The Clerk shall be directed to mail a copy of this order to the defendant and to the Commonwealth's Attorney.

ENTER:

/s/ Charles L. Ricketts III, JUDGE

12/23/15, DATE

APPENDIX B

VIRGINIA:

***In the Court of Appeals of Virginia on* Thursday *the* 12th *day of* May, 2016.**

Dan Haendel, Appellant,

against Record No. 0095-16-3
Circuit Court Nos. CR1400014-03 and CR14000014-04

Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Staunton

On December 30, 2014, upon appellant's guilty pleas pursuant to North Carolina v. Alford, 400 U.S. 27 (1972), the trial court sentenced appellant to a total of twenty years with thirteen years suspended for attempting to take indecent liberties with a minor and using a communications system to facilitate a sexual offense with a minor. On September 21, 2015, appellant filed a "Motion for Reconsideration and Motion to Suppress Evidence" in the trial court. Appellant alleged that the electronic communications upon which his convictions were based were intercepted unlawfully and should have been suppressed. In a subsequent pleading, appellant maintained that as a result of the illegally obtained evidence the judgment against him was void *an initio*. By order entered December 23, 2015, the trial court denied appellant's motions, finding that it "lack[ed] jurisdiction to suspend or otherwise modify [appellant's] sentence pursuant to Virginia Code Section 19.2-303 and Rule 1:1 of the

Rules of the Supreme Court of Virginia." Appellant appeals this ruling.[1]

> The Court of Appeals of Virginia
>
> is a court of limited jurisdiction. West v. Commonwealth, 18 Va. App. 456, 457, 445 S.E.2d 159, 159 (1994), appeal dismissed, 249 Va. 241, 455 S.E.2d 15 (1995). Unless a statute confers jurisdiction in this Court, we are without power to review an appeal. Polumbo v. Polumbo, 13 Va. App. 306, 307, 411 S.E.2d 229, 229 (1991).

Canova Elec. Contracting, Inc. v. LMI Ins. Co., 22 Va. App. 595, 599, 471 S.E.2d 827, 829 (1996).

This Court's appellate jurisdiction in criminal matters is defined by Code § 17.1-406(A), which provides that "[a]ny aggrieved party may present a petition for appeal to the Court of Appeals from . . . any final conviction in a circuit court of a traffic infraction or a crime, except where a sentence of death has been imposed. . . ." "[T]his statutory language limits the Court of Appeals' appellate criminal jurisdiction 'to appeals from final criminal convictions and from action

---

[1] Appellant's notice of appeal, filed on January 20, 2016, also states appellant is appealing from the trial court's December 30, 2014 sentencing order. Rule 5A:6 provides that "[n]o appeal shall be allowed unless, within 30 days after entry of final judgment. . . ." Appellant did not timely note an appeal from the sentencing order. The failure to file a notice of appeal in accordance with Rule 5A:6 is a jurisdictional defect. See Johnson v. Commonwealth, 1 Va. App. 510, 512, 339 S.E.2d 919, 920 (1986). Thus, any direct appeal from the December 30, 2014 order is dismissed.

on motions filed a disposed of while the trial court retains jurisdiction over the case.'" Green v. Commonwealth, 263 Va. 191, 194, 557 S.E.2d 230, 232 (2002) (quoting Commonwealth v. Southerly, 262 Va. 294, 299, 551 S.E.2d 650, 653 (2001)).

In Southerly, the Supreme Court of Virginia held:

> "[I]t is the nature of the method employed to seek relief from a criminal conviction and the circumstances under which the method is employed that determine whether an appeal is civil or criminal in nature. If the method consists of an appeal from the conviction itself or from action on motions filed and disposed of while the trial court retains jurisdiction over the case, the appeal is criminal in nature. But when, as here, the relief requested by way of a motion to vacate is a declaration that the trial court lacked the jurisdiction to take the action sought to be vacated and the motion is not filed until after the conviction has become final, then the motion and the appeal from the trial court's action thereon are both civil in nature."

Locklear v. Commonwealth, 46 Va. App. 488, 493, 618 S.E.2d 361, 364 (2005) (quoting Southerly, 262 Va. at 299, 551 S.E.2d at 652.

Appellant's pleading asserting that the judgment was void *ab initio* was filed long after his criminal convictions became final, see Rule 1:1, and his appeal therefrom is civil in nature. See Southerly, 262 Va. at 299, 551 S.E.2d 653. Accordingly, the appropriate

venue for this appeal is the Supreme Court of Virginia rather than this Court.

Code § 8.01-677.1 provides:

> Notwithstanding any other provisions of this Code, no appeal which was otherwise properly and timely filed shall be dismissed for want of jurisdiction solely because it was filed in either the Supreme Court or the Court of Appeals and the appellate court in which it was filed thereafter rules that it should have been filed in the other court. In such event, the appellate court so ruling shall transfer the appeal to the appellate court having appropriate jurisdiction for further proceedings in accordance with the rules of the latter court.

It appears that appellant's appeal from the trial court's December 23, 2015 order was "otherwise properly and timely filed" in this Court. Accordingly, we transfer the case to the Supreme Court of Virginia.

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By: /s/ A. John Vollino
Deputy Clerk

APPENDIX C

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 3rd day of February, 2017.

Dan Haendel, Appellant,

against Record No. 160752
Circuit Court Nos. CR14000014-03 and -04

Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Staunton

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 is of the opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: /s/ Leslie Smith
Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA ROANOKE DIVISION

DAN HAENDEL, **Plaintiff,** **v.** **ANNA REED, et al., Defendants.**	**Civil Action No. 7:17-cv-00119** **MEMORANDUM OPINION** **By: Hon. Jackson L. Kiser Senior United States District Judge** **(Filed Feb. 13, 2018)**

Dan Haendel, who is member of the District of Columbia Bar but a Virginia prisoner proceeding pro se, filed a verified complaint pursuant to 42 U.S.C. § 1983.[1] Plaintiff names as defendants: Anna Reed, an Assistant Commonwealth's Attorney for the City of Staunton ("Staunton"); Raymond C. Robertson, the Commonwealth's Attorney for Staunton; Jim Wilson,

[1] Plaintiff is listed on the D.C. Bar's website as an "active attorney" in "good standing" despite his felony convictions. See In Re Katrina Canal Breaches Consol. Litig., 533 F. Supp. 2d 615, 631-33 & nn.14-15 (E.D. La. 2008) (collecting cases indicating that federal courts may take judicial notice of governmental websites); Williams v. Long, 585 F. Supp. 2d 679, 686-88 & n.4 (D. Md. 2008) (collecting cases indicating that postings on government websites are inherently authentic or self-authenticating). I decline to extend the liberal construction standard to an attorney. See Haines v. Kerner, 404 U.S. 519, 521 (1972) (observing that a court should hold pro se complaints to "less stringent standards than formal pleadings drafted by lawyers") (emphasis added).

the Chief of Police for Staunton; BB Cully, a police officer for Staunton; Mark R. Herring, the Attorney General of Virginia; and Harold W. Clarke, the Director of the Virginia Department of Corrections. Plaintiff argues that he is being falsely incarcerated in violation of due process because his convictions for electronic communications with Officer Cully were used unlawfully during his state criminal proceedings. Defendants filed motions to dismiss, Plaintiff responded and filed a motion to amend, and most defendants renewed their motions to dismiss. After reviewing Plaintiff's submissions, I determine that Heck v. Humphrey, 512 U.S. 477, 478 (1994), bars the action, as amended, and dismiss it without prejudice as frivolous.

I.

A.

Plaintiff was arrested on May 13, 2014, as a consequence of his communications of a sexual nature with Officer Cully, who had pretended to be a minor. Plaintiff was charged with attempting to take indecent liberties with a minor, in violation of Virginia Code §§ 18.2-370 and 18.2-26, and with using a communications system to facilitate a sexual offence with a minor, in violation of Virginia Code § 18.2-374.3. Plaintiff pleaded no contest, and on December 30, 2014, he was sentenced by the Circuit Court of Staunton ("Circuit Court") to an active term of seven years' incarceration.

Nearly a year later in September 2015, Plaintiff filed with the Circuit Court a Motion for Reconsideration and Motion to Suppress Evidence. Plaintiff argued that the electronic communications with Officer Cully were unlawfully intercepted and should have been suppressed. The Circuit Court denied Motion for Reconsideration and Motion to Suppress Evidence, and Plaintiff appealed unsuccessfully to the Court of Appeals of Virginia and the Supreme Court of Virginia.

In January 2016, Plaintiff commenced a civil action in state court by filing a pro se "Motion of Judgment" against Reed, Officer Cully, Staunton, the Staunton Police Department, the Office of the Commonwealth's Attorney for Staunton, and the Commonwealth of Virginia. Plaintiff alleged that these defendants violated Virginia Code § 19.2-69 jointly and severally, and are liable for damages.[2] In a subsequent filing titled, "Motion for Judgment – Amended," Plaintiff argued that Reed and Officer Cully violated the provisions governing the use and disclosure of electronic conversations because Officer Cully posed as an underage minor without court approval. Plaintiff also argued that Officer Cully could not have "intercepted" the electronic conversations because the officer was a party to the conversation. The Circuit Court ultimately denied Plaintiff leave to file the "Motion for Judgment – Amended" and dismissed the case with prejudice on

[2] Virginia Code § 19.2-69 permits a civil action for damages in certain circumstances against "any person who intercepts, discloses or uses, or procures any other person to intercept, disclose or use [wire, electronic or oral] communications."

July 11, 2016. Plaintiff appealed unsuccessfully to the Supreme Court of Virginia.

B.

Plaintiff commenced this action no earlier than March 24, 2017, alleging, inter alia, constitutional due process violations by "Virginia Officials by failure to follow plain language of Virginia Statute as void ab initio resulting in false arrest and false imprisonment." Like in the "Motion for Judgement – Amended," Plaintiff asserts that Reed and Officer Cully violated the law by using the incriminating electronic communications in the criminal proceedings against Plaintiff. Plaintiff maintains these defendants' acts tainted his criminal case and render his plea and convictions invalid and void ab initio.[3]

In response to the motions to dismiss filed by Robertson, Reed, and Williams, Plaintiff filed a "motion to amend and motion in opposition to defendant's [sic] motion to dismiss."[4] Plaintiff explains that the motion is to clarify any misunderstandings about this action and to modify parts of the complaint.

---

[3] Plaintiff acknowledges that, despite his prior challenges to the criminal judgment in state courts, he has not yet sought a writ of habeas corpus from Virginia courts.

[4] It was also captioned as a "verified complaint," but it is clear from the document that it is not intended to replace the original complaint. See Fed. R. Civ. P. 8(e) ("Pleadings must be construed so as to do justice.").

Initially, Plaintiff clarifies that he sues defendants in both their individual and official capacities. Nonetheless, Plaintiff amends the relief sought to omit "relief in the form of monetary damages" and an injunction that would compel a speedier release from incarceration.[5] Plaintiff seeks only declaratory relief that recognizes:

> Virginia courts lack jurisdiction as void from the inception of the "sting" operation as contrary to the plain and specific language of the Virginia statutes in violation of civil rights under the Virginia and U.S. Constitutions. These officials formulated the "sting" operation knowing or having reason to know the limitations of VA Code [§] 19.2-62(B)(2) exemption for the "interception" by a party to the communication that such communications, even if "permissible," are not "admissible" in Virginia legal proceedings, absent judicial authorization primarily because the Virginia statute, in contrast to the federal statute, makes it a felony violation to use

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[5] I decline to construe the action as seeking habeas relief for several reasons. Plaintiff is, inexplicably, still a licensed attorney in good standing with the D.C. Bar, knows of habeas relief, and has not yet sought habeas relief. More notable, however, is the fact Plaintiff explicitly disclaims seeking habeas relief in this action. See, e.g., Castro v. United States, 540 U.S. 375, 386 (2003) ("Our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief. Recharacterization is unlike 'liberal construction,' in that it requires a court deliberately to override the pro se litigant's choice of procedural vehicle for his claim.") (Scalia, J., concurring).

> and/or disclose the contents of an interception if the person so doing knows or has reason to know that the contents are from an intercept without requiring, as does the federal statute, that the intercept be in violation of the statute.

Finding it appropriate to do so in accordance with Federal Rule of Civil Procedure 15 and Foman v. Davis, 371 U.S. 178, 182 (1962), the motion to amend is granted to the extent it clarifies the verified complaint as intended, and the relief is limited to declaratory relief. Cf. Kentucky v. Graham, 473 U.S. 159, 167 n.18 (1985) (noting a state's immunity can be overcome by naming state officials as defendants in official-capacity actions for injunctive or declaratory relief); Supreme Court of Virginia v. Consumers Union of U.S., Inc., 446 U.S. 719, 736-38 (1980) (disclaiming absolute immunity as a defense to actions for declaratory relief).

II.

Heck v. Humphrey, 512 U.S. 477, 486-87 (1994), bars this action.[6] See Wilkinson v. Dotson, 544 U.S. 74, 81-82 (2005) (recognizing § 1983 claims for declaratory relief are barred under Heck if success of the claims would necessarily demonstrate the invalidity of the prisoner's confinement without favorable termination). Plaintiff repeatedly challenges the legality of the

[6] The parties filed dispositive motions raising various challenges to the complaint, as amended. I find it unnecessary to address those other arguments in light of the broad application of Heck.

investigation and criminal judgment for which [sic] is presently incarcerated. There is no avenue to both issue the requested declaration yet not impugn the legality of Plaintiff's convictions and incarceration. Plaintiff would be unlawfully incarcerated if, arguendo, Virginia courts lacked jurisdiction. Also, the chat transcript – the only specific evidence establishing his guilt – would have been suppressed had the prosecutors and police violated due process and committed felonies to secure his convictions. Plaintiff argues that his convictions would not be impugned by issuing the declaration because his Alford plea and "other evidence" the police "may possess" could again result in his arrest and incarceration. However, a new plea hearing, the production of unknown "other evidence," re-arrest, and re-incarceration all presuppose that the current judgment is invalid and that the criminal process begins anew.

Plaintiff cannot use § 1983 to obtain declaratory relief that necessarily demonstrates the invalidity of his confinement, and he cannot prove favorable termination because he is still convicted and incarcerated for the crimes for which he seeks declaratory relief. Accordingly, the action is dismissed without prejudice as frivolous.[7]

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[7] Plaintiff's pursuit of this action despite an obvious lack of favorable termination constitutes the frivolous pursuit of an indisputably meritless legal theory. See, e.g., Neitzke v. Williams, 490 U.S. 319, 327 (1989); see also Russell v. Guilford Cty. Municipality, 599 F. App'x 65, 65 (4th Cir. 2015) (per curiam) (finding Heck barred a § 1983 complaint and upholding dismissal as

III.

For the foregoing reasons, I grant Plaintiff's motion to amend; grant Defendants' motions to dismiss as to the application of Heck v. Humphrey, 512 U.S. 477, 478 (1994), and deny them in part as moot as to other arguments; and dismiss the action without prejudice as frivolous. Because it appears the D.C. Bar has not yet been informed of Plaintiff's convictions, the Clerk shall forward a certified copy of this Memorandum Opinion and accompanying Order to the Office of Disciplinary Counsel for the District of Columbia Court of Appeals.

ENTER: This 13th day of February, 2018.

/s/ Jackson L. Kiser
Senior United States District Judge

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frivolous pursuant to 28 U.S.C. § 1915A(b)(1)); Wilson v. Sheriff Dep't, No. 7:10-cv-00363, 2010 U.S. Dist. LEXIS 85193, at *5, 2010 WL 3292654, at *2 (W.D. Va. Aug. 19, 2010) (dismissing without prejudice as frivolous under Heck (citing Omar v. Chasanow, 318 F. App'x 188, 189 (4th Cir. 2009) (modifying district court's dismissal with prejudice under Heck to reflect that dismissal is without prejudice to plaintiff refiling upon favorable termination of conviction) (per curiam))).

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA ROANOKE DIVISION

DAN HAENDEL,	**Civil Case No. 7:18cv00317**
Petitioner,	**MEMORANDUM OPINION**
v.	
IVAN GILMORE,	**By: Michael F. Urbanski Chief United States District Judge**
Respondent.	
	(Filed Mar. 12, 2019)

Dan Haendel, a Virginia inmate proceeding pro se,[1] filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 to challenge his criminal judgment entered by the Circuit Court for the City of Staunton. This matter is before the court on respondent's motion to dismiss. After reviewing the record, the court grants the motion and dismisses the petition as time-barred.[2]

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[1] The court notes that Haendel was- an attorney admitted to practice law in the District of Columbia from December 28, 1979 until his license was suspended on June 1, 2018, and he was disbarred on January 3, 2019. See In re Haendel, 199 A.3d 625, No. 18-BG-522, 2019 D.C. App. LEXIS 2, at *2, 2019 WL 81111, at *1 (D.C. Jan. 3, 2019).

[2] Since filing his petition, Haendel has been released from incarceration. See ECF No. 19. Because of his release, Haendel seeks to amend his petition to change the named respondent to the "Virginia Department of Corrections Probation and Parole District 29." See ECF No. 18. However, because the court is

I.

On December 30, 2014, after an Alford plea,[3] the Circuit Court for the City of Staunton convicted Haendel of attempting to take indecent liberties with a minor, in violation of Virginia Code §§ 18.2-370 and 18.2-26, and using a communications system to facilitate a sexual offence with a minor, in violation of Virginia Code § 18.2-374.3. The court sentenced him to a total term of twenty years' incarceration, with thirteen years suspended.

Nine months later, on September 30, 2015, Haendel filed a "Motion for Reconsideration and Motion to Suppress Evidence" with the Circuit Court for the City of Staunton. Haendel argued that the electronic communications with Officer Cully, an Officer of the Staunton Police Department who posed as a minor in communicating with Haendel, were unlawfully intercepted and should have been suppressed. The Circuit Court denied Haendel's motion on December 23, 2015, finding that it lacked jurisdiction to suspend or

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dismissing his petition, his motion to amend is moot and, thus, will be denied. The court notes that a petitioner's release from prison does not moot his petition simply because he is no longer "in custody," provided there is still some "collateral consequence" of the conviction. See Spencer v. Kemna, 523 U.S. 1, 14-16 (1998). A criminal conviction carries a presumption of collateral consequences, see id. at 8, and respondent has offered nothing to rebut this presumption.

[3] North Carolina v. Alford, 400 U.S. 25 (1970) "allows a defendant to plead guilty without admitting the commission of the acts underlying the offense and without incurring civil liability." Jones v. United States, 401 A.2d 473, 475 n.1 (D.C. 1979).

otherwise modify Haendel's sentence pursuant to Virginia Code § 19.2-303 and Rule 1:1 of the Rules of the Supreme Court of Virginia. Haendel appealed and the Supreme Court of Virginia refused the appeal on February 3, 2017. The Supreme Court of the United States denied his petition for writ of certiorari on October 2, 2017. Haendel filed the instant federal habeas petition on June 29, 2018. See R. Gov. § 2254 Cases 3(d) (describing the prison-mailbox rule).

II.

Under the Antiterrorism and Effective Death Penalty Act of 1996, a petitioner has a one-year period of limitation to file a federal habeas corpus petition. This statute of limitations runs from the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1). Here, Haendel alleges nothing to support application of § 2244(d)(1)(B)-(D). Under § 2244(d)(1)(A), Haendel's conviction became final on January 29, 2015, when his time to file a direct appeal to Court of Appeals of Virginia expired, see Va. Code § 8.01-675.3 and Va. S. Ct. R. 5A:6, and the statute of limitations began to run on that date. Therefore, Haendel had until January 29, 2016, to file a timely federal habeas petition.

Section 2244(d)(2) tolls the federal limitation period during the time in which "a properly filed application for State post-conviction or other collateral review . . . is pending." 28 U.S.C. § 2244(d)(2). An application for post-conviction review or other state collateral proceeding is "properly filed" when its delivery and acceptance are in compliance with the applicable laws and rules governing filings." Artuz v. Bennett, 531 U.S. 4, 8 (2000); see also Pace v. DiGuglielmo, 544 U.S. 408, 414 (2005). Haendel's September 30, 2015 motion in the circuit court, collaterally attacking his conviction, and the subsequent appeals of the denial of that motion, did not toll the statute of limitations because the motion was not "properly filed."[4] See Hall v. Johnson,

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[4] Moreover, even if the court tolled the statute of limitations during the pendency of Haendel's motion and subsequent appeals, his federal habeas petition would nevertheless be untimely. A total of 244 days passed from the time his conviction became

332 F. Supp. 2d 904, 909 (E.D. Va. 2004) (finding a collateral attack denied under Virginia Supreme Court Rule 1:1 was not properly filed and, thus, did not toll the statute of limitations period). Accordingly, Haendel's petition is time-barred unless he demonstrates that the court should equitably toll the one-year statute of limitations, Rouse v. Lee, 339 F.3d. 238, 246 (4th Cir. 2003), or that he is actually innocent of his convictions, McQuiggin v. Perkins, 569 U.S. 383, 386 (2013).

A district court may apply equitable tolling only in "those rare instances where—due to circumstances external to the party's own conduct—it would be unconscionable to enforce the limitation period against the party and gross injustice would result." Rouse, 339 F.3d. at 246 (citing Harris v. Hutchinson, 209 F.3d 325, 330 (4th Cir. 2000)). The petitioner must demonstrate

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final on January 29, 2015 to the time he filed his motion in the Circuit Court on September 30, 2015. The Supreme Court of Virginia denied his appeal of his collateral attack on February 3, 2017. Haendel's petition for writ of certiorari to the Supreme Court of the United States did not toll the statute of limitations. See Lawrence v. Florida, 549 U.S. 327, 334-36 (2007) (holding that a petitioner is not entitled to tolling to file a petition for writ of certiorari to the Supreme Court of the United States following state collateral review, even if the petition for writ of certiorari is actually filed). Therefore, the limitations period ran for another 511 days before he filed his federal habeas petition on June 29, 2018. Accordingly, even if the court tolled the limitations period during the pendency of his state collateral attacks, a total of 755 days passed between the time his conviction became final and time he filed his federal habeas petition and, thus, his petition would be untimely filed.

that some action by the respondent or "some other extraordinary circumstance beyond his control" prevented him from complying with the statutory time limit, despite his exercise of "reasonable diligence in investigating and bringing the claims." Harris, 209 F.3d at 330 (citing Miller v. N.J. State Dep't of Cons., 145 F.3d 616, 618 (3d Cir. 1998)). An inmate asserting equitable tolling "'bears a. strong burden to show specific facts'" that demonstrate he fulfills both elements of the test. Yang v. Archuleta, 525 F.3d 925, 928 (10th Cir. 2008) (quoting Brown v. Barrow, 512 F.3d 1304, 1307 (11th Cir. 2008)). Generally, the petitioner is obliged to specify "'the steps he took to diligently pursue his federal claims.'" *Id.* at 930 (quoting Miller v. Man, 141 F.3d 976, 978 (10th Cir.1998)). Haendel has presented no specific evidence to suggest that he was prevented from complying with the statutory time limit. Accordingly, the court finds no basis to equitably toll the limitations period.

Finally, a gateway claim of actual innocence requires a petitioner to produce new, reliable evidence sufficient to persuade the court that no reasonable juror would have found the petitioner guilty beyond a reasonable doubt to overcome a time-bar restriction. McQuiggin, 569 U.S. at 386 (citing Schlup v. Delo, 513 U.S. 298, 329 (1995)). Haendel has not presented any new evidence in his federal habeas petition and, thus, has not plausibly alleged a basis for excusing his untimely filing. Accordingly, the court concludes that Haendel's petition is time-barred.

III.

Based on the foregoing, the court will grant respondent's motion to dismiss.

ENTER: This 11th day of March, 2019.

/s/ Michael F. Urbanski
Chief United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA ROANOKE DIVISION

DAN HAENDEL, Plaintiff,	**Civil Action No. 7:17-cv-00119**
v.	**MEMORANDUM OPINION**
ANNA REED, et al., Defendants.	**By: Hon. Jackson L. Kiser Senior United States District Judge**
	(Filed Sep. 10, 2018)

Presently before me is a motion for reconsideration filed by pro se, incarcerated plaintiff Dan Haendel, who is a member of the District of Columbia Bar.[1] Plaintiff had alleged in this action pursuant to 42 U.S.C. § 1983 that "Virginia Officials['] . . . failure to follow plain language of Virginia Statute as void ab initio result[ed] in false arrest and false imprisonment." The alleged false imprisonment manifests as Plaintiff's current term of imprisonment after he pleaded no contest, pursuant to North Carolina v. Alford, 400 U.S. 25, 26 (1970), for attempting to take indecent liberties

[1] I decline to extend the liberal construction standard to an attorney. See Haines v. Kerner, 404 U.S. 519, 521 (1972) (observing that a court should hold pro se complaints to "less stringent standards than formal pleadings drafted by lawyers" (emphasis added)).

with a minor, in violation of Virginia Code § 18.2-370, and with using a communications system to facilitate a sexual offence with a minor, in violation of Virginia Code § 18.2-374.3.

I had dismissed the complaint, as amended, finding it barred by Heck v. Humphrey, 512 U.S. 477, 478 (1994). Plaintiff had argued that the investigative techniques used to collect the evidence of his crimes rendered his plea and convictions invalid, and the relief he had sought was a declaration that, inter alia, Virginia courts lacked jurisdiction to convict and sentence him. Plaintiff argued that:

> Virginia courts lack jurisdiction as void from the inception of the "sting" operation as contrary to the plain and specific language of the Virginia statutes in violation of civil rights under the Virginia and U.S. Constitutions. These officials formulated the "sting" operation knowing or having reason to know the limitations of VA Code [§] 19.2-62(B)(2) exemption for the "interception" by a party to the communication that such communications, even if "permissible," are not "admissible" in Virginia legal proceedings, absent judicial authorization primarily because the Virginia statute, in contrast to the federal statute, makes it a felony violation to use and/or disclose the contents of an interception if the person so doing knows or has reason to know that the contents are from an intercept without requiring, as does the federal statute, that the intercept be in violation of the statute.

In the motion for reconsideration, Plaintiff cites Covey v. Assessor of Ohio County, 777 F.3d 186, 189 (4th Cir. 2015), to argue that Heck does not apply. In Covey, the Court of Appeals held that "a civil-rights claim does not necessarily imply the invalidity of a conviction or sentence if (1) the conviction derives from a guilty plea rather than a verdict obtained with unlawfully obtained evidence and (2) the plaintiff does not plead facts inconsistent with guilt." Covey, supra at 197.

Convey [sic] is not applicable here because Plaintiff entered an Alford plea, not a guilty plea. "Ordinarily, a judgment of conviction resting on a plea of guilty is justified by the defendant's admission that he committed the crime charged against him . . . " Alford, 400 U.S. at 32. Thus, a guilty plea would have substituted as the basis for the convictions versus the underlying evidence used to support the arrest, charges, and convictions. In contrast, Virginia courts recognize that Alford pleas allow "criminal defendants who wish to avoid the consequences of a trial to plead guilty by conceding that the evidence is sufficient to convict them, while maintaining that they did not participate in the acts constituting the crimes." Carroll v. Commonwealth, 280 Va. 641, 644-45, 701 S.E.2d 414, 415 (2010) (emphasis added). "By these representations in his criminal prosecution, [a defendant] assumed a position of law, not a position of fact. He conceded only that the evidence was sufficient to convict him of the offenses and did not admit as a factual matter that he had

participated in the acts constituting the crimes." Parson v. Carroll, 272 Va. 560, 566, 636 S.E.2d 452, 455 (2006).

Plaintiff acknowledged in his written plea agreement that his "plea does not constitute an admission of guilt."[2] Instead of admitting guilt, Plaintiff "voluntarily, knowingly, and understandingly consent[ed] to the imposition of a prison sentence even if he [wa]s unwilling or unable to admit his participation in the acts constituting the crime." Alford, 400 U.S. at 37. Thus, Plaintiff "preferred the [factual] dispute . . . be settled by the judge in the context of a[n] [Alford] plea proceeding rather than by a formal trial." Id. at 32. To that end, the state court relied on evidence, now challenged as unlawfully procured and admitted, as the sole basis to support the convictions.[3]

"[T]he Constitution does not bar imposition of a prison sentence upon an accused who is unwilling

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[2] The state court record has been loaned to this court during the pendency of Plaintiff's petition for a writ of habeas corpus under 28 U.S.C. § 2254 in Haendel v. Gilmore, No. 7:18cv317.

[3] Transcripts were not prepared other than from the bond hearing where the parties discussed Plaintiff's potential access to computers and children at the bed and breakfast he owns in Middleburg, Virginia, and at his job. Although no transcript recites the facts supporting the convictions, the convictions rested on the chat logs that were entered into the record during the plea hearing. The chat logs reveal Plaintiff's intended grooming of a thirteen year child via computer and his attempted indecent liberties with a child. See Va. Code § 18.2-370(A)(4) (prohibiting, inter alia, the proposal of doing an act of sexual intercourse, anal intercourse, cunnilingus, fellatio, or anilingus to a child); § 18.2-374.3(C) (prohibiting the use of a computer for such proposals).

expressly to admit his guilt. . . ." Id. at 36. But, Heck does bar Plaintiff's attempt to treat a "no contest" plea in state criminal proceedings as a guilty plea in federal civil proceedings. Accordingly, the motion for reconsideration is denied.

ENTER: This 10th day of September, 2018.

s/Jackson L. Kiser
Senior United States
District Judge

APPENDIX G

FILED: April 15, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6496
(7:18-cv-00317-MFU-RSB)

DAN HAENDEL

Petitioner - Appellant

v.

IVAN GILMORE, Warden,
Coffeewood Correctional Center

Respondent - Appellee

This case has been opened on appeal.

Originating Court	United States District Court for the Western District of Virginia at Roanoke
Originating Case Number	7:18-cv-00317-MFU-RSB
Date notice of appeal filed in originating court:	04/12/2019
Appellant(s)	Dan Haendel
Appellate Case Number	19-6496
Case Manager	Cathy Tyree Herb 804-916-2724

APPENDIX H

FILED: May 14, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-7216
(7:17-cv-00119-JLK-RSB)

DAN HAENDEL

Plaintiff - Appellant

v.

ANNA REED, Assistant Commonwealth Attorney City of Staunton; BB CULLY, Police Officer, City of Staunton; RAYMOND C. ROBERTSON, Commonwealth Attorney, City of Staunton; JIM WILLIAMS, Chief of Police, City of Staunton; MARK R. HERRING, Attorney General Commonwealth of Virginia; HOWARD W. CLARKE, Director Virginia Department of Corrections

Defendants - Appellees

MANDATE

The judgment of this court, entered 03/26/2019, takes effect today.

This constitutes the formal mandate of this court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

/s/Patricia S. Connor, Clerk

FILED: May 6, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-7216
(7:17-cv-00119-JLK-RSB)

DAN HAENDEL

Plaintiff - Appellant

v.

ANNA REED, Assistant Commonwealth Attorney City of Staunton; BB CULLY, Police Officer, City of Staunton; RAYMOND C. ROBERTSON, Commonwealth Attorney, City of Staunton; JIM WILLIAMS, Chief of Police, City of Staunton; MARK R. HERRING, Attorney General Commonwealth of Virginia; HOWARD W. CLARKE, Director Virginia Department of Corrections

Defendants - Appellees

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed.

R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-7216

DAN HAENDEL,

Plaintiff - Appellant.

v.

ANNA REED, Assistant Commonwealth Attorney City of Staunton; BB CULLY, Police Officer, City of Staunton; RAYMOND C. ROBERTSON, Commonwealth Attorney, City of Staunton; JIM WILLIAMS, Chief of Police, City of Staunton; MARK R. HERRING, Attorney General Commonwealth of Virginia; HOWARD W. CLARKE, Director Virginia Department of Corrections,

Defendants - Appellees.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. Jackson L. Kiser, Senior District Judge. 7:17-cv-00119-JLK-RSB)

Submitted: February 28, 2019 Decided: March 26, 2019

Before KING and FLOYD, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Dan Haendel, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Dan Haendel appeals the district court's orders dismissing without prejudice his 42 U.S.C. § 1983 (2012) complaint and denying his motion for reconsideration. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *Haendel v. Reed*, No. 7:17-cv-00119-JLK-RSB (W.D. Va. Feb. 13, 2018; Sept. 10, 2018). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

FILED: March 26, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-7216
(7:17-cv-00119-JLK-RSB)

DAN HAENDEL

Plaintiff - Appellant

v.

ANNA REED, Assistant Commonwealth Attorney City of Staunton; BB CULLY, Police Officer, City of Staunton; RAYMOND C. ROBERTSON, Commonwealth Attorney, City of Staunton; JIM WILLIAMS, Chief of Police, City of Staunton; MARK R. HERRING, Attorney General Commonwealth of Virginia; HOWARD W. CLARKE, Director Virginia Department of Corrections

Defendants - Appellees

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

APPENDIX I

The Federal Wire and Electronic Communications Interception and Interception of Oral Communications Act, 18 U.S.C. Sections 2510 through 2522

The Virginia Interception of Wire, Electronic, or Oral Communications Act, Va Code Sections 19.2-61 through 19.2-70.3

28 U.S.C. Section 2511

Section 2511. Interception and disclosure of wire, oral, or electronic communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who –

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

(b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when . . .

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; **(emphasis added;**

note that the counterpart Virginia statute deletes the "in violation" language)

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or **(emphasis added; note that the counterpart Virginia statute deletes the "in violation" language)**

(e)(i) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, intercepted by means authorized by sections 2511(2)(a)(ii), 2511(2)(b)-(c), 2511(2)(e), 2516, and 2518 of this chapter, (ii) knowing or having reason to know that the information was obtained through the interception of such a communication in connection with a criminal investigation, (iii) having obtained or received the information in connection with a criminal investigation, and (iv) with intent to improperly obstruct, impede, or interfere with a duly authorized criminal investigation,

shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

(2)(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception. **(Emphasis added; note specific**

exemption for a "person acting under color of law" in federal statute – no such specific exemption in Virginia statute – which neutralizes prohibition of investigative or law enforcement official not having authority to investigate or prosecute crimes not listed by means of intercepting electronic communications)

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

(4)(a) Except as provided in paragraph (b) of this subsection or in subsection (5), whoever violates subsection (1) of this section shall be fined under this title or imprisoned not more than five years, or both.

Virginia Code § 19.2-62. Interception, disclosure, etc., of wire, electronic or oral communications unlawful; penalties; exceptions

A. Except as otherwise specifically provided in this chapter any person who:

1. Intentionally intercepts, endeavors to intercept or procures any other person to intercept or endeavor

to intercept, any wire, electronic or oral communication;

2. Intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical or other device to intercept any oral communication;

3. Intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, electronic or oral communication knowing or having reason to know that the information was obtained through the interception of a wire, electronic or oral communication; of **(emphasis added; note absence of "in violation" language for interception provided in federal law with only knowledge standard required for felony violation under Virginia statute)**

4. Intentionally uses, or endeavors to use, the contents of any wire, electronic or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire, electronic or oral communication; shall be guilty of a Class 6 felony, **(Emphasis added; note absence of "in violation" language for interception provided in federal counterpart statute with only knowledge standard required for felony violation under Virginia statute)**

2. It shall not be a criminal offense under this chapter for a person to intercept a wire, electronic or oral communication, where such person is a party to the communication or one of the parties to the communication

has given prior consent to such interception. **(Virginia statute does not provide specific exemption for investigative or law enforcement official to investigate crimes not listed in Va Code 19.2-66 by means of interception of electronic communications thereby making the sting operation unauthorized and, therefore, unlawful).**

Va Code Section 19.2-61 Definitions

"Electronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system . . .

"Intercept" means any aural or other means of acquisition of the contents of any wire, electronic or oral communication through the use of any electronic, mechanical or other device; . . .

"Investigative or law-enforcement officer" means any officer of the United States or of a state or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses; . . . (emphasis added)

"Oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception

under circumstances justifying such expectations but does not include any electronic communication; . . .

Va Code Section 19.2-66. When Attorney General or Chief Deputy Attorney General may apply for order authorizing interception of communications

A. The Attorney General or Chief Deputy Attorney General, if the Attorney General so designates in writing, in any case where the Attorney General is authorized by law to prosecute or pursuant to a request in his official capacity of an attorney for the Commonwealth in any city or county, may apply to a judge of competent jurisdiction for an order authorizing the interception of wire, electronic or oral communications by the Department of State Police, when such interception may reasonably be expected to provide evidence of the commission of a felonious offense of extortion, bribery, kidnapping, murder, . . . **[lists additional felonies, but does not list the two offenses charged against Plaintiff]**

Va Code Section 19.2-68

G. The contents of <u>any intercepted</u> wire, <u>electronic</u> or oral <u>communication or evidence derived therefrom</u> shall <u>not be received in evidence or otherwise disclosed in any trial, hearing or other proceeding in a state court</u> unless each party to the communication and to such proceeding, not less than 10 days before the trial, hearing or proceeding, has been furnished with a copy of the court order, accompanying application under which the interception was authorized and the

contents of any intercepted wire, electronic or oral communication that is to be used in any trial, hearing or other proceeding in a state court. This 10-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information 10 days before the trial, hearing or proceeding and that the party will not be prejudiced by the delay in receiving such information; provided that such information in any event shall be given prior to the day of the trial, and the inability to comply with such 10-day period shall be grounds for the granting of a continuance to either party. **(Emphasis added; note that "any intercepted . . . electronic communication includes interception by a party to the communication pursuant to the exemption for criminal offense in Va Code Section 19.2-62(B)(2))**

H. Any aggrieved person in any trial, hearing or proceeding in or before any court, department, officer, agency, regulatory body or other authority of the Commonwealth, or a political subdivision thereof, may move to suppress the contents of any intercepted wire, electronic or oral communication, or evidence derived therefrom, on the grounds that:

1. The communication was unlawfully intercepted, or was not intercepted in compliance with this chapter; or

2. The order of the authorization or approval under which it was intercepted is insufficient on its face; or

3. The interception was not made in conformity with the order of authorization or approval; or

4. The interception is not admissible into evidence in any trial, proceeding or hearing in a state court under the applicable rules of evidence.

Such motion shall be made before the trial, hearing or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. . . . **(Emphasis added)**

28 U.S.C. § 2520. Recovery of civil damages authorized

(a) In general. – Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate.

(b) Relief. – In an action under this section, appropriate relief includes –

(1) such preliminary and other equitable or declaratory relief as may be appropriate;

(2) damages under subsection (c) and punitive damages in appropriate cases; and

(3) a reasonable attorney's fee and other litigation costs reasonably incurred.

. . .

Va Code § 19.2-69. Civil action for unlawful interception, disclosure or use

Any person whose wire, electronic or oral communication is intercepted, disclosed or used in violation of this chapter shall (i) have a civil cause of action against any person who intercepts, discloses or uses, or procures any other person to intercept, disclose or use such communications, and (ii) be entitled to recover from any such person:

1. Actual damages but not less than liquidated damages computed at the rate of $400 a day for each day of violation or $4,000, whichever is higher, provided that liquidated damages shall be computed at the rate of $800 a day for each day of violation or $8,000, whichever is higher, if the wire, electronic, or oral communication intercepted, disclosed, or used is between (i) a husband and wife; (ii) an attorney and client; (iii) a licensed practitioner of the healing arts and patient; (iv) a licensed professional counselor, licensed clinical social worker, licensed psychologist, or licensed marriage and family therapist and client; or (v) clergy member and person seeking spiritual counsel or advice;

2. Punitive damages; and

3. A reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order or legislative authorization shall constitute a complete defense to

APPENDIX J

SAMPLES OF CONSTITUTIONAL ISSUES CITED

"The basis for this is 19.2-62B2, and that does exempt from criminal prosecution a person who is a party to the electronic communication. Now, as Mr. Haendel has noted, there does not seem to be any statutory reconciliation between 62B2 and 19.2-69, which talks about the civil cause of action. However, I believe the Supreme Court of Virginia has weighed in in the unpublished decision in Horn v. Clarke . . . I find . . . that because the officer, Mr. Cully, was a party to the communication, that the civil provisions under 19.2-69 do not apply." (Tr, pp. 5253)

ASSIGNMENT OF ERRORS; AUTHORITIES AND ARGUMENTS

A. The Circuit Court erred as to use of Horn v. Clarke and Plain Language of the Statute

Appellant maintains that by relying solely on the two ambiguous sentences in Horn v. Clarke, and failing to consider whether the "no violation" applies only to the interception as provided by the plain language of Va Code Section 19.262(B)(2), the Circuit Court did not properly evaluate the plain words of the underlying statute cited by this Supreme Court and claims that the exemption from a criminal offense solely for the intercept of the electronic communication under the Virginia statute requires a different result. . The two sentences in Horn v. Clarke relied on by the Circuit

Court for its disposition of this case are: "No violation of the Interception of Wire, Electronic or Oral Communication Act, Section 19.2-61 through 19.2-70.3 or the Federal Wire and Electronic Communications Interception and Interception of Oral Communication Act, 18 U.S.C. Section 2510 through 18 U.S.C. Section 2522, occurred because the officer

brief, Reed, p. 6) but, as the author of the Commonwealth's brief in the criminal appeal before this Court, Reed misrepresented the case by arguing that Padilla held the contents of the oral intercept in that case were admissible when, indeed, it did no such thing. The Padilla court suppressed the contents of the oral intercept which it held to be permissible. In short, the same rationale applies in this case. Even if Cully's intercept of the electronic intercept was permissible pursuant to 19.2-62(B)(2) despite his not having authority to investigate such offenses, the use and/or disclosure of the contents of the intercept absent a court authorization or approval is inadmissible in any Virginia court.

In Morton v. Commonwealth, 227 Va. 216, 315 S.E.2d 224 (1994), the Virginia Supreme Court relied on United States v. Campagnuolo, 556 F.2d 1209 (5th Cir. 1997) to hold that intercepted communications of offenses other than those specified in an authorization order require a subsequent approval by a judge to be disclosed in a court proceeding. As noted in United States v. Rabstein, 554 F. 2d 190 (1977) and Gelbard v. United States, 408 U.S. 41, 92 S. Ct. 2726 (1972), the restriction in the federal statute on which the Virginia statute is patterned is to prevent the very "fishing

expedition" and circumvention of its provisions Cully and Reed have perpetrated in this case with this Court in Wilks v. Commonwealth of Virginia, 217 Va. 885, 234 S.E.2d 250 (1977) characterizing the Virginia statute as more stringent than its federal counterpart.

B. The Circuit Court erred as to its grants of immunity

This case involves a Virginia statute modeled on a federal statute with interwoven state and federal law and enacted to prevent the very actions undertaken by Cully and Reed, with the Virginia [sic] even more explicit than the federal statute that their actions were outside the scope of their authority and duties and that they

to investigate crimes not listed under 19.2-66(A) pursuant to the definition of "investigative officer" and "law enforcement official" in 19.2-61.; 2) in the investigative phase of the "investigative officer" and "law enforcement official" have no immunity for actions taken outside the scope of their official authority and duties; during the prosecutorial phase their commission of felonies for intentional use and/or disclosure of the contents of electronic communications they knew or should have known were from an intercept fulfill the elements of the felony offenses pursuant to 19.2-62(A)(2)(3) and/or (4).

Appellees refer to the instant chats as conversations and recordation. This is not a case involving oral communications that trigger a privacy expectation contained in the statutory definition of "oral communications" pursuant to 19.2-61. This is a case of instant

chats found by the U.S. Supreme Court in Reno v. ACLU to be electronic communication as also clearly branded by the statute in the definition of "electronic communication" in 19.2-61 that does not entail a privacy expectation with privacy expectation incorporated in the definition of "oral communication," however. At least equally significant is the statute's limiting an investigative officer's and law enforcement official's authority to investigate and/or prosecute by means of an intercept only those crimes listed in 19.2-66(A). No matter how Appellees seek to avoid a party to an electronic communication acquisition of its contents constituting an interception, they fail to do so for the simple reason that 19.2-62(B)(2) brands it an "intercept" as do numerous cases cited above. By citing that provision of the statute, Horn v. Clark brands it an intercept and 19.2-68(G) requires any intercept to be authorized for it to be admitted in evidence in any Virginia legal proceeding.

Therefore, this Court should apply the plain language of the statute to hold that where an investigative officer or law enforcement official take [sic] action at the investigative phase, they are not entitled to the safe harbor of the "party to the communication" exception of 19.2-62(B)(2) because they have no authority pursuant to the definition of their positions to intercept electronic communications for the investigation of crimes not listed in 19.2-66(A). Even if this Court allows the officer and the official the exemption for a "part to the communication," it only applies to the interception for 19.2-62(A)(1), but not for 19.2-62(A)(2)(3) and/or (4) for

use and/or disclosure at the probable cause, grand jury, or the adjudication/sentencing hearing. Accordingly, each of them committed felonies, acted outside the scope of their authority and duties, and have no immunity for their actions in the civil action pursuant to the remedy embedded in the statute for such actions by 19.2-69.

The U.S. and Virginia Constitutions guarantee due process which is violated where the judiciary fails to adhere to the authorization and approval requirements assigned to it by the Virginia legislature to assure the protections provided to Virginia's citizens by the statute. The Virginia statute is models [sic] on the federal statute and where no precedent exists in Virginia law, Virginia courts have looked to federal precedent. The Virginia Supreme Court has an obligation to adhere to the plain language of the Virginia statute and provide for its force and effect, especially to investigative officers and law enforcements officials who fail to follow the statutory requirements they know or should have known.

Accordingly, Appellant respectfully requests that in its de novo review this Court reverse the Circuit Court's ruling on the matters of law, examine the factual pleadings in the Motion of Judgment – Amended, rule that they are sufficient to