment in exchange for "sexual intercourse." He also proffered that the underlying convictions arose from consensual sex with a seventeen-year-old girl who had claimed to be twenty-one. Appellant proffered that he had the girl "flown down from Connecticut," had " taken her out," and had "consensual sodomy" before learning that

she "had lied about her age." Appellant argued that there were no allegations that he had violated his probation by communicating with "underage girls," but only "consen[ting] adults." He also argued that it was not illegal to fly K.P. to Virginia for a date, whether "it's for sexual intercourse or not." After argument by counsel, the trial court revoked appellant's suspended sentences and resuspended all but f1ve years.

I. Appellant, by counsel, argues that the trial court erred by "sentencing [him] to too long of a period of incarceration." He contends that five years of active incarceration was an abuse of discretion because this was his first probation violation and there were no allegations that he had been communicating with underage girls.

After suspending a sentence, a trial court "may revoke the suspension of sentence for any cause

the court deems sufficient that occurred at any time within the probation period, or within the period of suspension fixed by the court." Code § 19.2-306(A). "When a defendant fails to comply with the terms and conditions of a suspended sentence, the trial court has the power to revoke the suspension of the sentence in whole or in part." Alsberry v. Commonwealth, 39 Va. App. 314, 320 (2002). "In revocation appeals, the trial court's 'findings of fact and judgment will not be reversed unless there is a clear showing of abuse of discretion.'" Jacobs v. Commonwealth, 61 Va. App. 529, 535 (2013) (quoting Davis v. Commonwealth, 12 Va. App. 81, 86 (1991)). "The evidence is considered in the light most favorable to the Commonwealth, as the prevailing party below." Id.

The trial court had sufficient cause to revoke appellant's suspended sentences based on appellant's

new convictions for residing at a bawdy place. Upon finding that appellant had violated the terms of his suspended sentences, the trial court was obligated to revoke the suspended sentences, and they were in "full force and effect." Code § 19.2-306(C)(ii). The trial court was permitted- but not required- to resuspend all or part of the sentences. Id.; Alsberry, 39 Va. App. at 320.

It was within the trial court's purview to weigh any mitigating factors appellant presented. Keselica v. Commonwealth, 34 Va. App. 31, 36 (2000). Here, the record demonstrates that the trial court considered the mitigating evidence that appellant cites on appeal, including that this was his first probation violation, that his younger brother had a mental disability, that his father committed suicide after appellant was arrested, and that his sodomy conviction arose from consensual sex with a

girl who had lied about her age. Balanced against these considerations, however, was appellant's continued criminal activity and use of the Seeking Arrangements website. Considering all the circumstances, the trial court imposed the sentence that it deemed appropriate.

"The statutes dealing with probation and suspension are remedial and intended to give the trial court valuable tools to help rehabilitate an offender through the use of probation, suspension of all or part of a sentence, and/or restitution payments." Howell v. Commonwealth, 274 Va. 737, 740 (2007). After being convicted of sexual battery, carnal knowledge, use of a computer to solicit a minor, and twenty counts of possession of child pornography, appellant continued to commit criminal offenses of a sexual nature and used the internet to communicate with women in violation of the

conditions of his probation. Thus, appellant had demonstrated that he was not amenable to rehabilitation. "When coupled with a suspended sentence, probation represents 'an act of grace on the part of the Commonwealth to one who has been convicted and sentenced to a term of confinement.'" Hunter v. Commonwealth, 56 Va. App. 582,587 (2010) (quoting Price v. Commonwealth, 51 Va. App. 443, 448 (2008)). Appellant had failed to make productive use of the grace that had been extended to him. Having reviewed the record, we hold that the trial court did not abuse its discretion by sentencing him to five years of active incarceration. See Alsberry, 39 Va. App. at 321-22 (finding the trial court did not abuse its discretion by imposing the defendant's previously-suspended sentence in its entirety "in light of the grievous nature of [the

defendant's] offenses and his continuing criminal activity").

II. In his pro se supplemental petition for appeal, appellant argues that "[p]rosecutorial misconduct tainted the probation violation hearing and resulted in an unduly harsh sentence." Appellant concedes that he did not present this argument to the trial court but asks that we address it under the ends of justice exception to Rule 5A: 18[1]

"The 'ends of justice' exception to Rule 5A:18 is ' narrow and is to be used sparingly.'" Melick v. Commonwealth, 69 Va. App. 122, 146 (2018) (quoting Pearce v. Commonwealth, 53 Va. App. 113, 123 (2008)). "[T]he ends of justice analysis is a two-step process: determining whether the alleged error occurred, and, if so, whether justice requires application of the ends of justice provision." Hines v. Commonwealth, 59 Va. App. 567, 572 (2012). "The

burden of establishing a manifest injustice is a heavy one, and it rests with the appellant." Holt v. Commonwealth, 66 Va. App. 199,210 (20 16) (en bane) (quoting Brittle v. Commonwealth, 54 Va. App. 505, 514 (2009)). " In order to avail oneself of the exception, a defendant must affirmatively show that a miscarriage of justice has occurred, not that a miscarriage might have occurred." Melick, 69 Va. App. at 146 (quoting Redman v. Commonwealth, 25 Va. App. 215, 221 (1997)). Furthermore, to demonstrate that a miscarriage of justice has occurred, "[i]t is never enough for the defendant to merely assert a winning argument on the merits- for if that were enough[,] procedural default 'would never apply, except when it does not matter.'" Winslow v. Commonwealth, 62 Va. App. 539, 546 (2013) (quoting Alford v. Commonwealth, 56 Va. App. 706,710 (2010)).

The record in this case reveals no miscarriage of justice. Appellant contends that the Commonwealth's sentencing argument improperly suggested, without supporting evidence, that appellant communicated with underage women, continued to be involved in human trafficking by luring young women from out-of-state to "offend against" them, and violated his probation by having contact with women when there was no such condition of his probation. His argument, however, seizes upon fragments of the Commonwealth's argument and removes them from their context. The Commonwealth's argument properly focused upon the nature of appellant's underlying convictions, which included carnal knowledge of a minor and use of a computer to solicit a minor, and emphasized that appellant had engaged in the same behavior that led to those convictions. That behavior included using

the Seeking Arrangements website, in violation of his probation, and communicating with K.P. over the phone, who Hudson testified was nineteen years old, while incarcerated. Appellant did not object to any of these allegedly improper remarks before the trial court. See Russo v. Commonwealth, 207 Va. 251,257 (1966) ("Objection to improper argument of counsel should be made at the time.").

The Commonwealth also properly argued that while appellant's new convictions were for residing at a bawdy place, they were the consequence of a plea agreement whereby appellant's human trafficking charges where amended. By providing a largely fabricated proffer, however, appellant "didn't ... cooperate with that [plea agreement] appropriately." Considering these circumstances, the Commonwealth concluded that appellant was "extremely" "dangerous[]" and asked for the trial

court to impose "at least ten years" of active incarceration. Nevertheless, the trial court only imposed five years of active incarceration. Having reviewed the record, we conclude that there was no miscarriage of justice in this case. Accordingly, Rule SA: 18 bars our consideration of appellant's argument on appeal.

III. Appellant, in his *pro se* supplemental petition for appeal, argues that the "trial court erred by allowing the unqualified admission of hearsay evidence." We review "evidence relevant to an admissibility issue 'in the light most favorable to the Commonwealth, as the prevailing party, including all reasonable and legitimate inferences that may properly be drawn from it'" Jenkins v. Commonwealth, 17 Va. App. 334, 342 (2019) (quoting Henderson v. Commonwealth, 285 Va. 318, 329 (2013)). "On appeal, a determination regarding the

relevance and admissibility of evidence is ordinarily reviewed for an abuse of discretion." Id. In evaluating the admission of an out-of-court statement for constitutional due process challenge, however, "we 'accept[] the historical facts' and 'apply a de novo review' to determine whether the record supports admitting the challenged evidence as a matter of law." Id. at 343.

Once a "criminal prosecution has ended in a conviction," the defendant "is not entitled to the 'full panoply' of constitutional rights to which he was entitled at trial." Henderson, 285 Va. at 325 (quoting Morrissey v. Brewer, 408 U.S. 471,480 (1972)). Consequently, "application of the Confrontation Clause to ... post-trial ... proceedings is inappropriate." Moses v. Commonwealth, 27 Va. App. 293, 301 (1998). Nevertheless, "a defendant has a limited right of confrontation in criminal sentencing

and any subsequent revocation proceedings under the Due Process Clause of the Fourteenth Amendment." Jenkins, 71 Va. App. at 343. *The rules of evidence* are not "strictly applied" in such proceedings, and hearsay is "frequently admitted." Henderson, 285 Va. at 326 (quoting United States v. Doswell, 670 F.3d 526, 530 (4th Cir. 2012)).

To demonstrate wrongdoing at a revocation hearing, testimonial hearsay is admissible only if the trial court "specifically finds good cause for not allowing confrontation." Id. To be admissible at "what is clearly the sentencing portion of a revocation hearing," however, testimonial hearsay need only "bear some indicia of reliability." Jenkins, 71 Va. App. at 346-48 (quoting Blunt v. Commonwealth, 62 Va. App. 1, 9 (2013)). Examples of indicia of reliability include: "[d]etailed police reports," "hearsay given under oath," statements by the

accused " that directly or circumstantially corroborate the accusations," "corroboration of [the] hearsay by third parties or physical evidence," application of a "well-established exception" to the rule against hearsay, "evidence of substantial similarities between past offenses and the new accusations that bolsters the accuser's credibility," and the accused's "failure to offer contradictory evidence." Saunders v. Commonwealth, 62 Va. App. 793, 808 (20 14) (quoting Henderson, 285 Va. at 327). Appellant identifies two instances where he alleges that the trial court allowed inadmissible hearsay, both of which occurred during the sentencing phase of the hearing after appellant conceded that he had violated his probation. First, Zwahl testified that a Winchester police detective had spoken with "a female that [appellant] was taking to a jewelry store" to "purchase items." Appellant's Winchester

probation officer confronted appellant about that interaction and his "accessing the website," but appellant denied the allegations. Zwahl testified to these events as they were described in the major violation report. While that testimony contained multiple layers of hearsay, it nevertheless satisfied the some-indicia-of-reliability test because Zwahl was testifying as to events personally investigated by the Winchester police and probation officers and recorded in appellant's major violation report. See Wolfe v. Commonwealth, 37 Va. App. 136, -8-142-43 (200 1) (affirming the admission of a probation officer's testimony containing multiple layers of hearsay when the probation officer obtained information from a sheriffs department employee who had personally investigated the complaint against the defendant).

Second, appellant argues that Hudson's testimony regarding appellant's phone calls with K.P. from prison were inadmissible hearsay. Specifically, he argues that the trial court erred by permitting Hudson's testimony of both appellant and K.P.' s statements. "[A]n out-of-court statement by a criminal defendant," however, "is admissible as a party admission, under an exception to the rule against hearsay." Atkins v. Commonwealth, 68 Va. App. 1, 8 (2017) (quoting Bloom v. Commonwealth, 262 Va. 814, 820 (2001)). Additionally, Hudson personally listened to the phone calls between appellant and K.P. and testified as to what she heard. See Blunt, 62 Va. App. at 4-7 (holding that a police officer's testimony regarding the defendant's participation in a drug sale had some indicia of reliability when the officer, though not present for the transaction, watched a video recording of the

events). Moreover, the details of appellant's phone call with K.P. had "substantial similarities" with the facts of appellant's underlying conviction-appellant communicated with an out-of-state female and flew her into the Commonwealth for sexual intercourse. Saunders, 62 Va. App. at 808 (holding that "evidence of substantial similarities between past offenses and the new accusations" is an example of an indicia of reliability). Accordingly, Hudson's testimony regarding the phone call between appellant and K.P. had some indicia of reliability and was properly admitted.

IV. Appellant, in his *pro se* supplemental petition for appeal, argues that the trial court erred by "by allowing testimony about Internet usage to violate [his] probation." He contends that the "probation restriction forbidding [him] from accessing social media websites is facially

unconstitutional." Appellant concedes that he did not preserve this issue before the trial court but asks that we address it under the ends of justice exception to Rule 5A:18.2

As noted above, to demonstrate that a miscarriage of justice has occurred," [i]t is never enough for the defendant to merely assert a winning argument on the merits- for if that were enough[,] procedural default 'would never apply, except when it does not matter.'" Winslow, 62 Va. App. at 546 (quoting Alford, 56 Va. App. at 71 0). Rather, the trial court's error must be " clear, substantial and material." Campbell v. Commonwealth, 14 Va. App. 988, 993 (1992) (quotation omitted). To be "clear," an error "must be apparent under existing statutory or case law without the necessity of further judicial interpretation and must not have been acquiesced in, either expressly or impliedly, by the complaining

party." Campbell, 14 Va. App. at 997 (Barrow, J., concurring) (citing Cooper v. Commonwealth, 205 Va. 883, 889 (1 965)). Additionally, the record must affumatively show that the error "clearly had an effect upon the outcome of the case." McDuffie v. Commonwealth, 49 Va. App. 170, 178 (2006) (quoting Brown v. Commonwealth, 8 Va. App. 126, 131 (1989)).

Here, appellant argues that the condition of his probation restricting his computer use was unconstitutional under the United States Supreme Court's opinion in Packingham v. North Carolina, 137 S. Ct. 1730 (2017). In that case, the Court struck down a statute prohibiting convicted sex offenders from accessing social media sites-Facebook, Linkedln, and Twitter-as unconstitutional. Id. at 1737. The Court held that "to foreclose access to social media altogether is to prevent the user from

engaging in the legitimate exercise of First Amendment rights." Id. This Court has since interpreted Packingham, however, as "not apply[ing] to prohibit a circuit court from imposing, *as a condition of probation*, a reasonable ban on internet access provided such ban is narrowly tailored to effectuate either a rehabilitative or public-safety purpose." Fazili v. Commonwealth, 71 Va. App. 239,25 1 (2019) (emphasis added). "Inherent in the very nature of probation is that probationers do not enjoy the absolute liberty to which every citizen is entitled . . . but only ... conditional liberty properly dependent on observance of [probation conditions]." Id. (internal citations and quotations omitted).

Appellant could use a computer only "for employment purposes or employment related needs." This condition is more narrowly tailored to appellant's underlying convictions-which included

use of a computer to solicit a minor and possession of child pornography-than the blanket ban on all convicted sex offenders from accessing social media at issue in Packingham. Additionally, it allowed appellant to "receive [the] legitimate benefits" of using the internet regarding his employment as he "seek[s] to reform and to pursue [a] lawful and rewarding" life. Packingham, 137 S. Ct. at 1737. Thus, the United States Supreme Court's decision in Packingham, as interpreted by this Court's decision in Fazili, does not "clearly" and manifestly demonstrate that the condition of appellant's probation restricting his computer use was unconstitutional. Indeed, had appellant raised the issue before the trial court, it could have been extensively litigated and argued by both parties. See Campbell, 14 Va. App. at 997 (Barrow, J., concurring) (stating that an error is not "clear,

substantial and material" when it involves "unresolved questions of law" that a "trial judge may reasonably rely on the parties to bring to [its] attention"). Appellant did not raise the issue before the trial court, however, and his argument on appeal fails to affirmatively demonstrate that a miscarriage of justice has occurred. Therefore, Rule 5A:18 bars our consideration of his argument.

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

The trial court shall allow Michael J. Hallahan, II, Esquire, the fee set forth below and

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

Costs due the Commonwealth by appellant in

Court of Appeals of Virginia:

Attorney's fee $400.00 plus costs and expenses

A Copy,

Teste: *Cynthia L. McCoy (S)*

Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 1st day of March, 2021.

James Dennis, Appellant,

against Record No. 200465

Court of Appeals No. 0497-19-2

Commonwealth of Virginia, Appellee.

From the Court of Appeals of Virginia

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

A Copy,

Teste:

Douglas B. Robelen, Clerk

By: (illegible signature)

Deputy Clerk

Additional material from this filing is available in the Clerk's Office.