

COURT OF APPEALS OF VIRGINIA

Record No. 1013-25-4

JULIAN DARIUS KARAPETKOV
v.
COMMONWEALTH OF VIRGINIA

Present: Judges O'Brien, Causey and Bernhard

Argued at Fairfax, Virginia

Opinion Issued September 1, 2026

FROM THE CIRCUIT COURT OF LOUDOUN COUNTY

James P. Fisher, Judge

Joseph Flood (Jonathan P. Sheldon; Sheldon & Flood, PLC, on briefs), for appellant.¹

Ken J. Baldassari, Assistant Attorney General (Jason S. Miyares,² Attorney General, on brief), for appellee.

PUBLISHED OPINION BY JUDGE DORIS HENDERSON CAUSEY

Julian Darius Karapetkov pleaded guilty to one count of arson of an occupied dwelling and one count of arson with \$1,000 or more of property damage, in violation of Code § 18.2-77 and Code § 18.2-81. The circuit court imposed a life sentence with all but 10 years suspended for the first count, and 10 years with no time suspended for the second count, totaling 20 years of active incarceration. On appeal, Karapetkov argues the court erred in failing to set restitution and ordering the probation officer to determine the amount of restitution as a special condition. In addition, he contends the court abused its discretion by denying his request to continue the hearing on the motion to reconsider his sentences, by imposing a sentence “more than six times the high end of the

¹ Different counsel represented Karapetkov before the circuit court.

² Jay C. Jones succeeded Jason S. Miyares as Attorney General on January 17, 2026.

[discretionary sentencing] guidelines,” and by denying reconsideration. He argues that his sentence is so disproportionate that it violates the Eighth Amendment’s prohibition against cruel and unusual punishment, and the due process guarantees of the Virginia and United States Constitutions.

We hold that the circuit court did not abuse its discretion in denying a continuance, because any prejudice from the proceeding was speculative. We further hold that Karapetkov’s sentence, imposed within the statutory range, is not subject to the appellate review that he seeks. Finally, regarding restitution, we decline to invoke the ends of justice exception. We accordingly affirm.

BACKGROUND³

This appeal stems from Karapetkov making incessant, unwanted, and eventually unlawful contact with C.G.⁴ over a three-year period. C.G. and Karapetkov attended middle school together and “reconnected in 2020” during their senior year of high school. Following a brief period of non-romantic communications and in person encounters, C.G. decided to “cut off contact” with Karapetkov. Regardless, Karapetkov continued communication with C.G. via text messaging and social media. Despite attempts to block Karapetkov and change her number, C.G. continued to receive messages from him, as many as 35 per day. Karapetkov and C.G. attended Virginia Commonwealth University (“VCU”) around the same time, where the messages continued in the same manner and frequency. In August 2021, C.G. reported Karapetkov to the VCU police and obtained a temporary protective order.

³ The facts relating to sentencing (in contrast to sufficiency of the evidence determinations) and to Karapetkov’s request for a continuance, are reviewed for abuse of discretion on the entire record. *See Minh Duy Du v. Commonwealth*, 292 Va. 555, 563-64 (2016) (sentencing); *Ortiz v. Commonwealth*, 276 Va. 705, 722 (2008) (continuance).

⁴ This opinion uses initials to protect the privacy of the victim.

In February 2022, Karapetkov was arrested, and subsequently convicted in the Richmond City General District Court, for stalking C.G. while the two were students at VCU. Karapetkov was granted an appeal bond in April 2022, requiring him to have no future contact with C.G. He violated this directive in August 2022. On September 4, 2022, a video showing C.G. attending a VCU campus party was posted to social media.⁵ A few hours later, the Loudoun County Fire and Rescue Services responded to a “structure fire” at the home of C.G.’s parents. The fire damaged a portion of the home and the two cars parked in the driveway. The Commonwealth estimated the damaged cars’ value at \$22,923 and \$22,475. Karapetkov admitted to setting the tires of the vehicles on fire. He told authorities he was “upset by the financial harm his parents had suffered due to him having to change schools and obtain attorneys.” He likewise admitted to “being upset by the video posted of [C.G.]”

On March 21, 2024, Karapetkov pleaded guilty to arson of an occupied dwelling and arson with \$1,000 or more of property damage. Paragraph (15)(f) of the “Plea of Guilty to Felonies” (herein “the plea agreement”) entered into between Karapetkov and the Commonwealth, and dated March 21, provides as follows: “No restitution is owed in this case.” The court accepted Karapetkov’s guilty pleas without amending the plea agreement, and, on the Commonwealth’s motion, the court entered a nolle prosequi as to the remaining charges. In a subsequent conviction order, the trial court wrote that it “accepts and agrees to abide by the terms and conditions set forth in the Plea Agreement.”

I. The Original Sentencing Hearing

During the plea hearing, the court discussed the sentencing ranges under the plea agreement, stating the arson of property offense carried a penalty of “two to ten years in the Virginia

⁵ “Th[e] video was a panning shot of a party at a fraternity house at VCU and[,] in part of the video, [C.G.] can be observed walking through the room.”

penitentiary,” and the arson of an occupied dwelling offense “has a legislative penalty range of five years to life in prison.” The court noted that sentencing guidelines would be prepared “for the purposes of establishing average sentences” but clarified that it could sentence Karapetkov “to any lawful punishment within the penalty ranges” if found guilty. Karapetkov acknowledged these statements.

On July 8, 2024, the parties convened for the sentencing hearing. The circuit court received sentencing guidelines, a pre-sentence report, and a sentencing memorandum in support of Karapetkov. The sentencing guidelines recommended a range of punishments from one year and three months to three years of incarceration. The Commonwealth presented the testimony of C.G. and C.G.’s father, mother, and sister.

C.G.’s father testified that Karapetkov’s “unwanted communications” with C.G. “have included expressions of anger, swearing, [and] claims to be able to manipulate counselors, and [that Karapetkov] attempted to fabricate evidence to suggest [C.G.] was sending messages to herself.” He alleged the arson damage caused the family to “spend[] tens of thousands of dollars out of pocket” for repairs and to be displaced from their home for 20 months.

C.G.’s sister read aloud several text messages sent by Karapetkov and contended, in the three years that he harassed C.G., he never changed his behavior, despite legal and nonlegal interventions.

C.G.’s mother testified that their home “used to be a place where [the family] felt safe; a place filled with memories of [their] kids growing up, of hosting holidays, [and] celebrating family milestones”; but “[n]ow the memories seem to all be about the fire.” She recalled the “fear and shock, trying not to panic when [they] were initially unable to get in contact with [C.G.], and memories of the aftermath of the fire: [s]oot everywhere[and] sorting through destroyed belongings.”

C.G. described Karapetkov's messages as "scary," "exhausting, due to the constant influx of them at all hours of the day and night," and "concern[ing] . . . because [he] was making suicidal remarks." She testified that Karapetkov "continued his constant terrorization" at VCU, where they both attended college, ultimately "ignor[ing] warnings from the school, law enforcement and judges." As a result, C.G. contemplated suicide, struggled in school, and feared entering new relationships, worried that Karapetkov would harm anyone with whom she became close.

The defense called Karapetkov's father and brother to the stand. His brother described Karapetkov's experiences with his court-appointed therapist, explaining the sessions lasted about ten minutes, and stating, "they didn't really talk about anything related to this case, or pretty much anything related to him." His father confirmed that Karapetkov attended therapy twice a week, sometimes for ten minutes, and testified, "[Karapetkov] was telling me that they [would] talk about good restaurants here in the Ashburn/Sterling area. It was not really . . . anything useful or helpful." His brother and father testified they were willing to delay or modify their employment to better monitor Karapetkov.

Karapetkov testified. He maintained he "would never . . . intentionally try to harm [C.G.] or her family," explaining "not once did [C.G.'s] parents, or anyone else, cross my mind. . . . The only person that was on my mind was [C.G.], and I knew for a fact that she was in Richmond, safe from the fire." He stated, "On the night of the fire, the only thought that kept flowing through my mind was that my opportunity of having a relationship with [C.G.], living a normal college life with plenty of friends and experiences, was gone." And "[w]hen I saw the . . . video of [C.G.], my heart dropped, and I began experiencing a lot of sadness, regret, anger and hopelessness."

The Commonwealth asked the court to sentence Karapetkov to 25 years, with no more than 10 years suspended. It reasoned the proposed sentence was appropriate given the facts of the case

and Karapetkov's behavior in the days leading up to the fire, which suggested that he intended to set the house on fire. Defense counsel rebutted, contending the evidence established that "a vehicle . . . outside the home[] was set on fire" and the "fire *jumped* from the car to the house." (Emphasis added). Defense counsel argued the messages were "no more than love letters" and insisted Karapetkov never approached C.G. in person or "made any threats, either direct or indirect." He further argued that Karapetkov did not receive a comprehensive mental health evaluation, and thus, "[h]e [hadn't] been given an opportunity to demonstrate . . . that with the help of a qualified professional, . . . he can comply with whatever condition is set by this [c]ourt." Defense counsel asserted the guidelines were "appropriate" because they adequately reflected all "relevant information," including Karapetkov's guilty plea, his acceptance of responsibility, the fact that he was "legally restrained," and "the injury to the victim."

The court "impart[ed] some of [its] reasoning" before issuing the sentences. The judge weighed aggravating and mitigating factors. Aggravating factors included that Karapetkov had a "truly unnatural and irrational obsession, of what [the court found] to be a possessory nature." The court gave "little credit" to Karapetkov's contention that the messages were simply "love machinations," instead deeming them to be "a product of a delusion . . . that's likely continuing to-date." The court held that Karapetkov's "ignoring of the legal restraint imposed by the Richmond court" constituted a "very strong factor," further stating, "I don't think it's adequately weighed in the Virginia sentencing guidelines."

Further, the court found that Karapetkov's "tactics of manipulation" lasted for 18 months. The court found that the balance of information demonstrated at least some pre-planning on Karapetkov's part to set the house on fire. In addition to "emotional, traumatic, and the psychological damage," it noted "financial damage[s] [of] over a million dollars" to the home and

vehicles.⁶ Lastly, when considering Karapetkov’s continued efforts to contact C.G. from jail, the court stated the sentencing guidelines “do not really, in any appreciable way, adequately account for the concept of future dangerousness,” “given the type of stalking that went on here.”

As to mitigating factors, the court noted that Karapetkov was a “young man” without a prior record. It determined that Karapetkov was undergoing “a mental or emotional disturbance” and the “vacuum of information” concerning his mental health was “equally capable of being dangerous, as it is being mitigating.” The court found that Karapetkov’s efforts at therapy were “anemic” and that it could not “put much weight on the guesswork that . . . [Karapetkov’s actions were the] product of depression.”

The court sentenced Karapetkov to life in prison, with all but ten years suspended, for the arson of an occupied dwelling conviction, and to ten years for the arson of property conviction. The court set conditions for the suspended sentence, including good behavior for life, no contact with the victim or the victim’s family, and supervised probation for five years. The court also listed several special conditions. In particular, the judge stated, “you are to develop and commit to a restitution plan with the supervising probation officer upon your release.” Karapetkov did not object to the imposed sentence or conditions.

The court memorialized its rulings in a sentencing order dated July 9, 2024. The restitution terms read:

12. *If directed by a Probation/Parole Officer, or otherwise by a specific court order of the Commonwealth of Virginia, pay restitution, fines and costs associated with this matter.*

. . . .

17. The Defendant is to develop and commit to a restitution plan with the probation officer upon release.

⁶ It is unclear from where in the record the circuit court drew this figure. The figure is not a finding as to restitution.

(Emphases added). The order further directs: “It is ORDERED that the Defendant is to pay the costs and restitution of this proceeding; including any Court Appointed Attorney fees that may be assessed, to the Clerk of the Court.”

On July 19, 2024, the court entered an order staying the “finality” of the sentencing order “until further Order of this [c]ourt.” The stay order was renewed in October 2024, December 2024, and January 2025, and the case was continued twice thereafter.

II. Hearing on the Motion to Reconsider the Sentences

On May 1, 2025, the circuit court held a hearing on Karapetkov’s motion to reconsider the imposed sentences. Defense counsel requested to continue the case until May 15 because Karapetkov’s mother had been hospitalized after falling through a screened door from the second floor of her residence. He explained that his mother served as a “potential rebuttal witness” and that Karapetkov wished for her to be present. He further asserted that Dr. Jennifer Marshall, the clinical psychologist who evaluated Karapetkov, indicated the mother’s fall might be a “potential suicide attempt,” which could affect her data and findings concerning his mental health. The Commonwealth objected, asserting the matter “ha[d] been continued so many times”⁷; “the mother

⁷ The Commonwealth stated, in relevant part:

[The motion to reconsider] was then extended and stays were granted initially from July to October, then October to December, December to January, January to February, and then when we were here in February, defense requested a further extension. The Commonwealth did object to the last two extensions of the stay.

We were here in February, the Court said essentially move or get off the pot when it comes to the motion to reconsider. . . . [And the case was] docketed to be heard April 3rd. The Commonwealth was contacted by . . . the clerk’s office . . . that April 3rd no longer worked for the Court and offered April 10th.

Defense counsel later requested that the case be set for May 1, 2025.

was not called as a witness at the original sentencing hearing”; and “an event almost a year after the original sentencing hearing” should not affect reconsideration of the sentences.

The court denied Karapetkov’s continuance request. It held that a motion to reconsider a sentence “is not . . . itself a substantive right” but rather “an accommodation on the notion that perhaps maybe there’s something out there that the [c]ourt could . . . consider.”⁸ Specifically, “it was represented . . . that there was an issue with regard to [Karapetkov’s] mental [health] and a report that was forthcoming.” Dr. Marshall’s report and testimony sufficiently addressed these concerns. Concerning “parents or other witnesses,” the court stressed the motion is not a “do over.” The hearing proceeded.

Dr. Marshall opined that Karapetkov suffered from depressive disorder.⁹ She explained that he faced several issues in adolescence, including a video-game addiction that led to major self-isolation, closing him out of all former social groups by the time he entered high school. She also attributed Karapetkov’s brother leaving for college, along with the impact of his parents’ divorce; Karapetkov maintained limited contact with his father and continued residence with his mother—who according to Karapetkov, his father, and his brother—experienced “significant struggles” with mental health and illness. Combined with little to no “significant parental supervision,” Dr. Marshall concluded that “significant opportunities for intervention . . . were lost.” Karapetkov did not receive any mental health treatment until the court’s directive, and even then, “[t]here really wasn’t any indication of a formal treatment plan.”¹⁰ Considering the

⁸ The court explained “the matter ha[d] already been considered at a full sentencing hearing.”

⁹ The court qualified Dr. Marshall as an expert.

¹⁰ Dr. Marshall stated, “I don’t recall [Dr. Martha Merrion] actually discussing any kind of formulation of a diagnostic impression and really what detailed services he needed.” She claimed Dr. Merrion “made several . . . reaching statements about [Karapetkov’s] culpability and

totality of circumstances, Dr. Marshall concluded that Karapetkov had no experience navigating romantic or non-romantic relationships and that he lacked “insight as to his behavior” with C.G. Karapetkov urged the court to consider the interventions outlined in Dr. Marshall’s report in place of the 20-year sentence.¹¹

The court denied the motion. It held there was “no sufficient nexus between the lack of treatment and the decision to sneak onto somebody else’s property and to maliciously set it on fire.” It held the “brain development argument” was a “total non sequitur,” as “millions of 18 to 25 year olds . . . [have] navigat[ed] the loss of girlfriends without setting the other family’s house on fire.” Finally, it stated, “even assuming [the] mitigating value in today’s presentation,” the evidence was “utterly insufficient to change my mind as to the July 2024 sentence[s].” The court ordered the July 9, 2024 sentencing order into execution. Karapetkov appealed.

ANALYSIS

I. The Denial of the Motion to Continue

Karapetkov contends the circuit court abused its discretion in denying his motion to continue the May 1, 2025 reconsideration hearing because his mother was an essential witness whose hospitalization rendered her unavailable. He asserts his mother’s possible suicide attempt could have altered the findings of his expert, Dr. Marshall. He also argues that he wanted his mother present both as a potential rebuttal witness and for support. Because Karapetkov has not shown the prejudice required for reversal, this Court affirms the ruling of the circuit court.

Whether to grant or deny a continuance rests within the sound discretion of the circuit court. *Haugen v. Shenandoah Valley Dep’t of Soc. Servs.*, 274 Va. 27, 34 (2007). To obtain a

the instant offense based on little to no data.” The transcript phonetically misspelled Dr. Merrion’s name as Dr. “Marion.”

¹¹ Dr. Marshall mentioned treatment for Karapetkov’s suicidal ideations, intensive therapy, group therapy, and cognitive behavioral interventions.

reversal on that ground, an appellant must show (1) an abuse of discretion *and* (2) any resulting prejudice. *Id.*

Prejudice is an essential prong. *See Bolden v. Commonwealth*, 49 Va. App. 285, 290 (2007). Prejudice may not be presumed; it must appear from the record. *Id.* Where the harm an appellant alleges is “equivocal and speculative,” no abuse of discretion occurs. *Salmon v. Commonwealth*, 32 Va. App. 586, 595 (2000) (quoting *Haase v. Haase*, 20 Va. App. 671, 680 (1995)).

Here, we need not decide whether the circuit court abused its discretion because Karapetkov has not demonstrated the requisite prejudice.¹² Karapetkov identifies only speculative harm. *See id.* As represented by defense counsel, Dr. Marshall indicated that his mother’s fall “may change some of her findings” if it proved to be a suicide attempt. Counsel did not proffer the substance of his mother’s anticipated testimony, and he did not identify how any of Dr. Marshall’s conclusions or treatment recommendations would change. In the record before us, prejudice does not stem from a contingent and unspecified possibility of an expert changing their findings upon some future incident that may not occur. *See Salmon*, 32 Va. App. at 595.

Karapetkov’s remaining grounds do not establish prejudice either. As to his mother’s role as a rebuttal witness, his mother’s planned testimony would have addressed a recorded jail call between her and Karapetkov. The circuit court stated it would give no weight to this jail call, which removed any need for that rebuttal. And Karapetkov’s wish for his mother to be present as support, however understandable, itself does not show how the denial prevented Karapetkov

¹² We do not reach the Commonwealth’s contention Karapetkov failed to proffer his mother’s testimony or the substance of any change to Dr. Marshall’s findings. Because the absence of prejudice is dispositive, we assume without deciding the claim was preserved and properly presented.

from presenting his case. The circuit court received Dr. Marshall's written evaluation, heard her testimony at length, and determined the report and testimony were sufficient for the limited purpose of the reconsideration motion. On this record, any asserted harm from that decision remains speculative. Karapetkov's challenge therefore fails on the prejudice prong, and we do not reach whether the circuit court's ruling was an abuse of discretion. *Bolden*, 49 Va. App. at 290. Accordingly, we affirm the denial of the motion to continue.

II. The Sentence

A circuit court's sentencing decision, and its denial of a motion to modify a sentence under Code § 19.2-303, are reviewed for abuse of discretion. *Minh Duy Du v. Commonwealth*, 292 Va. 555, 563 (2016); *Cellucci v. Commonwealth*, 77 Va. App. 36, 45-46 (2023) (en banc). An abuse of discretion requires more than a debatable ruling; it requires either (1) a decision no reasonable jurist could reach or (2) one factually or legally flawed at its foundation. *See Grattan v. Commonwealth*, 278 Va. 602, 620 (2009).

A. The Within-Range Sentence

A circuit court acts within its sentencing authority when it fixes punishment at a point within the range the legislature has established. *Minh Duy Du*, 292 Va. at 564-65. Karapetkov faced up to life imprisonment for arson of an occupied dwelling and up to ten years for arson of personal property valued at \$1,000 or more, and his sentences fall within those ranges. That his active term exceeds the *discretionary* guidelines is not grounds for reversal. Nothing in the record establishes that the circuit court failed to consider the mitigating evidence that Karapetkov now advances; we presume, without affirmative evidence to the contrary, that courts consider all evidence properly before them. *Cellucci*, 77 Va. App. at 52.

B. The Eighth Amendment

Karapetkov next asks this Court to conduct a proportionality review of his sentence under the Eighth Amendment. Such review is not available for any sentence less than life imprisonment without the possibility of parole. *Cole v. Commonwealth*, 58 Va. App. 642, 654 (2011). Although Karapetkov invites us to depart from that rule, we are bound by *Cole* under the rule of inter-panel accord and may not overrule it; only this Court sitting en banc or the Supreme Court of Virginia may do so. *Butcher v. Commonwealth*, 298 Va. 392, 397 n.6 (2020). The circuit court did not impose a sentence of life imprisonment without the possibility of parole. Karapetkov’s Eighth Amendment claim is therefore foreclosed, and we need not decide whether it was preserved. Karapetkov’s parallel claim under Article I, Section 9 of the Constitution of Virginia fails for the same reason, as that provision affords no greater protection than the Eighth Amendment. *See Vlaming v. W. Point Sch. Bd.*, 302 Va. 504, 528 (2023); *Dunaway v. Commonwealth*, 52 Va. App. 281, 311, 313 (2008).

C. Due Process and the Sentencing Guidelines

Karapetkov also maintains that departing from the discretionary sentencing guidelines by more than six times their upper end is so arbitrary as to deny him due process. The guidelines, however, are advisory, and the General Assembly has provided that the failure to follow them “shall not be reviewable on appeal or the basis of any other post-conviction relief.” Code § 19.2-298.01(F). Further, this Court has held that excluding decisions concerning the application of the discretionary guidelines from appellate review does not deny due process. *Jett v. Commonwealth*, 34 Va. App. 252, 257 (2001). Karapetkov’s due process argument is accordingly without merit, and we need not decide whether it was preserved. Karapetkov does not argue that Article I, Sections 8 and 11 of the Virginia Constitution provide any greater

protection than its federal counterpart, so we do not reach that question. *Shivaee v. Commonwealth*, 270 Va. 112, 119 (2005).

D. The Motion to Reconsider

Finally, the circuit court did not abuse its discretion in denying the motion to reconsider under Code § 19.2-303. The court considered Karapetkov’s mental-health evidence and found it insufficient to alter the sentence; it was not obligated to find that the evidence mitigated his offenses. *Cellucci*, 77 Va. App. at 52. Because we affirm both the sentence and the denial of the motion to reconsider, no remand under Code § 19.2-303 issues, and we therefore have no occasion to resolve the parties’ dispute over whether, under *Harris v. Commonwealth*, 85 Va. App. 497 (2025), the circuit court would retain jurisdiction to modify the sentence on such a remand. For the same reason, we deny as unnecessary Karapetkov’s alternative request that we stay this appeal pending the Supreme Court of Virginia’s disposition of the petition for appeal in *Harris*.

III. Restitution

Lastly, Karapetkov argues the trial court erred “when it failed to set the amount of restitution and instead delegated that responsibility to ‘a Probation/Parole Officer.’” Karapetkov asks us to apply the ends of justice exception, and, consequently, remand the case back to the trial court. We are not persuaded that Karapetkov’s restitution-related assignment of error merits review on appeal because the explicit terms of the plea agreement, accepted by the court and entered by court order, states that no restitution is owed.¹³

¹³ The record must affirmatively establish the appellant’s asserted error. *Smith v. Commonwealth*, 59 Va. App. 710, 724 (2012). We read the sentencing order only to decide whether the record affirmatively establishes a clear, substantial, and material error; we express no view on the merits of the delegation claim.

A. The Plea Agreement

Before sentencing, Karapetkov entered into a plea agreement, wherein he and the Commonwealth agreed that Karapetkov would not pay restitution.¹⁴ During the plea colloquy, the trial court accepted Karapetkov's plea without amending the agreement. In a subsequent conviction order, the *trial court* wrote that it “*accepts and agrees* to abide by the terms and conditions set forth in the Plea Agreement.” (Emphasis added). The trial court thus adopted the no-restitution term of the plea agreement in a legally enforceable court order.

We treat plea agreements as written contracts between a defendant and the Commonwealth. *Bardales v. Commonwealth*, 71 Va. App. 737, 743 (2020); *Wright v. Commonwealth*, 49 Va. App. 58, 62 (2006) (“[B]asic rules of contract law apply to plea agreements.”); *Griffin v. Commonwealth*, 65 Va. App. 714, 718 (2016) (“Once accepted, courts generally treat plea agreements as binding contracts[.]”); *Esparza v. Commonwealth*, 29 Va. App. 600, 606 (1999) (“[T]he law in force on the date a contract is formed determines the rights of its parties.”).

Because plea agreements are binding contracts, Virginia jurisprudence is replete with appellants who sought to vacate plea agreements that they or their counsel deemed ill-advised. We have generally held these parties liable to the terms to which they agreed. *See generally Perry v. Commonwealth*, 33 Va. App. 410, 412 (2000) (“[A] voluntary and intelligent [*Alford*] guilty plea by an accused is a waiver of all defenses other than those jurisdictional.” (internal quotation marks and citation omitted)); *Howell v. Commonwealth*, 60 Va. App. 737 (2012) (upholding plea agreement where defendant argued a “manifest injustice” because of ineffective counsel when he sought to withdraw his guilty plea); *Stevenson v. Commonwealth*,

¹⁴ Paragraph (15)(f) of the plea agreement provides that “[n]o restitution is owed in this case.”

No. 2350-02-1, 2004 Va. App. LEXIS 89 (Feb. 24, 2004) (upholding plea agreement where defendant argued that his guilty pleas were not knowingly and voluntarily tendered because his attorney advised that he could withdraw it after discussing it with his mother); *Lynch v. Commonwealth*, No. 0512-00-2, 2001 Va. App. LEXIS 275 (May 22, 2001) (upholding plea agreement where defendant moved to vacate guilty plea after discovering witnesses who would testify on his behalf).¹⁵

In its contract with Karapetkov, the Commonwealth agreed to waive whatever restitution Karapetkov may have owed the victim, the victim's family, or the Commonwealth for the damage to property resulting from his arson conviction. When a defendant, whose freedom is at stake, feels they wrongfully entered a plea agreement, we hold that a contract is a contract. Now, when the Commonwealth adopts a position¹⁶ that would evade the terms of the plea agreement,

¹⁵ These instances are provided purely as examples where defendants were held to the benefit of their bargain. Unpublished opinions have no precedential value but "are nevertheless persuasive authority." *Samartino v. Fairfax Cnty. Fire and Rescue*, 64 Va. App. 499, 508 n.2 (2015).

¹⁶ The Commonwealth posits a procedural default argument, urging this Court to implement Special Condition 12 because, while "it was improper for a trial court to delegate the determination of a restitution amount to a probation officer" (citing *Wilson v. Commonwealth*, 67 Va. App. 82, 89 (2016), *abrogated on other grounds by Cilwa v. Commonwealth*, 298 Va. 259 (2019)), ultimately "such an order was voidable, rather than void ab initio, and therefore was not subject to a collateral attack" (citing *id.* at 90). Following the Commonwealth's argument to its logical conclusion would provide this Court two options. One, we could issue a mandate allowing restitution to be set by the probation officer, merely because Karapetkov did not object when the trial court listed Special Condition 12 in its sentencing order. Or two, we could remand to allow the trial court to amend the sentencing order to precisely align with the plea agreement and the trial court's order enforcing it. Either option would require us to read Special Condition 12 in isolation, wholly ignoring the legally binding plea agreement precipitating Karapetkov's conviction. We must decline the opportunity to do so. Remand is unnecessary; the court must abide by the contract that Karapetkov signed. The plea agreement, as accepted by the trial court, waived the Commonwealth's burden of proof required to convict the defendant. The plea agreement cannot now be undone, as it would risk prejudicing Karapetkov, who may have relied on the no-restitution provision in his decision to plead guilty. See *Commonwealth v. Sandy*, 257 Va. 87, 91 (1999) (holding that a Commonwealth's Attorney may not withdraw from a plea agreement after the entry of a guilty plea by a defendant or any other change of position by the defendant resulting in prejudice to him because of reliance upon the agreement).

we must again hold that a contract is a contract. *See Fisher v. Commonwealth*, 236 Va. 403, 417 (1988) (“No litigant, even [the Commonwealth] in a criminal case, will be permitted to approbate and reprobate.”).

Those same principles guide the interpretation in this case. “The fundamental question before [an appellate court] in construing a contract is ‘what did the parties agree to as evidenced by their contract,’ and the ‘guiding light’ for such construction is ‘the intention of the parties as expressed by them in the words they have used.’” *RECP IV WG Land Invs. LLC v. Cap. One Bank (USA), N.A.*, 295 Va. 268, 283 (2018) (quoting *Schuiling v. Harris*, 286 Va. 187, 192 (2013)). The contract between the Commonwealth and Karapetkov is clear and unambiguous. *See Bentley Funding Grp., L.L.C. v. SK&R Grp., L.L.C.*, 269 Va. 315, 329 (2005) (“[W]hen contract terms are clear and unambiguous, we must construe those terms according to their plain meaning.” (alteration in original) (quoting *Lansdowne Dev. Co., L.L.C. v. Xerox Realty Corp.*, 257 Va. 392, 400 (1999))).¹⁷ Here, under Paragraph (15)(f) of the plea agreement, Karapetkov and the Commonwealth jointly agreed that “[n]o restitution is owed in this case.” The binding language is plain as can be: Karapetkov will not owe restitution in this matter.

The dissent suggests that Code §§ 19.2-305.1(A) and 19.2-305.1(B) disallowed the trial court from entering the plea agreement with the no-restitution provision. Code § 19.2-305.1(B) provides that “any person who . . . commits, and is convicted of, a crime in violation of any provision in Title 18.2 shall make at least partial restitution for any property damage or loss caused by the crime.” Code § 19.2-305.1(A) states that no person convicted of a property damage crime “shall be placed on probation” unless they pay part restitution, perform community service, or submit a plan “for doing that which appears . . . feasible under the

¹⁷ A court’s interpretation of a plea agreement is governed by contract law and is subject to de novo review. *Bardales*, 71 Va. App. at 743.

circumstances.” While true that restitution must be paid as a default requirement, “most legal rights—whether common law, statutory, or constitutional—can be waived if the requisite formalities are observed.” *Congdon v. Commonwealth*, 57 Va. App. 692, 695 (2011). *See also Paul v. Paul*, 214 Va. 651, 653 (1974) (“The law effective when the contract is made is as much a part of the contract as if incorporated therein.”). Here, by entering the plea agreement with Karapetkov, the Commonwealth waived the requirements of Code § 19.2-305.1.

B. Special Condition 12

Karapetkov assigns error to the trial court’s failure to set the amount of restitution and its delegation of that responsibility to “a Probation/Parole Officer,” in accordance with provision 12 of the “Special Conditions of Suspended Sentence and Supervised Probation” of the July 9, 2024 sentencing order (herein “Special Condition 12”). Special Condition 12 orders that Karapetkov, “[i]f directed by a Probation/Parole Officer, or otherwise by a specific court order of the Commonwealth of Virginia, pay restitution, fines and costs associated with this matter.”

Karapetkov argues that, pursuant to this condition, the trial court erred by delegating to an executive branch employee its judicial authority under Code § 19.2-305.1(D) to determine a defendant’s sentence. Karapetkov challenges the trial court’s order that states he must, “[i]f directed by a [probation officer] . . . , pay restitution.” (Emphasis added). Assuming without deciding that the trial court in fact acted in this manner, we agree with Karapetkov that any delegation of judicial action would be in error. *See Fazili v. Commonwealth*, 71 Va. App. 239, 254 (2019) (“[C]ircuit courts may not delegate to probation officers [those] responsibilities that are the sole province of the circuit courts.”).¹⁸ Indeed, under Code § 19.2-305.1, the amount of restitution is within the sole province of the sentencing court and may not be delegated to the

¹⁸ Code § 19.2-305.1(D) mandates that “[a]t the time of sentencing, *the court* shall determine the amount to be repaid by the defendant and the terms and conditions thereof.” (Emphasis added).

executive branch, especially when that sentence could lead to a defendant’s extended incarceration. *See Wilson v. Commonwealth*, 67 Va. App. 82, 89 (2016).

However, we nonetheless decline to apply the ends of justice exception to reach Karapetkov’s assignment of error because the plea agreement—a binding contract signed by both the Commonwealth and Karapetkov and explicitly accepted by the trial court—shows that a restitution payment *will not occur*, as “[n]o restitution is owed in this case.” In other words, the record suggests that the complained-of error, assigning the task of setting an amount of restitution to a probation officer, will not take effect. When read in tandem with the plea agreement, Special Condition 12’s restitution penalty will simply not be imposed.¹⁹

The “if directed” clause makes the provision conditional, to be abided by only if a probation officer orders restitution be paid. But here, the probation officer is bound to follow the terms of the plea agreement. The conviction order states that the court “accepts and agrees to abide by the terms and conditions set forth in the Plea Agreement,” making no restitution a term of the judgment; thus, the general boilerplate condition yields to the specific term that the court adopted. A probation officer lacks the statutory authority to petition a court to modify the terms of a plea agreement. *See* Code § 19.2-303 (providing the authority to determine the conditions of probation *and to modify* probation rests exclusively with the court); *Esparza v. Commonwealth*, 29 Va. App. 600 (1999) (concluding that a court’s discretionary authority to modify a sentence post-conviction under Code § 19.2-303 was in effect when the *plea agreement was executed* and when the sentence was imposed). Probation officers are tasked with enforcing the terms and conditions of probation as set by the plea agreement *and* sentencing order; they cannot make

¹⁹ There is no need to remand this case so that the trial court can address restitution. The plea agreement is clear. And our analysis ends with its unambiguous mandate. *See Shaw v. Commonwealth*, 304 Va. 217, 233 (2025) (observing that judicial restraint requires appellate courts to resolve cases on the best and narrowest ground available).

decisions assigned to the judicial branch, the *Commonwealth's Attorney*, or the defendant's attorney. *See generally Ellis v. Commonwealth*, 84 Va. App. 531 (2025); *Fazili*, 71 Va. App. 239.

Again, the court accepted a plea agreement between Karapetkov and the Commonwealth in which all parties agreed that “[n]o restitution is owed in this case.” The court’s order then adopted the terms and conditions of that agreement. The court’s approval and entry of the plea agreement made this provision binding on all parties. *See Brown v. Commonwealth*, 68 Va. App. 58, 70 (2017) (“[O]nce accepted by a circuit court, plea agreements are treated as binding contracts.” (citing *Griffin*, 65 Va. App. at 718)). Bound by the contract the Commonwealth signed with Karapetkov, no probation officer, representing the Commonwealth as an executive branch employee, would have the authority to order Karapetkov to pay restitution.

In his dissent, Judge Bernhard dissects and applies *Wilson* to the facts at hand. While we agree with the dissent’s worthwhile statutory analysis, we do not reach those merits, as this case can be decided on the plea agreement alone.

The dissent declines to implement the parties’ plea agreement, arguing that the trial court’s sentencing order is in conflict and, thus, subsumes or invalidates the plea agreement. The dissent argues that Special Condition 12 requires restitution to be paid, as set by Karapetkov’s probation officer. The dissent further discusses Special Condition 17, which provides that “the Defendant . . . develop and commit to a restitution plan with the probation officer upon release.” Additionally, the dissent notes that, in the second paragraph of the final page of its sentencing order, the trial court directed Karapetkov “to pay the costs and restitution of this proceeding” Thus, the dissent argues that the presumption of *some* restitution was envisioned by the circuit court.

However, these conclusions are supported only if each provision is read in isolation. The sentencing order provisions discussing restitution are either consistent with the plea agreement

or, at best, ambiguous. Any such ambiguity is readily clarified by reading the sentencing order as a document that incorporates, and is controlled by, the plea agreement. Reading the sentencing order and plea agreement together, no restitution was envisioned by the trial court.

First, in its sentencing order, among other special conditions of Karapetkov's supervised probation, the trial court adopted Special Condition 12, which reads: "*If directed* by a Probation/Parole Officer, or otherwise by a specific court order of the Commonwealth of Virginia, pay restitution, fines and costs associated with this matter." (Emphasis added). As noted above, the "if" clause in this provision makes the possibility of a probation officer's ordering restitution entirely contingent—and that contingency is rebutted by the explicit terms of the binding plea agreement entered by the trial court.

Additionally, Special Condition 12 merely notes that Karapetkov would pay restitution "associated with this matter." See *Russnak v. Commonwealth*, 10 Va. App. 317, 323-24 (1990) ("[N]o 'implicit' requirement of 'some form of restitution' . . . arises from an order that is otherwise silent as to that issue."). Coupled with the conditional "if directed" clause, the vague nature of Special Condition 12 cannot, alone, negate an unambiguous term of the plea agreement. Therefore, we respectfully disagree with Judge Bernhard that Special Condition 12 supersedes or otherwise undercuts the plea agreement. Reading the plain language of the plea agreement and the sentencing order in tandem, Special Condition 12 builds onto the plea agreement—they are not in conflict.

Similarly to Special Condition 12, Special Condition 17 does not enforce any kind of restitution; it merely states that Karapetkov must comply with his probation officer in putting together a plan—if he was in fact directed to pay restitution by the probation officer. But the plea agreement makes clear that no such directive will occur. That restitution plan could very

well say no restitution is owed.²⁰ Therefore, Special Condition 17 does not conflict with the plea agreement either.

Lastly, the directive “to pay the costs and *restitution of this proceeding*” in the second paragraph of the last page of the sentencing order does not contradict the plea agreement. (Emphasis added). The plea agreement provides that there would be no restitution for the damage to the victim’s and her family’s property caused by Karapetkov’s arson conviction, as provided by Code § 19.2-305.1(B). The plain language of the final page of the sentencing order demands only the payment of restitution for the *sentencing proceeding*. Restitution for the underlying crime wholly differs from restitution for costs that the victim and her family, as well as the Commonwealth, might have incurred by attending the sentencing hearing.

All in all, had the trial court wanted to impose restitution, it could have rejected the plea agreement during the plea colloquy, or again made it plain in its sentencing order that Karapetkov must pay a set amount of restitution, on a restitution schedule set by the probation officer, as provided under Code §§ 19.2-305.1(D) and 19.2-305.1(E). The trial court did not do so. We cannot now order Karapetkov to pay restitution merely because we might disagree with the policy choices made under the terms of the plea agreement.²¹ “When a trial ‘court accepts [a]

²⁰ The directive that a restitution *plan* be made does not necessitate a directive to pay restitution. Code § 19.2-305.1(A) requires such a plan be made as an alternative means to paying restitution. (“[N]o person convicted of a crime . . . which resulted in property damage or loss, shall be placed on probation . . . unless such person shall make at least partial restitution for such property damage or loss, . . . *or* shall submit a plan for doing that which appears to the court to be feasible under the circumstances.” (emphasis added)). The disjunctive “or” is decisive.

²¹ The concurrence asserts that we, as an appellate court, are denied the opportunity to review Special Condition 12 in light of the plea agreement because the plea agreement was not encompassed in Karapetkov’s assignment of error challenging his payment of restitution. But by accepting the plea agreement during the plea colloquy, and later in its written order, the trial court not only acknowledged but executed the binding contract between Karapetkov and the Commonwealth. We cannot now, on review, ignore this contract and allow the Commonwealth to escape the benefit of its bargain merely because Karapetkov failed to assign error to the specific contractual term undergirding the principles of his argument.

plea agreement, the court must inform the defendant that *it will embody in its judgment and sentence* the disposition provided for *in the agreement*.” *Sine v. Commonwealth*, 87 Va. App. 285, 291 (2026) (alteration in original) (emphases added) (quoting Rule 3A:8(c)(3)). *See also Calvillo v. Commonwealth*, 19 Va. App. 433, 435 (1994) (holding “the trial court was bound to enforce the plea agreement” after the trial court ignored the plea agreement’s deferred disposition term and imposed a five-year suspended sentence).

There is no need to remand this case for the trial court to address restitution. The plea agreement is clear. And our analysis ends with this unambiguous mandate: no restitution is owed. *See Shaw v. Commonwealth*, 304 Va. 217, 233 (2025) (observing that judicial restraint requires appellate courts resolve cases on the best and narrowest ground available).

C. The Ends of Justice

Finally, Karapetkov asks that we invoke the ends of justice exception to Rule 5A:18. That exception permits this Court to correct an unpreserved error where appellate action is so necessary that it will prevent “a miscarriage of justice,” *Redman v. Commonwealth*, 25 Va. App. 215, 221 (1997), that is “clear, substantial and material,” *Brown v. Commonwealth*, 8 Va. App. 126, 132 (1989); *see West v. Commonwealth*, 43 Va. App. 327, 338 (2004). This Court has repeatedly recognized that an appellant may proceed by showing either “a ‘grave injustice’” or a “wholly inexcusable ‘denial of essential rights.’” *Winslow v. Commonwealth*, 62 Va. App. 539, 546-47 (2013) (quoting *Brittle v. Commonwealth*, 54 Va. App. 505, 513 (2009)); *see also Charles v. Commonwealth*, 270 Va. 14, 20 (2005).

We are not persuaded that the ends of justice exception permits our review, assuming without deciding that the sentencing order did contain the error alleged.²² Under *Wright* and

²² The ends of justice analysis might well be different if the plea agreement was ambiguous concerning the possibility that the probation officer *would* impose a restitution obligation in the future. We do not suggest that our case law should be rewritten to require an

Griffin, the plea agreement must inform our understanding of the facts, and we must ground any ends of justice analysis that we perform in light of its terms. Given the unambiguous plea agreement mandating that no restitution is owed, the record shows that the complained-of harm *will not occur*. As discussed at length above, no probation officer has the authority to harm Karapetkov, so no grave injustice or denial of essential rights will befall him.²³ In the presence of a valid, approved plea agreement precluding the payment of restitution, we decline to apply the ends of justice exception to review a sentencing order that conditionally directs the defendant to pay restitution if ordered to do so by a probation officer.

CONCLUSION

For the foregoing reasons, we affirm Karapetkov's conviction and sentence. We affirm in regards to restitution, as the plea agreement makes clear that Karapetkov owes no restitution for the victim's and her family's personal property.

Affirmed.

application of the ends of justice exception only in the presence of a showing of "actual harm." To the contrary, our case law unambiguously shows that certain procedures are "so crucial that a court's failure to adhere to them constitutes error that is clear, substantial and material even in the absence of affirmative proof of error in the *result*." *Herring v. Herring*, 33 Va. App. 281, 287 (2000). Our decision not to apply the ends of justice exception here comes in the *presence* of "affirmative proof" that the result (i.e., restitution) will *not* be affected.

²³ Any residual inconsistency is correctable at any time under Code § 8.01-428(B), on the court's own initiative or on motion, and is therefore not a grave injustice or a wholly inexcusable denial of essential rights; *cf.* Code § 8.01-429.

O'Brien, J., concurring.

I agree that the circuit court's decision should be affirmed, and I also agree with the rationale of Parts I and II of the majority opinion. Because I disagree with the rationale of Part III, however, I write separately. In my view, Rule 5A:18 precludes review of Karapetkov's assignment of error concerning restitution because he failed to raise the issue at trial, and the ends-of-justice exception to that rule does not apply in this case. Moreover, Rule 5A:20 precludes review of an issue not raised in the assignment of error or argued on brief.

The assignment of error that divides the panel reads as follows: "The trial court erred when it failed to set the amount of restitution and instead delegated that responsibility to 'a [p]robation/[p]arole [o]fficer.'" In other words, he assigned error to the court's order granting the probation officer the authority to make a restitution determination.

This assignment of error does not call for us to determine whether the court order properly reflected the plea agreement. We are limited to Karapetkov's argument as set out in his assignments of error and brief. *Banks v. Commonwealth*, 67 Va. App. 273, 289 (2017) (explaining that "[t]his Court is limited to reviewing the assignments of error presented by the litigant"); Rule 5A:20(e) (requiring the opening brief to state "the standard of review and the argument . . . relating to each assignment of error"). Karapetkov merely assigned error to the court's delegation of responsibility to the probation officer, and Rule 5A:20 precludes our review of any inconsistency between the court's order and the plea agreement—an entirely separate issue not raised or briefed.²⁴

Additionally, Rule 5A:18 also precludes our review of any inconsistency. At no point during the sentencing hearing or on appeal did Karapetkov raise the issue of whether the court's

²⁴ I also note, as the dissent does, that Special Condition 17 assumes Karapetkov would owe some restitution. Special Condition 17 requires Karapetkov "to develop and commit to a restitution plan with the probation officer upon release."

order reflected the plea agreement. Appellate courts “will not search the record for errors in order to interpret the [appellant’s] contention and correct deficiencies in a brief.” *Gottlieb v. Gottlieb*, 19 Va. App. 77, 85-86 (1994) (quoting *Buchanan v. Buchanan*, 14 Va. App. 53, 56 (1992)).

The court erred in entering an order that improperly delegated authority to the probation officer. *Wilson v. Commonwealth*, 67 Va. App. 82, 85 (2016). I agree with the dissent that the court’s error rendered the order voidable, not void ab initio, *id.* at 90, and Karapetkov therefore was required to preserve his objection under Rule 5A:18, *Terry v. Commonwealth*, 81 Va. App. 241, 246 (2024). But I disagree with the dissent that the ends-of-justice exception should be applied to this case.

Appellate courts have repeatedly held that “[t]he ends of justice exception is narrow and is to be used sparingly,” *Holt v. Commonwealth*, 66 Va. App. 199, 209 (2016) (en banc) (quoting *Redman v. Commonwealth*, 25 Va. App. 215, 220 (1997)), and should be used when “the judgment of the trial court was error and application of the exception is necessary to avoid a grave injustice or the denial of essential rights,” *Brittle v. Commonwealth*, 54 Va. App. 505, 513 (2009) (quoting *Rowe v. Commonwealth*, 277 Va. 495, 503 (2009)). “Application of the ends of justice exception requires proof of an error that was ‘clear, substantial and material.’” *West v. Commonwealth*, 43 Va. App. 327, 338 (2004) (quoting *Brown v. Commonwealth*, 8 Va. App. 126, 132 (1989)). Further, for the exception to apply, an appellant “must affirmatively show that a miscarriage of justice has occurred, not that one *might* have occurred.” *Redman*, 25 Va. App. at 221.

For example, the Supreme Court of Virginia explained that it was appropriate to apply the ends-of-justice exception to reverse a sentencing order that was void because it exceeded the statutory maximum for the convicted crimes. *Commonwealth v. Bass*, 292 Va. 19, 29 (2016); *see*

also *Gordon v. Commonwealth*, 61 Va. App. 682, 685-86 (2013) (finding application of the ends-of-justice exception “fully justified” to reverse a “void sentence” that exceeded the statutory limit).

Likewise, in *Charles v. Commonwealth*, 270 Va. 14, 20 (2005), when appellant’s probation was revoked, the circuit court refused to give appellant credit for time served in the Detention Center Incarceration Program. Although appellant did not preserve his objection, the Supreme Court found the exception was justified “to avoid [the] grave injustice” of “[d]enying [appellant] his liberty on the basis of a void sentence.” *Id.*

Here, the court’s order granting the probation officer the authority to make a restitution determination, although made in error, was not a void order, but voidable. As such, I believe it is more comparable to the cases where we have declined to apply the ends-of-justice exception. *See Redman*, 25 Va. App. at 223 (declining to apply the ends-of-justice exception where the evidence only showed that “a miscarriage of justice *may* have occurred, not that a miscarriage of justice did occur” and there was no affirmative proof that an element of the crime did not occur); *Brittle*, 54 Va. App. at 518-20 (declining to apply the ends-of-justice exception where appellant failed to point to a place in the record that affirmatively established that an element of the offense did not occur or that he was convicted of a conduct that was not a criminal offense).

The dissent would find that Karapetkov had an “*essential right* to have the terms of his sentence set by a court rather than by an officer of the executive branch.” But “[e]rror alone, even a violation of constitutional principles, is not sufficient to warrant application of the ends of justice exception to Rule 5A:18.” *West*, 43 Va. App. at 339; *see also Ashby v. Commonwealth*, 33 Va. App. 540, 545 (2000) (explaining that Rule 5A:18 bars appeals “absent good cause or to attain the ends of justice, . . . even if it involves constitutional claims”); *Fitzpatrick v. Commonwealth*, No. 1508-06-4, 2008 Va. App. LEXIS 52 (Feb. 5, 2008) (finding that Rule

5A:18 barred the review of appellant’s argument that the statute governing the Parole Board was violating the constitutional principle of the separation of powers).²⁵

“The burden of establishing a manifest injustice is a heavy one, and it rests with the appellant.” *Brittle*, 54 Va. App. at 514. I do not believe Karapetkov has carried that burden in this case.²⁶ Karapetkov did not suffer any loss of liberty nor a violation of due process as a result of the court’s error. Further, “[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)). I therefore would find that Karapetkov failed to preserve this argument for appellate review and decline to apply the ends-of-justice exception to Rule 5A:18.

²⁵ “Although not binding precedent, unpublished opinions can be cited and considered for their persuasive value.” *Jones v. Commonwealth*, 71 Va. App. 375, 382 n.2 (2019) (quoting *Otey v. Commonwealth*, 61 Va. App. 346, 350 n.3 (2012)).

²⁶ I note that Karapetkov merely “asks that this Court reach [his assignments of error] to attain the ends of justice,” without making any arguments to support the application of the ends-of-justice exception. Rule 5A:20(e) (explaining that the opening brief “must state why the . . . ends of justice exception[] to Rule 5A:18 [is] applicable”).

Bernhard, J., concurring in part and dissenting in part.

I respectfully dissent and write separately to address Karapetkov’s contention that the circuit court “erred when it failed to set the amount of restitution and instead delegated that responsibility” to a probation officer. The Commonwealth does not defend that delegation on the merits; it contends rather that Karapetkov’s challenge is procedurally barred. Citing *Wilson v. Commonwealth*, 67 Va. App. 82, 89-90 (2016), *abrogated on other grounds by Cilwa v. Commonwealth*, 298 Va. 259 (2019), it asserts the court’s action is voidable error subject to Rule 5A:18, yet Karapetkov “failed to lodge an objection, or otherwise bring the restitution issue to the circuit court’s attention.” Karapetkov, in turn, claims that the same decision permits challenges to voidable restitution orders to which no objection was made, by timely petition to this Court; and, alternatively, that the ends of justice exception applies.²⁷

The sentencing order fixed no amount of restitution. It instead made restitution payable if a probation or parole officer, or a further “court order of the Commonwealth,” so directed, imposed that obligation as a special condition of the suspended sentence and of supervised probation, and required Karapetkov to develop a restitution plan with his probation officer after his release.

Whether the circuit court could delegate the determination of restitution to a probation officer presents a question of statutory interpretation that this Court reviews de novo. *Wilson*, 67 Va. App. at 88. Code § 19.2-305.1(D) directs that “[a]t the time of sentencing, the court shall determine the amount to be repaid by the defendant and the terms and conditions thereof.” Code § 19.2-305.1(D) (emphasis added). That subsection further commands that “[t]he court shall include such findings in the judgment order.” *Id.* The amount of restitution is within the sole

²⁷ This Court reviews de novo whether an appellant is entitled to invoke such exception. *Bell v. Commonwealth*, 81 Va. App. 616, 628 (2024).

province of the sentencing court and may not be delegated to the executive branch of government. *See Wilson*, 67 Va. App. at 89 (“[W]e agree with Wilson that the circuit court improperly delegated the determination of Wilson’s restitution amount to the probation officer . . .”). By committing that determination to the court and fixing its timing at sentencing, the statute ensures a defendant’s restitution obligation is set with the definiteness a judgment demands, protecting the defendant against an open-ended liability shaped by an officer of the executive branch and safeguarding the victim’s interest in a concrete, enforceable award rather than one left to the contingency of whether such an officer later acts.

The statute also governs the plan the order deferred. Subsection (C) directs that “[a]t or before the time of sentencing, the court shall receive and consider any plan for making restitution submitted by the defendant,” and provides that the defendant shall make restitution “[b]y order of the court incorporating the defendant’s plan or a reasonable and practical plan devised by the court.” Code § 19.2-305.1(C). Subsection (A) in turn conditions probation and suspension of sentence upon at least partial restitution, community service, or the submission of a plan “which appears to the court to be feasible under the circumstances.” The circuit court neither received and considered a plan at sentencing nor devised one. The statute times that determination to sentencing and assigns it to the court; the circuit court’s course put it off past sentencing and placed it in the hands of an officer of the executive branch.

The amount the court fixes at sentencing is also the hinge on which the statute’s remaining provisions turn. Subsection (E) requires the court to enter at sentencing not only the amount and the date and terms of repayment but “the victim’s name and contact information,” on a form prescribed by the Office of the Executive Secretary, a copy of which is furnished to the victim upon request. Code § 19.2-305.1(E).²⁸ The General Assembly has separately directed

²⁸ That form is DC-317, containing a signature block for the sentencing judge.

that victims “shall be advised that restitution is available for damages or loss resulting from an offense and shall be assisted in seeking restitution in accordance with” Code § 19.2-305.1, among other provisions. Code § 19.2-11.01(A)(2)(c). Subsection (F) then keys a continuing course of judicial review to that figure. The supervising agency must report to the court and to the attorney for the Commonwealth “the amount of any restitution that remains unsatisfied” before the defendant is released from supervision; the attorney for the Commonwealth must, if practicable, furnish the victim a copy of that notice; and if any amount remains unsatisfied the court must conduct a hearing and docket the order. Code § 19.2-305.1(F)(1); *see id.* (F)(2)-(3) (requiring continued review of the defendant’s compliance). An order docketed in the victim’s name is enforceable by the victim as a civil judgment. Code § 19.2-305.2(B). Sums collected ordinarily satisfy restitution, and the costs of collecting it, before any fine or cost. Code § 19.2-305.1(K). Where the victim cannot be located, any restitution collected is deposited for that victim’s benefit with the Criminal Injuries Compensation Fund. Code § 19.2-305.1(I). The length of Karapetkov’s own supervision turns on that figure as well: the five-year limit on supervised probation does not apply “to the extent that an additional period of probation is necessary . . . if a defendant owes restitution and is still subject to restitution compliance review hearings in accordance with” Code § 19.2-305.1. Code § 19.2-303. None of that machinery can operate upon a sum that has never been determined, and none of it lies within a probation officer’s power to supply: the supervising agency’s statutory office is to report an amount the court has fixed, not to fix one.

Rule 5A:18 provides that no ruling of the circuit 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.” An order that improperly delegates the restitution determination is not void ab initio; because the circuit court

had jurisdiction over the person and the subject matter, the defect renders the order only voidable. *Wilson*, 67 Va. App. at 89-90. A voidable error—one in which the court erred but acted within the bounds of its authority, and which characteristically involves a failure to comply with an applicable statute—is subject to the ordinary rules governing the preservation of error. *Terry v. Commonwealth*, 81 Va. App. 241, 246 (2024). Only an order that is void ab initio may be challenged directly for the first time on appeal; objections to voidable errors must be preserved. *Hannah v. Commonwealth*, 303 Va. 109, 119-20 (2024).

Karapetkov identifies no objection to the restitution provision made at or after sentencing. He points only to the sentencing order itself, but the presence of the challenged provision in the order is not an objection to it. His reliance on *Wilson* to secure direct review of an unpreserved claim is misplaced. The two avenues that *Wilson* described—moving in the trial court within 21 days or noting a timely direct appeal—concern the manner in which a voidable order may be attacked so as to avoid the bar against collateral attacks; they do not relieve a litigant of the contemporaneous-objection requirement that governs a direct appeal. *Wilson*, 67 Va. App. at 90. Because Karapetkov did not raise the restitution issue in the circuit court, it is defaulted.

Karapetkov asks, in the alternative, that we invoke the ends of justice exception to Rule 5A:18. That exception is narrow and is applied sparingly, but it permits this Court to correct an unpreserved error where doing so is necessary to prevent “a grave injustice *or the denial of essential rights*.” *Charles v. Commonwealth*, 270 Va. 14, 17 (2005) (emphasis added); accord *Brown v. Commonwealth*, 279 Va. 210, 219 (2010) (quoting *Charles*, 270 Va. at 17). To invoke the exception, an appellant bears the burden of showing that “a miscarriage of justice has occurred, not that a miscarriage *might* have occurred,” *Redman v. Commonwealth*, 25 Va. App. 215, 221 (1997), through an error that is “clear, substantial and material,” *West v.*

Commonwealth, 43 Va. App. 327, 338 (2004) (quoting *Brown v. Commonwealth*, 8 Va. App. 126, 132 (1989)). This is such a case, because the circuit court denied Karapetkov an essential right in imposing his sentence.

Where an unpreserved claim challenges the sufficiency of the evidence, the miscarriage must appear as an affirmative showing that the defendant's conduct was not a crime or that an element did not occur. *Holt v. Commonwealth*, 66 Va. App. 199, 209-10 (2016) (en banc). That formulation developed in cases testing a conviction and measures the grave-injustice route. The Supreme Court framed the inquiry disjunctively, asking whether application of the exception is necessary to avoid a grave injustice or the denial of essential rights. *Charles*, 270 Va. at 17; accord *Brown*, 279 Va. at 219. This Court has said the same, that an appellant may proceed by showing either "a 'grave injustice'" or a "wholly inexcusable 'denial of essential rights.'" *Winslow v. Commonwealth*, 62 Va. App. 539, 546-47 (2013) (quoting *Brittle v. Commonwealth*, 54 Va. App. 505, 513 (2009)). *Winslow* adds that a criminal appellant *usually* proceeds by the sufficiency showing. *Id.* at 547. That qualification confirms the point rather than contradicting it: it would be surplusage if the sufficiency showing were the only route available. Karapetkov proceeds on the latter ground, and the delegation here is wholly inexcusable: the circuit court surrendered a duty the statute commits to it alone, and the Commonwealth does not champion that delegation on the merits. The Commonwealth acknowledges instead that this Court has "previously stated it was improper for a trial court to delegate the determination of a restitution amount to a probation officer." That concession establishes that the error is clear and undisputed; it does not, standing alone, carry the exception, for an appellant must present a winning argument on the merits *and* a showing of grave injustice or a wholly inexcusable denial of essential rights. *Winslow*, 62 Va. App. at 546. Karapetkov makes both showings.

Fixing a criminal sentence is a judicial task, an allocation the Constitution of Virginia reflects in vesting the judicial power in the courts and in keeping the departments of government separate and distinct. Va. Const. art. VI, § 1; *id.* art. III, § 1. I invoke those provisions as background illuminating why the duty the statute assigns is not the court’s to give away, not as an independent ground of decision. By statute, it is the court that must fix the amount and terms of restitution, Code § 19.2-305.1(D), and it is the court that places a defendant on probation “under such conditions as the court shall determine,” Code § 19.2-303. A probation officer, by contrast, is an officer of the executive branch who enforces the sentence the court imposes rather than imposing it himself. *Diaz-Urrutia v. Commonwealth*, 77 Va. App. 182, 193 (2023). Hence, “while the circuit court sets the terms and conditions of probation, probation officers enforce those terms and conditions and exercise discretion in doing so.” *Fazili v. Commonwealth*, 71 Va. App. 239, 255 (2019); *accord Shifflett v. Commonwealth*, 81 Va. App. 277, 292 (2024) (en banc). A court may delegate to a probation officer the administration of the conditions it has set, but “circuit courts may not delegate to probation officers responsibilities that are the sole province of the circuit courts.” *Fazili*, 71 Va. App. at 254. When a court instead leaves the terms of the sentence to be defined by the probation office, it “impermissibly delegate[s] the judicial task of crafting a sentence.” *Ellis v. Commonwealth*, 84 Va. App. 531, 546 (2025).

That is what occurred here. The order made that delegation explicit. It advised Karapetkov that the special conditions subject to an officer’s direction were “additional, substantive required conditions” of his suspended sentence, imposed by the officer “upon the court’s express grant of authority for the purpose of imposing additional special conditions of probation . . . as may be necessitated from time to time.” A probation officer does not act as an officer of the court in imposing conditions of a sentence, whatever the order recites. The delegation denied Karapetkov *the essential right* to have the terms of his sentence set by a court

rather than by an officer of the executive branch. This delegation of the judicial power to the executive branch does not turn on what a probation officer may later do; it inheres in the sentence as imposed.²⁹ The miscarriage of justice affirmatively established on this record is therefore the denial of that right itself, apparent on the face of the sentencing order. That the amount of restitution remains unset does not render the injury equivocal or speculative: the injury is the court's surrender of an inherently judicial sentencing decision to an officer of the executive branch. The exception thus reaches an accomplished denial of an essential right, not a contingent harm a probation officer might later inflict. *See Redman*, 25 Va. App. at 221. Nor is the denial of that right without consequence for Karapetkov's liberty. The obligation an officer directs is a condition of a suspended life sentence, and Code § 19.2-305.1(G) provides that "[u]nreasonable failure to execute the plan by the defendant shall result in revocation of the probation or imposition of the suspended sentence." A restitution obligation authored by a probation officer thus fixes the measure of Karapetkov's exposure to revocation of that sentence. I do not reach whether the delegation independently offended that constitutional separation of powers, for the governing statute resolves its impropriety and I adhere to the settled practice of deciding a case on the best and narrowest ground. *See Watson-Scott v. Commonwealth*, 298 Va. 251, 258 n.2 (2019).³⁰

²⁹ Karapetkov may petition the circuit court after his release to review the amount the probation officer sets. Code § 19.2-304 permits a court to modify a condition of probation later, but only upon a hearing after reasonable notice to the defendant and the attorney for the Commonwealth. But Code § 19.2-305.1(D) requires the court to determine the amount and terms at the time of sentencing. The availability of a discretionary modification years afterward does not cure the delegation; it leaves the officer's determination in place unless and until the defendant succeeds in undoing it.

³⁰ Judge O'Brien's concurrence invokes the settled principle that error alone, even error of constitutional dimension, does not by itself warrant application of the ends of justice exception. *See West*, 43 Va. App. at 338; *Ashby v. Commonwealth*, 33 Va. App. 540, 545 (2000). I do not depart from it. That precedential principle, however, governs the second question the ends of justice exception poses, whether the failure to apply it would work a grave injustice, and

Because the defect renders the order voidable rather than void, and because Karapetkov noted a timely appeal, the improper delegation may be corrected on direct review, albeit here in application of the ends of justice exception. *Wilson*, 67 Va. App. at 90; Rule 5A:18.³¹ That the order is voidable rather than void bears on Karapetkov’s obligation to preserve his objection, not on the availability of the exception once his default is established. The ends of justice exception exists to reach unpreserved errors—which are, by their nature, ordinarily voidable—in the rare case where the record shows the denial of an essential right. I do not maintain that every voidable error touching sentencing or probation may be reached under the exception, and I do not reach whether the errors held merely voidable in *Terry* would qualify. I would hold only that a circuit court’s delegation of its nondelegable duty to fix the terms of a criminal sentence denies

it forecloses the appellant whose showing ends with the demonstration that the court was merely wrong. Karapetkov’s showing does not end there. The defect is not that the circuit court determined the amount and terms of restitution erroneously. It is that the court did not determine them at all, and the sentencing order records as much. The injustice lies in the absence of the adjudication the statute requires, not in the quality of one that was made. Even *West* recognizes that “some procedures are so crucial that a court’s failure to adhere to them constitutes error that is clear, substantial and material even in the absence of affirmative proof of error in the *result*.” *West*, 43 Va. App. at 338 (quoting *Herring v. Herring*, 33 Va. App. 281, 287 (2000)). Nor does the unpublished decision the concurrence cites bear on the ground I take, for it concerned a constitutional separation of powers claim and I do not reach the constitutional question.

Nor does my conclusion depend on how fully the argument was developed below. The burden of establishing a miscarriage of justice remains Karapetkov’s. He carries it with a record that affirmatively establishes the delegation on the face of the sentencing order, which is what application of the ends of justice exception requires—a showing from the record, not a demonstration that trial counsel said enough. The same answers the observation that the opening brief invokes the exception without elaborating upon it. Rule 5A:20(e) governs the contents of that brief, but its requirements are not jurisdictional, and whether a failure to adhere to them is significant enough to warrant treating an assignment of error as waived rests in this Court’s judgment. *Jay v. Commonwealth*, 275 Va. 510, 520 (2008). Karapetkov assigned error to the delegation, briefed it, and asked that we reach it to attain the ends of justice. The showing the exception requires appears on the face of the sentencing order, not in the elaboration of the brief.

³¹ Because this case involves procedural-default principles, as opposed to finality principles, it does not run afoul of the ultimate holding in *Wilson* that voidable erroneous restitution orders must be challenged in a timely manner and are generally not subject to collateral attacks. *Wilson*, 67 Va. App. at 89-90.

an essential right the exception reaches. What restitution, if any, is owed, and on what terms, is committed in the first instance to the circuit court, which must make that determination itself under Code § 19.2-305.1 rather than leave it to an officer of the executive branch. Nothing in this dissent would limit the circuit court's consideration of the terms of the parties' plea agreement. I do not reach any question whether the sentencing order departs from that agreement; no such error was assigned or briefed. This limited remand would correct an error identified on direct appeal; it does not rest on the circuit court's authority to modify a sentence under Code § 19.2-303, and the jurisdictional limitations the Commonwealth invokes therefore do not bar it. *Cf. Charles*, 270 Va. at 20 (applying the ends of justice exception to an unpreserved sentencing error).

I join the majority's opinion except as to restitution. Because the sentencing order commits to a probation officer a determination Code § 19.2-305.1(D) assigns to the court, and because that defect appears on the face of the order, I would apply the ends of justice exception, reverse the restitution provisions of the sentencing order, and remand for the circuit court to determine the amount to be repaid and the terms and conditions of repayment. To that extent, I respectfully dissent.