

No. 21-5487 **ORIGINAL**

**SUPREME COURT OF THE UNITED STATES**

Norman Michael Achin  
*Petitioner,*

v.

Commonwealth of Virginia  
*Respondent.*

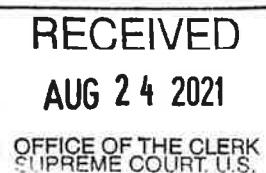


**PETITION FOR A WRIT OF CERTIORARI**

Virginia Supreme Court Record Number 200933  
Virginia Court of Appeals Record Number 1950-19-4  
Fairfax County Circuit Court Case No. FE-2018-0001497

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## **I. Questions Presented**

1. Does intercepting private electronic messages and cell phone communications without a warrant by impersonating another adult or by impersonating an imaginary person violate 18 U.S.C. § 2511 and a U.S. citizen's First, Fourth, and Sixth Amendment Rights?
2. How can a defendant's Fifth and Fourteenth Amendment right to due process and Sixth Amendment right to confront your accuser, be guaranteed when police deploy an imaginary person to be the victim, without a warrant?
3. Was Achin the architect of the crime or were the police engaged in outrageous police conduct, violating Achin's Fifth and Fourteen Amendment liberty right to date someone without government interference or surveillance?

## **II. List of Proceedings**

- Preliminary Hearing. One charge was dismissed and one charge was certified to go forward to the grand jury. General District Court of Fairfax County. GC18152110-00, GC18152111-00. Commonwealth of Virginia v. Norman Michael Achin. October 17, 2018.
- Hearing on the Motion to Suppress Evidence. Motion denied. Circuit Court of Fairfax County. FE-2018-0001497. Commonwealth of Virginia v. Norman Michael Achin. March 15, 2019.
- Bench Trial where Mr. Achin was found guilty. Circuit Court of Fairfax County. FE-2018-0001497. Commonwealth of Virginia v. Norman Michael Achin. May 20-21, 2019.
- Motion to Set Aside the Verdict and the Sentencing Hearing. Circuit Court of Fairfax County, FE-2018-0001497. Commonwealth of Virginia v. Norman Michael Achin. November 15, 2019.
- Oral Arguments Requesting a Writ. Court of Appeals of Virginia. Record No. 1950-19-4, Circuit Court No. FE-2018-0001497. Noman Michael Achin v. Commonwealth of Virginia. June 10, 2020.

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#### **IV. Petition for Writ of Certiorari**

Norman Achin, *pro se*, respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgments of the Fairfax County Circuit Court as appealed to the Virginia Court of Appeals and the Virginia Supreme Court (SCV). Mr. Achin is currently incarcerated at the Fairfax County Adult Detention Center in Fairfax, VA.

#### **V. Opinions and Orders**

- March 15, 2019. Circuit Court of Fairfax County No. FE-2018-0001497. Hearing on the Motion to Suppress Internet Chats and Recordings of Telephone Conversations Evidence (MSE) Transcript (MSE\_TR) {R. at 000487}
- March 15, 2019. Circuit Court of Fairfax County No. FE-2018-0001497. Order denying the Motion to Suppress. {R. at 000116}
- November 19, 2019. Circuit Court of Fairfax County No. FE-2018-0001497. Grand Jury Indictment {R. at 000117}
- May 20, 2019. Circuit Court of Fairfax County No. FE-2018-0001497. Trial Day 1 Transcript. (T1\_TR) {R. at 000508}
- May 20, 2019. Circuit Court of Fairfax County No. FE-2018-0001497. Bench Trial First Day. {R. at 000131}
- May 21, 2019. Circuit Court of Fairfax County No. FE-2018-0001497. Trial Day 2 Transcript. (T2\_TR) {R. at 000635}
- May 21, 2019. Circuit Court of Fairfax County No. FE-2018-0001497. Bench Trial Second Day. {R. at 000132}

- November 15, 2019. Circuit Court of Fairfax County No. FE-2018-0001497. Hearing on the Motion to Set Aside the Verdict (MSAV) and Sentencing Transcript. (SEN\_TR) {R. at 000738}
- April 24, 2020. Court of Appeals of Virginia, Achin v. Commonwealth of Virginia, Record No. 1950-19-4. Unpublished decision denying the petition for appeal. (Appendix I at 1)
- June 22, 2020. Court of Appeals of Virginia, Achin v. Commonwealth of Virginia, Record No. 1950-19-4. Order denying the petition for rehearing. (Appendix I at 1203)
- February 24, 2021. Virginia Supreme Court, Achin v. Commonwealth of Virginia, Record No. 200933. Order refusing the petition for appeal. (Appendix I at 1301)
- May 14, 2021. Virginia Supreme Court, Achin v. Commonwealth of Virginia, Record No. 200933. Order refusing the petition for rehearing. (Appendix I at 1302)

## VI. Jurisdiction

On March 15, 2019, the Fairfax County Circuit Court denied Achin's Motion to Suppress Internet Chats and Recordings of Telephone Conversations. At trial on June 19<sup>th</sup>, 2019, Achin's Counsel moved to strike Commonwealth's evidence presented, which the Court denied {T2\_TR at 11-25, 84-85}. Achin was found guilty as charged.

The Virginia Appellate Court's one-judge panel wrote an opinion denying Achin's petition for appeal, April 24, 2020. A petition for rehearing submitted April 27, 2020, was denied by a three-judge panel, June 22, 2020. Achin's petition for appeal to the Virginia Supreme Court was denied, February 24, 2021. A petition for rehearing before the Virginia Supreme Court was denied, May 14, 2021.

Achin invokes this Court's jurisdiction under 28 U.S.C. § 1257, having timely filed this petition for a writ of certiorari within ninety days of the Virginia Supreme Court's order denying rehearing, (Appendix I at 1302).

## VII. Constitutional Provisions, Executive Orders, and Statutes Involved

### United States Constitution, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

### United States Constitution, Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

### United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### United States Constitution, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

### United States Constitution, Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Executive Order 12333, United States Intelligence Activities (1981).** As amended by Executive Orders 13284 (2003), 13355 (2004) and 13470 (2008) (EO-12333), sec. 3.5(c): (pertinent text)

***Electronic Surveillance*** means acquisition of a nonpublic communication by electronic means without the consent of a person who is a party to an electronic communication or, in the case of a nonelectronic communication, without the consent of a person who is visibly present at the place of communication, but not including the use of radio direction-finding equipment solely to determine the location of a transmitter.

**Foreign Intelligence Surveillance Act of 1978, Amendments Act of 2008 (FISA), Section 702**  
(pertinent text)

*Who can't be targeted • A foreign person located abroad for the purpose of targeting a U.S. person or person inside the U.S. with whom the foreign person is communicating (often called "reverse targeting" or "indirect targeting")*

*"Reverse targeting," the targeting of a U.S. person under the guise or pretext of targeting a foreigner, is expressly prohibited.*

**50 U.S.C. § 1881a** (pertinent text)

(a) Authorization

Notwithstanding any other provision of law, upon the issuance of an order in accordance with subsection (j)(3) or a determination under subsection (c)(2), the Attorney General and the Director of National Intelligence may authorize jointly, for a period of up to 1 year from the effective date of the authorization, the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information.

(b) Limitation

An acquisition authorized under subsection (a) –

- (1) may not intentionally target any person known at the time of acquisition to be located in the United States;
- (2) may not intentionally target a person reasonably believed to be located outside the United States if the purpose of such acquisition is to target a particular, known person reasonably believed to be in the United States; ...

**In Appendix II:**

18 U.S.C. § 1028, 18 U.S.C. § 1028a, 18 U.S.C. § 2510, 2511, 18 U.S.C. § 2515,  
34 U.S.C. § 20911, Md. Code § 10-401, Md. Code § 10-402, Md. Code § 10-405,  
Va. Code § 18.2-374.3, Va. Code § 19.2-61, Va. Code § 19.2-62, Va. Code § 19.2-65,  
Va. Code § 19.2-66, Va. Code § 19.2-68

## **VIII. Statement of the Case**

Mr. Norman Achin subscribed to Grindr, an adult-only dating application, on July 8<sup>th</sup>, 2018. Two days later, Achin was approached by Alex VA, an imaginary person created and animated online by three officers {Motion to Suppress Internet Chats and Recordings of Telephone Conversations (MSE) at 16}:

1. Photos of an unnamed officer (not otherwise involved in the case) were posted by Det. Bauer profile as the visual image of Alex VA {Preliminary Hearing Tr. (PRE\_TR) at 21:23, 22:1-13; MSE at 7};
2. Det. Bauer, as Alex VA, sent text messages and intercepted all replies {PRE\_TR at 51-6, 6:15-17, 7:10-13};
3. Det. Gadell supplied the voice of Alex VA on recorded phone calls {PRE\_TR at 6:21-7:6, 8:15-21, 23:11-17}.

Bauer manipulated Alex VA to obtain Achin's electronic and oral communications. These communications were disclosed and used against Achin at trial, violating his Fourth Amendment rights {Amicus Curiae Brief (ACB) [Starting at CAV Record page 62] at 10}. An imaginary person cannot be considered a "person" represented in "We, the People...", or contemplated under Article IV of the Constitution {ACB at 10}. An imaginary person possesses no rights of personhood to intercept and record private communications with Achin or any other legal, human person {ACB at 19}.

### **A. Without a Warrant, Bauer Used his Imaginary Person on Grindr**

Bauer was not investigating a complaint from a real child against Achin and no parent filed a complaint. Without probable cause, Bauer (as "Alex VA") approached a random, anonymous user on Grindr (later identified as Norman Achin) and began chatting {PRE\_TR at 5:16-18; MSAV

at 2; ACB at 7}. Bauer targeted Grindr users intending to induce someone – anyone – to commit a crime {PRE\_TR at 16:2-6, 17:18-22; Petition for Appeal (CAV\_APPEAL) at 3}. On direct examination, Bauer testified that he had no warrant and was not specifically investigating Achin {PRE\_TR at 15:22-16:1}.

The preliminary hearing certified one charge to the grand jury. On November 19<sup>th</sup>, 2018, Achin was indicted under Va. Code § 18.2-374.3 (Appendix II at 48), use of a communication system to facilitate certain offenses involving children. But the alleged victim in this case, Alex VA, does not exist {MSE at 7; MSAV at 4:12-14}.

#### **B. Det. Bauer Violated Grindr's User Agreement**

Grindr requires all users to agree to its Terms and Conditions of Service, July 1, 2018 {Starting at Record page 000083}. This legally binding agreement between a user and Grindr {MSE at 7-8; CAV\_APPEAL at 10; ACB at 22; SCV\_APPEAL at 19-20} states:

- You must be a legal adult. You hereby affirm and warrant that you are currently eighteen (18) years of age or over (twenty-one (21) years in places where eighteen (18) years is not the age of majority) and you are capable of lawfully entering into and performing all the obligations set forth in this agreement. (at 2 sec. 1.2)
- You will NOT impersonate any person or entity, falsely (at 5 sec. 8.3.7)
- A user's profile may not contain "video, audio, photographs or images" of persons under 18 (at 5 sec 8.3.12).
- Government End Users. The Grindr Services are intended for the use by individuals, not government entities.... Otherwise, nothing in this Agreement or otherwise will give a government user rights to the Grindr Services broader than those set forth in this Agreement. (at 12 sec. 15.8)

Grindr enforces its policies. The day after meeting Alex VA, Achin reported Alex VA as underage to the Grindr system administrator. Bauer's fake account was quickly suspended {PRE\_TR at 18:11-13}.

Grindr expressly states its application is not intended for government entities, yet Bauer created two separate Grindr accounts to conduct investigations {Petition for Appeal to the Supreme Court of Virginia (SCV\_APPEAL) at 16}. Bauer also deployed several deceptions to evade Grindr's policy prohibiting underage use {R. at 000084}. For example, the "Alex VA" profile did not indicate age {R. at 000220:1-2; R. at 000850; MSE at 7; T2\_TR. at 38:5-6; ACB at 18}. Bauer's second profile used a different name, "Alex," used an icon instead of a recognizable photo, never suggested Alex was really Alex VA, and never indicated age in the profile {SEN\_TR at 5:3-6:11; CAV\_APPEAL at 4-5; SCV\_APPEAL at 6}. Therefore, at the very moment Bauer contracted with Grindr, he intended to breach Grindr's contractual obligations by deploying a fictional minor and impersonating it and / or the officer depicted as Alex VA. Accordingly, Bauer was "misrepresenting the source identity or content of information" {*ibid* at sec. 8.3.8} by providing "intentionally misleading" information {*ibid* at sec. 8.3.12}, and abusing Grindr's geo-location feature to target unsuspecting subscribers. Bauer's conduct also constitutes the intentional tort of civil fraud. See *Lloyd v. Smith*, 150 Va. 132 (1928), {CAV\_APPEAL at 10-14; SCV\_APPEAL at 15-19, 23}.

A *user* is defined as "any person duly authorized by the provider to engage such use." Va. Code § 19.2-61 (Appendix II at 51), Md. Code § 10-401(12) (Appendix II at 33), and 18 U.S.C. § 2510(13)(b) (Appendix II at 12). Since Bauer violated Grindr's contract, he was not a duly authorized user. Likewise, entering into a contract with an innocent third party while intending to breach that contract, cannot be considered "in the ordinary course of business" and violates 18 U.S.C. § 2510(5)(a). Bauer had no warrant because he had no probable cause to get one. In *Amati v. City of Woodstock*, 176 F.3d 952 (7<sup>TH</sup> Cir., 1999), Judge Posner wrote that "if 'ordinary' were read literally, warrants would rarely if ever be required for electronic eavesdropping, which was

surely not Congress's intent." {CAV\_APPEAL at 12-15; SCV\_APPEAL at 18}. Nor did Bauer's receipt of Achin's texts and Grindr messages qualify as exceptions under the meaning of "intercept." In *Adams v. City of Battle Creek*, 250 F.3d 980 (6<sup>th</sup> Cir., 2001), the Court ruled messages intercepted to and from a police department-issued pager required a warrant, and narrowed exceptions to that of recording phone calls in and out of prisons and law enforcement institutions.

The Grindr application becomes a component of any device on which it is installed. Bauer needed to install Grindr's application on his police phone and tablet in order for his deception to take shape. State and federal statutes exclude a "telephone ... or any component thereof" from the definition of "electronic, mechanical or other device" that is used "in the ordinary course of his duties." Yet Bauer was not lawfully using Grindr in the "ordinary course of business," rather his police phone and tablet became as an interception device to obtain communication content, see 18 U.S.C. § 2511 (Appendix II at 17) {CAV\_APPEAL at 9-10; SCV\_APPEAL at 17}. Bauer had no warrant; so he violated Achin's Fourth Amendment rights. The Trial Court erred by admitting Achin's communications into evidence An Imaginary Person Isn't Alive

"Person" primarily means "a human being." A "person" cannot be three humans, an impersonator, or an imaginary person. Black's Law Dictionary, 2<sup>nd</sup> ed. defines "person" as "capable of having rights," something that begins with a birth certificate {ACB at 20}. This meaning of "person" was contemplated under EO-12333 {Starting at Court of Appeals of Virginia (CAV) Record page 116}, and later codified in the ECPA {ACB at 3-4}. See also 50 U.S.C. § 1801(f)(3). Alex VA (Bauer) also could not be visibly present and convincingly chat with Achin, for Det. Bauer was not the human pictured as "Alex VA." Likewise, Det. Gadell (as Alex VA) could not convincingly talk with Achin while visibly present {MSE at 7}. A persona that is not a

flesh-and-blood person has no birth certificate. Imaginary people cannot grant consent {MSE at 17-18, ACB at 10-12, 19}. Therefore, Dets. Bauer and Gadell conducted electronic surveillance against Norman Achin without a warrant. {PRE\_TR at 16:17; ACB at 3}.

In *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389 (2002), this Court held that statutes are only enforceable when applied to images of “real” children. The provision that an image “is, or appears to be, of a minor” was ruled overbroad as it may not indicate exploitation of real children. Here, the adult officer pictured as Alex VA is not a minor, yet the criminal statute is for a crime against a minor {MSE at 7; ACB at 14}.

Robo callers also can function as imaginary persons and participate in conversations, but they are not people. A computer simulates a voice, either a computer-generated or an actual person’s recorded voice. Federal ECPA law prohibits Robo callers from recording unless the warning is first given: “This call may be monitored or recorded.” This applies equally to text messages. While Robo callers “participate” in calls, they cannot be “such person [who] is a party to conversations.” See 18 U.S.C. § 2511 and Va. Code § 19.2-62 (Appendix II at 56) {ACB at 19}.

This case also touches on Sixth Amendment concerns. A defendant is guaranteed the right “to be confronted with the witnesses against him.” The male pictured as Alex VA was never visibly present to witness any crime committed and was not party to Achin’s conversations, so could not give testimony. Moreover, any person who does not exist cannot witness a crime, appear in court, or speak. Neither the imaginary Alex VA nor the man pictured as Alex VA can satisfy Achin’s Sixth Amendment right {ACB at 18-19}.

### **C. Police Engaged in Identity Theft**

Photos are a “means of identification” showing unique physical characteristics of a person. 18 U.S.C. § 1028(a)(7), § 1028(d)(7)(B), (Appendix II at 1) and Va. Code § 18.2-186.3(C). Bauer procured a photo of someone else solely to intercept Achin’s communications {MSE at 7; CAV\_APPEAL at 4; SCV\_APPEAL at 6}. “*Whoever ... knowingly ... uses, without lawful authority, a means of identification of another person ... in connection with, any unlawful activity*” violates 18 U.S.C. § 1028(a)(7). {ACB at 17}.

In *U.S. v. George*, No. 19-4125 (4th Cir. 2020), the Court held that “person” includes those individuals living or deceased, pursuant to 18 U.S.C. § 1028A(a)(1) (Appendix II at 9). Imaginary people are incapable of living, aging, or dying. How can an imaginary person be “under” age when they can never age and grow older? *U.S. v. George* is significant because the court considered a “person” to be someone who actually lived. The officer depicted as Alex VA is alive. Bauer’s use of another’s photo as his own identification to intercept communications, meets the definition of identity theft under statute {MSE at 7-8; ACB at 18}.

### **D. Achin’s Mens Rea**

Grindr’s user policies prohibit use by minors. So, Achin believed he was communicating with an adult {MSE at 9}. Early on Achin wrote, “tell me what high school you graduated from.” {CAV\_APPEAL at 26}. After exchanging 40 messages over 3 hours, Achin realizes Alex VA is underage. He became alarmed, writing: {PRE\_TR at 6:18-20; CAV\_APPEAL at 3}.

“Did you say you not yet 15 am I reading that right? I’m wondering how you’re even on the app”

“I’m concerned on this for about your age you’re pretty young to be on an app like this”

“why are you on this site? As opposed to a more benign one?”

“You too young for sex cite”

Achin reported the “underage” Alex VA account to Grindr. On July 11<sup>th</sup>, Achin insisted Alex VA leave Grindr saying {R. at 000865; SCV\_APPEAL at 5}:

“If you just need a friend and mentorship that’s cool too then it might be possible to meet outside or off this app but this app puts a whole different flavor to it”

Since Grindr did not inform Achin it suspended the Alex VA account and since the defunct Alex VA profile was still visible to Achin on his device, Achin believed Alex VA never left Grindr.

#### **E. Entrapment**

Achin’s appeals argued that “commission of the crime was not in Mr. Achin’s mind but for the trickery of Bauer.” {CAV\_APPEAL at 26-27}. Bauer had faked a crisis by first putting his teen, Alex VA, on an adult-only site Grindr, then using Alex VA as bait to approach men. Bauer enticed Achin to sympathize with Alex VA, who claimed to have a troubled home life and who pressed Achin for an inappropriate relationship.

Alex VA said, “I feel like I’m bothering u. … I need the money.” {R. at 001001}, so Achin suggested yard work. Alex VA goaded Achin, claiming that as “stupid” and later declaring he was “not … looking for a father figure. Not y I was on there.” {R. at 001009; PRE\_TR at 20:17-20; CAV\_APPEAL at 3-4; SCV\_APPEAL at 5, 30}. Achin’s replies included {CAV\_APPEAL at 3; SCV\_APPEAL at 3-4}:

“looking for adult fun. Did not expect to run into your age, no. Not interested in that kind of relationship with a boy. Not legal or ethical. Concerned too you’d be taken advantage of” {R. at 001003}.

“You too young for sex site” {R. at 000867}.

As a public-school teacher, Achin received training identifying signs of child trafficking, teen depression, and suicide. Achin was concerned that Alex VA was in danger, possibly suicidal or was being trafficked {MSE at 10; MSAV at 3}. He felt he could not risk ignoring Alex VA {MSE at 12}. Using his training, Achin tried repeatedly to learn details of Alex VA’s life so he

could file a report useful to police. The few details Alex VA provided were contradictory. Two hometowns: Annandale and Fairfax; two ages: “gonna b 15” and “gonna be 14.” {R. at 000220, 000852, 000861, 001003}. A sign of being trafficked is not knowing your age or hometown. {T2\_TR at 30:5-9}.

Several times Bauer as Alex VA suggested they meet at his home when his guardian aunt was at work. Achin never expressed interest in meeting an unrelated teenager, much less at his home alone. As texts increased his alarm, Achin reluctantly agreed to meet in a public park {MSE at 11}. That’s where Achin was arrested.

Bauer gained entry into a private venue created by Grindr using trickery and deception. The defendant would not have performed the acts for which he was charged but for Det. Bauer’s trickery and fraud {CAV\_APPEAL at 25}. Bauer preyed on Achin’s concerns about rising teen suicide rates and child exploitation, and in doing so violated Mr. Achin’s constitutional and statutory rights {MSE at 3-6}.

Though he had no probable cause and no reason to suspect Achin, Bauer engaged in “creative activity,” constructing traps and manipulative language to compromise and then charge Achin with a solicitation crime. See *Johnson v. Commonwealth*, 211 Va. 815(1971).

At the preliminary hearing, Achin’s counsel asked Bauer, “when you went on the site, it was your intention to see if you could net anyone with this persona, Alex VA?” to which Bauer responded, “Anyone looking to have sex with a child, yes sir.” {PRE\_TR at 17}. Months later at trial, Bauer was asked, “How would you go about performing investigations for possible sexual predators on the Internet?” He responded, “We would also, at time, create a persona and go online to be solicited.” {T1\_TR at 51:15-17; CAV\_APPEAL at 24}

For a successful entrapment defense in Virginia, defendant's predisposition to commit a crime must be proven, and there must be a determination that law enforcement's "function does not include the manufacturing of crime." See *Commonwealth v. Allen*, Va. Cir. (Norfolk)(2016), quoting *Sherman v. United States*, 356 U.S.369 (1958).

The *Allen* Court found that Allen's "character and reputation were unknown to the officer." "The officer approached him and not the other way around," and "He [Allen] expressed reluctance." "The officer provided a sympathetic tale of protecting his girlfriend from harm." The facts here are similar {MSE at 9; CAV\_APPEAL at 22-24}. Bauer approached a random person having no knowledge of his reputation {R. at 000900}. Achin had enjoyed a stellar reputation throughout his teaching career, having no prior criminal history apart from traffic tickets. Achin expressed no interest in any sexual contact with minors. {PRE\_TR at 5:16-18; CAV\_APPEAL at 3}. Allen had no contraband on his persons when coming into physical contact with police. Likewise, Achin had no sexual paraphernalia or child pornography on his person, in his vehicle, or in his home {Trial Day 2 Tr. at 117:1-7, 121:14-23; MSAV at 4; SEN\_TR at 19:5-8}. Finally, the trial court itself observed at sentencing that "it seems to me [Defendant] lived a pretty decent life." {CAV\_APPEAL at 27}

A distinction must be made between using subterfuge as opportunity for committing a crime, and actually manufacturing the crime. *McCoy v. Commonwealth*, 9 Va. App. 227 (1989). The Commonwealth failed "to establish that petitioner was independently predisposed to commit the crime for which he was arrested." {CAV\_APPEAL at 25-27; SCV\_APPEAL at 27-29}. Subterfuge becomes entrapment where it "overstep[s] the line between setting a trap for the 'unwary innocent' and the 'unwary criminal.'" See *Jacobson v. United States*, 503 U.S. 540 (1992), quoting *Sherman v. United States*. The record shows inducement, and "[o]nce the

defendant has shown government inducement, the burden shifts to the government to prove beyond a reasonable doubt the defendant's predisposition to have engaged in criminal conduct." *U.S. v. Jones*, 976 F.2d 176 (4<sup>th</sup> Cir. 1992), {CAV\_APPEAL at 33}.

**F. Det. Bauer Impersonates Achin's Adult Friend, Zach.**

While attempting to help Alex VA, Achin was in a relationship with an adult male, Zach {PRE\_TR at 31:10-23}. Achin intended to send a text to Zach, but mistakenly typed to Alex VA, beginning "damn, I forgot my manners. Who pd for room? Happy to chip in" {R. at 001003}. This message obviously could not have been intended for Alex VA for Achin and Alex VA had never met in person let alone shared a hotel room. Yet Bauer immediately responded, impersonating Zach, drawing Achin into discussing intimate details and soliciting Achin's ideas for future engagement {PRE\_TR at 18:2-20-16}. After 91 exchanged messages spanning 5 hours 20 minutes, Bauer finally conceded, "I think u hav the wrong boy." "This is Alex." Achin immediately demanded, "why did you continue to respond then?" {MSE at 3; CAV\_APPEAL at 3; SCV\_APPEAL at 4}.

At Achin's preliminary hearing, Bauer testified he believed the Zach conversation demonstrated Achin's attempted solicitation of Alex VA, though Bauer admitted there were no overtly explicit conversations with Alex VA {PRE\_TR at 18:2-20-16}. The Commonwealth then amended Achin's indictment to sending a photo of an erect penis to Alex VA.

**G. Det. Bauer Creates a Second Imaginary Person, "Alex"**

Bauer's discovery that his "Alex VA" Grindr account was disabled prompted him to establish a second account ("Alex") to continue pursuing Achin. Bauer avoided Grindr's system administrators by using a male bathroom icon for the new profile image {R. at 000872}. Bauer re-entered Grindr as "Alex" and sought Achin from among many anonymous Grindr profiles.

Once again Bauer invited Achin to chat without mentioning age or that he was Alex VA {MSE at 8}. It had been twelve days since Achin communicated with Alex VA on Grindr, so Achin assumed the new Grindr account was a different adult {CAV\_APPEAL at 2; SCV\_APPEAL at 5-6}. Achin sent pictures including one of his penis to “Alex.” After 50 exchanged messages spanning two hours, Bauer (as “Alex”) finally mentioned his aunt. Then Achin realized “Alex” and “Alex VA” were the same.

Neither the indictment nor the conviction made clear which picture sent on Grindr constituted a crime: the one intended for Zach but accidentally sent to Alex VA that was never received, or the one sent to Alex whom Achin later realized was underage Alex VA. Nor did the Commonwealth prove Achin’s intent was to induce a child.

#### **H. Det. Gadell Provided Alex VA’s Voice on Phone Calls**

Due to confusion during texting, Achin had requested he and Alex VA speak on the phone. Bauer procured Det. Gadell to be the voice and impersonate Alex VA on two recorded phone calls “to sound younger,” {MSE at 42; MSE\_TR at 11:2-4; T1\_TR at 62:20-23} while Bauer stood nearby, listening {PRE\_TR at 6:21-7:6, 14:11-21; CAV\_APPEAL at 4, 25; SCV\_APPEAL at 5}.

Gadell used Bauer’s police phone for two reasons: (1) Bauer’s phone had been specially equipped to record calls; (2) The caller ID for Alex VA would match the number previously used for texting Achin {MSE at 19, ACB at 12}. A phone number is a “means of identification.” See 18 U.S.C. § 1028(a)(7), § 1028(d)(7)(B), and Va. Code § 18.2-186.3(C), {ACB at 14}.

Virginia statutes limit who can intercept, and for what crimes. Bauer and Gadell are not Virginia State Police Officers, See Va. Code § 19.2-68 (C)(4), so they could never obtain authorization to intercept. Law enforcement can only gain authorization to intercept for crimes

listed under statute, and Achin's charges are not listed. See Va. Code § 19.2-66(A), (Appendix II at 66) {MSE at 22-23; CAV\_APPEAL at 16}.

#### **I. Det. Bauer was the Recipient, but not the Intended Recipient**

Commonwealth argued that because Bauer was the recipient of Achin's messages, he was necessarily party to the communications and could receive Achin's messages {R. at 000113; MSE\_TR at 8:2-9:2}. This misstates the law. ECPA does not exclude *receipt* by a party to the communication from the meaning of *interception* {CAV\_APPEAL at 7; SCV\_APPEAL at 8}. Bauer was not an agent of Alex VA, not employed by Alex VA, not acting at Alex VA's direction. Alex VA was invented by Bauer, deployed deceptively to be the intended recipient of Achin's messages. Alex VA "is not a person, *it* cannot give permission to record" any electronic or oral communications (emphasis added) {MSE\_TR at 5:3-9, 16:13-17}. Neither Bauer nor Gadell were the intended recipients of Achin's communications; Alex VA was.

Unlike police, system administrators are granted limited statutory exception, permitting them to intercept communications for their job. This was tested in *U.S. v. Szymuszkiewicz*, — F.3d —, 2010 WL 3503506 (7th Cir. September 9, 2010). Szymuszkiewicz was convicted for being a recipient, though not the intended recipient, of emails intended for his boss. Szymuszkiewicz secretly set up auto-forwarding on his boss's account so email copies would also be sent to him {MSE at 18-19}. The Court ruled it an illegal interception. Similarly, when BES software acquired and logged Plaintiff's text messages, it was ruled an illegal interception. *Shefts v. Petrakis*, 758 R. Supp. 2d 620 630 (C.D. Ill. 2010), {MSE at 20; CAV\_APPEAL at 19-20; SCV\_APPEAL at 9}. In Achin's case, any messages sent to Alex VA were actually routed to Det. Bauer.

Over a hundred years ago, this Court established that messages must be received by the intended recipient for a solicitation to occur. Justice Holmes's majority opinion in *U.S. v. Thayer*,

154 F. 508, (June 17, 1907), clarified that solicitation crimes via U.S. mail only occur “if it takes place in the intended way.” “If the letter has miscarried” (delivered to someone else), “the defendant would not have accomplished a solicitation.” Twelve days after the Zach texting debacle, Achin logged on to Grindr, intending to send an explicit picture to Zach, but apparently sent it to the Alex VA account. Det. Bauer never received it because Grindr had suspended the account and Bauer could no longer log in as Alex VA. Bauer only discovered it after Achin’s arrest and upon examination of Achin’s phone. “Nothing less than bringing the offer to the actual consciousness of the person addressed would do” (emphasis added). Imaginary people have no consciousness. “An offer is nothing until it is communicated to the party to whom it is made.” The male pictured in the Grindr profile neither read the messages nor saw the pictures, so “the offense was not complete, but, when it had been read.” {ACB at 11}.

#### **J. Achin’s Communications Were Private and Protected by ECPA**

Bauer testified he understood communications on Grindr are private between two parties {PRE\_TR at 9:15-21}. Achin installed Grindr as an application on his passcode protected cell phone. A Grindr account also requires username and password. Achin used Grindr in the privacy of his locked home. Accordingly, the private messages Achin exchanged were protected by Va. Code § 19.2-62(A) and 18 U.S.C. § 2511(1) {MSE at 3, 8-9; CAV\_APPEAL at 18}. The phone calls were also protected for they were made from the privacy of Achin’s home {MSE at 19; ACB at 9}.

At trial, Bauer testified that he never received any training in Electronic Communications and Privacy Act (ECPA), and was not familiar with it {PRE\_TR at 22:20 – 23:3; ACB at 42}. Virginia’s wiretap statutes are derived from federal ECPA and “parrots” the federal wiretap statutes, though its statutes are more restrictive. {MSE at 13-15, 18, CAV\_APPEAL at 6}. 18

U.S.C. § 2511(2)(c) provides an *exception* for those acting under federal color of law. However, Virginia does not exempt persons acting under color of state law from the requirement to obtain a warrant to intercept and record conversations. See Va. Code § 19.2-62 {MSE at 13-16; CAV\_APPEAL at 7, 16-17; ACB at 38; SCV\_APPEAL at 12-13, 17-19}.

“Courts have consistently interpreted telephone conversations as wire communications under ECPA.” *Rassoull v. Maximus, Inc.*, No. DKC 2002-0214 2002 U.S. Dist. LEXIS 21866, \*10 (D. Md. Nov. 8, 2002) (citing federal appellate cases). Cellular Communications “are included in the definition of ‘wire communications’ and are covered by the statute.” See *U.S. v. Carr*, 805 F. Supp. 1266, 1270 (E.D.N.C. 1992) citing legislative history of the federal wiretap statute {MSE at 20-21}.

#### **K. Det. Bauer Intercepted Across State Lines**

Virginia Det. Bauer testified he traveled out of his jurisdiction to Maryland. While there, he used his imaginary person to intercept Achin’s electronic communications across state lines {PRE\_TR at 6:9-13}. Maryland is an all-party consent state and Achin in Virginia did not consent. See Md. Code § 10-402(c)(3) (Appendix II at 37). Bauer was not acting under Maryland color of law; he was not investigating violations of Maryland law. See Md. Code § 10-402(a)(1), § 10-402(b) and 18 U.S.C. § 2511(1)(a). Bauer was not acting under Maryland authority. See Md. Code § 10-401(11). At both preliminary hearing and trial, the Commonwealth and Bauer willfully used and disclosed content of conversations with Achin, including portions intercepted from Maryland. See Md. Code § 10-402(a)(2) and § 10-402(a)(3), 18 U.S.C. § 2511(1)(c), and § 2511(1)(d), {MSE at 17-18; CAV\_APPEAL at 17-18; SCV\_APPEAL at 21-22}. See also United

States Signal Intelligence Directive (USSID SP0018) *Legal Compliance and U.S. Persons Minimization Procedures* {ACB at 9-10; CAV R. at 299 sec 5.4}.

**L. Reverse Targeting of U.S. Citizens**

Imaginary people have no Fourth Amendment rights. Foreigners on foreign soil have no Fourth Amendment rights. The Foreign Intelligence Surveillance Act of 1978, Amendments Act of 2008 (FISA) extended Fourth Amendment protections to U.S. persons when they communicate with foreigners abroad. FISA strictly prohibits collecting communications of non-U.S. persons for ulterior motive, acquiring communications with the true target, a U.S. person. See 50 U.S.C. § 1881a (b)(2). FISA Amendments Act Section 702 and its corresponding OVSC1203 Class Transcript {[Starting at CAV Record page 730] at 24} outlines the distinction.

In the U.S.A., police target communications of imaginary people solely to intercept communications exchanged with their true target, a U.S. person. These actions are “reverse targeting,” domestic style {ACB at 22-23}.

**M. Achin Moved to Suppress Internet Messages, Texts, and Recorded Phone calls.**

Achin’s March 4, 2019 Memorandum of Law moved to suppress all communications intercepted and sought dismissal of the charge because Det. Bauer and Det. Gadell obtained the communications without authorization under Va. Code § 19.2-66(A); *id.* § 19.2-68(A)(1), (Appendix II at 63) {MSE at 1, MSE\_TR at 16:2-6}. Achin argued that his rights were violated because Alex VA is not a legal, human person who can be a lawful party to a communication. Nor did the three officers acting as “Alex VA” constituted a new flesh-and-blood person able to consent to recording text messages and phone calls {MSE at 13, 17; MSE\_TR at 16:13-17; ACB at 15}.

Achin's electronic and oral communications were intercepted in violation of Virginia, Maryland, and Federal interception law. See 18 U.S.C. § 2511, Va. Code § 19.2-62, and Md. Code § 10-402.

On hearing the motion, Judge Shannon stated, "there's nothing in the wire tap code that says – you know, that allows for some kind of exception when you didn't know the person you were speaking to wasn't the person you were speaking to." {MSE\_TR at 8:13-16}. "And Detective Bauer is not intercepting anything, he's receiving it, so I don't think the wire tap Code section applies in this case based on that exception." {MSE\_TR at 8:23-9:2}. He overruled Achin's Motion to Suppress, finding "a warrant is not needed for a party to the communication, which the Court finds covers the text messages at issue." {MSE\_TR at 16:23-17:2}.

Regarding the phone calls, "The Court finds that Det. Bauer was a party to the communication; namely he was a listener on the call to his own telephone." "Det. Gadell, whose voice is being used on the call, consented to Det. Bauer listening to the phone call. And the Faithless Friend doctrine allows Det. Bauer to record this call to his own phone without a warrant." {Commonwealth's Response to Defendant's Motion to Suppress at 2; MSE\_TR at 16:23-17:13}. Yet Bauer testified that he stood nearby listening and did not record the call himself {PRE\_TR at 7:3-6}. Judge Shannon also granted the Commonwealth's motion to amend the indictment to include section (C)(1).

#### **N. Achin Convicted Under Va. Code § 18.2-374.3(C)(1), a Felony.**

Achin's intercepted communications were disclosed and used at a bench trial on May 20-21, 2019, contrary to Va. Code § 19.2-65 (Appendix II at 60) and 18 U.S.C. § 2515 (Appendix II at 27). The evidence presented included intercepted communications where:

1. Bauer impersonated Zach in text messages.
2. Bauer impersonated Alex VA in text messages.

3. Bauer impersonated Alex VA on Grindr.
4. Bauer impersonated Alex on Grindr.
5. Gadell impersonated Alex VA in recorded phone calls.

The young man pictured as Alex VA was an officer, not a minor, and Achin's crime involves offense against a minor {PRE\_TR at 22:5-14}. Achin was found guilty for felony violation of Va. Code § 18.2-374.3(C)(1).

Achin's defense essentially argued entrapment. He filed Motion to Set Aside Verdict, November 8, 2019, outlining entrapment and arguing § 18.2-374.3 was unconstitutionally vague with respect to the clause, 'a person he has "reason to believe" is a child.' The "reason to believe" *mens rea* is overbroad for two reasons: (1) It encompasses conduct protected by the First Amendment. In *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), this Court ruled that the Communications Decency Act of 1996 ("CDA") was overbroad because it prohibited internet users from communicating material deemed patently offensive to minors, which includes speech that adults have a right to express (MSAV at 6). (2) The Commonwealth failed to argue and the trial court erred in assuming that Achin was predisposed to solicit a minor. On November 15<sup>th</sup>, 2019, Judge Devine denied the motion and sentenced Achin, including 25 years on the national Sex Offender Registry {R. at 000198-000200}.

## **O. Appeals.**

Achin appealed to the Virginia Appeals Court on March 4, 2020. The Virginia Court of Appeals granted leave for an Amicus Curiae Brief (ACB) in support of Achin, filed on March 18, 2020. The ACB argued warrantless electronic surveillance is illegal police interception. Commonwealth's Brief in Opposition {Starting at CAV Record page 1165} cited *Wilks v.*

*Commonwealth*, 217 Va. 885, 887 (1977) where Hockaday volunteered to be wired with a police microphone.

Precedents supporting the plain meaning of interception law exists. In Washington State, a detective arrested a drug dealer, then impersonated that dealer. The detective sent text messages from the dealer's confiscated phone, arranging meetings with buyers Hinton and Roden. They each met the officer. Both were arrested. Washington State Supreme Court overturned the convictions of Hinton and Roden reasoning that text messages are a "private affair," protected against warrantless intrusion via impersonation. See *State v. Hinton*, 87663-1 (Wa. 2014) and *State v. Roden*, 87669-0 (Wa. 2014), {ACB at 13}.

On April 24<sup>th</sup>, 2020, a one-judge panel of Virginia Appeals Court denied Achin's appeal and held that because Bauer and Gadell "were parties to the conversations ... it was not a criminal offense for them to 'intercept' or disclose those communications," and "There was no interception of communication that violated Va. Code § 19.2-62, and the rule of exclusion in Va. Code § 19.2-65 did not apply. The trial court thus did not err in denying the appellant's motion to suppress." The Court cited *Watkins v. Commonwealth*, 238 Va. 341, 347, (1989). *Watkins* held that a "telephone conversation recorded by or with the consent of one of the parties is not an interception." {Ruling from the Virginia Court of Appeals (CAV\_RULING) at 2}. The Court additionally determined that Achin had properly preserved the issue of entrapment for further review {CAV\_RULING at 2}.

April 27, 2020, Achin filed a Petition for Rehearing, which was denied by a three-judge Appellate panel on June 22, 2020. Achin appealed to Virginia Supreme Court on July 21, 2020. That Court declined to hear arguments and issued a one-page denial on February 24, 2021. A petition to rehear before that Court was also denied, May 14, 2021.

## IX. Reason for Granting the Writ

Approximately half of the 150,000<sup>1</sup> Internet Crimes Against Children (ICAC) Task Force prosecutions nationwide used imaginary people online to intercept private communications, without warrants. ICAC has received over \$477,500,000<sup>2</sup> in federal grants just since 2003 to catch people who had not committed a crime, but who might harm a real child in the future - a thought crime. People from 20 states have signed petitions requesting SCOTUS to hear Achin's case because these Fourth Amendment issues affects cases in their region as well. See Appendix III.<sup>3</sup>

### A. First and Fourth Amendment

*“Any person who intentionally intercepts ... any wire, oral or electronic communication; shall be punished” and “shall be guilty of a felony,” except “where such person is a party to the communication,”* from 18 U.S.C. § 2511, Va. Code § 19.2-62, and Md. Code § 10-402. The plain meaning of these statutes is clear, impersonators and imaginary people cannot legally intercept communications because they are not “such person [who] is a party to the communication.” Virginia statutes provide no exception for police. Without a warrant, Dets. Bauer and Gadell used impersonation and an imaginary person to intercept Achin’s communications in violation of these statutes. These intercepted communications should not have been received in evidence, pursuant to 18 U.S.C. § 2515 and Va. Code § 19.2-65. Yet the communications were disclosed and used to prosecute Achin, also in violation of these statutes.

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<sup>1</sup> DOJ. *The National Strategy for Child Exploitation Prevention and Interdiction. A Report to Congress*, April 2016. <https://www.justice.gov/psc/file/842411/download>. The report documents 39,957 prosecutions over 6 years from 2010 to 2015. Extrapolating over ICAC’s 23-year existence equates to 153,168 prosecutions.

<sup>2</sup> DOJ, OJJDP (Office of Juvenile Justice and Delinquency Prevention). *Internet Crimes Against Children Task Force*. <https://ojjdp.ojp.gov/programs/internet-crimes-against-children-task-force-program> Accessed July 18, 2021.

<sup>3</sup> Bonnie Burkhardt provided research and editing support upon request from Norman Achin.

The Commonwealth successfully argued there was no unlawful interception of Achin's cell phone communications because Det. Bauer didn't engage in a "physical act (such as splicing)" wires to Achin's wireless phone, citing *Smith v. Commonwealth*, 3 A. App. 650 (1987) {Commonwealth's Brief in Opposition at 3-4}. Detectives in *Smith* obtained an order authorizing interception, unlike in *Achin*. *Smith* stated "an 'intercept' occurred ... when the telephone line was broken," based on the 1985 Virginia statute at the time of Smith's arrest. During the pendency of Smith's 1987 appeal, ECPA was passed in 1986. ECPA updated 18 U.S.C. § 2511 *et seq*, adding protections for electronic communication and broadening the definition of *intercept* to include "other acquisition of the contents of any wire, electronic, or oral communication." "Other acquisition" includes use of impersonation and imaginary people to intercept via a police phone (an electronic device). These ECPA standards were adopted by Virginia in 1988. Misapplying the outdated *Smith* case to modern statutes and Achin's case was erroneous, but successful. ICAC officers continue to use impersonation and imaginary people to intercept private communications in violation of ECPA statutes, based on *Smith*.

#### 1. Controlling an Imaginary Person to Intercept Communications

It was outrageous police behavior for Det. Bauer to create an imaginary Alex VA by posting a photo of someone else on Grindr. Bauer then posed as Alex VA and sent text messages to a random user, later identified as Achin. Without probable cause, without a suspect, and without a warrant, Bauer unlawfully intercepted all of Achin's messages intended for Alex VA, starting with "hello." The man pictured as Alex VA never received any of Achin's communications. It was also outrageous and unlawful for Bauer to procure Det. Gadell to supply the voice of Alex VA. Gadell then unlawfully intercepted Achin's voice on phone calls, recorded using Bauer's

police phone. Not once was a warning, such as under Miranda or “This call may be monitored or recorded,” given to Achin prior to his arrest.

Deploying an imaginary person to intercept electronic communications is unlawful electronic surveillance (as defined under EO-12333, sec. 3.5(c)) since neither Bauer nor Gadell could be “visibly present” to intercept an equivalent oral conversation with Achin {MSE at 21}. Virginia Courts erred when they ruled that Bauer and Gadell were “party to a communication” with Achin, and these qualified for the exception “such person is party to a communication” which permits people to record their own communications. Alex VA “is not a person, it cannot give permission to record” any electronic or oral communications (emphasis on the word, “it”) {MSE\_TR at 5:3-9, 16:13-17}. Neither Bauer nor Gadell were “such person” pictured as Alex VA. Therefore, they violated ECPA statutes Va. Code § 19.2-62(A)(1), Md. Code § 10-402, and 18 U.S.C. § 2511(1)(a) {ACB at 7, 9}. Evidence obtained in violation of statutes cannot be admitted, pursuant 18 U.S.C. § 2515, Va. Code § 19.2-65, or Md. Code § 10-405 (Appendix II at 47) {MOTION-1 at 24}.

Such erroneous rulings elevate fictitious characters (like imaginary people) to the stature of actual humans, endowed by their creator (Bauer) with certain unalienable rights, such as the right to intercept one’s own communications. As this Court observed in *Katz*: “[T]he Fourth Amendment protects people, not places.” It does not protect imaginary people, either.

Virginia’s Det. Bauer to travel to Maryland where he lacked a warrant and had no law enforcement authority. It was outrageous and unlawful police behavior for Bauer to use his imaginary person in Maryland to intercept communication with Achin in Virginia, across state lines. Maryland is an all-party consent state, and Achin did not consent. Md. Code § 10-402(a) clearly states “... it is unlawful to: (1) willfully intercept ... any ... electronic communications;”

and “(b) Any person who violates subsection (a) of this section is guilty of a felony ...” Nevertheless, Virginia Courts ruled that all of Bauer’s intercepts were legally obtained {MSE\_TR at 16:23-17:2}. In 1999 Linda Tripp was indicted on two counts of violating Maryland wiretap law for recording her conversations with Monica Lewinski in Virginia, while Tripp was in Maryland.<sup>4</sup> How is it “legal” for such a double standard?

## 2. Impersonating a Real Person to Intercept Communications

It was outrageous and unlawful police behavior for Bauer to impersonate Achin’s adult friend, Zach, intercepting Achin’s communications intended for Zach without Zach’s approval and without a warrant. This violated Achin’s Fourth Amendment rights since impersonators are also not “such person” who can be a lawful party to communications. This intimate conversation was disclosed in court and used as evidence to argue that Achin was soliciting Alex VA. Achin’s First Amendment right to have a private, adult conversation with Zach was violated {MSAV at 6-7}.

## B. Sixth Amendment

Combining three officers (a group) to bring Alex VA to life online does not make Alex VA “a person” (singular). {MSE at 15, 18; ACB at 11}. Imaginary Alex VA could not witness a crime and could not be “visibly present” in Court to give testimony. The man pictured as Alex VA was not party to any conversation and did not witness anything. Neither can satisfy Achin’s Sixth Amendment right to confront Alex VA {ACB at 18-19}.

Virginia judges cited the Faithless Friend Doctrine as a reason to deny Achin’s motion and admit into evidence the officer’s intercept communications between Achin and Alex VA. But the Faithless Friend Doctrine only applies when the suspect’s close friend betrays him and becomes

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<sup>4</sup> Torry, Sandra and Mishra, Raja. Washington Post, July 31, 1999. *Tripp Indicted on Charges of Wiretapping*. Caselaw is unavailable because it is sealed.

an informant. It does not apply to imaginary characters who cannot experience friendship or demonstrate faithfulness {ACB at 19}. The Trial Court erred by ruling that “the Faithless Friend Doctrine allows Det. Bauer to record this call to his own phone without a warrant.” {MSE\_TR at 16:22-17:13}. In *Wilks v. Commonwealth*, Hockaday was an actual human who consented to be wired with a police microphone {CAV\_APPEAL at 18-19}. *Watkins v. Commonwealth* relies on the fact that the defendant’s real human friend gave police consent to record phone calls. {Ruling from the Virginia Court of Appeals (CAV\_RULING) at 2}. Det. Bauer was never Achin’s friend, and Alex VA is not “a person” capable of granting consent {MSE at 17-18, ACB at 10-12, 19}.

### C. Fifth and Fourteenth Amendments

#### 1. Convicted of a Felony with no Victim

How can Achin be convicted of a crime against a minor victim when the victim does not exist {MSE at 7; MSAV at 4:12-14}? A crime against an imaginary person is an imaginary crime. Men “are endowed by their Creator with certain unalienable Rights, that among these are Life, . . .” but imaginary people do not live. They cannot be “under” age for they can never age and grow older. Imaginary people have no unalienable right to protection under the law. For there to be a crime against a minor, there must be an actual minor person. Achin was penalized with 25 years on the national Sex Offender Registry {R. at 000199}, yet there is no category under 34 U.S.C. § 20911 (Appendix II at 28) for crimes against imaginary people.

#### 2. Entrapment

The police embarked on an overzealous sting operation to ferret out unlawful solicitation of a minors. In Achin’s case, Det. Bauer knowingly violating Grindr’s “no minors” rules, thereby trespassing on the Grindr internet service for the undisputed intent to ensnare a gay Grindr customer for criminal prosecution. Virginia courts failed to recognize the outrageous entrapment

scenario created when Bauer put his underage character, Alex VA, on Grindr. Det. Bauer manufactured the crime by deploying Alex VA to approach men on Grindr, tell of a troubled homelife, then text, “I need the money.” Bauer was not simply presenting an opportunity to commit a crime, but instead presented a contrived crisis begging for intervention by a responsible adult. Achin believed Alex VA was being trafficked and reported Alex VA to Grindr the next day. Grindr quickly disabled the Alex VA account.

When Bauer discovered his “Alex VA” account was disabled, it was his notice to move on to another target for he should have known Achin reported the underage Alex VA to Grindr. Instead, Bauer escalated his attempts to catch Achin in his criminal mousetrap by creating a second Grindr account, “Alex,” to hunt Achin, bypassing Achin’s efforts to shun contact with the minor Alex VA. Bauer’s deliberate conduct, continually pressing Achin until he achieved a “gotcha” moment to justify an arrest, is abhorrent and outrageous police behavior. After hundreds of communications, this revitalized scheme only succeeded when Achin made an innocent mistake and sent an incriminating photo to the wrong account. The Commonwealth failed to show that Achin was predisposed to commit the crime and failed to show that there was any “lascivious intent.” {MSAV at 2-6; CAV\_APPEAL at 25-26; SCV\_APPEAL at 26-30}. It exemplifies “the dangers of overzealous law enforcement” and “certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society.” See *Sherman v. United States*.

Bauer was trolling Grindr accounts looking for a gay man to fashion into a criminal, as the intent to engage in criminal behavior originated with Bauer. After encountering Achin, neither detective notified Achin that he was communicating with an officer. Whenever the police approach one they believe is a suspect, the Miranda protections are mandatory, which Bauer and Gadell both violated.

### 3. Tort of Civil Fraud

Grindr requires all users to agree to its Terms and Conditions of Service prior to use, which prohibits use by minors, photos of minors, impersonation, and government use. Bauer was not a duly authorized user exactly because he used a photo of someone else (a means of identification) to conduct the unlawful activity of intercepting communications without a warrant. See 18 U.S.C. § 1028(a). Since Bauer violated the Grindr contract, he was not an authorized Grindr user and was therefore engaged in trespass by fraud. The police were not using Grindr in the “ordinary course of business,” but rather as a vehicle to entrap gay men, using their police phone as an interception device to record evidence. Bauer’s conduct on Grindr constitutes the intentional tort of civil fraud. {CAV\_APPEAL at 10-14; SCV\_APPEAL at 15-19, 23}.

The trial evidence does not support, beyond a reasonable doubt, that Achin intended to transmit explicit photos to the imaginary Alex VA nor did he try to solicit Alex VA. In fact, the evidence shows beyond a reasonable doubt that police conduct reached outrageous proportions to hunt, ensnare, and prosecute Achin. Because this case raises the threshold question on the limits of lawful police activity, this question is very important for the Court to hear the full details of the police overreaching into violations of Constitutional rights.<sup>5</sup>

## X. Conclusion

Achin’s case is important because it is representative of ICAC sting operations nationwide where officers not only violate the Fourth Amendment, but also the First, Fifth, Sixth, and Fourteenth Amendments. Absent Court intervention, imaginary people will continue to be utilized to intercept private communications in violation of citizens’ civil rights. Since Virginia Courts

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<sup>5</sup> Attorney Steve Armstrong provided advice about entrapment.

have held that police do not need a warrant for this, vigilante groups are also using imaginary people to conduct their own sting operation, such as the California-based vigilante group “CC Unit” which targeted Norman Achin in Virginia in 2021. {SCV R. at 9-41}.

The natural consequence of upholding Achin’s conviction is to legalize the manufacture of videos by anyone using someone else’s image and voice, without any warrant or color of law authority. This case involved multiple pictures and actors creating a fake person. A video is nothing but a series of pictures shown quickly in time. It is a true holographic image brought to life which texts, talks, and visually does whatever the police or others want. Is this the new legal definition of “person” in the Electronic Age?

Achin was convicted of a thought crime that he never committed. The police manufactured the crime to prey upon Achin’s inner thoughts, drawing him into a minefield of actions. Achin was trying to help a teen he believed was being trafficked and made every attempt to avoid improper behavior. He just made an innocent mistake of sending a communication to the wrong person.

The public has a natural aversion to any sex crime against a minor. “The ends justify the means” philosophy, which dominates popular opinion about such “yucky” crimes, should not override citizens’ Fourth Amendment rights. The duty of the Virginia Supreme Court was to defend the rights of its vulnerable citizens against popular will. Quoting Justice Scalia:

*Judges are sometimes called upon to be courageous, because they must sometimes stand up to what is generally supreme in a democracy: the popular will. Their most significant roles, in our system, are to protect the individual criminal defendant against the occasional excesses of that popular will, and to preserve the checks and balances written in our constitutional system, that are precisely designed to inhibit swift and complete accomplishment of that popular will.<sup>6</sup>*

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<sup>6</sup> Scalia, Antonin, et. al. *The Essential Scalia: On the Constitution, the Courts, and the Rule of Law*. Crown Forum, 2020.

By the way, Det. Bauer's discussion of hash codes during Achin's forensic interview {[Starting at Record page 000218] Tr. at 101:6 – 102:8} led to uncovering other Fourth Amendment violations by ICAC. The ICAC Cops Database inventories the content of people's private computers based on hash codes, obtained without a warrant in violation of 18 U.S.C. § 2701. This database generates alerts for any IP address that downloaded a "suspicious" file based on its hash codes. Detectives then remotely break into password-protected computers at the IP address and search them, without a warrant {ACB at 9, 26-31}. This accounts for the other half (approximately) of the 150,000 ICAC prosecutions.

Mr. Achin respectfully requests that this Court issue a writ of certiorari to review this matter.

Date: July 24, 2021

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Norman Achin". The signature is fluid and cursive, with a large, sweeping initial 'N' and 'A'.

Norman Achin, *pro se*

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