

No. \_\_\_\_\_

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**SUPREME COURT OF THE UNITED STATES**

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Norman Michael Achin  
*Petitioner,*  
v.  
Commonwealth of Virginia  
*Respondent.*

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**PETITION FOR A WRIT OF CERTIORARI  
APPENDIX VOLUME I**

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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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## Table of Contents

<b>April 24, 2020.</b> Court of Appeals of Virginia, Achin v. Commonwealth of Virginia, Record No. 1950-19-4. Decision denying the petition for appeal. ....	1-6
<b>March 15, 2019.</b> Circuit Court of Fairfax County No. FE-2018-0001497. Order denying the Motion to Suppress .....	R. 000116
<b>November 19, 2018.</b> Circuit Court of Fairfax County No. FE-2018-0001497. Grand Jury Indictment .....	R. 000117
<b>May 20, 2019.</b> Circuit Court of Fairfax County No. FE-2018-0001497. Bench Trial First Day, Orders .....	R. 000131
<b>May 21, 2019.</b> Circuit Court of Fairfax County No. FE-2018-0001497. Bench Trial Second Day, Orders .....	R. 000132
<b>December 3, 2019.</b> Circuit Court of Fairfax County No. FE-2018-0001497. Order Denying the Motion to Set Aside the Verdict, Sentencing Order .....	R. 000198-000200
<b>March 15, 2019.</b> Circuit Court of Fairfax County No. FE-2018-0001497. Hearing on the Motion to Suppress Internet Chats and Recordings of Telephone Conversations Evidence Transcript - Denied .....	R. 000487-000507
<b>May 20, 2019.</b> Circuit Court of Fairfax County No. FE-2018-0001497. Trial Day 1 Transcript: Objection to the Motion to Admit Evidence - Overruled .....	R. 000508, 000585-000589
<b>May 21, 2019.</b> Circuit Court of Fairfax County No. FE-2018-0001497. Trial Day 2 Transcript: Motion to Strike – Overruled .....	R. 000635, 000645-000659, 000718-000719
<b>November 15, 2019.</b> Circuit Court of Fairfax County No. FE-2018-0001497. Hearing on the Motion to Set Aside the Verdict (Denied) and Sentencing Transcript .....	R. 000738-000779
Orders on Rehearing:	
<b>June 22, 2020.</b> Court of Appeals of Virginia, Achin v. Commonwealth of Virginia, Record No. 1950-19-4. Order denying the petition for rehearing .....	1203
<b>February 24, 2021.</b> Virginia Supreme Court, Achin v. Commonwealth of Virginia, Record No. 200933. Order refusing the petition for appeal .....	1301
<b>May 14, 2021.</b> Virginia Supreme Court, Achin v. Commonwealth of Virginia, Record No. 200933. Order refusing the petition for rehearing .....	1302

# **VIRGINIA:**

*In the Court of Appeals of Virginia on    Friday    the 24th day of April, 2020.*

Norman Michael Achin,

Appellant,

against

Record No. 1950-19-4

Circuit Court No. FE-2018-0001497

Commonwealth of Virginia,

Appellee.

From the Circuit Court of Fairfax County

Per Curiam

This petition for appeal has been reviewed by a judge of this Court, to whom it was referred pursuant to Code § 17.1-407(C), and is denied for the following reasons:

I. In a bench trial, the trial court convicted appellant for using a computer to solicit a minor in violation of Code 18.2-374.3(C)(1).<sup>1</sup> Appellant argues that the trial court erred in denying his motion to suppress text messages that he exchanged with Detective Robert Bauer, who was posing as a fourteen-year-old boy, and the recording of a telephone call between appellant and Detective Godell, who also was posing as a child. Appellant argues that introduction of the evidence violated Virginia statutes governing wiretapping.

Title 19.2, Chapter 6, of the Code of Virginia governs “Interception of Wire, Electronic or Oral Communications.” Under Code § 19.2-65,

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be

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<sup>1</sup> Appellant was tried upon an amended indictment charging him with violating Code § 18.2-374.3(C)(1). Under Code § 18.2-374.3(C)(1), it is unlawful for any adult “to use a communications system . . . for the purposes of soliciting, with lascivious intent, any person he knows or has reason to believe is a child younger than 15 years of age to knowingly and intentionally . . . [e]xpose his sexual or genital parts to any child . . . .”

received in evidence in any trial . . . before any court . . . *if the disclosure of that information would be in violation of this chapter.*

(Emphasis added).

Within Chapter 6 of Title 19.2, “intercept” is defined as “any aural or other means of acquisition of the contents of any wire, electronic or oral communication through the use of any electronic, mechanical or other device.” Code § 19.2-61. Code § 19.2-62(A) lists circumstances under which interception or disclosure of certain communications may constitute a criminal offense in violation of Chapter 6 of Title 19.2. However, Code § 19.2-62(B)(2) provides, “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.” Therefore, admission into evidence of a telephone conversation recorded by or with the consent of one of the parties to the communication does not violate Virginia’s wiretapping provisions. See Watkins v. Commonwealth, 238 Va. 341, 347 (1989).

It was undisputed that Bauer and Godell both communicated directly with appellant by electronic message or telephone and were parties to the conversations. By operation of Code § 19.2-62(B)(2), it was not a criminal offense for them to “intercept” or disclose those communications. Because the officers’ disclosure of the communication did not violate Chapter 6 of Title 19.2, admission of the communications into evidence at trial did not violate Code § 19.2-65. There was no interception of communication that violated Code § 19.2-62, and the rule of exclusion contained in Code § 19.2-65 did not apply. The trial court thus did not err in denying appellant’s motion to suppress.

II. Appellant contends that the trial court erred in denying his motion to set aside the verdict because the evidence established a defense of entrapment.<sup>2</sup> When reviewing a challenge to the sufficiency of the

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<sup>2</sup> The Commonwealth argues that the issue is not preserved because appellant did not raise entrapment as an affirmative defense at trial. See Rules 3A:9 and 5A:18. However, appellant raised the issue in a motion to set aside the verdict, which the trial court denied. We assume, *arguendo*, that appellant preserved this issue for appellate review.

evidence, this Court considers the evidence in the light most favorable to the Commonwealth, the prevailing party below, and reverses the judgment of the trial court only when its decision is plainly wrong or without evidence to support it. See Farhoumand v. Commonwealth, 288 Va. 338, 351 (2014). “[I]f there is evidence to support the conviction, the reviewing court is not permitted to substitute its judgment, even if its view of the evidence might differ from the conclusions reached by the finder of fact at the trial.” Linnon v. Commonwealth, 287 Va. 92, 98 (2014) (quoting Lawlor v. Commonwealth, 285 Va. 187, 224 (2013)).

In July 2018, Bauer, of the Fairfax County police, used the online dating application “Grindr” to investigate sexual exploitation of children on the Internet. Bauer adopted the persona “AlexVa” on Grindr, posed as a fourteen-year-old boy named “Alex,” and attached a photograph of a boy to the account. After appellant made initial contact with “AlexVa,” Bauer and appellant exchanged text messages over the course of thirteen days through Grindr and another text message application. In the messages, Bauer indicated that he was located in Fairfax and was not yet fifteen years old. The exchange of messages between appellant and “AlexVa” continued, and appellant pressured “AlexVa” to make contact by telephone. Appellant told “AlexVa” that he was “gorgeous” and “beautiful.” In response to questions from “AlexVa” about what they might do together, appellant said “suck and maybe more” depending on the child’s “comfort level.” At some point, the “AlexVa” account was flagged and frozen by Grindr, so Bauer opened a new account with the name “Alex” and no associated photograph. On July 22, 2018, using Grindr, appellant sent the “AlexVa” account a photograph of an erect penis.

On July 23, 2019, using the same cell phone number with which he had communicated with “AlexVa,” appellant sent a text message stating, “Check out app.” Bauer then arranged a telephone call with appellant in which Godell, who had a youthful voice, posed as “Alex.”<sup>3</sup> During the conversation, appellant verified that he was talking to “Alex,” the same person with whom he previously had communicated. Appellant told “Alex” to “check the app.” Appellant asked “Alex” to suggest a place and time to meet and

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<sup>3</sup> During the recorded conversation, Bauer was present with Godell.

discuss what they might do together. Appellant acknowledged that he could get into trouble because of "Alex's" age. Appellant told "Alex" to check out appellant's photographs on the Grindr application, and asked "Alex" to give his opinion about them.

In text messages after the phone call ended, appellant reminded "Alex" to check the application for the photographs. "Alex" then mentioned that his original Grindr account had been shut down and that he had set up a new one; appellant indicated that he had not previously known of this. Bauer then resent appellant the photograph associated with the "AlexVa" persona. When "Alex" indicated by text message that he was having trouble finding the pictures on Grindr, appellant sent him the photograph of an erect penis using the "Alex" Grindr account. By text, appellant asked if "Alex" liked the picture. "Alex" responded, "U mean the 1 of ur dick rite?" Appellant acknowledged that he had meant that particular photograph. After "Alex" responded affirmatively, they arranged a meeting at a park that day.

The police arrested appellant when he arrived at the agreed location to meet "Alex." The police recovered the text messages that appellant and Bauer had exchanged from appellant's cell phone.

Testifying in his own behalf, appellant said that he joined the Grindr application on July 8, 2018. He met a twenty-year-old man named Zach through Grindr and they had had a sexual encounter. After communicating with "AlexVa" on Grindr, appellant became concerned upon learning that he was under fifteen. Appellant claimed to have gotten his communications between Zach and "AlexVa" confused. Appellant, who was a high school teacher, said that he was worried about the mental well-being of "AlexVa" and wanted to counsel him. Appellant said that he did not recall sending the picture of the penis to "AlexVa" on Grindr on July 22, 2018. He claimed that when he sent the picture of the penis on July 23, 2018, he did not believe that "Alex" was the same person as "AlexVa." Appellant claimed that, based upon subsequent messages from "Alex," he later realized that "AlexVa" and "Alex" were the same person.

Appellant argues that the unlawful conduct was a product of police entrapment. "Entrapment is the conception and planning of an offense by a police agent, and his or her procurement of its commission by 'one who would not have perpetrated it except for the trickery, persuasion, or fraud' of the police." Howard

v. Commonwealth, 17 Va. App. 288, 293 (1993) (quoting Schneider v. Commonwealth, 230 Va. 379, 381 (1985)). “[W]hen the criminal design originates in the mind of the accused and, thereafter, the Commonwealth does no more than afford an opportunity for the commission of the crime, the defense of entrapment does not lie.” Cogdill v. Commonwealth, 219 Va. 272, 279 (1978). “Encouragement or solicitation of the commission of a crime by one who is willing and predisposed to commit the crime does not constitute entrapment.” McCoy v. Commonwealth, 9 Va. App. 227, 232 (1989).

The trial court accepted the Commonwealth’s evidence, and rejected appellant’s testimony that he did not intentionally send the photograph of the penis to a person he knew or had reason to know was a child under the age of fifteen. “Determining the credibility of witnesses . . . is within the exclusive province of the [fact finder], which has the unique opportunity to observe the demeanor of the witnesses as they testify.” Dalton v. Commonwealth, 64 Va. App. 512, 525 (2015) (quoting Lea v. Commonwealth, 16 Va. App. 300, 304 (1993)) (alteration in original). “When ‘credibility issues have been resolved by the [fact finder] in favor of the Commonwealth, those findings will not be disturbed on appeal unless plainly wrong.’” Towler v. Commonwealth, 59 Va. App. 284, 291 (2011) (quoting Corvin v. Commonwealth, 13 Va. App. 296, 299 (1991)). “In its role of judging witness credibility, the fact finder is entitled to disbelieve the self-serving testimony of the accused and to conclude that the accused is lying to conceal his guilt.” Flanagan v. Commonwealth, 58 Va. App. 681, 702 (2011) (quoting Marable v. Commonwealth, 27 Va. App. 505, 509-10 (1998)).

The evidence proved that appellant twice sent a photograph of an erect penis using Grindr, first to the “AlexVa” account and then to the “Alex” account. The transmissions were wholly unsolicited by the police. After the first transmission, appellant urged the recipient to look at the application. When he had the phone conversation with “Alex,” appellant again told him to look at the picture he had placed on Grindr. After learning later that the “AlexVa” account had been shut down, appellant resent the photograph to “Alex” via Grindr. The text messages before and after the second transmission demonstrated that appellant knew the two accounts were associated with the same fourteen-year-old boy. Indeed, appellant asked for “Alex” to give his

opinion of the photograph after appellant sent it the second time. Appellant was arrested when he appeared for his arranged meeting with "Alex." Upon these facts and circumstances, a reasonable finder of fact could conclude beyond a reasonable doubt that the criminal design to transmit the photograph to a child originated in appellant's mind, rather than that of a police officer, and that appellant was guilty of the charged offense.

This order is final for purposes of appeal unless, within fourteen days from the date of this order, there are further proceedings pursuant to Code § 17.1-407(D) and Rule 5A:15(a) or 5A:15A(a), as appropriate. If appellant files a demand for consideration by a three-judge panel, pursuant to those rules the demand shall include a statement identifying how this order is in error.

The Commonwealth shall recover of the appellant the costs in the trial court.

This Court's records reflect that Dennis P. Chapman, Esquire, and John P. McGeehan, Esquire, are counsel of record for appellant in this matter.

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By:

*Mary K.P. Ring*

Deputy Clerk



VIRGINIA

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Commonwealth of Virginia

Plaintiff(s)

v. Michael Achin  
Norman Defendant(s)

Case No. 2018-1497

This cause came on to be heard on the 15<sup>th</sup> day of March, 2019 on the  
Plaintiff's/Defendant's motion for suppress.

Upon the matters presented to the Court at the hearing, it is

ADJUDGED, ORDERED and DECREED as follows:

3-15-19  
The motion to suppress the text messages between Defendant and Detective Bauer is denied. The motion to suppress the phone call recording between Defendant, Detective Gaddell, and Detective Bauer is denied.

ⓔ The Commonwealth's motion to amend the indictment is granted over the objection of the Defense, who reserves the right to seek a continuance if needed due to the amendment.

SES Entered this 15<sup>th</sup> day of March, 2019.

SEEN: and Agreed

Donna Rowe

Counsel for the Plaintiff(s)

Commonwealth

Seen: and objected

Stephen J. Sheehy

Counsel for the Defendant(s)

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

November 19, 2018

FE-2018-1497

COMMONWEALTH OF VIRGINIA

vs.

NORMAN MICHAEL ACHIN

)  
)  
)  
)  
)

INDICTMENT FOR USING A  
COMPUTER TO SOLICIT A  
MINOR

The Grand Jurors of the Commonwealth of Virginia, in and for the body of the County of Fairfax, and now attending the said Court at its November Term, 2018, charges that: On or about the 23rd day of July, 2018, in the County of Fairfax, Norman Michael Achin, a person over the age of eighteen (18) years of age, feloniously used a communications system or other electronic means for the purpose of soliciting a minor for activity in violation of §18.2-361 or §18.2-370, knowing or having reason to know that such person was a ~~minor~~ child fifteen (15) years

Va. Code §18.2-374.3(c) of age or younger.  
VCC OBS-3730-F6

OBS-3701-F5

A True Bill \_\_\_\_\_

No True Bill \_\_\_\_\_

\_\_\_\_\_  
FOREMAN

Witnesses subpoenaed, sworn and  
available to testify before the  
Grand Jury:

R. M. Bauer, Fairfax County Police Dept.

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA ) CRIMINAL NUMBER FE-2018-0001497  
VERSUS )  
NORMAN MICHAEL ACHIN ) INDICTMENT – USING A COMPUTER  
TO SOLICIT A MINOR

BENCH TRIAL  
FIRST DAY

On May 20, 2019, Elena Lowe, the Assistant Commonwealth's Attorney, NORMAN MICHAEL ACHIN, the Defendant, and Stephen J. Sheehy, III, Counsel for the Defendant, appeared before this Court. The Defendant is indicted for the felony of USING A COMPUTER TO SOLICIT A MINOR and he appeared while on bond.

This case came before this Court for a trial with a jury. Counsel for the Defendant moved the Court to have this case heard without a jury. The Commonwealth's Attorney stated they had no objection.

The Court granted, without objection by the Defendant or his Counsel, the Assistant Commonwealth's Attorney's motion to amend the indictment to wit: by amending the Va. Code from § 18.2-374.3 to 18.2-374.3(c1).

07-19  
C The Defendant was arraigned upon the amended indictment and the Defendant, in person, entered a plea of not guilty and in person and in writing signed by him, waived his right to a trial by jury, to which the Attorney for the Commonwealth consented and the Court concurred.

The Court heard opening statements of the Commonwealth's Attorney and of Counsel for the Defendant and then proceeded to hear a portion of the evidence on behalf of the Commonwealth.

The Court, being of the opinion that this case could not be completed at a reasonable hour, continued this case to May 21, 2019 at 10:00 a.m.

The Defendant was continued on bond.

Entered on June 19, 2019.

  
JUDGE MICHAEL F. DEVINE

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA ) CRIMINAL NUMBER FE-2018-0001497  
VERSUS )  
NORMAN MICHAEL ACHIN ) INDICTMENT – USING A COMPUTER  
TO SOLICIT A MINOR

BENCH TRIAL  
SECOND DAY

On May 21, 2019, Rammy Barbari, the Assistant Commonwealth's Attorney, NORMAN MICHAEL ACHIN, the Defendant, and Stephen J. Sheehy, III, Counsel for the Defendant, appeared before this Court. The Defendant is indicted for the felony of USING A COMPUTER TO SOLICIT A MINOR and appeared while on bond.

The Court proceeded to hear the remainder of the Commonwealth's evidence. Upon conclusion of the evidence presented on behalf of the Commonwealth, Counsel for the Defendant moved the Court to strike the evidence presented. The Court, after hearing argument, **denied** the motion.

The Court heard all of the Defendant's evidence and argument of Counsel.

In consideration of the evidence heard and argument of Counsel, the Court found the Defendant, NORMAN MICHAEL ACHIN, guilty of USING A COMPUTER TO SOLICIT A MINOR, as charged in the amended indictment.

The Court granted the Defendant's motion to refer this case to the District Probation Officer for investigation and report before sentencing. This case was continued to August 16, 2019 at 10:00 a.m. for sentencing.

The Court granted, without objection by the Assistant Commonwealth's Attorney, the Defendant's motion to continue the Defendant on the bond posted in this case conditioned that the Defendant fully cooperate with the District Probation Officer assigned to this case.

The Defendant was continued on bond.

Entered on June 19, 2019.

  
JUDGE MICHAEL F. DEVINE

## SENTENCING ORDER

### VIRGINIA: IN THE CIRCUIT COURT OF FAIRFAX COUNTY

FEDERAL INFORMATION PROCESSING  
STANDARDS CODE: 059

Hearing Date: **November 15, 2019**

Judge: **MICHAEL F. DEVINE**

**COMMONWEALTH OF VIRGINIA,**

Versus

**NORMAN MICHAEL ACHIN, Defendant**

This case came before the Court for sentencing of the Defendant, who appeared in person with his Attorney, Thomas Walsh. The Commonwealth was represented by Brandon Sloane. The Defendant appeared while on bond.

The Court, after hearing argument, denied the Defendant's motion to set aside verdict.

On May 21, 2019, the Defendant was found guilty of the following offense:

CASE NUMBER	OFFENSE DESCRIPTION AND INDICATOR (F/M)	OFFENSE DATE	VA. CODE SECTION
<b>FE-2018-0001497</b>	<b>USNIG A COMPUTER TO SOLICIT A MINOR (F)</b>	<b>07/23/2018</b>	<b>18.2-374.3 OBS3730F6</b>

The pre-sentence report was considered and is ordered filed as a part of the record in this case in accordance with the provisions of Code § 19.2-299.

Pursuant to the provisions of Code § 19.2-298.01, the Court has considered and reviewed the applicable discretionary sentencing guidelines and the guideline worksheets. The sentencing guideline worksheets and the written explanation of any departure from the guidelines are ordered filed as a part of the record in this case.

Before pronouncing the sentence, the Court inquired if the Defendant desired to make a statement and if the Defendant desired to advance any reason why judgment should not be pronounced.

The Court **SENTENCED** the Defendant to:

**INCARCERATION.** Incarceration in the Virginia Department of Corrections for the term of: three (3) years. The total sentence imposed is **three (3) years**.

**SUSPENDED SENTENCE.** The Court further **ORDERED** that all but seven (7) months of the sentence be suspended for a period of two (2) years upon the following condition(s):

**SUPERVISED PROBATION.** The Defendant is placed on probation to commence upon his release from incarceration, under the supervision of a Probation Officer for two (2) years, or unless sooner released by the Court. The Defendant shall comply with all the rules and requirements set by the Probation Officer. As a special condition of probation, the Defendant shall enter and complete Sex Offender treatment, to include polygraph testing, as directed by the Probation Officer.

**COSTS.** The Defendant shall pay all costs of this case.

**CREDIT FOR TIME SERVED.** The Defendant shall be given credit for time spent in confinement while awaiting trial pursuant to § 53.1-187 of the 1950 Code of Virginia, as amended.

**SEX OFFENDER REGISTRY.** The Court further **ORDERED** that pursuant to § 9.1-903 of the 1950 Code of Virginia, as amended, the Defendant shall register with the Department of State Police within Three (3) days from release of confinement in a state or local correctional facility. If confinement is not imposed, the Defendant shall register within Three (3) days of date of the suspension of sentence. This registration shall be maintained in the Sex Offender Registry established pursuant to § 9.1-900 of the 1950 Code of Virginia, as amended.

**APPEAL RIGHTS.** The Court advised the Defendant of right to appeal from the sentence imposed, including the right to have an attorney appointed for him and to have the attorney's fees, costs and expenses in connection with an appeal paid for him in the event he is financially unable to pay. It is **ORDERED** by the Court that in the event the Defendant or his Counsel files a notice of appeal, the transcript is to be prepared and is made a part of the record in this case.

The Court certifies that at all times during these proceedings, the Defendant was present, and his Attorney likewise was present and capably represented the Defendant.

Counsel for the Defendant moved the Court to continue the Defendant on bond pending appeal, which motion the Court, **granted**. The Court **ORDERED** that the Defendant be supervised by District 29.

The Court **ORDERED** that this matter be set on **December 20, 2019 at 10:00 a.m.** for a status of appeal. The Defendant does not need to be present at this nearing.

The Court further **ORDERED** that this matter be set on March 15, 2020, at 10:00 a.m. for a status of appeal. The Defendant must be present at this hearing.

The Defendant was referred for DNA processing.

The Defendant was continued on bond.

Entered on ~~November~~ Dec 03, 2019.



JUDGE MICHAEL F. DEVINE

**DEFENDANT IDENTIFICATION:**

**Alias:** No  
**SSN:** 035-38-4352  
**DOB:** 09/26/1967  
**SEX:** Male

**SENTENCING SUMMARY:**

TOTAL SENTENCE IMPOSED: three (3) years

TOTAL SENTENCE SUSPENDED: all but seven (7) months

**ABSTRACT OF CONVICTION:**

**ADDRESS:** 15519 Banjo Ct., Woodbridge, VA, 22193  
**SNN/OL#:** 035-38-4352/T62748763 **STATE of OPERATOR'S LICENSE:** VA

**CHARGE:**

**STATUTE:** 18.2-374.3 (B)  
**VCC:** OBS3730F6  
**OTN:** 059GM1800047113  
**VIOLATION:** State  
**OL SURRENDERED:** No  
**SEX:** Male  
**DOO:** 07/23/2018  
**DOB:** 09/26/1967

21 DEC 13 3:13

V I R G I N I A

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

- - - - -X  
COMMONWEALTH OF VIRGINIA :  
-vs- :  
NORMAN MICHAEL ACHIN, :  
Defendant. :  
- - - - -X

CASE NO. FE-2018-1497

Circuit Courtroom 4H  
Fairfax County Courthouse  
Fairfax, Virginia

Friday, March 15, 2019

The above-entitled matter came on to be heard  
before THE HONORABLE STEPHEN C. SHANNON, Judge, in and for  
the Circuit Court of Fairfax County, in the Courthouse,  
4110 Chain Bridge Road, Fairfax, Virginia, beginning at  
11:29 o'clock a.m.

APPEARANCES:

On Behalf of the Commonwealth:

ELENA LOWE, ESQUIRE  
Assistant Commonwealth's Attorney

On Behalf of the Defendant:

STEPHEN J. SHEEHY III, ESQUIRE



## P R O C E E D I N G S

(The Court Reporter was previously sworn by the Clerk of the Court.)

THE COURT: Okay. This is the case of the Commonwealth versus Norman Michael Achin. Mr. Achin is in court this morning accompanied by his counselor, Mr. Sheehy. The Assistant Commonwealth's Attorney handling this case is present, as well. This comes before the Court on the Defendant's motion to suppress.

Counsel, please proceed when ready.

MR. SHEEHY: Thank you, Your Honor. I did submit a brief to the Court. Has the Court had an opportunity to review the brief?

THE COURT: I did.

MR. SHEEHY: Your Honor, then that will save a good deal of time. There are several points that I wanted to make today, Your Honor. Let me grab my notes real quick, if I may.

(Pause)

The situation that we have here, Your Honor, is that Detective Bauer was using a persona, and he began trolling a site known as Grindr on the 11th of July. Somehow my client and Detective Bauer came in contact with

1 one another at that time.

2 If you address the information provided at  
3 the preliminary hearing, Detective Bauer testified  
4 initially that this was just him, that he had not secured  
5 any warrant, there was no plan in place at the time, he  
6 was just trolling.

7 When he began having discussions with my  
8 client -- there are recordings that have been provided  
9 to me to date all the way back to the 11th of July -- and  
10 he was recording these and taking them as he played the  
11 role of Alex VA.

12 My client spoke with him throughout. He also  
13 had a friend that he had been speaking with and had  
14 actually met on Grindr, who was an adult. They had a  
15 consensual relationship.

16 Intending to send some explicit pictures to  
17 that friend, my client then sent those pictures and  
18 inadvertently they went to the persona represented by  
19 Detective Bauer.

20 The response brief from the Commonwealth makes  
21 a great deal of two things. One is that my client had  
22 permission to record these files and to record the  
23 communications and to record the intercepts that he was

1 doing on a private website.

2 And that flies in the face of the case that  
3 we have or the testimony that we have on Page 15, where  
4 Detective Bauer testifies that "It was just me, I was the  
5 one chatting, developing my own case."

6 And I think that that's significant, Your  
7 Honor, because a persona cannot give permission. So, he  
8 is in there, just taking whatever he can and violating my  
9 client's right to privacy.

10 Now, the Commonwealth makes a point to say  
11 that Detective Gaddell gave him permission to record, and  
12 that was at somewhat of a later date. And that may be the  
13 case, where Gaddell was talking to my client on the phone,  
14 but when we get to the start of the investigation my  
15 client's rights have been violated with the interception  
16 of these conversations.

17 And having done so, we have the concept of  
18 the fruit of the poisonous tree, and we submit that  
19 anything that comes after the initial confrontation, the  
20 investigation, the interceptions of the electronic  
21 communications would be fruit of the poisonous tree.

22 The statutes in Virginia clearly lay out what  
23 has to happen with regard to securing a warrant and for

1 what purposes, none of which falls into the category of  
2 what my client is accused of.

3 So, we would ask that you suppress any and  
4 all communications that were made by Mr. Achin. First,  
5 because the persona cannot give consent to record -- and  
6 that's the initial portion; and secondly, when it's stated  
7 in the response brief that Detective Gaddell gave him  
8 permission to record, that becomes the proof of the  
9 poisonous tree. They had already planted the seed on the  
10 11th of July. This investigation took place over the 11th  
11 of July to the arrest on July 23rd with Detective Bauer  
12 going back and forth with my client.

13 In the testimony, the only occasion for there  
14 to be something that was sexually explicit was on the 12th  
15 of July. When that happened, my client soon realized that  
16 that was mistake, that he had intended to send it to his  
17 friend, and explained to the Detective that it was a  
18 mistake. He gave the Detective the phone number of the  
19 person that he intended to send it to.

20 The Commonwealth makes a point of ignoring  
21 the case that Detective Bauer was involved in. And in  
22 that case he had arrested an officer of the Maryland  
23 Penitentiary System --

1 MS. LOWE: Your Honor, I object to anything  
2 about a previous lawsuit with Detective Bauer. I have the  
3 order here that that was dismissed without any judgment.  
4 I don't know why that would be relevant.

5 THE COURT: I overrule the objection.

6 MR. SHEEHY: Thank you, Your Honor.

7 In that case Detective Bauer was investigating  
8 a matter where the officer was accused of pretending to be  
9 an officer. She had a badge from her position on the  
10 board of the penitentiary system in Maryland. And before  
11 he arrested her, he called Maryland and verified that she  
12 was indeed an officer and still arrested her. And that  
13 was the nature of the suit.

14 Now, the interlocutory appeal, Your Honor, was  
15 had in the Eastern District of Virginia, where the Court  
16 determined that Detective Bauer had lost his immunity for  
17 the purposes of that case simply because he knew -- he  
18 knew the explanation was accurate and still arrested the  
19 party.

20 In this case, Your Honor, Detective Bauer was  
21 given the phone number for the person -- shown the phone  
22 number on my client's phone and did nothing about it. And  
23 that's why that case is relevant, because now I guess he's

1 learned his lesson -- you know, don't go for the proof,  
2 you'll lose your case.

3 Nonetheless, we're asking, Your Honor, based  
4 on the concept of the fruit of the poisonous tree, where  
5 he was violating my client's right on the Grindr initially  
6 by recording, and the fruit of the poisonous tree or  
7 anything subsequent to that we would ask that you suppress  
8 the evidence in the case.

9 THE COURT: All right, thank you.

10 Let me hear from the Commonwealth.

11 MS. LOWE: Your Honor, just because I think  
12 it's offensive to make that connection. Officer Bauer in  
13 that case had run the case by a Commonwealth's Attorney,  
14 who gave him the authority to get the warrant.

15 And he got a warrant from the magistrate  
16 before that was -- before that individual was arrested,  
17 so certainly he didn't just go off half-cocked and arrest  
18 someone without running the case by different people.

19 The outcome of that case was that there was no  
20 judgment entered against Detective Bauer, Your Honor. And  
21 I just wanted to clarify that since Counsel made some  
22 comparisons with that case that's very different.

23 And, Your Honor, the Commonwealth would argue

1 that there's certainly no grounds for these to be  
2 suppressed. The Detective is not intercepting these  
3 communications, he's the recipient of them.

4 Whether it's his real name or fake name, any  
5 individual takes the risk when they communicate with  
6 someone they don't see face to face that they may not be  
7 speaking to the person they think they're speaking to.

8 In fact, that's the nature of many of these  
9 kinds of offenses, is that you are speaking to an  
10 undercover police officer and not a juvenile, but that  
11 doesn't change the fact that you can be convicted of this  
12 crime despite the fact it's not actually a child.

13 And similarly, there's nothing in the wire tap  
14 code that says -- you know, that allows for some kind of  
15 exception when you didn't know the person you were  
16 speaking to wasn't the person you were speaking to.

17 He is speaking to Detective Bauer. He may not  
18 know everything about who this person on the other side of  
19 the line is, but that is a voluntary communication. He is  
20 not being forced to have that communication, it's not  
21 against his will, it's not when he's in handcuffs or in  
22 the back of a cruiser.

23 And Detective Bauer is not intercepting

1 anything, he's receiving it, so I don't think the wire tap  
2 Code section applies in this case based on that exception.

3 Your Honor, additionally, as to any kind of  
4 fruit of the poisonous tree -- again, we don't have a  
5 violation of any constitutional right. This is a one-  
6 party record state.

7 If you send a picture to someone, obviously it  
8 could be -- and I'm not talking about some kind of nude  
9 image that's disseminated -- but if you send a photograph  
10 to a friend or you send a friend a message, there's  
11 nothing to stop them from sending it to whoever they would  
12 like because this is a one-party consent state.

13 And so I'm frankly not sure what the authority  
14 is that would allow for a detective who's engaging in a  
15 conversation with someone to not be allowed to do that.  
16 He's not in custody, he's not under arrest, this would be  
17 like calling someone on the phone, which does happen in  
18 this case, as well. But you can call somebody and put it  
19 on the speaker phone, and they can't stop you from doing  
20 that. They have no control, once they voluntarily have a  
21 communication with one person, over what that person does  
22 with the information.

23 This isn't a case where Detective Bauer was



1 aware there was an actual juvenile having communications  
2 with the Defendant and without a search warrant or  
3 anything he just gets this information from that third  
4 party, whether it's a Website or through overhearing the  
5 conversation without permission.

6 He is the recipient of these communications,  
7 and so he is fully allowed to have them. He takes  
8 pictures of them, they're on his own cell phone -- he has  
9 a cell phone he uses for this case -- so I don't believe  
10 the wire tap provisions apply.

11 THE COURT: Well, that deals with -- that  
12 argument deals with written messages between Detective  
13 Bauer and Mr. Achin, according to your argument. But then  
14 how does Detective Gaddell fit into this? Is Detective  
15 Gaddell having conversations?

16 MS. LOWE: Your Honor, there's a phone call  
17 that takes place --

18 THE COURT: Yeah.

19 MS. LOWE: -- on the same phone that Officer  
20 Bauer -- Detective Bauer has been using, because it has to  
21 be the same phone number that the Defendant reaches out  
22 to. So, that's to Detective Bauer's phone, he puts a  
23 recording device on it to record the conversation that

1 he's receiving.

2 He and Detective Gaddell discuss what's going  
3 to happen. I believe they used Detective Gaddell's voice  
4 to sound younger, and Detective Bauer listened to the  
5 conversation with his consent.

6 And so they are -- essentially they're both  
7 parties to this conversation, they're jointly involved in  
8 what's happening, but it's Detective Gaddell's voice that  
9 the Defendant is hearing, but they are both present and  
10 listening to the conversation on Detective Bauer's phone.

11 THE COURT: Okay, so there's one phone call --

12 MS. LOWE: I believe there's -- they have more  
13 than one, but it's within the same transaction. I think  
14 the call -- the Defendant hangs up at one point but  
15 there's a call back. But it's all coming at the same  
16 time.

17 THE COURT: So, in other words, Detective  
18 Bauer is listening, but Detective Gaddell is speaking.

19 MS. LOWE: Yes.

20 THE COURT: All right.

21 MS. LOWE: And they had discussed previously  
22 what would be discussed. Since this was Detective Bauer's  
23 case, he briefed Detective Gaddell and spoke to him about

1 it. And it's on Detective Bauer's phone that they've been  
2 using for the text messaging and the app.

3 THE COURT: Does the Code make a distinction  
4 between -- or does the Code define interception? Because  
5 the Commonwealth's argument is that interception has to be  
6 intercepting a communication between -- well, let me back  
7 up. Interception means a third party is capturing the  
8 recording of other individuals as opposed to being a  
9 recipient.

10 Does the Code make that distinction?

11 MS. LOWE: I didn't bring up my 19.2, Your  
12 Honor.

13 MR. SHEEHY: Your Honor, that's -- if I may, I  
14 apologize. If I may, this is under 19.2-61, Definitions.  
15 "Intercept means any oral or other means of acquisition of  
16 the contents of any wire, electronic or oral communication  
17 through the use of any electronic, mechanical or other  
18 device." That's the definition. That's 19.2 --

19 THE COURT: Got it.

20 MR. SHEEHY: -- 61. And monitoring is in  
21 there, as well.

22 THE COURT: Let me see. Just a second.

23 (The Court examined a document.)

1 MS. LOWE: If I can point the Court to --  
2 actually the Defense's motion, on Page 19.

3 THE COURT: Okay.

4 MS. LOWE: Citing the Szy -- oh, gosh, it  
5 starts with an S and it's a long -- the Szymuszkiewicz  
6 case.

7 A message is intercepted much like in  
8 football, the message is in the air intended for one  
9 person, but just as it reaches its intended target another  
10 person intercepts it.

11 In fact, a message can be intercepted at the  
12 exact same time it's received, but as indicated there are  
13 two different actions, one person who receives but a  
14 different person who is intercepting.

15 In this case it's Detective Bauer. While the  
16 Defendant may not know exactly who he is, he is the person  
17 receiving the message. So, he's not intercepting it, it's  
18 coming to him.

19 THE COURT: Except for the phone call, right?

20 MS. LOWE: Which comes to his phone, and he  
21 asks another officer to be the voice on the line. But he  
22 is present and a party -- I would argue also a party to  
23 that communication or has consented to overhear it by

1 Detective Waddell.

2 (The Court examined a document.)

3 THE COURT: All right. Mr. Sheehy, you get  
4 the final word.

5 MS. LOWE: Your Honor, I only sat down because  
6 the Court was reading.

7 THE COURT: Oh, I apologize.

8 MS. LOWE: No -- I just had one more point.

9 Counsel references a search warrant, but  
10 Detective Bauer has in his own possession his own phone  
11 that is receiving these messages from the Defendant. So,  
12 he -- there's nothing for him to search. He has obtained  
13 them voluntarily through the Defendant,

14 So, that's the last point I wanted to make,  
15 Your Honor.

16 THE COURT: All right.

17 Mr. Sheehy, you get the final word on behalf  
18 of your client.

19 MR. SHEEHY: Well, as my brief points out,  
20 Your Honor, Virginia is far more restrictive than the  
21 federal laws.

22 And Detective Bauer is a member of the Fairfax  
23 County Police force. He goes to that office every day.

1 You know, there's no plan, there's no warrant, he knows  
2 what he's going to do. All of his fellow officers have  
3 shown him the transcript and told him, hey, this is a good  
4 site to go trolling. You know, why not take the time to  
5 just tell your boss, "I'm going to do this and get a  
6 warrant for it," and be safe about it.

7 Again, as was pointed out in this case, you  
8 know, maybe that's not such a good idea to know what's  
9 going to happen.

10 Now, as to the case, Your Honor, that came to  
11 the Supreme Court of Virginia, and cert was denied. I  
12 don't know what caused the case to be dismissed, but I  
13 suspect that it was resolved outside of the court once  
14 cert was denied on that case.

15 Now, the Szymuszkiewicz case, Your Honor, does  
16 make a very good point. This is being intercepted. My  
17 client is trying to help a boy who seems troubled. He is  
18 concerned, as a teacher, that he's been for over twenty  
19 years, for the suicidal tendencies. He's trying to help  
20 this boy. At one point he throws him off of Grindr.

21 He's trying to help this boy, he makes a  
22 mistake, and he's pounced upon by the officers, who are  
23 just lying in wait, just waiting -- but, then again,

1 without authority, without a plan, without a warrant.

2 The laws in Virginia are far more restrictive  
3 regarding this, as we've pointed out. And in this case,  
4 how easy would it have been for him to go to his boss and  
5 say, "Look, I'm going to go trolling on this site, I need  
6 authorization to do it, let me get a warrant"?

7 So, based on that, Your Honor, the last point  
8 I would make is that the telephone conversation between  
9 Detective Bauer, Detective Gaddell, Alex VA and my client  
10 occurred approximately on the 22nd, some eleven days into  
11 this investigation, which is why I think it's fruit of the  
12 poisonous tree.

13 But I want to point out that Alex VA is the  
14 person who my client is talking to, the persona. And a  
15 persona is not a person, it cannot give permission to  
16 record, and therefore we would ask that you suppress the  
17 evidence in this case, Your Honor.

18 Thank you.

19 THE COURT: Thank you.

20 (Pause)

21 The Court has considered the arguments on both  
22 sides. The motion to suppress the text messages between  
23 the Defendant and Detective Bauer is denied. A warrant is

1 not needed for a party to the communication, which the  
2 Court finds covers the text messages at issue.

3 The motion to suppress the phone call  
4 involving the Defendant, Detective Gaddell and Detective  
5 Bauer is denied. Regarding the phone call, it was made to  
6 Detective Bauer's phone. The Court finds that Detective  
7 Bauer was a party to the communication; namely, he was a  
8 listener on the call to his own telephone.

9 In the alternative, Detective Gaddell, whose  
10 voice is being used on the call, consented to Detective  
11 Bauer listening to the phone call. And the faithless  
12 friend doctrine allows Detective Bauer to record this call  
13 to his own phone without a warrant.

14 May I please have a blank order?

15 (Pause)

16 THE COURT: All right. This matter is  
17 concluded. Thank you both, Counselors.

18 MS. LOWE: Actually, Your Honor, while we're  
19 here, I noticed an issue in the indictment. I don't  
20 believe Counsel has an issue with me amending it at this  
21 time. If he does, I can put it on before the trial, but I  
22 don't believe it's a material change.

23 THE COURT: Okay.



1 (Mr. Sheehy and Ms. Lowe conferred, off the  
2 record.)

3 THE COURT: What's the issue?

4 MS. LOWE: Your Honor, I'd be asking -- and I  
5 can hand it up. But I would be asking to strike the word  
6 "minor," the last word in the indictment, and adding  
7 "child fifteen years of age or younger."

8 THE COURT: So change "soliciting a minor for  
9 activity" to "soliciting a child aged fifteen years or  
10 younger"?

11 MS. LOWE: Yes, Your Honor.

12 THE COURT: Any objection, Counsel?

13 MR. SHEEHY: Please just note our objection.  
14 We understand it will be granted.

15 THE COURT: Okay.

16 All right, over objection the motion to amend  
17 the indictment is granted. So, it will say, "The grand  
18 jurors of the Commonwealth of Virginia, in and for the  
19 body of the County of Fairfax and now attending the said  
20 court at its November term, 2018, charges that on or about  
21 the 23rd day of July, 2018, in the County of Fairfax,  
22 Norman Michael Achin, a person over the age of eighteen  
23 years of age, feloniously used a communication system or







1 other electronic means for the purpose of soliciting a  
2 minor for activity, in violation of 18.2-361 or 18.2-370,  
3 knowing or having reason to know that such person was a  
4 child fifteen years of age or younger."

5 Ms. Lowe, is that what you're asking for?

6 MS. LOWE: Yes, Your Honor, it's what I'm  
7 asking for.

8 THE COURT: Okay. All right.

9 MS. LOWE: Yes. Thank you.

10 THE COURT: All right. Over the objection of  
11 the Defense, the motion to amend is granted.

12 All right, anything else, Counselors?

13 MS. LOWE: No, Your Honor.

14 MR. SHEEHY: No, Your Honor. We would reserve  
15 the right to request a continuance in the event we deem  
16 one is necessary.

17 THE COURT: What's the trial date?

18 MR. SHEEHY: It's Tuesday.

19 MS. LOWE: That's fine. It's just officers.  
20 There's no civilian witnesses.

21 THE COURT: Okay, that's fine.

22 MS. LOWE: We can address that on Tuesday if  
23 we need to.

1 THE COURT: That's fine, all right. Thank  
2 you.

3 MS. LOWE: And may I ask for two copies of  
4 that?

5 THE COURT: And the order should indicate  
6 that the Defense has objected to the motion to amend the  
7 indictment. That way, if there's a (indistinct)  
8 continuance on Tuesday, there's not going to be any  
9 heartburn from the judge that this was --

10 And I ask both of you to initial it.

11 MS. LOWE: That's fine, Judge.

12 MR. SHEEHY: That's fine.

13 (Whereupon, Counsel complied with the  
14 request.)

15 THE COURT: Counsel, I'm writing on the order  
16 that the Commonwealth's motion to amend the indictment is  
17 granted over the objection of the Defense. I also put  
18 that the Defendant reserves the right to seek a  
19 continuance, if needed, due to the amendment. That way,  
20 whoever gets this won't be cross with anybody besides me.

21 \* \* \*

22 (Whereupon, at approximately 12:03 p.m., the  
23 hearing in the above-entitled matter was concluded.)

\* \* \* \* \*

## CERTIFICATE OF REPORTER

I, KATHLEEN M. ELIAS, a Certified Verbatim Reporter, do hereby certify that I took the stenographic notes of the foregoing proceedings which I thereafter reduced to typewriting; that the foregoing is a true record of said proceedings; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were held; and, further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of the action.



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Kathleen M. Elias, CVR  
Certified Verbatim Reporter

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2019 DEC 19 AM 9:14

V I R G I N I A

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

- - - - - X  
:  
COMMONWEALTH OF VIRGINIA, :  
:  
-VS- :  
:  
NORMAN MICHAEL ACHIN, : FE-2013-0001497  
:  
Defendant. :  
:  
- - - - - X

Circuit Courtroom 5F  
Fairfax County Courthouse  
Fairfax, Virginia

Monday, May 20, 2019

The above-entitled matter came on to be heard  
before the HONORABLE MICHAEL F. DEVINE, Judge, in and for  
the Circuit Court of Fairfax County, in the Courthouse,  
Fairfax, Virginia, beginning at 10:00 o'clock a.m.

APPEARANCES:

On Behalf of the Commonwealth:

ELENA GABRIELA LOWE, ESQUIRE  
Assistant Commonwealth's Attorney

On Behalf of the Defendant:

STEPHEN J. SHEEHY, III, ESQUIRE



1 Who's home?" I think I made reference to being in school  
2 -- high school I think I said.

3 And there was discussion on the phone when he  
4 asked Alex, you know, "You said 14," or he -- he  
5 references the age or a different age 14, 13.

6 Q And were you using any kind of specific  
7 language in these conversations?

8 A A lot of language that I used in text was the  
9 way that kids chat using like -- like abbreviations,  
10 misspellings, emojis and just kind of being I guess  
11 emotional maybe.

12 MS. LOWE: Your Honor, at this time the  
13 Commonwealth would move in the recorded phone calls,  
14 Commonwealth's 6.

15 THE COURT: Seven.

16 MS. LOWE: I think I tried to move it in  
17 earlier as six.

18 THE COURT: Oh, six --

19 MS. LOWE: And then --

20 THE COURT: -- was the same phone call --

21 MS. LOWE: -- the interview.

22 THE COURT: -- oh, it was the --

23 MS. LOWE: Yes, --

1 THE COURT: -- phone call, --

2 MS. LOWE: -- the phone call.

3 THE COURT: -- you're right. So moving -- six  
4 is the phone call. Any objection on the phone call?

5 MR. SHEEHY: Yes, Your Honor, I still think  
6 Detective Godell needs to authenticate that phone call as  
7 the one that he tape recorded. The witness has testified  
8 that he asked Detective Godell to set that up and to make  
9 the phone call.

10 THE COURT: Well, you -- well, I -- I'm going  
11 to -- were you present during the phone call?

12 THE WITNESS: Yes. So I used my recording --

13 THE COURT: All right. You answered my  
14 question. What's lacking? What's the -- what's the  
15 problem with the foundation on the phone call?

16 MR. SHEEHY: I just think that Godell who was  
17 handling and controlling everything has to verify that it  
18 is accurate. I think Godell is here, he can testify --

19 THE COURT: Well, --

20 MR. SHEEHY: -- to it.

21 THE COURT: -- there may be a million ways to  
22 skin a cat, it doesn't mean this way isn't good enough.

23 MR. SHEEHY: That -- that's fine, Judge.

1 THE COURT: So -- so there's -- I mean, this  
2 witness is present. Did I get a fair and accurate on  
3 that? I got a fair and accurate on the interview.

4 MS. LOWE: I believe -- I can clarify again  
5 but I believe he testified that he's reviewed the  
6 recording of the phone call and it fairly and accurately  
7 depicts the call.

8 THE COURT: Okay. I'm not sure I -- I grabbed  
9 that.

10 BY MS. LOWE:

11 Q Have you reviewed the recording since --

12 A Yes.

13 Q -- the undercover phone call?

14 A Yes.

15 Q And does it fairly and accurately contain the  
16 conversation that you heard?

17 A Yes.

18 THE COURT: All right. I think -- I think the  
19 foundation is laid.

20 MR. SHEEHY: But the only point being, Your  
21 Honor, is that Godell is the one listening. He's  
22 listening to it after the fact, listening to the  
23 recording. And Godell is telling him that's what he was

1 saying. And that --

2 THE COURT: That's not what I understood. I  
3 understood this gentleman was present during the phone  
4 call.

5 MR. SHEEHY: I don't -- I think the  
6 question --

7 THE COURT: Do you want to voir dire the  
8 witness?

9 MR. SHEEHY: The only question I would ask is  
10 whether he not he --

11 THE COURT: Well, ask it.

12 MR. SHEEHY: Were you able to hear Mr. Achin  
13 on the phone at the time of the recording?

14 THE WITNESS: At points where Detective Godell  
15 and I were together, yes. But there were like a few  
16 seconds where he did walk away or was uncomfortable.

17 MR. SHEEHY: All right. So you did not hear  
18 the entire conversation?

19 THE WITNESS: Not beginning to end, no.

20 MR. SHEEHY: Okay.

21 THE COURT: Not until I listened to the  
22 recording.

23 MR. SHEEHY: Okay. That would be my

1 objection, Your Honor.

2 MS. LOWE: I think he's testified that he  
3 recognized the Defendant's voice. And the Defendant  
4 admitted to the conversation when they spoke in person and  
5 that he was present and -- and recorded it.

6 THE COURT: All right. I'm going to overrule  
7 the objection and admit the exhibit. Commonwealth's 6 is  
8 admitted.

9 (The item referred to above was  
10 marked Commonwealth Exhibit No. 6  
11 for identification and received in  
12 evidence.)

13 MS. LOWE: Thank you, Your Honor. And I can  
14 hand up the envelope so the clerk can mark it.

15 THE COURT: All right. Are you going to play  
16 the phone call?

17 MS. LOWE: Yes, Your Honor. This is just  
18 audio.

19 THE COURT: So the reporter will not need to  
20 take down the phone call.

21 MS. LOWE: I would have brought a blank laptop  
22 but, obviously, none of ours works.

23 (Whereupon, an audio was played at this time.)

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2019 DEC 19 AM 9:14

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

- - - - -x

COMMONWEALTH OF VIRGINIA :

-vs- : FE-2018-0001497

NORMAN MICHAEL ACHIN, :

Defendant. :

- - - - -x

Courtroom 5F

Fairfax County Courthouse

Fairfax, Virginia

Tuesday, May 21, 2019

The above-entitled matter came on to be heard before the HONORABLE MICHAEL FRANCIS DEVINE, Judge, in and for the Circuit Court of Fairfax County, in the Courthouse, 4110 Chain Bridge Road, 5th Floor, Fairfax, Virginia, beginning at approximately 10:00 o'clock a.m. when there were present on behalf of the parties:

On Behalf of the Commonwealth:

ELENA GABRIELLA LOWE, ESQUIRE

ASSISTANT COMMONWEALTH ATTORNEY

On Behalf of the Defendant:

STEPHEN SHEEHY, ESQUIRE

1 MS. LOWE: No, Your Honor.

2 THE COURT: All right. Commonwealth rests.

3 How do you wish to proceed, Mr. Sheehy?

4 MR. SHEEHY: A motion to strike, Your Honor,  
5 please.

6 THE COURT: Let me hear your argument.

7 MR. SHEEHY: The offense that we have is an  
8 intent crime, and throughout the entirety of everything  
9 that we have seen, while we have had pictures sent --

10 MS. LOWE: I hate to interrupt. There's no  
11 rule as far as I'm aware.

12 THE COURT: I don't recall a rule necessarily.  
13 I generally tell witnesses not to discuss the testimony  
14 with people who are out there.

15 Is this what is going to be subject to recall  
16 perhaps?

17 MS. LOWE: It's possible.

18 THE COURT: You want him to remain outside?

19 MS. LOWE: I think it's probably for the best.

20 THE COURT: All right. Let me have you remain  
21 outside and on standby, sir. Don't discuss the case with  
22 anyone who was out there.

23 (The witness exited the courtroom.)

1 THE COURT: All right, go ahead. So you were  
2 saying it's an intent offense.

3 MR. SHEEHY: It is an intent offense, Your  
4 Honor. Throughout the entirety of these conversations,  
5 Detective Bauer was in control of this. He was  
6 approaching Mr. Achin when we had the initial conversation  
7 with the individual who was Zack, you know, he stated he  
8 didn't charge him for that crime, but that was there.

9 He spent five hours having a discussion with  
10 Zack going back and forth --

11 THE COURT: When you say he, you mean --

12 MR. SHEEHY: Bauer. Mr. Achin was having --

13 THE COURT: Mr. Achin.

14 MR. SHEEHY: -- was having the discussion with  
15 whom he thought was Zack. Detective Bauer never stopped  
16 him, never. And would have been right to say initially  
17 what the heck is going on.

18 There's no further evidence of any salacious  
19 content whatsoever until we get to Alex, who is a new  
20 profile a site. My client is seeking companionship on the  
21 site and he is dealing with several people which causes,  
22 you know, the errors in this thing, but he's also texting  
23 with the persona Alex VA by phone.



1           And you will see where he is explaining to him  
2           that he's trying to be a mentor, "What can I do to help?  
3           I'll talk to your aunt." All of which is rejected by him,  
4           and he is concerned for that.

5           Nowhere in here have they established a direct  
6           intent to send pictures to Alex VA. We have the pictures  
7           that are sent --

8           THE COURT: But the pictures weren't sent to  
9           Alex VA, it was sent to Alex.

10          MR. SHEEHY: It was sent to Alex.

11          THE COURT: Right.

12          MR. SHEEHY: Correct, who is --

13          THE COURT: So it seems to me your argument,  
14          if I'm understanding it, is there's no evidence that shows  
15          that Alex is the same person as Alex VA.

16          MR. SHEEHY: That is correct, Your Honor.

17          THE COURT: And therefore there would be --  
18          he's not knowingly communicating with someone who is 15  
19          years or younger.

20          MR. SHEEHY: Correct.

21          THE COURT: And he's not -- okay. That's the  
22          argument that you are making.

23          MR. SHEEHY: That is the argument that I'm

1 making.

2 THE COURT: Okay.

3 MR. SHEEHY: He's on an adult site believing  
4 that he's talking to an adult.

5 THE COURT: Right, he thinks Alex is an adult.

6 MR. SHEEHY: That is correct.

7 THE COURT: Even though he knew Alex VA was  
8 not, but this is Alex, somebody --

9 MR. SHEEHY: That's correct, but he never  
10 sent --

11 THE COURT: Different profile.

12 MR. SHEEHY: -- anything to Alex VA.

13 THE COURT: Right.

14 MR. SHEEHY: Follow that up with the  
15 conversation that is had in the two and a half hours that  
16 we listened to, and throughout that, Mr. Achin never  
17 wavered in his claim of innocence, in fact, spoke about  
18 his history, his concern for one, a child, and spoke about  
19 how he was endeavoring to assist this child. Was sort of  
20 lost because he wasn't involved in the format of the  
21 school system at the time, and his experience had  
22 demonstrated to him that the schools were not necessarily  
23 responsive. And that was his concern.

1 I'm almost tempted to bring up a defense of  
2 entrapment in this case.

3 THE COURT: I don't think you can do that on a  
4 motion to strike, can you?

5 MR. SHEEHY: Well, then I won't. Thank you,  
6 Your Honor.

7 THE COURT: All right. So it seems the  
8 question is where is it established that Alex, the Grinder  
9 persona Alex, is the same as Alex VA.

10 MS. LOWE: And, Your Honor, I would argue that  
11 it is a connection between the phone call that's made and  
12 reading all the messages together that --

13 THE COURT: But the phone call gets made well  
14 after the picture is sent, doesn't it?

15 MS. LOWE: No, Your Honor. It's --

16 THE COURT: What's the date of the phone call?

17 MS. LOWE: The phone call is on the 23rd.

18 THE COURT: And then what day is -- because  
19 this, the Alex doesn't have the date on it. So what's the  
20 date of that conversation that starts off? It just says  
21 Monday.

22 MS. LOWE: That is July 23rd. July 23rd is a  
23 Monday.

1 THE COURT: Same day.

2 MS. LOWE: Yes.

3 THE COURT: So the phone call is made at what  
4 time?

5 MS. LOWE: The phone call is at --  
6 Commonwealth's 3 is the call log. The phone call takes  
7 place at 2:12 and 2:18.

8 I would point the Court, in Commonwealth's 2,  
9 at the last page of the messages --

10 THE COURT: Let me get to Commonwealth's 2.  
11 Commonwealth's 2 is this one. [indicating]

12 MS. LOWE: The Grinder, yes.

13 THE COURT: Yes.

14 MS. LOWE: On page 22.

15 THE COURT: Page 22 which is the last message  
16 under Alex VA?

17 MS. LOWE: Correct. At this point Bauer said  
18 he did not -- he had been kicked off, he didn't have  
19 access to this account, but as we see it says Sunday this  
20 picture was sent. The phone call happens Monday, July  
21 23rd, and in that phone call, the defendant asked, "Did  
22 you see my picture?"

23 THE COURT: Okay. So we had the pictures sent

1 at looks like 6:38 on Sunday, that would have been to Alex  
2 VA through the Grinder app.

3 MS. LOWE: Correct.

4 THE COURT: And --

5 MS. LOWE: This whole time they've been  
6 texting on the same number about a phone call or a meeting  
7 or the other things. And the phone call finally takes  
8 place on that phone number.

9 THE COURT: All right. So if we look at the  
10 Commonwealth's Exhibit Number 4, which are the text  
11 messages, and we look at -- that would have been Sunday,  
12 the 22nd?

13 MS. LOWE: Yes.

14 THE COURT: And if we put these two together,  
15 then it should sort of make sense as far as --

16 MS. LOWE: Yes, and I'd encourage -- the text  
17 messages in Commonwealth's 4, what are extracted in  
18 Commonwealth's 1 --

19 THE COURT: Right.

20 MS. LOWE: -- and so there's more time stamps  
21 in this for some of the messages that aren't time stamped.

22 THE COURT: Okay. So if we're looking at  
23 Sunday around -- that would have been very early in the

1 morning on Sunday, 6:38 AM that picture looks like it was  
2 sent. So if the picture gets sent on Sunday, that's the  
3 21st?

4 MS. LOWE: 22nd.

5 THE COURT: No, Sunday's the --

6 MR. SHEEHY: Is the 20th.

7 THE COURT: 22nd. Well, let's get the date  
8 right.

9 MR. SHEEHY: 22nd.

10 THE COURT: Sunday is the 22nd?

11 MS. LOWE: Yes.

12 THE COURT: Because on the text messages, it  
13 appears that there is very little communication between  
14 Saturday at 3:11, there's a message out that says, "Hi,"  
15 Monday 9:42 there's a response, "Hey." So that means  
16 between Saturday at 3:11, Sunday at 6:38, the picture gets  
17 sent through the Grinder app to Alex VA.

18 MS. LOWE: Yes, right.

19 THE COURT: And then we pick up on Monday at 3  
20 o'clock is the next communication through the Grinder app.

21 MS. LOWE: Correct.

22 THE COURT: So then Monday at 10:49 there's  
23 more communications.