No. 21-6827

SUPREME COURT OF THE UNITED STATES

Ryan Thomas Pick
Petitioner,
v.
Commonwealth of Virginia
Respondent.

PETITION FOR A WRIT OF CERTIORARI

Virginia Supreme Court Record Number 210173
Virginia Appellate Court Record Number 1945-19-2
Hanover County Circuit Court Case No. CR18001081

Petitioner: Ryan Thomas Pick, *pro se*
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I. Questions Presented

1. Are citizen's Fourth Amendment rights impinged and Electronic Communication and Privacy Act statutes violated when police intercept private electronic communications sent by a suspect, while police are impersonating the intended recipient or are animating an imaginary person to be the intended recipient; or when police unmask the identity of an anonymous online user and geo-locate him; or when police misuse retention orders and search warrants to obtain content of private communications, all without obtaining proper interception authorizations? (18 U.S.C. §§ 2511, 2701, and 3121)
2. Are Fifth and Sixth Amendment rights violated when police drag a person out of his home in handcuffs while dressed in pajamas and without eye-glasses, place him in a guarded SWAT van, and then begin interrogation without issuing a Miranda warning?
3. When police impersonate someone else or animate an imaginary person to be the intended underage recipient of risqué communications sent by a suspect, does this violate the suspect's Sixth Amendment right to confront the witnesses against him and his Eighth Amendment protection from excessive bail and punishment, considering he is subsequently charged with violent sex offense felonies for sending the messages, is denied bond, is sentenced to 5-30 years per felony, and is required to register as a sex offender?

   (Va. Code §§ 17.1-805, 18.2-374.3, 19.2-120, and 9.1-902)

II. List of Proceedings

- Hearing on Motion to Suppress Evidence. Motion denied. Circuit Court of Hanover County. CR18001081. Commonwealth of Virginia v. Ryan Thomas Pick. April 18, 2019.
- Hearing on Defendant's Motion to Suppress and Assistant Attorney General's Motion *in Limine*. Motions denied. Circuit Court of Hanover County. CR18001081. Commonwealth of Virginia v. Ryan Thomas Pick. August 16, 2019.
- Trial by Jury where Mr. Pick was found guilty. Circuit Court of Hanover County. CR18001081. Commonwealth of Virginia v. Ryan Thomas Pick. August 19, 2019.
- Sentencing Hearing. Circuit Court of Hanover County, CR18001081. Commonwealth of Virginia v. Ryan Thomas Pick. November 22, 2019.

III. Table of Contents and Authorities

Volume II - Pertinent Text of Statutes

Volume III Signatures

Signed petitions from at least 43 states, DC and Puerto Rico requesting the United States Supreme Court grant the Writ of Certiorari for Ryan Thomas Pick, for the Fourth Amendment privacy laws being argued affect cases in their region.

Table of Authorities

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IV. Petition for Writ of Certiorari

Ryan Pick, *pro se,* respectfully petitions this Court for a writ of certiorari reviewing the decision of Hanover County Circuit Court as appealed to Virginia Appellate Court (CAV) and Virginia Supreme Court (SCV). Mr. Pick is currently incarcerated at Nottoway Correctional Center, Burkeville, Virginia.

V. Opinions and Orders

- November 20, 2018. Circuit Court of Hanover County No. CR18001081. Grand Jury Indictments {R. 55-59}
- April 18, 2019. Circuit Court of Hanover County No. CR18001081. Oral rulings on Motion to Suppress Evidence (MSE1) {CAV_R. at 998}
- April 18, 2019. Circuit Court of Hanover County No. CR18001081. Order denying Pick's Motion to Suppress. {R. at 91}
- August 16, 2019. Circuit Court of Hanover County No. CR18001081. Oral rulings on motions. {CAV_R. at 716}
- August 16, 2019. Circuit Court of Hanover County No. CR18001081. Motion Hearing Order. {R. at 232-233}
- August 19, 2019. Circuit Court of Hanover County No. CR18001081. Oral rulings on motions during trial {R. at 345-644}
- August 19, 2019. Circuit Court of Hanover County No. CR18001081. Jury Trial and Acquittal Order. {R. at 226-229}

- November 22, 2019. Circuit Court of Hanover County No. CR18001081. Sentencing Order. {R. at 310-313}
- June 30, 2020. Court of Appeals of Virginia, Pick v. Commonwealth of Virginia, Record No. 1945-19-2. Granting petition for appeal. {CAV_R. at 996}.
- January 12, 2021. Court of Appeals of Virginia, Pick v. Commonwealth of Virginia, Record No. 1945-19-2. Published opinion affirming Pick's conviction. {CAV_R. at 1441}.
- July 13, 2021. Virginia Supreme Court, Pick v. Commonwealth of Virginia, Record No. 210173. Order refusing petition for appeal. (Appendix I at 66)
- October 6, 2021. Virginia Supreme Court, Pick v. Commonwealth of Virginia, Record No. 210173. Order refusing petition for rehearing. (Appendix I at 67)

VI. Jurisdiction

April 10, 2019, Hanover County Circuit Court denied Pick's Motion to Suppress Internet Chats. August 16, 2019, that court denied Pick's Motion to Suppress comments he made during custodial interrogation. A jury convicted Pick of three felony counts under Va. Code § 18.2-374.3.

June 30, 2020, Virginia Appellate Court granted Pick's petition on three issues. The Court affirmed his convictions, January 12, 2021. Pick's April 27, 2020, petition for rehearing was denied on January 12, 2021. Pick's appeal to the Virginia Supreme Court was denied, July 13, 2021. Pick's petition for rehearing was denied, October 6, 2021.

Pick invokes this Court's jurisdiction under 28 U.S.C. § 1257, having timely filed this petition for writ of certiorari within ninety days of the Virginia Supreme Court's order denying rehearing. (Appendix I at 67).

VII. Constitutional Provisions, Executive Orders, and Statutes Invoked

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 defense.

United States Constitution, Amendment VIII:

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

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.

In Appendix II:

1 U.S.C. § 8, 18 U.S.C. § 1028, 18 U.S.C. § 1028A,

18 U.S.C. § 2510, 18 U.S.C. § 2511, 18 U.S.C. § 2515, 18 U.S.C. § 2516,

18 U.S.C. § 2703, 18 U.S.C. § 3121, 18 U.S.C. §3127,

34 U.S.C. § 20911, 50 U.S.C. § 1801, 50 U.S.C. § 1881a,

Va. Code § 1-207, Va. Code § 1-230, Va. Code § 1-248,

Va. Code § 17.1-805, Va. Code § 18.2-186.3, 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, Va. Code § 19.2-69, Va. Code § 19.2-120

VIII. Statement of the Case

"Lilly is not a real person, is imaginary." The prosecutor, Assistant Attorney General (AAG) Williams thus described the "victim" to the court. {4/18/19 Tr. at 9:15-16, ACB at 6; SCV_APPEAL at 20}. Lilly is an imaginary 13-year-old created using photos of a young female. Inv. Troy Payne animated Lilly online by impersonating her. AAG Williams stated that the distinction "between a real person and a fake person, the law really does not support this." {4/18/19 Tr. at 11:10-12}. This was Williams' justification to admit into evidence private electronic communications exchanged with Lilly. This evidence was used to identify, prosecute, and convict Pick for online solicitation of an adolescent.

A. Controlling an Imaginary Person to Intercept Communications

July 10, 2018, Inv. Troy Payne of the Hanover Sheriff's Office conducted an undercover child sex crimes investigation, without a suspect in mind. {8/19/19 Tr. at 93:10-11}. Inv. Payne as "Lilly" logged onto Omegle, a web-based application. Omegle randomly paired Lilly with an anonymous "Stranger" (ostensibly Pick) for a one-on-one, private chat. {R. at 76; MSE1 at 2; R. at 74; 8/19/19 Tr. at 84, 91-94; SCV_APPEAL at 7}. Payne photographed the intercepted chats beginning at "Hi." {8/19/19 Tr. at 108:5}. Defense argued that Payne created this imaginary person solely to obtain electronic communications of a target. Payne manufactured text messages, sent as if they came from Lilly to induce an unwitting target to violate the law. {MSE1 at 1-2; ACB at 21}.

When Stranger asked Lilly for a picture, Inv. Payne did not send a picture of himself disguised as Lilly. Instead, he procured four photos of a female dressed in shorts and a T-shirt.

{MSE1 at 2}. Payne placed these photos into his Dropbox and transmitted the Dropbox link to Stranger. Stranger then viewed the photos.

Inv. Payne testified Lilly was a "geomorph," a creature where "the face was selected from one child, the eyes from another, the body from another so that no one child was actually used." {7/19/21 Tr. at 101:6-17}. When Stranger asked about Lilly's age, Inv. Payne replied "13," though later said "12." Stranger indicated that his name was Ryan, that he was 40 years old, a music teacher, and that his Snapchat identification was "stonynots." Stranger additionally stated that he had "jerked off" thinking about [Lilly]". Payne choreographed the scene, instructing Stranger, "You could DB [Dropbox] a video too neck down or something." Payne gave detailed instructions on how to transmit the video using Dropbox, "put the pic in your db [Dropbox], right click the pic and copy the link. then paste it here." {7/19/21 Tr. at 112-115}. Payne testified that Stranger did create a Dropbox and Stranger sent Lilly a video showing a man from the waist down masturbating wearing a blue wristband. {7/19/21 Tr. at 85}. Payne testified the wristband matched the one Pick was wearing in a Disney family photo, a blue MagicBand. {R. at 679; 8/19/19 Tr. at 115}.

B. Identifying and Geo-locating, Without a Warrant.

After intercepting the Omegle conversation on July 10th, Inv. Payne immediately conducted internet research. Payne googled the terms "Ryan," "music teacher," and "Woodbridge." {CAV_R. at 658}. "Ryan" and "music teacher" were derived from intercepted chats. However, "Woodbridge" (Pick's hometown) was not mentioned.

Moments before the April 18, 2019 motion's hearing, Defense asked AAG Williams how "Woodbridge" was obtained on July 10th, since the subpoenas did not return an IP address or "Woodbridge" until July 17th and 18th. {R. at 658}. After conferring with Inv. Payne, she

responded that "Woodbridge" was discovered through subpoenas. At the hearing, Williams asserted that "Ryan" and "music teacher" were searched, but not "Woodbridge." {4/18/19 Tr. at 10:24-25; ACB at 35}. Likewise at trial, Inv. Payne did not reveal the *whole truth* when listing "Ryan," "music teacher," then adding vaguely, "and things like that." {8/19/19 Tr. at 118:1-1}.

C. Arrest and Denying Bond

August 20, 2018, Hanover County deputies obtained arrest warrants for Ryan Pick. {8/16/19 Tr. at 27}. Early on August 21, 2018, Hanover County deputies and Virginia State Police SWAT team descended upon Pick's home in Woodbridge, Virginia. {8/16/19 Tr. at 27-28}.

Officers placed Pick, his wife, and young children in handcuffs. {8/16/19 Tr. at 7:19-22}. Officers escorted Pick dressed in pajamas and without his glasses into a guarded SWAT van. There, two agents removed Pick's cuffs, then interrogated him. {8/16/19 Tr. at 13} No one informed Pick of his rights pursuant to Miranda before questioning began. {MSE2 at 3; 8/16/19 Tr. at 138-145; SCV_APPEAL at 11}. Payne asked Pick if he was Stranger in Lilly's Omegle chat. {8/16/19 Tr. at 15-17; SCV_APPEAL at 11}. After 11 minutes, Pick stated, "I'd like to get an attorney please." {8/16/19 Tr. at 15-20; MSE2 at 14}. At 20 minutes, officers read Pick his rights and formally arrested him. Inv. Payne testified there was probable cause to arrest Pick, and Pick "was not free to leave." {8/16/19 Tr. at 16:14-19, 18:11 – 19:2; CAV_APPEAL at 14-16; SCV_APPEAL at 11}.

The trial court found Pick was not "in custody" upon entry into the SWAT vehicle, so Pick's statements were admitted into evidence. {R. at 232; 8/16/19 Tr. at 40}

November 20, 2018, Hanover County grand jury indicted Pick for one count of Va. Code § 18.2-374.3(C) and four counts of Va. Code § 18.2-374.3(B). Both involved use of a communication system to facilitate offenses against children.

Pick was initially denied bond under Va. Code § 19.2-120(A)(2) *and* § 19.2-120(B)(8). November 9, 2018, Pick was released on bond but placed on house arrest. {R. at 73}.

D. Pick Moved to Suppress Internet Messages

Pick filed a Motion to Suppress Internet Chats (MSE1), which the Court heard April 18, 2019. {Starting at R. page 69}. Pick argued Payne required a warrant to intercept private Omegle communications, pursuant to Va. Code § 19.2-65, 19.2-68 (H)(1). {MSE1 at 1; CAV_APPEAL at 7,10; SCV_APPEAL at 15, 18}. Va. Code § 19.2-61 *et seq.* is Virginia's version of the Federal Electronic Communication and Privacy Act (ECPA) statutes 18 U.S.C. §§ 2511 and 3121. {MSE1 at 1; CAV_APPEAL at 7, 9; ACB at 4; SCV_APPEAL at 15-17} Pick argued Virginia's statute, "is appropriately construed and applied in precisely the same way as its federal counterpart." *Global Policy Partners, LLC*, 686 F. Supp. 2d 631, 637. {MSE1 at 1}.

Since Lilly is imaginary, Pick argued that "Lilly" does not constitute a human endowed with rights. Black's Law Dictionary, 9th ed. defines "person" as a human being or the living body of a human being; "impersonate" means the act of impersonating someone. {MSE1 at 1-2; ACB at 11; SCV_APPEAL at 20}. Black's Law Dictionary, 2nd ed. earlier defined "person" as "capable of having rights." {ACB at 20; SCV_APPEAL at 20}. Pick argued he should not be convicted for a crime against an imaginary person, but conceded that *Grafmuller* did not support his position. *Grafmuller v. Commonwealth*, 290 Va. 525 (2015) {4/18/19 Tr. at 5-7; 8/19/19 Tr. at 217}.

Pick argued Payne and the female are "in fact two individuals; one, the actual person of Inv. Payne" and Lilly, who's image was transmitted. {MSE1 at 2; 4/18/19 Tr. at 4:17-18, 6:18-20}. The female pictured was not party to any chat. Payne's impersonation of "Lilly" distorts the law and plain meaning of "person." {MSE1 at 1-2, 4/18/19 Tr. at 8:14-16; CAV_APPEAL at 11; SCV_APPEAL at 15}.

Both federal and state statutes refer to *"a person"* singular, *"such person" (not "such people"), and "is a party"* (not *"are parties").* Nowhere do statutes legitimize an impersonator or imaginary person. {MSE1 at 2; CAV_APPEAL at 8; ACB at 11; SCV_APPEAL at 17}:

> *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.*** (Emphasis added)

Since Payne was not "such person" pictured, Payne was not a lawful party to the communications. {MSE1 at 1-2; 4/18/19 Tr. at 4-8; ACB at 5; SCV_APPEAL at 21}. Inv. Payne was not authorized to be the third person intercepting and monitoring a non-person. {4/18/19 Tr. at 7; ACB at 21}.

Only after demonstrating probable cause may the Attorney General or Chief Deputy authorize a warrant to intercept. Authorization is for certain crimes, and Pick's charges do not qualify. *Morton v. Commonwealth,* 315 S.E.2d 224 (1984). {APPEAL a5 7; ACB at 26} 18 U.S.C. § 2511(2)(c) provides an *exception* for those acting under federal color of law, but still requires that "**such person** is a party..." Virginia has no color of state law exception. Only Virginia State Police may intercept after obtaining authorization. See Va. Code § 19.2-62. There are criminal penalties for unlawful interception, 18 U.S.C. § 2511, Va. Code § 19.2-68. {MSE1 at 2; CAV_APPEAL at 1, 6-8, 11-12; ACB at 43; SCV_APPEAL at 17}.

Payne intercepted Omegle messages intended for Lilly. But Payne was not an *agent* of Lilly, not *employed* by Lilly, not acting at Lilly's direction or consent. Lilly was a creature of Payne, deployed to be the intended recipient. {MSE1 at 2; ACB at 14-15; CAV_APPEAL at 12; SCV_APPEAL at 15}. The perils of being a recipient, but not an intended recipient are demonstrated in *U.S. v. Szymuszkiewicz*, — F.3d —, 2010 WL 3503506 (7th Cir. September 9, 2010). Szymuszkiewicz was a system administrator who secretly set up auto-forwarding on his boss's email account. Copies of his boss's emails were sent to Szymuszkiewicz. Szymuszkiewicz was convicted for illegally intercepting his boss's communications. {MSE1 at 1; ACB at 6}

AAG Williams argued that wiretapping statutes are inapplicable because "Payne did not engage in wiretapping during the chat." {R. at 75}. She erroneously equated the legal term "intercept" with one method of interception, "wiretapping." Interception laws are nicknamed "wiretap laws" even though the word "wiretap" does not appear., Va. Code § 19.2-61 and 18 U.S.C. § 2510

Judge Harris ruled that interception could only happen if there was a third device, ignoring interception by impersonation or by controlling an imaginary person. "[D]id the General Assembly intend that the same device by which you are actually making the communication would be considered the interception device? ... My ruling is that it did not." {4/18/19 Tr. at 16:12-25}. Yet statutes broadly define "intercept" as acquisition by "any" device, not just a separate device.

Judge Harris even contemplated an imaginary person as the third device. If "the person who's communicating is believing they're communicating with some person who doesn't exist, that somehow there's a communication from the real person to a virtual person and that the police officers in effect intercepting it as though he himself is the other device that we're talking about. He's listening. Well, I don't think that's what the General Assembly intended either." (Emphasis

added) "[T]hey did not intend it to be between one person and a virtual person. So motion is overruled." {4/18/19 Tr. at 18-20}

E. Pick Moved to Suppress pre-Miranda Statements

July 25, 2019, Pick filed Motion to Suppress his pre-Miranda statements (MSE2), alleging his Fifth Amendment Rights were violated during interrogation in the SWAT van. {R. at 153; CAV_APPEAL at 13}. See *Miranda v. Arizona*, 384 U.S. 436 (1966). "'[n]o person ... shall be compelled in any criminal case to be a witness against himself.' U.S. Constitution Amendment V." Despite having warrants for Pick's arrest, Inv. Payne told Pick he was not under arrest. {8/16/19 Tr. at 7; SCV_APPEAL at 11-12, 16}. Pick's motion was denied because the Court found Pick was not in custody. {8/16/19 Tr. at 40-41}.

F. Commonwealth's Motion *in Limine*

July 8, 2019, AAG Williams filed a Motion *in Limine* requesting that three private Snapchat conversations between Pick and his friends be admitted into evidence. {R. at 100-109, 134-135, 149-151}. Yet, Inv. Payne did not communicate with Pick on Snapchat. Snap Inc. had received a search warrant dated April 22, 2019. This warrant is not in the record. On June 7, 2019, Snap Inc. replied with contents of Pick's conversations. Pick knew nothing of the search warrant until referenced in Commonwealth's motion *in Limine.* {R. at 147, ACB at 27}.

Law Enforcement may preserve Snapchat content by submitting a Preservation Request, per Snap Inc., *Law Enforcement Guide (Sept. 21, 2018)* {CAV_R. at 672}. An administrative

subpoena was issued to Snap, Inc. on July 12th for the 90 days prior. {CAV_R. at 675}. But all intercepted Snapchat conversations occurred at least four days after the requested time period.

The Court overruled the Commonwealth's motion before Pick even argued it. {8/16/19 Tr. at 47-48}.

G. Pick Convicted of 3 Felonies

At a jury trial on August 19, 2019, the court dismissed two of Pick's charges under Code 18.2-374.3(B). {R. at 226-229; SCV_APPEAL at 12}. Inv. Payne had testified that Stranger sent Lilly a video through Stranger's Dropbox. Though Payne photographed the Omegle chats, he was unable to photograph or capture video for evidence. {8/19/19 Tr. at 99; CAV_APPEAL at 2}. Forensic examination of Pick's electronic devices yielded no trace of the video, no evidence Pick used Dropbox, and no evidence Omegle was accessed that day. {8/19/19 Tr. at 99-100, 184-187, 228}. Pick's pre-Miranda statements were used as evidence.

AAG Williams' position was that the Commonwealth "is not required to prove that the defendant was communicating with an actual minor." Pick objected, but was overruled. {8/19/19 Tr. at 217-220}. Pick renewed his motion to strike citing insufficient video evidence. Pick also moved to strike because the Commonwealth ascribed two charges for one conversation. Both were overruled. {8/19/19 Tr. at 204-230; CAV_R. at 1418}. The jury convicted Pick of one count of Va. Code § 18.2-374.3(C) and two counts of 18.2-374.3(B).

November 22, 2019, Pick was sentenced to seven years' active incarceration and required to register as a sex offender. {R. at 311}. Pick's motion to set aside the verdict was denied {8/19/19 Tr. at 294}.

H. Appeals.

1. Appellate Court

May 19, 2020, Pick appealed to the Virginia Appellate Court citing three issues: first, denial of Pick's Motion to Suppress internet chats; second, denial of Pick's Motion to Suppress his pre-Miranda statements; and third, insufficient evidence supporting his conviction under Va. Code § 18.2-374.3(C). {CAV_APPEAL at 5-6}.

Issue 1: An officer impersonating someone else while communicating directly with a suspect ignores the intent of the Wiretap Act: to limit government intrusion into conversations of private citizens. The exact device used to intercept is not a factor. *Holmes v. State*, 236 Md. App. 636, 653, 182 A.3d 341, 350 (2018). The communication involved three parties: ostensibly the Appellant, Payne, and the fictitious Lilly. Law enforcement's failure to obtain proper authorization violates the Virginia Wiretap Act. The trial court erred by not suppressing the intercepted communications. They were received into evidence, disclosed to the court, and used to prosecute Pick, violating 18 U.S.C. § 2515 and Va. Code § 19.2-65. {ACB at 17-18; CAV_APPEAL at 6-13; SCV_APPEAL at 15-17}.

Issue 2: After a person has been 'deprived of his freedom of action in any significant way," (emphasis added) the defendant must be informed of his rights pursuant to Miranda. *U.S. v. Sullivan,* 948 F.Supp. 549 (E.D. Va. 1996). Pick's evidence demonstrates that officers' pressure on Pick constituted a coercive custodial interrogation. Police approached Pick's home in a powerful display of force, placing Pick and his family in handcuffs. The interrogation occurred inside a SWAT van for more than 20 minutes prior to issuing Miranda warnings. This encounter escalated whereby a reasonable person may be compelled to be a witness against himself in violation of the protection afforded by the Fifth Amendment. The court erred by not suppressing

Pick's statements made in the first 11 minutes of the interrogation when Pick specifically asked for an attorney. {MSE2; CAV_APPEAL at 13-17; SCV_APPEAL 15 11-15}

Issue 3: The sole evidence Pick exposed his genitals occurred in a video that Payne was unable to capture. Payne described the video as of a man from the waist down only. The evidence did not indicate it was Pick in the video. Therefore, the court erred in finding Pick guilty of violating Va. Code § 18.2-374.3(C). {CAV_APPEAL at 17-18}

2. Amicus Curiae Brief

Virginia Appellate Court granted leave for an Amicus Curiae Brief (ACB) supporting Pick. {CAV_R. at 18}. It was filed March 18, 2020. The ACB. was written by a DoD contractor well-trained in ECPA statutes. It argued that Pick's Fourth Amendment rights were violated in many ways:

The statutory definition of "person" as one human endowed with rights and possessing a birth certificate, not an impersonator or imaginary person. {Starting at CAV_R. page 74}. A "person" includes those individuals living or deceased, pursuant to 18 U.S.C. § 1028A(a)(1). See *U.S. v. George*, No. 19-4125 (4th Cir. 2020). Imaginary people are incapable of living, aging, or dying. So, an imaginary person cannot be "under" age since they can never grow older. {ACB at 18, 20}. Imaginary people cannot consent to interception. {ACB at 12-15}.

Photos showing a human face are the quintessential form of personal identification and are a "means of identification." 18 U.S.C. § 1028(a)(7), § 1028(d)(7)(B), and Va. Code § 18.2-186.3(C). {7/19/21 Tr. at 100:11-21; ACB at 16-17; SCV_APPEAL at 21}. Lilly is wearing an "ALLSTAR 07" T-shirt in a perfectly fuzzy selfie taken using a 2008-era flip-phone before a bathroom mirror. {R. at 646-647}. "Lilly" closely resembles a policewoman assigned to the Richmond area around 2008. Meta-data indicates one photo was taken July 7, 2008, so Lilly would

be 23-years-old in 2018. Payne procured "means of identification" to intercept communications. {MSE1 at 2; ACB at 16-19; SCV_APPEAL at 21}. *"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 18}. These police tactics violate identity theft statutes. This Court has ruled that applying statutory protection for real children to an image that "is, or appears to be, of a minor" is overbroad as it may not indicate exploitation of real children. *Ashcroft v. Free Speech Coalition,* 122 S. Ct. 1389 (2002). {ACB at 9, 14}.

Inv. Troy Payne could not be visibly present as Lilly, yet convincingly talk with Pick. Therefore, Payne was conducting illegal electronic surveillance because Payne could not meet the visibly present criteria of EO-12333. {R. at 646-649; ACB at 11-15, 28-29}. EO-12333 was codified into ECPA, 18 U.S.C. § 2511, and 50 U.S.C. § 1801(f)(3). States derived their own statutes, such as Va. Code § 19.2-62. {ACB at 3-4}.

Federal policy and industry standards refer to communications between a sender and "intended recipients." Snapchat *Law Enforcement Guide* discusses messages sent and "viewed by all intended recipients." {CAV_R. at 665}. Payne was not the intended recipient. See Va. Code § 19.2-62(C), 18 U.S.C. § 2511 (3)(a,b); 50 U.S.C. § 1801(f)(1,3); United States Signal Intelligence Directive (USSID SP0018) *Legal Compliance and U.S. Persons Minimization Procedures* {CAV_R. at 257-258 footnote, 272}, OVSC1203: FISA Amendments Act Section 702 Class Transcript {CAV_R. at 552, 561; ACB at 4-6, 13-16}.

A century ago, this Court resolved the meaning of *solicitation* in *U.S. v. Thayer*, 154 F. 508, (June 17, 1907). Solicitation requires an offer and awareness of the offer on the part of the solicited. A solicitation crime can only occur "if it takes place in the intended way." "Nothing less than bringing the offer to the actual consciousness of the person addressed would do." *U.S. v.*

Thayer, 154 F. 508, (June 17, 1907). But imaginary people have no consciousness. The female pictured never read the messages nor saw the video, so "the offense was not complete, but, when it had been read." {ACB at 12}. No solicitation of "Lilly" actually occurred.

Imaginary people like Lilly have no Fourth Amendment rights, just like foreigners on foreign soil. A citizen's right to privacy extends to their conversations with foreigners. The Foreign Intelligence Surveillance Act of 1978, Amendments Act of 2008 (FISA) strictly prohibits "reverse targeting": collecting communications of non-U.S. persons for an ulterior motive, acquiring communications with the true target, a U.S. person, 50 U.S.C. § 1881a (b)(2). Police target communications of imaginary people to intercept communications exchanged with their true target, a U.S. person. This represents domestic "reverse targeting." See OVSC1203: FISA Amendments Act Section 702 Class Transcript at 12. {CAV_R. at 540; ACB at 28-29}.

The ACB took up Pick's Sixth Amendment right "to be confronted with the witnesses against him." The female pictured did not witness any crime. She was not party to Pick's conversations, so could not give testimony. Neither "Lilly" nor the female pictured can satisfy Pick's right to confront his accuser. {ACB at 16}.

Payne violated Dropbox's User Agreement by falsely identifying himself as "Lilly" to exchanged images. Payne was not a lawful user of Dropbox, so Payne unlawfully received the video in question. Dropbox's User Agreement is a legal binding contract which prohibits: {MSE1 at 2; CAV_R. at 823}

- sending deceptive or false source-identifying information.
- sharing material that's fraudulent … or misleading
- violating the privacy or infringing on the rights of others.
  See Dropbox Terms of Service (April 16, 2019)

Dropbox becomes a component of the device on which it is used. A user is defined as "any person duly authorized by the provider to engage such use." Va. Code § 19.2-61 and 18 U.S.C. § 2510 (13)(b). Payne's use of device(s) for unauthorized operation of Dropbox did not constitute "ordinary course of business." Rather, Payne's devices became interception device(s). {ACB at 24-25}.

Pick had a reasonable expectation of privacy using his password-protected electronic device(s) in the privacy of his home. See *Report on Investigations Involving the Internet and Computer Networks,* Department of Justice (DOJ), Office of Justice Programs, (January, 2007) at 76. {CAV_R. at 176; ACB at 10; SCV_APPEAL at 15}.

3. Commonwealth Reply

Commonwealth's Brief in Opposition {Starting at CAV_R. page 858} argued that Payne did not need any warrant because his occupation fit the broad definition of "person," Va. Code § 19.2-61: "any employee or agent of the commonwealth, ... trust or corporation." At trial court, both AAG Williams and Defense agreed the Omegle chats were private conversations between two individuals. {R. at 74; 8/19/19 Tr. at 84}. On appeal, the Commonwealth abandoned that position, instead arguing that the conversations occurred in a public chat room so Fourth Amendment protections didn't apply.

4. CAV Ruling

June 30th, 2020, the Virginia Appellate Court granted Pick's appeal on the three issues. January 12th, 2021, the Court affirmed Pick's conviction in a published opinion. {CAV_R. at 1441-1454}. Court applied Va. Code § 19.2-62(B)(2) holding that "a person [Payne] does not criminally

violate the wiretap act by acquiring an electronic communication when that person is a party to the communication." {CAV_4 at 1448-1449; SCV_APPEAL at 16}.

5. SCV Appeal

Pick appealed to the Virginia Supreme Court, February 11, 2021. Pick argued that no societal definition of "geomorph" was found, which undermines the Appellate Court's published opinion on the matter. {SCV_APPEAL at 20}. Even if Payne did not criminally violate Va. Code § 19.2-62, the Virginia Appellate ruling fails to consider that Va. Code § 19.2-69 provides for civil liability and damages for interception obtained in violation "of this chapter" or disclosure. The Appellate ruling did not address why an acquisition is not felonious and presumptively admissible; yet is subject to civil liability, is inadmissible under Va. Code § 19.2-65, and is subject to suppression pursuant to Va. Code § 19.2-68(H)(1). {SCV_APPEAL at 18-19}. July 13, 2021, the Court denied Pick's petition.

The Court of Appeals incorrectly concluded that Pick's counsel had not preserved his argument during the hearing, because the argument was detailed in the Motion to Suppress Internet Chats. {SCV_APPEAL at 19}. They also erred when concluding that Pick waived the Miranda issue. {SCV_APPEAL at 24-27}.

July 27, 2021, petition for reconsideration was filed, then denied October 6, 2021.

IX. Reason for Granting the Writ

This case involves officers crossing the line of acceptable police deception, to police criminally violating ECPA statutes which were established to protect privacy and Fourth Amendment rights. Inv. Payne picked a random Stranger online (ostensibly Pick) and illegally

intercepted his private communications. Payne used entrapment techniques to manufacture the crime. Payne violated pen register laws to unmask Stranger's identity. Payne and the prosecutor, AAG Williams, stacked charges so Pick would face 150 years in prison, in an attempt to extort a plea deal. They obtained content of Pick's private Snapchat communications with his friends without any "wiretap" authorization. Thirty-one statutes are referenced to explain how the tactics violate ECPA and related laws. These tactics are typical of the 150,000[1] Internet Crimes Against Children (ICAC) prosecutions nationwide since 1998.

It is profitable for police and sheriff departments to have an ICAC officer. Just since 2003, federal ICAC grants to states exceeded $477,500,000[2]. Virginia budgets $1,000,000 per year[3] for ICAC and pays about $130 per day for incarceration when bond is denied, which is typical. Add in millions spent on court costs and attorneys. The lower courts also misunderstand custody as applicable to Miranda rights, which is a serious violation of the Fifth and Sixth Amendments. It is critical that the Court act to stop these tactics and instruct judges on the proper interpretation of ECPA laws; namely that illegal interception can happen even when no one taps a wire to a wireless phone. People from 43 states, DC and Puerto Rico have signed petitions requesting that SCOTUS take Pick's case.[4]

Virginia Appellate Court published a ruling so broad that it legalizes impersonation of anyone for the purpose of intercepting private electronic communications, whether in phone calls, texts, or emails. Intercepted communications can now be disclosed and used in criminal

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[1] DOJ. *Department of Justice, DOJ, 2016 Report to Congress on the National Strategy for Child Exploitation Prevention and Interdiction. Statistics for 2010 to 2015 extrapolated to cover 23 years of ICAC.*
[2] 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.
[3] Commonwealth of Virginia. *Biennial Budget and Amendments to the 2017 Appropriation Act.* https://dpb.virginia.gov/budget/buddoc18/BudgetDocument.pdf Accessed August 31, 2020.
[4] [4]Bonnie Burkhardt provided research and editing support upon request from Ryan Pick.

proceedings or even sold for profit. Surely, THAT was not what the Founders' intended when they enshrined rights for people "to be secure in their persons, houses, [electronic] papers, and effects" in the Fourth Amendment.

Judge Harris posed a question regarding the limits on law enforcement's use of deception: "[H]ow much deception is the line?" {4/18/19 Tr. at 19:22-23}. Is it permissible for law enforcement to create an imaginary person using photos of someone else, impersonate them to intercept private communications sent, then unmask the sender's identity, all done without a warrant? Imaginary people have effectively been endowed with human rights. But they are not humans; they are ***things***. {MSE at 2; ACB at 12}. "The Fourth Amendment protects people, not places." *Katz v. United States*, 389 U.S. 347 (1967). It does not protect *things* like the imaginary Lilly, either.

Inv. Payne did much more than beguile Stranger into talking to police. Payne manufactured Lilly to be the party to communications and intended recipient. Payne animated this "unique individual" with a face and body, speech, personality, and history. {MSE1 at 1; 8/19/19 Tr. at 92:24 – 93:2; SCV_APPEAL at 21}.

The Virginia Appellate Court cherry-picked words from ECPA statutes to attain its desired outcome: Inv. Payne "did not criminally violate [Va.] Code § 19.2-62(A)" because "Payne was a 'person who was a party to the communication[s]'." {CAV_R at 1448-1450}. But the court omitted words which prohibit impersonation, "**where such** person is a party ..." when quoting Va. Code § 19.2-62(B)(2). Payne was never the intended recipient. The Court further ignored the statutory prohibition on "procuring[es] any other person [Lilly] to intercept" communications, see Va. Code § 19.2-62(A) and 18 U.S.C. § 2511(1)(a). {ACB at 11, 23; SCV_APPEAL at 17}.

The Virginia Appellate Court, like the prosecutor, cherry-picked words from Va. Code § 18.2-374.3 to uphold Pick's conviction. {R. at 86}. The statute requires that the victim be a person, not a thing. The full clause criminalizes "solicitating ... **any person** he knows or has reason to believe is a child ..." The gerund "soliciting" has the direct object "person." It is followed by the adjectival clause describing the age of the person. {ACB at 23}.

A. Fourth Amendment Issues

1. Intercepting Omegle Chats without a Warrant

Virginia Appellate Court correctly ruled that the imaginary "Lilly is not a 'person' for the purposes of the wiretap act." {CAV_R. at 1449}. According to 1 U.S.C. § 8(a), the definition of "person" and "child" refers to a "homo sapiens who is born alive at any stage of development." Va. Code § 1-248 declares the Constitution and laws of the United States and the Commonwealth shall be supreme. No court order can be incongruent, so imaginary people cannot be included in any interpretation of "person," "child," or "minor." See Va. Code §§ 1-207 and § 1-230. How can Pick be convicted of three counts of Va. Code § 18.2-374.3 – "Use of communications systems to facility certain offenses involving children" when Lilly is not a "child"? But, factual impossibility was ruled to not be a defense in *Hix v. Commonwealth,* 042717 (Va. 2005).

The Appellate Court correctly determined "it was Payne who participated in the chat;" {CAV_APPEAL_RULING at 9}. However, the Court erred because Payne did not qualify for the "such person" exception, Va. Code § 19.2-62(B)(2) and 18 U.S.C. § 2511(2)(d). {MSE1 at 2; CAV_APPEAL at 11; SCV_APPEAL at 20}.

There are two further problems with this Appellate ruling. Either 1) The Court erred and Payne criminally violated Va. Code § 19.2-62. Or 2) The Court correctly ruled Payne did not criminally violate Va. Code § 19.2-62 but then failed to explain the civil liabilities involved.

The first problem asserts that unless "otherwise specifically provided in this chapter" any person who intercepts "shall be guilty of a Class 6 felony." Since Virginia provides no color of law exception, Payne would be liable for criminal prosecution and penalties. However, the Court determined Payne committed no crime, but failed to consider why the acquisition is deemed admissible in criminal court under Va. Code § 19.2-65; yet is deemed inadmissible under Va. Code § 19.2-68(H)(1) and subject to civil liability under Va. Code § 19.2-69. {SCV_APPEAL at 18-19}.

The Appellate Court ruling that Lilly "was not a party to the Omegle chats with the appellant" is partly correct because the female pictured was not party to anything. {CAV_R. at 1449}. Yet, how could Lilly be the victim of a communication crime if Lilly was not party to the Omegle communication and never received the video? This places the entire discussion in the realm of fantasy, effectively a thought crime. It was illogical for the Appellate Court to then uphold Pick's conviction for communicating with a minor after ruling Lilly did not participate in the communication.

This decision that Lilly "was not a party" to the chats is partly in error. The Court failed to understand that the imaginary Lilly was a participant in the conversation, {R. at 85} just like a Robo-caller is a participant in a telephone call by a telemarketer. Even though Lilly and Robo-callers do not qualify as a 'person,' they can still participate in communications. But they cannot legally intercept or record unless a warning is first provided like, "This call may be monitored or recorded." {ACB at 15}.

This Appellate Court ruling failed to factor in the **visibly present** criteria for electronic surveillance definition specified in EO-12333 (1981):

> ***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, ...* (Emphasis added)

Here, "person" is a living human endowed with rights. To be a lawful "person who is a party to an electronic communication," that person MUST be capable of having a similar oral conversation while "visibly present at the place of communications." EO-12333. Imaginary people can never be **visibly present** for oral conversations. Impersonation does not qualify either. If Payne had sent pictures of himself wearing a Lilly disguise, Payne could have had a similar face-to-face conversation and could have been a lawful party to the electronic conversation. {SCV_APPEAL at 21} Instead, Payne conducted illegal electronic surveillance, criminally violating the ECPA, 18 U.S.C. § 2511, and Va. Code § 19.2-62, all of which derive from EO-12333. {ACB at 3, 21}. Payne's interception lacked probable cause and "is an intrusion into constitutionally protected areas," such as private chats. "The Fourth Amendment's protections include 'conversation,' and the use of electronic devices to capture it was a 'search.'" *Berger v. New York*, 388 U.S. 41 (1967).

Yet, the Commonwealth successfully decried that no unlawful interception occurred because Inv. Payne didn't "engage in wiretapping during the chat." See *Smith v. Commonwealth,* 353 SE 2d 159, 3 Va. App. 650 (1987). {R. at 73}. Pick never argued that Payne tapped a wire to Pick's wireless phone. Pick did argue that Payne unlawfully intercepted communications by impersonating the imaginary Lilly. The *Smith* case started before the passage of ECPA, which broadened the definition of *intercept* in 1986 to include "other acquisition of the contents of any

wire, electronic, or oral communication." 18 U.S.C. § 2511. "Other acquisition" includes impersonating and using imaginary people.

It is not in "the ordinary course of business" to use Omegle on police-issued equipment to intercept communications. When Google used its devices to intercept content of emails for advertising, it was found to violate its own user agreements as well as ECPA interception statutes. Although endemic to Google's corporate purpose, advertising was deemed not part of "the ordinary course of business" for transmitting emails. *In re Google Inc. Gmail Litigation.*, Case No.: 13-MD-02430-LHK (N.D. Cal. Sep. 26, 2013).

2. Intercepting Video without a Warrant

Va. Code § 18.2-374.3(B,C) requires proof of "lascivious intent." Yet it was Inv. Payne who conceived the idea of sending a video and placed that in the mind of Stranger. {8/19/19 Tr. at 109:8-9, 114:21, 115,4-3; 115:5, see also CAV_R. at 651-658}. Payne recommended using Dropbox. {Tr. at 109:12}. When Stranger proved too inept and asked, "How do I send you the link?", Payne sent detailed instructions. {8/19/19 Tr. at 115:12-14}. Technically, it was Inv. Payne who solicited Stranger and instructed Stranger to commit a crime. "Criminal solicitation involves the attempt of the accused to incite another to commit a criminal offense." *Branche v. Commonwealth*, 25 Va.App. 480, 490, 489 S.E.2d 692, 697 (1997). This is abhorrent and outrageous police behavior. {ACB at 22}.

Inv. Payne claimed he viewed the video by clicking on a Dropbox link sent by Stranger. However, this link was unlawfully intercepted content, and obtained in violation of Dropbox's contractual user agreement. Pick also argued insufficiency of video evidence. {CAV_APPEAL at 2}.

3. Identifying and Geo-Locating Without a Warrant

The town "Woodbridge" was a critical search term used to identify Ryan Pick on July 10th. But "Woodbridge" does not appear in the Omegle chat. If "Woodbridge" was obtained legally, Williams and Payne would not have obscured how it was obtained four separate times. The only possible source of "Woodbridge" on July 10th would be when Payne clandestinely obtained Stranger's IP address by using Dropbox. Payne geo-located the IP address to Woodbridge, then identified Pick. But this required a warrant.

Pick's Fourth Amendment rights were violated when Inv. Payne used Dropbox as a *de facto* pen register to obtain the underlying IP address of Stranger. {ACB at 31-38}. When Stranger asked for a generic picture, Payne did not send the photo directly. Instead, Payne put photos in his Dropbox, then sent a link of his Dropbox to Stranger. As Stranger opened the photos in Dropbox on July 10th, his IP address became visible to Payne on Payne's Dropbox display. A "pen register" is a device or process that records addressing information for transmitting electronic communications, like an IP address. Use of a pen register requires a warrant, pursuant to Va. Code §§ 19.2-70.1, 19.2-70.2, 19.2-70.3, and 18 U.S.C. § 3121. It is also not the "ordinary course of business" when using Dropbox to obtain a suspect's hidden IP address. See 18 U.S.C. § 3127(3). Payne's Investigation Report states that maxmind.com was used to resolve the IP address to "Woodbridge." {CAV_R. at 659; ACB at 36-38}. But this is unlikely. See the Amicus Curiae Brief at 33-38 for a detailed explanation and supporting case law.

Inv. Payne and prosecutor AAG Williams covered up the unlawful unmasking of Pick's identity multiple times. "Perjury" includes the voluntary "omission to what has been promised under oath," Merriam-Webster's Dictionary, 2021:

1. On July 11th, Inv. Payne issued administrative subpoenas to provide cover for what he already knew on July 10th: the hometown "Woodbridge" and the identity of the Omegle user. On July 18th, the subpoenas returned "Woodbridge" and "Ryan Pick."
2. AAG Williams omitted "Woodbridge" from the list of search terms she provided to the court, yet stated this was the "only information" Payne used. {4/18/19 Tr. at 10:24 – 11:4}
3. Inv. Payne failed to mention "Woodbridge" in his testimony about search terms, concluding only with, "things like that." {8/19/19 Tr. at 118:2}.
4. When AAG Williams addressed the jury, she declared Payne "simply went to Google and to Facebook." She listed search terms, but omitted "Woodbridge." {8/19/19 Tr. at 224}.

Pen register statutes protect ***ownership*** of the recipient account (Pick), safeguard ***transmission routes used*** (IP addresses), while obscuring their ***geographic locations*** (Woodbridge). See *Report on Investigations Involving the Internet and Computer Networks,* Department of Justice (DOJ), Office of Justice Programs, (January, 2007) at 78, citing ECPA, 18 U.S.C. §2501, 18 U.S.C. §2701, 18 U.S.C. §3121 {CAV_R. at 178}; and Office of Director of National Intelligence (DNI), *Civil Liberties and Privacy Guidance for Intelligence Community Professionals: Properly Obtaining and Using Publicly Available Information* (July 2011), citing EO-12333 and FISA. {CAV_R. at 312-313}.

4. Intercepting Snapchats without a Warrant

Intercepted communication content CANNOT legally be obtained by subpoena or search warrant, Va. Code § 19.2-70.3(A). An *Assistant* AG (AAG) cannot authorize interception, pursuant to Va. Code § 19.2-66(A). {ACB at 27}. The administrative subpoena signed by AAG Stacey Rohrs and sent to Snap. Inc. was only valid for 90 days. 18 U.S.C. § 2703(f)(2). {CAV_R. at 675}. Querying a selector (phone number, or Snapchat account name) is a potential violation

of law even when it returns no content data. *See* NSA / Central Security Service *IG Report of Investigation (9 January 2014)* at 2-4, citing EO-12333, USSID SP0018, and 18 U.S.C. § 2511. {CAV_R. at 477-479}.

Interception laws protect communications up to 180 days (Va. Code § 19.2-68 and 18 U.S.C. § 2516). To skirt these laws, Payne had a search warrant issued at the 250-day mark. Why? Abandoned communications stored by the customer can be obtained with a search warrant after 180 days. Communications that law enforcement ordered to be intercepted and retained CANNOT be obtained with just a search warrant. 18 U.S.C. § 2701 and *Report on Investigations Involving the Internet and Computer Networks,* Department of Justice (DOJ), Office of Justice Programs, (January, 2007) at 80. {CAV_R. at 180}. See *U.S. v. Giordano*, 469 F.2d 522 (4th Cir. 1972) for proper procedure. {ACB at 26}. Messages that Pick exchanged with his friends were read, so they had not been abandoned. Since Snapchat automatically deletes read messages, Pick's messages should not exist 250 days later. "*Our Privacy Principles, Privacy Policy, Snapchat.com*" (October 1, 2018), {CAV_R. at 676-678}. Snapchat began intercepting AFTER receiving the subpoena so it would have something to preserve. But warrantless "wiretaps" violate Va. Code § 19.2-68 *and* 18 U.S.C. § 2516. *See Mitchell v. Forsyth,* 472 U.S. 511 (1985). {ACB at 28}

In her motion *in limine,* AAG Williams disclosed five unlawfully intercepted Snapchat communications and attempted to use three as evidence, violating U.S.C. § 2511(1) and Va. Code § 19.2-62(A). Though the court denied the motion, actions taken by law enforcement and the AG's office led to two additional cover ups:

5. There is no subpoena or preservation request in the record for the period after July 12th when the interception occurred.
6. Payne's search warrant to Snap, Inc. is missing.

Based on the number of cover-ups, it appears Payne and Williams understood they acted without authority. Payne was not employed by Virginia State Police, the only entity authorized to intercept, Va. Code § 19.2-68(C)(4). No authorizations to intercept communications for solicitation were granted from 2010-present, anywhere in the Virginia. Virginia AG *Annual Report on Number of Applications for Intercept Orders* (per Va. Code § 19.2-70). {R. at 235-250}. Federal procedures underscore that any communications between U.S. Persons, even incidentally collected must be destroyed. See Office of DNI. United States Signal Intelligence Directive (USSID SP0018) *Legal Compliance and U.S. Persons Minimization Procedures* {CAV_R. at 272-274; ACB at 32}. All illegally intercepted communications and evidence derived therefrom should have been suppressed and the charges against Pick dismissed. {MSE1 at 2-3; CAV_APPEAL at 10; SCV_APPEAL at 15}

Violations of Pick's Fourth Amendment rights are ongoing. His Snapchat communications are now public records. Illegal interception and disclosure of Pick's Snapchat communications occurred during the investigation stage where prosecutors have no qualified immunity.

5. Legacy of Fourth Amendment Violations

ICAC investigations have crossed the line of lawful interception for years, but no one has argued this point. In 2001, Ms. Akers reported that her daughter, Samantha, was being solicited online - certainly worth investigating. However, both Akers and Det. Smith impersonated Samantha online to arrange a meeting with Bloom and intercepted Bloom's private communications for Samantha, without Samantha being party to the conversation. *Bloom* failed to argue that impersonation violated interception statutes. *Bloom v. Commonwealth*, 34 Va.App. 364, 373, 542 S.E.2d 18, 22, aff'd, 262 Va. 814, 554 S.E.2d 84 (2001).

Nor has anyone argued that utilizing imaginary children to intercept communications violates ECPA statutes. For example, Det. Well's 13-year-old creation, "Heather Boon" was used in *Hix v. Commonwealth.* (2005) and a decade later in *Hawthorne v. Commonwealth*, Stafford County, CR16-383-00 (2016). *Hix* set precedent, yet *Hix* failed to argue that neither Det. Wells nor his imaginary "Heather" could legally intercept Hix's communications. Contrast *Hix* with *Grafmuller*, where a female officer portrayed a 13-year-old girl in emails and phone calls. One assumes the policewoman was capable of having a similar "visibly present" conversation with Grafmuller, pursuant to EO-12333.

The Government is prohibited from examining the interior of a home to obtain information which would have been unknowable without physical intrusion. *Kyllo v. United States*, 533 U.S. 27, 121 S. Ct. 2038 (2001). {CAV_R at 487; SVC_APPEAL at 21-22}. Yet, this principle is ignored with password-protected phones or computers used at home.

Writing for the majority in *Carpenter*, Chief Justice Roberts opined, "The United States Supreme Court is obligated, as subtler and more far-reaching means of invading privacy have become available to the government, to ensure that the progress of science does not erode Fourth Amendment protections." *Carpenter v. United States*, No. 16-402, 585 U.S. _ (2018).

Irrespective of salacious content, the purpose of Va. Code Title 19.2, Chapter 6, is to protect privacy in electronic communications through constraint of the Commonwealth's authority to intercept messages. {MSE1 at 1-2, ACB at 13; CAV_APPEAL at 8-9; SCV_APPEAL at 15}. Individuals rightfully expect privacy when they communicate with individuals electronically, as with phone calls. *Katz v. United States*. {SCV_APPEAL at 21}. "The electronic communications and all derivative evidence should be suppressed, and the indictments dismissed." Va. Code §§ 19.2-70.1, 19.2-70.2, 19.2-70.3. {MSE1 at 2-3; CAV_APPEAL at 10; SCV_APPEAL at 15}

B. **Miranda Rights Violated**

When officers descended on Pick's home, they handcuffed him and escorted him in his pajamas to a SWAT van without allowing him to retrieve his glasses. The Disney photo used to identify Pick showed him wearing thick glasses, so officers might surmise he needed them. {R. at 679}. But Pick was restrained and unable to retrieve his eye-glasses because he was in police custody, effectively under arrest. Pick was unable to discern the faces of the officers interrogating him. Although Pick was "told the door to the car [sic] was unlocked and shown how to open it," {R. at 157; 8/16/19 Tr. at 8; SCV_APPEAL at 11} all Pick could see was a blur. What's more, Payne testified that Pick was not free to leave, reinforcing the idea that he was detained or in custody. Appellate courts have made clear that after a person has been "deprived of his freedom of action in any significant way,' the defendant must be informed about his right pursuant to Miranda. *U.S. v. Sullivan*, 948 F.Supp. 549 (E.D. VA. 1996). {MSE2, CAV_APPEAL at 15}. Such interrogation, when any reasonable person would believe he was under arrest, violated Pick's Fifth Amendment right against self-incrimination and his Sixth Amendment right to counsel. {CAV_APPEAL at 13-17}.

Due to technical difficulties, the audio of the interrogation could not be played. The prosecution then provided their written transcript as a substitute. Defense counsel refused to concede that it was accurate since it was not done by a court reporter. The defense counsel only agreed to allow Payne to reference it to refresh his memory. But the court permitted Inv. Payne to read it in lieu of playing the actual audio. {8/19/19 Tr. at 126-129}. Pick had listened to the audio many times and said critical points were indiscernible where the prosecution claimed Pick made a confession. Rather than indicate indiscernible portions, words were inserted.

Serving years in prison, followed by years on the sex offender registry is excessive for a thought crime against an imaginary person.

X. Conclusion

More and more, interpersonal human relations are migrating onto the internet. Individuals have a reasonable expectation of privacy when they communicate directly with another individual on the internet, just as when they pick up a telephone. {ACB at 3; SCV_APPEAL at 21}.

Transmitting deceptive electronic communications to a target (ostensibly Pick) and using entrapment techniques to cause the target to react in a manner that is detrimental to himself, qualifies as electronic warfare against U.S. persons, as defined in the Joint Publication 3-13.1 *Electronic Warfare (2012).* {starting at CAV_R. page 331; ACB at 29-31}.

Under the Virginia Court of Appeal's reasoning in *Pick*, it is permissible for law-enforcement to use a digital voice program to disguise police telephone calls to a suspect as telephone calls from known acquaintances. The police could obtain incriminating statements made voluntarily when the suspects hear the voice of someone they recognize. Will police also rely on this ruling to justify using apparently human holograms or other digital entities, and animating them with voice and motion (current video gaming technology) to ensnare people? It is the role of this Court to maintain the balance of fairness required to preserve that which makes us human against the onslaught of a digital dystopia. {SCV_APPEAL at 23}.

Correcting this erroneous ruling and affirming the true meaning of ECPA statutes holds national implications on protecting citizens' rights and their privacy.

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

Date: 12/27/2021

Respectfully submitted

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