UNC SCHOOL OF GOVERNMENT

2022 Spring Public Defender Attorney & Investigator Conference ATTORNEY TRACK (May 11 & 13)

May 11-13, 2022 – Asheville, NC

ELECTRONIC CONFERENCE MATERIALS*

*This PDF file contains "bookmarks," which serve as a clickable table of contents that allows you to easily skip around and locate session documents within the larger file. A bookmark panel should automatically appear on the left-hand side of this screen. If it does not, click the icon—located on the left-hand side of the open PDF document—that looks like a dog-eared page with a ribbon hanging from the top.

UNC | SCHOOL OF GOVERNMENT

2022 Public Defender Spring Conference

May 11-13, 2022
Asheville, NC

Sponsored by the UNC-Chapel Hill School of Government,
North Carolina Office of Indigent Defense Services,
North Carolina Association of Public Defenders, &
North Carolina Association of Public Defender Investigators

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ATTORNEY AGENDA

(This conference offers 13.25 hours of CLE credit. All hours are general credit hours unless otherwise noted.)

WEDNESDAY, MAY 11

11:00 a.m.-12:20 p.m.	**Check-in**
12:20-12:30 p.m.	**Welcome**
12:30-1:30 p.m.	**IDS Update and PD Association Meeting** [60 min.] Mary Pollard, Director Susan Brooks, Defender Administrator North Carolina Indigent Defense Services, Durham, NC
1:30-2:30 p.m.	**Client Rapport with Challenging Clients** [60 min.] [*Ethics credit*] Tucker Charns, Regional Defender North Carolina Indigent Defense Services, Durham, NC
2:30-2:45 p.m.	*Break*
2:45-4:00 p.m.	**Criminal Case and Legislative Update** [75 min.] Phil Dixon, Teaching Assistant Professor UNC School of Government, Chapel Hill, NC
4:00-4:45 p.m.	**Self-Defense Update** [45 min.] Dan Shatz, Assistant Appellate Defender, Sterling Rozear, Assistant Appellate Defender, Office of the Appellate Defender, Durham, NC
4:45 p.m.	*Adjourn*
5:15 p.m.	**Optional Social Gathering** – *Details to be announced*

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THURSDAY, MAY 12

	MISDEMEANOR TRACK	FELONY TRACK
9:15-10:00 a.m. [45 min.]	**Pretrial Release Strategies and Update** Katie Corpening, Assistant Public Defender, New Hanover County Public Defender's Office, Wilmington, NC	**Getting DSS Records** Timothy Heinle, Civil Defender Educator UNC School of Government, Chapel Hill, NC
10:00-11:00 a.m. [60 min.]	**Pleadings Issues and Challenges for District Court** Catherine McCormick and Cynthia Hernandez, Assistant Public Defenders, Mecklenburg County Public Defender's Office, Charlotte, NC	**Defending Sexual Assaults** Lisa Dubs, Attorney Law Offices of Lisa Dubs, Hickory, NC
11:00-11:15 a.m.	*Break*	
11:15 a.m.-12:00 p.m. [45 min.]	**Introduction to TROSA** Jesse Battle, Senior Director of Community Partnerships, TROSA, Durham, NC	**Juvenile Transfers for Felony Defenders** Jacqui Greene, Assistant Professor of Public Law and Policy UNC School of Government, Chapel Hill, NC
12:00-1:15 p.m.	*Recess for Lunch*	
1:15-2:15 p.m. [60 min.]	**Search Warrants Tips and Tricks** Jordan Duhe Willetts, Attorney Duhe Willetts Law, Wilmington, NC	**Forensics Update** Sarah Olson, Forensic Resource Counsel North Carolina Indigent Defense Services, Durham NC
2:15-3:15 p.m. [60 min.]	**Litigating Stops and Frisks** Michele Goldman, Assistant Appellate Defender, Office of the Appellate Defender, Durham, NC	**Courtroom Monuments and Racial Justice** Elizabeth Hambourger, Staff Attorney and Public Information Liason Center for Death Penalty Litigation, Durham, NC
3:15-3:30 p.m.	*Break*	
3:30-4:15 p.m. [45 min.]	**Investigation Strategies** Laura Gibson, Assistant Public Defender, Beaufort County Public Defender's Office, Washington, NC	**Sex Offender and SBM Update** Jamie Markham, Professor of Public Policy UNC School of Government, Chapel Hill, NC
4:15-4:45 p.m. [30 min.]	**Expunction Update** John Rubin, Professor of Public Law and Government UNC School of Government, Chapel Hill, NC	**Update from the State Crime Lab** Vanessa Martinucci, Director North Carolina State Crime Lab, Raleigh, NC
4:45 p.m.	*Adjourn*	

FRIDAY, MAY 13

9:00-10:00 a.m.	**Challenging Digital Surveillance** [60 min.] [*Technology credit*] Larry Daniel, Technical Director – Digital Forensics Practice, Envista Forensics, Morrisville, NC
10:00-10:15 a.m.	*Break*
10:15-11:15 a.m.	**Racial Justice and Your Jury** [60 min.] Emily Coward, Policy Director The Decarceration Project, Durham, NC
11:15 a.m.-12:15 p.m.	**The Prosecution, the Defense, and Ethics** [60 min.] [*Ethics credit*] Noell Tin, Attorney Tin, Fulton, Walker, and Owen, LLC, Charlotte, NC
12:15-12:45 p.m.	**A View from the North Carolina Supreme Court** [30 min.] Justice Anita Earls, North Carolina Supreme Court Raleigh, NC
12:45 p.m.	*Adjourn*

CLE HOURS
General: Up to 10.25
Ethics: Up to 2.0
Technology: 1.0
Total CLE Hours: 13.25

Final CLE hours are subject to change in accordance with NC State Bar Approval

2021-22 OFFICE ACCOMPLISHMENTS

(The "By Judicial Order, Covid is Officially Over" edition)

SUCCESS FOR CLIENTS

Trial victories

Orange APDs **Natasha Adams** and **Carter Thompson** went to trial with a client who was accused of Athlete Agent Inducement that involved a professional football player testifying virtually from another state. The case resulted in a mistrial. Instead of a second trial, the client was offered and accepted a misdemeanor.

Greensboro APD **ShaKeta Berrie** was undefeated in three jury trials this year, including one in March where she was able to overcome a video of her client's allegedly committing the offense.

Robeson APD **Gayla Biggs'** client facing charges of AWDWIKISKI had issues with showing up for appointments, but they were finally able to hash out the details of the case, which involved the alleged victim's leg being blown off by the client's gun. In the middle of trial, the ADA offered Gayla's client a plea to misdemeanor assault inflicting serious injury with a PJC, no restitution, and no costs or fines. The client also got his gun back.

The **Cumberland APDs** have had a lot of success with trials this year. **Shawn McManus** had an AWDWISI trial, and his client was acquitted. **Kevona Bethune** had her first jury trial, a misdemeanor appeal, and won an acquittal. They were tried back to back, and the jury was out less than ten minutes on each. Additionally, **Robert Brooks** won a trial on directed verdict.

The ADA made an offer for Robeson APD **Matthew D'Amato's** client to plead guilty as charged to one felony breaking and entering and larceny after B&E for a suspended sentence and supervised probation. The client had been charged but not convicted of similar charges with very similar facts in neighboring counties, but he maintained his innocence and refused to add a first felony, with all its collateral consequences, to his record. Prior to trial, Matthew got several motions granted, including a motion to sequester the witnesses, a motion for joinder of all the charges, and a motion to prohibit the ADA and the court to let the jury know that he works for the PD office, lest the jury make the inference that the client would steal because he is poor. After the first witness was called, the ADA pulled Matthew aside and informed him that she was going to dismiss all the charges.

Matthew also had a client charged in two separate cases of second-degree kidnapping in one and simple assault and trespassing in the other, with different alleged victims. The client has a large family with many children, making it important that he not be incarcerated. In one case, Matthew found after investigation that the alleged victim had absconded from probation. Matthew quickly set the case for the PC hearing, for which the alleged victim did not appear, and the State dismissed the case. In the other case, the alleged victim, who is the mother of the client's children, stated that she did not want to testify but then changed her mind a week before trial because they had gotten into a fight about the children. However, she failed to appear for trial, and the judge was not willing to continue the case over the State's objection and request for a continuance. The case was

dismissed, and the client was able to go back to living with his children without criminal proceedings hanging over his head.

One of **Matthew's** clients was a young man in his early 20s. The client confessed to second-degree burglary and two counts of felony breaking and entering and larceny, but the client claimed to have only committed the crimes because he was trying to help his mother support the family. The offer was to plead guilty to the B&E with a suspended sentence and supervised probation. With the help of Sentencing Specialist **Janna Williams**, Matthew was able to present the ADA with a mitigation report, and upon renegotiation the client was offered deferred prosecution with restitution and community service. Matthew notes that the client called recently to report that the restitution has been paid and the community service completed, and he is looking forward to having all the charges dismissed.

High Point APD **John Davis** represented a client on charges of PWISD heroin, trafficking in heroin, and maintaining a dwelling. The client had let his cousin live with him. The client's probation officer conducted a scheduled residence search and found over 100g of heroin. A third party told the PD office that the drugs were his and that the client did not know about them. The third part subsequently died, and the State had not interviewed him despite John's providing the statement to them. John was successful at a motion hearing in getting his client's in-custody interrogation statements and in having the third party's statement ruled admissible under a hearsay exception. He also won on a motion *in limine* to exclude the specifics of the client's probation. At trial, the jury was split 9-3 for several hours before receiving the *Allen* instruction and then ultimately finding the client not guilty of trafficking but guilty of PWISD and maintaining a dwelling. The client was sentenced to 4-14 months suspended and 18 months supervised probation.

High Point APD **Rip Fiser** got a good result in a case involving charges of assault on a female, assault by strangulation, false imprisonment, and second-degree forcible sex offense. The alleged victim had come to the client's first appearance and recanted her version of the facts. She continued to maintain that the facts reported by police were incorrect and communicated with Rip because she could get no one in the DA's office to talk with her. When the DA victim/witness coordinator finally called to speak with her, she was told that she had to testify and that her minor children would be subpoenaed to court. This infuriated the alleged victim, who continued to stand by her recantation of the events. On the day of trial, the client and alleged victim came to court together. The ADA finally decided to speak with the alleged victim and called for an evidentiary hearing before calling the case for trial. At the hearing, the ADA essentially berated the alleged victim on the witness stand. The ADA then decided to dismiss all charges against the client, and the client and the alleged victim left as they had come – together.

Second District APD **Matt Geoffrion** tried a first-degree murder in Pitt County with facts that suggested the decedent was ambushed. After a week-long trial, the jury was deadlocked either 6-6 or 9-3 (in favor of acquittal), depending on who was asked. Matt is currently in negotiations to resolve this case in a much more favorable outcome, with the next court date scheduled in June.

Greensboro APD **Johnna Herron** tried the first pandemic jury trial in Guilford County. The client insisted on going forward on self-defense even though the undisputed fact was that client stabbed the guy in the back. Johnna managed to pry a probationary sentence from one of the resident judges who has gone on record as being opposed to probation in any case, particularly assault cases.

Greensboro APD **Josh Landreth** won his first jury trial and managed to get the elected DA to back down on a denial of a PC hearing in a probation case.

Robeson APD **Jack Moody**, who handles most of the office's DWI cases, has had a significant number of DWIs dismissed, as well as achieving some not guilty verdicts
First District APD **Christan Routten** represented a client charged with second-degree forcible rape and second-degree forcible sex offense. The client was extremely difficult to work with and offered little true assistance with the case. On top of that, there was 404(b) evidence that he had previously engaged in similar conduct in another state. Christan held the State's feet to the fire regarding the discovery and was able to keep certain witnesses from being qualified as experts in pre-trial motions. During trial, it was discovered that a witness for the State had not provided all of her notes. Ultimately, because of the pressure Christan was putting on the DA's Office, the State offered her client a plea to second-degree kidnapping and assault on a female, which was consolidated for one judgment, with the client walking out of jail.

With the assistance of a Campbell Law School 3L, High Point APD **Kate Shimansky** got a dismissal at the close of evidence in a felony larceny and obtaining property by false pretense trial. Kate's client testified in his own behalf that he had pawned the jewelry with permission.

Kate also scored a win in district court on a DWI case. The client had fled from a traffic stop and bailed from the car. During processing, the arresting officer asked the client questions about impairment but did no FSTs. The court suppressed the questions and found insufficient evidence of impairment, evidently believing the client's testimony that he ran because of outstanding warrants, delivering a not guilty verdict.

Extolling New Hanover APD **Tracy Wilkinson**, PD Jennifer Harjo explained that Tracy often acts as jury trial assistant. In one case, Tracy "forced" Jennifer to take over his cases, including a B&E caught on video with the perp wearing a distinctive "ITS BEEN REAL" T-shirt. Naturally, the client was wearing this exact distinctive shirt when he was arrested a few hours after the crime. The client was indicted for habitual B&E and habitual felon, meaning he had a lot to lose. He arrived late to court late on most days, riding a rickety old bike, and slept as much as possible, in court, during the trial, and finally quit showing up during deliberations. Throughout the somewhat lengthy trial (long mostly because Jennifer seemed to be hell bent on getting "admonished" by the judge every hour), Tracy fed the client by getting him lunch and taking him to Golden Corral for dinner so he could stay alert and sober, made him get vaccinated while he was getting Covid tested during trial and after trial, Tracy even gave him a new set of bike wheels. During trial, Tracy fed the client caffeinated drinks and gum, constantly nudged him, and wrote him love notes such as "stay the F—— awake." With Tracy's interpersonal client skills and perceptive investigation about an innocuous missing video frame, Jennifer was able to obtain an acquittal — frustrating the ADA so much as to cause her to dismiss other unrelated offenses. Says Jennifer, "Gracias Tracy."

High Point APD **Juan Zuluaga** continued his success this year in a carrying a concealed firearm district court trial. Juan spoke to the officer prior to trial, and at trial the officer testified to something different. After Juan confronted the officer with the contradiction, the court dismissed the case at the close of the State's evidence.

On the same date as the above, **Juan** had a total of six cases dismissed after the court denied the State's motions to continue. The court found that the prosecuting witness had committed malicious prosecution and ordered that she be taken into custody and held until she paid court costs. Juan approached the bench and told the court that the PW had told the responding police that she had initiated the bad conduct and did not want Juan's client charged, but the officer pushed for her to file charges, so the court released her. As Michael Troutman reported, the PW and the client left the courtroom together, and love prevailed.

Juan got his motion for dismissal granted at the close of the State's evidence in a district court trial involving charges of assault on a female, assault on a child, injury to personal property, and interfering with emergency communication.

Appellate victories

Commending what **OAD attorneys and staff** are doing, AD Glenn Gerding spotlighted three victories his office accomplished in one day on June 16, 2021, noting that "Having three on the same day really shows how involved OAD is in client-centered and cutting-edge litigation."

- First, according to her client's wishes, AAD **Amanda Zimmer** filed a MAR in the NC Supreme Court for a client on death row who had been waiting for a decade while his RJA case was stayed. The Supreme Court remanded for an evidentiary hearing, and the State and defense ultimately entered a consent MAR vacating the judgment and death sentence, and the client pled guilty to second degree murder, rape, and robbery via a WebEx hearing including his trial counsel in Mecklenburg County court and Amanda with the client in prison, and the client was released from prison that night. Unfortunately, the client has since died, but it should be considered a victory for him not to have died in prison.
- Next, AAD **Anne Gomez** filed a pre-trial certiorari petition in a capital case set for trial, challenging the presiding judge's order that trial counsel turn over recordings of witness interviews for an *in camera* review for the possibility of releasing the recordings to the State in discovery. The judge had refused to stay his order or appoint OAD. Nonetheless, Anne filed a motion for a stay, which the Supreme Court granted. Glenn advises, "OAD doesn't file these interlocutory PWCs often but when we do, counsel have to drop everything and get up to speed on a case, gather transcripts and pleadings, work with trial counsel, and prepare arguments for why this can't just wait until direct appeal. Bravo to Anne for doing all of that quickly and skillfully. Unfortunately, the court did not grant the petition, but as Glenn says, "this was a good effort."
- Not to be outdone, AAD **Jim Grant** filed his new brief in *State v. Waterfield* at the Supreme Court, challenging the lack of *mens rea* in administrative regulatory offenses – crab pot and gill net violations in this case. Glenn comments, "It isn't every day that we get a chance to argue against the "administrative state" and to argue in favor of our General Assembly. Or to cite the hunting and fishing provision of our State constitution! Or to get amicus support from the Pacific Legal Foundation!" Glenn recommends reading both Jim's brief and the PLF's amicus brief. (In another, though less happy, coincidence, Jim's client died the same day that Jim argued his case at the Supreme Court, so there will be no opinion in this case.)

Assistant Parent Defender **Lee Gilliam** got a win in In the Matter of S.F.D. The Court of Appeals held that the trial court failed to set out a specific and measurable case plan against which DSS's

reasonable efforts and Mother's progress towards reunification could be measured and remanded the case for reentry of a new order with such a plan.

AAD **Anne Gomez** convinced the Court of Appeals to vacate the judgment and remand for resentencing in *State v. Turner* on the grounds that lack of documentation of the client's prior convictions impeded his right to appeal his sentence.

In *In re J.A.D.*, a juvenile delinquency case involving extortion for cookies and homework in lieu of publicizing revealing photos of a middle-schooler, AAD **Jillian Katz** persuaded the Court of Appeals to vacate the adjudication orders due to the trial court's failure to include the burden of proof in its written adjudication order as required by N.C. Gen. Stat. § 7B-2411 and also failed to make sufficient findings of fact showing that it considered each of the five factors listed in N.C. Gen. Stat. § 7B-2501(c).

AAD **Hannah Love** earned a dissent in *State v. Julius*, involving a warrantless vehicle search. (Hey, sometimes dissents evolve into majority opinions!)

AAD **Sterling Rozear's** work in *State v. Crew* resulted in the Court of Appeals' ruling that it was unconstitutional for the trial court to convert $70,000 in restitution to civil judgments for dogfighting, felony cruelty to animals, misdemeanor cruelty to animals, and restraining dogs convictions.

Sterling also convinced the Court to issue a favorable opinion on self-defense in *State v. McLymore*, although the Court ultimately held the error was not prejudicial. (Also important in *McLymore* is a discussion about the specificity requirement in Rule 10 related to preserving issues for appeal [see paragraphs 16-18].)

The Court of Appeals vacated an involuntary commitment order at **Sterling's** behest in In the Matter of T.S. The court ruled that the trial court erred by involuntarily committing T.S. where the trial court's findings of fact – including screaming, cussing, yelling, refusing to take a COVID-19 test while there was an outbreak on the unit, threatening to sue her psychiatrist, or refusing to take medication – did not establish that she was dangerous to others.

In *State v Sheffield*, the Court of Appeals was persuaded by AAD **Amanda Zimmer** to vacate automatic lifetime SBM that was mistakenly imposed for an ineligible offense.

Amanda also scored a big win in *State v. Davenport*, where the Court of Appeals ordered a new trial on first degree murder and held that the trial court erred in failing to grant a motion to dismiss for robbery with a dangerous weapon. The court found that there was insufficient evidence for the RWDW and that the cumulative effect of improperly admitted evidence regarding the client's prior incarceration and his gang involvement and tattoos amounted to plain error.

Good outcomes

Upon request, Orange APD **Brett Berne** jumped into service quickly to get Orange County charges dismissed for a client so that she could get into the treatment ordered as part of her probationary sentence in Lee County.

Robeson APD **Tatiana Connor** represented a client with a long history of drug possession, larceny, and prostitution on a charge of felony possession of cocaine. After multiple jail visits involving heart-to-heart conversations, Tatiana convinced the client to go into inpatient rehab. Tatiana worried that the client would leave rehab, but the client stuck it out and successfully completed TROSA's two-year program, obtaining a degree in medical billing and coding. The client's criminal charges have been dismissed, and she has moved to the beach and is reportedly doing very well.

Thanks to ACD **Jason Crump's** excellent handling of a *Batson* challenge, the Court of Appeals remanded *State v. William Anthony Brown* on the grounds that the trial court failed to make specific findings of fact regarding the third step of the *Batson* analysis. For more info, read the opinion and a *Winston-Salem Journal* article about the case.

Robeson PD **Ronald Foxworth**, joined by Investigator **Matthew Locklear** and Sentencing Specialist **Janna Williams**, represented a client charged with first-degree murder. Their client was 19 years old and the decedent was the client's supposed friend, mentor, father figure, and employer who turned out to be a longtime sexual predator of young boys. The decedent showered his victims, who were mostly young boys who had no fathers or very poor parental relationships, with friendship, money, gifts, and affection. The client was very well liked and respected in school and, while an average student, was never in trouble. He excelled in ROTC and looked forward to a military career. With the help of his team, Ronald was able to negotiate an open plea to involuntary manslaughter with extraordinary mitigation, and the client received a split sentence and probation. As Ronald puts it, "This was a very satisfying result for a good kid who was himself a victim."

Orange APD **Dana Graves** in the same week successfully argued two motions to suppress based on ID, and both of the clients' cases were dismissed.

In what has been described as a hard case with brutal, graphic pictures, and strong victim emotions, First District APD **Jay Hollingsworth** was part of a team that successfully achieved an LWOP sentence for a client accused of stealing guns from his mother, being caught in the act by her boyfriend, fighting with him, stabbing the boyfriend 83 times, and shooting him in the groin area post mortem. Upon fleeing to Virginia, the client got into a standoff with the Chesapeake Police, trying to commit suicide by cop. The team kept in touch with the client and let him know what they were doing, and when they told the client he needed to plead to LWOP, the client trusted them and accepted the plea.

Chatham APD **Tamzin Kennett** negotiated a plea of guilty to a Class G non-registerable felony and probation for client charged with a B1 sex offense felony where there were witnesses and the potential sentence was 144 months active minimum.

Robeson APD **Troy Peters** represented a client on failure to register charges. The client's brother had moved him to North Carolina from Florida, the site of the original conviction and failure to register, and the client was homeless after being in jail for four months. Troy got the client's bond unsecured, and the client's brother moved him to another county where he also failed to register. The client lost contact with the PD office for a year. After the client was arrested and prosecuted in the adjacent county, he was returned to Robeson County. The client was declared incapable to proceed after a third forensic evaluation, and the brother was replaced as the client's custodian by

DSS. DSS fought this in multiple hearings while the client remained in jail. After being informed by AOC legal counsel that AOC would pursue an order to compel them to follow the superior court order, DSS found a placement for the client in the Outer Banks area, where his probation case was also transferred, resulting in a dismissal of both counts of failure to register in Robeson County.

The team comprising ACD **Robert Singagliese**, OCD Investigator **Richard McGough**, attorney Amos Tyndall, and others succeeded in deadlocking the jury and getting a mistrial in a declared death case, leading the DA to take death off the table for the retrial.

First District APD **Jenny Wells** represented a client charged with DWI and DWLR while on probation for two prior DWIs. The client clearly had an alcohol problem that was enhanced by the loss of her husband in the bed next to her. She lost her job as an EMT and had four children. This charge was going to be an A1 conviction, with all the conditions that come with that. With much convincing, the client entered rehab where she stayed to a successful completion, and three days after completing the rehab, client had a beer and promptly checked herself back into rehab the next day. After a total of 16 months in the program and completely turning her life around, the client entered a plea to the A1 DWI. At sentencing, Jenny and her client put on such a compelling case that the courtroom was in tears, including the Judge. The judge sentenced the client to supervised probation, gave her credit for the rehab against the active portion of the sentence, and unsupervised the probation she was already on for the other two DWIs. As First District PD Tommy Routten puts it, this is a "true success story that became reality through Jenny's hard work in the face of an extremely difficult case."

Greensboro APD **Richard Wells** has continued his unbelievable work in assisting clients – both assigned and as a friend of the court – with getting off the sex offender registry.

New Hanover PD Jennifer Harjo sang the praises of AA **Kimberly Whitehouse** for her mitigation work. Jennifer wrote: "I want you to know how much my office benefits from the work of Kimberly Whitehouse. She is employed as our Administrative Assistant, but in reality, she is working as our mitigation specialist – a position every office should have, including mine. I credit Kimberly with a great many of our favorable dispositions. Today, her work resulted in convincing a client to accept a plea to 2nd degree murder to a case I would have tried with a result of life in prison."

Going the extra mile/fighting the good fight

Hoke APD **Jim Hedgpeth**, 16A/B Sentencing Specialist **Janna Williams**, and co-counsel Ken Ransom had to literally fight for their client's life after the client insisted on pleading guilty to first-degree murder. Although the jury returned two death sentences, Jim, Janna, and Ken did their best in presenting the jury with reasons for life. Scotland/Hoke PD Jonathan McInnis relates, "They excelled in their representation, along with Ken Ransom and the experts, through the plea and the subsequent sentencing hearing."

AAD **Hannah Love** earned a dissent in State v. Julius, involving a warrantless vehicle search. (Hey, sometimes dissents evolve into majority opinions!)

During the month of July 2021, High Point APD **Juan Zuluaga** disposed of 52 district court cases via a combination of plea, trial, and dismissals.

COLLABORATION

Continuing the trend, several **APDs** came to the rescue of their colleagues in other areas by responding to requests on the APD listserv. Thanks to all who helped out as well as those who reached out!

AAD **Hannah Love** and Forsyth PD **Paul James** joined forces to free a client originally convicted of first-degree statutory sex offense and indecent liberties in 1997 in Forsyth County. The client's MAR had been denied, and he was resentenced without the assistance of counsel after an improper initial sentencing. Hannah contacted the DA and convinced the DA that this was a violation of the client's constitutional and statutory rights to counsel. The DA agreed to a consent MAR to vacate the trial court's resentencing and to vacate the trial court's denial of the MAR on the other claims because the client had been denied counsel at the evidentiary hearing. Hannah worked with Paul, who was appointed to represent the client, to file an amended MAR. They convinced the DA to let the client replead to second-degree sex offense, which meant that upon resentencing he was released on time served – or, as AD Glenn Gerding proclaimed, "She walked her client out of prison without even filing an appeal!"

Wake PD **Deonté Thomas** and APD **Alexis Strombotne**, along with Katelin Ray and Jonathan Broun, finally got the Wake County District Attorney to declare Kendrick Gregory's case non-capital, after more than five years. The client suffered from severe mental illness and had been found incompetent numerous times by doctors at Central Regional. Says CDPL Director Gretchen Engel, "The team worked relentlessly to obtain medical and mental health records and shared the product of their labors in a powerful motion to prohibit the death penalty based on mental illness." https://nccadp.org/wake-county-wanted-the-death-penalty-for-a-man-with-severe-mental-illness-only-a-pandemic-stopped-it/

The New Hanover team of APD **Bud Woodrum** and LA **Jamie Karaszewski** have kept cases rolling and Superior Court on its toes. During the Covid crisis, Bud managed organization of the lawyers and staff while Jamie kept her group of LAs prepared.

SERVICE TO THE COMMUNITY

New Hanover APD **Jason Minnicozzi** is running for Congress.
https://www.wect.com/2021/07/07/assistant-public-defender-launches-congressional-campaign-nc-07/

Jason

Wake PD **Deonté Thomas** was interviewed by Spectrum News about his work, related to the occasion of the first former public defender's being confirmed for the US Supreme Court.
https://spectrumlocalnews.com/nc/triangle-sandhills/news/2022/04/08/ketanji-brown-jackson-becomes-first-public-defender-to-serve-on-supreme-court?cid=id-app15_m-share_s-web_cmp-app_launch_august2020_c-producer_posts_po-organic

IMPROVING THE SYSTEM

OJD Communications Manager **LaTobia Avent**, AJD **Burcu Hensley**, and JD **Eric Zogry** were featured on the AOC's All Things Judicial podcast, speaking about Raise the Age.

In the First District, APDs **Brandon Belcher** and **Blake Drewry** handle the juvenile and DSS representation for the office over the seven counties of the First District and occasionally have to take cases in the Second District. The judges often turn to them to educate everyone (including other judges) on how a case should proceed through the system, especially with the more technical points of transfer hearings and Raise the Age issues. They are also heavily involved in the training of new attorneys in the area trying to become qualified to be placed on the court appointed lists.

Gaston APD **Jesse Caldwell** was appointed to fill in the superior court judge's seat vacated by his father and former PD, Jesse B. Caldwell, III.
https://www.wfae.org/local-news/2021-06-25/judge-caldwell-tradition-continues-as-son-succeeds-father-on-gaston-bench

The Honorable Father and Son

Second District APDs **Galo Centenera** and **Stacie Everette** have represented the office in Recovery Court, which has seen its first successful "graduates." PD Tommy Routten relates, "The office has been involved since the idea of a Recovery Court for the district was conceived. It has been a huge time commitment for Galo and Stacie, especially with the heavy court loads they have, but they have been able to be a part of the successes the program can have."

Lydia Hoza was appointed to be the first PD in the new District 27B (Cleveland & Lincoln Counties) PD Office. Welcome aboard, Lydia!
https://www.nccourts.gov/news/tag/press-release/first-chief-public-defender-appointed-for-cleveland-and-lincoln-counties

Lydia being sworn in

Pitt PD **Bert Kemp** was named to the Chief Justice's Task Force on ACE-Informed Courts. The purpose of the Task Force is to enable Judicial Branch stakeholders to understand the impact on children of exposure to ACEs (adverse childhood experiences; adverse community environments) and to develop strategies for addressing adverse consequences within our court system.

Bert

Forsyth PD **Paul James** (as well as IDS Executive Director Mary Pollard) was quoted in a *Lawyer's Weekly* piece about the need for proper funding of the indigent defense system to address workloads and backlogs.

Several **Mecklenburg APDs** organized and participated in this year's Expungement Clinic, despite the challenge of having to do much of the work virtually.

Mecklenburg APD **Anthony Monaghan** once again put on several free webinars for CLE credit, including Challenging No Bond Holds under 15A-533; Overview of a Forensic Autopsy; Laboratory Files and Discovery Material Needed to Evaluate DNA and Serology Evidence; Plea Bargaining and Prosecutorial Power; Cell Location Evidence for Legal Professionals; One Client, Many Lawyers: Ethical and Practical Approaches to Successive and Concurrent Representation; Civil and Criminal Competency in North Carolina; and Age and the Death Penalty. Additionally, several Mecklenburg APDs presented at CLEs locally or through UNC SOG programs.

Greensboro APD **Erin Neely** stepped up and organized her own expungement program, assisting hundreds of people in cleaning up their records.

Special Counsel (and former Durham APD) **Chad Perry** was appointed by the IDS Commission to be the new Chief Special Counsel upon the retirement of the first and, to that point, only Chief Special Counsel **Dolly Whiteside**.
https://juno.nccourts.org/news/chad-perry-appointed-chief-special-counsel-office-indigent-defense-services

Chad

Cumberland APD **Adam Phillips** was appointed to the district court bench.

Judge Adam

From Robeson AA **Kim Taylor** about the office staff: Many defendants are directed to the office by the clerk of court staff and other courthouse offices. The PD staff hear many unkind words about receiving the runaround from others and just listen, though that can be hard with having to sit through the cussing in person and on the telephone. The staff let them vent and it seems to calm them down. Kim believes that they are just so frustrated with the process that they want someone to listen to them and to help them. Kim says that if she must listen to a few rants and tantrums, it is worth it to let them know that there are people who truly want to help, and most of them apologize by the end of the encounters and thank the staff for their help. Some even ask how they do it. Kim relates that the staff assists them with recalls, extensions to pay, court dates, attorney information, directions to different facilities, and more. She says that if other offices would take the time to listen to people instead of shuffling them off to the PD office, the other office staff "would have the unique pleasure of feeling good that someone's day was made a little easier and lighter because of their assistance."

In addition to her work as liaison to the Guilford Indigent Appointment Committee, Greensboro APD **Alex Snow** organized the first appearance volunteer program in Greensboro so that an attorney is present at each first appearance. Nearly every APD in the two Guilford County offices volunteered time to be at first appearance.

Wake PD **Deonté Thomas** was one of several Wake judicial officials who discussed six changes that could reduce bias and the number of people in jail.
https://www.newsobserver.com/news/local/crime/article259978765.html

Deonté

Civil commitment guru and Mecklenburg APD **Bob Ward** was interviewed by *NC Policy Watch* about the problems posed by the NC Court of Appeals' decisions not to require legal representation for the state or petitioners in commitment proceedings occurring outside of state hospitals.
https://ncpolicywatch.com/2021/07/23/nc-court-of-appeals-issues-controversial-rulings-on-involuntary-commitment-process/

Bob

OFFICE SPACE AND OTHER CALAMITY SURVIVAL

First and Second District PD Tommy Routten noted that his entire office deserves praise for how they handled court during the highs and lows of Covid. Second District supervisor **Laura Gibson** was and still is on various committees relating to court operations in the five counties of the

District, and the Second District currently does not have a backlog of criminal cases coming out of the pandemic.

Buncombe PD **Sam Snead** was quoted in an article about the continuing battle against Covid in the Buncombe County courthouse.
https://www.citizen-times.com/story/news/2021/08/24/buncombe-county-courthouse-covid-delta-variant-spread-policy-protocols/8249976002/

SPECIAL RECOGNITION

Longtime High Point AA **Cora Billups** retired after 50 years of incredible, dedicated service. More on Cora and her service can be found here: https://www.nccourts.gov/news/tag/general-news/guilford-county-public-defenders-office-administrative-professional-celebrates-50-year-milestone.

Drifter served as PD for the Day in June in the Pitt office. Reportedly, he ran the office at least as well as the regular chief PD and wagged his tail much more.

Drifter

Cumberland APD **Janelle Headen** passed the Criminal Law Specialty exam. The Cumberland office contains four of the six criminal law board-certified specialists in the county in **Shawn McManus**, **Robert Brooks**, and **Carl Ivarsson**.

Likewise, New Hanover APD **Lyana Hunter** became a certified parent/juvenile attorney specialist.

Several Mecklenburg APDs moved into supervisory roles. Specifically, **Charlena Harvell** was named First Assistant Public Defender; **Eddie Thomas, Jr.** was named head of the Violent Crime

Defense Team; **Elizabeth Gerber** was named head of the Habitual Felon Defense Team; and **Jessica DeLuccia** was named head of Felony Crime Defense Team.

Ten members of the **Mecklenburg PD Office** welcomed new babies into their homes in the past year!

Guilford PD John Nieman says that Greensboro APD **Katie Sanders** has stepped up and taken control of the office website as well as "continuing her role as minister of swag, organizing t-shirts and sweatshirts for the office."

Cumberland APD **Nathan Warfel** was selected by the *Fayetteville (NC) Observer* to be a member of their "40 under 40" Class of 2021.
https://www.fayobserver.com/story/lifestyle/2021/06/09/fayetteville-observer-40-under-40-public-defender-nathan-warfel-cumberland-county/4995033001

Nate

MISCELLANOUS

The **Durham office** celebrated Public Defense Day this year, many in their snazzy Durham PD T-shirts.

The Durham crew

New Hanover APD **Miles Duncan** was seen sporting his New Hanover PD shirt on Public Defense Day.

Miles

. . . And then with Jessica Chastain in costume as Tammy Wynette.

Jessica Chastain standing by Miles and Jennifer Harjo

The **New Hanover PD and Capital Defender office**s posed together on a beautiful sunny day by the Cape Fear River.

New Hanover PDO and OCD and mascots

. . . AND A SPECIAL WORD OF THANKS

Durham APD **Shannon Tucker** hit the nail on the head when she wrote:

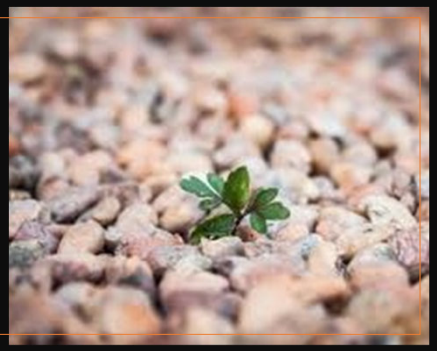
> Personally, I think we all deserve recognition for coming to court, continuing to work in-person, continuing to visit our clients in the jail, and often being the only attorneys in the entire courthouse for the past 2 years.
>
> It has been very difficult to continue doing our jobs with the ADAs all working from home, not responding to calls or emails, our clients not getting court dates, repeatedly showing up to handle probable cause hearings only to find your case had been continued for 2 months without notice, dealing with clients who are deservedly angry and frustrated at 2 years of delays in their lab reports, court dates and jury trials, and putting your health at risk by being unvaccinated and visiting clients who are not wearing masks in jails where there were repeated reports of Covid clusters.
>
> I would like to give a piece of the crown to **Richard Wells**, for telling me where I could go ASAP to get my first COVID vaccine, so that I, and my family, felt safer about my going to work every day.

Added Guilford PD **John Nieman**, "Every member of both [Guilford] offices persevered throughout the pandemic to keep the office open and clients served. Their commitment and dedication to the work was something that shall never be forgotten." And Scotland/Hoke PD **Jonathan McInnis** said about his offices, "The offices -- each and every person – has performed superbly as always with zealous representation of our clients."

IDS likewise recognizes and thanks you for putting yourself on the lines for your clients in the fight to achieve a truly fair and just system. You are all essential, and you are all greatly appreciated.

Client Trust: How to Win It & What to Do When It Falls Apart

D. Tucker Charns
Chief Regional Defender
Office of Indigent Defense Services



1

2

3

4

5

JAMA Original Investigation

Medical Education

November 30, 2018

Prevalence of and Factors Associated With Patient Nondisclosure of Medically Relevant Information to Clinicians

Andrea Gurmankin Levy, PhD, MBe[1]; Aaron M. Scherer, PhD[2]; Brian J. Zikmund-Fisher, PhD[3]; et al
Knoll Larkin, MPH[4]; Geoffrey D. Barnes, MD, MSc[5]; Angela Fagerlin, PhD[6]

6

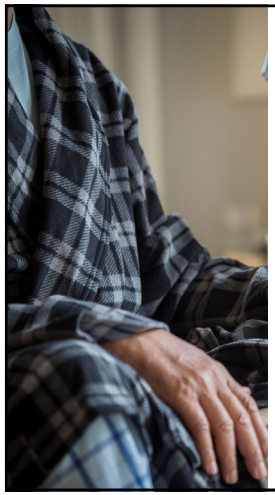
Patients lie to their doctors.

7

81% of patients said they had lied to their doctors about exercise, diet, medication and stress reduction.

50% reported they did not speak up about not understanding the doctor.

8



Why lie to someone trying to help you?

9

Fear of shame.
Fear of judgment.

10

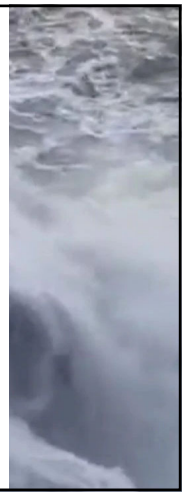
Why do clients lie to lawyers?

11

Fear of shame.
Fear of judgment.

12

Fear we are not on their side.



13

Fear we won't work hard for them if they tell us everything.

14

15

Trust.

16

Our own experiences.

17

The experiences of our clients.

18

Trust.

19

Ethics Based Client Centered Advocacy

Recognizing that an attorney is ethically bound to use any and all legal means necessary to get the best possible outcome for the fully informed client.

20

Thoroughness and preparation.

Communication.

Loyalty to the client.

Advocate for client's interest.

21

N.C. State Bar:

22

Rule 1.1 Competence

. . . Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

23

Rule 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

24

Rule 1.4 Communication

Consult/explain:

- Informed consent
- Case status
- Requests for information
- Attorney limitations
- What the client needs to make an informed decision about their choices

25

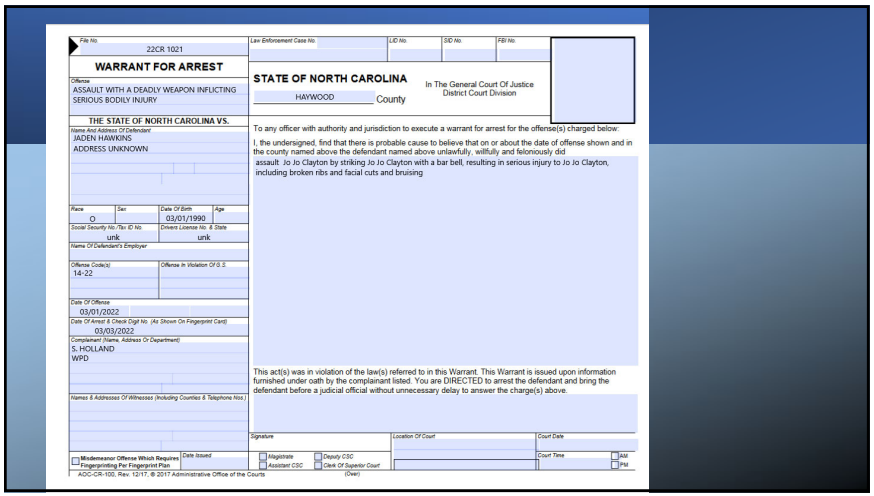
Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information acquired during the professional relationship with a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

26

We know that!

27



File No. 22CR 1021

WARRANT FOR ARREST

Offense: ASSAULT WITH A DEADLY WEAPON INFLICTING SERIOUS BODILY INJURY

THE STATE OF NORTH CAROLINA VS.

Name And Address Of Defendant: JADEN HAWKINS, ADDRESS UNKNOWN

Race: O | Sex | Date Of Birth: 03/01/1990 | Age

Social Security No.-Tax ID No.: unk | Drivers License No. & State: unk

Name Of Defendant's Employer

Offense Code(s): 14-22 | Offense In Violation Of G.S.

Date Of Offense: 03/01/2022

Date Of Arrest & Check Digit No. (As Shown On Fingerprint Card): 03/03/2022

Complainant (Name, Address Or Department): S. HOLLAND, WPD

Names & Addresses Of Witnesses (Including Counties & Telephone Nos.)

Misdemeanor Offense Which Requires Fingerprinting Per Fingerprint Plan | Date Issued

AOC-CR-100, Rev. 12/17, © 2017 Administrative Office of the Courts

Law Enforcement Case No. | LID No. | SID No. | FBI No.

STATE OF NORTH CAROLINA HAYWOOD County

In The General Court Of Justice District Court Division

To any officer with authority and jurisdiction to execute a warrant for arrest for the offense(s) charged below:

I, the undersigned, find that there is probable cause to believe that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did assault Jo Jo Clayton by striking Jo Jo Clayton with a bar bell, resulting in serious injury to Jo Jo Clayton, including broken ribs and facial cuts and bruising

This act(s) was in violation of the law(s) referred to in this Warrant. This Warrant is issued upon information furnished under oath by the complainant listed. You are DIRECTED to arrest the defendant and bring the defendant before a judicial official without unnecessary delay to answer the charge(s) above.

Signature | Location Of Court | Court Date

Magistrate | Deputy CSC | Assistant CSC | Clerk Of Superior Court | (Over)

Court Time: AM | PM

28

29

When we think we know the story, we don't hear the story.

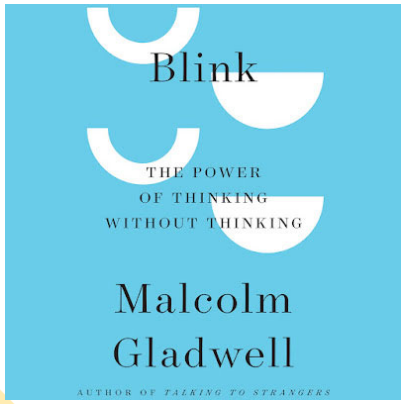
30

Trust.

31

Prepare for the meeting.

32



33

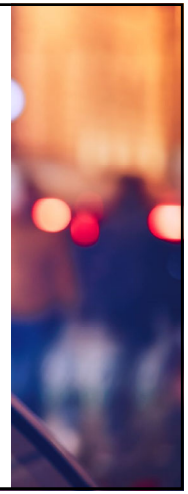
"(First) judgments are, first of all, enormously quick: they rely on the thinnest slices of experience…they are also unconscious."

34

Prepare for the meeting.

35

What our client has seen.



36

What our client has lost.

37

Trust.

38

Check the warrant for conflicts.

Check the warrant for defects.

39

Know the elements and defenses to the charges.

40

Know the next court date.

41

Meet the client as soon as possible after the event.

42

Communication.

43

In the interview, the attorney talks first.

44

Confidentiality.

45

Explain the elements.
Explain the defenses.
Explain the process and what happens next.

46

What they should expect.

47

What they should really expect.

48

?

If you ask questions about the event, be mindful of how you ask the questions.

49

Words are our tools.

50

Instead of:

"Where did they find the drugs?"

51

Try:

"Where will the officer say she found the drugs?"

52

Instead of:

"What did you tell the police?"

53

Try:

"What will they say you said?"

54

Keep the communication door open.

55

Instead of:

"So, you admit that…."

56

Try:

"Let's talk about…."

57

Instead of:

"Your record will kill you."

58

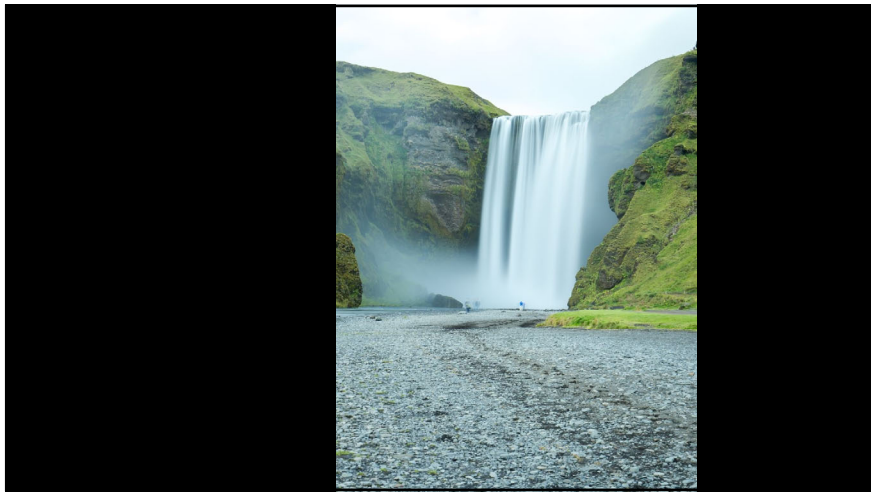
Try:

"Let's think about what the jury/judge would think about a that…"

59

Keep the communication glass full.

60



61

Loyalty to the client

62

63

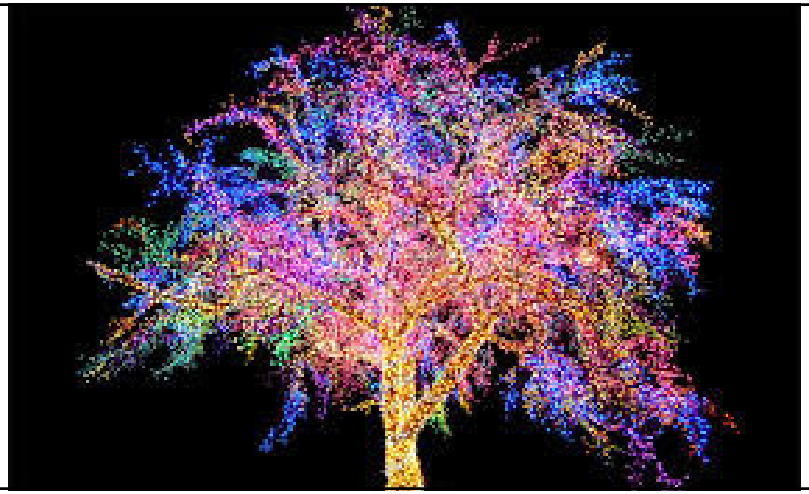
64

In court…..

65

NO CLIENT

66



67

I do not have any information that I am able to provide.

68

69

70

Advocate for the Client's Interest

71

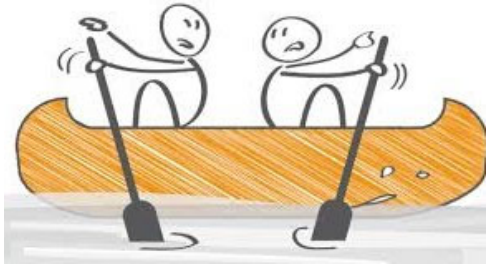
Rule 1.2 Scope of Representation and Allocation of Authority between Client and Lawyer

(a) Subject to paragraphs (c) and (d), a **lawyer shall abide by a client's decisions concerning the objectives of representation and,** as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.

72

(1) A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

73



Conflict about the case.

74

What do you do with a client who won't do what is best?

75

The fully informed client's expressed outcome controls.

76

Plea or trial.

77

Bond hearing.

78

Trial strategy.

79

"[W]hen counsel and a fully informed criminal defendant reach an absolute impasse as to such tactical decisions, the client's wishes must control…in accord with the principal-agent nature of the attorney-client relationship."

State v. Ali
329 N.C. 394 (1991)

80

81

"I told my lawyer, 'man, you work for me.
Object. Object.
This ain't right.'"

82

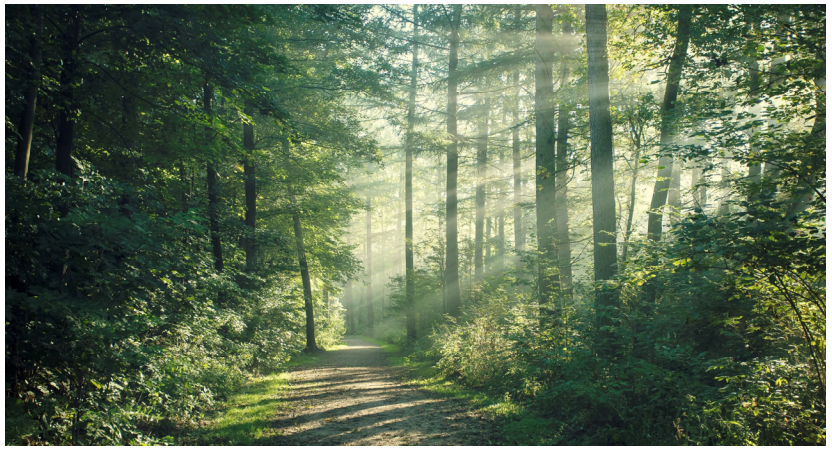
83

Batson v. Kentucky, 476 U.S. 79 (1985)

84

Simeon v. Hardin,
339 N.C. 358 (1994)

85



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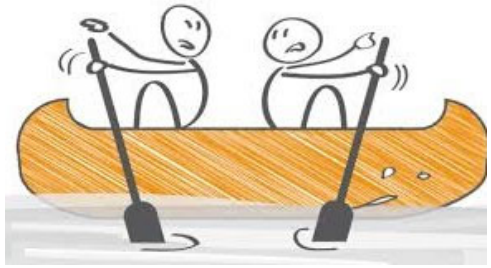


That moment.

87

You work for the State.
You are not fighting for me.
Others get better pleas.
You are selling me out to the DA.

88

Oh, fuck.

89

90

You need to get from
“Oh, fuck”
to
“OK”.

91

Recognize the “oh, fuck”.

92

93

Don’t get hijacked.

94

Get to okay.

95

At okay, turn to the client.

96

Recognize that the client's rational brain has been hijacked by the reptile brain.

97

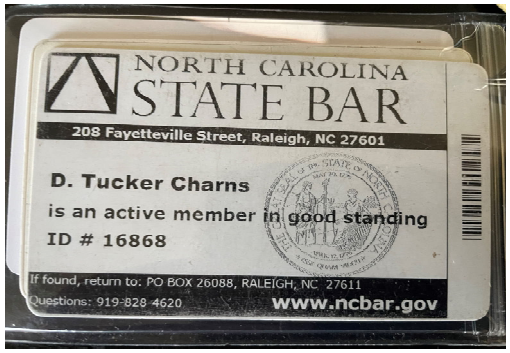
98

Don't make it worse.

99

Don't interrupt.
Don't correct.
Don't argue.

100



101

Anything else you want to tell me?

102

103

Anything else you want to tell me?

104

Respond, don't react.

105

Your goal right now is not to solve the problem/s in the rant but to stop talking AT each other.

106

Getting some yes answers.

107

I bet you think no one understands how trapped you feel right now.

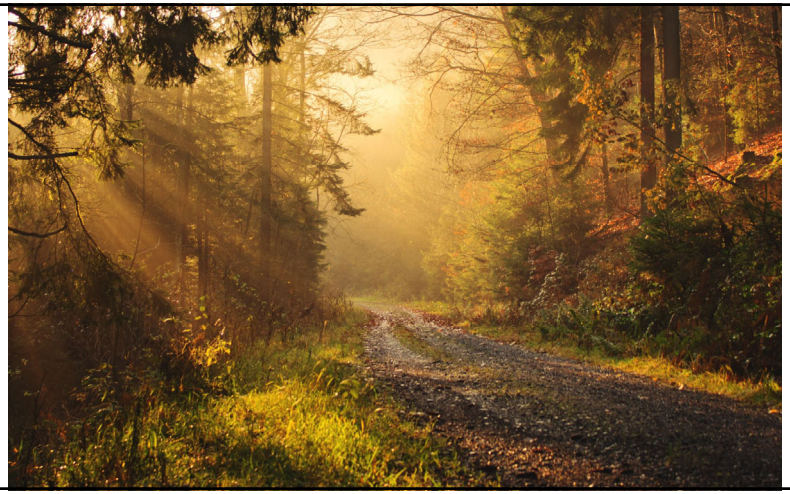
108

I guess you think I'm against you sometimes because when you say A, I say Z.

109

You've been thinking on this for a while, yes?

110



111

Three steps to re-building trust.

112

1. Start with with seeing the client's perspective.

113

Every living thing wants to be seen.

114

115

Seeing someone means understanding their perspective.

116

You have to ask.

117

Guess the emotion.
Cite the facts for that.
Ask the question.

118

Wow. You seem very cross. What happened between now and the last time we talked?

119

You seem to be saying that you are worried I am out to get you. What makes you say that?

120

You are saying that I'm making you take a plea. We have talked about that being your call. What else is going on here?

121

2. Seeing the client's view of the facts the case.

122

What are you seeing that I am not seeting?

123

How hard do you really believe that?

124

How would a jury handle that?

125

3. Seeing the client's view of the law of the case.

126

127

128

129

You work for the State..

130

Other plea offers.

131

Family.

132

What CCA is not.

133

What CCA requires.

134

The heart of a warrior.

135

"We are all broken by something. We have all hurt someone and have been hurt. We all share the condition of brokenness even if our brokenness is not equivalent."

- Bryan Stevenson

136

137

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138

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UNC School of Government©

2022 Annual Spring Public Defender Conference
Criminal Law Update
May 11, 2022
Renaissance Hotel, Asheville, NC

Cases covered include published criminal and related decisions from the U.S. Supreme Court, the Fourth Circuit Court of Appeals, and North Carolina appellate courts decided between May 4 and October 5, 2021. Summaries are prepared by School of Government faculty and staff. To view all of the case summaries, go the Criminal Case Compendium. To obtain summaries automatically by email, sign up for the Criminal Law Listserv. Summaries are also posted on the North Carolina Criminal Law Blog.

Warrantless Stops and Seizures

(1) In the absence of a plea arrangement, a defendant is not required to give notice of his intent to appeal to pursue right to appeal denial of motion to suppress; (2) Officer did not have reasonable suspicion to stop the car in which the defendant was traveling based on its transporter license plate, and officer's mistake of law regarding license plate was not objectively reasonable.

State v. Jonas, ___ N.C. App. ___; 867 S.E.2d 563; 2021-NCCOA-660 (Dec. 7, 2021). In this Cabarrus County case, the defendant was convicted of possession of a Schedule II controlled substance based on 0.1 grams of methamphetamine found in a backpack in the trunk of a vehicle in which the defendant was a passenger. The defendant moved to suppress the evidence on the basis that it was seized in connection with a traffic stop that was not supported by reasonable suspicion. The trial court denied the motion. Defendant pled guilty, without a plea arrangement with the State, and appealed.

(1) G.S. 15-979(b) provides that an order finally denying a motion to suppress may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty. The North Carolina Supreme Court held in *State v. Reynolds*, 298 N.C. 380 (1979), that when a defendant intends to appeal from the denial of a motion to suppress pursuant to G.S. 15A-979(b), the defendant must give notice of that intention to the prosecutor and the court before plea negotiations are finalized. Absent such notice, the right to appeal is waived. The Court of Appeals held that the *Reynolds* notice requirement did not apply in the instant case because the defendant did not plead guilty as part of a plea arrangement. Thus, the defendant had a statutory right to appeal without having provided notice to the State and the trial court before entering his guilty plea.

(2) The officer who stopped the car in which the defendant was traveling testified that he stopped the car because it emerged from the empty parking lot of a closed business, a trailer had recently been stolen in that area, and the car was equipped with transporter plate, which the officer had never seen placed on a vehicle other than a truck. The Court of Appeals noted that, despite the officer's belief to the contrary, G.S. 20-79.2 "clear[ly] and unambiguous[ly]" permits transporter plates to be used on motor vehicles generally, not just trucks. Though the Fourth Amendment tolerates objectively reasonable mistakes, the Court concluded that the officer's mistake about the transporter plates was not objectively reasonable because the statute was not ambiguous. Thus, the officer's belief regarding

the transporter plates could not support reasonable suspicion. The Court determined that the additional facts that the business was closed and there was a recent trailer theft in the area were insufficient to support reasonable suspicion. Accordingly, the Court held that the trial court erred in denying the defendant's motion to suppress. It reversed the trial court's order and remanded the case to the trial court for entry of an order vacating the defendant's guilty plea.

Reasonable suspicion of trespassing, impaired driving, and illegal parking supported stop of defendant parked in high school parking lot during school hours, even without presence of crossbow in backseat; crossbow alternatively provided reasonable suspicion and any mistake of law as to the legality of the weapon on school property was reasonable

U.S. v. Coleman, 18 F.4th 131 (Nov. 9, 2021). A school official in the Western District of Virginia noticed a man parked in the high school's parking lot one morning as the school day began. The man appeared to be asleep in his car and had a crossbow in the backseat. The car was running, had its brakes on, and was parked partially in a lane of travel. The school resource officer responded. As the deputy pulled behind the defendant's car, the defendant began to drive away. The deputy then stopped the car. He saw the crossbow upon making contact and asked the defendant about other weapons. The defendant acknowledged a gun in the car, and the deputy asked him out of the car. As the defendant exited, the deputy noticed apparent marijuana inside. The defendant appeared tired and submitted to field sobriety testing. The car was searched and a gun, baggies, a scale, and methamphetamine was discovered. The defendant was charged with various federal drug and gun offenses and moved to suppress, arguing that the stop was unjustified because possession of a crossbow on school grounds is not illegal in Virginia. The district court denied the motion, finding that the deputy had reasonable suspicion to stop the vehicle based on the corroborated report from the school official about a sleeping man on school grounds with a weapon and the defendant's driving away upon the deputy's approach. It further found that any mistake by the deputy about the legality of the crossbow on school grounds was an objectively reasonable mistake of law under *Heien v. N.C.*, 574 U.S. 54 (2014). The defendant was convicted at trial and sentenced to 211 months.

On appeal, a unanimous panel of the Fourth Circuit affirmed. Even without the crossbow, the deputy had reasonable suspicion to stop the defendant's car for suspicion of trespassing on school grounds, impaired driving, and illegal parking. In the alternative, the court found that the crossbow provided reasonable suspicion by itself or in combination with other factors. The deputy was not required to ignore the presence of a strange man with a weapon on school grounds, whether or not the crossbow was legal to possess. "Here, as in *Terry*, the underlying behavior does not have to be illegal for us to conclude that Deputy Johnson had reasonable suspicion to stop Coleman." *Id*. at 15. The district court's denial of the motion to suppress was therefore affirmed.

Though none of the circumstances alone would satisfy constitutional requirements, together they provided officers with reasonable suspicion to stop the defendant

State v. Royster, ___ N.C. App. ___; 867 S.E.2d 204; 2021-NCCOA-595 (Nov. 2, 2021). In this Forsyth County case, the defendant was charged with possession of a firearm by a felon, several drug crimes including trafficking opium or heroin by possession, possession of a weapon on school property, and attaining the status of habitual felon after an investigatory stop on school grounds stemming from an anonymous tip. The police received a detailed anonymous report saying that a black male named Joseph Royster who went by the nickname "Gooney" had heroin and a gun in the armrest of his black Chevrolet Impala with a specific license plate number, that he was wearing a white t-shirt and blue jeans, had gold

teeth and a gold necklace, and that he was parked near South Fork Elementary School. An experienced officer who received the tip searched a police database that showed a person by that name as a black male with gold teeth and a history of drug and weapon charges. Officers went to the named elementary school, saw a vehicle with the specified license plate number matching the description in the tip in the parking lot, and eventually saw a person matching the description in the tip return to the vehicle. When that person quickly exited the vehicle, reached back into it and turned it off, began to walk away from officers and reached for his waistband, officers frisked him for weapons and detained him for a narcotics investigation. The defendant moved to suppress, arguing that officers did not have reasonable articulable suspicion for the stop. The trial court denied the motion and the defendant pled guilty.

On appeal of the denial of the motion to suppress, the defendant argued that the anonymous call did not demonstrate sufficient reliability. The Court of Appeals noted that the anonymous call itself merely provided identifying information, and there was nothing inherent in the tip itself that would give officers reasonable suspicion to make the stop. The Court rejected the State's argument, based on *Navarette v. California*, 572 U.S. 393 (2014), that the caller's use of a phone to make the tip sufficiently bolstered its reliability, because there was no evidence as to whether the caller used 911 or a non-emergency number or otherwise preserved her anonymity. The Court was likewise unpersuaded that the caller's use of the defendant's nickname showed a level of familiarity with the defendant that made the call sufficiently reliable in its assertion of illegality. Thus, the anonymous call itself was insufficient to provide officers with reasonable articulable suspicion.

Looking at the totality of the circumstances, however, the Court concluded that officers did have reasonable articulable suspicion. The defendant's actions in exiting the vehicle, reaching back into it, walking away from officers, and reaching for his waistband demonstrated evasive behavior that went beyond merely walking away from officers and supported a finding of reasonable suspicion for the stop. Additionally, the caller's allegation that the defendant was in possession of a firearm, coupled with his presence on school grounds and his prior criminal record obtained through the police database gave officers reasonable suspicion that he was in possession of a firearm, and that he was thus violating the criminal statute prohibiting the possession of a firearm on school property. As a result, the stop was deemed proper, and the Court concluded that the trial court did not err in denying the defendant's motion to suppress.

(1) Stop was not unreasonably extended where officer had not yet determined whether to charge the defendant; (2) Consent was freely and voluntarily given

State v. Jordan, ___ N.C. App. ___; 2022-NCCOA-214 (April 5, 2022). Law enforcement in Guilford County received information that the defendant was selling drugs from his girlfriend's apartment. They conducted a controlled buy at the location with the help of an informant, who identified the defendant as the seller. Police were later surveilling the home and saw the defendant leave with his girlfriend in her car. The car was stopped for speeding 12 mph over the limit. The stopping officer saw the defendant reach for the center console and smelled a strong odor of marijuana upon approach. The officer removed the occupants from the car and searched it, leading to the discovery of marijuana. During the search, an officer contacted the drug investigators about the possibility of notifying the defendant of the wider drug investigation. This took approximately five to seven minutes. The on-scene officers then informed the pair of the ongoing drug investigation of the defendant and sought consent to search the apartment, which the girlfriend gave. A gun and cocaine were discovered there, and the defendant was charged with firearm by felon and possession of cocaine. He moved to suppress, arguing that the traffic stop was unreasonably extended and that any consent was invalid. The trial court denied the motion,

and the defendant entered a guilty plea, preserving his right to appeal the denial of the motion. On appeal, the Court of Appeal unanimously affirmed.

(1) The defendant argued since the police never acted on the speeding or marijuana offenses discovered during the traffic stop, the mission of the stop was complete, and the officer deviated from the mission of the stop by delving into an unrelated drug investigation and seeking consent to search the apartment. The court disagreed:

> [A]t the time Officer Fisher asked for consent to search the Apartment, there is no evidence to suggest Officer Fisher had already made a determination to refrain from charging Defendant for the traffic violation or marijuana possession. Instead, the Record seems to indicate that at the time of Officer Fisher's request for consent to search the Apartment, the stop had not been 'otherwise-completed' as he had not yet made a decision on whether to charge Defendant for the marijuana possession." *Jordan* Slip op. at 9-10.

The act of asking for consent to search the apartment therefore occurred during the lawful course of the stop. Further, officers had reasonable suspicion that the defendant was selling drugs, justifying extension of the stop even if the original mission of the stop was complete at the time of the request for consent. Given the tip, the controlled purchase, law enforcement surveillance of the residence (which included observing a high volume of guests visiting the home), law enforcement likely had probable cause to arrest the defendant or obtain a warrant to search the apartment. "Consequently, the officer was justified in extending the seizure to question Defendant about the sale of heroin and crack-cocaine even though it was unrelated to the traffic violation." *Id*. at 12.

(2) Officers had informed the pair that police would seek a search warrant, or that they could consent to a search of the apartment. The defendant argued that this was improper coercion and that any consent was therefore involuntary and invalid. The court disagreed. The defendant and his girlfriend were informed of the right to refuse consent, the girlfriend signed a written consent form, and neither person objected or attempted to revoke consent during the search. Further, the officers did not use any threats or other "inherently coercive tactics" in obtaining consent. Thus, the trial court properly determined that consent was freely and voluntarily given. The trial court's judgment was consequently affirmed.

Exigent circumstances supported warrantless acquisition of cell phone location and call log data

U.S. v. Hobbs, 24 F.4th 965 (Feb. 1, 2022). In this case from the District of Maryland, the defendant broke into his ex-girlfriend's home, threatened her with a firearm, and took a television. He also threatened to kill the woman, her child, other family members, and any police officers who may be alerted. When the victim reported the incident to law enforcement, she recounted that the defendant was "obsessed" with guns and had possessed assault rifles in the past. She was aware of the defendant's violent criminal history, which included robbery and attempted murder convictions. She also provided the defendant's cell phone number. A detective submitted an "exigent form" to a cell phone provider seeking to locate the defendant by way of pinging the phone and to access the phone's call log. The form noted that the defendant was suspected of threatening the victim with a gun and that he had stated that he would not surrender peacefully. Police were able to locate the defendant with the information from the cell phone company and eventually arrested him, finding a loaded firearm in his vehicle. He was charged with felon in possession and moved to suppress the cell phone evidence. The

district court denied the motion, finding that officers had exigent circumstances. On appeal, a unanimous panel of the Fourth Circuit agreed.

The defendant was suspected of serious offenses, including firearms offenses, and swore to kill any responding law enforcement officers, in addition to the threats to the victim and her family. Police found the victim credible and corroborated the damage to the victim's home. Coupled with the defendant's criminal history, there was an imminent threat of harm to the victim, her family, and to law enforcement. Additionally, the data obtained was limited to location and call logs and could be produced by the cell phone company in an hour. The same company was known to typically require days to comply with a search warrant. This was sufficient exigent circumstances, and the search was therefore reasonable under the Fourth Amendment. According to the court:

> [W]e agree with the district court's observation that even a brief delay in apprehending Hobbs placed many individuals at significant risk of harm. We therefore conclude that the district court did not clearly err in finding that 'the only way to get help from T-Mobile' in a timely fashion was by submitting an 'exigent form.' *Hobbs* Slip op. at 10 (citation omitted).

Another challenge to the verdict was similarly rejected, and the district court affirmed in full.

Search Warrants

(1) The defendant had standing to contest the search of a building where he was a late-night occupant and exercised apparent control of the door and a safe within; (2) Potential loss of car keys tied to stolen car was not exigent circumstance justifying warrantless entry and drugs discovered inside the building likewise could not support warrantless entry; (3) Purported consent was invalid as the product of an illegal warrantless entry and was not sufficiently attenuated from the illegal police actions; (4) Search warrant for safe based on sight of drugs inside the home did not establish probable cause

State v. Jordan, ___ N.C. App. ___; 2022-NCCOA-215 (April 5, 2022); *temp. stay allowed*, ___ N.C. ___; ___ S.E.2d ___ (April 21, 2022). Charlotte-Mecklenburg police received a report of a stolen car and information about its possible location. Officers went to the location, which was part residence and part commercial establishment. A car matching the description of the stolen vehicle was in the back parking lot. As police watched, a man came out of the building and approached the car as if to enter it. He noticed the unmarked police car and immediately returned to the building, alerting the occupants to the presence of police. Police pulled into the driveway intending to detain the man. The defendant opened the door of the building from inside and the man who had approached the stolen car went inside, although the door was left open. An officer approached and asked the man to come out and speak with police before immediately stepping into the building through the open door. That officer noticed a safe next to the defendant and saw the defendant close the safe, lock it, and place the key in his pocket. More officers arrived on scene and noticed drug paraphernalia in plain view. Officers swept the house and discovered a gun in a bedroom. At this point, officers established that a man inside either owned or leased the building and requested his consent to search. The man initially refused but assented when officers threatened to place everyone in handcuffs and to obtain a search warrant. The defendant informed officers that anything they found in the home was not his and that he did not live there. He denied owning the safe, but a woman who was present at the time later informed officers that the safe

belonged to the defendant. Officers obtained a search warrant for the safe and discovered money, drugs, paraphernalia, and a gun inside. The defendant was subsequently charged with trafficking, firearm by felon, habitual felon, and other offenses. He moved to suppress. The trial court denied the motion, apparently on the basis that the defendant lacked standing (although because no written order was entered, the findings and conclusions of the trial court were not easily determined). The defendant was convicted at trial of the underlying offenses and pled guilty to having obtained habitual felon status. The trial court imposed a minimum term of 225 months in consecutive judgments. On appeal, a unanimous panel of the Court of Appeals reversed.

(1) The defendant had a reasonable expectation of privacy in the building. He opened the door when it was knocked and was one of only four people inside the home at a late hour. The defendant further had apparent permission to keep the safe inside and clearly had an interest in it as the person with its key and the ability to exclude others. While the defendant did not own or lease the property, this was not enough to defeat his expectation of privacy. The defendant also disclaimed ownership of the safe to police, and the State argued that this amounted to abandonment, defeating any privacy interest in the safe. The court disagreed, noting that the defendant only made that remark after the police illegally entered the home and that abandonment does not apply in such a situation. In its words:

> [W]hen an individual 'discards property as the product of some illegal police activity, he will not be held to have voluntarily abandoned the property or to have necessarily lost his reasonable expectation of privacy with respect to it[.]' *Jordan* Slip op. at 14 (citation omitted).

Thus, the defendant had standing to challenge the police entry and search.

(2) The trial court determined that officers had reasonable suspicion to speak with the man who was seen approaching the stolen car. However, this did not justify warrantless entry into the home. The State argued that the entry was supported by exigent circumstances, in that the keys to the stolen car and the drug paraphernalia seen inside the building could have been easily destroyed. However, there was no evidence that the first officer who approached the home saw any drug paraphernalia at the time and the officer therefore could not have had a legitimate concern about its destruction. There was likewise no explanation from the State regarding the need for immediate warrantless entry to preserve the car keys evidence. Because officers had already seen the man approach the car with the keys and because possession of a stolen car may be established by constructive possession, there was no immediate need to obtain the car keys. Further, there was no immediate risk of destruction of evidence where the occupants of the home left the door open, and an officer entered the home within "moments" of arrival. Exigent circumstances therefore did not support the warrantless entry.

(3) The State also argued that the person with a property interest in the building gave valid consent, and that this consent removed any taint of the initial illegal entry. Illegally obtained evidence may be admissible where the link between the illegal police activity and the discovery of evidence is sufficiently attenuated. *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975). Here, the taint of the illegal entry had not dissipated. Officers obtained consent soon after entering the home, no intervening circumstances arose between the entry and the obtaining of consent, and officers purposefully and flagrantly entered the building without a warrant or probable cause. Any consent was therefore tainted by the initial police illegality and could not justify the search.

(4) Although police did ultimately obtain a search warrant for the safe, the information contained in the search warrant application was based on information obtained by police after they were inside the building. There was no evidence that officers saw any drugs prior to entry, so any evidence obtained as a result was the fruit of the poisonous tree. Without the drugs evidence, the stolen car in the parking lot, the man walking up to the stolen car, and his abrupt return from the car to the building did not supply probable cause to search the building or safe. According to the court:

> Because the affidavit supporting the issuance of the search warrant, stripped of the facts obtained by the officers' unlawful entry into the residence, does not give rise to probable cause to search the residence for the evidence of drugs and drug paraphernalia described in the warrant, 'the warrant and the search conducted under it were illegal and the evidence obtained from them was fruit of the poisonous tree.' *Id*. at 24.

The denial of the motion to suppress was therefore reversed and the case was remanded for any further proceedings.

Standing

The defendant did not have standing to challenge the placement of a GPS tracking device on a vehicle he did not own or possess

State v. Lane, ___ N.C. App. ___; 866 S.E.2d 912; 2021-NCCOA-593 (Nov. 2, 2021). In this Wake County case, evidence of the defendant's crimes was obtained using a GPS tracking device installed, pursuant to a court order, on a car owned by Sherry Harris and driven by Ronald Lee Evans. Evans was the target of the investigation. When officers intercepted the vehicle as it returned from a trip to New York, the defendant was driving, and Evans was a passenger. The defendant ultimately pled guilty to attempted trafficking and trafficking heroin by transportation and preserved his right to appeal the denial of his motion to suppress the GPS evidence.

The Court of Appeals concluded that the defendant did not have standing to challenge use of the GPS device. Under the common law trespass theory of a search, a search happens when government agents intrude into a constitutionally protected area to obtain information. Here, the defendant offered no evidence that he possessed the car to which the GPS device was attached such that any trespass by the government violated his rights as opposed to the rights of the owner (Harris) or usual driver (Evans). Likewise, under a reasonable expectation of privacy theory, the defendant could not show that he had a reasonable expectation of privacy in his movements in someone else's car on a public thoroughfare. To the contrary, the Court said, "[f]or the Defendant, the [car] was a vehicle for a trip to conduct a heroin transaction. Defendant did not have a reasonable expectation of privacy to confer standing to challenge the court order issue on probable cause." Slip op. ¶ 30.

Recent occupant of car did not have standing to challenge search or stop when he was not actually present at the time and otherwise had no possessory or other interest in the property

U.S. v. Smith, 21 F.4th 122 (Dec. 17, 2021). Greensboro police were surveilling a nightclub and saw the defendant leave in a car with a known felon around 2 am. The defendant was sitting in the front passenger seat of car, which police followed from the nightclub to a gas station. Officers believed the car had a fake license plate, but it was later determined that an officer misread the license plate number. At

the gas station, the defendant exited the car with the driver and was inside the convenience store when police arrived. The backseat passenger was in the parking lot at the time and was detained at gunpoint by law enforcement. Officers shined a light inside the car the men had been travelling in and immediately saw a gun on the floorboard of the front passenger area. Another officer soon noticed a second gun. Two other officers approached the two men inside the store and informed the defendant he was being detained for fictitious tags. The defendant immediately stated that the car did not belong to him. During the encounter inside the store, the officers did not know that guns had been discovered in the car by other officers outside. A full search of the car lead to the discovery of heroin on the front passenger side of the car, where the defendant had been sitting, along with the defendant's cell phone. When the defendant was informed that he was being charged with trafficking heroin, he protested that the drugs did not weigh more than 3.5 grams and were therefore under the state trafficking amount of 4.0 grams. The drugs in fact weighed 3.3 grams. The defendant was charged with various federal drug and gun offenses and moved to suppress. The trial court denied the motion, and the Fourth Circuit affirmed.

It is the defendant's burden to demonstrate a reasonable expectation of privacy in property in order for Fourth Amendment protections to apply. Here, the defendant neither owned nor claimed any other interest in the car searched by the police. "[I]f a passenger asserts neither a property or possessory interest in the car and simultaneously disclaims any interest in the seized objects, that passenger normally has no legitimate expectation of privacy." *Smith* Slip op. at 6-7 (citation omitted). The presence of the defendant's cell phone in the car was another factor to be considered but was insufficient on its own to confer an expectation of privacy in the car, particularly in light of the fact that the defendant left it in the car when he went inside the store. According to the court: "When someone leaves personal belongings behind in another's car, he assumes the risk that the car's owner will consent to a search of the car or that the car's contents will come into plain view of the police." *Id*. at 8 (citation omitted). The fact that the defendant was detained inside the store also did not convert the defendant from a recent passenger to an actual one. Once inside, the defendant appeared to ignore the activity in the parking lot outside and admitted to attempting to mislead the police inside about his connection to the car. "Smith cannot initially pretend to be unassociated with the Malibu and then later declare a privacy interest in it. Such conduct suggests that his assertion of privacy is contrived rather than legitimate." *Id.* at 9. For the same reasons that the defendant lacked standing to object to the search of the car, he lacked standing to challenge the stop of the vehicle, and the district court was correct to deny the suppression motion.

Other challenges were similarly rejected, and the district court's judgment affirmed in all respects. Judge Wynn dissented in part and dissented in judgment. He would have granted the defendant a new trial based on the trial court's failure to instruct on a lesser-included drug offense, but otherwise concurred in the majority opinion.

Crimes

Video sweepstakes games as modified remain games of chance under the predominant factor test and violate the sweepstakes ban statute

Gift Surplus, LLC v. State of North Carolina, 380 N.C. 1; 2022-NCSC-1 (Feb. 11, 2022). The plaintiffs sought a declaratory judgment that their sweepstakes video games were lawful and did not violate G.S. 14-306.4 (banning certain video sweepstakes games). For the third time, the North Carolina Supreme Court held that the video games at issue are primarily games of chance in violation of the statute. While

the games were modified to award more nominal money prizes and to allow players to "double nudge" game symbols into place to win, these changes did not alter the chance-based character of the games. The question of whether a game falls within the prohibition on games of chance in G.S. 14-306.4 is a mixed question of law and fact and is subject to de novo review where there is no dispute about how the game is played. Applying that standard, the Court unanimously held the modified games remained games of chance. In its words:

> After considering plaintiffs' game when viewed in its entirety, we hold that the results produced by plaintiffs' equipment in terms of whether the player wins or loses and the relative amount of the player's winnings or losses varies primarily with the vagaries of chance and not the extent of the player's skill and dexterity. *Gift Surplus Slip op.* at 22 (cleaned up).

Because the Court determined the games at issue violated G.S. 14-306.4, it declined to consider whether the games also constituted illegal gambling.

The Court of Appeals majority opinion below held that the games violated the statute regardless of whether or not they were games of chance because the games constituted an "entertaining display" under the statute. This was error, as entertaining displays are not banned under the statute unless the game is one of chance. "Any doubt about whether the statute is only concerned with games of chance is resolved by subsection (i), the statute's 'catch-all provision,' which prohibits sweepstakes through '[a]ny other video game not dependent on skill or dexterity.'" *Id.* at 12. The Court of Appeals was consequently affirmed as modified.

There was sufficient evidence that the defendant committed multiple assaults against his girlfriend where a "distinct interruption" occurred between the assaults

State v. Dew, 379 N.C. 64; 2021-NCSC-124 (Oct. 29, 2021). There was sufficient evidence that the defendant committed multiple assaults against his girlfriend and the Court was equally divided as to whether there was sufficient evidence to establish that the defendant used his hands, feet, or teeth as deadly weapons. The Court characterized "the question of how to delineate between assaults—to know where one assault ends and another begins—in order to determine whether the State may charge a defendant with multiple assaults" as an issue of first impression. Reviewing case law, the Court explained that a single assault "might refer to a single harmful contact or several harmful contacts within a single incident," depending on the facts. The Court declined to extend the three-factor analysis of *State v. Rambert*, 341 N.C. 173 (1995), applicable to discharging a firearm into occupied property, to assault cases generally, saying that the *Rambert* factors were "not the ideal analogy" because of differences in the nature of the acts of discharging a firearm and throwing a punch or kick. The Court determined that a defendant may be charged with more than one assault only when there is substantial evidence that a "distinct interruption" occurred between assaults. Building on Court of Appeals jurisprudence, the Court said:

[W]e now take the opportunity to provide examples but not an exclusive list to further explain what can qualify as a distinct interruption: a distinct interruption may take the form of an intervening event, a lapse of time in which a reasonable person could calm down, an interruption in the momentum of the attack, a change in location, or some other clear break delineating the end of one assault and the beginning of another.

The Court went on to explain that neither evidence of a victim's multiple, distinct injuries nor evidence of different methods of attack alone are sufficient to show a "distinct interruption" between assaults.

Turning to the facts at hand, the Court concluded that evidence showing that the defendant beat the victim for hours inside a trailer and subsequently beat the victim in a car while driving home was sufficient to support multiple charges of assault. The assaults were separated by an intervening event interrupting the momentum of the attack – cleaning the trailer and packing the car. The assaults also were distinct in time and location. Though the defendant was charged with at least two assaults for conduct occurring inside the trailer, the Court concluded that the evidence indicated that there was only a single assault inside the trailer as the attack was continuous and ongoing. [Brittany Williams blogged about this case, here.]

In this human trafficking case involving multiple victims, (1) the indictments were sufficient to convey subject matter jurisdiction; (2) Trial court did not err by entering judgments for multiple counts of human trafficking for each victim

State v. Applewhite, ___ N.C. App. ___; 867 S.E.2d 692; 2021-NCCOA-610 (Dec. 21, 2021). (1) The Court of Appeals rejected the defendant's arguments concerning the sufficiency of the seventeen indictments charging him with human trafficking of six different victims. The Court noted that the indictments alleged every element of the offense within a specific time frame for each victim and tracked the language of the relevant statute word for word.

(2) The Court then turned to and rejected the defendant's argument that human trafficking is a continuous offense and may only be charged as one crime for each victim. The Court explained that the defendant's interpretation of G.S. 14-43.11, which explicitly provides that each violation of the statute "constitutes a separate offense," would "result in perpetrators exploiting victims for multiple acts, in multiple times and places, regardless of the length of the timeframe over which the crimes occurred as long as the Defendant's illegal actions and control over the victim were 'continuous.'" The Court characterized human trafficking as "statutorily defined as a separate offense for each instance."

Judge Arrowood concurred in part and dissented in part by separate opinion, expressing his view that it was improper to convict the defendant of multiple counts per victim of human trafficking. Judge Arrowood explained that North Carolina precedent, specifically involving issues of first impression addressing statutory construction, "clearly instructs that, where a criminal statute does not define a unit of prosecution, a violation thereof should be treated as a continuing offense." Judge Arrowood then proceeded with a lengthy and detailed analysis of the appropriate unit of prosecution for human trafficking in North Carolina.

Sufficient evidence existed for the jury to find that the defendant was aware of a DVPO; Court of Appeals erred in failing to view the evidence in the light most favorable to the State

State v. Tucker, 380 N.C. 234; 2022-NCSC-15 (Feb. 11, 2022). In this case from Mecklenburg County, the defendant was convicted of violating a domestic violence protective order ("DVPO") while in possession of a deadly weapon, as well as felony breaking or entering in violation of the DVPO, assault with a deadly weapon, and assault on a female. The defendant was served with an ex parte DVPO and a notice of hearing on the question of a permanent DVPO. He failed to attend the hearing, and a year-long DVPO was entered in his absence. On appeal, a unanimous Court of Appeals vacated the breaking or entering

and DVPO violation convictions, finding that the defendant lacked notice of the permanent DVPO and therefore could not have willfully violated that order (summarized here). On discretionary review, the North Carolina Supreme Court reversed.

The ex parte DVPO was served on the defendant and indicated that a hearing would be held to determine whether a longer order would be entered. Though the defendant was not present at the hearing, he acknowledged his awareness of the DVPO during his arrest in the victim's apartment the day after the hearing on the permanent order by stating he knew the plaintiff had obtained a DVPO—a remark captured on an officer's bodycam. While this remark could have referred to the ex parte DVPO, it was sufficient evidence of the defendant's knowledge of the permanent order when viewed in context in the light most favorable to the State. The Court of Appeals erred by failing to apply that standard. According to the unanimous Court:

> Defendant's statement, 'I know,' in addition to his other statements, conduct, and the timing of such conduct, supports this holding. The existence of evidence that could support different inferences is not determinative of a motion to dismiss for insufficient evidence. The evidence need only be sufficient to support a reasonable inference. *Tucker* Slip op. at 10 (citations omitted).

The Court of Appeals was therefore reversed, and the defendant's convictions reinstated.

(1) Conviction for making a threat under G.S. 14-16.7(a) requires proof that it was a "true threat," meaning that the statement was both objectively threatening to a reasonable recipient and subjectively intended as a threat by the speaker; (2) the state presented sufficient evidence of such a threat to withstand defendant's motion to dismiss, but conviction was vacated and remanded for new trial where the jury was not properly instructed on the First Amendment

State v. Taylor, 379 N.C. 589; 2021-NCSC-164 (Dec. 17, 2021). The facts of this case were previously summarized following the Court of Appeals decision in *State v. Taylor,* 270 N.C. App. 514 (2020), available here. Briefly, the defendant in this case wrote several social media posts allegedly threatening an elected district attorney over her decision not to seek criminal charges in connection with the death of a child. The defendant was convicted of threatening a court officer under G.S. 14-16.7(a) and appealed. The Court of Appeals held that the defendant's convictions were in violation of the First Amendment and vacated the conviction. The state sought and obtained discretionary review at the state Supreme Court. The higher court concluded that the defendant's conviction was properly vacated but remanded the case for a new trial rather than entry of a judgment of acquittal.

The Supreme Court began its analysis by reviewing the events that prompted the defendant's Facebook posts, the contents of those posts, and the state's evidence purportedly supporting the charges, such as evidence that the prosecutor was placed in fear by the threats. Next, the higher court summarized the opinion of the Court of Appeals, which held that the offense required proof of both general and specific intent on the part of the defendant. The appellate court held that the defendant could only be constitutionally convicted under this statute if he made a "true threat," meaning that the defendant not only made a statement that was objectively threatening (i.e., one which would be understood by those who heard or read it as a serious expression of intent to do harm), but also that he made that statement with the subjective intent that it be understood as a threat by the recipient. Finding that the state failed to make a sufficient showing of those requirements, the Court of Appeals held the statements were protected speech under the First Amendment and vacated the conviction.

Undertaking its own review, the state Supreme Court noted that the First Amendment broadly protects the fundamental right of free speech, and only certain limited categories of speech involving obscenity, defamation, incitement, fighting words, and "true threats" can be constitutionally restricted. The court reviewed *Watts v. United States*, 394 U.S. 705 (1969), which distinguished true threats from other types of protected speech. The court identified three factors from *Watts* that were relevant to evaluating the case at hand, although no single factor is dispositive: (i) the statute at issue must be interpreted with the First Amendment in mind; (ii) the public's right to free speech is even more substantial than the state's interest in protecting public officials; and (iii) the court must consider the context, nature and language of the statement, and the reaction of the listener. Next, the court reviewed the fractured opinions from another true threats case, *Virginia v. Black*, 538 U.S. 343 (2003). After considering the contrasting interpretations offered by the state and the defendant in the present case as to how *Black's* holdings should be construed, the court ultimately concluded that "a speaker's subjective intent to threaten is the pivotal feature separating constitutionally protected speech from constitutionally proscribable true threats." Based on the precedent above and reiterating the importance of the free speech interest at stake, the court held that a true threat is defined as "an objectively threatening statement communicated by a party which possesses the subjective intent to threaten a listener or identifiable group," and "the State is required to prove both an objective and a subjective element in order to convict defendant under N.C.G.S. § 14-16.7(a)."

Applying that definition and framework, the state Supreme Court then considered whether the trial court erred by denying the defendant's motion to dismiss. On a motion to dismiss, the question for the trial court is whether there is substantial evidence, when viewed in the light most favorable to the state, to support each element of the offense and find that the defendant was the perpetrator. In this case there was no dispute that the defendant wrote the posts at issue, and they contained ostensibly threatening language that was not clearly "political hyperbole" or other protected speech. The state Supreme Court acknowledged that cases raising First Amendment issues are subject to an independent "whole record review," but explained that this supplements rather than supplants traditional appellate review, and it is not inconsistent with the traditional manner of review on a motion to dismiss. Under this standard of review, the trial court did not err by ruling that the state had presented sufficient evidence to withstand a motion to dismiss and submit the case to the jury.

However, because the trial court did not properly instruct the jury on the charged offense consistent with the the subjective intent requirement under the First Amendment, the conviction was vacated and the case was remanded to the trial court for a new trial and submission of the case to a properly instructed jury.

Justice Earls concurred with the majority's conclusion that the First Amendment requires the state to prove both the objective and subjective aspects of the threat, but dissented on the issue of whether the state's evidence was sufficient to withstand a motion to dismiss in this case, and disagreed with the majority's interpretation and application of whole record review. In Justice Earls' view, the defendant's Facebook posts could not have been viewed as a serious intent to inflict harm when considered in context by a reasonable observer, and even if they could, the state offered insufficient evidence to show that this was the defendant's subjective intent.

(1) State failed to establish that an objectively reasonable hearer would have construed juvenile's statement about bombing the school as a true threat; (2) State presented sufficient evidence that the juvenile communicated a threat to harm a fellow student

In Re: Z.P., __ N.C. App. ___; 868 S.E.2d 317; 2021-NCCOA-655 (December 7, 2021). In this Iredell County case, the juvenile, "Sophie," was adjudicated delinquent for communicating a threat of mass violence on educational property in violation of G.S. 14-277.6 after making a statement, in the presence of four classmates, that she was going to blow up the school. She was also adjudicated delinquent for communicating a threat to harm a fellow student in violation of G.S. 14-277.1 after stating that she was going to kill him with a crowbar and bury him in a shallow grave. Sophie argued that the State failed to present sufficient evidence to support the allegations of the charged offenses.

(1) Proof of a "true threat" is required for an anti-threat statute. The true threat analysis involves both how a reasonable hearer would objectively construe the statement and how the perpetrator subjectively intended the statement to be construed. While there is a split in cases regarding what the State must prove regarding the perpetrator's subjective intent, this case is resolved because the State did not meet its burden of showing that a reasonable hearer would have construed Sophie's statement as a true threat. The three classmates who heard the threat and testified at the adjudication hearing did not think she was serious when she made the threat. Sophie had made outlandish threats before and never carried them out. Most of the classmates believed that Sophie was joking when she made the statement. There is not enough evidence to support an inference that it would be objectively reasonable for the hearers to think Sophie was serious in this threat. The adjudication is reversed with respect to the offense of communicating a threat of mass violence on educational property.

(2) The evidence provided regarding the threat to the classmate was sufficient. That evidence, when analyzed in the light most favorable to the State, established that the statement was made so that the classmate could hear it, the classmate took the threat seriously, and it would be reasonable for a person in the classmate's position to take the threat seriously because the classmate was smaller than Sophie and had previously been physically threatened by her. The Court of Appeals affirmed the adjudication of communicating a threat to harm a fellow student and remanded the case to allow the trial court to reconsider the disposition in light of the reversal of the adjudication of communicating a threat of mass violence on educational property.

Extortion is unprotected speech as speech integral to criminal conduct and the "true threats" analysis does not apply to the offense

State v. Bowen, ___ N.C. App. ___; 2022-NCCOA-213 (April 5, 2022). The defendant and victim met on a website arranging "sugar daddy" and "sugar baby" relationships, and the two engaged in a brief, paid, sexual relationship. The victim was a married man with children at the time. Years later, the defendant contacted the man, stating that she planned to write a book about her experiences on the website and that she intended to include information about their relationship within. The woman repeatedly contacted the man and threatened to include information that the man had shared with her about his ex-wife and their marriage. She also threatened to contact the man's ex-wife, as well as his current wife. Eventually, she offered the man a confidentiality agreement, whereby she would keep the details of their relationship private in exchange for a large sum of money. The man went to the police, and the woman was charged with extortion. She was convicted at trial and appealed.

Although the defendant did not raise a constitutional challenge in her motions to dismiss at trial, her motion to dismiss for insufficient evidence preserved all sufficiency issues for review, including her constitutional argument.

Under the First Amendment to the U.S. Constitution, threat crimes must be interpreted to require a "true" threat. "A 'true threat' is an 'objectively threatening statement communicated by a party which possess the subjective intent to threaten a listener or identifiable group.'" *Bowen* Slip op. at 10 (citing *State v. Taylor*, 379 N.C. 589 (2021)). The defendant argued that extortion under G.S. 14-118.4 must be interpreted to require proof of a true threat. The court disagreed. It found that extortion falls within another category of unprotected speech—speech integral to criminal conduct, or speech that is itself criminal (such as solicitation to commit a crime). This approach to extortion is consistent with treatment of the offense by federal courts. Although an extortion statute may sweep too broadly in violation of the First Amendment, North Carolina's extortion statute requires that the defendant possess the intent to wrongfully obtain a benefit via the defendant's threatened course of action. The statute therefore only applies to "extortionate" conduct and does not reach other types of protected speech, such as hyperbole or political and social commentary. According to the unanimous court:

> Following the U.S. Supreme Court and federal appellate opinions, we hold extortionate speech is criminal conduct in and of itself and, as such, is not constitutionally protected speech. Therefore, the First Amendment does not require that the 'true threat' analysis be applied to N.C. Gen. Stat. § 14-118.4. *Bowen* Slip op. at 16.

Here, the evidence clearly established the defendant's wrongful intent and threats, and she was properly convicted of extortion.

(1) Sufficient evidence supported the defendant's convictions for embezzlement in excess of $100,000; (2) The trial court did not err in declining to give a special jury instruction on joint ownership

State v. Steele, ___ N.C. App. ___; 868 S.E.2d 876; 2022-NCCOA-39 (Jan. 18, 2022). The defendant was close friends with older couple in Pamlico County. They considered each other family. When the husband of the couple unexpectedly died, the defendant offered to assist the surviving widow. She ultimately turned over complete control of her finances to the defendant. Two months later, she signed a power of attorney making the defendant her attorney in fact and named the defendant as the primary beneficiary of her will. Money was withdrawn from the widow's accounts and deposited into new bank accounts opened jointly in the names of the widow and the defendant. The defendant then used the widow's funds to make personal purchases and pay individual debts. Additionally, some of the widow's funds were automatically withdrawn by the bank from the joint accounts to cover overdrafts owed by the defendant on his individual bank accounts. After the discovery that more than $100,000.00 had been withdrawn from the widow's accounts, the defendant was charged with embezzlement and multiple counts of exploitation of an older adult. At trial, the defense requested a special jury instruction regarding the rights of joint account holders based on provisions in Chapter 54C ("Savings Banks") of the North Carolina General Statutes. The trial court declined to give the proposed instruction, the jury convicted on all counts, and the defendant was sentenced to a minimum 73-months imprisonment.

On appeal, a unanimous Court of Appeals found no error. (1) The defendant's motion to dismiss for insufficient evidence was properly denied. The evidence showed a fiduciary relationship existed between the defendant and the widow, even before the execution of the power of attorney. "[T]he evidence sufficiently established that a fiduciary relationship existed between Defendant and Mrs. Monk prior to that point, when he 'came into possession of the funds in Mrs. Monk's bank accounts.'" *Steele* Slip op. at 10. The defendant also argued that, as a joint account holder with the widow, the money in the accounts was properly considered his property. The court disagreed. While joint account holders

may be presumed to be the owners of the money in a joint account, that presumption can be overcome when ownership is disputed. Then, ownership of the funds is determined by examining the history of the account, the source of the money, and whether one party intended to gift money to the other joint account holder (among other factors). It was clear here that the widow was the source of the funds in the joint accounts and that she did not intend to make any gift to the defendant. "[T]here was sufficient evidence that the funds taken were the property of Mrs. Monk, and that she did not have the requisite 'donative intent' to grant Defendant the money to withdraw and use for his personal benefit." *Id*. at 14 (citation omitted). There was also sufficient evidence that the defendant intended to embezzle an amount exceeding $100,000. While more than $20,000 of the missing funds had been automatically withdrawn by a bank to cover the defendant's preexisting overdraft fees and the defendant denied being aware of this, the overdraft repayments occurred over a 9-month period of time. The defendant received bank statements recounting the repayments each month during that time frame. The total amount deducted as overdraft repayments exceeded $20,000, more than one-fourth of the defendant's yearly salary. There was also evidence of the defendant's financial problems. This was sufficient circumstantial evidence of the defendant's fraudulent intent to embezzle over $100,000. The defendant's various sufficiency arguments were therefore all properly rejected.

(2) The trial court did not err in failing to give the jury a special instruction on joint accounts and joint tenancy. The proposed instruction was based on the language of G.S. 54C-165 and related laws regarding banking regulations. These laws are intended to protect banks and allows them to disburse joint funds to either party listed on the account. The laws do not allow a joint account holder to wrongfully convert the funds to their own use simply by virtue of being a joint account holder. The proposed instruction therefore would have been confusing and misleading to the jury. In the words of the court:

> Because the requested special instruction could have misled the jury and was likely to create an inference unsupported by the law and the record—that Defendant's lawful access to the funds in the joint accounts entitled him to freely spend the money therein—the trial court properly declined to deliver Defendant's requested special jury instruction. *Steele* Slip op. at 19.

There was sufficient circumstantial evidence that the defendant was the driver of a moped

State v. Ingram, ___ N.C. App. ___; 2022-NCCOA-264 (Apr. 19, 2022). In this Rowan County case, the defendant appealed after being convicted of impaired driving after a jury trial. The conviction stemmed from a 2017 incident in which the defendant was found unresponsive on a fallen moped in the middle of the road. Field sobriety tests and a toxicology test indicated that the defendant was impaired. The trial court denied the defendant's motion to dismiss and the defendant was convicted. On appeal, the defendant contended that the trial court erred by denying his motion to dismiss because there was insufficient evidence that he drove the moped. Though no witness testified to seeing the defendant driving the moped, the Court of Appeals concluded that there was sufficient circumstantial evidence that he did. He was found alone, wearing a helmet, lying on the double yellow line in the middle of the road and mounted on the seat of the fallen moped. The Court thus found no error.

Defenses

(1) Statutory self-defense provisions of G.S. 14-51.3 and 14-51.4 abolished the common law right of perfect self-defense; (2) Defendant's argument that the felony disqualification required a causal nexus was preserved; (3) Felony disqualification provisions of G.S. 14-51.4 require a causal nexus between the felony and the need for defensive force (4) Based on the jury's guilty verdict for armed robbery, the trial court's failure to instruct on a causal nexus did not prejudice the defendant

State v. McLymore, 380 N.C. 185, 2022-NCSC-12 (Feb. 11, 2022). Under G.S. 14-51.4, a person may not claim self-defense if the person was attempting a felony, committing a felony, or escaping from the commission of a felony at the time of the use of force. The defendant was charged with first-degree murder, armed robbery, and fleeing to elude in Cumberland County. He claimed self-defense and testified on his behalf. Evidence showed that the defendant had multiple prior felony convictions and that he possessed a weapon at the time of the murder. The trial court gave a general instruction on statutory self-defense and instructed the jury that the defendant could not claim self-defense if he was committing the felony of possession of firearm by a felon at the time of his use of force. The jury convicted on all counts and the defendant was sentenced to life without parole. On appeal, the Court of Appeals affirmed, finding that the defendant was disqualified from claiming statutory self-defense under *State v. Crump,* 259 N.C. App. 144 (2018) (strictly interpreting the felony disqualification) and determining that G.S. 14-51.4 supplanted the common law right in the situations covered by the statute. On discretionary review, the Supreme Court modified and affirmed.

(1) The trial court and Court of Appeals correctly rejected the defendant's argument that the statutory self-defense disqualification did not apply because the defendant was claiming common law, rather than statutory, self-defense. The Court agreed with the lower courts that G.S. 14-51.3 and 14-51.4 were intended to abolish the common law right to perfect self-defense in the circumstances identified by the statute, noting that the language of G.S. 14-51.3 closely followed the common law definition of self-defense and that the legislature had failed to express an intent to retain the common law (unlike other parts of the statutory self-defense laws, where such an intention was expressly stated). In the words of the Court:

> [A]fter the General Assembly's enactment of G.S. 14-51.3, there is only one way a criminal defendant can claim perfect self-defense: by invoking the statutory right to perfect self-defense. Section 14-51.3 supplants the common law on all aspects of the law of self-defense addressed by its provisions. Section 14-51.4 applies to the justification described in G.S. 14-51.3. Therefore, when a defendant in a criminal case claims perfect self-defense, the applicable provisions of G.S. 14-51.3—and, by extension, the disqualifications provided under G.S. 14-51.4—govern. *McLymore* Slip op. at 8-9 (cleaned up).

The trial court therefore did not err by instructing the jury on statutory self-defense, including on the felony disqualifier.

(2) The defendant's objections to the jury instructions were sufficient to preserve his arguments relating to a "causal nexus" requirement for the felony disqualification provisions of G.S. 14-51.4, and his arguments were also apparent from the record. Among other reasons, the State argued, and the trial

court relied on, the *Crump* decision (finding no causal nexus requirement for the felony disqualifier) in rejecting the defendant's proposed jury instruction.

(3) The Court agreed that G.S.14-51.4 must be read to require a nexus between the defendant's use of force and felony conduct used to disqualify the defendant from use of defensive force. A strict interpretation of this statute would lead to absurd and unjust results and would also contract the common law right to self-defense. "[A]bsent a causal nexus requirement, each individual [committing a felony not related to the need for defensive force] would be required to choose between submitting to an attacker and submitting to a subsequent criminal conviction." *McLymore* Slip op. at 18. The Court also noted that a broad interpretation of the felony disqualifier may violate the North Carolina Constitution's protections for life and liberty. N.C. Const. art. I, sec. 1. The Court therefore held that the State has the burden to demonstrate a connection between the disqualifying felony conduct and the need for the use of force, and the jury must be instructed on that requirement. *Crump* and other decisions to the contrary were expressly overruled. In the Court's words:

> [W]e hold that in order to disqualify a defendant from justifying the use of force as self-defense pursuant to N.C.G.S. § 14-51.4(1), the State must prove the existence of an immediate causal nexus between the defendant's disqualifying conduct and the confrontation during which the defendant used force. The State must introduce evidence that 'but for the defendant' attempting to commit, committing, or escaping after the commission of a felony, 'the confrontation resulting in injury to the victim would not have occurred.' *McLymore* Slip op. at 20.

(4) Though the trial court's instructions on the felony disqualification were erroneous, this error did not prejudice the defendant under the facts of the case. The jury convicted the defendant of armed robbery based on his theft of the victim's car immediately after the murder. This necessarily showed that the jury found the defendant was committing or escaping from the commission of a felony related to his need to use force. The Court observed:

Based upon the outcome of McLymore's trial, it is indisputable that there existed an immediate causal nexus between his felonious conduct and the confrontation during which he used assertedly defensive force, and the felony disqualifier applies to bar his claim of self-defense. *Id*. at 23.

However, the Court rejected the State's argument that the defendant would be categorically barred from self-defense with a firearm due to this status as a convicted felon. The defendant was not charged with possession of firearm by felon in the case and had no opportunity to defend against that charge. Additionally, the jury was not instructed on a causal connection between the defendant's mere possession of the firearm and his need for use of force. According to the Court:

> To accept the State's argument on this ground would be to effectively hold that all individuals with a prior felony conviction are forever barred from using a firearm in self-defense under any circumstances. This would be absurd. *Id*. at 22.

The Court of Appeals was therefore modified and affirmed. Chief Justice Newby wrote separately to concur in result only, joined by Justice Barringer. They would have found that the causal nexus argument was not preserved and should have not been considered. Alternatively, they would have ruled that the felony disqualification does not require a causal nexus.

(1) Request for involuntary manslaughter instruction was preserved for appellate review; (2) Failure to instruct the jury on involuntary manslaughter was reversible error where the jury could have found that the defendant acted recklessly instead of with malice

State v. Brichikov, ___ N.C. App. ___; 869 S.E.2d 339; 2022-NCCOA-33 (Jan. 18, 2022). In this Wake County murder case, the defendant admitted to having assaulted his wife and she was found with physical trauma to her face. She also had cocaine and fentanyl in her blood, had recently overdosed, and had a serious heart condition. There was conflicting evidence at trial on whether the facial injuries alone could have caused her death. The defendant requested instructions on voluntary and involuntary manslaughter. The trial court declined to give the requested instructions and the jury convicted on second-degree murder. A divided Court of Appeals reversed and remanded for a new trial.

(1) The defendant's request for an involuntary manslaughter instruction was preserved. While an initial request for the instruction focusing on the defendant's failure to act would have been a special instruction (as it deviated from the pattern instruction) and would have needed to be in writing in order to preserve the issue, the defendant articulated multiple theories in support of an involuntary manslaughter instruction. He also objected to the lack of manslaughter instructions at the charge conference and again after the jury was instructed. This preserved the issue for review.

(2) The defendant argued that his evidence contradicted the State's evidence of malice with evidence of recklessness, and that he was entitled to an involuntary manslaughter instruction when the evidence was viewed in the light most favorable to him. The State argued that the defendant's use of a deadly weapon—his hands—"conclusively established" the element of malice, so that no lesser-included instructions were required. The court agreed with the defendant:

> Viewing the evidence in the light most favorable to Defendant, the evidence was not "positive" as to the element of malice for second-degree murder. The jury could reasonably have found Defendant did not act with malice, but rather committed a reckless act without the intent to kill or seriously injure–he spent the day declaring his love for Mrs. Brichikov, they used drugs together . . . and her body was in a weakened state from a recent overdose, heart blockage, and fentanyl overdose. *Brichikov* Slip op. at 17-18.

The failure to give an involuntary manslaughter instruction prejudiced the defendant and required a new trial. The court declined to consider the propriety of the defendant's proposed special jury instruction on culpable negligence by omission, finding that issue moot in light of its ruling and expressing no opinion on the merits of the instruction.

Judge Carpenter dissented and would have found that any error in the jury instructions was not prejudicial in light of the aggravating factor found by the jury that the defendant acted especially cruelly.

Right to Counsel

Trial court did not err by failing to further investigate defendant's complaints about trial counsel or by denying his mid-trial request to represent himself

State v. Ward, ___ N.C. App. ___; 868 S.E.2d 169; 2022-NCCOA-40 (Jan. 18, 2022). In this Pasquotank County case, the defendant was convicted at trial of statutory rape and abduction of a child. (1) During the first day of trial, the defendant complained about his attorney and claimed to have repeatedly fired him during the case. In response, the trial court allowed the defendant to express his concerns and attempted to address them. On the second day of trial, the defendant asked to represent himself, a request the trial court refused. On appeal, he argued that the trial court failed to inquire into an alleged impasse between trial counsel and the defendant and erred by not allowing him to represent himself. A unanimous Court of Appeals disagreed. While the defendant expressed some dissatisfaction with his attorney, his comments did not evince an absolute impasse in the case. In the court's words:

> Defendant's complaints . . .were deemed misunderstandings that were corrected during the colloquies by the trial court. . .Defendant may have had a personality conflict with his counsel, and asserted he did not believe defense counsel had his best interest at heart. Defendant has failed to show an 'absolute impasse as to such tactical decisions' occurred during trial. *Ward* Slip op. at 9.

Thus, the trial court did not err by failing to more fully investigate the issue. The trial court also did not err by refusing to allow the defendant to proceed pro se after trial had begun, or by failing to conduct the colloquy for self-represented individuals in G.S. 15A-1242. While waiver of the right to counsel requires a knowing, voluntary, and intelligent waiver by the defendant, the right to self-representation may be waived by inaction, as occurred here. Further, without the defendant making a timely request to represent himself, the defendant is not entitled to be informed about the right to self-representation. The trial court did not err in disallowing self-representation, or in failing to make the statutory inquiry required for self-representation, under these circumstances. According to the court:

> Defendant did not clearly express a wish to represent himself until the second day of trial. The trial court gave Defendant several opportunities to address and consider whether he wanted continued representation by counsel and personally addressed and inquired into whether Defendant's decision was being freely, voluntarily, and intelligently made. Defendant's arguments are without merit and overruled. *Id*. at 10-11.

(1) Challenge to earlier order extending probation following later revocation was not an impermissible collateral attack on the underlying judgment; (2) Violation of defendant's right to counsel at probation extension hearing voided extension order, which deprived the trial court of jurisdiction to later revoke probation

State v. Guinn, ___ N.C. App. ___; 868 S.E.2d 672; 2022-NCCOA-36 (Jan. 18, 2022). The defendant was on supervised probation in Gaston County after pleading guilty to two counts of uttering a forged instrument. 24 months into a 30-month period of probation, a probation violation was filed, accusing the defendant of willful failure to pay. The defendant was not represented by counsel at the hearing, and the trial court ultimately extended probation by 12 months. A year later, probation filed a violation report accusing the defendant of numerous violations. An absconding violation was filed soon after. A hearing was held where the defendant's probation was revoked, and his sentence activated.

On appeal, the defendant argued that the initial extension of his probation was invalid based on a violation of his right to counsel. (1) The State argued that the defendant was not permitted to collaterally attack the underlying judgment. The court disagreed, finding that the defendant sought to challenge the order extending his probation, not the underlying criminal judgment placing him on

probation. Because the defendant had no right of appeal from that order, he retained the right to challenge it in the present case.

(2) The trial court failed to conduct a colloquy pursuant to G.S. 15A-1242 to ensure the defendant knowingly, intelligently, and voluntarily waived his right to counsel at the first probation hearing. While the defendant and judge had signed a waiver of counsel form indicating that the defendant waived all counsel, the judge failed to check either box (indicating partial or total waiver of counsel) on the certification section of the form. The certification attests that the G.S. 15A-1242 colloquy with the defendant was completed. This was a substantive error and not a clerical mistake—the trial court only had jurisdiction to revoke probation in the current case if the initial extension was valid, and the initial extension was only valid if the defendant's right to counsel was honored, so a mistake here spoke directly to the length of the defendant's probation. While a knowing, voluntary, and intelligent waiver of counsel may be presumed from the defendant's signature on the waiver form, that presumption will not be indulged where other record evidence contradicts that conclusion. According to the court:

> [A]lthough a signed written waiver is generally 'presumptive evidence that a defendant wishes to act as his or her own attorney,' we conclude that the written waiver in the instant case is insufficient—notwithstanding the presence of both parties' signatures—to pass constitutional and statutory muster. *Guinn* Slip op. at 18 (cleaned up).

Further, the transcript revealed that no waiver of counsel colloquy occurred. Even assuming the signed waiver of counsel form was valid, the trial court still has a duty to conduct the colloquy of G.S. 15A-1242 and its failure to do so was prejudicial error. The trial court's original order extending probation by 12 months was therefore invalid, as those proceedings violated the defendant's right to counsel. Accordingly, the trial court lacked jurisdiction at the later probation violation hearing, and the order of revocation was vacated.

Judge Tyson dissented. He would have found that the signed form conclusively established the defendant's valid waiver of counsel and would have affirmed the trial court's revocation order.

The trial court did not abuse its discretion by allowing the defendant to represent himself

State v. Applewhite, ___ N.C. App. ___; 868 S.E.2d 137; 2021-NCCOA-610 (Dec. 21, 2021). In this human trafficking case involving multiple victims, the trial court did not abuse its discretion by allowing the defendant to represent himself. The Court of Appeals rejected the defendant's argument that the trial court's statements concluding that he had an "absolute right" to represent himself coupled with the trial court's failure to consider whether he fell into the "gray area" of being competent to stand trial but incapable of representing himself was a mistake of law requiring a new trial. While the defendant suffered from an unspecified personality disorder and drug use disorders, the record showed that the trial court "undertook a thorough and realistic account of Defendant's mental capacities and competence before concluding Defendant was competent to waive counsel and proceed *pro se*." The Court of Appeals noted that after interacting with him, considering his medical conditions, and receiving testimony concerning his forensic psychiatric evaluation, two judges had ruled that Defendant was competent to proceed and represent himself. The Court of Appeals said that even if the trial court erred in allowing the defendant to represent himself, he invited the error by disagreeing with the manner of representation of appointed counsel and any such error was harmless beyond a reasonable doubt.

Pleadings

An attempted robbery with a dangerous weapon indictment was not fatally defective for failing to include the name of a specific victim

State v. Oldroyd, ___ N.C. ___; 869 S.E.2d 193; 2022-NCSC-27 (Mar. 11, 2022). In this Yadkin County case, a defendant pled guilty to second-degree murder, attempted robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon in 2013. The defendant filed a motion for appropriate relief asserting that the indictment for the attempted robbery charge was fatally defective in that it did not include the name of a victim, but rather described the victims as "employees of the Huddle House" located at a particular address. The trial court denied the motion. A divided panel of the Court of Appeals agreed with the defendant. *State v. Oldroyd*, 271 N.C. App. 544 (2020). The Supreme Court reversed the Court of Appeals, concluding that the indictment sufficiently informed the defendant of the crime he was accused of and protected him from being twice put in jeopardy for the same offense. The Court rejected the defendant's argument, based on cases decided before the enactment of the Criminal Procedure Act of 1975, that indictments for crimes against a person must "state with exactitude" the name of a person against whom the offense was committed. The Court also distinguished prior cases finding indictments defective when they named the wrong victim or did not name any victim at all. Under the modern requirements of G.S. 15A-924(a)(5), the Court concluded that the attempted robbery with a dangerous weapon charge here was not defective. Therefore, the Court reversed the Court of Appeals and reinstated the trial court order denying the defendant's motion for appropriate relief.

There was no fatal variance in charge for injury to personal property where named victim was not the legal owner, but had a special interest in the property

State v. Redmond, __ N.C. App. __; 868 S.E.2d 661; 2022-NCCOA-5 (Jan. 4, 2022). Upon trial de novo in superior court, the defendant in this case was convicted of misdemeanor injury to personal property for throwing a balloon filled with black ink onto a painting during a protest at an arts event in Asheville. The defendant received a suspended 30-day sentence and was ordered to pay $4,425 in restitution. On appeal, the defendant argued that her motion to dismiss the injury to personal property charge should have been granted due to a fatal variance, and argued that the restitution amount was improperly based on speculative value. The appellate court rejected both arguments.

The charging document alleged that the defendant had damaged the personal property of the artist, Jonas Gerard, but the evidence at trial indicated that the painting was the property of the artist's corporation, Jonas Gerard Fine Arts, Inc., an S corporation held in revocable trust, where Jonas Gerard was listed as both an employee and the sole owner. Although this evidence established that the artist and the corporation were separate legal entities, each capable of owning property, the court held that the state's evidence sufficiently demonstrated that the artist named in the pleading was nevertheless a person who had a "special interest" in the property and was therefore properly named in the charging instrument. The painting was not yet complete, it was still in the artist's possession at the time it was damaged, and the artist regarded himself and the corporation as functionally "one and the same" and he "certainly held out the paintings as his own." Finding the facts of this case analogous to *State v. Carr*, 21 N.C. App. 470 (1974), the appellate court held that the charging document was "sufficient to notify Defendant of the particular piece of personal property which she was alleged to have damaged," and the trial court did not err in denying the motion to dismiss for a fatal variance.

The superior court had original jurisdiction to try a misdemeanor charge that was initiated by indictment but amended by a statement of charges

State v. Barber, ___ N.C. App. ___; 868 S.E.2d 601; 2021-NCCOA-695 (Dec. 21, 2021). In this case arising from a high-profile incident where William Joseph Barber was convicted of second-degree trespass for refusing to leave the office area of the General Assembly while leading a protest related to health care policy after being told to leave by security personnel for violating a building rule prohibiting causing disturbances, the Court of Appeals found that the superior court had subject matter jurisdiction to conduct the trial and that the trial was free from error.

The Court of Appeals rejected the defendant's argument that the superior court lacked jurisdiction to try him for the misdemeanor because the charging document upon which the State proceeded in superior court was a statement of charges rather than an indictment and Defendant had not first been tried in district court. Here, the defendant was indicted by a grand jury following a presentment but the prosecutor served a misdemeanor statement of charges on him on the eve of trial and proceeded on that charging document in superior court. The Court of Appeals noted that the superior court does not have original jurisdiction to try a misdemeanor charged in a statement of charges but went on to explain that because the prosecution in this case was initiated by an indictment, the superior court had subject matter jurisdiction over the misdemeanor. The Court characterized the statement of charges as a permissible amendment to the indictment (because it did not substantially change the nature of the charged offense) rather than a new charging document.

Continuances

(1) Denial of defense motion for continuance compromised defendant's right to effective counsel in this case; (2) Error was harmless in conviction for general intent offense, but warranted reversal on specific intent offense, where the evidence at issue related only to negating affirmative defenses to specific intent

State v. Johnson, 378 N.C. 236, 2021-NCSC-165 (Dec. 17, 2021). The state obtained recordings of several hundred phone calls that the defendant made while he was in jail awaiting trial on charges of murder, armed robbery, and assault on a government official. The charges arose out of a robbery at a gas station where the clerk was killed and an officer was threatened with a firearm. The defendant gave notice of the affirmative defenses of diminished capacity, mental infirmity, and voluntary intoxication (insanity was also noticed, but not pursued at trial). Copies of the jail calls were provided to the defense in discovery, but the recordings could not be played. Defense counsel emailed the prosecutor to request a new copy of the calls, and asked the state to identify any calls it intended to use at trial. The prosecutor provided defense counsel with new copies of the calls that were playable, but also indicated that the state did not intend to offer any of the calls at trial, so defense counsel did not listen to them at that time. The evening before trial, the prosecutor notified defense counsel that the state had identified 23 calls that it believed were relevant to showing the defendant's state of mind and memory at the time of the murder. At the start of trial the next morning, the defense moved for a continuance on the basis that it had not had time to review the calls or asses their impact on the defendant's experts' testimony, and argued that denial of a continuance at this point would violate the defendant's state and federal constitutional rights to due process, effective counsel, and right to confront witnesses. The trial court denied the continuance, as well as defense counsel's subsequent request to delay opening statements

until Monday (after jury selection concluded mid-day Friday) in order to provide the defense an opportunity to listen to the calls and review them with the defendant's experts.

The defendant was subsequently convicted of armed robbery, assault on a government official, and felony murder based on the assault. He was sentenced to life imprisonment for the murder and 60-84 months for the robbery; judgment was arrested on the assault. The defendant appealed, and a divided Court of Appeals found that the trial court did not err in denying the continuance, and furthermore any error would not have been prejudicial because the felony murder was a general intent crime and the calls were only offered by the state as rebuttal evidence regarding defendant's diminished capacity. The dissent concluded that the majority applied the wrong standard of review, since the denial of the motion to continue was based on constitutional grounds, and would have found error and ordered a new trial. The defendant appealed to the state Supreme Court based on the dissent.

The higher court found no prejudicial error regarding the felony murder conviction, but vacated the armed robbery judgment. First, regarding the correct standard of review, a trial court's decision on a motion to continue is normally reviewed only for abuse of discretion, but if it raises a constitutional issue it is reviewed de novo; however, even for constitutional issues, denial of a motion to continue is only reversible if the error was prejudicial. In this case, the trial court erred because the time allowed to review the calls was constitutionally inadequate. Defense counsel relied on the state's representation that it would not use the calls until receiving a contrary notice the evening before trial began, and defense counsel did not have an opportunity to listen to the nearly four hours of recordings or consult with his expert witnesses before starting the trial. Under the circumstances of this case, the impact this had on defense counsel's ability to investigate, prepare, and present a defense demonstrated that the defendant's right to effective counsel was violated. Additionally, the defendant was demonstrably prejudiced by this violation, since defense counsel could not accurately forecast the evidence or anticipated expert testimony during the opening statements.

However, the state Supreme Court concluded that as to the felony murder conviction, the error was harmless beyond a reasonable doubt. The murder conviction was based on the underlying assault, a general intent crime "which only require[s] the doing of some act," unlike specific intent offenses "which have as an essential element a specific intent that a result be reached." The recorded calls were only offered as rebuttal evidence on this issue of intent, and therefore the error was harmless as to the assault and felony murder offenses as a matter of law, since "any evidence in this case supporting or negating that defendant was incapable of forming intent at the time of the crime is not relevant to a general-intent offense." But the defendant's conviction for armed robbery, a specific intent offense, was vacated and remanded for a new trial.

Joinder

(1) Court of Appeals erred in finding that the trial court should have granted defendant's motions to dismiss for vindictive prosecution and failure to join; (2) Remanded for reconsideration of defendant's double jeopardy argument

State v. Schalow, 379 N.C. 639, 2021-NCSC-166 (Dec. 17, 2021) ("*Schalow II*"). The facts of this case were previously summarized following the Court of Appeals decision in *State v. Schalow*, 269 N.C. App. 369 (2020) ("*Schalow II*"), available here. The defendant was initially charged with attempted murder and several counts of assault against his wife, but the state only proceeded to trial on attempted murder

and dismissed the assault charges. After discovering the indictment for attempted murder failed to allege malice, the court granted the state a mistrial over the defendant's objection. The defendant was subsequently tried for that charge on a new indictment and convicted. On appeal, the defendant argued in *State v. Schalow*, 251 N.C. App. 354 (2018) ("*Schalow I*") that the mistrial was granted in error because it sufficiently alleged manslaughter as written, and therefore the second prosecution violated double jeopardy. The appellate court agreed and vacated the conviction. In addition to seeking discretionary review of the decision in *Schalow I* (which was ultimately denied), the state obtained several new indictments against the defendant for felony child abuse and the related assaults against his wife. The defendant's pretrial motion to dismiss the new charges on the basis of vindictive prosecution, double jeopardy, and failure to join charges under G.S. 15A-926 was denied, and the defendant sought discretionary appellate review, which was granted. The Court of Appeals held that the trial court erred by denying the defendant's motion to dismiss in *Schalow II*, finding that the defendant was entitled to a presumption of prosecutorial vindictiveness and also met his burden of showing that the state withheld the prior indictments to circumvent the joinder requirements of G.S. 15A-926, which required dismissal of the charges. Based on those holdings, the appellate court did not reach the double jeopardy issue.

The state sought discretionary review of the appellate court's rulings in *Schalow II*, which was granted and resulted in the current decision. On review, the state Supreme Court reversed the Court of Appeals on the two issues it decided, and remanded the case to the lower court to reconsider the remaining double jeopardy argument.

First, regarding vindictive prosecution, the higher court explained that *North Carolina v. Pearce*, 395 U.S. 711 (1969) and *Blackledge v. Perry*, 417 U.S. 21 (1974) establish a presumption of vindictiveness when a defendant receives a more serious sentence or faces more serious charges with significantly more severe penalties after a successful appeal, but noted that subsequent cases have declined to extend that presumption to other contexts. The filing of new or additional charges after an appeal, without more, "does not necessarily warrant a presumption of prosecutorial vindictiveness," even when there is "evidence that repeated prosecution is motivated by the desire to punish the defendant for his offenses." The Court of Appeals erred in concluding that the defendant faced a more severe sentence for substantially the same conduct under the new set of charges, since G.S. 15A-1335 independently prohibits imposing a more severe sentence in these circumstances, making that outcome a "legal impossibility" in this case. The court also rejected the defendant's argument that under *U.S. v. Goodwin*, 457 U.S. 368 (1982), the presumption of vindictiveness applies whenever there has been a change in the charging decision after an initial trial is completed. The language in *Goodwin* regarding the lower likelihood of vindictiveness in pretrial charging decisions did not establish "that such a presumption was warranted for all post-trial charging decision changes," and given the harshness of imposing such a presumption, the court was unwilling to find that it applied here. Additionally, although the prosecutor in this case made public statements about his intent to pursue other charges against the defendant if the ruling in *Schalow I* were upheld, those statements indicated an intent to punish the defendant for his underlying criminal conduct, not for exercising his right to appeal. Concluding that the presumption of vindictiveness did not apply and actual vindictiveness was not established, the state Supreme Court reversed the appellate court on this issue.

Second, the state Supreme Court also disagreed with the Court of Appeals' conclusion that the defendant's motion to dismiss should have been granted for failure to join offenses under G.S. 15A-926. The statute provides that after a defendant has been tried for one offense, his pretrial motion to dismiss another offense that could have been joined for trial with the first offense must be granted unless one

of the enumerated exceptions applies. Pursuant to *State v. Furr*, 292 N.C. 711 (1977), this statute does not apply to charges that were not pending at the time of the earlier trial. However, under *State v. Warren*, 313 N.C. 254 (1985), the later-filed charges must nevertheless be dismissed if the prosecutor withheld those charges in order to circumvent the statutory requirement. If either or both of two circumstances are present — (i) during the first trial the prosecutor was aware of evidence that would support the later charges, or (ii) the state's evidence at the second trial would be the same as the first trial — those factors will "support but not compel" a finding that the state did withhold the other charges to circumvent the statute. At the trial level, the defendant in this case only argued that dismissal was required by the statute, but did not argue that dismissal was required under *Warren* even though the charges were not pending at the time of the prior trial; therefore, the argument presented by the defendant on appeal was not properly preserved for review, and the appellate court erred by deciding the issue on those grounds. Additionally, the Court of Appeals erred by holding that the trial court was required to dismiss the charges upon finding that both *Warren* factors were present. Even if one or both *Warren* factors were found, that will "support" a dismissal by the trial court, but it does not "compel" it. The appellate court incorrectly converted "a showing of both *Warren* circumstances into a mandate requiring dismissal," contrary to case precedent.

The case was remanded for reconsideration of the defendant's remaining argument that prosecution for the assault charges would also violate double jeopardy, which the Court of Appeals declined to address.

Jury Selection

Where the prosecutor's race-neutral explanations for use of a peremptory strike were unsupported by the record, the defendant should have prevailed on his *Batson* challenge; order denying defense *Batson* challenge reversed on the merits

State v. Clegg, 380 N.C. 127; 2022-NCSC-11 (Feb. 11, 2022). The defendant was tried for armed robbery and possession of firearm by felon in Wake County. When the prosecution struck two Black jurors from the panel, defense counsel made a *Batson* challenge. The prosecution argued the strikes were based on the jurors' body language and failure to look at the prosecutor during questioning. The prosecution also pointed to one of the juror's answer of "I suppose" in response to a question on her ability to be fair, and to the other juror's former employment at Dorothea Dix, as additional race-neutral explanations for the strikes. The trial court initially found that these reasons were not pretextual and overruled the *Batson* challenge. After the defendant was convicted at trial, the Court of Appeals affirmed in an unpublished opinion, agreeing that the defendant failed to show purposeful discrimination. The defendant sought review at the North Carolina Supreme Court. In a special order, the Court remanded the case to the trial court and retained jurisdiction of the case.

On remand, the defense noted that the "I suppose" answer used to justify the prosecutor's strike was in fact a mischaracterization of the juror's answer—the juror in question responded with that answer to a different question about her ability to pay attention (and not about whether she could be fair). The defense argued this alone was enough to establish pretext and obviated the need to refute other justifications for the strike. As to the other juror, the defense noted that while the juror was asked about her past work in the mental health field, no other juror was asked similar questions about that field. The defense argued with respect to both jurors that the prosecutor's body language and eye contact explanations were improper, pointing out that the trial court failed to make findings on the issue despite trial counsel disputing the issue during the initial hearing. It also noted that the prosecutor referred to

the two women collectively when arguing this explanation and failed to offer specific reasons for why such alleged juror behavior was concerning. This evidence, according to the defendant, met the "more likely than not" standard for showing that purposeful discrimination was a substantial motivating factor in the State's use of the strikes.

The State argued that it struck the juror with a history in mental health as someone who may be sympathetic to the defendant but did not argue the juror's body language or eye contact as explanations for its use of that strike at the remand hearing. As to the other juror, the State reiterated its original explanations of the juror's body language and eye contact. It also explained that the mischaracterization of the juror's "I suppose" answer was inadvertent and argued that this and another brief answer of "I think" from the juror during voir dire indicated a potential inability of the juror to pay attention to the trial.

The trial court ruled that the strike of the juror with previous employment in the mental health field was supported by the record, but that the prosecution's strike of the other juror was not. It found it could not rely on the mischaracterized explanation, and that the body language and eye contact justifications were insufficient explanations on their own without findings by the trial court resolving the factual dispute on the issue. The trial court therefore determined that the prosecutor's justifications failed as to that juror. The trial court considered the defendant's statistical evidence of racial discrimination in the use of peremptory strikes in the case and historical evidence of racial discrimination in voir dire statewide. It also noted disparate questioning between Black and White jurors on the issue of their ability to pay attention to the trial but found this factor was not "particularly pertinent" under the facts of the case. The trial court ultimately concluded that this evidence showed the prosecutor's explanation was improper as to the one juror, but nonetheless held that no purposeful discrimination had occurred, distinguishing the case from others finding a *Batson* violation. Thus, the objection was again overruled, and the defendant again sought review at the North Carolina Supreme Court.

A majority of the Court reversed, finding a *Batson* violation by the State. The prosecutor's shifting and mischaracterized explanation for the strike of the juror who answered "I suppose"—initially argued as an indication the juror could not be fair, but later argued as going to her ability to pay attention—indicated the reason was pretextual, and the trial court correctly rejected that justification for the strike. The trial court also correctly determined that the demeanor-based explanations for the strike of this juror were insufficient without findings of fact on the point. However, the trial court erred in several critical ways. For one, when the trial court rejects all of the prosecutor's race-neutral justifications for use of a strike, the defendant's *Batson* challenge should be granted. According to the Court:

> If the trial court finds that all of the prosecutor's proffered race-neutral justifications are invalid, it is functionally identical to the prosecutor offering no race-neutral justifications at all. In such circumstances, the only remaining submissions to be weighed—those made by the defendant—tend to indicate that the prosecutor's peremptory strike was 'motivated in substantial part by discriminatory intent.' *Clegg* Slip op. at 47.

Further, while the trial court correctly recited the more-likely-than-not burden of proof in its order, it failed to meaningfully apply that standard. While the present case involved less explicit evidence of racial discrimination in jury selection than previous federal cases finding a violation, it is not necessary for the defendant to show "smoking-gun evidence of racial discrimination." *Id*. at 41. The trial court also erred in reciting a reason for the strike not offered by the prosecution in its order denying relief. Finally, there was substantial evidence that the prosecutor questioned jurors of different races in a disparate

manner, and the trial court failed to fully consider the impact of this evidence. Collectively, these errors amounted to clear error and required reversal. Because the Court determined that purposeful discrimination occurred as to the one juror, it declined to consider whether discrimination occurred with respect to the strike of the other juror.

The conviction was therefore vacated, and the matter remanded to the trial court for any further proceedings. A *Batson* violation typically results in a new trial. The defendant here had already served the entirety of his sentence and period of post-release, and the Court noted the statutory protections from greater punishment following a successful appeal in G.S. 15A-1335. In conclusion, the Court observed:

> [T]he *Batson* process represents our best, if imperfect, attempt at drawing a line in the sand establishing the level of risk of racial discrimination that we deem acceptable or unacceptable. If a prosecutor provides adequate legitimate race-neutral explanations for a peremptory strike, we deem that risk acceptably low. If not, we deem it unacceptably high. . . Here, that risk was unacceptably high. *Clegg* Slip op. at 56-57.

Justice Earls wrote separately to concur. She would have considered the *Batson* challenge for both jurors and would have found clear error with respect to both. She also noted that this is the first case in which the North Carolina Supreme Court has found a *Batson* violation by the State. Her opinion argued the State has been ineffective at preventing racial discrimination in jury selection and suggested further action by the Court was necessary to correct course.

Justice Berger dissented, joined by Chief Justice Newby and Justice Barringer. The dissenting Justices would have affirmed the trial court's finding that a *Batson* violation did not occur in the case.

Confrontation Clause

Assuming the admission of substitute analyst testimony and 404(b) evidence was error, the defendant was not prejudiced in light of overwhelming evidence of his guilt

State v. Pabon, 380 N.C. 241, 2022-NCSC-16 (Feb. 11, 2022). The defendant was charged with second-degree rape and first-degree kidnapping in Cabarrus County and was convicted at trial. Benzodiazepines were found in the victim's urine, and the State presented expert testimony at trial on the urinalysis results. The expert witness did not conduct the forensic testing but independently reviewed the test results. The defendant's hearsay and Confrontation Clause objections were overruled. Expert testimony from another witness established the presence of a muscle relaxant in the victim's hair sample and indicated that the two drugs in combination would cause substantial impairment. There was additional evidence of a substantial amount of the defendant's DNA on the victim, as well as evidence of prior similar sexual assaults by the defendant admitted under Rule 404(b) of the North Carolina Rules of Evidence. He was convicted of both charges and appealed. A divided Court of Appeals affirmed, finding no error (summarized here). Among other issues, the majority rejected the defendant's arguments that the admission of the substitute analyst testimony and the 404(b) evidence was error. The defendant appealed the Confrontation Clause ruling and the North Carolina Supreme Court later granted discretionary review on the Rule 404(b) issue.

Assuming without deciding that admission of the substitute analyst testimony was error, the error was harmless beyond a reasonable doubt. Testimony from the substitute analyst established the presence of benzodiazepines in the victim's blood based first on a preliminary test, and then a confirmatory test. While the defendant objected to all of this testimony at trial, only the testimony regarding the confirmatory test was challenged on appeal. Thus, "[e]ven in the absence of [the substitute analyst's] subsequent testimony regarding the confirmatory testing, there was still competent evidence before the jury of the presence of Clonazepam in [the victim's] urine sample." *Pabon* Slip op. at 23. The Court noted that evidence from the other analyst established a different impairing substance in the victim's hair which could have explained the victim's drugged state on its own. In light of this and other "overwhelming" evidence of guilt, any error here was harmless and did not warrant a new trial.

As to the 404(b) evidence, the Court likewise assumed without deciding that admission of evidence of the previous sexual assaults by the defendant against other women was error but determined that any error was not prejudicial under the facts. Unlike a case where the evidence amounts to a "credibility contest"—two different accounts of an encounter but lacking physical or corroborating evidence—here, there was "extensive" evidence of the defendant's guilt. This included video of the victim in an impaired state soon before the assault and while in the presence of the defendant, testimony of a waitress and the victim's mother regarding the victim's impairment on the day of the offense, the victim's account of the assault to a nurse examiner, the victim's vaginal injury, the presence of drugs in the victim's system, and the presence of the a significant amount of the defendant's DNA on the victim's chest, among other evidence. "We see this case not as simply a 'credibility contest,' but as one with overwhelming evidence of defendant's guilt." *Id*. at 34. Thus, even if the 404(b) evidence was erroneously admitted, it was unlikely that the jury would have reached a different result. The Court of Appeals decision was therefore modified and affirmed.

Chief Justice Newby concurred separately. He joined in the result but would not have discussed the defendant's arguments in light of the Court's assumption of error.

The defendant's Confrontation Clause rights were violated by the introduction of an unavailable witness's plea allocution in a related case; no "opening the door" exception to the right to confront

Hemphill v. New York, 595 U.S. __, 142 S. C.t 681 (2022). In this murder case, the Supreme Court determined that the defendant's Sixth Amendment right to confront witnesses against him was violated when the trial court admitted into evidence a transcript of another person's plea allocution. In 2006, a child in the Bronx was killed by a stray 9-millimeter bullet. Following an investigation that included officers discovering a 9-millimeter cartridge in his bedroom, Nicholas Morris was charged with the murder but resolved the case by accepting a deal where he pleaded guilty to criminal possession of a .357-magnum revolver in exchange for dismissal of the murder charge. Years later, the defendant Hemphill was charged with the murder. At trial, for which Morris was unavailable as a witness, Hemphill pursued a third-party culpability defense and elicited undisputed testimony from the State's law enforcement officer witness indicating that a 9-millimeter cartridge was discovered in Morris's bedroom. Over Hemphill's Confrontation Clause objection, the trial court permitted the State to introduce Morris's plea allocution for purposes of proving, as the State put it in closing argument, that possession of a .357 revolver, not murder, was "the crime [Morris] actually committed." Relying on state case law, the trial court reasoned that Hemphill had opened the door to admission of the plea allocution by raising the issue of Morris's apparent possession of the 9-millimeter cartridge.

After finding that Hemphill had preserved his argument by presenting it in state court and accepting without deciding that the plea allocution was testimonial, the Supreme Court determined that admission of Morris's plea allocution violated Hemphill's confrontation rights and rejected various arguments from the State advocating for an "opening the door" rule along the lines of that adopted by the trial court. Describing the "door-opening principle" as a "substantive principle of evidence that dictates what material is relevant and admissible in a case" the Court distinguished it from procedural rules, such as those described in *Melendez-Diaz*, that the Court has said properly may govern the exercise of the right to confrontation. The Court explained that it "has not held that defendants can 'open the door' to violations of constitutional requirements merely by making evidence relevant to contradict their defense." Thus, the Court reversed the judgment of the New York Court of Appeals which had affirmed the trial court.

Justice Alito, joined by Justice Kavanaugh, concurred but wrote separately to address the conditions under which a defendant can be deemed to have validly waived the right to confront adverse witnesses. Justice Alito wrote that while it did not occur in this case, there are circumstances "under which a defendant's introduction of evidence may be regarded as an implicit waiver of the right to object to the prosecution's use of evidence that might otherwise be barred by the Confrontation Clause." He identified such a situation as that where a defendant introduces a statement from an unavailable witness, saying that the rule of completeness dictates that a defendant should not be permitted to then lodge a confrontation objection to the introduction of additional related statements by the witness.

Justice Thomas dissented based on his view that the Court lacked jurisdiction to review the decision of the New York Court of Appeals because Hemphill did not adequately raise his Sixth Amendment claim there.

Sentencing and Probation

The trial court did not err by ordering restitution for all the seized animals or by failing to explicitly consider the defendant's ability to pay, but erred in converting the restitution award to a civil judgment absent statutory authorization

State v. Crew, ___ N.C. App ___; 868 S.E.2d 351; 2022-NCCOA-35 (Jan. 18, 2022). The defendant was charged with and convicted of dogfighting and related offenses in Orange County. The trial court ordered the defendant to pay Animal Services restitution in the amount of $70,000 for its care and keep of the animals and immediately converted the award to a civil judgment (presumably based on the 60-month minimum active portion of the sentence imposed in the case). Thirty dogs were seized from the defendant's property, but he was only convicted of offenses relating to 17 of the animals. According to the defendant, the restitution award should have therefore been proportionally reduced. The court disagreed, observing that "[t]he trial court may impose restitution for 'any injuries or damages arising directly and proximately out of the offense committed by the defendant,'" pointing to G.S. 15A-1340.34(c). *Crew* Slip op. at 9. Because the defendant's crimes resulted in the removal of all the animals, he could properly be held responsible for the cost of caring for the animals.

The defendant also argued that the trial court erred in failing to consider his ability to pay before ordering restitution. While the trial court need not make express findings on the issue, G.S. 15A-1340.36(a) requires the judge to consider the defendant's ability to pay among several other factors

when deciding restitution. Here, there was evidence in the record concerning the defendant's income, the price of a "good puppy," and of the defendant's living arrangements. "Based on this evidence, the trial court's determination that the defendant had the ability to pay was within the court's sound discretion and certainly not manifestly arbitrary or outside the realm of reason." *Crew* Slip op. at 10-11.

Finally, the defendant argued the trial court improperly converted the restitution award to a civil judgment. The court agreed. The restitution statutes distinguish between offenses subject to the Crime Victim's Rights Act ("VRA") and offenses exempt from that law. G.S. 15A-1340.38 expressly authorizes a trial court to convert an award of restitution to a civil judgment in VRA cases. No similar statutory authorization exists for non-VRA cases. While some other offenses have separate statutory provisions permitting conversion of a restitution award to a civil judgment (*see, e.g.,* G.S. 15-8 for larceny offenses), no such statute applied to the crimes of conviction here. The court noted that G.S. 19A-70 authorizes animal services agencies to seek reimbursement from a defendant for the expenses of seized animals and observed that the agency failed to pursue that form of relief. The court rejected the State's argument that the trial court's action fell within its inherent authority. The civil judgments were therefore vacated. The convictions and sentence were otherwise undisturbed.

Defendant failed to properly make or preserve statutory confrontation objection at probation violation hearing; State presented sufficient evidence of absconding

State v. Thorne, 279 N.C. App. 655; 2021–NCCOA–534 (Oct. 5, 2021). The defendant was placed on 36 months of supervised probation after pleading guilty to one count of conspiracy to obtain property by false pretenses. The defendant's probation officer subsequently filed a violation report alleging that the defendant had violated his probation by using illegal drugs, and an addendum alleging that the defendant had absconded from probation. At the violation hearing, the defendant admitted to using illegal drugs, but denied that he absconded. The state presented testimony at the violation hearing from a probation officer who was not involved in supervising the defendant, but who read from another officer's notes regarding the defendant's alleged violations. The trial court found the defendant in violation, revoked his probation for absconding, and activated his suspended 10-to-21-month sentence. The defendant filed a *pro se* notice of appeal, which was defective, but the court granted his petition for *writ of certiorari* and addressed the merits.

On appeal, the defendant argued that his confrontation rights under G.S. 15A-1345(e) were violated when the trial court allowed another probation officer to testify from the supervising officer's notes, over the defendant's objection. However, at the hearing the defendant did not state that the objection was based on his statutory confrontation right, nor did he request that the supervising officer be present in court or subjected to cross-examination. The court held that, at most, it could be inferred that the defendant's objection was based on hearsay grounds or lack of personal knowledge. The court rejected the defendant's argument that the issue was preserved despite the absence of an objection because the trial court acted contrary to a statutory mandate, per *State v. Lawrence*, 352 N.C. 1 (2000). In this case, the trial court did not act contrary to the statute because the objection made at the hearing was insufficient to trigger the trial court's obligation to either permit cross-examination of the supervising officer or find good cause for disallowing confrontation. Therefore, the officer's testimony based on the notes in the file was permissible, and it established that the defendant left the probation office without authorization on the day he was to be tested for drugs, failed to report to his probation officer, did not respond to messages, was not found at his residence on more than one occasion, and could not be located for 22 days. Contrasting these facts with *State v. Williams*, 243 N.C. App. 198 (2015), in which the evidence only established that the probationer had committed the lesser violation of failing to allow

his probation officer to visit him at reasonable times, the evidence here adequately showed that the defendant had absconded. The court therefore affirmed the revocation but remanded the case for correction of a clerical error because the order erroneously indicated that both violations justified revocation, rather than only the absconding per G.S. 15A-1344(d2).

Restitution amount was not speculative where it was based on evidence of fair market value

State v. Redmond, ___ N.C. App. __; 868 S.E.2d 661; 2022-NCCOA-5 (Jan. 4, 2022). The restitution amount was supported by competent evidence. A witness for the state testified that a potential buyer at the show asked what the painting would cost when completed and was told $8,850, which was the gallery's standard price for paintings of that size by this artist. The artist also testified that the canvas was now completely destroyed, and the black ink could not be painted over. The trial court ordered the defendant to pay half that amount as restitution. The appellate court held that the fact that the painting "had not yet been purchased by a buyer does not mean that the market value assigned by the trial court for restitution was speculative." The evidence presented at trial was sufficient to establish a fair market value for the painting prior to it being damaged, and the trial court's restitution order would not be disturbed on appeal.

The trial court abused its discretion in concluding a crime was committed and revoking defendant's probation where there was no evidence beyond the fact that the defendant was arrested that tended to establish he committed a crime

State v. Graham, ___ N.C. App. ___; 869 S.E.2d 776; 2022-NCCOA-132 (Mar. 1, 2022). The defendant pled guilty to second-degree murder and possession of a firearm by a convicted felon. The defendant was sentenced to active terms of 176-221 months imprisonment for the second-degree murder charge and 16-20 months imprisonment for the possession of a firearm by a convicted felon charge. The active sentence for possession of a firearm by a convicted felon was suspended for 36 months of supervised probation, which commenced in August 2019 after the defendant was released from prison following his active sentence for second-degree murder.

In February 2021, the State filed a violation report alleging that the defendant violated his probation by failing to pay the full monetary judgment entered against him and because he was arrested and charged with possession of a firearm by a felon. Following a hearing, the trial court found that the defendant committed a crime and revoked the defendant's probation. The Court of Appeals granted the defendant's petition for writ of certiorari.

On appeal, the defendant argued that the trial court erred in revoking his probation. The Court of Appeals agreed, reasoning that in order to revoke a defendant's probation for committing a criminal offense, there must be some form of evidence that a crime was committed. The only evidence presented at the probation revocation hearing was the probation officer's violation report and testimony from the probation officer. The Court concluded that this evidence only established that defendant was arrested for possession of a firearm by a felon and that there was no evidence beyond the fact that defendant was arrested that tended to establish he committed a crime. The Court thus held that the trial court abused its discretion in concluding a crime was committed and revoking defendant's probation.

Post-Conviction and Appeals

The trial court properly applied the multi-factor test for evaluating an MAR based on newly discovered evidence.

State v. Reid, 2022-NCSC-29, ___ N.C. ___ (Mar. 11, 2022). In this Lee County case, the trial judge granted a motion for appropriate relief and awarded a new trial for a defendant who was convicted of first-degree murder committed when he was fourteen years old, largely on the basis of a confession made during a police interrogation conducted outside the presence of a parent or guardian. Years later, postconviction counsel located a new witness who claimed a different person had confessed to the crime, exculpating the defendant. The trial court found the new witness's testimony credible and granted the MAR based on the newly discovered evidence and ordered a new trial. The Court of Appeals reversed, saying the trial court abused its discretion and erred in granting a new trial, in that the defendant's affidavit failed multiple prongs of the seven-factor test for evaluating newly discovered evidence set forth in *State v. Beaver*, 291 N.C. 137 (1976). *State v. Reid*, 274 N.C. App. 100 (2020).

After allowing the defendant's petition for discretionary review, the Supreme Court reversed the Court of Appeals, concluding that the trial court properly applied the *Beaver* test. First, the trial court did not err in concluding that the newly discovered evidence was "probably true," despite the inconsistencies in the new witness's testimony. It was the factfinder's role—not the role of the Court of Appeals—to evaluate the credibility of the witness and make findings of fact, which are binding on appeal if supported by the evidence. The Court of Appeals thus erred by reweighing the evidence and making its own findings as to whether the new evidence was "probably true."

Second, the trial court did not err in finding that the defendant's trial counsel had exercised due diligence in attempting to procure the newly discovered evidence. The trial court's findings that an investigator had earlier attempted to find the new witness and that those efforts were unsuccessful due in part to interference by the witness's mother were supported by the evidence and binding on appeal. The Court noted that the "due diligence" prong of the *Beaver* test requires "reasonable diligence," not that the defendant have done "everything imaginable" to procure the purportedly new evidence at trial. Where, as here, neither the defendant nor his lawyer knew whether the sought-after witness actually had any information about the victim's killing, hiring an investigator was deemed reasonable diligence without the need to take additional steps such as issuing an subpoena or asking for a continuance.

Third, the Court concluded that the trial judge did not err in concluding that the new witness's testimony was "competent" even though it was hearsay. The evidence was admitted without objection by the State, and was therefore competent. And in any event, the test for competence within the meaning of the *Beaver* test is not admissibility at the MAR hearing, but rather whether it would be material, competent, and relevant in a future trial if the MAR were granted. Here, the trial court properly concluded that the new witness's testimony would have been admissible at trial under the residual hearsay exception of Rule 803(24).

Finally, the trial court did not err in concluding that the addition of the newly discovered evidence would probably result in a different outcome in another trial. Though the defendant's confession was admissible, it was nonetheless the confession of a fourteen-year-old and might therefore receive less probative weight in a case like this where the other evidence of the defendant's guilt was not overwhelming.

The Supreme Court reversed the Court of Appeals and remanded the case for a new trial.

Chief Justice Newby, joined by Justice Barringer, dissented. He wrote that the defendant failed to meet the "due diligence" prong of the *Beaver* test in that he did not take reasonable action at trial to procure the evidence he later argued was newly discovered. The Chief Justice disagreed with the majority's conclusion that hiring an investigator was enough. Rather, he wrote, the defense lawyer should have gone to the trial court for assistance in obtaining testimony from the witness (such as through a material witness order), or spoken to other witnesses who likely had the same information (such as the sought-after witness's brother).

Spring 2022 Criminal Law Update

Phil Dixon, Jr.
UNC School of Government

1

* * *

Rule 28. Equitable Imposition of Monetary Obligations in Criminal Cases and Infraction Cases Based on the Defendant's Ability to Pay

(a) **Scope**. This rule applies only in criminal cases and infraction cases in which the court has discretion to impose costs, fees, fines, restitution, or other monetary obligations equitably based on the defendant's ability to pay.

(b) **Motion for Relief**. A defendant convicted of a crime or found responsible for an infraction may use AOC-CR-415, Request for Relief from Fines, Fees, and Other Monetary Obligations, to move the court to impose costs, fees, fines, restitution, or other monetary obligations equitably based on the defendant's ability to pay.

(c) **Determination by Court**. The court must consider the defendant's motion and, if necessary, conduct a hearing. The court must rule on the motion prior to imposing costs, fees, fines, restitution, or other monetary obligations and may grant the defendant any relief permitted by law.

* * *

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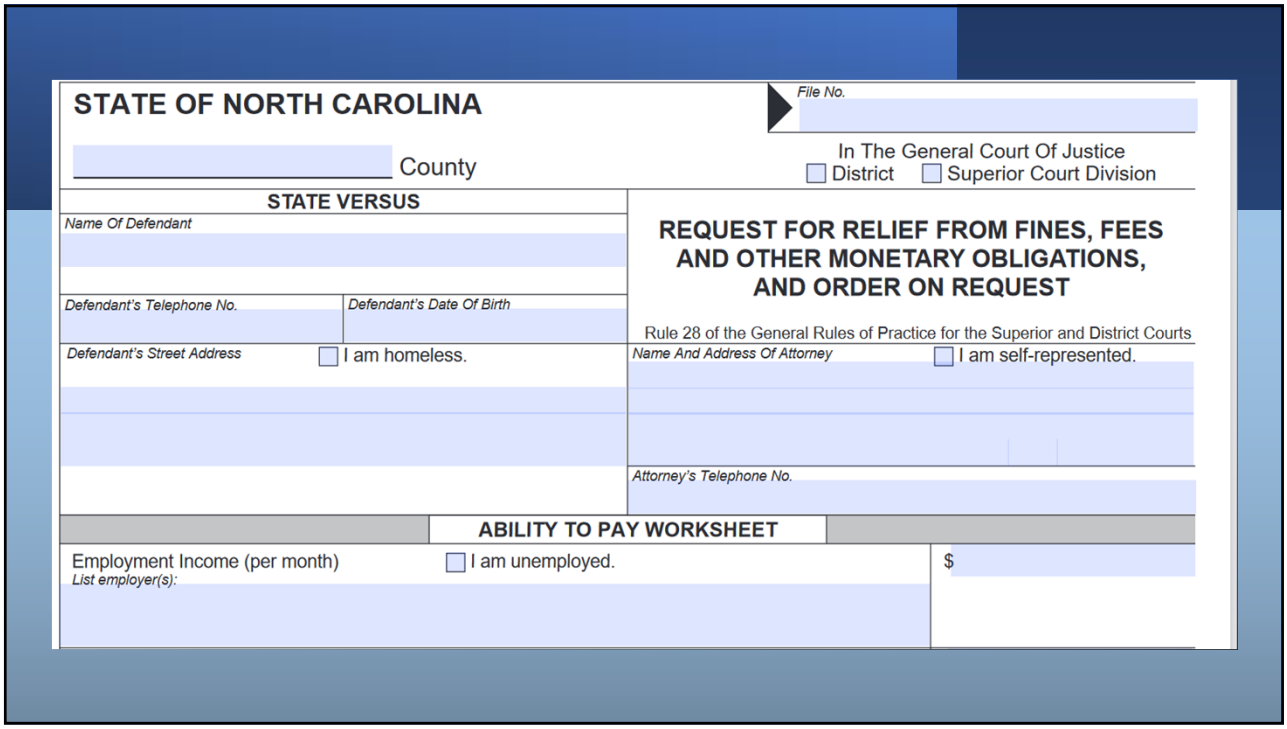


STATE OF NORTH CAROLINA

File No.

_____ County

In The General Court Of Justice
☐ District ☐ Superior Court Division

STATE VERSUS

Name Of Defendant

Defendant's Telephone No. | Defendant's Date Of Birth

Defendant's Street Address ☐ I am homeless.

REQUEST FOR RELIEF FROM FINES, FEES AND OTHER MONETARY OBLIGATIONS, AND ORDER ON REQUEST

Rule 28 of the General Rules of Practice for the Superior and District Courts

Name And Address Of Attorney ☐ I am self-represented.

Attorney's Telephone No.

ABILITY TO PAY WORKSHEET

Employment Income (per month) ☐ I am unemployed. $

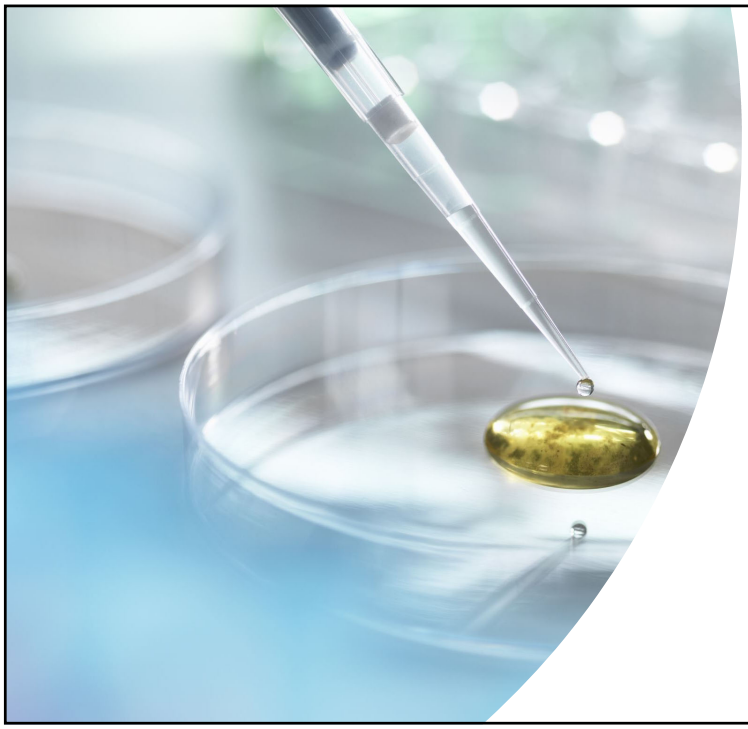
List employer(s):

3

New Criminal Procedure

- G.S. 15A-601 amended to provide for first appearance for all in-custody defendants
- Generally, within 72 hours; if courthouse closed, may be within first 96 hours or first available session, whichever is earlier
- Clerks of court may act when a judge is not available, and (now) magistrates may conduct the hearing if a clerk is not available

4



Remote Forensic Testimony in Superior Court per G.S. 15A-1225.3(b)

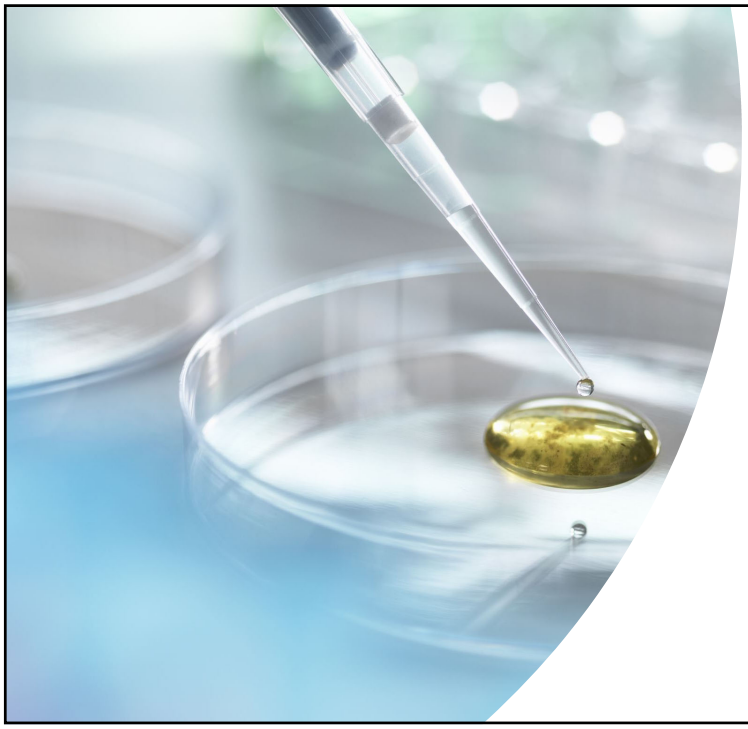
Admissible if:

1) D. receives notice at least 15 biz. days ahead of court and

2) D. received a copy of the forensic report and

3) D. fails to object at least five days before court

5



Remote Forensic Testimony in D.C. per G.S. 15A-1225.3(b1), G.S. 20-139.1(c6)

Admissible if:

1) D. receives notice at least 15 biz. days ahead of court and

2) D. received a copy of the forensic report

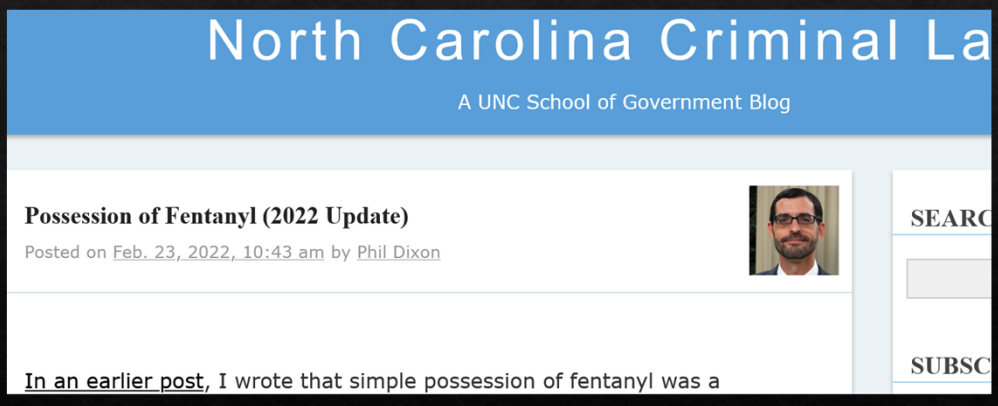
6

New Crimes

- New class I felony Resist, Obstruct, Delay Causing Serious Injury per G.S. 14-233; class F for serious bodily injury
- New crimes of B/E LEO vehicle and larceny from a LEO vehicle per G.S. 14-56 and 14-72.9
- Amended G.S. 14-72.8 renders theft of catalytic converters a class I felony

7

Fentanyl Fix



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New Crimes

New G.S. 14-113.9(a)(6) bans possession and sale/delivery of credit card skimming devices; class I felony

New G.S. 14-234.2 prohibits public officers from soliciting or receiving personal financial gain by misuse of office; class H felony

9

Sex Offenders and Geographical Restrictions

- Amended G.S. 14-208.18 and .16:

-Adds sexual exploitation of minors to list of offenses subject to premise restrictions

-Adds State Fairgrounds during the fair as a prohibited area

-Clarifies that the 1000 ft. residence rule applies broadly

10

"Carolina Squat" Ban

Per G.S. 20-135.4(d), infraction offense

Mandatory license suspension after 3 convictions

11

Changes to Limited Driving Privileges

- Interlock only required on one vehicle, not all vehicles owned by D.
- Standard alcohol concentration restriction changed to 0.02 BAC for everyone
- 45 day wait period for interlock privileges gone
- After June 1, 2022, interlock folks not subject to standard hours restrictions

12

New (And Complex) Rules for Expunging Convictions

North Carolina Criminal

A UNC School of Government Blog

2021 Changes to North Carolina's Expunction Laws

Posted on Dec. 8, 2021, 10:28 am by John Rubin

As in recent sessions, the General Assembly remained active in revising North Carolina's expunction laws. The biggest changes came in S.L. 2021-118 (S 301), as amended by section 2.3 of S.L. 2021-167 (H 761). The legislation expanded the opportunity for a person to expunge older convictions of "nonviolent" felonies but with complex eligibility conditions. This post is a first stab at analyzing that legislation. At the end of the post are short summaries of other 2021 legislation revising North Carolina's expunction laws.

Definition of "Nonviolent" Offenses

13

14

State v. Jonas, p. 1

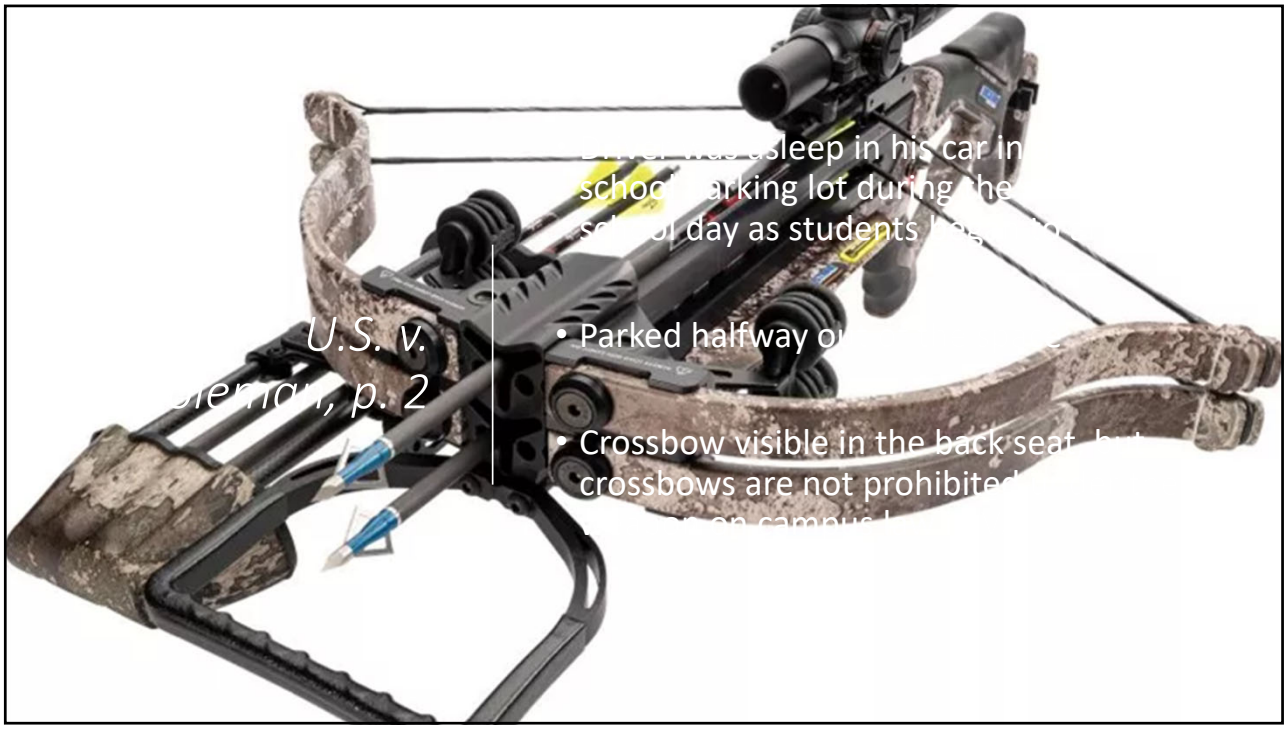
- Car leaves parking lot of closed trucking company around 10 pm; recent trailer theft in the area
- Officer notices transporter plate, and says plate comes back as not "assigned" to any vehicle, but not expired or revoked

15

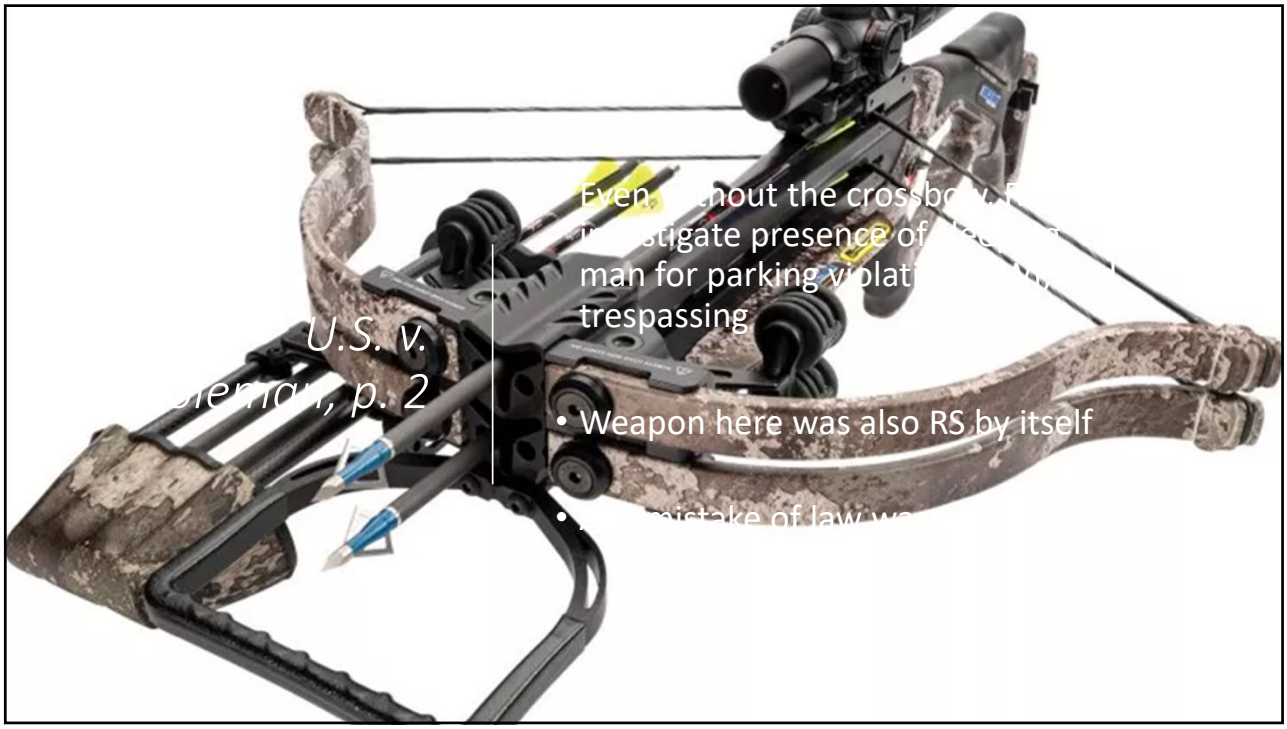
State v. Jonas, p. 1

- G.S. 20-79.2(a) clearly allows transporter plates on cars
- Recent theft and pulling out of closed business was not enough on its own to establish RS without more
- Mistake of law was unreasonable, denial of MTS rev'd

16


U.S. v. [illegible], p. 2
• Parked halfway o
• Crossbow visible in the back seat
crossbows are not prohibited

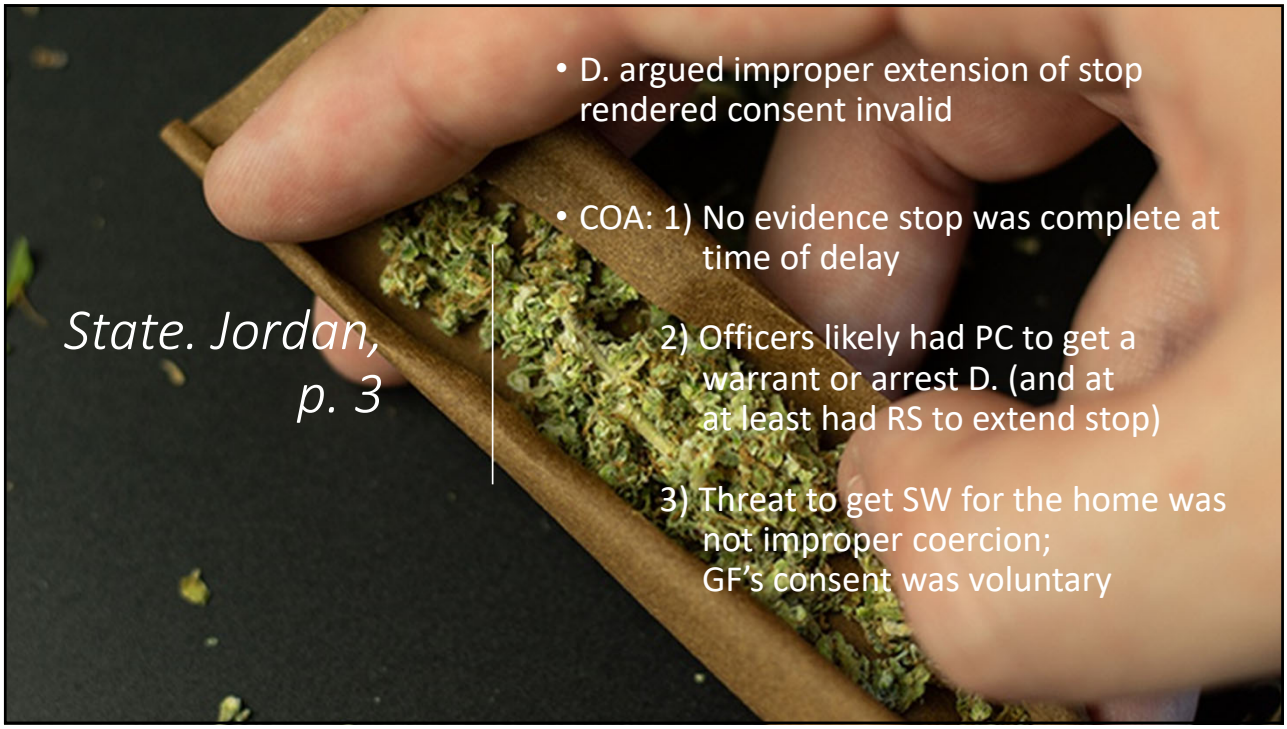
17


U.S. v. [illegible], p. 2
• Weapon here was also RS by itself

18


State. Jordan, p. 3
• Following tip, controlled buys conducted at apartment where D. lived with GF
• Stopped for speeding while riding together; strong odor of MJ and furtive movements by D.
• 5-7 min. delay for stopping officers to confer with drug investigators
• GF eventually consents to search of apt., leading to discovery of guns and cocaine

19


State. Jordan, p. 3
• D. argued improper extension of stop rendered consent invalid
• COA: 1) No evidence stop was complete at time of delay
2) Officers likely had PC to get a warrant or arrest D. (and at at least had RS to extend stop)
3) Threat to get SW for the home was not improper coercion; GF's consent was voluntary

20

State v. Jordan, p. 5

- Police approach and enter home after seeing occupant walk towards stolen car in driveway
- Other officers arrive and see drugs in plain view through the open door, leading to consent search of home, then a SW for a safe
- D. charged with trafficking, FBF, HF

21

State v. Jordan, p. 5

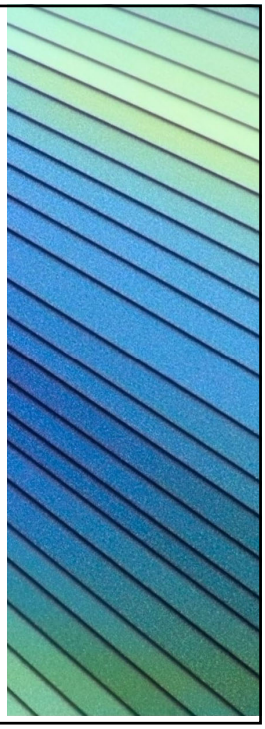
- D. had standing as an occupant with apparent authority and control of safe inside; abandonment only occurred in response to illegal entry
- Man approaching stolen car was not exigent circumstances justifying warrantless entry
- Any consent was invalid and not attenuated from illegality
- SW was based on fruit of poisonous tree

22

Standing and the Fourth Amendment

State v. Lane, p. 7 - where D. was driving for a person authorized to possess the car by the owner but otherwise had no interest in the car lacked standing to contest GPS tracking evidence

U.S. v. Smith, p. 7-8 - front seat passenger who was inside gas station store at the time of the stop had no standing to contest stop or search



23

24

State v. Dew, p. 9

D. may only be convicted of multiple assaults when there is evidence of distinct interruption between each

Multiple, distinct injuries alone is not sufficient evidence of an interruption to support multiple counts

25

State v. Dew, p. 9

- What constitutes a distinct interruption?
  - Passage of time such that a reasonable person would calm down
  - Intervening event
  - Interruption of the Assault
  - Change in location
  - Any other clear to one assault before the next begins

26

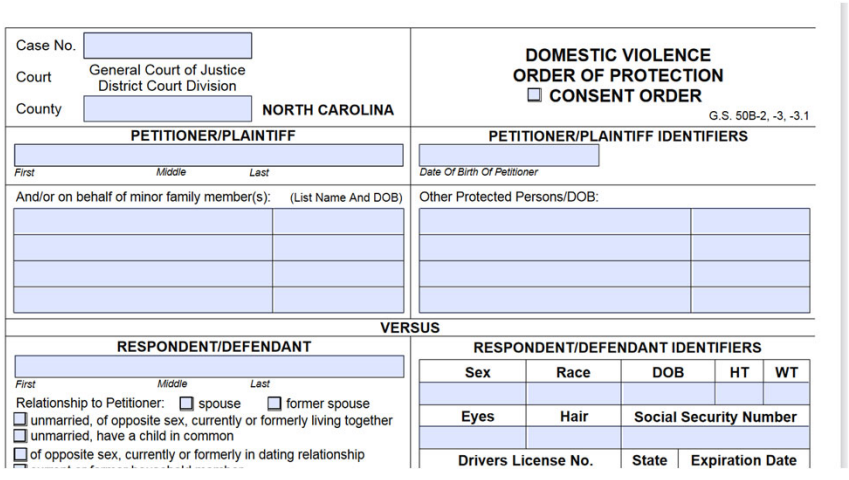
State v. Applewhite, p. 10

- D. convicted of multiple counts of human trafficking for each of several victims
- Sentenced to 2,880-3,744 mos.
- Under G.S. 14-43.11(c), each violation is a separate offense
- **Dissent**: This is a continuing offense; only one count per victim

27

State v. Tucker, p. 10

Knowledge of DVPO



Case No.
Court General Court of Justice District Court Division
County NORTH CAROLINA

DOMESTIC VIOLENCE ORDER OF PROTECTION
☐ **CONSENT ORDER**
G.S. 50B-2, -3, -3.1

PETITIONER/PLAINTIFF
First Middle Last

PETITIONER/PLAINTIFF IDENTIFIERS
Date Of Birth Of Petitioner

And/or on behalf of minor family member(s): (List Name And DOB)

Other Protected Persons/DOB:

VERSUS

RESPONDENT/DEFENDANT
First Middle Last
Relationship to Petitioner: ☐ spouse ☐ former spouse
☐ unmarried, of opposite sex, currently or formerly living together
☐ unmarried, have a child in common
☐ of opposite sex, currently or formerly in dating relationship

RESPONDENT/DEFENDANT IDENTIFIERS

Sex	Race	DOB	HT	WT
Eyes	**Hair**	**Social Security Number**		
Drivers License No.	**State**	**Expiration Date**		

28

Crime and the First Amendment

Categories of Unprotected Speech

- Obscenity & Child Pornography
- "Fighting Words"
- Incitement to Lawlessness
- Defamation
- True Threats
- Speech that is itself a crime

29

State v. Taylor, p. 11

To criminally punish speech as a true threat, State must show:

1) Subjective intent by the speaker to communicate an actual threat

AND

2) The threat is objectively one that a person hearing would take seriously

30

In Re: Z.P., p. 12-13

- Communicating threats and communicating threat of mass violence on educational property based on:
  - "I'm gonna blow up the school" in front of students who thought she was joking
  - "I'm going to kill you with a crowbar and bury you in a shallow grave" in front of a peer she had previously bullied and who took it seriously

31

St. v. Bowen, p. 13

- Extortion is unprotected speech as speech integral to criminal conduct
- "True threats" analysis not applicable

32

33

Indictments and State v. Oldroyd, p. 21

Offense(s)	Date Of Offense OR Date Range Of Offense	G.S. No.	CL.
I. Attempted Robbery with a Dangerous Weapon	10/05/1996	14-87	D
II.			

I. The jurors for the S … county named above the defenda…

attempt to steal, take … sence of employees of the Huddle House … act by having in possession and with … se employees was threatened and endan…

Attempt to steal, take, and carry away another's personal property, United States currency, from the person and presence of EMPLOYEES OF THE HUDDLE HOUSE located at 1538 Highway 67, Jonesville, North Carolina

34

Indictments and State v. Oldroyd, p. 21

- RWDW indictment need not name correct or actual owner of property but must name who was in charge or in the presence of the property at the time of the offense. *State v. Burroughs*, 147 N.C. App. 693, 696 (2001)
- COA: Grant the MAR, fatal defect
- NCSC: Nope. This was sufficient to give D. notice and protect against DJ. G.S. 15A-924 requires no more, and pre-1975 cases requiring more are disclaimed

35

State v. Guinn, p. 19

- D. unrepresented at initial probation violation hearing resulting in extension
- Waiver in file signed by D. and TC, but neither box checked indicating which type of waiver –all counsel, or only appointed counsel
- This was insufficient to show knowing waiver of right to counsel, given lack of colloquy in the transcript at extension hearing
- Because initial extension was improper, no jurisdiction to later revoke

36

State v. Clegg, p. 25

- First ever *Batson* violation against the State for improper race discrimination in jury selection

37

State v. Pabon, p. 27

- Substitute analyst allowed to testify to lab results in sexual assault case
- Any error was harmless on the facts, but this is an area ripe for challenge
- Basis of opinion (and not for the truth of the matter) logic used to justify subs. analysts in NC was expressly rejected by five justices in *Williams v. Illinois* plurality. 567 U.S. 50 (2012)

38

39

State v. Crew and Restitution, p. 29

- Even though convictions only related to some dogs, D. properly ordered to pay restitution for all seized dogs
- Some evidence in the record of D's income and liabilities, and this was enough to show TC considered D's ability to pay
- Improper to order civil judgment where not expressly authorized (and not authorized in non-CVRA cases)

40

41

The End

Phil Dixon
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919-966-4248

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43

Gift Surplus, LLC v. N.C., p. 5

Where a game is predominantly one of chance and not skill, it is prohibited under the sweepstakes ban

For the third time, NCSC finds sweepstakes video games violate the law, despite modifications

44

State v. Robinson, p. 11

- Magistrate found D. in direct criminal contempt after mag. closed window blinds and D. left
- Error to impose direct criminal contempt without notice and opportunity to be heard

45

46

Hemphill v. NY, p. 28

47

State v. McLymore and Self-Defense

- G.S. 14-51.2 – Home, Vehicle, and Workplace Protections (Defense of Habitation)
- G.S. 14-51.3 – Defense of Persons (Stand Your Ground)
- G.S. 14-51.4 – Disqualification from Perfect Self-Defense

48

Self-Defense Disqualification G.S. 14-51.4

Perfect Self-Defense is not available if:

- D. is the initial aggressor (subject to narrow exceptions)

OR

- D. was committing a felony, attempting a felony, or escaping from the commission of a felony

49

Two Questions:

- 1) To what extent does the statutory defense of persons overrule common law right to perfect self-defense?
- 2) How should the felony disqualification be interpreted?

50

State v. McLymore

- Self-defense statutes abrogated common law perfect self-defense
- For felony disqualification to apply, there must be a nexus between the felony and the need for D. to use defensive force

51

Sex Offenders and SBM

- New SBM scheme, caps time at 10 years total and excludes misdemeanor offenses from definition of reoffender
- New requirement of risk assessment plus hearing
- Requests for early termination can be made to a judge after five years
- Very likely constitutional based on recent NCSC rulings

52

State v. Steele, p. 10

- Joint account holders and fraud

53

N.C. Gen. Stat. §§ 14-17, 14-18, 14-51.2, 14-51.3, 14-51.4

206.10 FIRST-DEGREE MURDER WHERE A DEADLY WEAPON IS USED, COVERING ALL LESSER INCLUDED HOMICIDE OFFENSES AND SELF-DEFENSE. FELONY.

NOTE WELL: If self-defense is at issue and the assault occurred in defendant's home, place of residence, workplace or motor vehicle, see N.C.P.I.—Crim. 308.80, Defense of Habitation.

NOTE WELL: N.C. Gen. Stat. §§ 15-176.4; 15A-2000(a): When the defendant is indicted for first degree murder the court shall, upon request by either party, instruct the jury as follows:

"In the event that the defendant is convicted of murder in the first degree, the court will conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment (without parole).[1] If that time comes, you will receive separate sentencing instructions. However, at this time your only concern is to determine whether the defendant is guilty of the crime charged or any lesser included offenses about which you are instructed."[2]

The defendant has been charged with first degree murder.

Under the law and the evidence in this case, it is your duty to return one of the following verdicts:

1) guilty of first-degree murder,

2) guilty of second-degree murder,[3]

3) guilty of voluntary manslaughter,

4) guilty of involuntary manslaughter, or

5) not guilty.

First degree murder is the unlawful killing of a human being with malice and with premeditation and deliberation.

Second-degree murder is the unlawful killing of a human being with malice, but without premeditation and deliberation.

Voluntary manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation.

Involuntary manslaughter is the unintentional killing of a human being by an unlawful act not amounting to a felony or by an act done in a criminally negligent way.

The defendant would be excused of first-degree murder and second-degree murder on the ground of self-defense if:

First, the defendant believed it was necessary to kill the victim[4] in order to save the defendant from death or great bodily harm.

And Second, the circumstances as they appeared to the defendant at the time were sufficient to create such a belief in the mind of a person of ordinary firmness. In determining the reasonableness of the defendant's belief, you should consider the circumstances as you find them to have existed from the evidence, including (the size, age and strength of the defendant as compared to the victim), (the fierceness of the assault, if any, upon the defendant), (whether the victim had a weapon in the victim's possession), (and the reputation, if any, of the victim for danger and violence) (*describe other circumstances, as appropriate from the evidence*).

The defendant would not be guilty of any murder or manslaughter if the defendant acted in self-defense, and if the defendant (was not the aggressor in provoking the fight and) did not use excessive force under the circumstances.

(One enters a fight voluntarily if one uses toward one's opponent abusive language, which, considering all of the circumstances, is calculated and intended to provoke a fight. If the defendant voluntarily and without provocation entered the fight, the defendant would be considered the aggressor unless the defendant thereafter attempted to abandon the fight and gave notice to the deceased that the defendant was doing so. In other words, a person who uses defensive force is justified if the person withdraws, in good faith, from physical contact with the person who was provoked, and indicates clearly that [he] [she] desires to withdraw and terminate the use of force, but the person who was provoked continues or resumes the use of force. A person is also justified in using defensive force when the force used by the person who was provoked is so serious that the person using defensive force reasonably believes that [he] [she] was in imminent danger of death or serious bodily harm, the person using defensive force had no reasonable means to retreat, and the use of force likely to cause death or serious bodily harm was the only way to escape the danger. The defendant is not entitled to the benefit of self-defense if the defendant was the aggressor[5] with the intent to kill or inflict serious bodily harm upon the deceased.[6])

NOTE WELL: Instructions on aggressors and provocation should only be used if there is some evidence presented that defendant provoked the confrontation. See N.C. Gen. Stat. § 14-51.4(2). If no such evidence is presented, the preceding parenthetical and reference to the aggressor throughout this instruction would not be given. In addition, the remainder of the instruction, including the mandate, would need to be edited accordingly to remove references to the aggressor.

A defendant does not have the right to use excessive force. A defendant uses excessive force if the defendant uses more force than reasonably appeared to the defendant to be necessary at the time of the killing. It is for you the jury to determine the reasonableness of the force used by the defendant under all of the circumstances as they appeared to the defendant at the time.

Furthermore, the defendant has no duty to retreat in a place where the defendant has a lawful right to be.[7] (The defendant would have a lawful right to be in the defendant's [home][8] [own premises] [place of residence] [workplace][9] [motor vehicle][10].)

> *NOTE WELL: The preceding parenthetical should only be given where the place involved was the defendant's [home] [own premises] [place of residence] [workplace] [motor vehicle].*[11]

Therefore, in order for you to find the defendant guilty of first-degree murder or second-degree murder, the State must prove beyond a reasonable doubt, among other things, that the defendant did not act in self-defense, or, failing in this, that the defendant was the aggressor with the intent to kill or to inflict serious bodily harm upon the deceased. If the State fails to prove that the defendant did not act in self-defense or was the aggressor with intent to kill or to inflict serious bodily harm, you may not convict the defendant of either first- or second-degree murder. However, you may convict the defendant of voluntary manslaughter if the State proves that the defendant was the aggressor without murderous intent in provoking the fight in which the deceased was killed, or that the defendant used excessive force.

For you to find the defendant guilty of first-degree murder, the state must prove six things beyond a reasonable doubt:

First, that the defendant intentionally[12] and with malice killed the victim with a deadly weapon.

Malice means not only hatred, ill will, or spite, as it is ordinarily understood, but it also means the condition of mind which prompts a person to intentionally take the life of another or to intentionally inflict serious bodily harm that proximately results in another person's death without just cause, excuse or justification. If the State proves beyond a reasonable doubt, (or it is admitted)[13] that the defendant intentionally killed the victim with a deadly weapon or intentionally inflicted a wound upon the deceased with a deadly weapon that proximately caused the victim's death, you may infer first, that the killing was unlawful, and second, that it was done with malice, but you are not compelled to do so.[14] You may consider this along with all other facts and circumstances in determining whether the killing was unlawful and whether it was done with malice.

[A firearm is a deadly weapon.] [A deadly weapon is a weapon which is likely to cause death or serious injury. In determining whether the instrument involved was a deadly weapon, you should consider its nature, the manner in which it was used, and the size and strength of the defendant as compared to the victim.]

Second, the State must prove that the defendant's act was a proximate cause of the victim's death. A proximate cause is a real cause, a cause without which the victim's death would not have occurred,[15] and one that a reasonably

careful and prudent person could foresee would probably produce such [injury] [damage] or some similar injurious result. (The defendant's act need not have been the only cause, nor the last or nearest cause. It is sufficient if it occurred with some other cause acting at the same time, which, in combination with, caused the death of the victim.) (A child has been killed if the child was born alive, but died as a result of injuries inflicted prior to being born alive.)[16]

Third, that the defendant intended to kill the victim. Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proven by circumstances from which it may be inferred. An intent to kill may be inferred from the nature of the assault, the manner in which the assault was made, the conduct of the parties and any other relevant circumstances.

Fourth, that the defendant acted with premeditation, that is, that the defendant formed the intent to kill the victim over some period of time, however short, before the defendant acted.

Fifth, that the defendant acted with deliberation, which means that the defendant acted while the defendant was in a cool state of mind. This does not mean that there had to be a total absence of passion or emotion. If the intent to kill was formed with a fixed purpose, not under the influence of some suddenly aroused violent passion, it is immaterial that the defendant was in a state of passion or excited when the intent was carried into effect.

Neither premeditation nor deliberation is usually susceptible of direct proof. They may be proved by circumstances from which they may be inferred, such as the [lack of provocation by the victim] [conduct of the

defendant before, during and after the killing] [threats and declarations of the defendant] [use of grossly excessive force] [infliction of lethal wounds after the victim is felled] [brutal or vicious circumstances of the killing] [manner in which or means by which the killing was done][17] [ill will between the parties].[18]

And Sixth, that the defendant did not act in self-defense or that the defendant was the aggressor in provoking the fight with the intent to kill or inflict serious bodily harm upon the deceased.

Second Degree Murder differs from first degree murder in that the State does not have to prove specific intent to kill, premeditation, or deliberation. For you to find the defendant guilty of second-degree murder, the State must prove beyond a reasonable doubt that the defendant unlawfully, intentionally[19] and with malice wounded the victim with a deadly weapon, proximately causing the victim's death. The State must also prove that the defendant did not act in self-defense, or if the defendant did act in self-defense, the State must prove that the defendant was the aggressor in provoking the fight with the intent to kill or inflict serious bodily harm.

Voluntary Manslaughter is the unlawful killing of a human being without malice, premeditation, and deliberation. A killing is not committed with malice if the defendant acts in the heat of passion upon adequate provocation.

The heat of passion does not mean mere anger. It means that at the time the defendant acted, the defendant's state of mind was so violent as to overcome reason, so much so that the defendant could not think to the extent necessary to form a deliberate purpose and control the defendant's

actions. Adequate provocation means anything that has a natural tendency to produce such passion in a person of average mind and disposition.[20] Also, the defendant's act must have taken place so soon after the provocation that the passion of a person of average mind and disposition would not have cooled.

The burden is on the State to prove beyond a reasonable doubt that the defendant did not act in the heat of passion upon adequate provocation, but rather that the defendant acted with malice. If the State fails to meet this burden, the defendant can be guilty of no more than voluntary manslaughter.

For you to find the defendant guilty of voluntary manslaughter, the State must prove three things beyond a reasonable doubt:

First, that the defendant killed the victim by an intentional[21] and unlawful act.

Second, that the defendant's act was a proximate cause[22] of the victim's death. A proximate cause is a real cause, a cause without which the victim's death would not have occurred.

And Third, that the defendant [did not act in self-defense] or [though acting in self-defense [was the aggressor] (or) [though acting in self-defense used excessive force].

Voluntary manslaughter is also committed if the defendant kills in self-defense but uses excessive force under the circumstances or was the aggressor without murderous intent in provoking the fight in which the killing took place.

The burden is on the State to prove beyond a reasonable doubt that the defendant did not act in self-defense. However, if the State proves beyond a reasonable doubt that the defendant, though otherwise acting in self-defense, [used excessive force] (or) [was the aggressor, though the defendant had no murderous intent when the defendant entered the fight], the defendant would be guilty of voluntary manslaughter.[23]

If you do not find the defendant guilty of murder or voluntary manslaughter, you must consider whether the defendant is guilty of involuntary manslaughter. Involuntary manslaughter is the unintentional killing of a human being by an unlawful act that is not a felony, or by an act done in a criminally negligent way.

For you to find the defendant guilty of involuntary manslaughter, the State must prove two things beyond a reasonable doubt:

First, that the defendant acted

a) [unlawfully] [The defendant's act was unlawful if (*define crime alleged to have been violated, e.g., defendant recklessly discharged a gun, killing the victim*).]

b) [in a criminally negligent way].[24] [Criminal negligence is more than mere carelessness. The defendant's act was criminally negligent, if, judging by reasonable foresight, it was done with such gross recklessness or carelessness as to amount to a heedless indifference to the safety and rights of others.]

And Second, the State must prove that this [unlawful] (or) [criminally negligent] act proximately caused the victim's death.

(If the victim died by accident or misadventure, that is, without wrongful purpose or criminal negligence on the part of the defendant, the defendant would not be guilty.[25] The burden of proving accident is not on the defendant. The defendant's assertion of accident is merely a denial that the defendant has committed any crime. The burden remains on the State to prove the defendant's guilt beyond a reasonable doubt.)

FINAL MANDATE ON ALL CHARGES AND DEFENSES

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant, acting with malice and not in self-defense, wounded the victim with a deadly weapon thereby proximately causing the victim's death, that the defendant intended to kill the victim, and that the defendant acted after premeditation and with deliberation, it would be your duty to return a verdict of guilty of first-degree murder. If you do not so find or have a reasonable doubt as to one or more of these things, you will not return a verdict of guilty of first-degree murder, but will determine whether the defendant is guilty of second degree murder.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant intentionally and with malice but not in self-defense wounded the victim with a deadly weapon thereby proximately causing the victim's death, it would be your duty to return a verdict of guilty of second-degree murder. If you do not so find or have a reasonable doubt as to one or more of these things, you will not return a verdict of guilty of second-degree murder, but will determine whether the defendant is guilty of voluntary manslaughter.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant intentionally wounded the victim with a deadly weapon and thereby proximately caused the victim's death, and that the defendant was the aggressor in provoking the fight or used excessive force, it would be your duty to find the defendant guilty of voluntary manslaughter even if the state has failed to prove that the defendant did not act in self-defense.

Or, if you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant intentionally and not in self-defense wounded the victim with a deadly weapon and thereby proximately caused the victim's death, but the State has failed to satisfy you beyond a reasonable doubt that defendant did not act in the heat of passion upon adequate provocation, it would be your duty to return a verdict of guilty of voluntary manslaughter.

If you do not so find or have a reasonable doubt as to one or more of these things, you will not return a verdict of guilty of voluntary manslaughter, but will determine whether the defendant is guilty of involuntary manslaughter.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant [committed the offense of (name crime)] [acted in a criminally negligent way] thereby proximately causing the victim's death, it would be your duty to return a verdict of guilty of involuntary manslaughter. However, if you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

And finally, if the State has failed to satisfy you beyond a reasonable doubt that the defendant did not act in self-defense, that the defendant was the aggressor, or that the defendant used excessive force, then the defendant's action would be justified by self-defense; and it would be your duty to return a verdict of not guilty.

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1. The parenthetical phrase, without parole, must be used for offenses occurring on or after October 1, 1994.

2 .N.C. Gen. Stat. § 14-5.2 (effective July 1, 1981) abolished all distinctions between accessories before the fact and principals to felonies as to both trial and punishment, except that if a person who would have been guilty and punishable as an accessory before the fact is convicted of a capital felony, and the jury finds that his conviction was based solely on the uncorroborated testimony of one or more principals, co-conspirators or accessories to the crime, he shall be guilty of a Class B felony. The act applies to all offenses committed on or after July 1, 1981. See N.C.P.I.–Crim. 202.30.

As to felonies allegedly committed before that date, accessories before the fact should be tried (and punished) according to previously existing law. See N.C.P.I.—Crim. 202.20, 202.30 and State v. Small, 301 N.C. 407, 272 S.E.2d 128 (1980).

See N.C.P.I.—Crim. 206.10A for suggested procedure and instruction where an accessory before the fact is convicted of first-degree murder.

3. If the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree, including premeditation and deliberation, and there is no evidence to negate these elements other than defendant's denial that he committed the offense, the trial judge should properly exclude from jury consideration the possibility of a conviction of second-degree murder." S v. Strickland, 307 N.C. 274, 293 (1983), overruling S v. Harris, 290 N.C. 718 (1976).

4. Substitute "to use deadly force against the victim" for "to kill the victim" when the evidence tends to show that the defendant intended to use deadly force to disable the victim, but not to kill the victim. See State v. Watson, 338 N.C. 168 (1994). See also State v. Richardson, 341 N.C. 585 (1995).

5. N.C. Gen. Stat. § 14-51.4(2).

6. Pursuant to N.C. Gen. Stat. § 14-51.4(1), self-defense is also not available to a person who used defensive force and who was [attempting to commit] [committing] [escaping after the commission of] a felony. If evidence is presented on this point, then the instruction should be modified accordingly to add this provision.

7. See N.C.P.I.—Crim. 308.10.

8. N.C. Gen. Stat. § 14-51.2 (a) (1) states that a home is a "building or conveyance of any kind, to include its curtilage, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, and is designed as a temporary or permanent residence." Curtilage is the area "immediately surrounding and associated with the home," which may include "the yard around the dwelling house as well as the area occupied by barns, cribs, and other outbuildings." State v. Grice, 367 N.C. 753, 759 (2015) (citations and quotations omitted) (defining curtilage in a Fourth Amendment case).

9. N.C. Gen. Stat. § 14-51.2 (a) (4) states that a workplace is a "building or conveyance of any kind, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, which is being used for commercial purposes."

10. N.C. Gen. Stat. § 14-51.2 (a) (3); which incorporates N.C. Gen. Stat. § 20-4.01 (23), defines "motor vehicle" as "Every vehicle which is self-propelled and every vehicle designed to run upon the highways which is pulled by a self-propelled vehicle. This shall not include mopeds as defined in N.C. Gen. Stat. § 20-4.01(27)d1."

11. **"[W]herever an individual is lawfully located—whether it is his home, motor vehicle, workplace, or any other place where he has the lawful right to be—the individual may stand his ground and defend himself from attack when he reasonably believes such force is necessary to prevent imminent death or great bodily harm to himself or another." State v. Bass, 371 N.C. 456, 541, 819 S.E.2d 322, 326 (2018). "[A] defendant entitled to any self-defense instruction is entitled to a complete self-defense instruction, which includes the relevant stand-your-ground provision." Id.**

12. If a definition of intent is required, see N.C.P.I.–Crim. 120.10. If a further definition of general intent or specific intent is required, you may consider giving the following additional instruction: [Specific Intent is a mental purpose, aim or design to accomplish a specific harm or result] [General Intent is a mental purpose, aim or design to perform an act, even though the actor does not necessarily desire the consequences that result] Black's Law Dictionary, 825-26 (Bryan A. Garner, 8th ed. 2004).

13. Use the parenthetical only if defendant admits to an intentional shooting in open court. See State v. McCoy, 303 N.C. 1, 28-29 (1981).

14. In Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965 (1985), the Supreme Court held that a mandatory presumption, if it relieves the State of its burden of persuasion on an element of the offense, violates the Due Process Clause. This raises questions concerning the validity of the mandatory presumption of malice required in S. v. Reynolds, 307 N.C. 184 (1982).

15. Where there is a serious issue as to proximate cause, further instructions may be helpful, e.g., "The defendant's act need not have been the last cause or the nearest cause. It is sufficient if it concurred with some other cause acting at the same time, which in combination with it, proximately caused the death of (name victim)." This language was approved in State v. Messick, 159 N.C. App. 232 (2003), per curiam affirmed, 358 N.C. 145

(2004). ("Defendant's act does not have to be the sole proximate cause of death. It is sufficient that the act was a proximate cause which in combination with another possible cause resulted in [the victim's] death.").

16. This sentence is only to be provided if the offense involved the killing of a child.

17. If there is evidence of lack of mental capacity to premeditate or deliberate, see S. v. Shank, 322 N.C. 243, 250-251 (1988), S. v. Weeks, 322 N.C. 152 (1988) and S. v. Rose, 323 N.C. 455 (1988), and N.C.P.I.–Crim. 305.11.

18. See State v. Battle, 322 N.C. 114 (1988).

19. Neither second-degree murder nor voluntary manslaughter has as an essential element an intent to kill. In connection with these two offenses, the phrase 'intentional killing' refers not to the presence of a specific intent to kill, but rather to the fact that the act which resulted in death is intentionally committed and is an act of assault which in itself amounts to a felony or is likely to cause death or serious bodily injury. Such an act committed in the heat of passion suddenly aroused by adequate provocation or in the imperfect exercise of the right of self-defense is voluntary manslaughter. But such an act can never be involuntary manslaughter. This is so because the crime of involuntary manslaughter involves the commission of an act, whether intentional or not, which in itself is not a felony or likely to result in death or great bodily harm. S. v. Ray, 299 N.C. 151, 158 (1980). See also S. v. Jordan, 140 N.C. App. 594 (2000); S. v. Coble, 351 N.C. 448 (2000).

20. If some evidence tends to show legally sufficient provocation (e.g., assault), but other evidence tends to show that the provocation, if any, was insufficient (e.g., mere words), the jury should be told the kind of provocation that the law regards as insufficient, e.g., "Words and gestures alone, however insulting, do not constitute adequate provocation when no assault is made or threatened against the defendant."

21. "Neither second-degree murder nor voluntary manslaughter has as an essential element an intent to kill. In connection with these two offenses, the phrase 'intentional killing' refers not to the presence of a specific intent to kill, but rather to the fact that the act which resulted in death is intentionally committed and is an act of assault which in itself amounts to a felony or is likely to cause death or serious bodily injury. Such an act committed in the heat of passion suddenly aroused by adequate provocation or in the imperfect exercise of the right of self-defense is voluntary manslaughter. But such an act can never be involuntary manslaughter. This is so because the crime of involuntary manslaughter involves the commission of an act, whether intentional or not, which in itself is not a felony or likely to result in death or great bodily harm." S. v. Ray, 299 N.C. 151, 158 (1980). See also S. v. Jordan, 140 N.C. App. 594 (2000); S. v. Coble, 351 N.C. 448 (2000).

22. Where there is a serious issue as to proximate cause, further instructions may be helpful, e.g., "The defendant's act need not have been the last cause or the nearest cause. It is sufficient if it concurred with some other cause acting at the same time, which in combination with it, proximately caused the death of the victim."

23. Where the evidence raises the issue of retreat, see N.C.P.I.—Crim. 308.10.

24. Note that you must choose either "unlawfully" or "in a criminally negligent way." Jurors should not be given both options.

25. In the event that the evidence shows that there was an accident, give N.C.P.I.—Crim. 307.10.

DEFENSE OF [HABITATION] [WORKPLACE] [MOTOR VEHICLE]—HOMICIDE AND ASSAULT.

NOTE WELL: The use of force, including deadly force, is justified when the defendant is acting to prevent a forcible entry into the defendant's home, other place of residence, workplace, or motor vehicle, or to terminate an intruder's unlawful entry. See G.S. 14-51.1. This instruction is designed to be used instead of, or together with, the self-defense instructions which are incorporated in the murder charges (N.C.P.I.—Crim. 206.10, 206.11, 206.30), and those in N.C.P.I.--Crim. 308.40 or 308.45.

NOTE WELL: The trial judge is reminded that this instruction must be combined with the substantive offense instruction in the following manner: (1) the jury should be instructed on the elements of the charged offense; (2) the jury should then be instructed on the definition of defense of habitation set out in this instruction below; (3) the jury should then be instructed on the mandate of the charged offense; and (4) the jury should be instructed on the mandate for self-defense as set out below in this instruction. ***THE FAILURE TO CHARGE ON ALL OF THESE MATTERS CONSTITUTES REVERSIBLE ERROR.***

If the defendant [killed] [assaulted] the victim to prevent a forcible entry into the defendant's [home][1] [place of residence][2] [workplace][3] [motor vehicle][4], or to terminate the intruder's unlawful entry, the defendant's actions are excused and the defendant is not guilty. The State has the burden of proving from the evidence beyond a reasonable doubt that the defendant did not act in the lawful defense of the defendant's [home] [place of residence] [workplace] [motor vehicle].

The defendant was justified in using (deadly) force[5] if:

(1) such force was being used to [prevent a forcible entry] [terminate the intruder's unlawful entry] into the defendant's [home] [place of residence] [workplace] [motor vehicle];

(2) the defendant reasonably believed that the intruder [would kill or inflict serious bodily harm to the defendant or others in the [home] [place of residence] [workplace] [motor vehicle]][6] [intended to commit a felony in the [home] [place of residence] [workplace] [motor vehicle]]; and

(3) The defendant reasonably believed that the degree of force the defendant used was necessary to [prevent a forcible entry] [terminate the intruder's unlawful entry] into the defendant's [home] [place of residence] [workplace] [motor vehicle].[7]

A lawful occupant within a [home] [place of residence] [workplace] [motor vehicle] does not have a duty to retreat from an intruder in these circumstances.[8] Furthermore, a "person who unlawfully and by force enters or attempts to enter a person's [home] [place of residence] [workplace] [motor vehicle] is presumed to be doing so with the intent to commit an unlawful act involving force or violence."[9] In addition, (absent evidence to the contrary)[10], the lawful occupant of a [home] [place of residence] [workplace] [motor vehicle] is presumed to have held a reasonable fear of imminent death or serious bodily harm to [himself] [herself] or another when using defensive force that is intended or likely to cause death or serious bodily harm to another if both of the following apply:

(1) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a [home] [place of residence] [workplace] [motor vehicle], or if that person had removed or was attempting to remove another against that person's will from the [home] [place of residence] [workplace] [motor vehicle]; and

(2) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.[11]

It is for you, the jury, to determine the reasonableness of the defendant's belief from the circumstances as they appeared to the defendant at the time.

NOTE WELL: The following self-defense mandate must be given after the mandate on the substantive offense(s).

***INCLUDING THE SELF-DEFENSE MANDATE IS REQUIRED BY STATE V. WOODSON**, 31 N.C. APP. 400 (1976). Cf. State v. Dooley, 285 N.C. 158 (1974).*

DEFENSE OF HABITATION MANDATE

If you find beyond a reasonable doubt that the defendant [killed] [assaulted] the victim you may return a verdict of guilty only if the State has satisfied you beyond a reasonable doubt that the defendant did not act in the lawful defense of the defendant's [home] [place of residence] [workplace] [motor vehicle], that is,

(1) that the defendant did not use such force to [prevent a forcible entry] [terminate the intruder's unlawful entry] into the defendant's [home] [place of residence] [workplace] [motor vehicle];

(2) that the defendant did not reasonably believe that the intruder [would kill or inflict serious bodily harm to the defendant or others in the [home] [place of residence] [workplace] [motor vehicle]] [intended to commit a felony in the [home] [place of residence] [workplace] [motor vehicle]]; and

(3) that the defendant did not reasonably believe that the degree of force the defendant used was necessary to [prevent a forcible entry] [terminate the intruder's unlawful entry] into the defendant's [home] [place of residence] [workplace] [motor vehicle].[12]

If you do not so find, or have a reasonable doubt that the State has proved any one or more of these things, then the defendant would be justified in defending the [home] [place of residence] [workplace] [motor vehicle], and it would be your duty to return a verdict of not guilty.

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1. G.S. 14-51.2(b), (defense of habitation applies when the person against whom defensive force is used is "in the process of unlawfully and forcefully entering a home"); G.S. 14-51.2(a)(1) ("home" is defined to "include its curtilage"). See also *State v. Dilworth*, __ N.C. App. __, 851 S.E.2d 406 (2020) (holding that a defendant is entitled to a defense of habitation instruction where the person against whom defensive force is used is in the process of entering the home through its curtilage).

2. *See State v. Blue*, 356 N.C. 79, 565 S.E.2d 133 (2002) (concluding that defense of habitation can be applicable to the porch of a dwelling under certain circumstances and that the question of whether a porch, garage, or other appurtenance attached to a dwelling is within the home or residence for purposes of G.S. 14-51.1 is a question best left to the jury).

3. G.S. 14-51.2 (a) (4) states that a workplace is a "building or conveyance of any kind, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, which is being used for commercial purposes."

4. G.S. 14-51.2 (a) (3); G.S. 20-4.01 (23) defines "motor vehicle" as "Every vehicle which is self-propelled and every vehicle designed to run upon the highways which is pulled by a self-propelled vehicle. This shall not include mopeds as defined in G.S. 20-4.01(27)d1."

5. *See* G.S. 14-51.4. The justification described in G.S. 14-51.2 and 14-51.3 is not available to a person who used defensive force and who: "(1) Was attempting to commit, committing, or escaping after the commission of a felony; or (2) Initially provokes the use of force against himself or herself. However, the person who initially provokes the use of force against himself or herself will be justified in using defensive force if either of the following occur: a. The force used by the person who was provoked is so serious that the person using defensive force reasonably believes that he or she was in imminent danger of death or serious bodily harm, the person using defensive force had no reasonable means to retreat, and the use of force which is likely to cause death or serious bodily harm to the person who was provoked was the only way to escape the danger. b. The person who used defensive force withdraws, in good faith, from physical contact with the person who was provoked, and indicates clearly that he or she desires to withdraw and terminate the use of force, but the person who was provoked continues or resumes the use of force."

If evidence is presented to show the preceding, then this instruction should be modified accordingly.

6. G.S. 14-51.3 (a) (1).

7. G.S. 14-51.2 (e) states that a person is not justified in using (deadly) force where the "person against whom force was used is a law enforcement officer or bail bondsman who was lawfully acting in the performance of his or her official duties and the officer or bail bondsman identified himself or herself in accordance with any applicable law or the person using force knew or reasonably should have known that the person was a law enforcement officer or bail bondsman in the lawful performance of his or her official duties." If the defendant instigated or provoked an intrusion, [he] [she] cannot rely on the defense that the degree of force used by [him] [her] was reasonably necessary.

8. G.S. 14-51.2 (f) states "a lawful occupant within his or her home, motor vehicle, or workplace does not have a duty to retreat from an intruder in the circumstances described in this section." The defendant can stand the defendant's ground and repel force with force regardless of the character of the assault being made upon the defendant. (N.C.P.I. Crim. 308.10).

9. G.S. 14-51.2 (d).

10. This parenthetical should be used where there is evidence presented to rebut the presumption.

11. G.S. 14-51.2 (b). Pursuant to G.S. 14-51.2(c), the presumption in (b) does not apply in any of the following circumstances: "(1) The person against whom the defensive force is used has the right to be in or is a lawful resident of the home, motor vehicle, or workplace, such as an owner or lessee, and there is not an injunction for protection from domestic violence or a written pretrial supervision order of no contact against that person. (2) The person sought to be removed from the home, motor vehicle, or workplace is a child or grandchild or is otherwise in the lawful custody or under the lawful guardianship of the person against whom the defensive force is used. (3) The person who uses defensive force is engaged in, attempting to escape from, or suing the home, motor vehicle, or workplace to further any criminal offense that involves the use or threat of physical force or violence against any individual. (4) The person against whom the defensive force is used is a law enforcement officer or bail bondsman who enters or attempts to enter a home, motor vehicle, or workplace in the lawful performance of his or her official duties, and the officer or bail bondsman identified himself or herself in accordance with any applicable law or the person using force knew or reasonably should have known that the person entering or attempting to enter was a law enforcement officer or bail bondsman in the lawful performance of his or her official duties. (5) The person against whom the defensive force is used (i) has discontinued all efforts to unlawfully and forcefully enter the home, motor vehicle, or workplace and (ii) has exited the home, motor vehicle, or workplace." If the State presents evidence to rebut this presumption, then this instruction should be edited accordingly. For instance, language like the following could be added: If you find that the defendant was (describe rebuttal evidence presented by State), then this presumption would not apply.

12. *See also* G.S. 14-51.3 (b), which provides that a person who uses force as permitted by the statute is justified in using such force and is immune from civil or criminal liability, unless the person against whom force was used is a law enforcement officer or bail bondsman "who was lawfully acting in the performance of his or her official duties and the officer or bail bondsman identified himself or herself in accordance with any

applicable law or the person using force knew or reasonably should have known that the person was a law enforcement officer or bail bondsman in the lawful performance of his or her official duties."

DEFENSE OF [HABITATION] [WORKPLACE] [MOTOR VEHICLE]—HOMICIDE AND ASSAULT.

NOTE WELL: The use of force, including deadly force, is justified when the defendant is acting to prevent a forcible entry into the defendant's home, other place of residence, workplace, or motor vehicle, or to terminate an intruder's unlawful entry. See G.S. 14-51.1. This instruction is designed to be used instead of, or together with, the self-defense instructions which are incorporated in the murder charges (N.C.P.I.—Crim. 206.10, 206.11, 206.30), and those in N.C.P.I.--Crim. 308.40 or 308.45.

NOTE WELL: The trial judge is reminded that this instruction must be combined with the substantive offense instruction in the following manner: (1) the jury should be instructed on the elements of the charged offense; (2) the jury should then be instructed on the definition of defense of habitation set out in this instruction below; (3) the jury should then be instructed on the mandate of the charged offense; and (4) the jury should be instructed on the mandate for self-defense as set out below in this instruction. ***THE FAILURE TO CHARGE ON ALL OF THESE MATTERS CONSTITUTES REVERSIBLE ERROR.***

If the defendant [killed] [assaulted] the victim to prevent a forcible entry into the defendant's [home][1] [place of residence][2] [workplace][3] [motor vehicle][4], or to terminate the intruder's unlawful entry, the defendant's actions are excused and the defendant is not guilty. The State has the burden of proving from the evidence beyond a reasonable doubt that the defendant did not act in the lawful defense of the defendant's [home] [place of residence] [workplace] [motor vehicle].

The defendant was justified in using (deadly) force[5] if:

(1) such force was being used to [prevent a forcible entry] [terminate the intruder's unlawful entry] into the defendant's [home] [place of residence] [workplace] [motor vehicle];

(2) the defendant reasonably believed that the intruder [would kill or inflict serious bodily harm to the defendant or others in the [home] [place of residence] [workplace] [motor vehicle]][6] [intended to commit a felony in the [home] [place of residence] [workplace] [motor vehicle]]; and

(3) The defendant reasonably believed that the degree of force the defendant used was necessary to [prevent a forcible entry] [terminate the intruder's unlawful entry] into the defendant's [home] [place of residence] [workplace] [motor vehicle].[7]

A lawful occupant within a [home] [place of residence] [workplace] [motor vehicle] does not have a duty to retreat from an intruder in these circumstances.[8] Furthermore, a "person who unlawfully and by force enters or attempts to enter a person's [home] [place of residence] [workplace] [motor vehicle] is presumed to be doing so with the intent to commit an unlawful act involving force or violence."[9] In addition, (absent evidence to the contrary)[10], the lawful occupant of a [home] [place of residence] [workplace] [motor vehicle] is presumed to have held a reasonable fear of imminent death or serious bodily harm to [himself] [herself] or another when using defensive force that is intended or likely to cause death or serious bodily harm to another if both of the following apply:

(1) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a [home] [place of residence] [workplace] [motor vehicle], or if that person had removed or was attempting to remove another against that person's will from the [home] [place of residence] [workplace] [motor vehicle]; and

(2) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.[11]

It is for you, the jury, to determine the reasonableness of the defendant's belief from the circumstances as they appeared to the defendant at the time.

NOTE WELL: The following self-defense mandate must be given after the mandate on the substantive offense(s).

***INCLUDING THE SELF-DEFENSE MANDATE IS REQUIRED BY STATE V. WOODSON**, 31 N.C. APP. 400 (1976). Cf. State v. Dooley, 285 N.C. 158 (1974).*

DEFENSE OF HABITATION MANDATE

If you find beyond a reasonable doubt that the defendant [killed] [assaulted] the victim you may return a verdict of guilty only if the State has satisfied you beyond a reasonable doubt that the defendant did not act in the lawful defense of the defendant's [home] [place of residence] [workplace] [motor vehicle], that is,

(1) that the defendant did not use such force to [prevent a forcible entry] [terminate the intruder's unlawful entry] into the defendant's [home] [place of residence] [workplace] [motor vehicle];

(2) that the defendant did not reasonably believe that the intruder [would kill or inflict serious bodily harm to the defendant or others in the [home] [place of residence] [workplace] [motor vehicle]] [intended to commit a felony in the [home] [place of residence] [workplace] [motor vehicle]]; and

(3) that the defendant did not reasonably believe that the degree of force the defendant used was necessary to [prevent a forcible entry] [terminate the intruder's unlawful entry] into the defendant's [home] [place of residence] [workplace] [motor vehicle].[12]

If you do not so find, or have a reasonable doubt that the State has proved any one or more of these things, then the defendant would be justified in defending the [home] [place of residence] [workplace] [motor vehicle], and it would be your duty to return a verdict of not guilty.

---

1. G.S. 14-51.2(b), (defense of habitation applies when the person against whom defensive force is used is "in the process of unlawfully and forcefully entering a home"); G.S. 14-51.2(a)(1) ("home" is defined to "include its curtilage"). See also *State v. Dilworth*, __ N.C. App. __, 851 S.E.2d 406 (2020) (holding that a defendant is entitled to a defense of habitation instruction where the person against whom defensive force is used is in the process of entering the home through its curtilage).

2. *See State v. Blue*, 356 N.C. 79, 565 S.E.2d 133 (2002) (concluding that defense of habitation can be applicable to the porch of a dwelling under certain circumstances and that the question of whether a porch, garage, or other appurtenance attached to a dwelling is within the home or residence for purposes of G.S. 14-51.1 is a question best left to the jury).

3. G.S. 14-51.2 (a) (4) states that a workplace is a "building or conveyance of any kind, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, which is being used for commercial purposes."

4. G.S. 14-51.2 (a) (3); G.S. 20-4.01 (23) defines "motor vehicle" as "Every vehicle which is self-propelled and every vehicle designed to run upon the highways which is pulled by a self-propelled vehicle. This shall not include mopeds as defined in G.S. 20-4.01(27)d1."

5. *See* G.S. 14-51.4. The justification described in G.S. 14-51.2 and 14-51.3 is not available to a person who used defensive force and who: "(1) Was attempting to commit, committing, or escaping after the commission of a felony; or (2) Initially provokes the use of force against himself or herself. However, the person who initially provokes the use of force against himself or herself will be justified in using defensive force if either of the following occur: a. The force used by the person who was provoked is so serious that the person using defensive force reasonably believes that he or she was in imminent danger of death or serious bodily harm, the person using defensive force had no reasonable means to retreat, and the use of force which is likely to cause death or serious bodily harm to the person who was provoked was the only way to escape the danger. b. The person who used defensive force withdraws, in good faith, from physical contact with the person who was provoked, and indicates clearly that he or she desires to withdraw and terminate the use of force, but the person who was provoked continues or resumes the use of force."

If evidence is presented to show the preceding, then this instruction should be modified accordingly.

6. G.S. 14-51.3 (a) (1).

7. G.S. 14-51.2 (e) states that a person is not justified in using (deadly) force where the "person against whom force was used is a law enforcement officer or bail bondsman who was lawfully acting in the performance of his or her official duties and the officer or bail bondsman identified himself or herself in accordance with any applicable law or the person using force knew or reasonably should have known that the person was a law enforcement officer or bail bondsman in the lawful performance of his or her official duties." If the defendant instigated or provoked an intrusion, [he] [she] cannot rely on the defense that the degree of force used by [him] [her] was reasonably necessary.

8. G.S. 14-51.2 (f) states "a lawful occupant within his or her home, motor vehicle, or workplace does not have a duty to retreat from an intruder in the circumstances described in this section." The defendant can stand the defendant's ground and repel force with force regardless of the character of the assault being made upon the defendant. (N.C.P.I. Crim. 308.10).

9. G.S. 14-51.2 (d).

10. This parenthetical should be used where there is evidence presented to rebut the presumption.

11. G.S. 14-51.2 (b). Pursuant to G.S. 14-51.2(c), the presumption in (b) does not apply in any of the following circumstances: "(1) The person against whom the defensive force is used has the right to be in or is a lawful resident of the home, motor vehicle, or workplace, such as an owner or lessee, and there is not an injunction for protection from domestic violence or a written pretrial supervision order of no contact against that person. (2) The person sought to be removed from the home, motor vehicle, or workplace is a child or grandchild or is otherwise in the lawful custody or under the lawful guardianship of the person against whom the defensive force is used. (3) The person who uses defensive force is engaged in, attempting to escape from, or suing the home, motor vehicle, or workplace to further any criminal offense that involves the use or threat of physical force or violence against any individual. (4) The person against whom the defensive force is used is a law enforcement officer or bail bondsman who enters or attempts to enter a home, motor vehicle, or workplace in the lawful performance of his or her official duties, and the officer or bail bondsman identified himself or herself in accordance with any applicable law or the person using force knew or reasonably should have known that the person entering or attempting to enter was a law enforcement officer or bail bondsman in the lawful performance of his or her official duties. (5) The person against whom the defensive force is used (i) has discontinued all efforts to unlawfully and forcefully enter the home, motor vehicle, or workplace and (ii) has exited the home, motor vehicle, or workplace." If the State presents evidence to rebut this presumption, then this instruction should be edited accordingly. For instance, language like the following could be added: If you find that the defendant was (describe rebuttal evidence presented by State), then this presumption would not apply.

12. *See also* G.S. 14-51.3 (b), which provides that a person who uses force as permitted by the statute is justified in using such force and is immune from civil or criminal liability, unless the person against whom force was used is a law enforcement officer or bail bondsman "who was lawfully acting in the performance of his or her official duties and the officer or bail bondsman identified himself or herself in accordance with any

applicable law or the person using force knew or reasonably should have known that the person was a law enforcement officer or bail bondsman in the lawful performance of his or her official duties."

~~Self-Defense~~ Lawful Use of Defensive Force Update

By Daniel Shatz and Sterling Rozear

Assistant Appellate Defenders

Recent Cases

State v. Hicks, 2022-NCCOA-263

- **Holding**:
  - Reversible error to instruct on D as initial aggressor when there is no evidence D was the initial aggressor. To be an initial aggressor, a defendant must "aggressively and willingly enter into a fight without legal excuse or provocation." Merely arming oneself in anticipation of trouble does not make the defendant an initial aggressor.
- **Takeaway**:
  - The statute speaks of D provoking the use of force by V which, in turn, necessitates D's use of force against V. If a defendant's version is V attacked me and I had to defend myself, and the State's evidence is D attacked V without provocation, an instruction on aggressor doctrine (as the case calls it) is NOT warranted.

Recent Cases

State v. Dilworth, 274 N.C.App. 57 (2020)

- **Holding**:
  - Where there was no evidence victim actually entered the curtilage of defendant's home unlawfully and forcefully, defendant was not entitled to an instruction under §14-51.2.
- **Takeaway**:
  - A defendant's belief that the victim has unlawfully and forcefully entered his home (including the curtilage) is not enough. There must be evidence this belief was actually correct.

Recent Cases

State v. Coley, 375 N.C. 156 (2020)

- **Holding**:
  - Error not to instruct on self-defense when evidence in light most favorable to the defendant supports an instruction.
- **Takeaways**:
  1. In determining whether a defendant gets an instruction, the evidence must be viewed in the light most favorable to D.
  2. Even if D testified he fired a warning shot, this does not disqualify D from self-defense if there is conflicting evidence on whether D fired a warning shot or intended to hit V with the blow.

Recent Cases

State v. Austin, 2021-NCCOA-494

- **Holdings**:
  - (1) The Statutes do not create any right to a judicial determination of immunity. The legislature's inclusion of the word "immunity" in the statutes meant and did nothing at all.
  - (2) The five enumerated grounds in 14-51.2(c) are not the exclusive means of rebutting the presumption in 14-51.2(b).
- **Implications**:
  - Life sucks. Eat Arby's. More below.

Recent Cases

State v. McLymore, 2022-NCSC-12

- **Holdings**:
  - (1) **§14-51.3 and §14-51.4 have supplanted the common law.**
    - "after the General Assembly's enactment of N.C.G.S. § 14-51.3, there is only one way a criminal defendant can claim perfect self-defense: by invoking the statutory right to perfect self-defense."
  - (2) **§14-51.4(1) incorporates a causal nexus requirement.**
    - Defendant's commission or attempted commission of a felony must be a "but for" cause of the confrontation during which defendant used force would not have occurred.
- **Implications**:
  - Tons of implications – see below

Issues/Ideas

- What does “causal nexus” mean?
  - Does the type of felony matter?
  - Does the timing of the commission of the felony matter?

Issues/Ideas

Don't forget the Constitution!

- If your client is not entitled under the statute, raise a constitutional objection to the loss of the right to act in self defense.
- Our Supreme Court has recognized that "'[t]he first law of nature is that of self-defense[;]'" it is "a 'primary impulse' that is an 'inherent right' of all human beings." *State v. Moore*, 363 N.C. 793, 796, 688 S.E.2d 447, 449 (2010) (quoting *State v. Holland*, 193 N.C. 713, 718, 138 S.E. 8, 10 (1927)).
- Argue:
  - (1) self-defense instructions are required under state and federal **substantive due process**
  - If the use of defensive force involves a firearm, (2) argue self-defense instructions are also required under the **Second Amendment**. *McDonald v. Chicago*, 561 U.S. 742, 177 L. Ed. 2d 894 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 171 L. Ed. 2d 637 (2008).

Issues/Ideas

- Do the statutes eliminate the concept of excessive force?
- Does imperfect self-defense still exist?

Elements of *Common Law* Perfect Self-defense (deadly force)

(1) defendant believed it to be necessary to kill the deceased or use deadly force in order to save himself/herself or others from death or great bodily harm;
(2) defendant's belief was reasonable;
(3) defendant was not the aggressor in bringing on the affray,; and
(4) defendant did not use excessive force.

See *State v. Norris*, 303 N.C. 526, 530, 279 S.E.2d 570, 572-73 (1981).

Issues/Ideas

- Imperfect self-defense applied when the evidence supports a determination that only the first two elements of self-defense existed at the time of the killing, in which case the defendant would be guilty of the lesser included offense of voluntary manslaughter.
  - *See* *State v. Locklear*, 349 N.C. 118, 154-55, 505 S.E.2d 277, 298 (1998), cert. denied, 526 U.S. 1075, 119 S. Ct. 1475, 143 L. Ed. 2d 559 (1999)

Issues/Ideas

Elements of Lawful Use of Deadly Defensive Force by Statute:

Under the statute, a person is justified in the use of deadly force if: He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another. N.C.G.S. § 14-51.3(a)(1).

- Subject only to the bars set out in N.C.G.S. § 14-51.4.

This matches the first two elements of common law perfect self-defense:

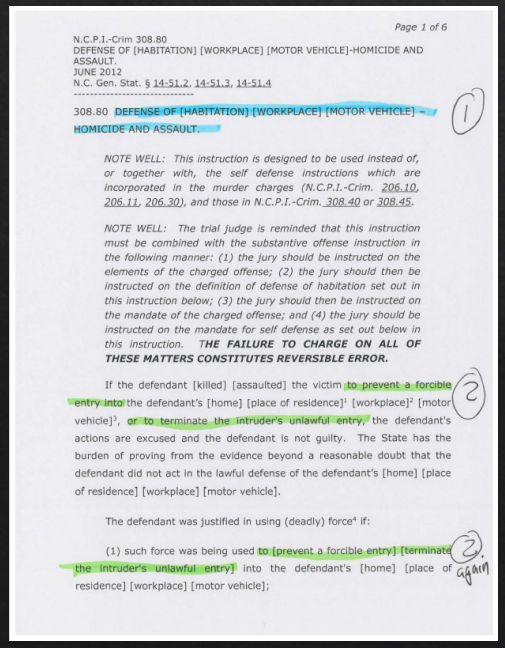
1. defendant believed it to be necessary to kill the deceased or use deadly force in order to save himself/herself or others from death or great bodily harm;
2. And defendant's belief was reasonable.

Issues/Ideas

- What do correct jury instructions look like?

Issues/Ideas

- What do correct jury instructions look like?
  - It's complicated.



N.C.P.I.-Crim 308.80
DEFENSE OF [HABITATION] [WORKPLACE] [MOTOR VEHICLE]-HOMICIDE AND ASSAULT.
JUNE 2012
N.C. Gen. Stat. § 14-51.2, 14-51.3, 14-51.4

308.80 DEFENSE OF [HABITATION] [WORKPLACE] [MOTOR VEHICLE] – HOMICIDE AND ASSAULT.

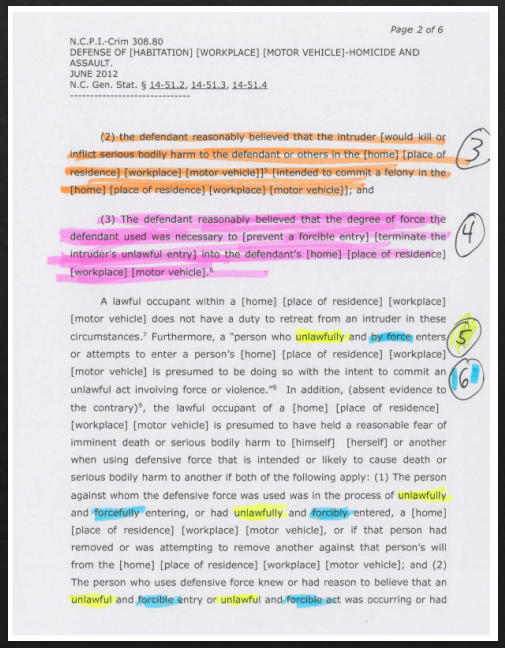
NOTE WELL: This instruction is designed to be used instead of, or together with, the self defense instructions which are incorporated in the murder charges (N.C.P.I.-Crim. 206.10, 206.11, 206.30), and those in N.C.P.I.-Crim. 308.40 or 308.45.

NOTE WELL: The trial judge is reminded that this instruction must be combined with the substantive offense instruction in the following manner: (1) the jury should be instructed on the elements of the charged offense; (2) the jury should then be instructed on the definition of defense of habitation set out in this instruction below; (3) the jury should then be instructed on the mandate of the charged offense; and (4) the jury should be instructed on the mandate for self defense as set out below in this instruction. ***THE FAILURE TO CHARGE ON ALL OF THESE MATTERS CONSTITUTES REVERSIBLE ERROR.***

If the defendant [killed] [assaulted] the victim to prevent a forcible entry into the defendant's [home] [place of residence][1] [workplace][2] [motor vehicle][3], or to terminate the intruder's unlawful entry, the defendant's actions are excused and the defendant is not guilty. The State has the burden of proving from the evidence beyond a reasonable doubt that the defendant did not act in the lawful defense of the defendant's [home] [place of residence] [workplace] [motor vehicle].

The defendant was justified in using (deadly) force[4] if:

(1) such force was being used to [prevent a forcible entry] [terminate the intruder's unlawful entry] into the defendant's [home] [place of residence] [workplace] [motor vehicle];

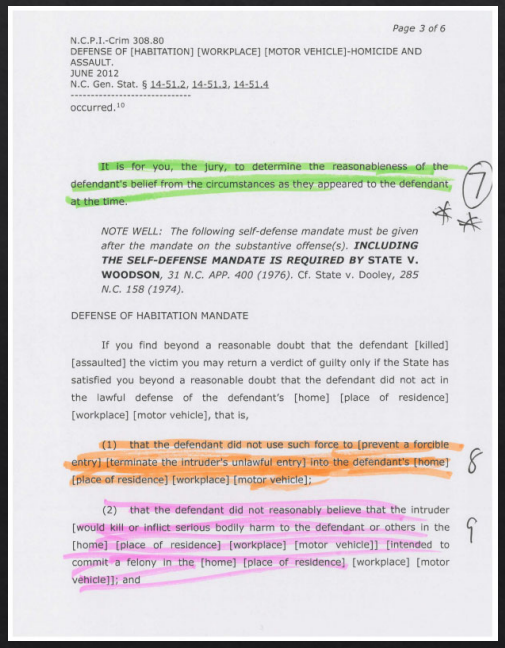


N.C.P.I.-Crim 308.80
DEFENSE OF [HABITATION] [WORKPLACE] [MOTOR VEHICLE]-HOMICIDE AND ASSAULT.
JUNE 2012
N.C. Gen. Stat. § 14-51.2, 14-51.3, 14-51.4

(2) the defendant reasonably believed that the intruder [would kill or inflict serious bodily harm to the defendant or others in the [home] [place of residence] [workplace] [motor vehicle]][5] [intended to commit a felony in the [home] [place of residence] [workplace] [motor vehicle]]; and

(3) The defendant reasonably believed that the degree of force the defendant used was necessary to [prevent a forcible entry] [terminate the intruder's unlawful entry] into the defendant's [home] [place of residence] [workplace] [motor vehicle].[6]

A lawful occupant within a [home] [place of residence] [workplace] [motor vehicle] does not have a duty to retreat from an intruder in these circumstances.[7] Furthermore, a "person who unlawfully and by force enters or attempts to enter a person's [home] [place of residence] [workplace] [motor vehicle] is presumed to be doing so with the intent to commit an unlawful act involving force or violence."[8] In addition, (absent evidence to the contrary)[9], the lawful occupant of a [home] [place of residence] [workplace] [motor vehicle] is presumed to have held a reasonable fear of imminent death or serious bodily harm to [himself] [herself] or another when using defensive force that is intended or likely to cause death or serious bodily harm to another if both of the following apply: (1) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a [home] [place of residence] [workplace] [motor vehicle], or if that person had removed or was attempting to remove another against that person's will from the [home] [place of residence] [workplace] [motor vehicle]; and (2) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had



N.C.P.I.-Crim 308.80
DEFENSE OF [HABITATION] [WORKPLACE] [MOTOR VEHICLE]-HOMICIDE AND ASSAULT.
JUNE 2012
N.C. Gen. Stat. § 14-51.2, 14-51.3, 14-51.4

occurred.[10]

It is for you, the jury, to determine the reasonableness of the defendant's belief from the circumstances as they appeared to the defendant at the time.

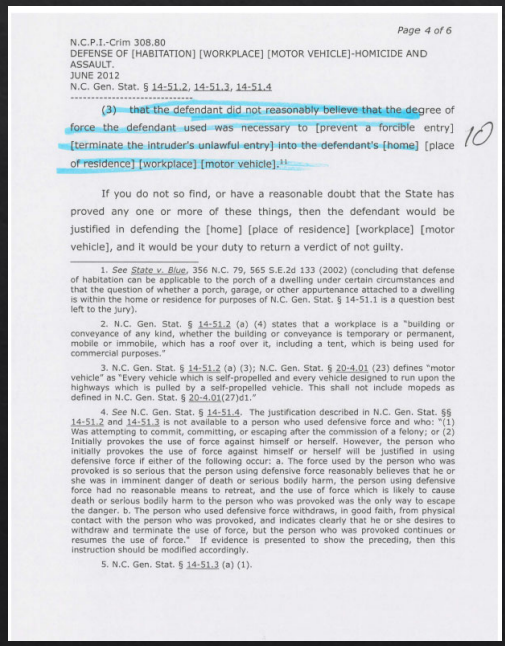
NOTE WELL: The following self-defense mandate must be given after the mandate on the substantive offense(s). ***INCLUDING THE SELF-DEFENSE MANDATE IS REQUIRED BY STATE V. WOODSON****, 31 N.C. APP. 400 (1976).* Cf. State v. Dooley, *285 N.C. 158 (1974).*

DEFENSE OF HABITATION MANDATE

If you find beyond a reasonable doubt that the defendant [killed] [assaulted] the victim you may return a verdict of guilty only if the State has satisfied you beyond a reasonable doubt that the defendant did not act in the lawful defense of the defendant's [home] [place of residence] [workplace] [motor vehicle], that is,

(1) that the defendant did not use such force to [prevent a forcible entry] [terminate the intruder's unlawful entry] into the defendant's [home] [place of residence] [workplace] [motor vehicle];

(2) that the defendant did not reasonably believe that the intruder [would kill or inflict serious bodily harm to the defendant or others in the [home] [place of residence] [workplace] [motor vehicle]] [intended to commit a felony in the [home] [place of residence] [workplace] [motor vehicle]]; and



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JUNE 2012
N.C. Gen. Stat. § 14-51.2, 14-51.3, 14-51.4

(3) that the defendant did not reasonably believe that the degree of force the defendant used was necessary to [prevent a forcible entry] [terminate the intruder's unlawful entry] into the defendant's [home] [place of residence] [workplace] [motor vehicle].[11]

If you do not so find, or have a reasonable doubt that the State has proved any one or more of these things, then the defendant would be justified in defending the [home] [place of residence] [workplace] [motor vehicle], and it would be your duty to return a verdict of not guilty.

1. *See State v. Blue*, 356 N.C. 79, 565 S.E.2d 133 (2002) (concluding that defense of habitation can be applicable to the porch of a dwelling under certain circumstances and that the question of whether a porch, garage, or other appurtenance attached to a dwelling is within the home or residence for purposes of N.C. Gen. Stat. § 14-51.1 is a question best left to the jury).

2. N.C. Gen. Stat. § 14-51.2 (a) (4) states that a workplace is a "building or conveyance of any kind, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, which is being used for commercial purposes."

3. N.C. Gen. Stat. § 14-51.2 (a) (3); N.C. Gen. Stat. § 20-4.01 (23) defines "motor vehicle" as "Every vehicle which is self-propelled and every vehicle designed to run upon the highways which is pulled by a self-propelled vehicle. This shall not include mopeds as defined in N.C. Gen. Stat. § 20-4.01(27)d1."

4. *See* N.C. Gen. Stat. § 14-51.4. The justification described in N.C. Gen. Stat. §§ 14-51.2 and 14-51.3 is not available to a person who used defensive force and who: "(1) Was attempting to commit, committing, or escaping after the commission of a felony; or (2) Initially provokes the use of force against himself or herself. However, the person who initially provokes the use of force against himself or herself will be justified in using defensive force if either of the following occur: a. The force used by the person who was provoked is so serious that the person using defensive force reasonably believes that he or she was in imminent danger of death or serious bodily harm, the person using defensive force had no reasonable means to retreat, and the use of force which is likely to cause death or serious bodily harm to the person who was provoked was the only way to escape the danger. b. The person who used defensive force withdraws, in good faith, from physical contact with the person who was provoked, and indicates clearly that he or she desires to withdraw and terminate the use of force, but the person who was provoked continues or resumes the use of force." If evidence is presented to show the preceding, then this instruction should be modified accordingly.

5. N.C. Gen. Stat. § 14-51.3 (a) (1).

Any Questions?

- We do, too.

DIGITAL FORENSICS //

ENVISTA FORENSICS

Expert Testimony: Digital Forensics

Lars Daniel, EnCE, CCPA, CCO, CTNS, CTA, CWA, CIPTS
Practice Leader – Digital Forensics

What is an Expert?

In the field of digital forensics, there is no governing body at the national or state level than accredits examiners is being competent in their field. The industry does not have a bar exam or other system in place to ensure that experts in digital forensics possess even the minimum qualifications necessary to practice in this field. This complicates selecting a digital forensics expert, and the complications multiply when numerous forms of digital evidence are in a case. For example, an expert may be competent in computer forensics, but have no experience in mobile phone or GPS forensics.

Depending on your state or jurisdiction, the test used to determine whether or not expert testimony will be allowed by the court may be the Frye test (Frye v. United States . 293 F. 1013 (D.C. Cir. 1923) 1 , Daubert test (Daubert v. Merrell Dow Pharmaceuticals , 509 U.S. 579 (1993)) 2 , Porter test (State v. Porter , 241 Conn. 57, 698 A.2d 739 (1997) 3 , cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed.2d 645 (1998), Sec. 7-2 Connecticut Code of Evidence), 4 or other test outlined in that state's code. Many states have practice manuals and a set of specific statutes that govern experts and expert testimony. Contacting your state bar association is an excellent way to locate this type of information. The Federal system uses Section 700 of the Federal Rules of Evidence, and specifically Rule 702 to define expert witness testimony.

> Federal Rules of Evidence: Rule 702. Testimony by Experts:
>
> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

No matter which rule governs your particular case, all experts must first qualify as an expert in any case in the United States where they will be asked to provide expert testimony. When determining what expert is best for your case, it is important to establish a selection criterion.

What evidence is part of your case?

If your case includes multiple types of evidence, such as computers, mobile phones, social media accounts, and call detail records, it is critical that your expert is qualified and all of these areas. To cover all the bases, it may be necessary to have multiple digital forensic experts on a single case to cover all the forms of evidence. Given the complexity and myriad of sub disciplines within digital forensics, this is a highly probable reality.

What type of case do you have?

The expert you employee should have expertise and experience in a particular type of case that you have. If you have a data breach with a loss of personally identifiable information, an expert in cyber security and protocols related to proper cyber hygiene is exactly what you need. However, that same expert may not have the correct tool set to handle a medical malpractice case where a mobile phone examination is needed to determine the location of a doctor the night before, or to recover deleted text messages that might be of evidentiary value.

The Prequalification Process

Once you have determined a list of potential experts, it is helpful to go through a prequalification process to determine which one is the best fit. Resumes and curriculum vitae should be examined, and the following questions can assist in the decision making process.

Does the examiner have forensic training and experience?

Well a technical expert may have an impressive resume, digital forensics is a niche and specialized field. Technical certifications related to networking, computer repair, or other information technology disciplines are not the same as digital forensic certifications. There are numerous certifications specific to digital forensics that show a level of competency. The certifications also greatly improve the likelihood that the expert will be able to qualify as an expert in court.

CASE EXAMPLE

In the NC vs. Cooper homicide case Google map evidence was critical in the defense of Bradley Cooper according to defense counsel. In order to proffer this evidence, the defense attempted to call Jay Ward as their expert. Jay Ward had over 15 years of experience in network security and information technology. Despite this, the court ruled that he could not testify to the evidence because he lacked the necessary qualifications:

"The State focused on Ward's lack of training and experience as a forensic computer analyst. The trial court agreed with the State and, on 19 April 2011, ruled that Ward could not testify specifically about the Google Map files."

https://lawprofessors.typepad.com/evidenceprof/2013/09/in-2006-i-was-living-inchelsea-one-day-my-wife-our-friend-and-i-went-to-thewhole-foodsin-chelsea-while-we-were-in-the-c.html#

What are the fees charged by the examiner? Are they reasonable?

Wow there is a range of hourly rates within all professional services, there is a range that is reasonable. If rates are too high it should raise suspicions, and if they are too low this is likewise the case. If they are too high, you're potentially getting fleeced, and if they are too low it should bring in the question if the expert has the appropriate tools and expertise to do the work. Remember, anyone can hang a shingle on their door and claim to do digital forensics since there is no governing agency for the field. The best way to get an estimate on appropriate hourly rates is to get quotes from numerous repeatable digital forensic companies.

What tools and software does the examiner have?

Since there is no governing agency ensuring that a client will have an actual qualified examiner, knowing the tools and software that the digital forensics expert utilizes in the process of their examination is critical. This is because the true barrier to entry to actually doing digital forensics work is the cost to acquire the forensic tools and software to do the work properly. A list of example forensic certifications and the corresponding forensic tools, software, and disciplines are as follows:

Computer Forensics

Magnet Forensics Certified Examiner (MCFE)
Certified Expert in Cyber Investigations (CECI)

Encase Certified Examiner (EnCE)

Digital Forensics Certified Practitioner (DFCP)

Certified Blacklight Examinar (CBE)

Certified Computer Examiner (CCE)

Certified Forensic Investigation Professional (CFIP)

Certified Mac Forensics Specialist (CMFS)

OSForensics Certified Examiner (OSFCE)

Cell Phone Forensics

XRY Certified Examiner (XRY)

Cellebrite Certified Operator (CCO)

Cellebrite Certified Physical Analyst (CCPA)

Cellebrite Advanced Smartphone Analysis (CASA)

Cellebrite Certified Mobile Examiner (CCME)

Cell Phone Tracking and Location

Certified Telecommunications Analyst (CTA)

Certified Wireless Analysis (CWA)

Certified Telecommunications Network Specialist (CTNS)

Certified IP Telecommunications Specialist (CIPTS)

GPS Forensics

Blackthorn Certified Examiner (BCE)

CASE EXAMPLE

In a civil case that later became a Federal RICO case, the opposing expert was ordered by the court to provide forensic images (copies) of all the computers at the defendant's location. The opposing expert used an information technology tool to make copies of the computers. This tool is not a forensic tool and does not have the capability to provide the forensic hash algorithms or cyclical redundancy checks that allow an examiner to know, without a doubt, that the evidence is above reproach. Our examiner testified as an expert witness in the case explaining the problem with these copies. At the end of our expert's testimony, the judge ruled from the bench in favor of the plaintiff due to the improper handling of the evidence by the opposing expert and the lack of cooperation by the defense due to their refusal to provide the original evidence items to us.

What to Expect from an Expert

When you contact a forensics expert, you may not know exactly what you need or where the Data will be located that could be a potential evidentiary value. Further, depending on the case, the steps that must be taken for a proper examination and very considerably. An expert should be able to assist you in every step of the process, including:

1. Obtaining evidence

    a. An expert should be able to assist you in the technical portions when developing motions and orders to access evidence. In many instances, if the evidence is not asked for correctly with the proper technical terminology, it will result in receiving the wrong information, or nothing at all.

    b. An expert should be able to assist you in determining where valuable data is to your case. This includes if the data is on local devices such as mobile phones and computers, network share drives, in cloud storage, or social media accounts.

2. Analysis

    a. In order to perform an analysis, it is often required that a protocol be in place before an work can even begin. An expert should be able to assist you in creating a protocol for the examination of evidence, and this protocol should provide the necessary information to ensure all parties involved that the original evidence items will remain exactly as they were

before the examination. Every attempt should always be made in a digital forensics analysis to preserve digital evidence as a "snapshot in time" of exactly how they existed upon seizure or forensic imaging (copying).

b. Your expert should be able to verify the work of an opposing expert to determine if the findings are valid. This involves performing an independent analysis of the evidence to ensure all the facts are accurate, and also that all of the evidence has been completely analyzed. It is not uncommon for some experts to find their alleged "smoking gun", and then proceed to end their examination prematurely as they have not taken all of the data into account.

3. Court Preparation
    a. If a case is going to go to trial, your expert should be able to assist you in understanding what an opposing expert is going to say based upon their forensic report. Further, your expert should be able to assist you in writing direct examination for themselves, and in preparing cross examination for an opposing expert.

Expert testimony is the culmination of everything that goes into a digital forensic examination, from consultation, acquisition, analysis, reporting, and finally to the courtroom. Selecting the expert with the appropriate technical expertise and experience is vital, but just as important is that expert's ability to explain technical concepts, forensic procedures, and digital artifacts in plain language. The use of jargon and acronyms is detrimental to the triers of fact. At the end of the day, if an expert has an airtight analysis but cannot communicate effectively to a judge and jury, the words are meaningless. As a final parting recommendation, when selecting an expert choose one or you can have a conversation with. If that expert cannot explain technical details to you in an accessible way, they likely don't understand what they are talking about themselves.

DIGITAL FORENSICS //

ENVISTA FORENSICS

Don't Geofence Me In: Have You Been Caught in a Google Location History Warrant?

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Digital Forensic Examiner at Envista Forensics

You roll out of bed, prepare for work, help the kids get ready for school, and say your morning farewells. About the time you start your car, you receive the first notification for the day, "Light traffic to Starbucks this morning, approximately 15 minutes."

With technology so embedded into our daily lives, many have become desensitized to its implications on privacy. Some argue that modern life's hectic pace requires a mobile phone to act as a digital assistant, providing reminders, intel, document storage, and even location information. How else would you know if traffic allowed for a coffee before work?

For our mobile phones to be helpful assistants, they must collect data about us, and, unsurprisingly, they do. People today are aware that our phones track us now more than ever before. Perhaps you have heard how your cellular provider records your location data in Call Detail Records (CDRs) or how social media applications geotag pictures and videos with location information.

Most people are unconcerned about this, claiming they have nothing to hide. Why would I be concerned about the location data I generate if I do nothing wrong? Luis Molina, a man wrongfully charged with murder based upon geofence data, might have something to say about that.[1] Molina's attorney, Heather Hamel, told the Phoenix New Times, “Police had arrested the wrong man based on location data obtained from Google and the fact that a white Honda was

spotted at the crime scene. The case against Molina quickly fell apart and he was released from jail six days later. Prosecutors never pursued charges against Molina, yet the highly publicized arrest cost him his car, his job, and his reputation."[2]

Across the country, Google location history is utilized as evidence in many cases.[3] However, the geofence warrants used to obtain this location data are being litigated against in many states.

What are Geofence Warrants?

Google has responded to thousands of search warrants for geographical searches for all known users in the area, referred to as geofence warrants. The warrant requests Google to search its repository of user location data and turn that data over *anonymously*. These warrants set out a three-step process by which Google will search for location data on its users for a predetermined area and time.

The Three-Step Process in a Geofence Warrant

Step One: Set the Geofence

Step one is a search limited by a geographical area or geofence. This is typically achieved by using a circle or square drawn using geographic coordinates. The search is also defined by time, which encompasses the incident being investigated. Google is instructed to search user data for location data that meets the time and geographic coordinates outlined in the warrant. Once this search is complete, Google returns the users' data to law enforcement. At this stage, the data is advertised as *anonymous* data.

Location History Database Search

It is important to understand, limiting the size of the geofence has no impact on the number of users searched. This is because all location history data is stored in a single database. Since all of the data is stored in one container, the entire container must be searched to find the users' data responsive to the warrant request.

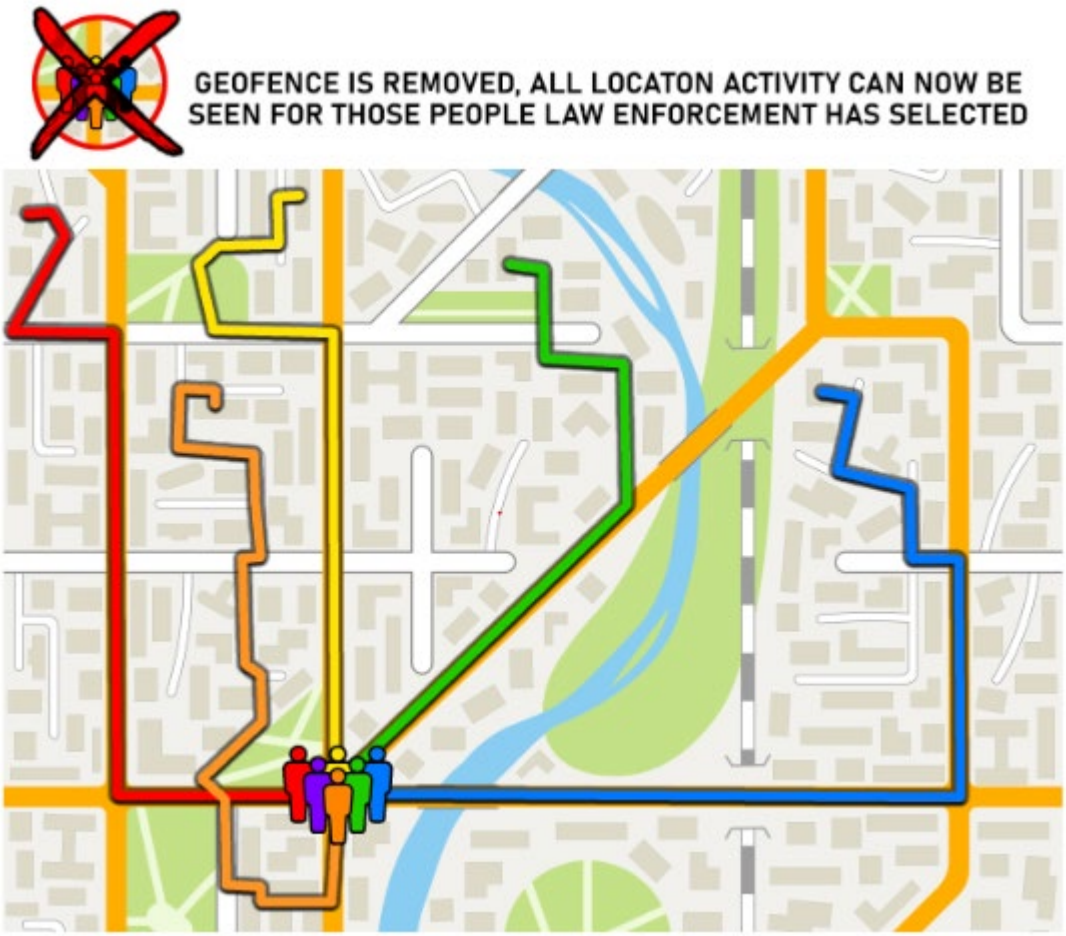
The most unsettling part of this seems to be the indiscriminate search of users' data without their knowledge. In other words, Google needs to search every account with location history to conduct this search. Yes, you read that correctly, ***every account***.

Google representatives declared in documents from United States v. Okello Chatrie, that every warrant requires a search of tens of millions of user accounts.[4] To put that in perspective, Google responded to approximately 9,000 of these search warrants in 2018. That means a search of tens of millions of Google users' data occurred thousands of times. This type of search continues to this day.

Step Two: Examine Contextual Data

Law enforcement determines who they believe are the most likely suspects, and makes a request of Google to provide the contextual data on the step one users. Step two removes the geographical limits and expands the timeframe. This data now shows the step one users before and after they appear in the geofence. You will see the users as they travel from their homes, businesses, places of worship, or any other locations they visited that day. Finally, based on this

data, law enforcement will select the users they believe are suspects or associated with the incident and make the final request.

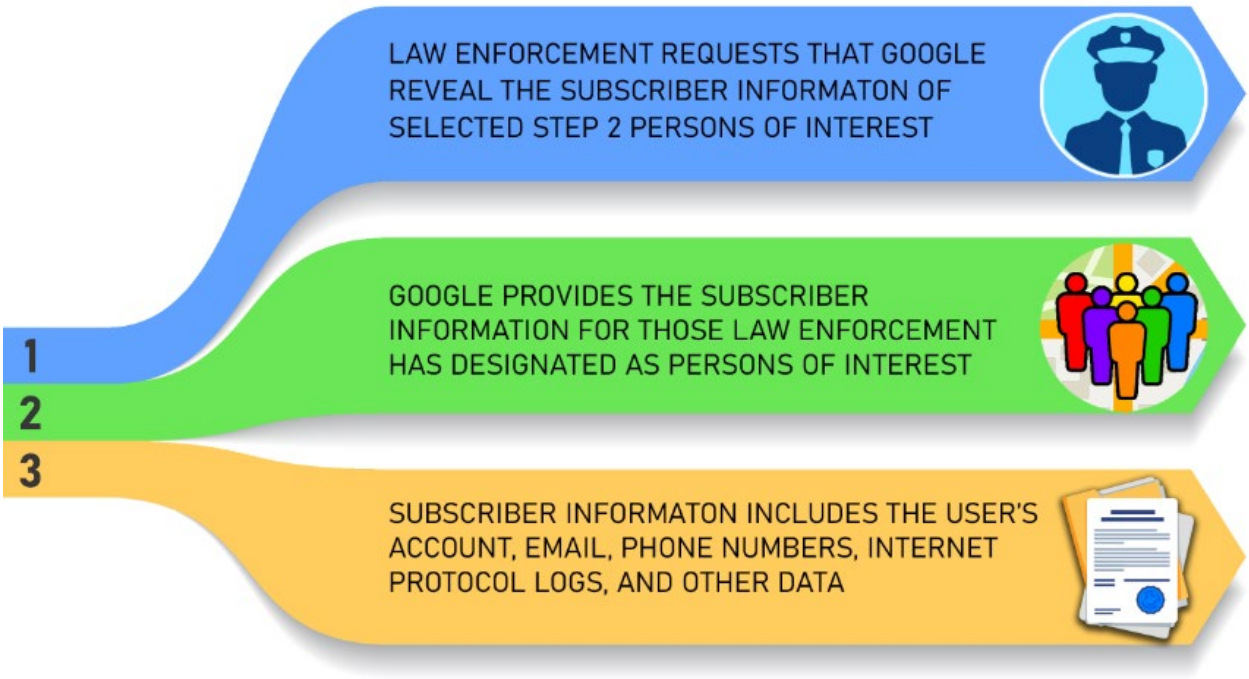


This geofence search warrant process yields private location data about all the parties captured in the search. In step two, users can be tracked when traveling to protected places they frequent in their daily lives. These unique movements are not anonymous but are very identifiable. Think about each place you have been today. What is the likelihood of another person, besides a close family member, going to each of those places simultaneously? Imagine you were caught inside a geofence in the morning. Later that day you visit your doctor, grab

lunch with a love interest, pick your kids up from school, and meet up with friends for a drink that evening before calling it a day. All that activity would be recorded.

Step Three: Subscriber Information

Step three is the final request made based on a geofence warrant. Law enforcement will request the step two users and have Google reveal their subscriber information. This may include the subscriber's Gmail address, telephone number, account number, Google services used, and internet protocol logs associated with the account. This is the "de-anonymization" of the user(s).



Have I been Targeted by a Geofence?

In many instances, these warrants are accompanied by non-disclosure orders that limit Google from notifying their subscribers when their data has been turned over. When a non-disclosure order is not provided, Google has notified targeted users by email. Zachary McCoy of Gainesville, FL received a notification as a result of a geofence warrant that targeted suspects of a burglary in his own neighborhood.[5] "I didn't realize that by having location services on that

Google was also keeping a log of where I was going," McCoy stated. "I'm sure it's in their terms of service but I never read through those walls of text, and I don't think most people do either." McCoy was determined not to be the suspect as a result of the investigation.[6]

Caleb Kenyon, Attorney at Turner, O'Connor, Kozlowski who represented Mr. McCoy, shared his opinion on geofence warrants and stated, "Geofence warrants are law enforcement's latest machinations to harness data harvested by big tech and claim that they aren't conducting a search. But a government entrance through the back door to search your data is still a search under the Constitution. The general geofence warrant fails on multiple fronts: it lacks probable cause for all persons searched and it lacks particularity in the discretion allowed during the execution of the warrant."

Litigation against the use of this technique is heating up. Cases across the nation are receiving attention from the media and Fourth Amendment arguments are at the heart of these cases. The National Association of Criminal Defense Lawyers (NACDL) and the Electronic Frontiers Foundation (EFF) have assisted defense attorneys in litigating these issues. The obvious over-breadth and lack of particularity are among the arguments against the use of these warrants.

Sources:

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3 https://support.google.com/accounts/answer/3118687?hl=en
4 https://www.nacdl.org/Content/United-States-v-Chatrie,-No-3-19-cr-130-(E-D-Va-)
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Data Collections: The Critical Link in Protecting Your Organization in the Face of Potential Litigation

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If a situation arises where litigation is even a remote possibility, it is in an organization's best interest to ensure that the collection of digital data is done in such a way that it is above reproach. Digital forensics tools and methodologies allow for data to be collected in a forensically sound manner that meet industry standards, best practices, and have been tested in the court of law.

As defined by the National Institute for Standards in Technology, digital forensics is the "…application of science to the identification, collection, examination, and analysis of data while preserving the integrity of the information and maintaining a strict chain of custody for the data."[1]

There is a chain of events that occurs as part of a forensic examination. These events are:

Consultation

During a thorough consultation, a digital forensics expert will work with counsel and the information technology team at an organization to ascertain the location of relevant data and explain the various methods by which this data can be collected.

Acquisition

During the acquisition phase, digital forensics experts utilize forensic tools and methodologies to collect data from various electronic sources. This includes on-site collections, where our experts go on location to make forensic images, or copies, of computers, servers, cell phones, cloud data, social media

[1] https://nvlpubs.nist.gov/nistpubs/Legacy/SP/nistspecialpublication800-86.pdf

accounts, and other electronic media. All efforts are made in this process to limit the impact on an organization.

In many instances, remote collections can also be performed, allowing our experts to collect data from anywhere in the world with minimal impact on a business.

Acquisitions of electronic data can also be performed pro-actively. When an employee leaves a business, it is becoming increasingly common for the organization to work with digital forensic specialists to forensically image the employee's computer, phone, or other electronic data. This prepares an employer for potential litigation if this evidence is needed as evidence in court.

Analysis

Using specialized forensic technology and methods, our experts examine the data, including the recovery of deleted data. In our in-depth analysis process, we seek to accurately determine what occurred, how it occurred, and who the responsible parties could be. In the analysis phase, we seek to answer questions such as…

- Did the employee engage in bad faith, providing sensitive information to outside parties?
- Was a documented altered, forged, or otherwise manipulated electronically?
- What actions did a user perform on specific dates and time frames?
- Did the user attempt to delete electronic data?
- Did the user use anti-forensic tools to try and cover their tracks?
- Was company policy broken concerning acceptable computer usage?
- Did an employee steal customer lists on the way out the door?

Reporting

If requested by the client, the reporting phase begins. This is where the technical roadmap is laid out of what happened in a matter. For example, if there was concern that a former employee stole intellectual property, this report would include the explanation and analysis of forensic artifacts that point toward evidence of user attribution. In other words, what files are accessed, how these files were exfiltrated from the organization, who took the data, when the data was stolen, and how it is potentially being used.

Expert Testimony

To provide expert testimony in court, that expert needs to be able to qualify first. If the expertise of the expert is challenged, the attorney calling the expert must make a showing that the expert has the necessary background experience. This includes questions related to the expert's education, certifications, case experience, training, and special knowledge. While in information technology professional is certainly an expert in their field, they are rarely an expert in digital forensics, which require specialized knowledge in niche technical domains. There is a distinct probability that an information technology expert will not be able to qualify as a digital forensic expert, and therefore would be unable to render an expert opinion or at best would have their testimony severely limited by the court.

The Critical Link

The acquisition, or forensic collection phase, is the critical link in the chain of events between consultation and expert testimony that protects a client from accusations of data manipulation, incomplete collections, and spoliation. The forensic process of collecting data utilizes algorithms and checksums that guarantee that collected data is a perfect snapshot in time of what existed on an electronic device.

Using information technology tools in lieu of forensic tools to collect data does not offer this protection and has led to unfavorable outcomes for organizations countless numbers of times. Further, if expert testimony is needed by a digital forensics expert, the only way they can attest to the authenticity and completeness of the data is if it was collected in a forensically sound manner and they have the information needed to back it up. This information comes in the form of forensic software audit logs, and the aforementioned checksums and algorithms.

There is also a benefit to utilizing a neutral third-party to collect data from an organization. This in many ways invalidates the claim that could be brought by opposing parties of bias in the collection process if employees of the organization self-collect or if the data is collected by internal information technology staff.

DIGITAL FORENSICS IN CHILD EXPLOITATION CASES

FINDING YOUR WAY THROUGH

Justin Ussery, Digital Forensics Examiner
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About the Authors

Jake and Justin have are both Former Law Enforcement Officers who were assigned as Digital Forensic Examiners and Task Force Officers of the United States Secret Service Electronic Crimes Task Forces in South Carolina and California. Jake and Justin both work matters and cases involving all aspects of Digital Forensics, including Cellular Phones, Tablets, Computers, and Cloud data. This article is meant to give you a brief overview of the frequently and daunting amount of confusing electronic evidence you receive in discovery and an overview of this information you often find in the discovery process of a Child Exploitation matter.

Introduction

This article is meant to give you a brief overview of what is frequently a daunting amount of confusing electronic evidence you may receive via discovery in a child pornography case.

Uniqueness of Child Exploitation or Child Pornography cases

Child pornography cases present unique difficulties because of how attorneys can view the evidence and how experts can examine that evidence. These cases are controlled at the federal level by the Adam Walsh Child Safety and Protection Act of 2006. This act explicitly says government examiners cannot send a report containing child pornography in any form to any person outside of law enforcement. The evidence review likely will take place at a government facility, and we are often supervised by law enforcement officials, often the same ones who performed the original forensics. The Adam Walsh Act prevents child pornography from being disseminated, which is a good thing. However, this places a burden on the defense, as examinations of forensic data need to occur at a law enforcement facility. The examiner may only leave with certain artifacts, which do not contain images or videos, making the onsite review of the evidence critical, as this typically does not take place more than once due to the cost of placing a forensic examiner on site.

Law Enforcement Investigations: Before the Search Warrant

CyberTips

Law Enforcement typically deals with two main entities when it comes to dealing with child pornography: Internet Crimes Against Children (ICAC) and The National Center for Missing and Exploited Children (NCMEC). NCMEC acts as a clearinghouse for business and Electronic Services Providers (ESPs) to report possible illicit media.

After ESPs notify NCMEC, a “CyberTip” is created and forwarded to a Regional ICAC Task Force or local law enforcement agency. The Regional ICAC Taskforce or agency then investigates and collects evidence. The investigating officer may perform a forensic examination of this evidence or may assign this to a qualified forensic examiner.

All of this activity originates with the Cyber Tip.

The Cyber Tip will generally include dates and times of said activity, Internet Protocol (IP) addresses during the period of the event, and account information such as email addresses, phone numbers, mailing addresses, and possible user names of the account utilized during the actions.

Online Law Enforcement Investigation Tools and Resources

Detectives and investigators across our country conduct digital or online investigations with a variety of digital tools and software. Many of these tools are deemed to be "law enforcement sensitive" and in our experience as law enforcement examiners, a court order may be required to gain access to these specific tools for review by a forensic examiner working with defense counsel.

Several keywords and processed should be defined at a basic level before continuing:

IP Addresses

An Internet Protocol address is an identifying number for a computer network. A unique Public IP address is assigned by an Internet Service Provider (ISPs like CenturyLink, RCN, Frontier, Verizon, or AT&T). These assignments are unique to physical locations (modems or gateways), which can distribute the connection physically via a wired network switch or a broadcast wireless network via a Wi-Fi router. Public IP addresses are unique to physical locations (home, business, public Wi-Fi) and are not typically unique to physical devices like cellphones, computers, and tablets.

Once an IP address is documented, the owner of the IP address can be found. IP addresses are owned by Internet Service Providers (ISP).

This identification process proceeds in steps:

The IP address is obtained by law enforcement from an online investigation.

The owner of the IP address is identified using a "reverse" lookup to locate the company that owns the IP address. This is accomplished using a "WHOIS" lookup service. One such service is "whatismyip.com". For instance, looking up a text IP Address shows that the owner of the IP Address is Charter Communications.

One the owner of the IP address is known; the law enforcement officer will create a warrant or subpoena and send that to the owner of the IP address to obtain the subscriber information for the IP address on the date of interest.

GUID: Globally Unique Identifier

GUIDs are an alphanumeric series of numbers that can be assigned by a computer system. For this article, a GUID is assigned to each asset or device within a P2P network. This GUID is unique but can be changed or updated by the P2P network.

Metadata: "Data about data."

While the colloquial definition "data about data" is often used, we prefer "information about data." Metadata is a collection of information about the source or creation of data. This information could

be the manufacturer or model of a camera, GPS location, file metadata such as date and time of creation; or modifications, source, author, or editor.

Hash Value: Electronic DNA

A hash value is the application of a mathematical formula (algorithm) to produce a unique alphanumeric string associated with a single file or a set of files. Changes to the data (even a single bit) will result in the change of the hash value. Hash values allow investigators to identify known images, accurately preserve and reproduce data. Common hash values are MD5 (message-digest algorithm), SHA-1, and SHA-256 (Secure Hash Algorithm).

Through our background, experience, and review of software documentation, we're able to offer some insight into these investigative aids. We cover three unique pieces of software used by law enforcement to conduct online investigations. It should be noted that the log files discussed in each section are unique to each piece of software and should be requested through discovery or court order. The below listed log files do not contain illicit content, images, or media and can be released by law enforcement to a civilian defense examiner.

ShareazaLE

One of the most common investigative tools is a variant of the peer to peer (or "P2P") program, Shareaza, that has enhanced features for investigations. This piece of software allows law enforcement to single out an IP address (known as a "single source download"). ShareazaLE produces a log called "ShareazaLE Summary Report for IP: "0.0.0.0"," where "0.0.0.0" is the target or identified IP address.

Torrential Downpour

This is another free piece of software that has been modified to suit the needs of law enforcement investigators. However, this piece of software operates using a different protocol, called torrents. In the most basic sense, torrents are a series or set of files. The torrent file itself is a set of instructions related to the source file and metadata. These source files can be a single file (i.e., movie) or an archived folder containing multiple files (i.e., sets of photos or music from an album). Torrent files are typically sourced from search engines, websites, or forums, but some Bit Torrent software packages have built-in search features. Torrential Downpour produces a series of log files: Datawritten.xml, Details.txt, Downloadstatus.xml, Netstat.txt, summary.txt, and Torrentinfo.txt. It should be noted that the torrent file itself is not illegal to possess as it contains only metadata.

RoundUp eMule

RoundUp was designed to investigate the eD2K or eDonkey2000 file-sharing network. EMule and similar P2P networks are built around keyword searches. A user enters a general keyword (like "porn"), and the search results in the return of any files containing the keyword (i.e., "child porn" or "adult porn"). RoundUp produces logs named: SummaryLog.txt, DetailedLog.txt, Netstat.txt, IdentityLogging.txt, and IndentitySignatures.xml.

Law Enforcement Investigations:
After the Search Warrant

Major Software Vendors

There are several major software vendors utilized by both government examiners and private examiners alike. For cellular device forensics, you will likely see Cellebrite UFED with Physical Analyzer, Oxygen Forensics Detective, Axiom by Magnet Forensics, and GrayKey by Grayshift. Most cellular device tools rely on three general types of extractions from the phones, but all produce very similar results with a few caveats. There are thousands of applications operated on four major smartphone operating systems: Android, Apple iOS, Windows Mobile, and Blackberry OS. Not every tool can decode and make sense of every single application in the world and that is a primary reason why it is beneficial to utilize a variety of different tools during examinations.

As for computer forensics, you will see Axiom or IEF by Magnet Forensics, Forensic Took Kit by Access Data, Encase by OpenText, Analyze by Griffeye, Forensic Explorer by GetData and BlackLight by Cellebrite (formerly Blackbag Technologies).

Many of these tools can redact child pornography images and safely provide a good deal of metadata about the activities without the dissemination of child pornography by Law Enforcement or prosecutors.

Review of Digital Forensic Evidence

If law enforcement recovers electronic evidence and utilizes forensic tools, the scope of their investigation should not be limited to the simple question of "Is illicit media on this device?" Digital investigations need to be a great deal more comprehensive. An expert should search for any known evidence such as suspect IP Address, GUID, hash values, user attribution, as well as a possible indication of file use and knowledge.

Many law enforcement forensic tools and Cyber Tips identify IP Addresses and GUIDs. A review of these records is essential to identify the physical location of an IP address (possibly the defendant's home or work). The subsequent investigation of a network, like a broadcasting Wi-Fi router, may be necessary to determine what devices were connected at a location. While gathering evidence, an investigator should collect and review network connection logs (if logging is enabled) or records from an ISP. Knowing when and what devices were connected to a network can significantly assist in the identification of a suspect. Failing to gather these logs can result in their overwriting or deletion.

If a law enforcement investigator is adequately trained and utilizes online tools, like those outlined above, they should retain the available logs. These logs should become part of the investigator's digital case file. The logs should be maintained as a unique piece of digital evidence, as printing will result in the loss of file metadata (i.e., the creation and modification dates and times).

This metadata is critical to what is referred to as "user attribution."; putting a specific person behind the keyboard at the time of the offense. This will likely make or break the case for a prosecutor. These indicators of user attribution are often forgotten or overlooked by examiners who are providing evidence to the investigating officer or prosecutor.

These user attribution indicators are held in a variety of places on a computer and consist of jump lists, .lnk files (pronounced "Link"), Shellbags, Windows MRU, and search terms found within browsing histories.

Jump Lists

A "jump list" is a system-provided menu that appears when the user right-clicks a program in the taskbar or on the Start menu. It is used to provide quick access to recently or frequently used documents and offers direct links to app functionality.

Link Files

An LNK (short for LiNK) is a file extension for a shortcut file used by Microsoft Windows to point to an executable file. LNK file icons use a curled arrow to indicate they are shortcuts, and the file extension is typically hidden from the computer user. Generally, if the "linked" or source file is deleted, the LNK file will remain behind and will contain information not only of when the LNK file was created, but about the target file of interest.

Shellbags

Windows uses the "Shellbag" to store user preferences for folder display within Windows Explorer. Everything from visible columns to display mode (i.e., icons, details, or list) to sort order and are tracked.

Most Recently Used files (MRU)

The Most Recently Used "MRU" is a list that contains a history of recent activity on a computer. MRUs can include open documents or webpages.

If user attribution indicators are disregarded for any reason, the case weakens. The user attributes held within these specific items can show a pattern of behavior by a computer user. This makes it much more unlikely that this offense was an isolated incident and was occurring over an extended time period. Again, these crucial artifacts frequently go unexamined. These are in many cases, "make or break" items worth looking at when it comes to a defense strategy.

Defense of Child Pornography Cases

U.S. vs. Flyer

In *U.S. vs. Flyer*,[i] defense counsel made successful arguments regarding the lack of possession for images found in unallocated space. Unallocated space is not accessible by ordinary users. We have reviewed many cases where government examiners find child pornography in unallocated space

but do not identify additional forensic artifacts. An inability to exercise "dominion and control," no proof of "file use and knowledge," and lack of user attribution makes a case easier to defend as there is a lack of knowing possession and intent.

Thumbnails and Cache Files

Thumbnail images are an image that is a smaller representation of the original photograph. These thumbnail images by themselves usually are devoid of metadata and are created by the operating system without use interaction.

The Internet browser cache contains images saved by the browser to help speed up your rendering of web pages. By avoiding downloading the same image again and again the computer user experiences a faster web page viewing experience.

In both instances, the operating system or web browser application is automatically doing this as an automated process. The computer user has no knowledge of or access to these files.

ISP Connections

The way that the law enforcement agency determines where to go for a search warrant or "knock and talk" is to find out the subscriber account for an internet download.

When law enforcement performs a lookup of the IP address for a download, they will then research to determine which Internet Service Provider owns that IP address.

Once the owner of the IP address is determined, i.e. Spectrum or Charter Cable, the law enforcement officer will send a subpoena to the ISP and find out who the subscriber is for that IP address on the date and time of the download.

The subscriber account information will also provide a physical address for the internet connection.

Once the law enforcement officer has that information in hand, he or she will then apply for a warrant to search the residence or business at the address, This is based on the probable cause in the form of the download history from one of the tools used for the online investigation and the subscriber information from the ISP.

There are times when the connection is not being made from the address, i.e. someone is stealing a connection from a nearby address.

"The sound of his door being broken down awoken the man at 6:20 a.m. on March 7. Seven armed officers greeted the homeowner, whose name has not been released. He was forced to lie down on the floor while the officers pointed guns at him while calling him a pedophile and a pornographer. According to the Associated Press, the officers had the initials of I.C.E. on their jackets, which the man didn't know stood for Immigration and Customs Enforcement, and we don't blame him.

The agents searched the man's desktop for about two hours that morning looking for evidence, and eventually confiscated the computer, as well as his and his wife's iPads and iPhones. It took three days for investigators to realize the man, who had told the officers at the time of the intrusion that they had the wrong guy, was actually telling the truth and was indeed not the kiddie-porn downloader. A week later, investigators arrested a 25-year-old neighbor and charged him with distribution of child pornography. However, he did not get in trouble for piggybacking off the man's WiFi signal."

Source: https://www.geek.com/news/man-wrongly-accused-of-child-porn-learns-to-password-protect-wifi-the-hard-way-1347033/

Conclusion

Nearly every case in today's digital age has an electronic evidence component. These components can supply both supporting and damning information for your case. The question is: How do you obtain and interpret the evidence? A qualified and experienced expert can assist you with a thorough discovery review and comprehensive analysis of the electronic evidence.

[i] 633 F.3d 911 (9th Cir. 2011).

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Spoofs, Fakes, and Manipulation: The Challenge of Validating Messages and Social Media Content on Mobile Phones

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We would all like to believe that when we view a photo, the contents therein are a true and accurate representation of what they purport to be. Unfortunately, this is not always the case. We are all aware of software tools that allow for manipulating photos to create convincingly real fakes. Sometimes, these fakes are so convincing that veracity cannot be determined by examining the picture alone with the naked eye.

This has been true with photos for a long time and is true today with videos using deep fake technology. Software applications are widely available that allow a person to manipulate video or audio in order to make it appear that he or she is saying something that they never said. Like with the Reface App[i], where a person's face can be replaced with another's. It seems that the technology has advanced to the point where anyone can create a very convincing fake video of events and do so using an application on his or her phone. The individual need not have any special expertise in creating videos, all they need is the software.

Making fake photos and videos is relatively simple but making faked and spoofed social media and messaging content is even easier.

Additionally, a person can alter or fake text message communications, and someone can do it with a low level of technical sophistication and relative ease.

In mobile device forensics, the best method to collect the evidence from a phone is performed by utilizing cell phone forensics software and hardware. Before we cover the problems with verifying pictures and screenshots of social media content and text messages, it is pertinent to have a high-level overview of how data is collected.

The forensic acquisition process encompasses all the methods and procedures utilized to collect digital evidence. This collection process can take many forms with mobile phones and the data from mobile devices can reside in numerous locations. With mobile phones, the data extraction methods used are determined by multiple factors, including the cell phone's make, model, operating system version, and physical damage, to name a few.

How Mobile Phone Forensic Tools Verify Evidence

When a forensic acquisition is performed on a computer hard drive, a bit-for-bit duplicate of the data is created. In other words, all the data contained on the hard drive, including existing data, deleted data, and unallocated space, are collected in a forensic image file. This forensic image file is exactly like the data contained on the computer hard drive. However, a forensic acquisition of a mobile device is different, as it almost always has to be powered on.

The forensic data collection process from the mobile device is better called a "forensics extraction," as data is extracted from the device instead of a perfect bit-for-bit copy of the evidence item. With the mobile phone powered on, the forensic software cannot access some areas of data. However, that inaccessible data is usually of little to no value evidentiarily.

Following the forensic copying comes the hashing process. A mathematical algorithm is run against the copied data, producing a unique hash value. This hash value can be thought of as a digital fingerprint, uniquely identifying the copied evidence exactly as it exists at that point in time.

Preemptively raising the question, “Why bother hashing the forensic copy of a cell phone if it is not exactly the same as the original evidence like a computer?” Well, suppose you made a forensic copy of a phone today and hashed it, and sometime later an opposing attorney claimed you manipulated data. In that case, you could go back to the original forensic copy to prove you did not.

But what happens when the evidence is collected from a cell phone using screenshots or pictures? Since there is no mathematical algorithm or any other kind of forensic verification, how do we know that the messages or social media content are real?

Manual Examinations

To have confidence in the evidence gathered from mobile phones without forensic software and hardware begins with a correctly performed manual examination. A physical acquisition is the best option with mobile phone forensics, followed by a logical or filesystem acquisition. Manual examinations should be utilized as a last resort when other forensic acquisition methods are not possible. The risk of changing or deleting evidence on a mobile phone is significantly increased when performing a manual examination because it introduces a higher potential for human error.

A manual examination of a cell phone involves an examiner manipulating the mobile phone to the different areas of information, such as text messages or call history, and taking pictures of the screen with a camera. A correctly performed manual examination will reduce the risks of modifying the original evidence. Therefore, a manual examination is a viable option when acquiring cell phone evidence with correct procedures and thorough documentation.

The quality of a manual cell phone examination depends on the competency of the examiner. For example, suppose proper procedures and detailed documentation are not part of the manual examination. In that case, it can call into question whether or not the evidence was properly preserved and if tampering, intended or otherwise, occurred during the examination of the cell phone.

Pictures only tell part of the story. What happened during the time between the individual pictures being taken? Pictures alone do not provide any real verification that the phone evidence has not been altered. A video camera running continuously throughout the manual examination process, with no breaks, pauses, or edits, is the only method for evidence verification in the absence of a mathematical hash value. The video should begin before the phone is powered up. At the end of the examination, the phone should be powered down in view of the camera.

In my experience, it is uncommon for forensic examiners to properly follow best practices and protocols when it comes to manual examinations. A video recording rarely accompanies the photos of the mobile phone contents.

Why It Matters: Fakes Are Spoofs Are Real and On The Rise

Social Media Fakes

The pervasiveness of social media in our culture and the frequency at which users access these platforms to communicate, share, and consume content have broadened and deepen the amount of courtroom evidence. However, social media evidence has one particular vulnerability, the ability to be altered or forged.

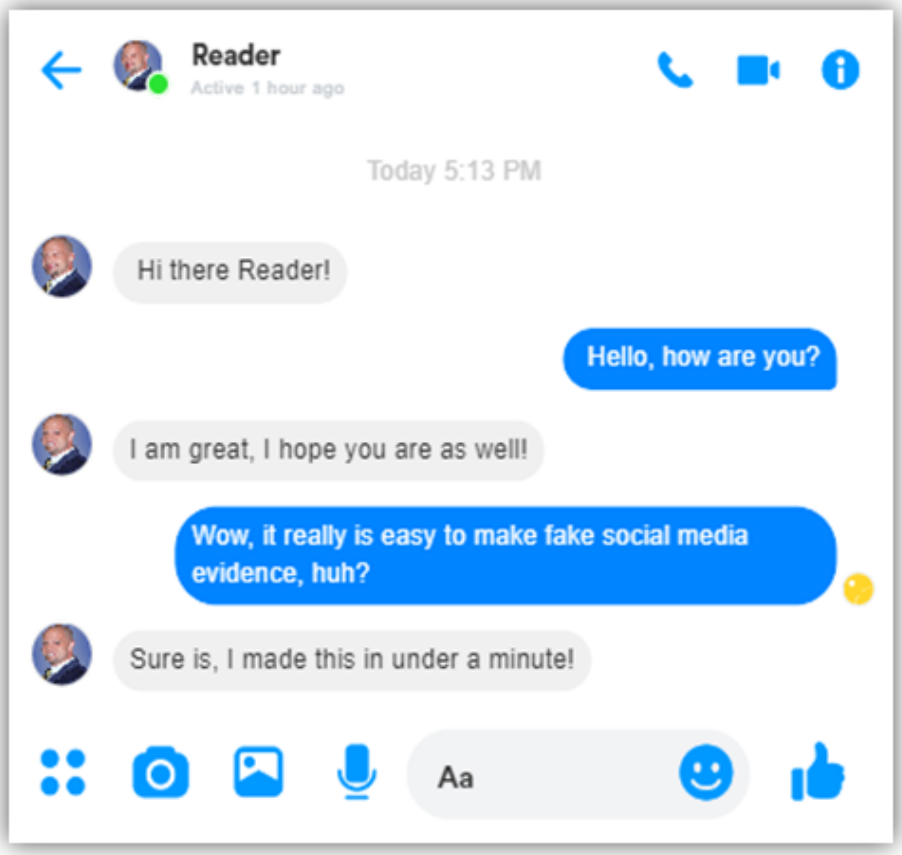
It does not take a high degree of technical capability or access to special software to create fake social media posts. Anyone can find websites that allow you to make fake social media posts and messages that look real, indistinguishable from authentic content.

For example, here are posts I made between myself and you, the reader, as a means of illustration. In addition, I can create fake posts and messages for all major social media platforms. The following faked social media messages and posts were created using a web-based application that is both simple to use and free.[ii]

Facebook

The time, date, location, content, comments, reactions, and chat messages contained in these photos are all fake.

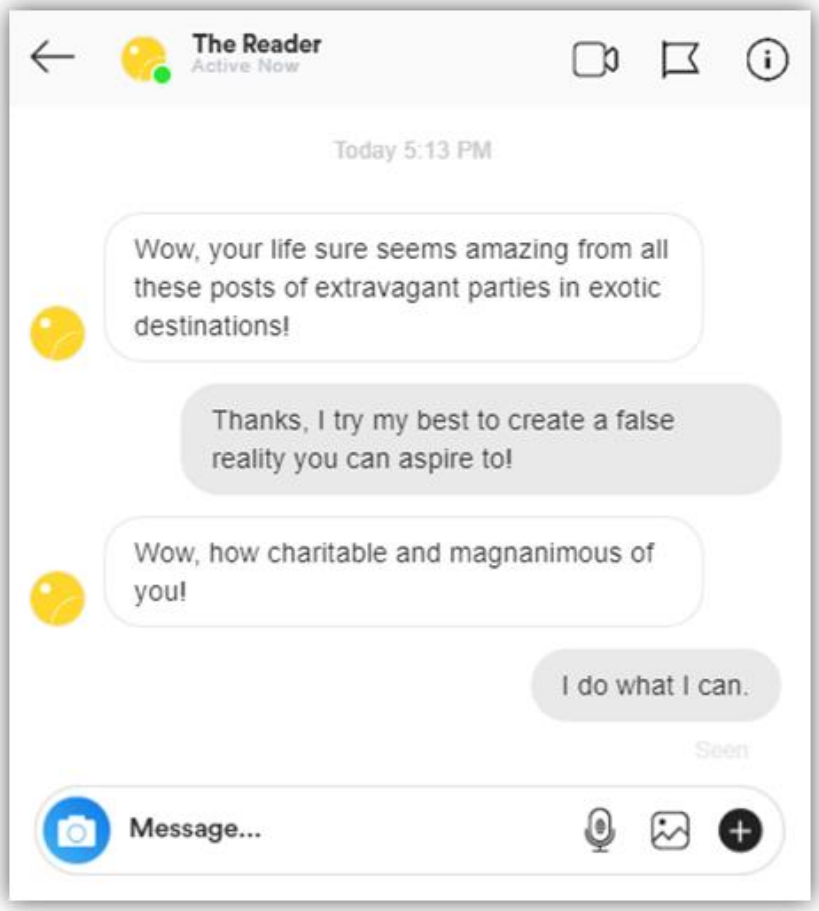

Lars Daniel is with You the Reader at My Backyard
Yesterday at 4:45am
Hello reader, here is a fake post I created just for you . I have even written a fake comment on your behalf!
I HATE COVID-19
26
21 Comments 10 Shares
Like
Comment
Share
View more 16 Comments
Reader Wow, where can I get that shirt!
10
Like · Reply · 1h
Write a comment...



Instagram

The account, blue check showing that I am a verified user, location, photo, content, comments, reactions, and chat communications are all fake.

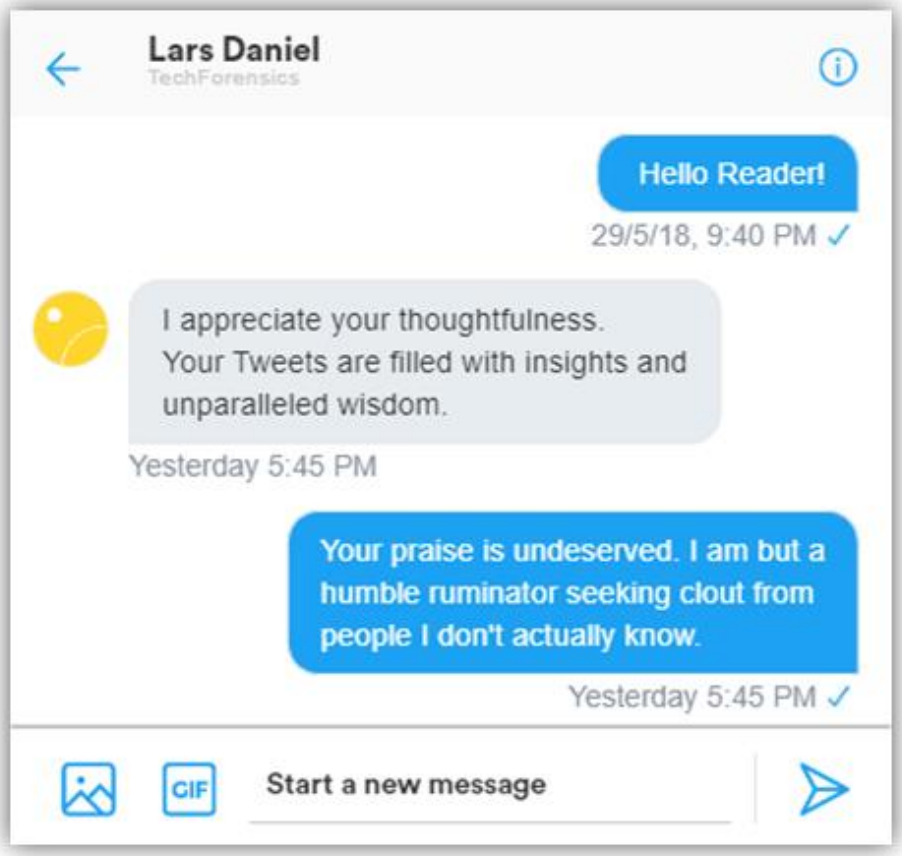

Lars Daniel · Follow
Chuckle Cheesers, Raleigh NC
Liked by The Reader and 120 others
Lars Daniel Fake post of my fake life on Instagram! ... more
View all 16 comments
Reader Wow, I wish I was as cool as you!
Add a comment...
6 August



Twitter

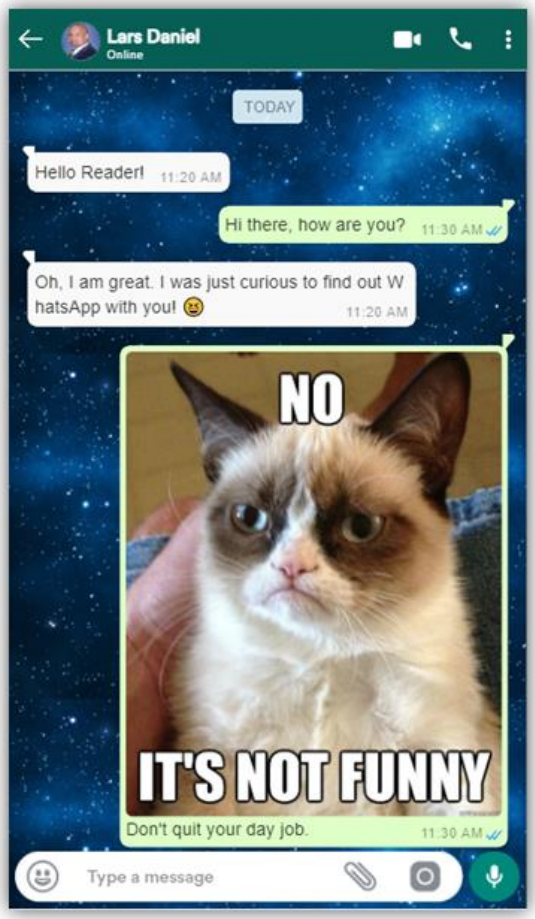
The account, tweets, time, retweets, likes, comments, and chats communications are fake.


Lars Daniel
TechForensics
Tweeting is the best. I prefer communicating in 280 characters or less. I find it encourages open, thoughtful dialogue.
4:17 PM. Aug 14, 2021 Twitter for iPhone
18k Retweets 160 Likes
The Reader @ReadingThisBook · 4h
Replying to @The Reader
I agree, Twitter's format in no way promotes logical fallacies and unnecessarily combative exchanges.



WhatsApp

The account, name, status, content, photo, and time are all fake.

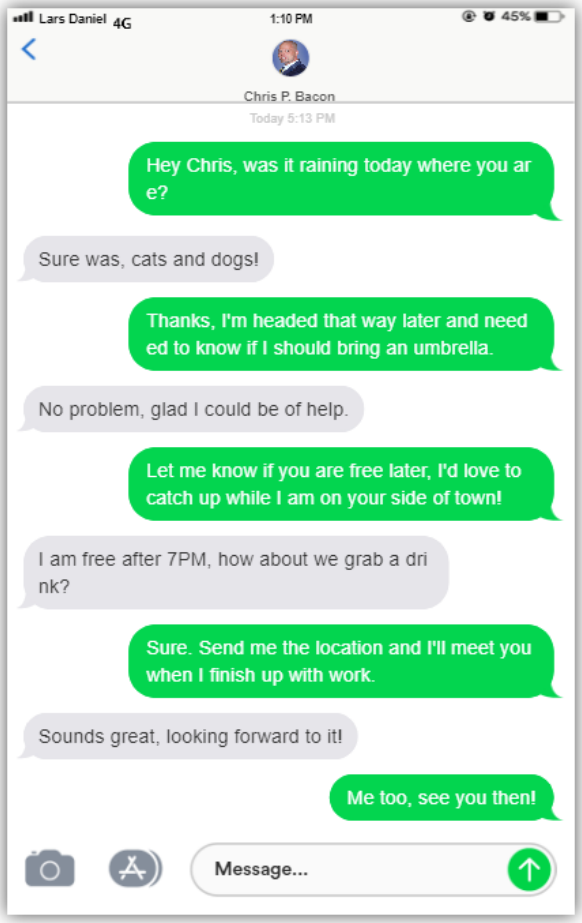


Snapchat

The image, text, time, name, account, and content are all fake

Texting

The account, contact, connection, name, content, time, icons, battery, and cellular service bars are all fake.

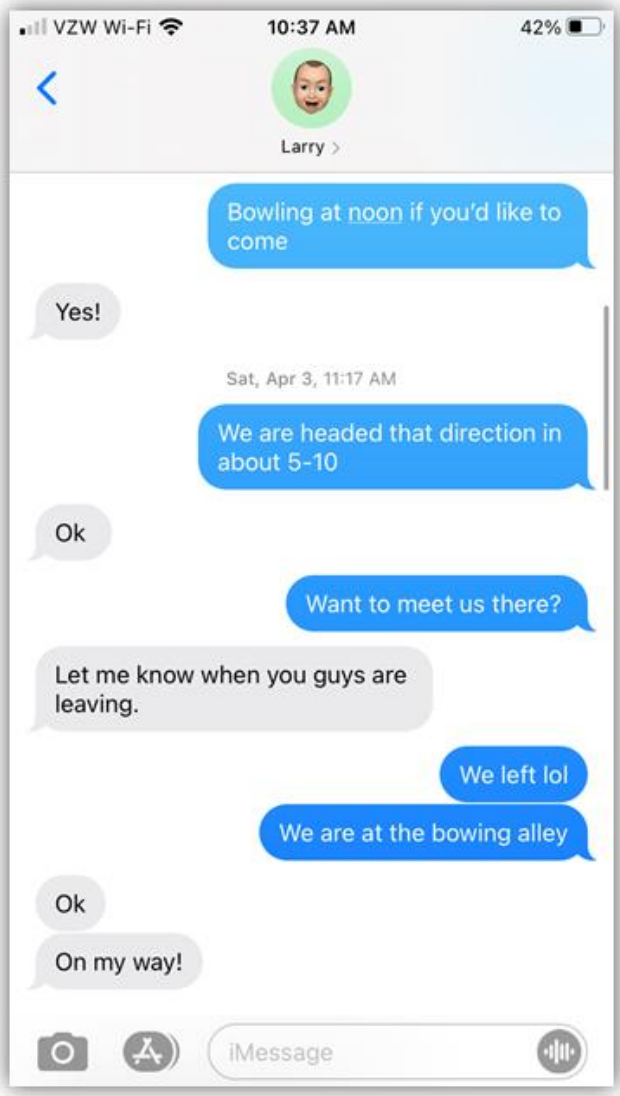


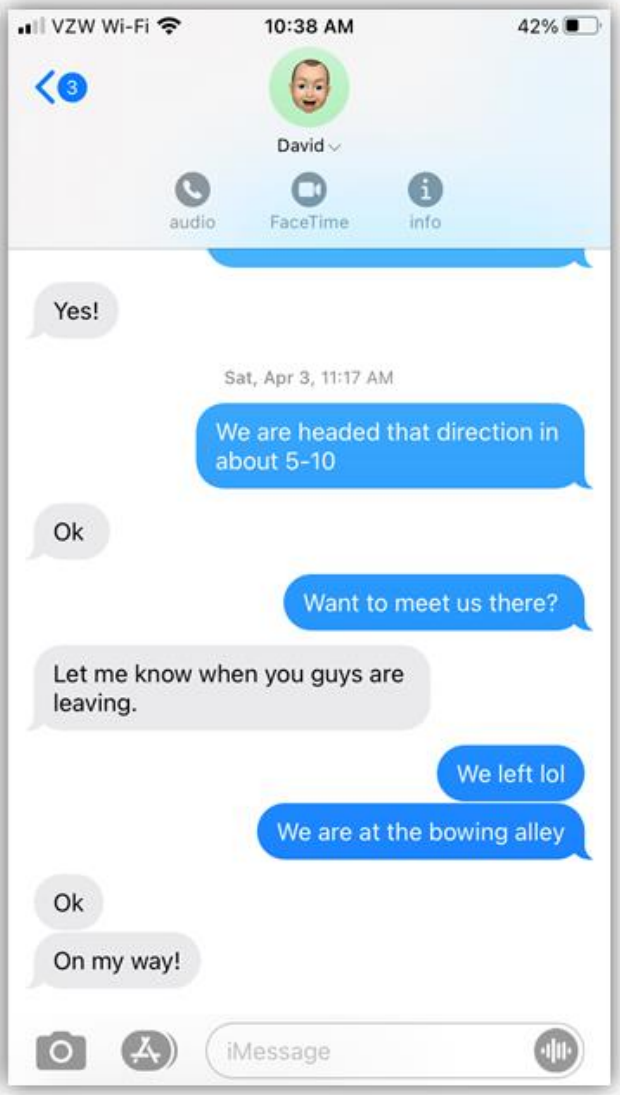
Spoofs and Fakes: Just the Phone

Creating fake messaging application communications on a cell phone doesn't require any outside tools, like the web-based application from the previous section. Instead, a user can make a fake with just the phone that they have in their hands that looks the same as a screenshot or photo provided as evidence.

Name Change

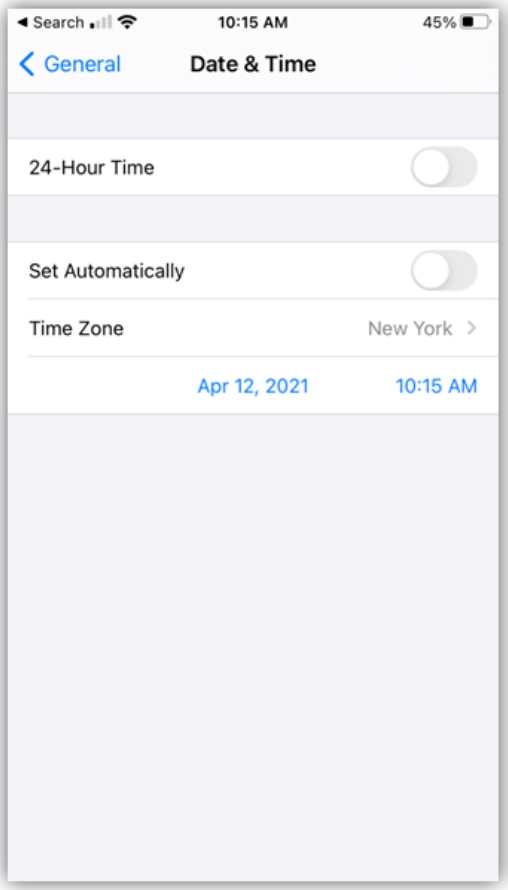
Screenshots of a text message conversation cannot verify the actual identity of a person alone. This is because the contact name can be changed at any time and the phone numbers of the sender or recipient are not recorded in the actual conversation itself in any way. For example, a person could change the contact on their phone named "Larry" to "David" by only editing the contact information, then take the pictures of the conversations to provide as evidence. All the messages sent between the person and Larry would appear to be between the person and David.

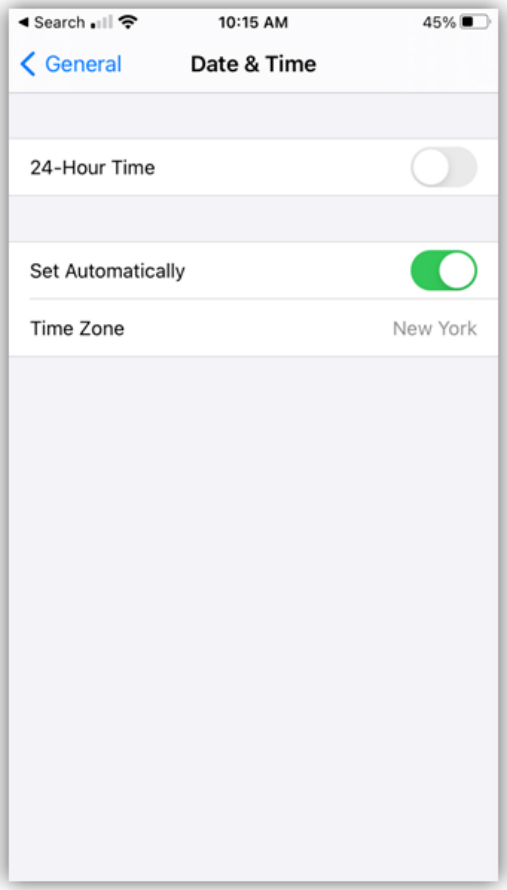

VZW Wi-Fi
10:37 AM
42%
Larry
Bowling at noon if you'd like to come
Yes!
Sat, Apr 3, 11:17 AM
We are headed that direction in about 5-10
Ok
Want to meet us there?
Let me know when you guys are leaving.
We left lol
We are at the bowing alley
Ok
On my way!
iMessage

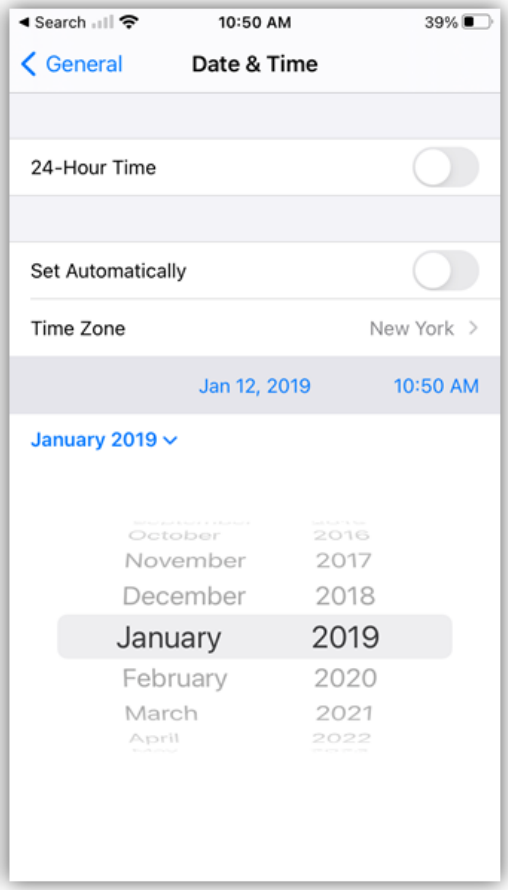

VZW Wi-Fi
10:38 AM
42%
3
David
audio
FaceTime
info
Yes!
Sat, Apr 3, 11:17 AM
We are headed that direction in about 5-10
Ok
Want to meet us there?
Let me know when you guys are leaving.
We left lol
We are at the bowing alley
Ok
On my way!
iMessage

Time Travel - Back Dating

It is possible to backdate an iPhone and to create text messages with fake dates and times. This can be done by going to the "Settings" application, selecting "General" from the menu, and then selecting "Date & Time." Next, from the "Date & Time" menu, turn off "Set Automatically." From there, click the menu option "Set Date & Time," and now the date and time can be set to anything. I can then send a text message that will show any date and time I select.



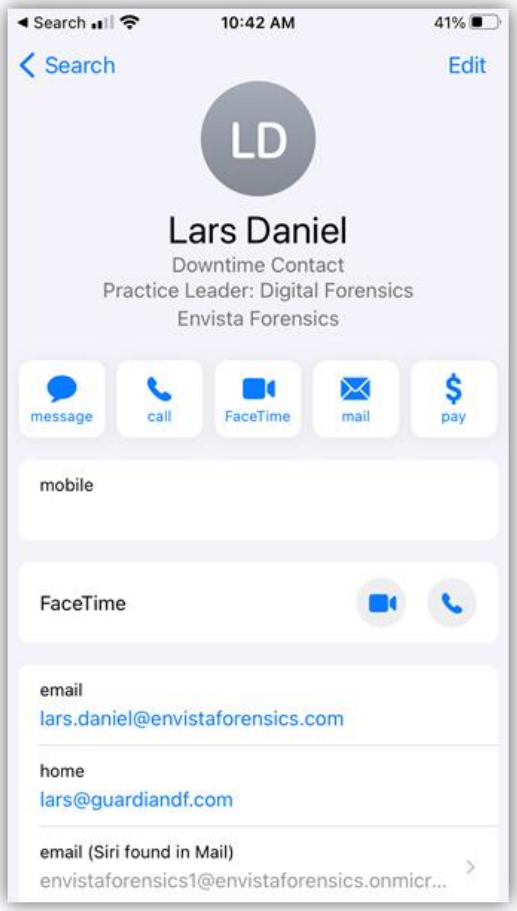


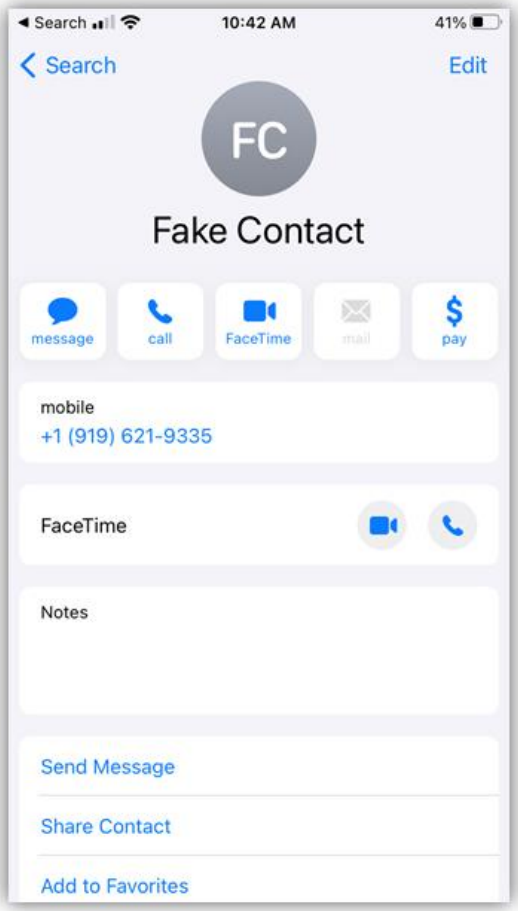


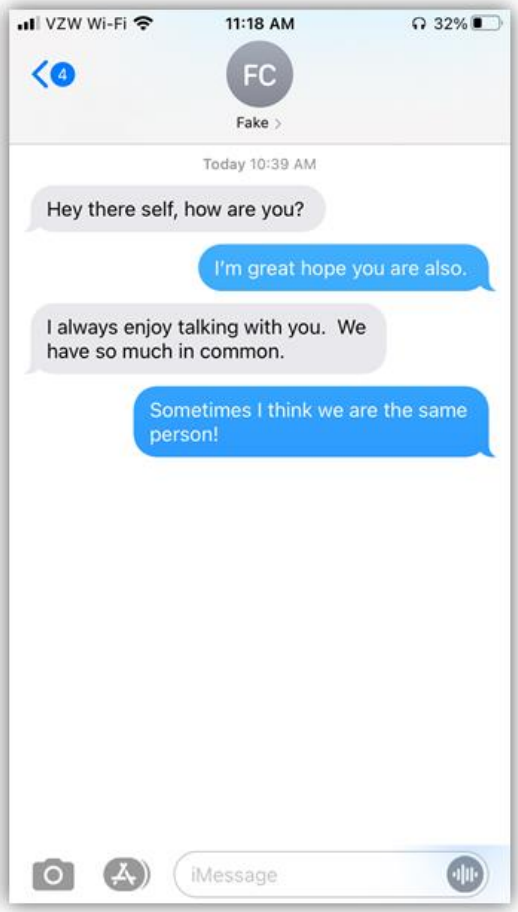
Talking to Myself - iMessage

Using only an iPhone, you can create a contact that uses your email address for iMessage communication. You then make a different contact on the phone that uses your cell phone number. While both the email and cell phone number are associated with you, you can have a conversation with yourself by naming them differently on the phone.

Couple this with the ability to backdate an iPhone, and it's possible to create months' or even years' worth of messages between two parties in an afternoon whom you can name anything you want and the screenshots would look exactly the same as a real message conversation.







When in Doubt Challenge the Evidence

When performing a manual examination, there are two critical components. One, the phone needs to be isolated from cellular and wireless networks. If you're looking at photos of text messages and see that there are Wi-Fi or cellular bars, you know that the phone was not isolated from the networks. Isolation of the device itself is achieved by eliminating all forms of data transmission, including the cellular network, Bluetooth, wireless networks (Wi-Fi), and infrared connections. By isolating the phone from all networks, the mobile phone is prevented from receiving any new data that would cause other data to be deleted, or worse, overwritten. The goal is to preserve the evidence as a snapshot in time of exactly how the evidence existed when it was received into custody.

Isolation

Did they Use a Faraday Bag?

A Faraday bag blocks any signals that a cell phone might pick up by blocking electrical fields and radio frequencies. A microwave uses this same technology, utilizing a Faraday cage to contain the magnetron's radio frequency within the cooking chamber. A cell phone can also be isolated from networks by wrapping the phone in a radio frequency shielding cloth and placing it into Airplane Mode.

Airplane Mode

After a digital forensic examiner has placed the phone into a Faraday bag or other device to ensure that the phone cannot receive any data, it is acceptable to put it into Airplane Mode. Once this is done, the phone can be removed for the duration of the examination. However, there is one caveat to this. The examiner must ensure that the phone is placed in Airplane Mode and that wireless functionality is turned off. You have likely experienced this in real life when flying. Even though you must turn off your cellular service while on an airplane, you can still access the Internet and transmit data using Wi-Fi; both wireless and cellular connectivity must be turned off for device isolation.

Video Verification

The other critical component, as previously discussed, is the continuous video footage of the examination of the cell phone, using photos of the contents, such as text messages or emails, for verification. Documentation from the National Institute of Standards and Technology (NIST) is an excellent resource for cross-examining experts or whoever documented messages via photo or screenshot.

In the following short example, we will utilize NIST documentation as exhibits to show the need for video verification. We will assume that no video was taken during the manual examination for the purpose of our example.

Cross-Examination Example: Video Verification

Q: Are you familiar with the National Institute of Standards and Technology (NIST)?

A: Yes

Q: Would you consider NIST to be a reliable source for information concerning cell phone forensics?

A: Yes

Q: Would you consider NIST to be an authority in the digital forensics community on how digital evidence should be handled?

A: Yes

INTRODUCE EXHIBIT: ***NIST Special Publication 800-101 Revision 1 Guidelines on Mobile Device Forensics***

Q: Please read the second to last paragraph on page 51.

A: "Invariably, not all relevant data viewable on a mobile device using the available menus may be acquired and decoded through a logical acquisition. Manually scrutinizing the contents via the device interface menus while video recording the process not only allows such items to be captured and reported but also confirms that the contents reported by the tool are consistent with observable data. Manual extraction must always be done with care, preserving the integrity of the device in case further, more elaborate acquisitions are necessary."

Q: What exactly is a manual examination of a cell phone?

A: A manual examination is where you take pictures of the contents from the phone, such as pictures of the text messages or emails.

Q: And that is what NIST is talking about in that paragraph, is that correct?

A: yes

Q: Did you video record your manual examination?

A: No

Q: Is there a reason you chose not to videotape the examination?

A: I didn't think I needed to since I was documenting the text messages with photos.

Q: Since the examination was not video recorded, can you prove if any of the text messages on the phone were deleted **UNINTENTIONALLY** during the manual examination?

A: No

Q: Since the examination was not video recorded, is there any way you can prove if any of the text messages on the phone were deleted **INTENTIONALLY** during the manual examination?

A: No

Q: Since the examination was not video recorded, is there any way you can prove if any of the text messages on the phone were modified **UNINTENTIONALLY** during the manual examination?

A: No

Q: Since the examination was not video recorded, is there any way you can prove if the text messages on the phone were modified **INTENTIONALLY** during the manual examination?

A: No

Q: Since the examination was not video recorded, is there any way you can prove if the text messages on the phone were created **UNINTENTIONALLY** during the manual examination?

A: No

Q: Since the examination was not video recorded, is there any way you can prove if the text messages on the phone were created **INTENTIONALLY** during the manual examination?

A: No

Q: If you had video recorded your examination, you could provide proof that there was no intentional or unintentional manipulation of the cell phone. Is that correct?

A: Yes

Conclusion

It is not hard to imagine this line of questioning expanded and enhanced by an attorney being a long and arduous experience for the witness. All because they skipped a simple step of video recording the process of their examination. Having testified as an expert witness on evidence verification and the authenticity of photos or screenshots of text messages, I can tell you that this is a common scenario.

Often basic forensic procedures are not followed in manual examinations. Mobile phones are not isolated from networks, exposing them to data manipulation and deletion. Manual examinations are not recorded, leaving the trier of fact with only the word of the examiner instead of verifiable proof in the form of a video recording. We all walk around with a video camera in our pocket. Beyond extreme circumstances, there is no excuse for an improperly performed manual examination, and if your encounter one in your case, it can be challenged from a forensic perspective.

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[i] Reface. Face swap videos

[ii] Zeoob | Generate Instagram, TikTok, Snapchat, Twitter, Facebook Chats & Posts with comments to offer your students some variety in dealing with storytelling.

DIGITAL FORENSICS //

ENVISTA FORENSICS

Resource Packet for Legal Professionals

Lars Daniel, EnCE, CCPA, CCO, CTNS, CTA, CIPTS, CWA

Practice Leader – Digital Forensics at Envista Forensics

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This document is ever-changing. Our team is consistently adding and updating information. You can contact me to check for the most up-to-date version. ***Disclaimer: None of our experts are attorneys, and we do not offer legal advice. Nothing in this resource guide should be viewed as providing legal advice or instruction.***

Call Detail Record Subpoena Language

If you do not see the carrier you are looking for, particularly Tracfone or other prepaid (Mobile Virtual Network Operators (MVNO) companies, or have any questions regarding call detail records, please contact us.

- Other important steps prior to sending legal process:
- If your matter is civil litigation, please contact our experts for assistance as the service process may vary from these samples.
- Contact the carrier to ensure they are the correct carrier to request data.
- Send preservation letters to hold all available records, this can be done for 90 days at a time.
- Refer to search.org for the most current contact numbers and delivery methods for legal process. https://www.search.org/resources/isp-list/

AT&T Wireless

AT&T Wireless

11760 US Highway 1 Suite 600 North Palm Beach, FL 33408

Contact Phone Number: 800-635-6840

SERVICE BY FAX OR EMAIL: 888-938-4715 or gldc@att.com

Language:

Defendant, by and through their attorney, requests the following information be provided regarding cell phone communications in the form of historical call detail records with cell site locations tower location listings, for cell phone number(s) 000-000-0000 for the period of time between 00-00-2000 and 00-00-2000.

All information including but not limited to:

1. Subscriber information for the above listed numbers, including financially responsible party, billing address, features and services and equipment,

2. Call Detail Records with cell site location, all call originations, call terminations, call attempts, voice and text message transactions, including push to talk, data communications, SMS and MMS communications, and voice communications, LTE and/or IP sessions and destinations with cell site information, including the originating and receiving phone numbers or network IDs for all incoming and outgoing call transactions, data transactions and push to talk sessions.

3. Records are to include the IMEI, IMSI or other equipment or handset identification information for the target phone number if known.

4. All stored SMS content, MMS content and / or Browser Cache if available.

5. Beginning and ending switch and cell site / tower identifiers for each call, SMS MMS and data transmission, including the location information and azimuth for the tower and sector used for the call.

6. A legend and definition for any and all abbreviations used in the reports provided

7. An explanation of how to read the call detail records.

8. Any precise measurement data such as e-911 location data, NELOS data and or any other data recorded for the time period that will provide additional location data.

9. Specific information regarding the time stamps / time zones of the records.

Provide the following information regarding cell tower locations for the following areas containing cell towers actively in service between 00-00-2000 and 00-00-2000.

Include the below AT&T cell tower information:

Mobile Country Code (MCC), Mobile Network Code (MNC), Location Area Code (LAC), System Identification Number (SID), Network Identity (NID), Tracking Area Code (TAC), Cell ID, E-UTRAN Cell Global Identifier (ECGI), eNodeB ID (eNBID), Technology, Band, Frequency, Channel, EARFCN, Sector Identifier, Sector Orientation (azimuth), Beamwidth, PCI, PSC, PN Offset, and Tower Height.

10. Any records or information regarding cell towers that were undergoing maintenance, or were out of service the time period in this request.

All responsive data is to be provided in both Adobe PDF format and Microsoft Excel format, .TXT or .CSV format.

Please indicate in your response to this subpoena if there is any data loss due to the time difference between the date of the receipt of this subpoena and the time period requested, and if so, a detailed description of what data is not recoverable versus what data would be recoverable based on the carrier's retention period for call detail records.

Please respond to this subpoena via email to: your email & Expert with Envista Forensics

Verizon Wireless

180 Washington Valley Road Bedminster, NJ 07921

Contact Phone Numbers: Subpoena contact: 888-483-2600

SERVICE BY FAX :Subpoenas: 888-667-0028

Orders & Warrants: 888-667-0026

Language:

Defendant, by and through their attorney, requests the following information be provided regarding cell phone communications in the form of historical call detail records with cell site locations tower location listings, for cell phone number(s) 000-000-0me between 00-00-2000 and 00-00-2000.

All information including but not limited to:

1. Subscriber information for the above listed numbers, including financially responsible party, billing address, features and services and equipment,

2. Call Detail Records with cell site location, all call originations, call terminations, call attempts, voice and text message transactions, including push to talk, data communications, SMS and MMS communications, and voice communications, LTE and/or IP sessions and destinations with cell site information, including the originating and receiving phone numbers or network IDs for all incoming and outgoing call transactions, data transactions, VOLTE with cell sites.

3. Records are to include the IMEI, IMSI or other equipment or handset identification information for the target phone number if known.

4. All stored SMS content, MMS content and / or Browser Cache if available.

5. Beginning and ending switch and cell site / tower identifiers for each call, SMS MMS and data transmission, including the location information and azimuth for the tower and sector used for the call.

6. A complete table of cell towers / cell site information for all cell towers / cell sites in the

Mobile Country Code (MCC), Mobile Network Code (MNC), Location Area Code (LAC), System Identification Number (SID), Network Identity (NID), Tracking Area Code (TAC), Cell ID, E-UTRAN Cell Global Identifier (ECGI), eNodeB ID (eNBID), Technology, Band, Frequency, Channel, EARFCN, Sector Identifier, Sector Orientation (azimuth), Beamwidth, PCI, PSC, PN Offset, and Tower Height.

8. An explanation of how to read the call detail records.

9. Any precise measurement data such as e-911 location data, RTT, RTTL, RTTM, ERLTE, ALULTE or reports of similar nature data that provide estimated locations of the device or distances from the base station. Any other data recorded for the time period that will provide additional location data.

10. Specific information regarding the time stamps / time zones of the records.

11. Any records or information regarding cell towers that were undergoing maintenance, or were out of service the time period in this request.

All responsive data is to be provided in both Adobe PDF format and Microsoft Excel format, .TXT or .CSV format.

Please indicate in your response to this subpoena if there is any data loss due to the time difference between the date of the receipt of this subpoena and the time period requested, and if so, a detailed description of what data is not recoverable versus what data would be recoverable based on the carrier's retention period for call detail records.

Please respond to this subpoena via email to: your email & Expert with Envista Forensics

T-Mobile/Metro PCS

4 Sylvan Way

Parsippany, New Jersey 07054

Contact: 866-537-0911

SERVICE BY E-MAIL AND FAX: Lerinbound@T-Mobile.com, 973-292-8697

Language:

Defendant, by and through their attorney, requests the following information be provided regarding cell phone communications in the form of historical call detail records with cell site locations tower location listings, for cell phone number(s) 000-000-0me between 00-00-2000 and 00-00-2000.

All information including but not limited to:

1. Subscriber information for the above listed numbers, including financially responsible party, billing address, features and services and equipment,

2. Call Detail Records with cell site location, all call originations, call terminations, call attempts, voice and text message transactions, including push to talk, data communications, SMS and MMS communications, and voice communications, LTE and/or IP sessions and destinations with cell site information, including the originating and receiving phone numbers or network IDs for all incoming and outgoing call transactions, data transactions and push to talk sessions.

3. Records are to include the IMEI, IMSI or other equipment or handset identification information for the target phone number if known.

4. All stored SMS content, MMS content and / or Browser Cache if available.

5. Beginning and ending switch and cell site / tower identifiers for each call, SMS MMS and data transmission, including the location information and azimuth for the tower and sector used for the call.

6. Cell Site List including; Mobile Country Code (MCC), Mobile Network Code (MNC), Location Area Code (LAC), System Identification Number (SID), Network Identity (NID), Tracking Area Code (TAC), Cell ID, E-UTRAN Cell Global Identifier (ECGI), eNodeB ID (eNBID), Technology, Band, Frequency, Channel, EARFCN, Sector Identifier, Sector Orientation (azimuth), Beam width, PCI, PSC, PN Offset, and Tower Height.

7. A legend and definition for any and all abbreviations used in the reports provided

8. An explanation of how to read the call detail records.

9. Any precise measurement data such as e-911 location data, TDOA (Time Delay of Arrival) Truecall, Timing Advance or reports of similar nature data and or any other data recorded for the time period that will provide additional location data.

10. Specific information regarding the time stamps / time zones of the records.

All responsive data is to be provided in both Adobe PDF format and Microsoft Excel format, .TXT or .CSV format.

Please indicate in your response to this subpoena if there is any data loss due to the time difference between the date of the receipt of this subpoena and the time period requested, and if so, a detailed description of what data is not recoverable versus what data would be recoverable based on the carrier's retention period for call detail records.

Please respond to this subpoena via email to: your email & Expert with Envista Forensics

Sprint Corporation

6480 Sprint Pkwy

Overland Park, Kansas 66251 Contact: 800-877-7330

SERVICE BY FAX: 816-600-3111; To receive status updates for Subpoenas and Search Warrants by contacting 800-877-7330 extension 3.

Language:

Defendant, by and through their attorney, requests the following information be provided regarding cell phone communications in the form of historical call detail records with cell site locations tower location listings, for cell phone number(s) 000-000-0me between 00-00-2000 and 00-00-2000.

All information including but not limited to:

1. Subscriber information for the above listed numbers, including financially responsible party, billing address, features and services and equipment,

2. Call Detail Records with cell site location, all call originations, call terminations, call attempts, voice and text message transactions, including push to talk, data communications, SMS and MMS communications, and voice communications, LTE and/or IP sessions and destinations, eHRPD with cell site information, including the originating and receiving phone numbers or network IDs for all incoming and outgoing call transactions, data transactions and push to talk sessions.

3. Records are to include the IMEI, IMSI or other equipment or handset identification information for the target phone number if known.

4. All stored SMS content, MMS content and / or Browser Cache if available.

5. Beginning and ending switch and cell site / tower identifiers for each call, SMS MMS and data transmission, including the location information and azimuth for the tower and sector used for the call.

6. A complete table of cell towers / cell site information for all cell towers / cell sites;

a. Cell Site List including; Mobile Country Code (MCC), Mobile Network Code (MNC), Location Area Code (LAC), System Identification Number (SID), Network Identity (NID), Tracking Area Code (TAC), Cell ID, E-UTRAN Cell Global Identifier (ECGI), eNodeB ID (eNBID), Technology, Band, Frequency, Channel,

EARFCN, Sector Identifier, Sector Orientation (azimuth), Beamwidth, PCI, PSC, PN Offset, and Tower Height.

7. a legend and definition for any and all abbreviations used in the reports provided

8. An explanation of how to read the call detail records.

9. Any precise measurement data such as e-911 location data, Per Call Measurement Data (PCMD) or reports of similar nature data that provide estimated locations of the device or distances from the base station. Please provide a PCMD report for each Vendor/Call type. Any other data recorded for the time period that will provide additional location data.

10. Include reports for VOVoice (VOWIFI, VOLTE, VOCDMA)

11. Specific information regarding the time stamps / time zones of the records.

12. Any records or information regarding cell towers that were undergoing maintenance, or were out of service the time period in this request.

All responsive data is to be provided in both Adobe PDF format and Microsoft Excel format, .TXT or .CSV format.

Please indicate in your response to this subpoena if there is any data loss due to the time difference between the date of the receipt of this subpoena and the time period requested, and if so, a detailed description of what data is not recoverable versus what data would be recoverable based on the carrier's retention period for call detail records.

Please respond to this subpoena via email to: your email & Expert with Envista Forensics

Cell Site List Request

This request should be used for all carriers, and is important to complete an analysis or cell site survey.

Look up each carrier and their subpoena compliance info using, https://www.search.org/resources/isp-list/

Language:

Please include a list of the following information regarding Cell Sites for the State of Insert State, during Insert Month, Year.

To include (but not limited to):

Mobile Country Code (MCC), Mobile Network Code (MNC), Location Area Code (LAC), System Identification Number (SID), Network Identity (NID), Tracking Area Code (TAC), Cell ID, E-UTRAN Cell Global Identifier (ECGI), eNodeB ID (eNBID), Technology, Band, Frequency, Channel, EARFCN, Sector Identifier, Sector Orientation (azimuth), Beamwidth, PCI, PSC, PN Offset, and Tower Height.

Please provide the list in excel, .csv or similar format.

Please respond to this subpoena via email to: your email & Expert with Envista Forensics

Mobile Virtual Network Operator (MVNO) Subscriber/Billing request

This request can be used for all MVNO, and supplements the call detail record request to the company providing cell service. Look up each carrier and their subpoena compliance info using, https://www.search.org/resources/isp-list/

A separate request needs to be made to the company providing service (ie. Verizon, AT&T)

Language:

Defendant, by and through their attorney, requests the following information be provided regarding cell phone communications in the form of historical call detail records with cell site locations tower location listings, for cell phone number(s) 000-000-0me between 00-00-2000 and 00-00-2000.

1. Subscriber information for the above listed numbers, including financially responsible party, billing address, features and services and equipment.
2. All call originations, call terminations, call attempts, voice and text message transactions, including push to talk, data communications, SMS and MMS communications, and voice communications, LTE and/or IP sessions and destinations.
3. Records are to include the IMEI, IMSI or other equipment or handset identification information for the target phone number if known.
4. A legend and definition for any and all abbreviations used in the reports provided.
5. An explanation of how to read the call detail records.

All responsive data is to be provided in both Adobe PDF format and Microsoft Excel format, .TXT or .CSV format.

Please indicate in your response to this subpoena if there is any data loss due to the time difference between the date of the receipt of this subpoena and the time period requested, and if so, a detailed description of what data is not recoverable versus what data would be recoverable based on the carrier's retention period for call detail records.

Please respond to this subpoena via email to: your email & Expert with Envista Forensics

Call Detail Records – What You Should Get in Discovery from Opposing Counsel

Subpoena responses and warrant returns from wireless phone companies will contain specific files that are delivered via email, on disk or via a secure web portal. It is very important that you received all of the files returned to the requester. Also, copies of the original subpoena and or warrant with the affidavit are very helpful for your expert.

There are spreadsheets and documents that provide such information as subscriber information; the call detail records themselves, cell tower location keys, explanation forms and disclaimers. These disclaimers are important, as they provide pertinent information regarding location accuracy or time-zone information. Each carrier stores their records in various formats and below you will find the specific data you should receive organized by four of the major carriers. Other carriers like US Cellular follow a similar pattern.

Verizon Wireless

Verizon Wireless call detail records also require a cell tower key to determine the location of the towers in the area. Call detail records will often be labeled "Cell sites incoming outgoing" and the tower key with contain a city name and "LEA". Verizon records may also contain Voice Over LTE records which will contain "VOLTE" in the spreadsheet name. If requested in the proper timeframe, you may receive Real Time Tool records, the spreadsheet name will contain "RTTM". Verizon also provides subscriber information, explanation information for each of the different spreadsheets as well as disclaimers. Each of the spreadsheets containing location information will be in Microsoft Excel format and explanation forms are typically in Portable Document Format (.pdf).

Sprint

Sprint also provides call detail records and cell site keys in separate spreadsheets. Again, both are needed to analyze the records. Sprint's records also come in Microsoft Excel format and are typically labeled with a number. There will be several spreadsheets all containing the various information. They may also provide Per Call Measurement Data (PCMD) if requested in the proper timeframe. Sprint also provides need explanation forms and disclaimers.

AT&T/Cricket

provides their call detail records and text detail, with location information, in one spreadsheet. This is typically labeled "Reports AU" and comes in two formats, Text format (.txt) and Portable Document Format (.pdf). This is standard for all requests, unless otherwise specified. At&t will provide subscriber information, as well as needed explanation forms and disclaimers. At&t may also provide, if requested, Network Event Location Service (NELOS) data. It is important for your expert to receive the text format (.txt) files for analysis, this format allows for data to be imported into various software platforms for converting time zones and analysis.

T-Mobile / MetroPCS

T-Mobile / MetroPCS provides call detail records in Microsoft Excel spreadsheets that are typically labeled "CDR Mediations". This spreadsheet will provide the call record as well as the tower location information needed. Subscriber information will be provided and explanation forms will also be provided. Depending on the year the records were provided, they may be kept in different time-zones, for this reason the explanation form is important. No other location information is available from T-Mobile at this time.

Google Location History Subpoena Language

Request the following for accounts: googleuser@gmail.com

INFORMATION SOUGHT: Google location services to include: account information, date, time (UTC), latitude, longitude, maps display radius (accuracy in meters), device source, device tag, and platform.

FOR THE DATE RANGE: December 5, 2015

SEND TO:

Google, Inc.

Contact Name:	Google Legal Investigations Support
Online Service Address:	1600 Amphitheatre Parkway Mountain View, CA 94043
Phone Number:	(844)383-8524
E-mail Address:	uslawenforcement@google.com
Note(s):	For a faster response time, submit your legal requests through the Law Enforcement Request System (LERS). The system requires each user to register for a unique account to submit legal requests. Register for an account at https://support.google.com/legal-investigations/contact/LERS From Googles LERS FAQ: https://lers.google.com/u/2/app/faq "Notwithstanding Title 18, United States Code, Section 2252A [or similar statute or code] Google shall disclose responsive data, if any, by delivering encrypted files through Google's Law Enforcement Request System" Oct 2016: telephone number listed for google and the message said the number has changed. The message said the new number is (844)383-8524 or (650)417-9011

Questions can be emailed to USLawEnforcement@google.com

For Emergency Disclosure Requests leave a message with details of the emergency and your contact information at 650-253-3425. Google will only return calls from sworn law enforcement officers handling emergency situations.

Google has launched a new Law Enforcement System. Here is the link to sign up in advance for an account: https://support.google.com/legal-investigations/contact/LERS

Last Updated: July 2017

Previous Information: As of Feb, 2016: Voice # :650-253-3425 In February 2015, Notes was: For a faster response time, Google has created a web form for submitting legal demands. Use of fax and email are still options for delivering, but the web form is preferred by Google: Google Legal Portal: https://support.google.com/legal-investigations. For Custodian of Records and Legal Investigations Support call the "Emergency Disclosure Request" department at: 650-253-3425. Leave a message and an agent will call you back. For search warrant requests, please send them to: Email: USLawEnforcement@google.com (preferred by Google) or by Fax: 650-249-3429. Attention: Custodian of Records Google, Inc. 1600 Amphitheatre Parkway Mountain View, CA 94043 At Google's request, please include the following language in any subpeona: "Please do not disclose/notify the user of the issuance of this subpoena. Disclosure to the user could impede an investigation or obstruct justice." Additionally, please include the following in your search warrant "Google shall disclose responsive data, if any, by sending to [LE's postal address] using the US Postal Service or another courier service, notwithstanding 18 U.S.C. 2252A or similar statute or code." Google will disclose release of information unless in violation of law or court order or if convinced doing so will place a child at risk. A short affidavit arguing the last will be considered. Google does not disclose preservation of data actions to account holders. For Gmail: Custodian of Records and Legal Investigations Support can be reached at: 650-253-3425. For search warrant requests, please submit them to:
Email: USLawEnforcement@google.com(preferred by Google) or by Fax: 650-249-3429. Attention: Custodian of Records Google, Inc. 1600 Amphitheatre Parkway Mountain View, CA 94043 At Google's request, please include the following language in any subpoena: "Please do not disclose/notify the user of the issuance of this subpoena. Disclosure to the user could impede an investigation or obstruct justice."

Video Recording System (DVR) Subpoena Language

1) Any and all records related to the recording device , specifically for the period of time beginning on _____ and ending upon _____ used in the recording of the interviews of persons _____ and _____

2) All information related to the recording device including but not limited to:

    a. user manuals
    b. service records
    c. training materials
    d. installation manuals
    e. manufacturer, make, model, and serial number
    f. date the recording device went into service
    g. known issues or problems with the recording device
    h. firmware version
    i. software version

3) Any and all maintenance records for the recording device.

4) Any and all information concerning the recording device hardware in regards to the installation and operation. This information is to include, but is not limited to how it is installed in the facility, and any possible errors in the installation that could have an effect on the operation of the recording device.

5) Any and all information concerning the software and firmware of the recording device. This information is to include, but is not limited to how the software and firmware are installed on the recording device, how any upgrades to the software and firmware have been performed,

and any possible errors in the installation of the software or firmware that could have an effect on the operation of the recording device.

6) The qualifications, resume, curriculum vitae, and any records related to the training of the person who created and/or exported the video and audio recordings from the recording device for the persons _____ and _____.

7) Any protocols, operation manuals, guidelines, standard operating procedures, and any and all documents created by the (LAW ENFORCEMENT AGENCY/PRIVATE COMPANY) concerning the particular recording device, audio forensics, video forensics, chain of custody in relation to video and audio, and the preservation methods of video and audio.

8) Any and all documentation, reports, narratives, or other documents concerning the method by which the video recordings were extracted from the device to include, but not limited to, the quality settings, file type, and compression ratio.

9) Any and all documentation, reports, narratives, or other documents concerning the settings of recording device between the dates of _____ and _____ including, but not limited to, the quality settings, number of cameras, multiplexing, file type, import settings, export settings, compression ratio, encryption, and audio settings.

GPS (Global Positioning System) Records Subpoena Language

1) Any and all records related to the GPS records identified by serial numbers _____ specifically for the period of time beginning on _____ and ending upon _____.

2) All Information related to GPS units identified by serial numbers _____ and _____, to include but not limited to GPS activity such as powering up, powering down, distance traveled, mileage, latitude and longitude, location by address, speed of travel, distance traveled, long stop, short stop, dilution of precision ratings, and so forth.

3) Any information that is available regarding the physical GPS units installed in the vehicle(s) identified by GPS Unit serial number(s) _____. This is to include, but is not limited to; user manuals, installation manuals, owner manuals, manufacturer, make, model, dates units went into service, dates unites went out of service, known issues or problems with GPS models such as loss of signal, problems with calibration, pinging, areas of service, problems due to extraneous factors such as weather and so forth.

4) Any information that is available regarding the software used by both Vehiclepath.com and their clients. This is to include, but is not limited to; user manuals, installation manuals, owner manuals, online documentation, known problems with the software either used by Vehiclepath.com or their clients, user errors that could have an effect upon GPS records, and so forth.

5) Any and all maintenance records for the GPS units identified by serial number(s) _____.

6) A list of all GPS units supported by COMPANY NAME'S tracking system up to MONTH of 20XX.

7) Any and all information on the GPS units regarding their installation and operation. This information is to include, but is not limited to how and where they are installed in vehicles, possible errors in installation that could have an effect on GPS records, how the tracking ability of GPS units could be manipulated by being turned on and off by the user, otherwise disabling of the GPS unit, the use of software or hardware that could modify the unit, other ways of intentionally causing a GPS unit to function in any way other than intended.

Digital Evidence Generic ESI Request

With regard to any electronic data that you expect to use as evidence in this case, please produce the following:

1. a duplicate of any forensic copies made by the expert of any computer hard drive, digital storage media including but not limited to CD-ROMS, USB flash drives, floppy disks, memory cards, digital camera storage, smart cards and portable hard drives.

2. a complete inventory of all items supplied to the expert that may contain any type of digital data, whether or not such items were examined or copied by the expert.

3. a complete copy of all forensics reports, chain of custody records, and lab notes generated by the expert pertaining to the acquisition, preservation, analysis, and or reporting by said expert.

4. any documents produced from the electronic sources examined by the expert in this case, both in printed and electronic formats, including, but not limited to:
    a. log files;
    b. any or all printer artifacts;
    c. user access histories;
    d. user account information including all known access times to the server by any of the persons named in this lawsuit;
    e. user account information including security levels and access control lists;
    f. user account information including user names, account type and passwords;

With regard to any person whom you expect to call as an expert witness at the trial of this case, please produce the following:

1) All materials and documents of any kind in the possession, custody, or control of the expert witness that pertain to the subject matter of this case, including, but not limited to, all correspondence between you and the expert witness, all correspondence between your attorney and the expert witness, all e-mail communications between you and the expert witness, all e-mail communications

between your attorney and the expert witness, all notes that pertain to the subject matter of this case, all diaries or personal journals that pertain in any manner to the subject matter of this case, and all records, depositions, statements, transcripts, reports, writings, drawings, graphs, calculations, estimates, exhibits, charts, photographs, audio tapes, video tapes, plans, invoices, bills, and receipts from any source that relate in any manner to this litigation;

2) All documents prepared by the expert that pertain to this case, including, but not limited to, true, correct, and complete copies of all reports concerning this case that have been prepared by the expert. This request for production specifically includes all preliminary drafts of reports as well as final drafts of reports;
    a) All documents that you or your attorney or any of your representatives have sent to the expert witness that pertain in any manner to this case;
    b) All documents, data, or other information used, considered, or reviewed by the expert witness that pertain in any manner to this case;
    c) All documents that pertain to any compensation agreement for the expert's services in this case;
    d) All documents that have been or will be shown to the expert prior to the expert's trial testimony; and,
    e) All documents, including current curriculum vitae, used to establish the expert's qualifications as an expert witness.

With regard to the usage, operation and maintenance of the servers,

software and or computers in this case, please provide the following:

1) Any and all software manuals, including but not limited to user manuals, training materials, administrator manuals and setup guides for the software that may contain customer data.
2) Any and all maintenance records, including invoices, paid or unpaid, from any vendor involved in the maintenance of the servers, patient accounting software, or other electronic sources of information that will be used as evidence in this case. Such records are to include trouble tickets, user setup tickets, service tickets, password changes, password settings, user account lists, administrative changes and training session information.
3) Any administrative records regarding the installation, maintenance and or usage of the server, the computer network and the patient records software.

Cell Phone Preservation Letter

Cell Phone Preservation / ESI

[date/address]

Re: Notice to Preserve Electronic Evidence [Legal Matter]

Dear _____ :

Our law firm represents [name] in the above legal matter in which you [your business] are [is] [will be] named as a defendant. This letter requests your immediate action to preserve electronically stored information that may contain evidence important to the above legal matter. Briefly, the matter involves [short statement of facts in case].

This notice applies to your [custodian] cell phone, cell phone backups, removable electronic media, and computer systems. This includes, but is not limited to, e-mail and other electronic communications; electronically stored documents, records, images, graphics, recordings, spreadsheets, databases; calendars, system usage logs, contact manager information, telephone logs, internet usage files, deleted files, cache files, user information, and other data. Further, this notice applies to archives, backup and disaster recovery tapes, discs, drives, cartridges, voicemail and other data. All operating systems, software, applications, hardware, operating manuals, codes, keys and other support information needed to fully search, use, and access the electronically stored information must also be preserved.

The importance of immediate action cannot be overstated. Electronically stored information is easily corrupted, altered, and deleted in normal daily operations. Even booting an electronic device, running an application, or reviewing a document can permanently alter evidence.

The cell phone should be powered off, sealed inside of an evidence container, and placed in secure evidence storage until such a time whereas a cell phone forensics expert can create a forensic image of the device. Full chain of custody should also be kept.

Further, any external media or computer system used to create backups of the cell phone should also be powered off according to digital forensics best practices, placed into sealed evidence containers, and securely stored until forensic images of the evidence items can be created. Full chain of custody should also be kept.

Online accounts associated with the cell phone, including but not limited to, social media accounts, application based accounts, cloud data storage accounts, email accounts, messaging accounts, and/or any other application than can be accessed via the cell phone device should be preserved.

[If known, identify any key persons', officers', supervisors', and employees' computers to which special attention for forensic imaging must be directed.] This preservation notice covers the above items and information between the following dates: [state dates].

Follow the above procedures to preserve electronic information created after this notice. Current law and rules of civil procedure clearly apply to the discovery of electronically stored information just as they apply to other evidence, and confirm the duty to preserve such information for discovery.

You [company] and your officers, employees, agents, and affiliated organizations must take all reasonable steps to preserve this information until this legal matter is finally resolved. Failure to take the necessary steps to preserve the information addressed in this letter or other pertinent information in your possession or control may result in serious sanctions or penalties. Further, to properly fulfill your preservation obligation, stop all scheduled data destruction, electronic shredding, rotation of backup tapes, and the sale, gift or destruction of hardware. Notify all individuals and affiliated organizations of the need and duty to take the necessary affirmatives steps to comply with the duty to preserve evidence.

Sincerely, [attorney/address]

Cellular Account Preservation Letter

Date

Dear Custodian of Records,

Now comes _____ , by and through his attorney, and requests the following information be preserved regarding cell phone communications for cell phone number(s) **000-000-0000 and 000-000-0000.** _____ requests that the data and information outlined below be preserved to include the time period of _____ to _____ for a period of 180 days beginning on 00/00/2018. If and when additional preservation time is needed, or if the time that the data is preserved is extended, an additional preservation order will be presented for that purpose.

All information including but not limited to:

Subscriber information for the above listed numbers, including financially responsible party, social security number, billing address, features and services and equipment,

2. Call Detail Records with cell site location, all call originations, call terminations, call attempts, voice and text message transactions, including push to talk, data communications, SMS and MMS communications, and voice communications, including the originating and receiving phone numbers or network IDs for all incoming and outgoing call transactions, data transactions and push to talk sessions.

3. Records are to include the IMEI, IMSI, ICCID or other equipment or handset identification information for the target phone number.

4. All stored SMS content, MMS content and / or Browser Cache

5. Beginning and ending switch and cell site / tower identifiers for each call, SMS MMS and data transmission.

6. Central office identifiers and or switch identifiers for the area of coverage for the time period requested

7. All connection attempts including completed and failed connections with call duration times to one second

8. Any available information regarding the state of the towers for the time period requested, including trouble tickets, maintenance tickets, maintenance schedules and tower downtime records.

9. Any precise measurement data or call detail records with cell site such as, PCMD, RTT, RTTM, RTTL, ERLTE, ALUTE, NELOS, VOLTE, Truecall, TDOA, VOVoice, VOWIFI, VOCDMA e-911 location data, and or any other data recorded for the timeperiod that will provide additional location data.

10. Any information or event activities related to law enforcement activities regarding these phone number to include, but not limited to, a. Pen trap and trace activity

- Content captured or any other CALEA data provided to law enforcement, with or without a warrant or court order for the phone number or numbers for this request.
- Any location data provided to law enforcement under CALEA or as the result of any filing or request by law enforcement for such data.

Respectfully submitted,

Name

Video Evidence Preservation Letter

DATE:

Dear Legal Department,

My client is the subject of an ongoing criminal investigation in which surveillance video from your location, (Store name, address, city, state) was initially collected by the (police department or agency).

In preparation for criminal litigation in this matter, I am requesting that the video device and video data for the surveillance system located at the aforementioned location be preserved in total and specifically for the period of (date and time through date and time).

I am also requesting that you allow our office to have an independent forensics expert travel to the location and collect the original video data for preservation purposes.

Please respond immediately as time is of the essence due to the limited storage capability of video surveillance systems. It is imperative that we collect this data as soon as possible.

You can respond to this request via email to email@email.com or via facsimile to 555-555-5555.

Sincerely,

ATTORNEY NAME

Motion to Compel Production of Cellular Phone (Example)

Motion to Compel Production of Cellular Phone

Please modify the facts to suit your case.

Comes now DEFENDANT, by and through his attorney ATTORNEY NAME, and moves this Court to compel production of the alleged victim's cellular phone for forensic examination.

DEFEDANT is charged with _____, of the most serious offenses under STATE law. Considering the seriousness of this charge, it is absolutely imperative that DEFENDANT have all relevant resources available for his defense.

FACTS of the case:

On _____, 20XX, VICTIM claimed that DEFENDANT sexually assaulted her in her hotel room. Her claim is that she left her hotel room door open in anticipation of a friend's later arrival and then fell asleep. She further claims that the defendant entered her room and sexually molested her.

It is the defendant's belief that evidence contained in the electronic storage of her cellular phone (smart phone), specifically related to Twitter messages she sent to the Internet and subsequently deleted from her Twitter timeline can be recovered from the cellular phone device and that such "tweets" are critical to his defense.

In the same way that evidence collected from a cellular phone can be used to link a perpetrator to a victim, in this case, such evidence can be used to show that the victim posted information related to the alleged assault to the Internet via the service, Twitter, via "tweets", that is in conflict with her account of the crime.

Therefore the defendant respectfully requests that the court compel the alleged victim to produce the cellular "smart" phone for forensic examination for evidence of said "tweets" and other electronic communications, including email and other correspondence that would prove exculpatory to the defendant.

Forensic examinations of cellular phones are conducted every day on a routine basis by law enforcement agencies in the US and such examinations yield a great deal of evidence that is brought to bear in cases by the government. _____ is simply asking the court to allow an expert in cellular phone examinations to provide the same services for the purpose of producing exculpatory evidence

that the victim may have produced communications that are in conflict with her claims via the use of her cellular phone.

Such forensic examinations are well known at this point in time with current forensic examination methods to have the ability to recover information and data that has been deleted from cellular phones, even for a significant period of time after such a deletion has occurred.

Due to the personal nature of a cellular phone, in that such devices are carried on or about a person nearly at all times, this makes the cellular phone a critical repository of evidence and as such, should be produced for examination by the defense's expert, in the same way that a defendant's cellular phone would have been examined by the government's expert in a criminal case with an accusation of such a serious crime as this one.

Temporary Restraining Order + Order for Expedited ESI Discovery

Temporary Restraining Order and Order for Expedited Discovery

THIS CAUSE came on to be heard before the undersigned Superior Court Judge Presiding over the Civil Session of _____ County Superior Court, on___ , on Plaintiff's Motion for Temporary Restraining Order and for Expedited Discovery.

The Court, having reviewed the pleadings of record, finds that the Plaintiff has shown that reasonable grounds exist to believe the following:

1. This is an action by Plaintiff seeking damages and injunctive relief relating to Defendants_____ and _____ breach of a contract containing a covenant not to compete: and relating to all Defendants misappropriation and use of Confidential Information and trade secrets of Plaintiff.
2. Defendants do business in competition with Plaintiff, and using Confidential Information and trade secrets of Plaintiff, _____, from a location whose address is _____ ("The Business Location").
3. Defendants have misappropriated and used Confidential Information and trade secrets of Plaintiff: the Confidential Information and trade secrets are stored on computers owned or operated by Defendants which are a the Business Location (and which may be at other locations): and Defendants may secrete or destroy evidence of their use of the same irreparably and immediately injuring the Plaintiff if they are not enjoined from doing so.

BASED UPON THE FOREGOING FINDING OF FACT, THE COURT CONCLUDES AS A MATTER OF LAW that a temporary restraining order should be entered, preventing Defendants from removing, destroying, or tampering with any of the computers; hard drives, disks, CDs, DVDs, memory sticks, thumb drives, or any other medium upon which information is stored electronically, that they may have at any location.

BASED UPON THE FOREGOING FINDINGS OF FACT, THE COURT FURTHER CONCLUDES AS A MATTER OF LAW that an order should be entered granting expedited discovery by permitting Plaintiff's inspection and copying of all of the computers; hard drives, disks, CDs, DVDs, memory sticks, thumb drives, magnetic tapes, or any other medium upon which information is stored electronically, which are at the Business Location.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND

DECREED AS FOLLOWS:

1. Defendants are temporarily restrained and enjoined from removing, destroying, or tampering with any of the computers; hard drives, disks, CDs, DVDs, memory sticks, thumb drives, magnetic tapes, or any other medium upon which information is stored electronically, that they may have under their possession, custody or control, at any location.
2. Hearing on Plaintiff's motion for preliminary injunction, extending the restraints set forth herein, shall be held in the _____, _____ of _____at_____ on the _____day of___, 2010, or as soon thereafter as may be reached.
3. Plaintiff shall post as a bond, with respect to entry of the restraints set forth, the principal amount of $_____.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED as follows:

1. Defendants shall allow representatives of Plaintiff to enter the Business Location (_____) and conduct an examination of any of the computers; hard drives, disks, CDs, DVDs, memory sticks, thumb drives, or any other medium upon which information is stored electronically, which are at the Business Location. Such examination may include copying of all hard drives, disks, CDs, DVDs, memory sticks, thumb drives, or any other medium upon which information is stored electronically. Defendants may permit Plaintiff's representatives to remove such items to expedite copying process, or may permit the inspection and copying to be performed at the Business Location, as Defendants may elect.

2. Defendants shall permit the entry and copying described above beginning at____ on the ___day of _____, 2010 and continuing until finished.
3. The _____Sheriff shall serve this Temporary Restraining Order and Order for Expedited Discovery upon Defendants as immediately as possible.
4. The information discovered in response to the inspection and copying permitted herein shall be used by Plaintiff solely for the prosecution of its claims, and for no other purpose whatsoever, unless and until the Court orders otherwise.

_____

Superior Court Judge

DATE AND TIME ENTERED: _____

Digital Evidence Examination Procedure (Example)

If an expert is appointed or retained onto a case, they should provide a procedure detailing how evidence will be handled and examined. If they have no such protocol, I would question their capability and training. Protocols provide a roadmap for you, opposing counsel, and their expert.

A comprehensive procedure can help you get things done, moving the ball forward in your case. Often, both parties want the evidence contained on the mobile phone. However, concerns of those involved can impede the process. These concerns center on how evidence will be handled and if the examiner will properly protect the device's data or the device itself, as well as how much of the data the examiner and opposing attorney have access to.

Here is an example protocol our team developed for a transportation (trucking) accident case:

Digital Device Examination Procedures of MAKE AND MODEL

PRIVACY PROTECTION

A representative of Envista Forensics' Digital Forensics group will perform a forensically sound acquisition or extraction of data from the computers, cell phones, GPS devices, or electronic storage devices.

The forensic hardware and software employed by Envista Forensics is considered the industry standard and is in use all over the world by a large number of private forensic consulting firms and law enforcement agencies worldwide, including the Federal Bureau of Investigation (FBI), Homeland Security, the Department of Defense, Naval Criminal Investigation Services (NCIS), the Secret Service and hundreds of other national, state and local agencies.

Software and hardware tools in use by Envista include Cellebrite, Logicube Forensic Falcon, MacQuisition, EnCase Forensic Software, Forensic Tool Kit (FTK), Paladin, Magnet Axiom, Tableau Write Blockers, Image MASSter, Encase Portable, WeibeTech Forensic UltraDock, DI USB 3.0 Media Card Write Blocker and other tools as needed.

In the particular case of cell phones, the Cellebrite tool does not allow the examiner to restrict the data retrieved from the phone. The data that is ultimately delivered to the parties involved can be limited to a particular time frame and limited to a selected portion of the complete data set, such as only producing text messages or call history.

The digital forensic examiners at Envista Forensics are trained and experienced in the collection and protection of data so that nothing is exposed that is outside of the parameters set in civil agreements, court orders, or protective orders.

All of the data collected during the forensic extraction process is secured and stored in our locked, secure storage area. No data is provided to anyone outside the scope of the disclosure limits agreed to by the parties of this matter unless so ordered by a court of law.

NON-DESTRUCTIVE PROCESS

All of the processes, hardware, and software used in the acquisition (copying) of data from cell phones, computers, GPS devices, or other electronic storage devices are non-destructive.

The basic tenet of forensic acquisitions (forensic copying) and examination of digital evidence from electronic storage devices of all kinds are that the process must protect the original data from any change. There is a built-in method of verification to ensure that the original data matches the forensic copy of the data at the time the data is forensically copied. This verification is in the form of a "hash value."

A hash value is a mathematical calculation using the contents of the data to create a computed value unique to the contents of the data as it exists when acquired.

To prevent the engagement of possibly destructive processes (Brute Force, JTAG, ISP, Chip Off), Envista Forensics should be provided the following:

- Device PIN (Personal Identification Numbers), typically between four and six digits
- Device Passwords (alphanumeric combination containing letters and numbers)
- Device Unlock Patterns
- Encryption Passwords
- Smart Lock

Presence of Mobile Device Management (MDM) applications such as AppTec360 Enterprise Mobility Management, Baramundi Management Suite, ManageEngine Mobile Device Manager Plus, SOTI MobileControl, Citrix XenMobile, IBM MaaS360, Microsoft Intune, VMware AirWatch, and MobileIron.

MDM applications are typically utilized by government, businesses, and schools

EVIDENCE TRANSFER

After completing the below-described chain of custody form, the evidence custodian should package the evidence to prevent damage during shipment.

Regardless of the shipping vendor the custodian chooses, Envista typically requests the following:

- Shipment Tracking Number
- Overnight Shipping (if authorized by paying party)
- Direct Signature Required
- Please ship evidence to the following:

  ENVISTA FORENSICS

  ATTN: Jake Green

  2700 Gateway Centre Blvd, Suite 100

  Morrisville, NC 27560

Please provide the tracking number, estimated delivery date, and time by email to jake.green@envistaforensics.com

CHAIN OF CUSTODY

Complete a chain of custody form for receipt of the computer, cell phone, GPS device, or electronic storage device and any accessories.

- Each item is to be listed separately on the chain of custody form.
- The device will be inspected at the Envista Forensics Lab office in Morrisville, NC.
- The device is logged into custody, identified, and assigned a unique identifying lab number.
- The device is identified by make, model, and unique identifying number (IMEI, DEC, ESN)
- The device is tagged with a lab number.
- The device is isolated from network/internet connections.
- The device is physically inspected.

CONDITION

All items of interest will be photographed before any work is performed for chain of custody purposes.

If the computer, cell phone, GPS device, or electronic storage device is in a bag or other container, take a photo of the container before removing the computer, cell phone, GPS device, or electronic storage device for inspection from the front, back, and top of the container.

If the computer, cell phone, GPS device, or electronic storage device is not in a container, take a photo of the computer, cell phone, GPS device, or electronic storage device in its current state of the top, bottom, front, back, left side and right side.

Take close-up photos of any identifying information, including any asset tags, the serial number, MEID HEX, product number, ESN, and any other identifying information.

If the computer, cell phone, GPS device, or electronic storage device is a flip phone or a clamshell design, open the device to show the screen and keypad. Take photos of the screen and the keyboard area.

Have the producing custodian sign the chain of custody form indicating that they have reviewed the inventory on the Chain of Custody form and are transferring the items to a representative of Envista Forensics.

RESEARCH

The device is fully researched before extraction. Research includes:

- Operating system
- CPU Chipset
- Memory type/size
- Carrier limitations
- Manufacturer limitations
- Forensic tool compatibility
- Research sources include:
- Lab notes
- Peer networks
- Internet
- Manufacturer

REPAIR (If required)

- Physical damage will be closely assessed and triaged.

- Physical part damage
- Internal component damage
- Liquid damage
- Physical part damage will be repaired by part replacement.
- Screen
- Buttons
- USB port
- Battery
- Sensors
- Internal component damage will be repaired by component replacement.
- Liquid damage will be repaired by following liquid damage protocols.
- Isolation
- Ultra-Sonic cleaner

The repair goal is to achieve an extractable device, not a permanent repair. Repair methods/techniques will move towards that goal.

EXTRACTION

An extraction method is chosen based on research and device status. The least invasive, non - destructive method that produces the desired results will be used.

Desired results in order of importance (most preferred to least preferred)

- Full Physical extraction
- File system extraction
- Logical/Advanced Logical extraction

Only industry-accepted digital forensic methods will be used for extraction. User data WILL NOT be modified.

ENVISTA EXPERT NAME will conduct the extraction at the Envista Forensics Lab in CITY, STATE.

Equipment/Software used MUST be licensed to Envista Forensics Laboratory or individual examiner.

Extraction Tools for the MAKE AND MODEL: (in order of preference)

- Cellebrite UFED

- Axiom

EXTRACTION RESULTS

- A successful extraction will result in a forensic copy of the device's memory.
- The result will be a .bin file or forensic container.
- Results will be assigned a hash value for self-authentication
- Counsel for the parties may be present during the extraction process.
- Opposing counsel's expert may be present during the extraction process to monitor the work.

POST EXTRACTION

Open the forensic image of the computer, cell phone, GPS device, or electronic storage device in the associated forensics software program to ensure the image was completed successfully, thoroughly, and verifiably.

Have the producing custodian sign the chain of custody form indicating that they have reviewed the inventory on the Chain of Custody form and are receiving the items back into their custody from Envista Forensics.

Create master and working copies of the forensic image on separate storage locations for backup redundancy.

VALIDATION

Validation is conducted whenever possible to ensure equipment/software operation.

ANALYSIS

Data carving/parsing will be conducted on the extracted forensic copy (.bin file, .rar file) only. Only industry-accepted digital forensic software will be used for Analysis.

Analysis software includes (in order of preference):

- Cellebrite Physical Analyzer
- Axiom

Analysis TBD after the acquisition and not completed until scope has been agreed on by both parties.

- Experts will be authorized to review data during the following timeframe:
- 90 minutes before and after 12:00 PM on January 1, 2020

- No other data may be exported or retained.
- Defendant's expert will retain the originally extracted data.
- REPORTING
- The scope of Analysis governs the final examination report.
- Final examination report formats:
    - Adobe PDF,
    - Microsoft Excel, or
    - UFDR (with reader)
    - Included with the final examination report:
    - Analyst report (PDF of technical data)
    - The report will be on electronic media (depending on size)
    - DVD
    - Flash Drive

Envista Forensics' disclosure to Defendant, _____, shall be limited to a written report summarizing recovered electronically stored data of Defendants usage of device functions during the aforementioned period including, but not limited to, application usage, voice usage, messaging usage, GPS usage, Bluetooth pairings, locations, SIM Data, and wireless network usage.

Envista Forensics shall not disclose or shall redact any "Personal Information" extracted from the device.

Envista Forensics acknowledges and agrees to the term "Personal Information" as used herein and as defined below. Forensic expert agrees it shall keep secret, retain in the strictest confidence and prevent the unauthorized duplication, use, and disclosure of the Personal Information. Personal Information shall be used and duplicated (as is reasonably required) only so that Forensic Expert may accomplish the Extraction and Analysis and for no other purpose. Forensic expert agrees, except when required by law, to maintain and keep confidential Defendants Personal Information and not disclose the same to the Receiving Parties or third parties to this Agreement. "Personal Information" includes the following data during the period of time analyzed pursuant to the Analysis: email content (recipient name and number, subject line, body text), text message content (recipient name and/or number, body text), SMS/MMS content (recipient name and/or number, body text), Instant Messenger (IM) content (recipient name and/or number, body text), social media posting content made during the period in question, photographs, videos, website addresses or URLs, Social Security numbers, PINs (Personal Identification

Numbers), user names, passcodes, passwords, voicemails, recorded messages, notes, cookies, browser history, bookmarks, phone numbers, the identification of callers to or from the Mobile Device(s).

Plaintiff's counsel will receive an additional copy of the complete raw binary extraction (.bin file or.rar file)

EVIDENCE RETURN

The device is resealed in its original evidentiary container and marked with initials/date.

If the device is submitted without an evidentiary container, it will be sealed in a new container and marked with initials/date

The device will be immediately returned to plaintiff's counsel via a prepaid shipping label or FedEx.

CONFIDENTIALITY

Envista Forensics acknowledges that it may be held liable for disseminating Personal Information to parties other than opposing counsel unless and until such time as the Trial Court approves of such dissemination by written order.

Except as required by law, Envista Forensics agrees to take commercially reasonable steps to protect from disclosure to third parties any confidential and proprietary information of the plaintiff that may be exchanged in connection with this examination. Except as required by law, Envista Forensics agrees to take commercially reasonable steps to protect the confidentiality of information in or on electronic data and media made available or furnished to them for examination. Plaintiff agrees that if during the course of this examination, Envista Forensics shall find within any electronic data or media evidence of child exploitation (e.g., child pornography) or of a credible threat of physical harm to any person, Envista Forensics shall be entitled to immediately bring such matters to the attention of federal or state law enforcement authorities and that no assertion of privilege, confidentiality or breach of contract will be raised as a bar to such action.

_____

PLAINTIFF

_____

DEFENDANT

Facebook Subpoena Language/ Self-Download

Facebook can be difficult to obtain records from via subpoena. Included in this section is Facebook's reasoning , and how to do a self-direct download of Facebook data.

Subpoena Language

Facebook

Facebook, Inc.

Contact Name:	Security Department/ Custodian of Records
Online Service Address:	1601 S. California Avenue Palo Alto, CA 94304
Fax Number:	650-644-3229
E-mail Address:	subpoena@fb.com
Note(s):	Requests may be faxed, emailed, or mailed.

Any and all subscriber records regarding the identification of Facebook friend ID(s): **10000000000**, emailaddress@email.com to include real name, screen names, status of account, login log, ip address log, detailed billing logs, date account opened and closed, method of payment and detailed billing records. Also, to be included, but limited to, are all stored emails and all profile pages including wall posts, communications and chat logs.

Such stored information is to include any deleted and or archived pages or email or communications, that Facebook has retained as part of its normal business operations for the period of _____ to _____.

In the case of archived or deleted pages for the above account, the archive URLs for the pages may be returned as part of this request, provided that the URLs are accessible via the Internet. If any credentials are required to access the archive URLs, then those must be provided as part of the response to this request.

Download Facebook Account (Reason)

The following is Facebook's response to the question, "May I obtain any account information or account contents using a subpoena?"

Account Contents

Federal law does not allow private parties to obtain the content of communications (example: messages, timeline posts, photos) using subpoenas. See the Stored Communications Act, 18 U.S.C. § 2701 et seq.

Parties to litigation may satisfy party and non-party discovery requirements relating to their Facebook accounts by producing and authenticating the content of communications from their accounts and by using Facebook's "Download Your Information" tool, which is accessible through the Settings drop down menu. Facebook does not respond to requests to disclose information that are accompanied by purported user consent because Facebook account holders may access, produce and authenticate information from their accounts.

If a person cannot access their content, Facebook may, to the extent possible, attempt to restore access to deactivated accounts to allow the person to collect and produce their content. However, Facebook cannot restore account content that has been deleted.

Account Information

Facebook may provide the available basic subscriber information (not content) where the requested information is indispensable to the case, and not within a party's possession upon personal service of a valid subpoena or court order and after notice to affected account holders.

Your subpoena or Court order must be directed to the entity mentioned in the Terms of Service that are applicable to your use of the Facebook service (i.e. Facebook Ireland or Facebook, Inc., depending on where you are domiciled meaning if serving the subpoena on Facebook, Inc., the subpoena must be a valid federal, California or California domesticated subpoena, addressed to and served on Facebook, Inc. If serving Facebook Ireland Limited, the subpoena or court order must be addressed to and served on Facebook Ireland Limited.")

Any such subpoena or court order should be limited in scope to seek basic subscriber information only, and set out the specific accounts at issue by identifying them by URL or Facebook user ID (UID). Names, birthdays, locations, and other information are insufficient.[1]

[1] https://www.facebook.com/help/133221086752707?helpref=related&ref=related&source_cms_id=1332210867527 07

Download Facebook Account (Instructions)

This is the method Facebook provides for users to download Facebook accounts:

If you want to download a copy of your information from Facebook, you can use the **Download Your Information** tool.

To download a copy of your Facebook data:

Click in the top right of Facebook.

Select **Settings & Privacy**, then click **Settings**.

In the left column, click **Your Facebook Information**.

Next to **Download Your Information**, click **View**.

To add or remove categories of data from your request, click the boxes on the right side of Facebook.

Select other options, including:

The format of your download request.

The quality of photos, videos and other media.

A specific date range of information. If you don't select a date range, you'll request all the information for the categories you've selected.

Click **Create File** to confirm the download request.

After you've made a download request, it will appear as **Pending** in the **Available Copies** section of the **Download Your Information** tool. It may take several days for us to finish preparing your download request.

Once we've finished preparing your download request, we'll send a notification letting you know it's ready.

To download a copy of data you requested:

Go to the **Available Copies** section of the **Download Your Information** tool.

Click **Download** and enter your password.

You can also click **Show more** to view information about your download request, such as the format and when it will expire.

Note: You can always view your Privacy Shortcuts to learn about the ways you can control your data and privacy on Facebook. If you want to review recent activity on your Facebook account or want to review your Facebook account information, you can use the Access Your Information tool.

Adam Walsh Act (Child Exploitation) Language

Contraband cases are unique in the sense that they are covered by the Adam Walsh Child Safety and Protection Act of 2006. Because of this federal law, barriers are in place to prevent actions that would result in the distribution of the materials to defense attorneys and defense experts. An expert working on behalf of the defense must perform their examination onsite at a law enforcement facility and under their supervision. Data can be taken from this examination, such as log files, file listings, and other forensics artifacts. However, no images or videos of contraband, even suspected contraband, should be taken.

Language for Access to Evidence in Child Exploitation Cases

ACCESS TO FORENSIC EVIDENCE

The Defendant requests that government's agent provide to the Defendant's expert access to the physical evidence seized by the State in the course of its investigation under the following conditions:

1. The defense expert will supply in advance an external hard drive, factory new, if required by the law enforcement agency, for the purpose of providing forensic copies of the evidence to be examined during the defense expert's forensic examination and will be kept in the custody of law enforcement at all times.
2. The law enforcement agency shall copy to the provided hard drive any FTK, Encase or other type of forensic image files that are an exact forensic copy of the hard drive(s), CD-ROM or DVD-ROM media, flash cards, floppy disks, smart media cards or any other digital evidence seized and copied by law enforcement.
3. The law enforcement agency shall provide to the defense expert an un-redacted copy of any computer forensic reports for the use of the defense expert while performing the forensic examination. Such un-redacted reports shall be returned to the law enforcement agent at the end of each day's examination period at the discretion of the supervising agent.
4. The law enforcement agency shall have available for inspection by the defense expert copies of any derivative evidence created and supplied to the prosecution, including but not limited to media created for the purpose of prosecution review, submission to the National Center for Missing and Exploited Children, or for the use by other law enforcement parties to the investigation of the charges, pending or otherwise.

5. The expert will perform all of his work on the provided hard drive, using forensic analysis equipment provided by the law enforcement agency, provided that hardware provided by the law enforcement agency is no more than 18 months old, has a current version of 64 bit Windows OS (7, 8 or 10), and current versions of Microsoft Office Professional, Adobe PDF reader, a video player that is fully configured to play all types of video files such as VLC Media player, and any other software normally used in the course of forensic examinations, excepting actual forensic software. The expert may install other forensic analysis software on the provided computer for the purpose of performing his examination as needed and will bring his own licensing keys or USB dongles for that purpose.
6. At the end of the forensic examination session, the examination hard drive will be sealed in the presence of the defense expert and given to the law enforcement agent and kept in the custody of the police in case further review is needed at a future time or the review room will be locked so that processes on the computer can continue overnight as needed.
7. The law enforcement agency shall make such supervisory arrangements as deemed appropriate in accordance with the law enforcement agencies' policies and procedures for the forensic examination of contraband material by a defense expert.
8. The expert will show to the law enforcement agent any items he wishes to copy or print, to provide to defense counsel as part of his analysis or reporting, to ensure that no contraband images are copied or transferred.
9. The expert will be given a minimum window of 6 hours per day, scheduled in advance, to perform the analysis.
10. All items and information discovered by the expert are to be treated as attorney work product, and protected as such even though the law enforcement agent will review said documents and information for the presence of contraband.

GUIDE –Digital Forensics in Child Exploitation Cases – Finding Your Way Through

Justin Ussery, Digital Forensics Examiner
Jake Green, Digital Forensics Examiner

About the Authors

Jake and Justin have are both Former Law Enforcement Officers who were assigned as Digital Forensic Examiners and Task Force Officers of the United States Secret Service Electronic Crimes Task Forces in South Carolina and California. Jake and Justin both work matters and cases involving all aspects of Digital Forensics, including Cellular Phones, Tablets, Computers, and Cloud data. This article is meant to give you a brief overview of the frequently and daunting amount of confusing electronic evidence you receive in discovery and an overview of this information you often find in the discovery process of a Child Exploitation matter.

Introduction

This article is meant to give you a brief overview of what is frequently a daunting amount of confusing electronic evidence you may receive via discovery in a child pornography case.

Uniqueness of Child Exploitation or Child Pornography cases

Child pornography cases present unique difficulties because of how attorneys can view the evidence and how experts can examine that evidence. These cases are controlled at the federal level by the Adam Walsh Child Safety and Protection Act of 2006. This act explicitly says government examiners cannot send a report containing child pornography in any form to any person outside of law enforcement. The evidence review likely will take place at a government facility, and we are often supervised by law enforcement officials, often the same ones who performed the original forensics. The Adam Walsh Act prevents child pornography from being disseminated, which is a good thing. However, this places a burden on the defense, as examinations of forensic data need to occur at a law enforcement facility. The examiner may only leave with certain artifacts, which do not contain images or videos, making the onsite review of the evidence critical, as this typically does not take place more than once due to the cost of placing a forensic examiner on site.

Law Enforcement Investigations: Before the Search Warrant

CyberTips

Law Enforcement typically deals with two main entities when it comes to dealing with child pornography: Internet Crimes Against Children (ICAC) and The National Center for Missing and Exploited

Children (NCMEC). NCMEC acts as a clearinghouse for business and Electronic Services Providers (ESPs) to report possible illicit media.

After ESPs notify NCMEC, a "CyberTip" is created and forwarded to a Regional ICAC Task Force or local law enforcement agency. The Regional ICAC Taskforce or agency then investigates and collects evidence. The investigating officer may perform a forensic examination of this evidence or may assign this to a qualified forensic examiner.

All of this activity originates with the Cyber Tip.

The Cyber Tip will generally include dates and times of said activity, Internet Protocol (IP) addresses during the period of the event, and account information such as email addresses, phone numbers, mailing addresses, and possible user names of the account utilized during the actions.

Online Law Enforcement Investigation Tools and Resources

Detectives and investigators across our country conduct digital or online investigations with a variety of digital tools and software. Many of these tools are deemed to be "law enforcement sensitive" and in our experience as law enforcement examiners, a court order may be required to gain access to these specific tools for review by a forensic examiner working with defense counsel.

Several keywords and processed should be defined at a basic level before continuing:

IP Addresses

An Internet Protocol address is an identifying number for a computer network. A unique Public IP address is assigned by an Internet Service Provider (ISPs like CenturyLink, RCN, Frontier, Verizon, or AT&T). These assignments are unique to physical locations (modems or gateways), which can distribute the connection physically via a wired network switch or a broadcast wireless network via a Wi-Fi router. Public IP addresses are unique to physical locations (home, business, public Wi-Fi) and are not typically unique to physical devices like cellphones, computers, and tablets.

Once an IP address is documented, the owner of the IP address can be found. IP addresses are owned by Internet Service Providers (ISP).

This identification process proceeds in steps:

The IP address is obtained by law enforcement from an online investigation.

The owner of the IP address is identified using a "reverse" lookup to locate the company that owns the IP address. This is accomplished using a "WHOIS" lookup service. One such service is "whatismyip.com". For instance, looking up a text IP Address shows that the owner of the IP Address is Charter Communications.

One the owner of the IP address is known; the law enforcement officer will create a warrant or subpoena and send that to the owner of the IP address to obtain the subscriber information for the IP address on the date of interest.

GUID: Globally Unique Identifier

GUIDs are an alphanumeric series of numbers that can be assigned by a computer system. For this article, a GUID is assigned to each asset or device within a P2P network. This GUID is unique but can be changed or updated by the P2P network.

Metadata: "Data about data."

While the colloquial definition "data about data" is often used, we prefer "information about data." Metadata is a collection of information about the source or creation of data. This information could

be the manufacturer or model of a camera, GPS location, file metadata such as date and time of creation; or modifications, source, author, or editor.

Hash Value: Electronic DNA

A hash value is the application of a mathematical formula (algorithm) to produce a unique alphanumeric string associated with a single file or a set of files. Changes to the data (even a single bit) will result in the change of the hash value. Hash values allow investigators to identify known images, accurately preserve and reproduce data. Common hash values are MD5 (message-digest algorithm), SHA-1, and SHA-256 (Secure Hash Algorithm).

Through our background, experience, and review of software documentation, we're able to offer some insight into these investigative aids. We cover three unique pieces of software used by law enforcement to conduct online investigations. It should be noted that the log files discussed in each section are unique to each piece of software and should be requested through discovery or court order. The below listed log files do not contain illicit content, images, or media and can be released by law enforcement to a civilian defense examiner.

ShareazaLE

One of the most common investigative tools is a variant of the peer to peer (or "P2P") program, Shareaza, that has enhanced features for investigations. This piece of software allows law enforcement to single out an IP address (known as a "single source download"). ShareazaLE produces a log called "ShareazaLE Summary Report for IP: "0.0.0.0"," where "0.0.0.0" is the target or identified IP address.

Torrential Downpour

This is another free piece of software that has been modified to suit the needs of law enforcement investigators. However, this piece of software operates using a different protocol, called torrents. In the most basic sense, torrents are a series or set of files. The torrent file itself is a set of instructions related to the source file and metadata. These source files can be a single file (i.e., movie) or an archived folder containing multiple files (i.e., sets of photos or music from an album). Torrent files are typically sourced from search engines, websites, or forums, but some Bit Torrent software packages have built-in search features. Torrential Downpour produces a series of log files: Datawritten.xml, Details.txt, Downloadstatus.xml, Netstat.txt, summary.txt, and Torrentinfo.txt. It should be noted that the torrent file itself is not illegal to possess as it contains only metadata.

RoundUp eMule

RoundUp was designed to investigate the eD2K or eDonkey2000 file-sharing network. EMule and similar P2P networks are built around keyword searches. A user enters a general keyword (like "porn"), and the search results in the return of any files containing the keyword (i.e., "child porn" or "adult porn"). RoundUp produces logs named: SummaryLog.txt, DetailedLog.txt, Netstat.txt, IdentityLogging.txt, and IndentitySignatures.xml.

Law Enforcement Investigations: After the Search Warrant

Major Software Vendors

There are several major software vendors utilized by both government examiners and private examiners alike. For cellular device forensics, you will likely see Cellebrite UFED with Physical Analyzer, Oxygen Forensics Detective, Axiom by Magnet Forensics, and GrayKey by Grayshift. Most cellular device tools rely on three general types of extractions from the phones, but all produce very similar results with a few caveats. There are thousands of applications operated on four major smartphone operating systems: Android, Apple iOS, Windows Mobile, and Blackberry OS. Not every tool can decode and make

sense of every single application in the world and that is a primary reason why it is beneficial to utilize a variety of different tools during examinations.

As for computer forensics, you will see Axiom or IEF by Magnet Forensics, Forensic Took Kit by Access Data, Encase by OpenText, Analyze by Griffeye, Forensic Explorer by GetData and BlackLight by Cellebrite (formerly Blackbag Technologies).

Many of these tools can redact child pornography images and safely provide a good deal of metadata about the activities without the dissemination of child pornography by Law Enforcement or prosecutors.

Review of Digital Forensic Evidence

If law enforcement recovers electronic evidence and utilizes forensic tools, the scope of their investigation should not be limited to the simple question of "Is illicit media on this device?" Digital investigations need to be a great deal more comprehensive. An expert should search for any known evidence such as suspect IP Address, GUID, hash values, user attribution, as well as a possible indication of file use and knowledge.

Many law enforcement forensic tools and Cyber Tips identify IP Addresses and GUIDs. A review of these records is essential to identify the physical location of an IP address (possibly the defendant's home or work). The subsequent investigation of a network, like a broadcasting Wi-Fi router, may be necessary to determine what devices were connected at a location. While gathering evidence, an investigator should collect and review network connection logs (if logging is enabled) or records from an ISP. Knowing when and what devices were connected to a network can significantly assist in the identification of a suspect. Failing to gather these logs can result in their overwriting or deletion.

If a law enforcement investigator is adequately trained and utilizes online tools, like those outlined above, they should retain the available logs. These logs should become part of the investigator's digital case file. The logs should be maintained as a unique piece of digital evidence, as printing will result in the loss of file metadata (i.e., the creation and modification dates and times).

This metadata is critical to what is referred to as "user attribution."; putting a specific person behind the keyboard at the time of the offense. This will likely make or break the case for a prosecutor. These indicators of user attribution are often forgotten or overlooked by examiners who are providing evidence to the investigating officer or prosecutor.

These user attribution indicators are held in a variety of places on a computer and consist of jump lists, .lnk files (pronounced "Link"), Shellbags, Windows MRU, and search terms found within browsing histories.

Jump Lists

A "jump list" is a system-provided menu that appears when the user right-clicks a program in the taskbar or on the Start menu. It is used to provide quick access to recently or frequently used documents and offers direct links to app functionality.

Link Files

An LNK (short for LiNK) is a file extension for a shortcut file used by Microsoft Windows to point to an executable file. LNK file icons use a curled arrow to indicate they are shortcuts, and the file extension is typically hidden from the computer user. Generally, if the "linked" or source file is deleted, the LNK file will remain behind and will contain information not only of when the LNK file was created, but about the target file of interest.

Shellbags

Windows uses the "Shellbag" to store user preferences for folder display within Windows Explorer. Everything from visible columns to display mode (i.e., icons, details, or list) to sort order and are tracked.

Most Recently Used files (MRU)

The Most Recently Used "MRU" is a list that contains a history of recent activity on a computer. MRUs can include open documents or webpages.

If user attribution indicators are disregarded for any reason, the case weakens. The user attributes held within these specific items can show a pattern of behavior by a computer user. This makes it much more unlikely that this offense was an isolated incident and was occurring over an extended time period. Again, these crucial artifacts frequently go unexamined. These are in many cases, "make or break" items worth looking at when it comes to a defense strategy.

Defense of Child Pornography Cases

U.S. vs. Flyer

In *U.S. vs. Flyer*,[i] defense counsel made successful arguments regarding the lack of possession for images found in unallocated space. Unallocated space is not accessible by ordinary users. We have reviewed many cases where government examiners find child pornography in unallocated space but do not

identify additional forensic artifacts. An inability to exercise "dominion and control," no proof of "file use and knowledge," and lack of user attribution makes a case easier to defend as there is a lack of knowing possession and intent.

Thumbnails and Cache Files

Thumbnail images are an image that is a smaller representation of the original photograph. These thumbnail images by themselves usually are devoid of metadata and are created by the operating system without use interaction.

The Internet browser cache contains images saved by the browser to help speed up your rendering of web pages. By avoiding downloading the same image again and again the computer user experiences a faster web page viewing experience.

In both instances, the operating system or web browser application is automatically doing this as an automated process. The computer user has no knowledge of or access to these files.

ISP Connections

The way that the law enforcement agency determines where to go for a search warrant or "knock and talk" is to find out the subscriber account for an internet download.

When law enforcement performs a lookup of the IP address for a download, they will then research to determine which Internet Service Provider owns that IP address.

Once the owner of the IP address is determined, i.e. Spectrum or Charter Cable, the law enforcement officer will send a subpoena to the ISP and find out who the subscriber is for that IP address on the date and time of the download.

The subscriber account information will also provide a physical address for the internet connection.

Once the law enforcement officer has that information in hand, he or she will then apply for a warrant to search the residence or business at the address, This is based on the probable cause in the form of the download history from one of the tools used for the online investigation and the subscriber information from the ISP.

There are times when the connection is not being made from the address, i.e. someone is stealing a connection from a nearby address.

"The sound of his door being broken down awoken the man at 6:20 a.m. on March 7. Seven armed officers greeted the homeowner, whose name has not been released. He was forced to lie down on the floor while the officers pointed guns at him while calling him a pedophile and a pornographer. According to the Associated Press, the officers had the initials of I.C.E. on their jackets, which the man didn't know stood for Immigration and Customs Enforcement, and we don't blame him.

The agents searched the man's desktop for about two hours that morning looking for evidence, and eventually confiscated the computer, as well as his and his wife's iPads and iPhones. It took three days for investigators to realize the man, who had told the officers at the time of the intrusion that they had the wrong guy, was actually telling the truth and was indeed not the kiddie-porn downloader. A week later, investigators arrested a 25-year-old neighbor and charged him with distribution of child pornography. However, he did not get in trouble for piggybacking off the man's WiFi signal."

Source: https://www.geek.com/news/man-wrongly-accused-of-child-porn-learns-to-password-protect-wifi-the-hard-way-1347033/

Conclusion

Nearly every case in today's digital age has an electronic evidence component. These components can supply both supporting and damning information for your case. The question is: How do you obtain and interpret the evidence? A qualified and experienced expert can assist you with a thorough discovery review and comprehensive analysis of the electronic evidence.

[i] 633 F.3d 911 (9th Cir. 2011).

DIGITAL FORENSICS //

ENVISTA FORENSICS

Vehicle Infotainment Forensics: It's About More Than Accidents

Lars Daniel, EnCE, CCPA, CCO, CTNS, CTA, CIPTS, CWA
Practice Leader – Digital Forensics at Envista Forensics

With the new technologies developed for vehicle infotainment systems, principally by BERLA, digital forensic experts can access digital evidence from many of today's vehicles. This evidence can include location history, connected devices, and operating system data, including hard braking events, gear shifts, the speed of the wheel, and hard acceleration.

Further, the forensic artifacts recovered from vehicle infotainment systems allow an examiner to determine where hands were in a vehicle at a particular point in time. For example, if someone used the controls on the steering wheel to change the volume or reached across to the center console to turn the volume knob.

The digital evidence that an examiner can recover from vehicles is not relegated to vehicle accident cases. Imagine the following scenario. A defendant allegedly drove to a location and committed a crime. According to the state's theory, the defendant traveled there and committed the crime alone. However, upon analysis of the infotainment system data from the vehicle, it is determined that three doors opened simultaneously upon arrival at the incident location: the front driver door and the two rear passenger doors. This action is an interesting trick, an impressive physical feat, or, most reasonably, the defendant was not alone.

With an event data recorder or EDR, the purpose is to store pre and post-crash data. The resulting data from an EDR extraction applies primarily to accident reconstruction alone. This does produce more robust crash evidence than the infotainment system. Still, it does not produce as much or the same types of evidence as the data collected in infotainment forensics analysis. Further, some accident events are too small for an EDR to record, including a low-impact collision with a bicycle or pedestrian. In these situations, the methods by which an infotainment system records vehicle event data, with less total data but over a long period, may be the best or sole source of crash data evidence.

Except in a crash event, infotainment system data is superior in answering the who, what, when, where, and why questions. This is especially true when a person connects their phone to

the vehicle infotainment system. When this connection occurs, data from the phone is synced to the vehicle. An infotainment system is formally defined as:

"A factory original or aftermarket console system that uses some form of connectivity to provide drivers and passengers with vehicle specific information, navigation, and standalone or integrated applications and/or multimedia entertainment including audio and video" [1]

In other words, an infotainment system is a combination of capabilities, typically including GPS, satellite radio, Bluetooth, Wi-Fi, the ability to pair and interact with a mobile phone, and the ability to play audio and video. These capabilities are represented to the user on the screen with a Graphical User Interface or GUI, which makes the functionality of the infotainment system accessible to non-technical consumers.

The data contained falls into one of three primary categories: navigation data, vehicle event data, and user data.

Vehicle Event Data

The vehicle information data includes evidence related to braking, gear shifts, wheel speed, and hard acceleration. It can also record Wi-Fi and Bluetooth connections and disconnections. While this information may seem useless outside of an accident investigation, this is not the case. In the previous example, we utilized multiple doors opening simultaneously to show how this evidence could answer the question if the defendant were alone or with others at a particular time.

If it is critical in a case to determine if someone is impaired in some way, the vehicle event data around the time the person is believed to be impaired could be compared to the entirety of the vehicle event data to see if it is different. In other words, if they historically drive responsibly, but during the period of interest, these data points paint a picture of erratic and unusual driving, the data could be utilized with other evidence to bolster or refute the claim of impairment, even if that impairment does not lead to a vehicle accident.

For example, a defendant is accused of burglarizing a business. The vehicle event data shows that they usually drive safely, within normal parameters. However, the driving was erratic and unusual on the day in question. This information is provided to counsel. Holistically looking at their case, counsel connects the erratic driving to the fact the defendant had changed from one medication to another as instructed by their doctor the day before.

Navigation Data

The navigation data recoverable from an infotainment system includes saved locations, recent locations, and track points, among other forensic artifacts. It is not uncommon for many thousands of data points related to navigation to be recovered from the vehicle. This data allows an examiner to determine where that vehicle has been historically, potentially going back to the car's genesis, resulting in potentially years of location data.

This data is exceptionally well utilized when conjoined with other forms of location evidence in the same case. Not only is the infotainment system in your car tracking where you go. Your mobile phone is also recording your location activity to act as a personal assistant, predicting when you're about to leave for work and informing you that traffic will be heavy. Your digital camera includes geolocation coordinates in the metadata of the pictures you take. Call detail records, or CDRs, which can be subpoenaed from a cellular provider, also record the cell tower and sector utilized when a phone makes a call or SMS/MMS text message.

If the reliability of the navigation data is called into question or is, in fact, questionable, utilizing other forms of location from different devices can assist in the verification or dismissal of the evidence.

User Data

User data is where it gets interesting. When you connect your phone to a vehicle, it syncs much of the data contained on your phone onto the internal storage of the car itself. The result is that an examiner can collect mobile phone data without having the phone. The user data recoverable from vehicles includes messages, emails, social media content, call logs and application data, and the list continues to expand as time passes and technology advances.

Previously reserved only for luxury vehicles, infotainment systems are seen in almost every car produced. The widespread distribution of this technology and its rapid advancement create an environment of innovation and customer demand.

This demand is for cars to do more. Ever-increasing connectivity and functionality with a mobile phone, more conveniences, and more features require the infotainment system to record more information about you. For your car to do helpful things, it needs to know how to personalize the experience just for you. To do that means that it must collect as much information as

possible from your mobile phone and the interactions with the infotainment system itself. Of course, this leads to more digital evidence.

Looking Forward

Hyper-connectivity is the future with connected vehicles, smart devices, wearable technology, and even entire smart cities. This future means that more data than ever will be collected concerning our habits, location, activities, health, and financial information. Virtues and vices will be stored electronically, and when that data is collected and stored, it can often be recovered using forensic tools and methodology.

Not only will more devices will talk to each other. We are not far off from a world whereby everything talks to everything. This is apparent if we look at the relationship between wearable technology and phones. Ultimately, we will see biometric data, sleep patterns, markers of healthiness and disease, physical activity, and heart rate contained in the infotainment data. If that sounds far-fetched, consider the following scenario, which happens every day. First, you sync your fitness watch to your phone. Then you connect your phone to your car, which syncs your phone data to the infotainment system. It would now be possible for biometric data collected from your fitness watch to be contained in the infotainment system of your car. It's a brave new world.

END

[1] TIBCO Software. The connected car: finding the intersection of opportunity and consumer demand. Palo Alto (CA): 2016

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CHALLENGING DIGITAL SURVEILLANCE

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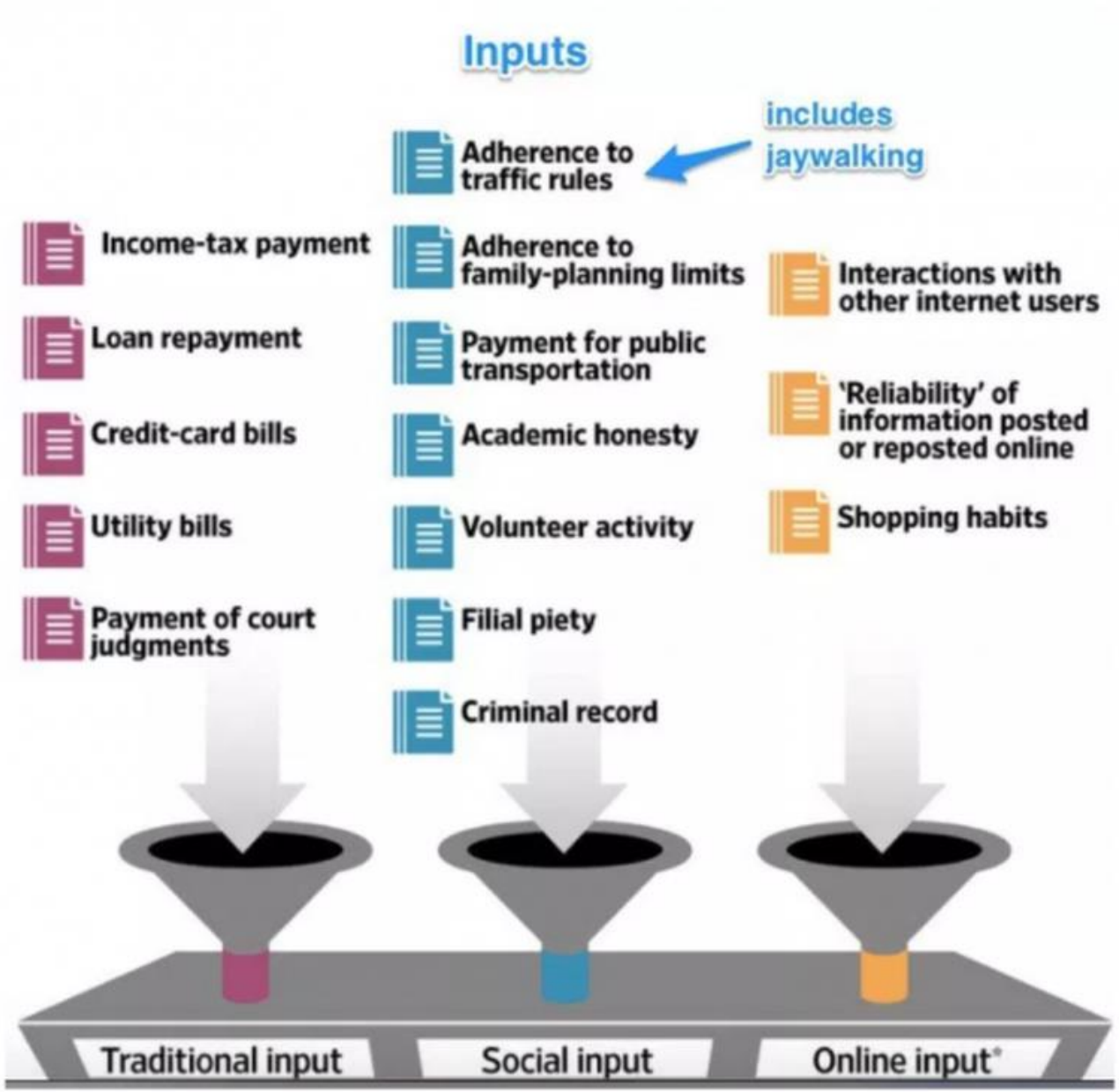
Chinese Social Credit System

https://www.zerohedge.com/news/2018-05-24/chinas-terrifying-social-credit-system-has-already-blocked-11-million-taking

Chinese Social Credit System

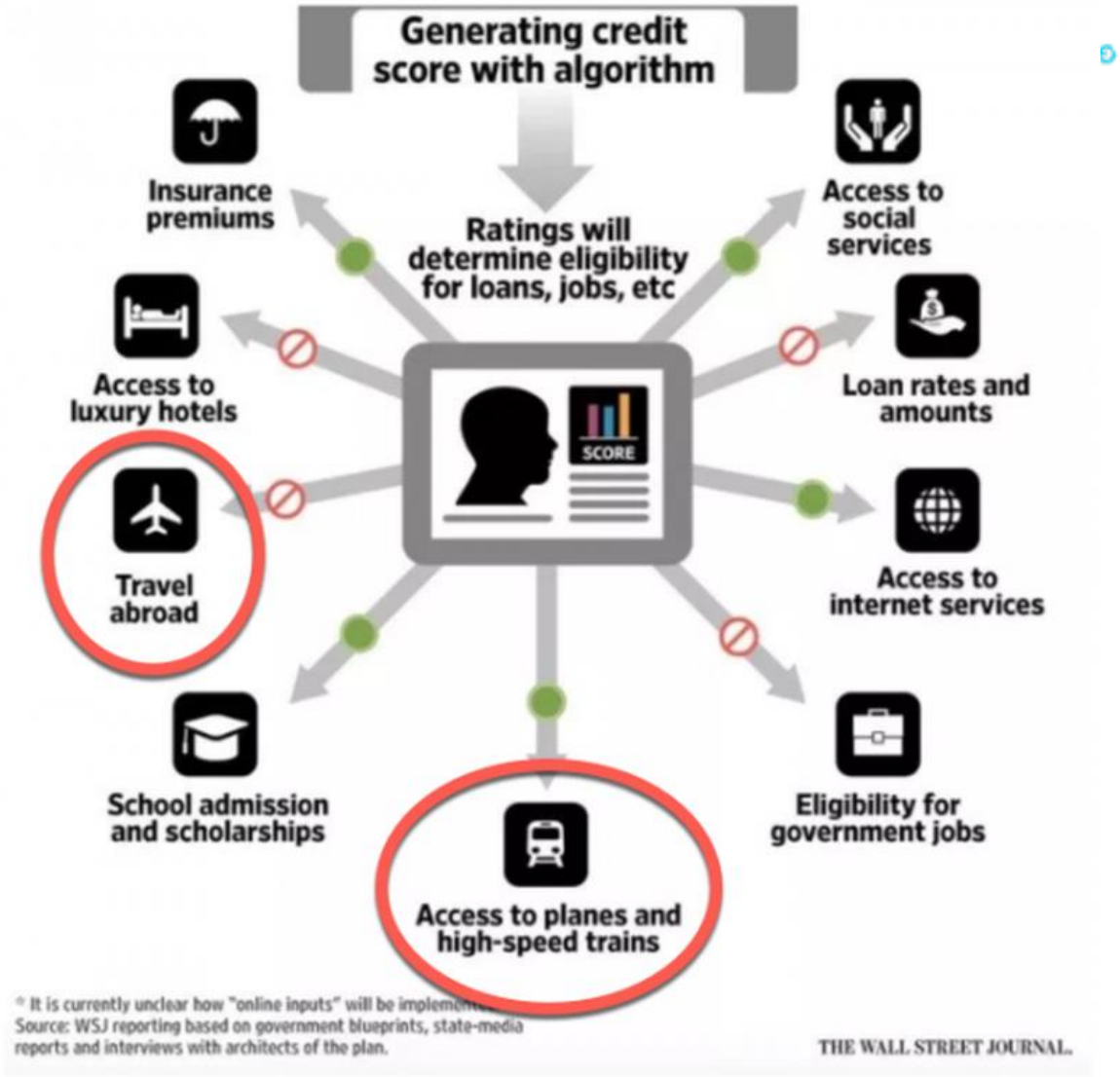
- Inputs
  - Traditional
  - Social
  - Online



https://www.zerohedge.com/news/2018-05-24/chinas-terrifying-social-credit-system-has-already-blocked-11-million-taking

Chinese Social Credit System

- Banning you from flying or getting the train
- Throttling your internet speeds
- Banning you, or your kids, from the best school
- Stopping you getting the best jobs
- Keeping you out of the best hotels
- Getting your dog taken away
- Being publicly named as a bad citizen
- Unable to secure loans, credit cards, financial assistance



https://www.zerohedge.com/news/2018-05-24/chinas-terrifying-social-credit-system-has-already-blocked-11-million-taking

Chinese Social Credit System

- Facial Recognition
  - As of 2019, it is estimated that 200 million monitoring CCTV cameras of the "Skynet" system have been put to use in mainland China, four times the number of surveillance cameras in the United States. By 2021, the number of surveillance cameras in mainland China is expected to reach 570 [illegible]

https://medium.com/@ivonne.teoh/chinas-tech-companies-help-government-to-set-up-social-credit-system-by-2020-ebbd96bc0b06

Chinese Social Credit System

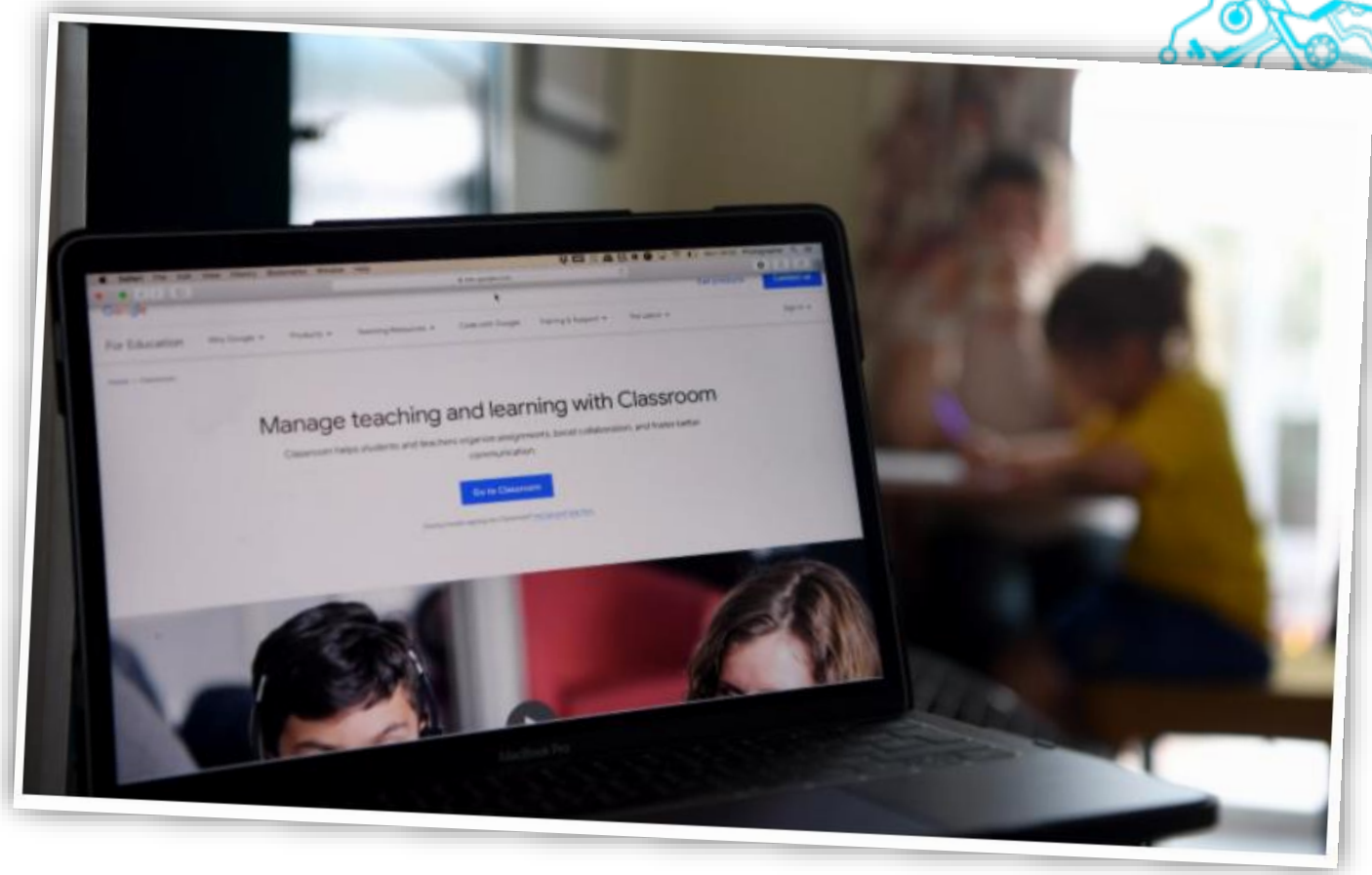
• Facial Recognition

- Every movement of pupils at Hangzhou Number 11 High School in eastern China is watched by three cameras positioned above the blackboard.The "smart classroom behaviour management system," or "smart eye", is the latest highly-intrusive surveillance equipment to be rolled out in China, where leaders have rushed to use the latest technology to monitor the wider population…The computer will pick up seven different emotions, including neutral, happy, sad, disappointed, angry, scared and surprised.

https://www.telegraph.co.uk/news/2018/05/17/chinese-school-uses-facial-recognition-monitor-student-attention/

Google in the Classroom

- Facial Recognition
  - Google is using its services to create face templates and "voiceprints" of children, the complaint says, through a program in which the search giant provides school districts across the country with Chromebooks and free access to G Suite for Education apps. Those apps include student versions of Gmail, Calendar and Google Docs.



https://www.cnet.com/news/two-children-sue-google-for-allegedly-collecting-students-biometric-data/

Chinese Social Credit System

- Facial Recognition
- "Officers wear augmented-reality smart glasses that recognize facial features and license plates in near real time checking them against a database of subjects"

EUTERS/Thomas Peter

https://www.businessinsider.com/china-police-using-smart-glasses-facial-recognition-2018-3

Lower Manhattan

- **Facial Recognition**

  The **Domain Awareness System** is a surveillance system developed as part of Lower Manhattan Security Initiative in a partnership between the New York Police Department and Microsoft to monitor New York City. This allows them to track surveillance targets and gain detailed information about them. The system is connected to 6,000 video cameras around New York City.

https://www.cityandstateny.com/articles/opinion/commentary/new-york-should-regulate-law-enforcement-use-of-facial-recognition
https://en.wikipedia.org/wiki/Domain_Awareness_System

Facebook

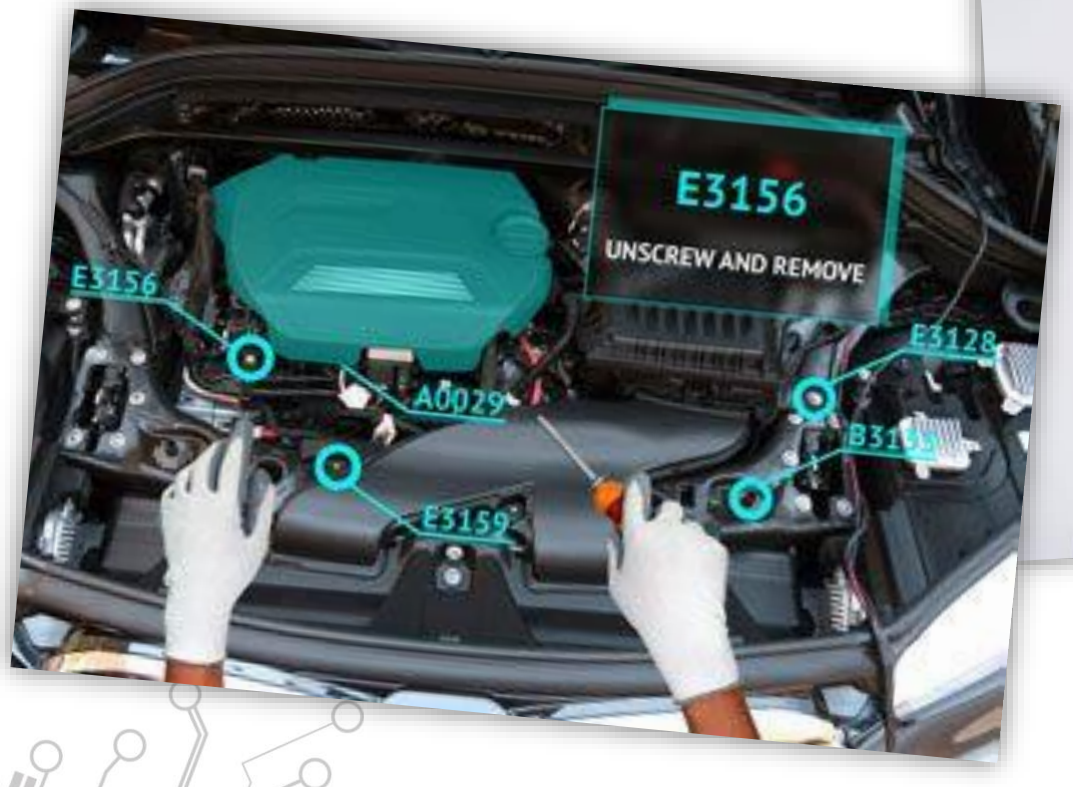
- Facial Recognition
  - A judge has approved what he called one of the largest-ever settlements of a privacy lawsuit, giving a thumbs-up Friday to Facebook paying $650 million to users who alleged the company created and stored scans of their faces without permission.
  - "Biometrics is one of the two primary battlegrounds, along with geolocation, that will define our privacy rights for the next generation," Attorney Jay Edelson, who filed the lawsuit, said in January of 2020.

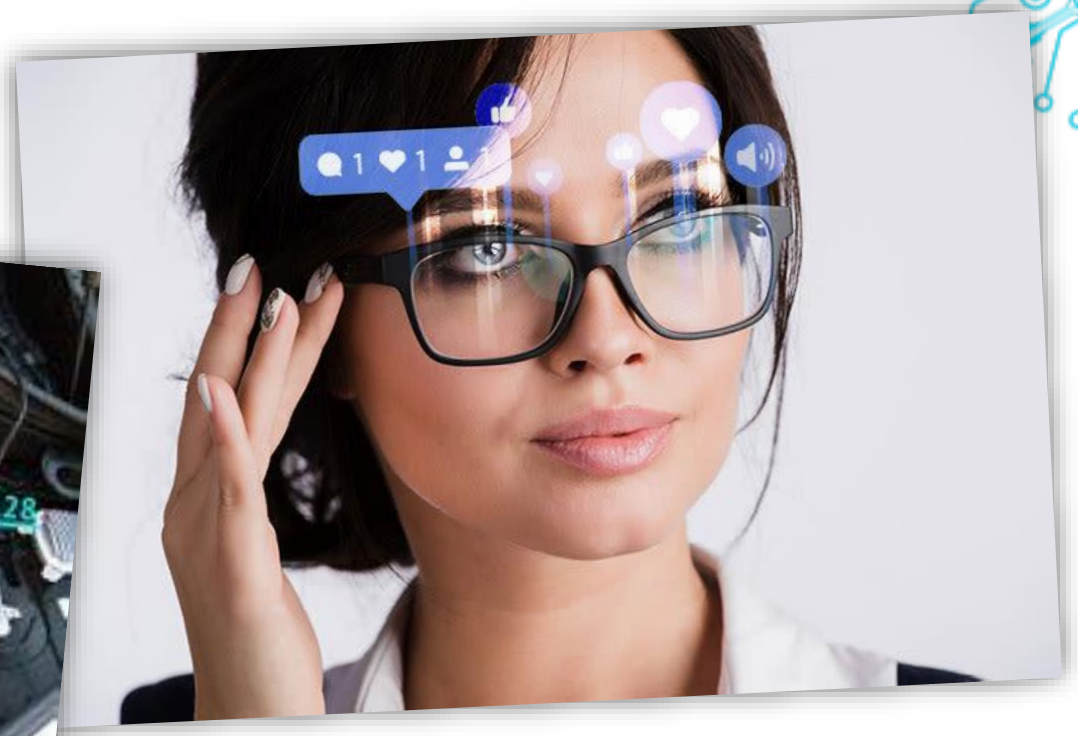
Facebook CEO Mark Zuckerberg.
James Martin/CNET

https://www.cnet.com/news/facebook-privacy-lawsuit-over-facial-recognition-leads-to-650m-settlement/

Facebook: Smart Glasses

- Facial Recognition…?
  - Augmented Reality





https://www.allaboutvision.com/eyeglasses/smart-glasses/

Sony

- Facial Recognition
  - In order to mimic the behavior of an actual pet, an Aibo device will learn to behave differently around familiar people. To enable this recognition, Aibo conducts a facial analysis of those it observes through its cameras. This facial-recognition data may constitute "biometric information" under the law of Illinois, which places specific obligations on parties collecting biometric information. Thus, we decided to prohibit purchase and use of Aibo by residents of Illinois.

https://www.cnet.com/home/security/what-sonys-robot-dog-teaches-us-about-biometric-data-privacy/

Facial Recognition

- Facial Recognition
  - Facial recognition software essentially treats everyone as a suspect. More than 20 states allow federal law enforcement to search state databases of driver's license photos
  - In 2017, a British journalist tested the system in Guiyang, a massive metropolis. The reporter provided police his photograph, then began walking the city streets to see how long he could elude capture. Chinese police surrounded the journalist after just seven minutes.

- https://www.washingtonpost.com/technology/2019/07/07/fbi-ice-find-state-drivers-license-photos-are-gold-mine-facial-recognition-searches/
- https://techcrunch.com/2017/12/13/china-cctv-bbc-reporter/

Chinese Social Credit System

- Surveillance Drones
- Over recent years, more than 30 Chinese military and government agencies have reportedly been using drones made to look like birds to surveil citizens in at least five provinces, according to the South China Morning Post. The program is reportedly codenamed "Dove" and run by Song Bifeng, a professor at Northwestern Polytechnical University in Xi'an. Song was formerly a senior scientist on the Chengdu J-20, Asia's first fifth-generation stealth fighter jet, according to the Post.The bird-like drones mimic the flapping wings of a real bird using a pair of crank-rockers driven by an electric motor. Each drone has a high-definition camera, GPS antenna, flight control system and a data link with satellite communication capability, the Post reports.

https://www.cnet.com/news/china-launches-high-tech-bird-drones-to-watch-over-its-citizens/?fbclid=IwAR3LwxkR81A99QKa72t4Cx1gGq3QBIShvEA0bPGmc0muCn9f4myPNGpHHHE

ALPRs (Automatic License Plate Readers)

- ALPRs
  - ALPRs can be mounted on police cruisers or placed in one location. They record license plates' physical locations.
  - Manufacturers – ALPRs spot stolen cars or determine whether the registered owner of a vehicle is a fugitive. They're the equivalent of police running every plate they see through a crime database.
- 2019
  - California's state auditor found that ALPRs captured some 320 million images of license plates, none of which aroused any suspicion of a crime. The agencies gathering the information enforced no privacy or data retention policies. With little in the way of safeguards, ALPRs could have a chilling effect on citizens' decisions to attend, for example, political events or religious services.

Photos by Mike Katz-Lacabe (CC BY)

https://www.eff.org/pages/automated-license-plate-readers-alpr

Chinese Social Credit System

- Data Collection
  - The Chinese government aims at assessing the trustworthiness and compliance of each person. Data stems both from peoples' own accounts, as well as their network's activities. Website operators can mine the traces of data that users exchange with websites and derive a full social profile, including location, friends, health records, insurance, private messages, financial position, gaming duration, smart home statistics, preferred newspapers, shopping history, and dating behavior.
- Algorithms
  - Automated algorithms are used to structure the collected data, based on government rules

https://en.wikipedia.org/wiki/Social_Credit_System

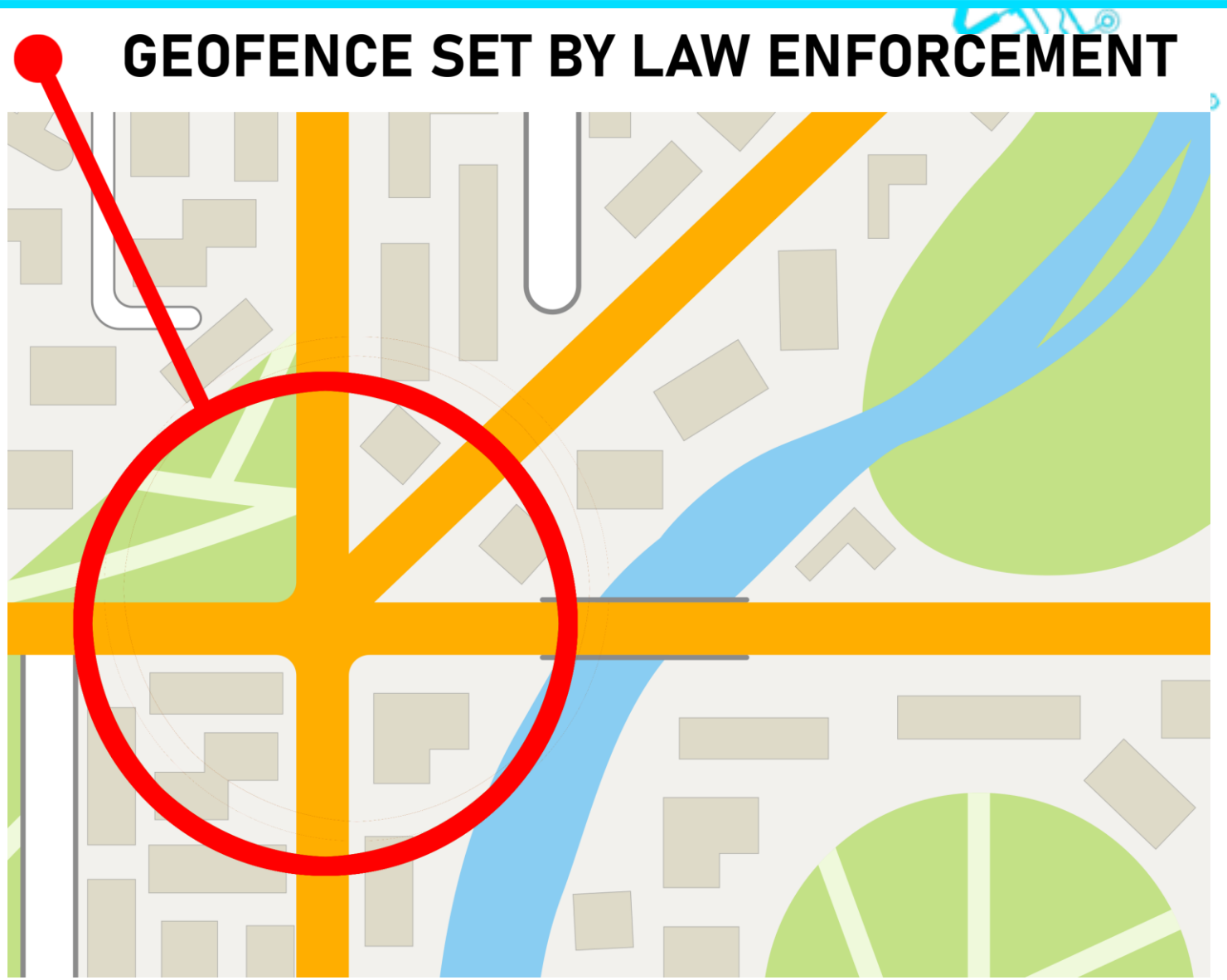
Data Collection in the USA

- Data Collection
  - License Plate Databases
    - License plate records and geo-tagged photos
  - Credit Reporting Agencies
    - Collect sensitive data and sell it to banks, creditors, insurers…
  - Smartphone Location Tracking
    - Extremely precise, allows for real time traffic, location busyness…
      - Google tells you how busy the gym or restaurant is at a particular time
  - Digital Ads/Purchases
    - Location data sold to retailers (online and brick and mortar) to generate targeted ads.
  - Smart Home Objects
    - iRobot Roomba mapping your home

https://en.wikipedia.org/wiki/Social_Credit_System

Location Data: Google GeoFence (GeoFence Warrant)

- GeoFence Warrant



Location Data: Google GeoFence (GeoFence Warrant)

1. LAW ENFORCEMENT DETERMINES THE COVERAGE AND TIMEFRAME OF INTEREST FOR THE GEOFENCE

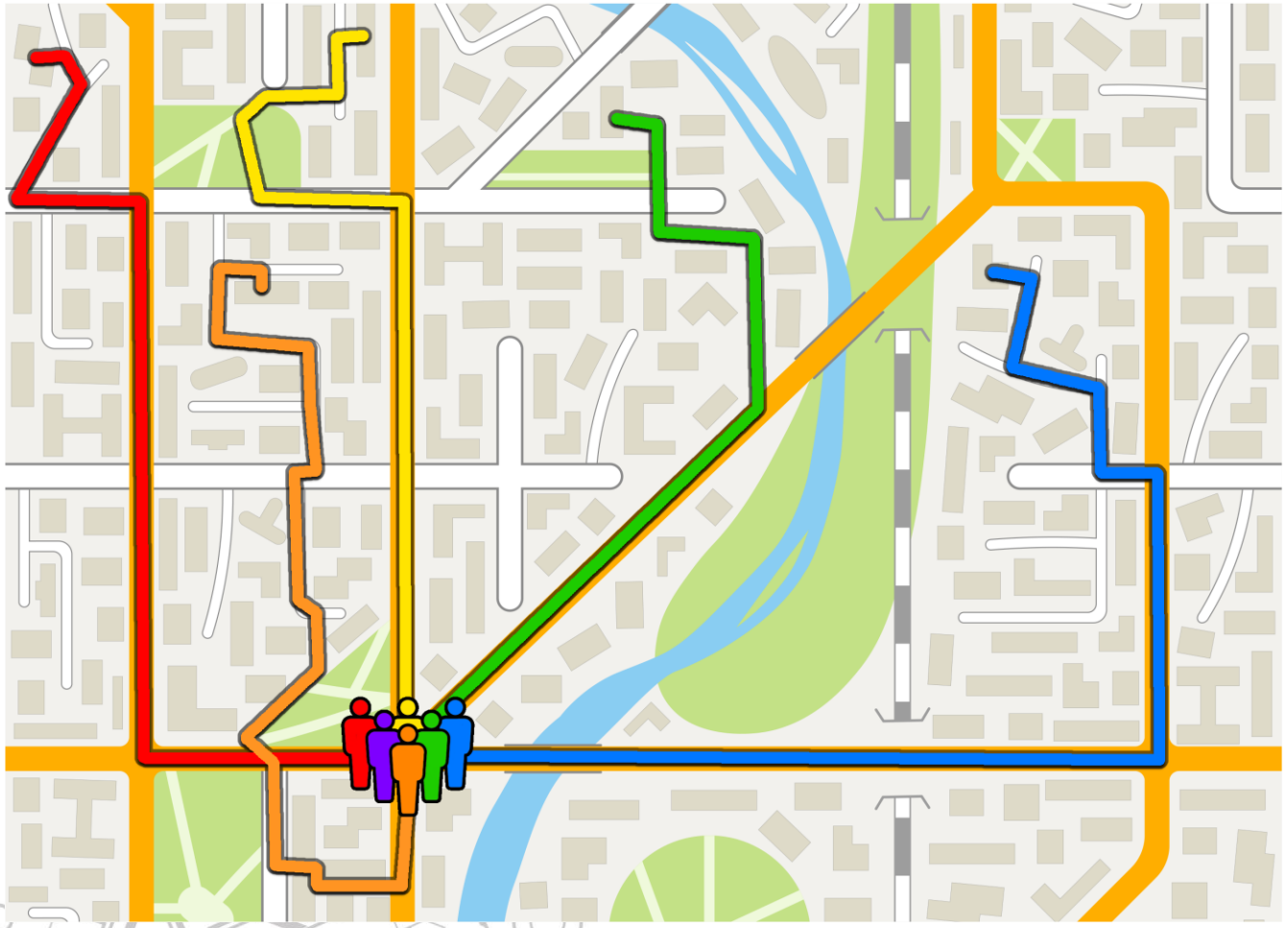
2. EVERY SINGLE GOOGLE ACCOUNT WITH LOCATION HISTORY IN THE WORLD IS SEARCHED

3. GEOFENCE IS POPULATED WITH EVERY PERSON IN THE AREA FOR THE DESIGNATED PERIOD

4. LAW ENFORCEMENT SELECTS SUSPECTS. THEY CAN NOW SEE THEIR ACTIVITY WITH NO GEOGRAPHIC LIMITS. (STEP 2)

Location Data: Google GeoFence (GeoFence Warrant)

GEOFENCE IS REMOVED, ALL LOCATON ACTIVITY CAN NOW BE SEEN FOR THOSE PEOPLE LAW ENFORCEMENT HAS SELECTED



Location Data: Google GeoFence (GeoFence Warrant)

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1. LAW ENFORCEMENT REQUESTS THAT GOOGLE REVEAL THE SUBSCRIBER INFORMATON OF SELECTED STEP 2 PERSONS OF INTEREST

2. GOOGLE PROVIDES THE SUBSCRIBER INFORMATION FOR THOSE LAW ENFORCEMENT HAS DESIGNATED AS PERSONS OF INTEREST

3. SUBSCRIBER INFORMATON INCLUDES THE USER'S ACCOUNT, EMAIL, PHONE NUMBERS, INTERNET PROTOCOL LOGS, AND OTHER DATA

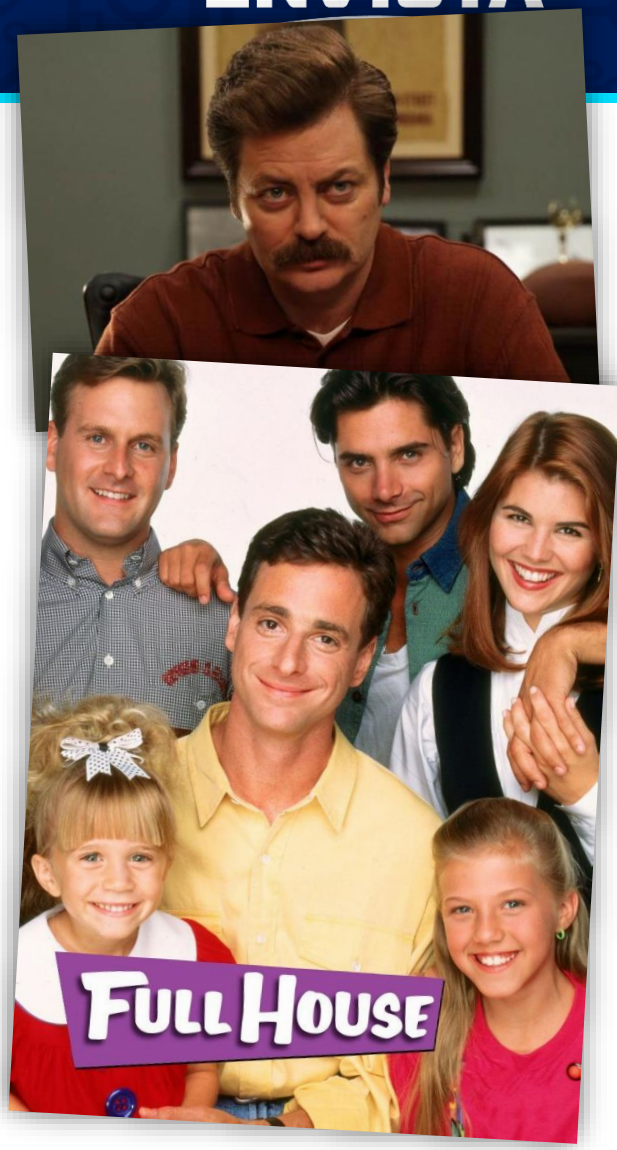
Chinese Social Credit System

- For example, buying something like diapers is seen as “responsible” and will improve your score, while things like video games are seen as idle and irresponsible and will bring your score down.
- your score also goes up or down based on interaction with friends who have a higher or lower score than you. Meaning, if a friend is given a low score and therefore deemed “less trustworthy,” you would be urged to spend less time with that person…(by Gov’t)

humancreativecontent.com/news-and-politics/2016/3/8/sypxe6b7dm2o8by6m4cwz1bh2kcszl

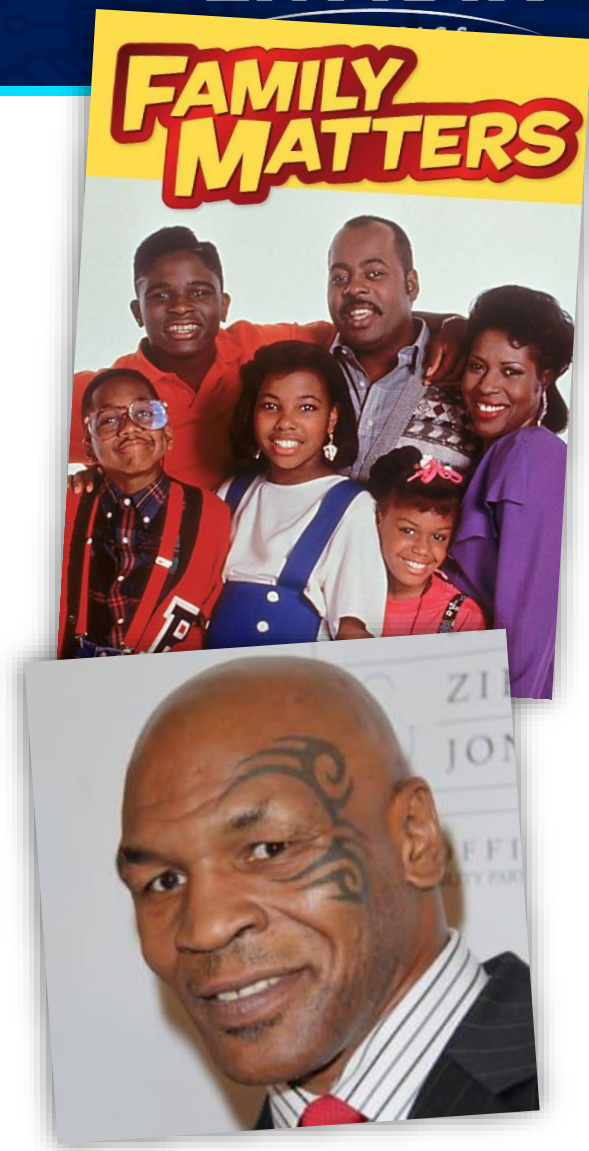
What determines the “truth” of content?

- Deepfake Videos – Nick Offerman



Will sharing this lower your score?

- Deepfake Videos – Mike Tyson



The Fake News Problem – what about this?

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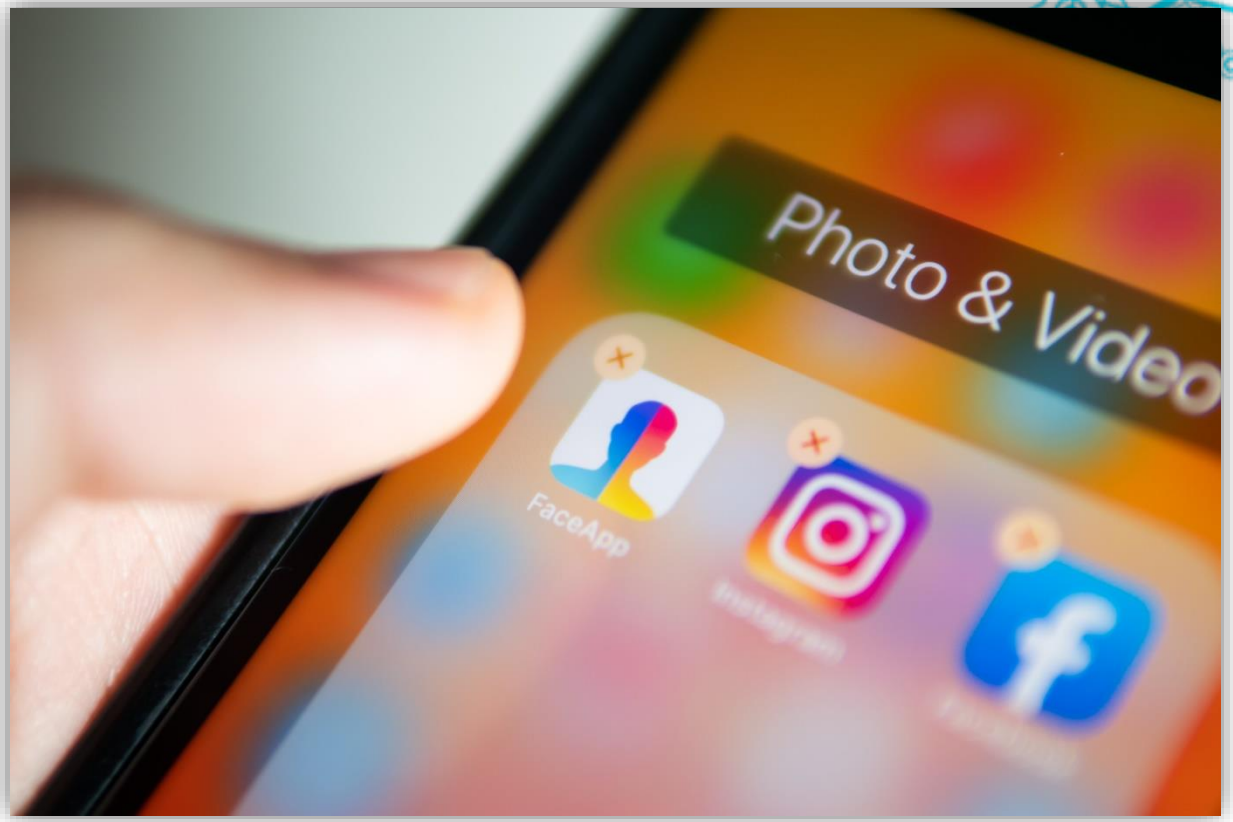
LARRY DANIEL
TECHNICAL DIRECTOR– DIGITAL FORENSICS

REALITY CAPTURE

DIGITAL FORENSICS //

Reality Capture

- New Territory
  - The ultimate social engineering
    - Virtual reality deepfakes




LOS ANGELES, CA
ONE WILSHIRE
nightline

ENVISTA FORENSICS

LARRY DANIEL
TECHNICAL DIRECTOR– DIGITAL FORENSICS

WHAT IS THE IOT?

INTERNET OF THINGS

DIGITAL FORENSICS //

Internet of Things (IoT)

- What is the Internet of Things?
  - 1980's
    - Carnegie Melon University
      - Programmers would connect via the internet to the Coke machine to see if a drink was available, and if it was cold.

> In the mid-seventies expansion of the department caused people's
> offices to be located ever further away from the main terminal room
> where the Coke machine stood. It got rather annoying to traipse down
> to the third floor only to find the machine empty - or worse, to shell
> out hard-earned cash to receive a recently loaded, still-warm Coke.
> One day a couple of people got together to devise a solution.
>
> They installed micro-switches in the Coke machine to sense how many
> bottles were present in each of its six columns of bottles. The
> switches were hooked up to CMUA, the PDP-10 that was then the main
> departmental computer. A server program was written to keep tabs on
> the Coke machine's state, including how long each bottle had been in
> the machine. When you ran the companion status inquiry program, you'd
> get a display that might look like this:
>
> EMPTY EMPTY 1h 3m
> COLD   COLD   1h 4m
>
> This let you know that cold Coke could be had by pressing the
> lower-left or lower-center button, while the bottom bottles in the two
> right-hand columns had been loaded an hour or so beforehand, so were
> still warm. (I think the display changed to just "COLD" after the
> bottle had been there 3 hours.)

https://www.cs.cmu.edu/~coke/history_long.txt

Internet of Things (IoT)

- What is the Internet of Things?
  - Any device with that is connected to the internet
  - Shared processing power
    - The **Internet of Things (IoT)** is the network of physical objects—devices, vehicles, buildings and other items embedded with electronics, software, sensors, and network connectivity—that enables these objects to collect and exchange data

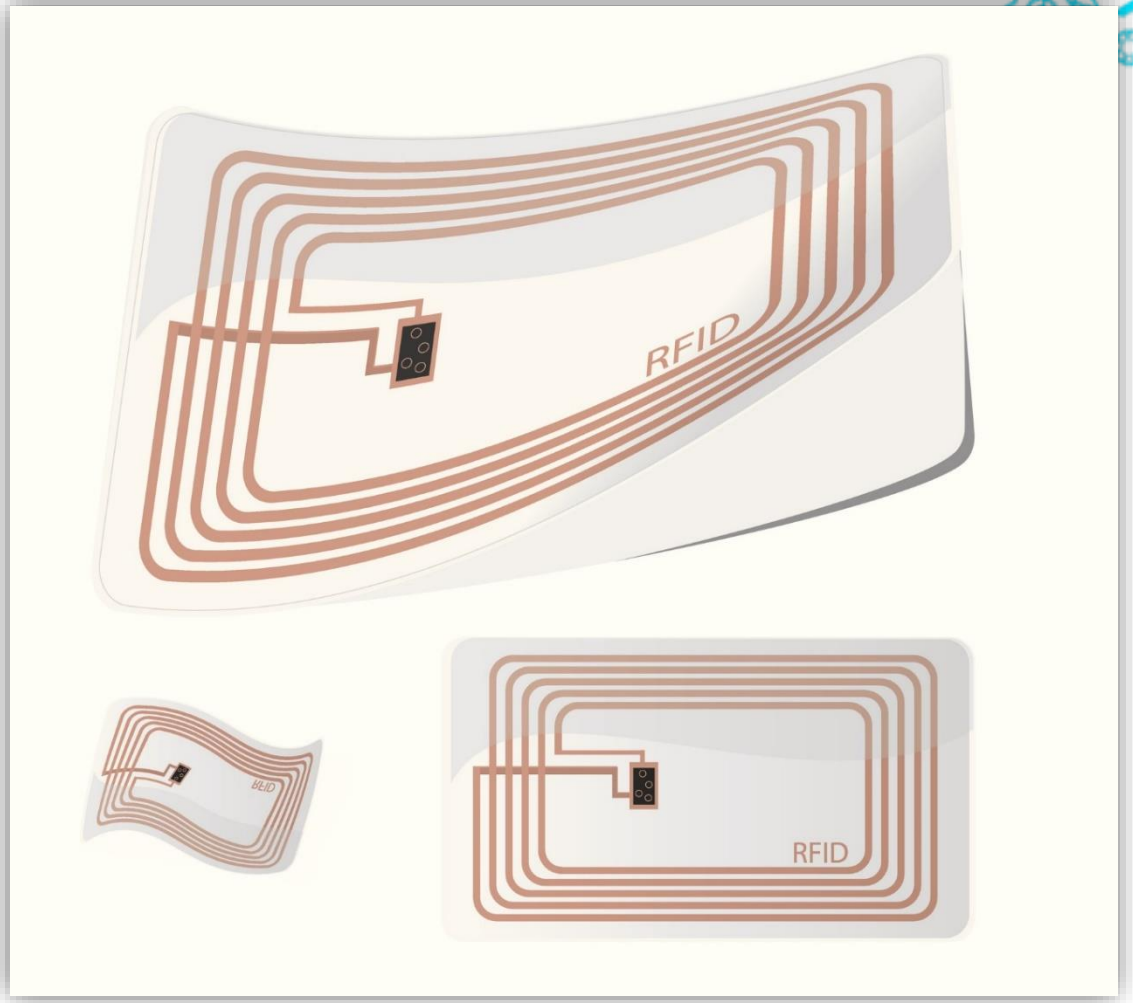
Petchatz.com

Internet of Things (IoT)

- Milestones
  - Barcode Reader
    - 1952
      - First ever built in a New York apartment by Norman Joseph and Bernard Silver
      - Ability to create and store data for retailers, shipping, inventory management…powerful when coupled with RFID

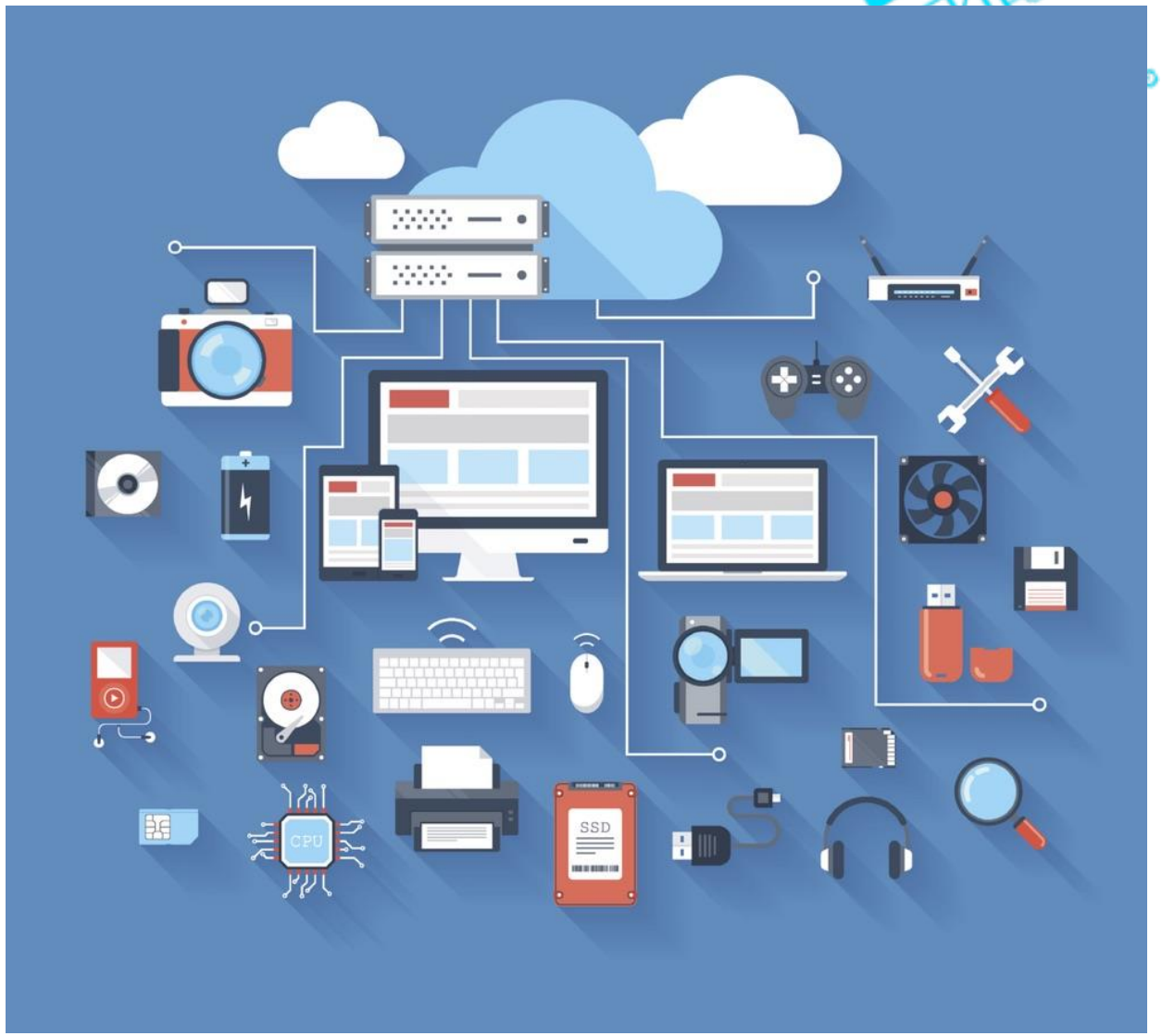
Internet of Things (IoT)

- Milestones
  - RFID
    - 1990's (becomes commonplace)
      - Automatic tracking without the need for a human to scan or capture data
      - Much more efficient that barcodes



Internet of Things (IoT)

- Milestones
  - Sensors
    - Everything talks to everything
    - Stores and transmits data
    - Talks to RFID

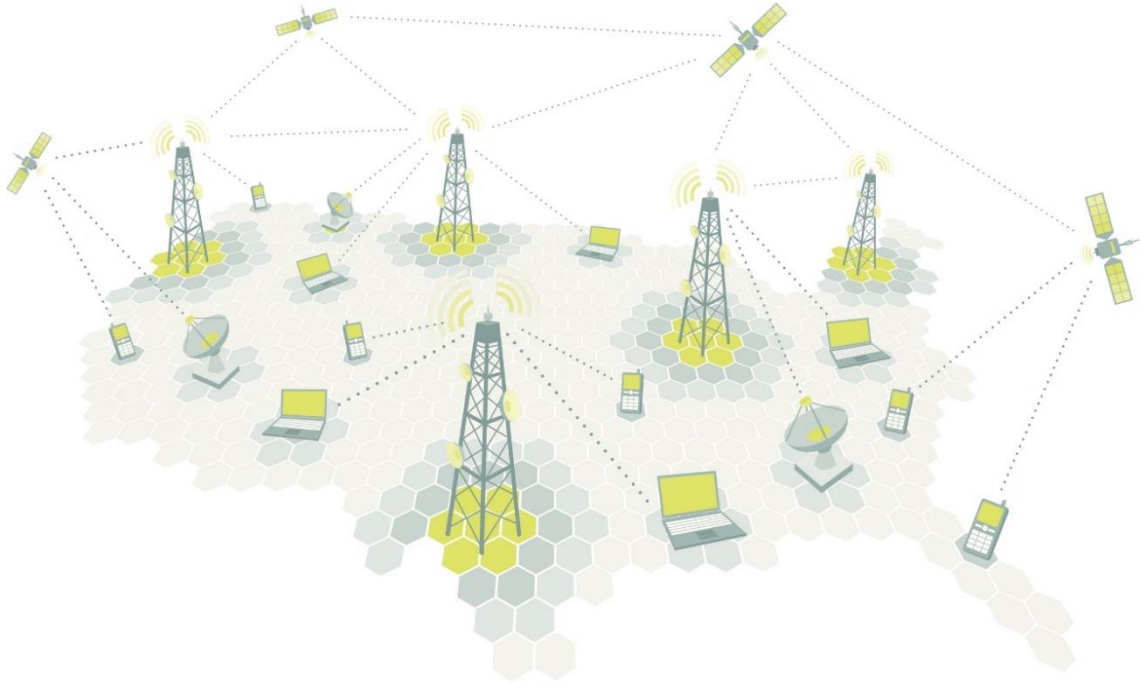


Internet of Things (IoT)

- Milestones
  - Big Data / Cloud
    - 2008-2009
      - According to Cisco Internet Business Solutions Group (IBSG), the Internet of Things was born in between 2008 and 2009 at simply the point in time when more “things or objects” were connected to the Internet than people.
    - 12.5 billion connected devices in 2010
  - Why is needed
    - Ability to store and transmit massive amounts of data generated by devices, sensors, websites, applications, etc.

Internet of Things (IoT)

- Cellular Network
  - Big Data / Cloud
    - Around 29 billion connected devices[1] are forecast by 2022, of which around 18 billion will be related to IoT
    - 90% of the world covered by cellular signal
    - 70% of wide-area IoT devices will use cellular technology in 2022
    - LTE and Beyond



https://www.ericsson.com/en/mobility-report/internet-of-things-forecast

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TECHNICAL DIRECTOR– DIGITAL FORENSICS

IOT DEVICES

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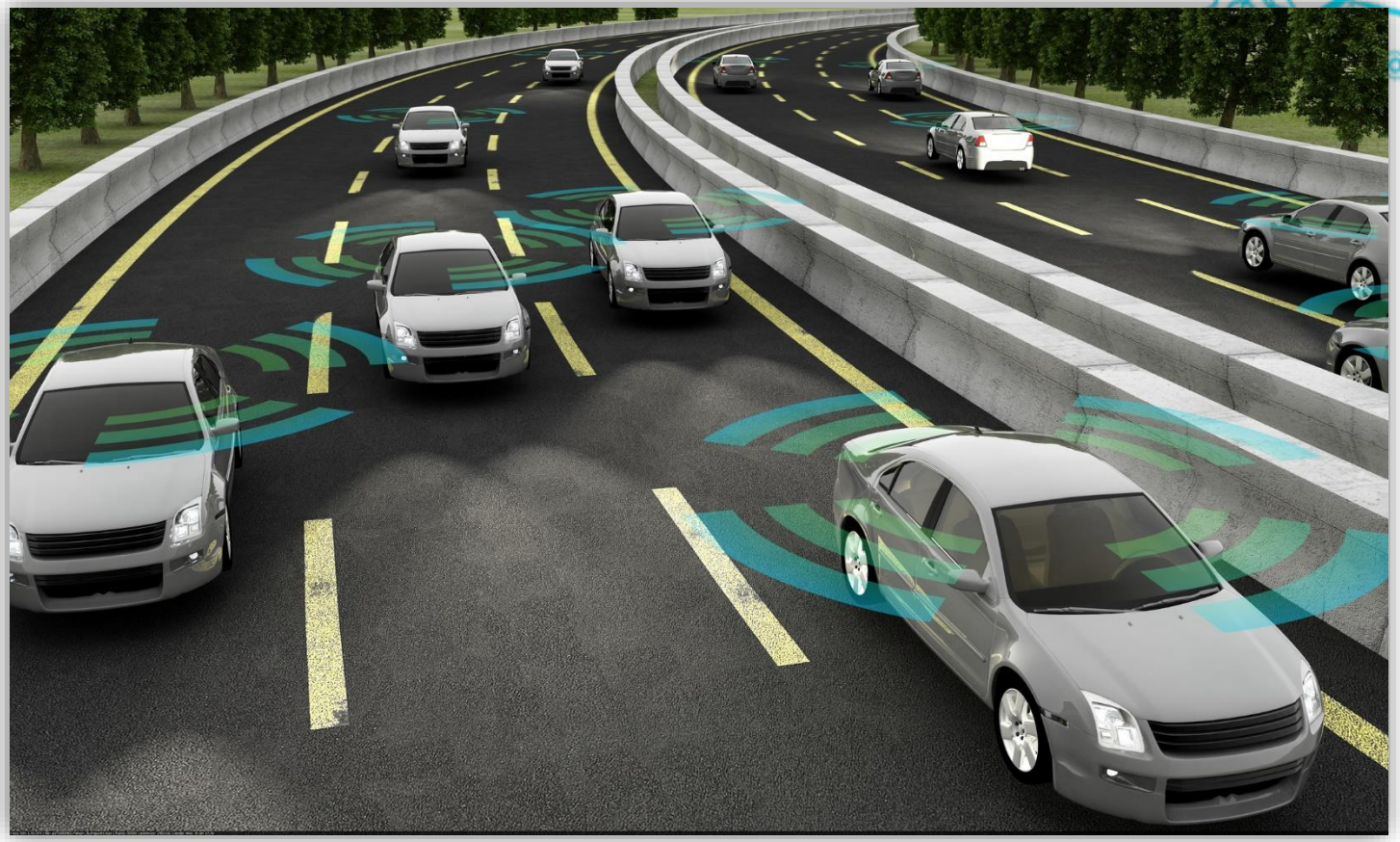
IoT Devices

- Always on devices
  - Always listening…?
  - Data collection
  - Data stored on local devices
    - Cell phones, computers
  - Data stored in the cloud
    - Association accounts

IoT Devices

- Vehicles
  - Cellular connection
  - Autonomous
  - Semi-autonomous
  - Video



IoT Devices

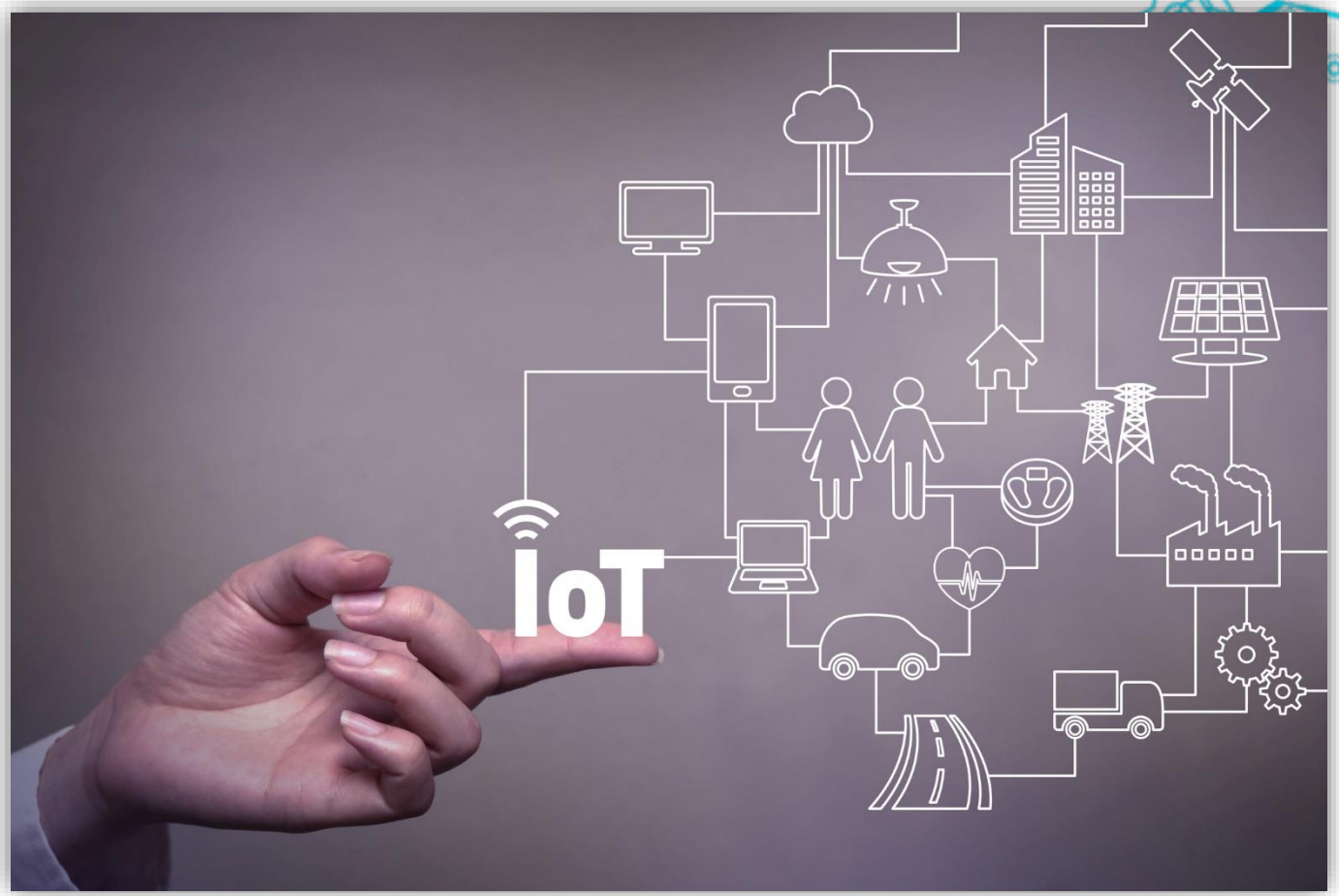
- Wearable technology
  - Beyond fitness!
  - Medical
    - Athletic performance, medical analytics
  - Logistics
    - People movement, animal movement
      - Livestock are one of the first uses of IoT, including tracking movement, fertility, behavior, lactation…
  - Government
    - Tracking, monitoring

Digital Forensics – Murder Cases

- Case Example
  - SODDI Defense
    - (Some Other Dude Did It)
      - Computer Forensics
      - Cell Phone Forensics
      - Cellular Location
      - Xbox Forensics
      - Alarm System Logs

Internet of Things (IoT)

- What the Future Holds
  - Hyper-connection is the future, and it is coming fast.



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IOT CYBER SECURITY

TODAY'S HACKING = TOMORROW'S EVIDENCE

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IoT Security Risks

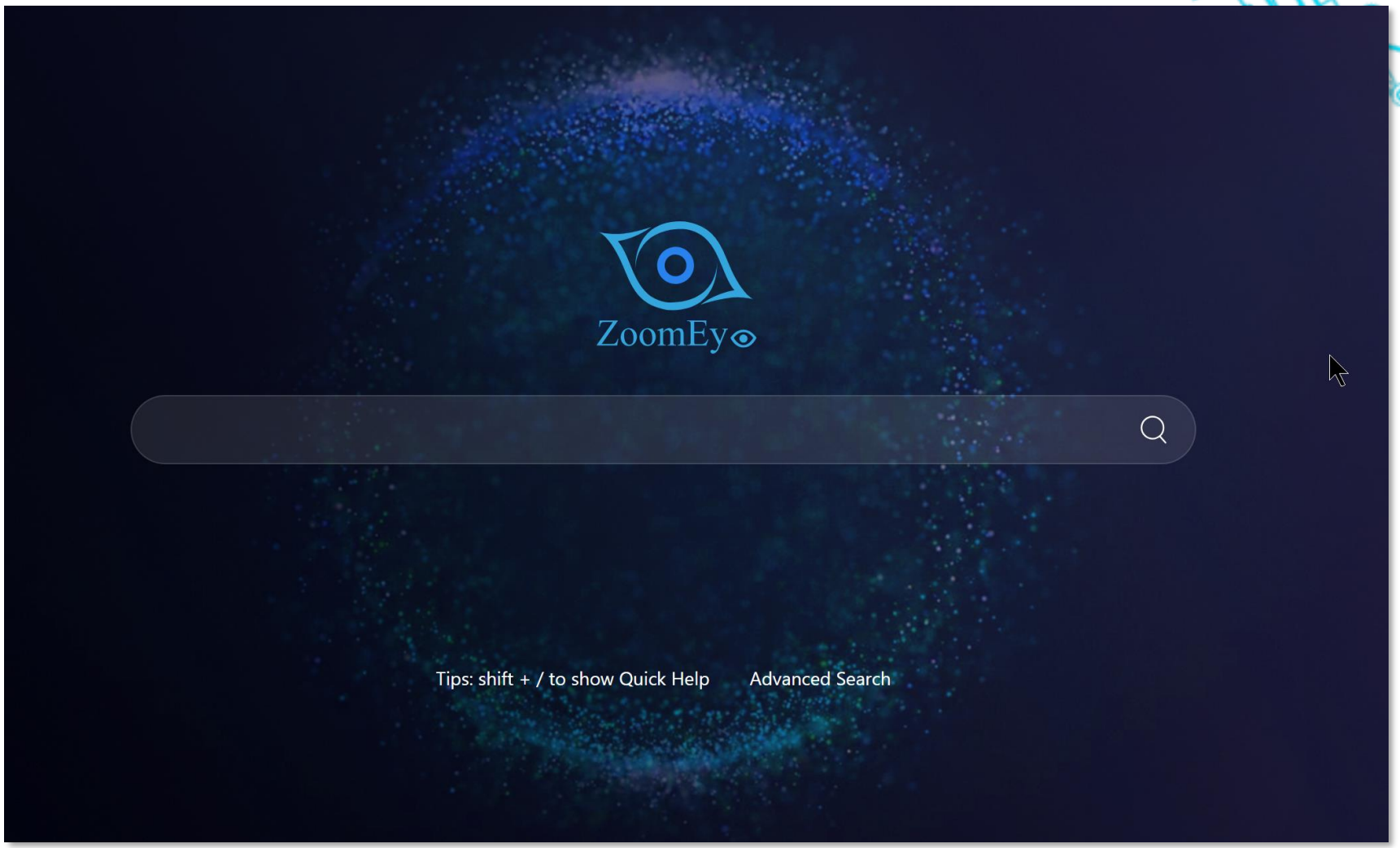
- Hacking
  - millions of insecure connected devices
  - Leaves critical systems and data around the world at risk

IoT Hacking Tools and Techniques

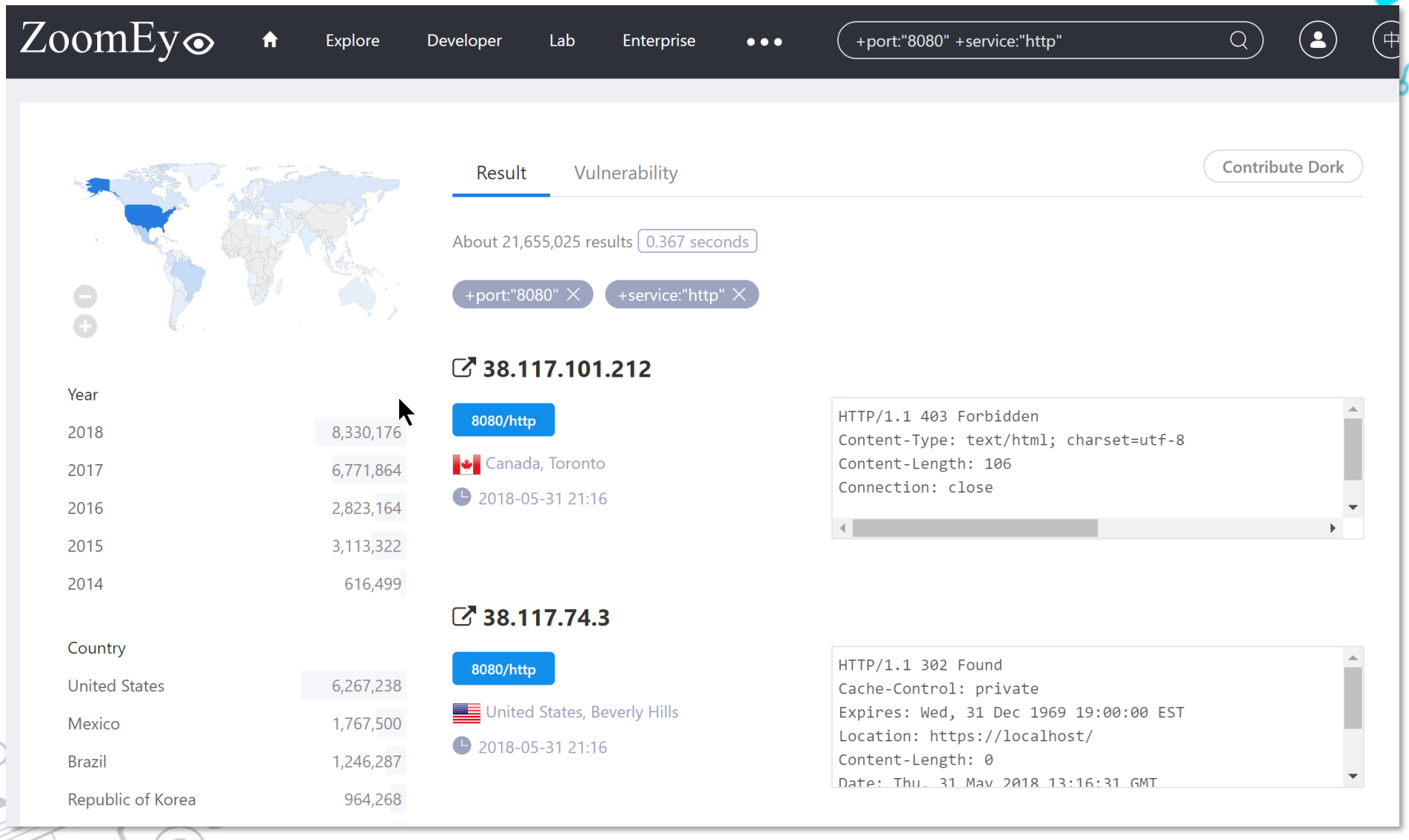
- Finding Attackable Hosts –
  - There are three difference search engines that scan for open ports and vulnerable services:
    - Censys.io
    - Zoomeye.org
    - Shodan.io

IoT Hacking Tools and Techniques

- Zoomeye.org

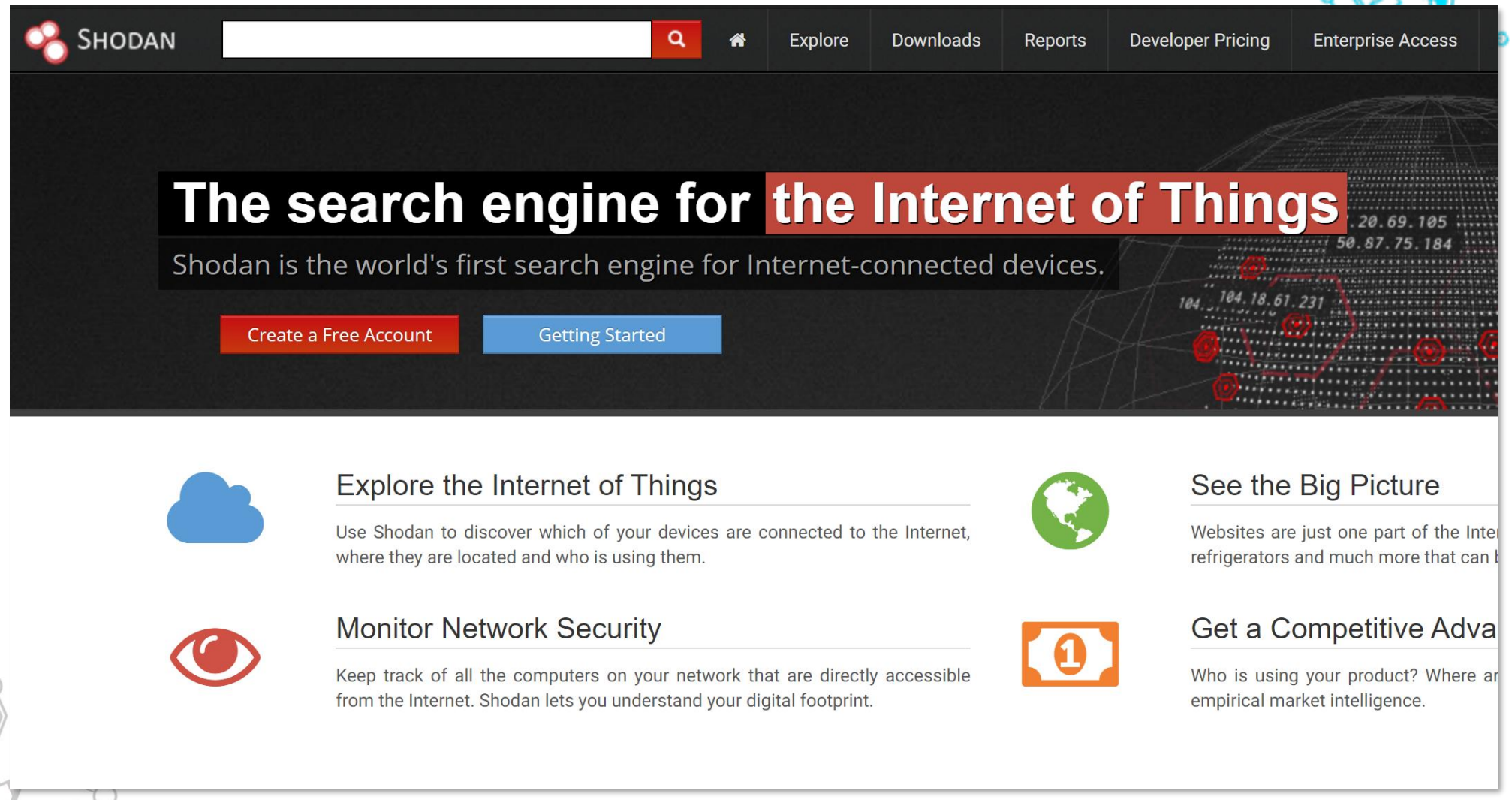


IoT Hacking Tools and Techniques



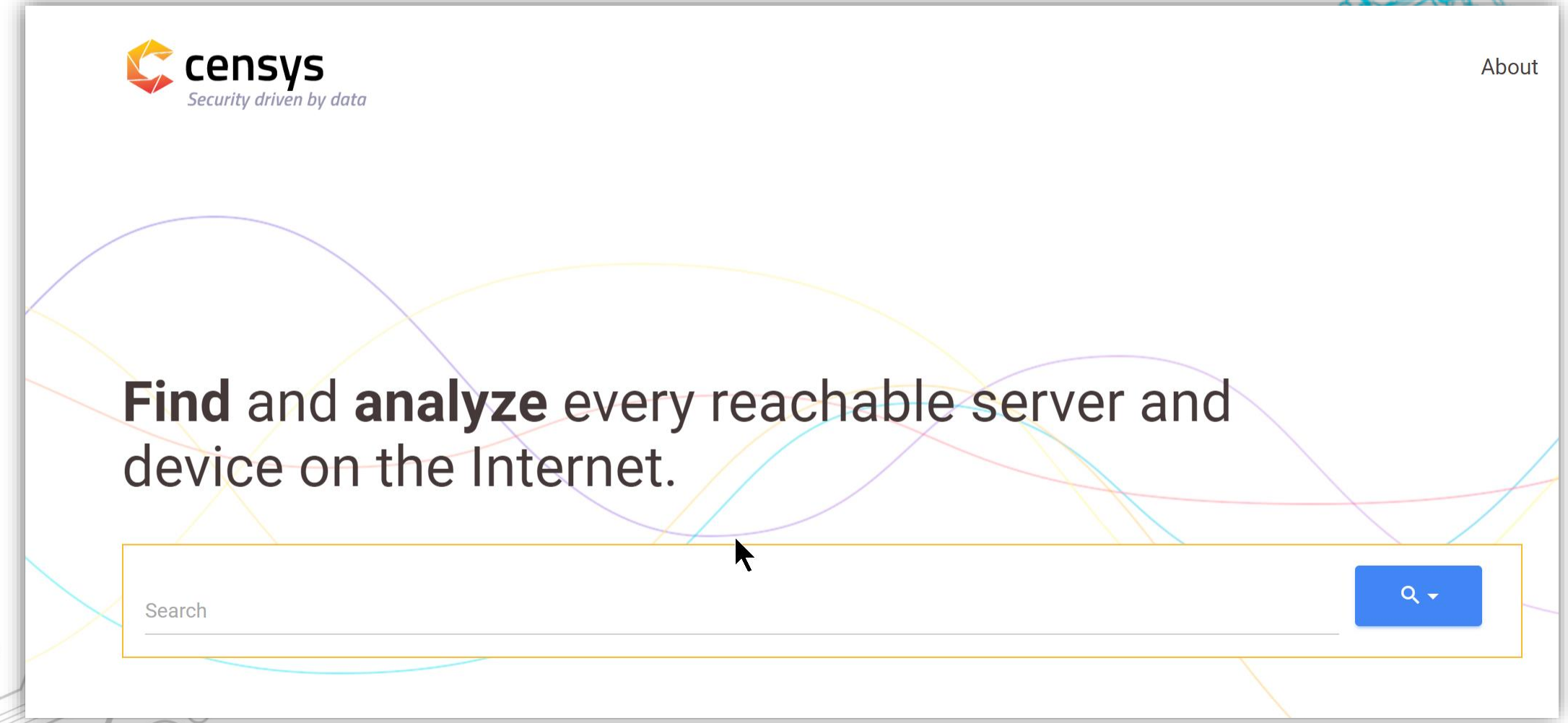
IoT Hacking Tools and Techniques

- Shodan.io

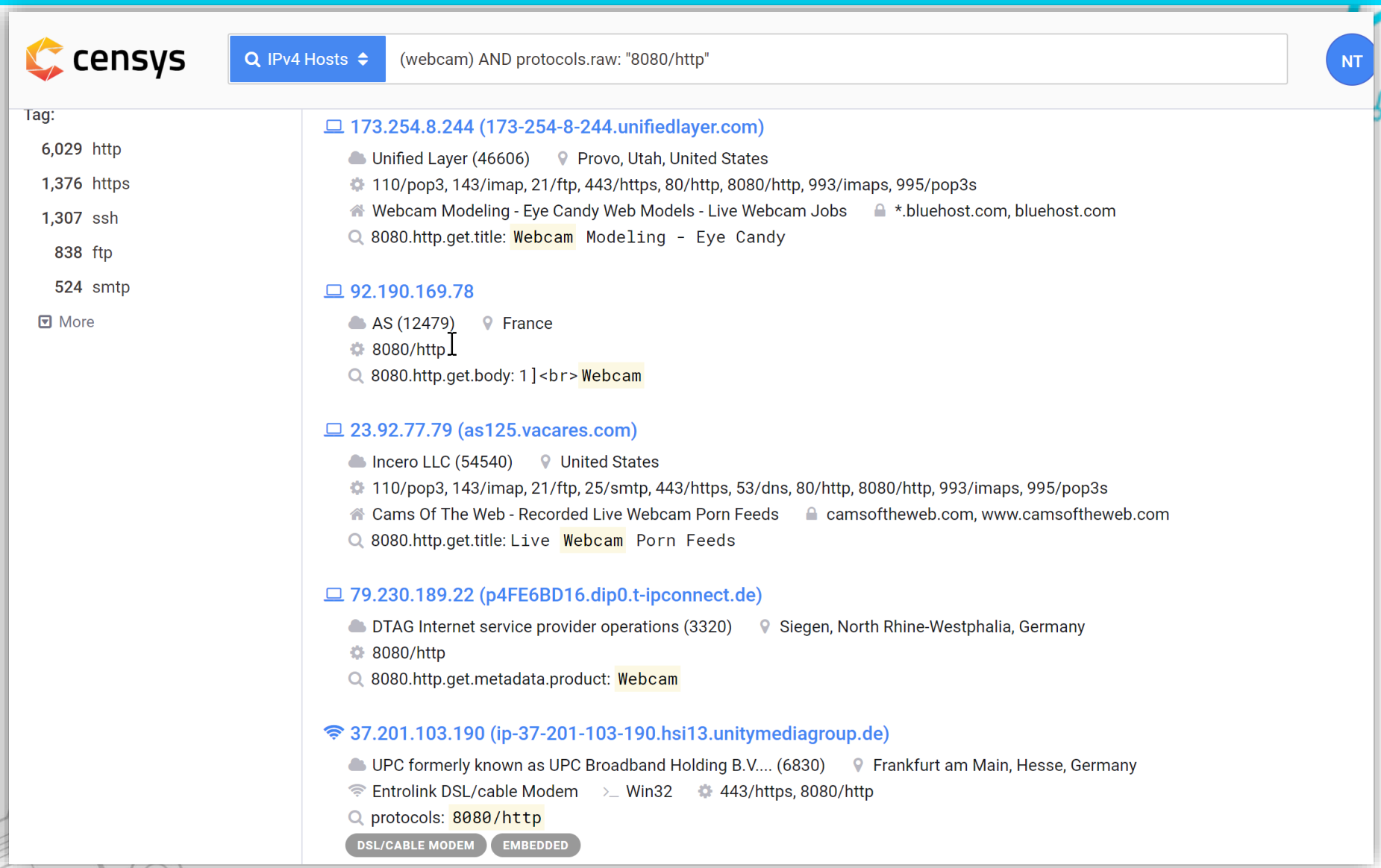


IoT Hacking Tools and Techniques

- Censys.io



IoT Hacking Tools and Techniques



IoT Hacking Tools and Techniques

- Live Webcam

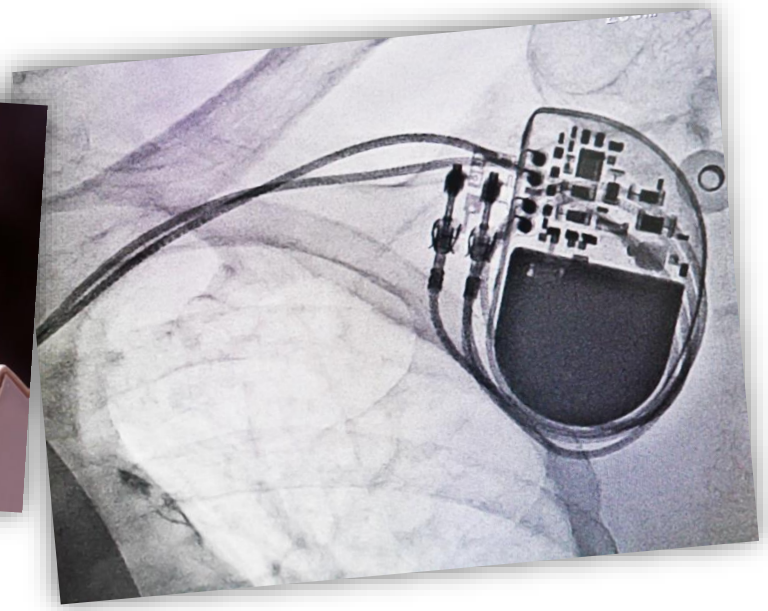
IoT Security Risks

- Hacking
  - Cardiac devices
    - Early this year, CNN wrote, "The FDA confirmed that St. Jude Medical's implantable cardiac devices have vulnerabilities that could allow a hacker to access a device. Once in, they could deplete the battery or administer incorrect pacing or shocks, the FDA said.
    - "The vulnerability occurred in the transmitter that reads the device's data and remotely shares it with physicians. The FDA said hackers could control a device by accessing its transmitter."

https://www.iotforall.com/5-worst-iot-hacking-vulnerabilities/

Who cares about Pacemaker data?

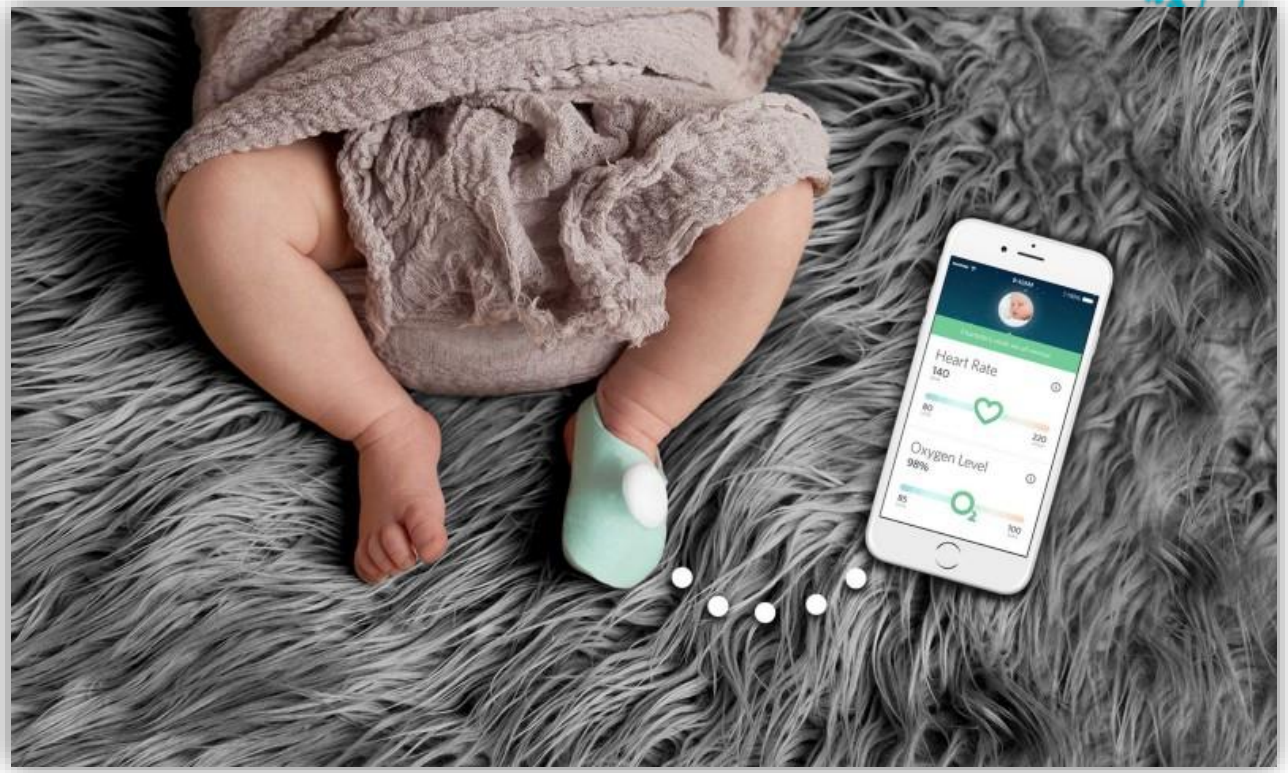
- Home arson case
  - **pacemaker**: In a home arson case, the homeowner told police that he did a number of things as soon as he discovered the fire: he gathered his belongings, packed them in a suitcase and other bags, broke out the bedroom window with his cane, threw his belongings outside, and rushed out of the house. The police searched the 59-year old's pacemaker. Its data showed that the man's heart rate barely changed during the fire. And after a cardiologist testified that it was "highly improbable" that a man in his condition could do the things claimed, the man was charged with arson and insurance fraud.



https://www.crowelldatalaw.com/2017/07/recent-iot-device-cases/

IoT Security Risks

- Hacking
  - Owlet Baby Monitor
    - Alerts parents if baby is having heart trouble
    - Hackers could cause false signals or cause device to stop reporting



https://www.iotforall.com/5-worst-iot-hacking-vulnerabilities/

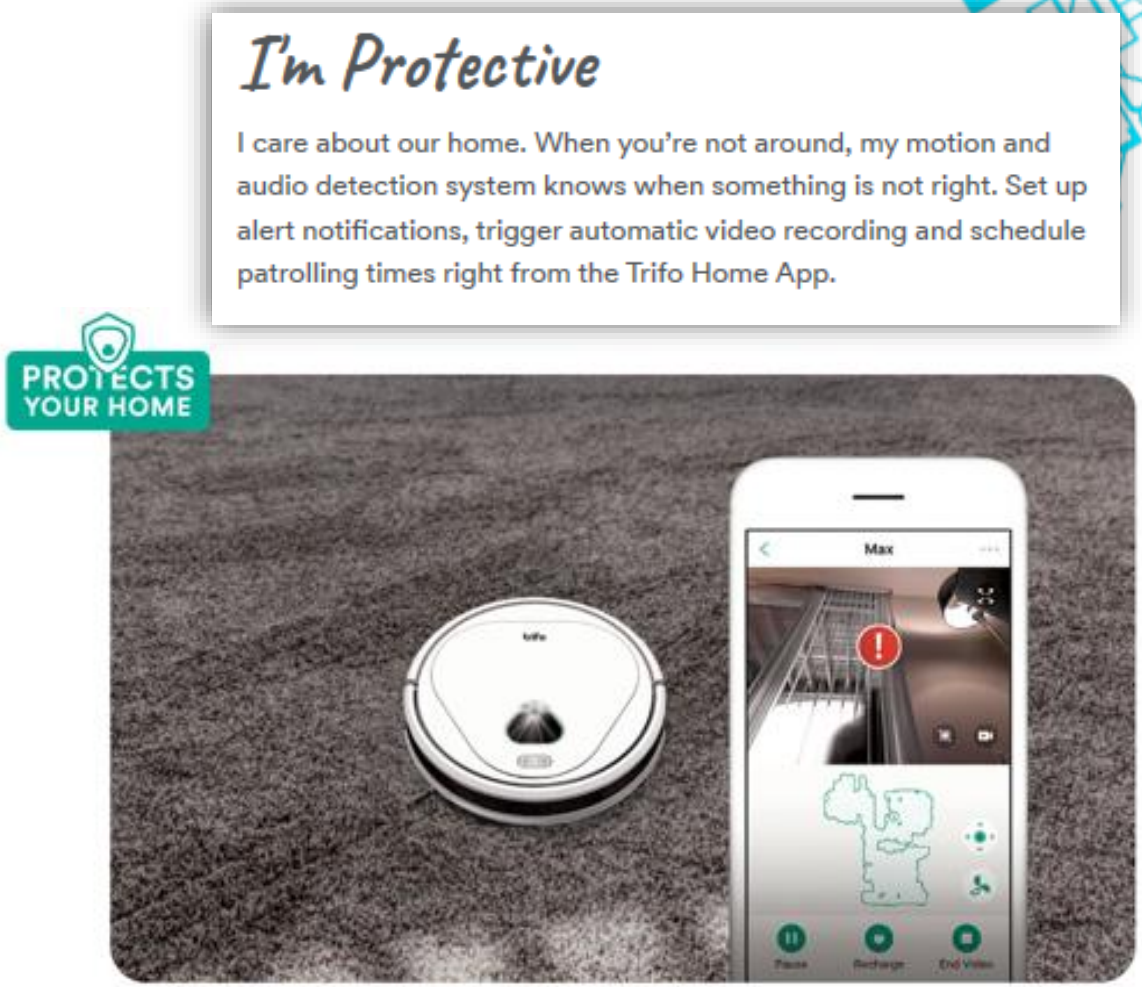
IoT Security Risks

- Hacking
  - TRENDnet Webcam Hack
    - TRENDnet transmitted user login credentials in clear, readable text over the Internet, and its mobile apps for the cameras stored consumers' login information in clear, readable text on their mobile devices, the FTC said.
    - Allowed hackers to watch the video feed from the camera in real time.

https://www.iotforall.com/5-worst-iot-hacking-vulnerabilities/

IoT Security Risks

- Hacking
  - Robot Vacuum Cleaner
    - According to researchers with Checkmarx, the vacuum has several high-severity flaws that open the device to remote attacks. Those include a denial of service (DoS) attack that bricks the vacuum, to a hack that allows adversaries to peer into private homes via the vacuum's embedded camera.



https://threatpost.com/vacuum-cleaners-baby-monitors-and-other-vulnerable-iot-devices/153294/

IoT Security Risks

- Hacking
  - Industrial Robot Arm
    - At the IEEE Security & Privacy conference later this month, they plan to present a case study of attack techniques they developed to subtly sabotage and even fully hijack a 220-pound industrial robotic arm capable of wielding gripping claws, welding tools, or even lasers.

https://www.wired.com/2017/05/watch-hackers-sabotage-factory-robot-arm-afar/

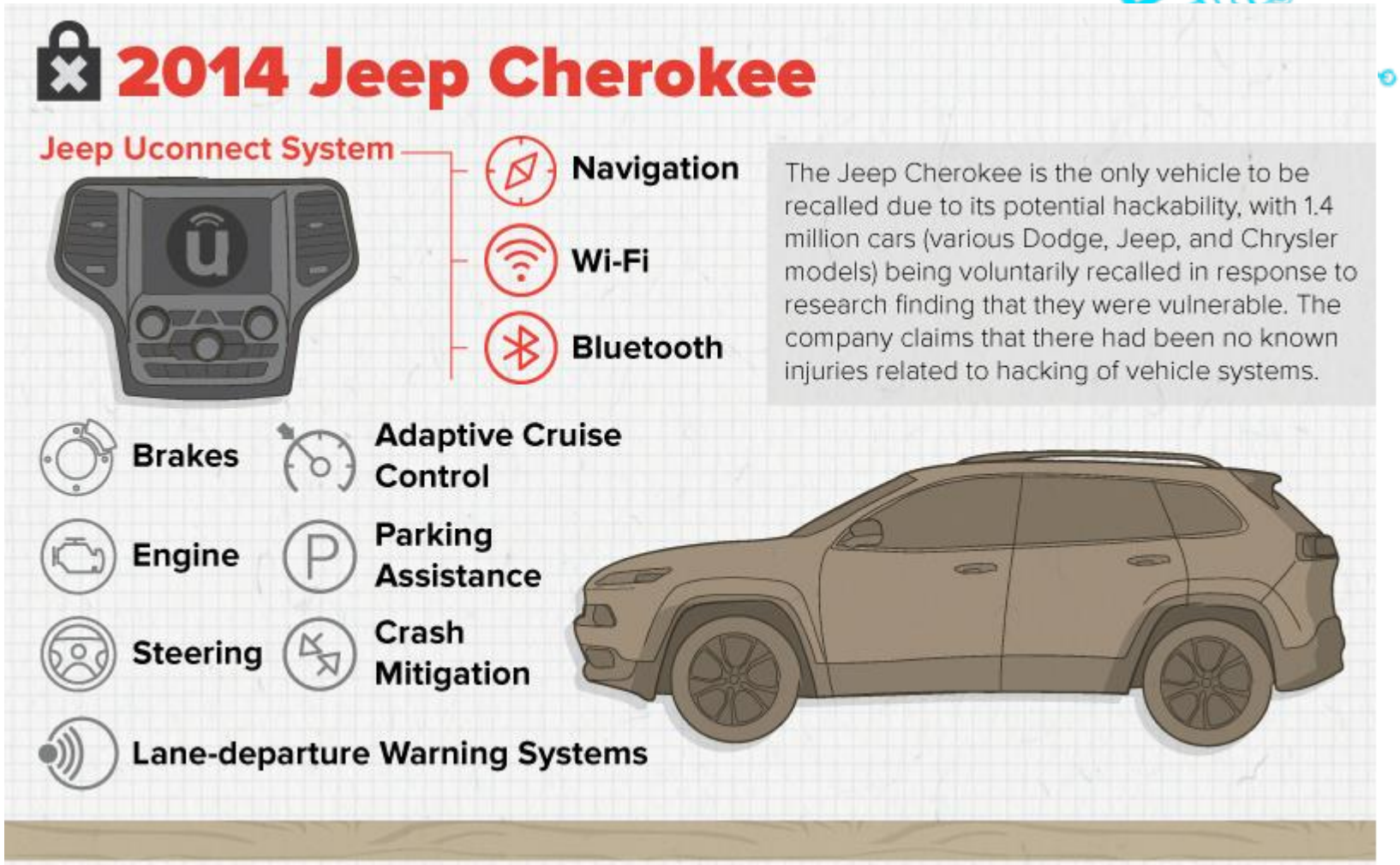
IoT Security Risks

- Physical Ransomware..?
- DDOS Attacks
  - Hackers are actively searching the internet and hijacking smart door/building access control systems, which they are using to launch DDoS attacks, according to firewall company SonicWall…(due to the type of exploit) meaning it can be exploited remote, even by low-skilled attackers without any advanced technical knowledge…these vulnerable systems can also be used as entry points into an organization's internal networks.

https://www.wired.com/2017/05/watch-hackers-sabotage-factory-robot-arm-afar/

IoT Security Risks

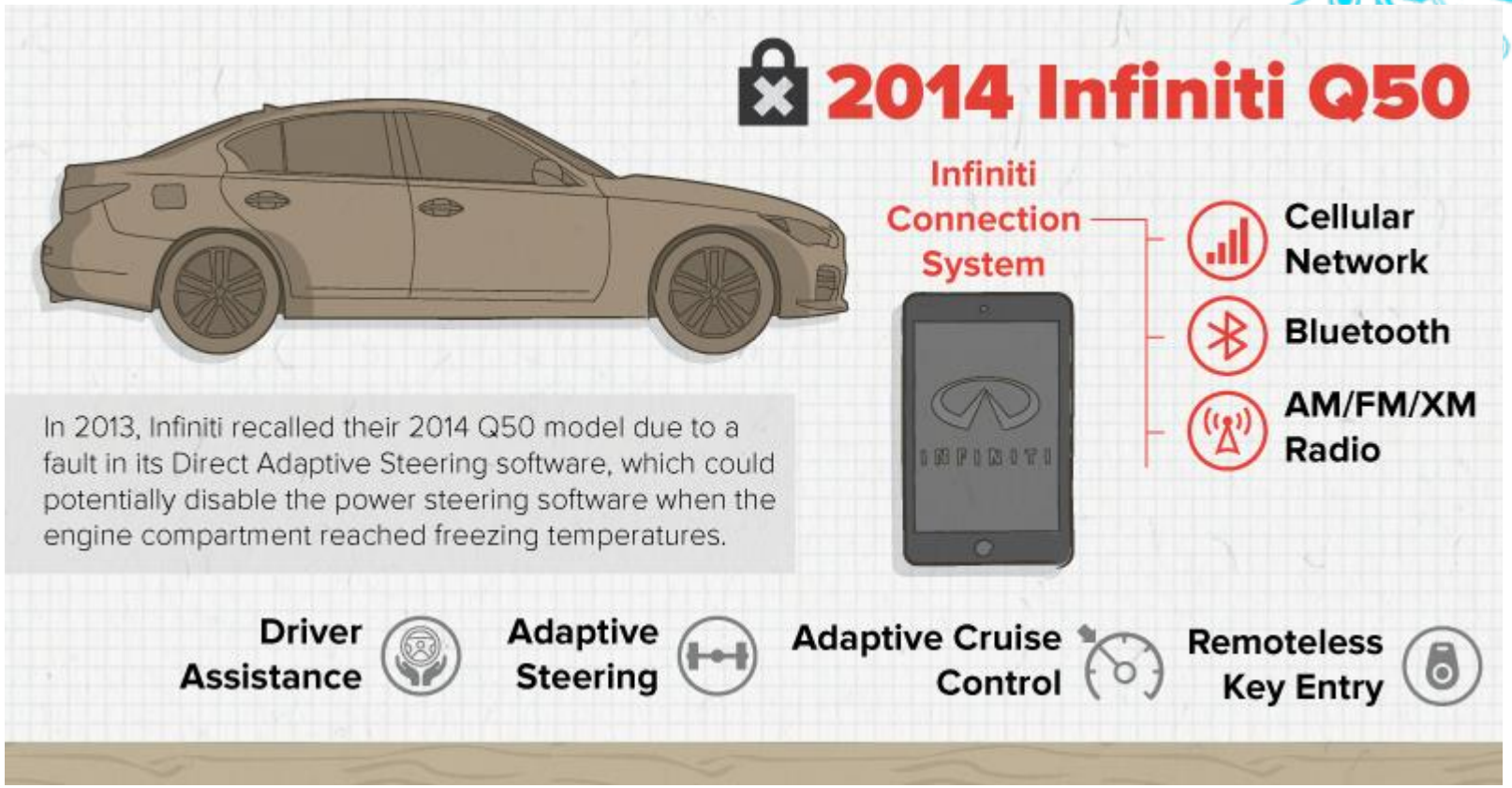
- Hacking
  - Connected vehicles



https://www.envistaforensics.com/news/the-most-hackable-cars-on-the-road-1

IoT Security Risks

- Hacking
  - Connected vehicles



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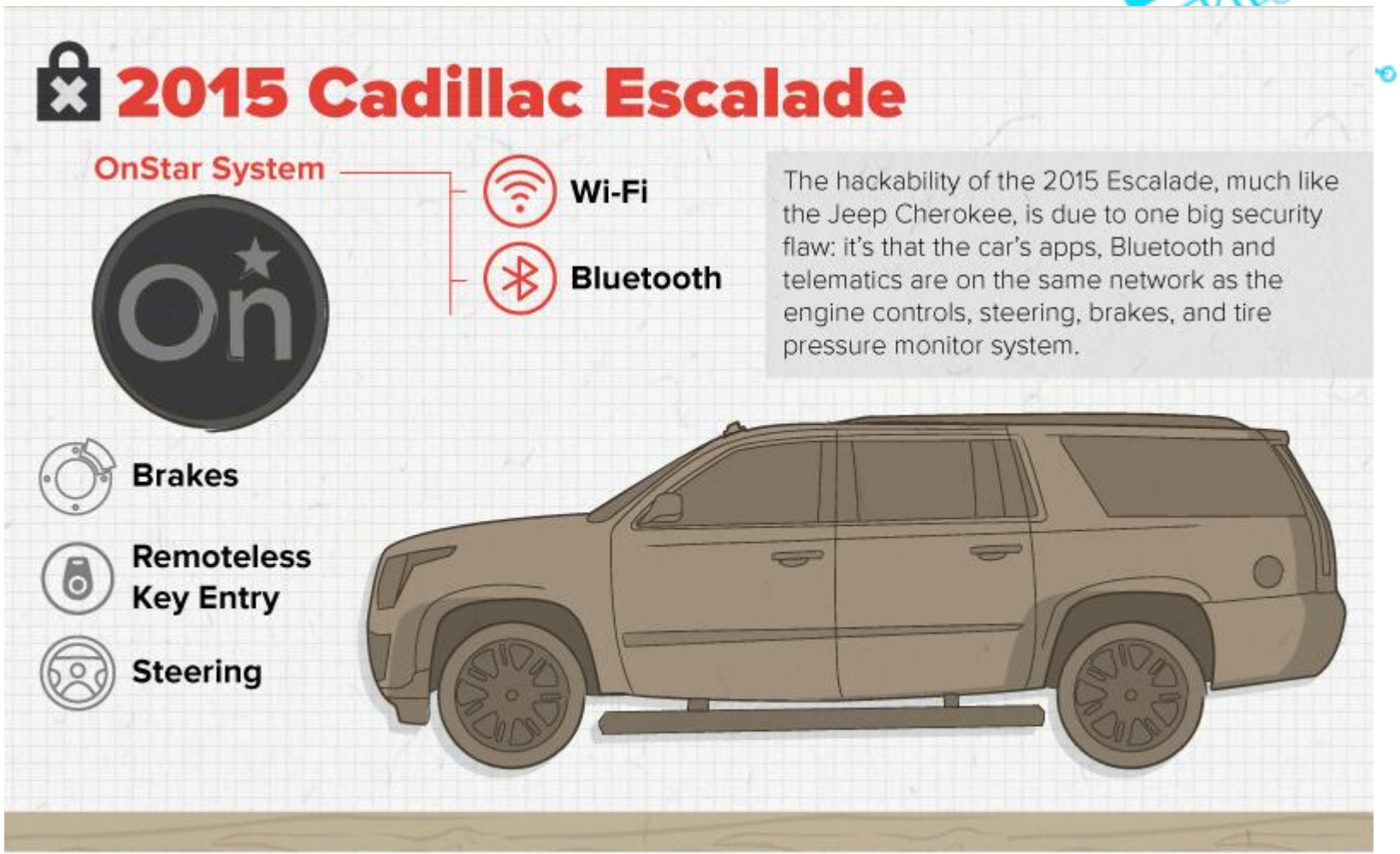
IoT Security Risks

- Hacking
  - Connected vehicles



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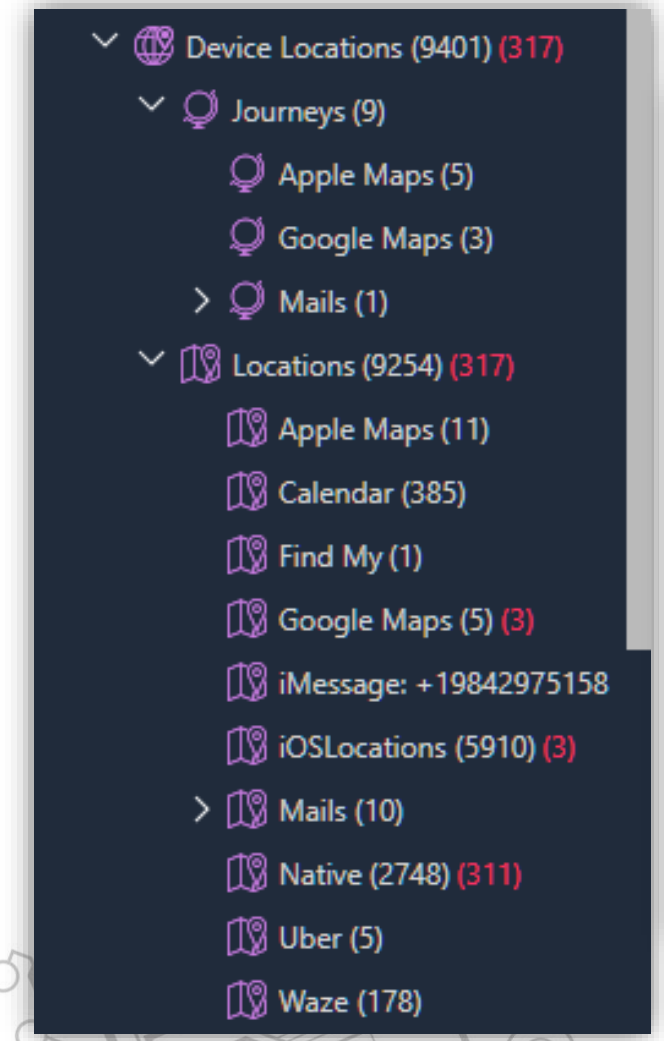
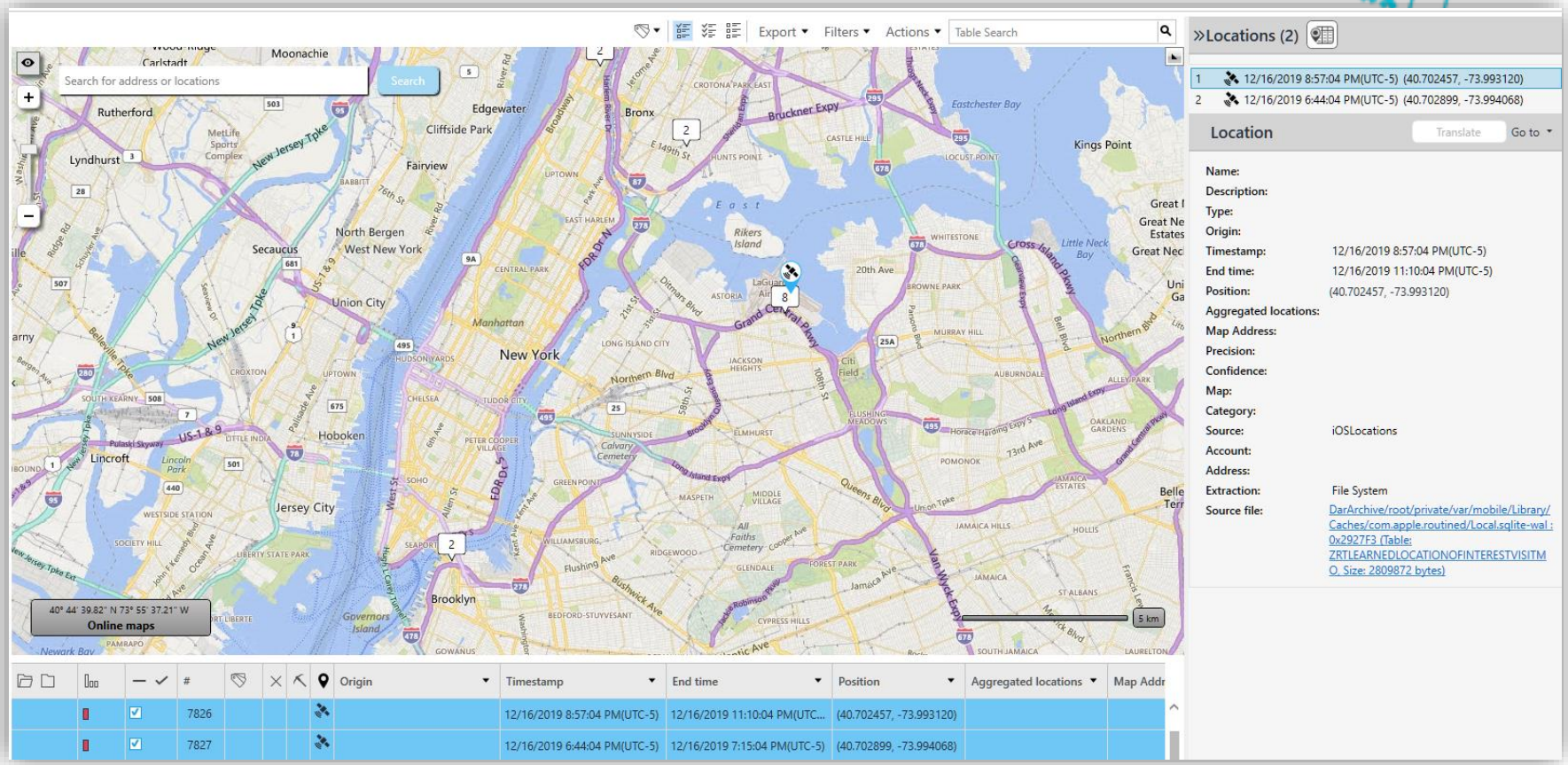
Location Data

- Location data from multiple sources within the cell phone





Application Events - CarPlay

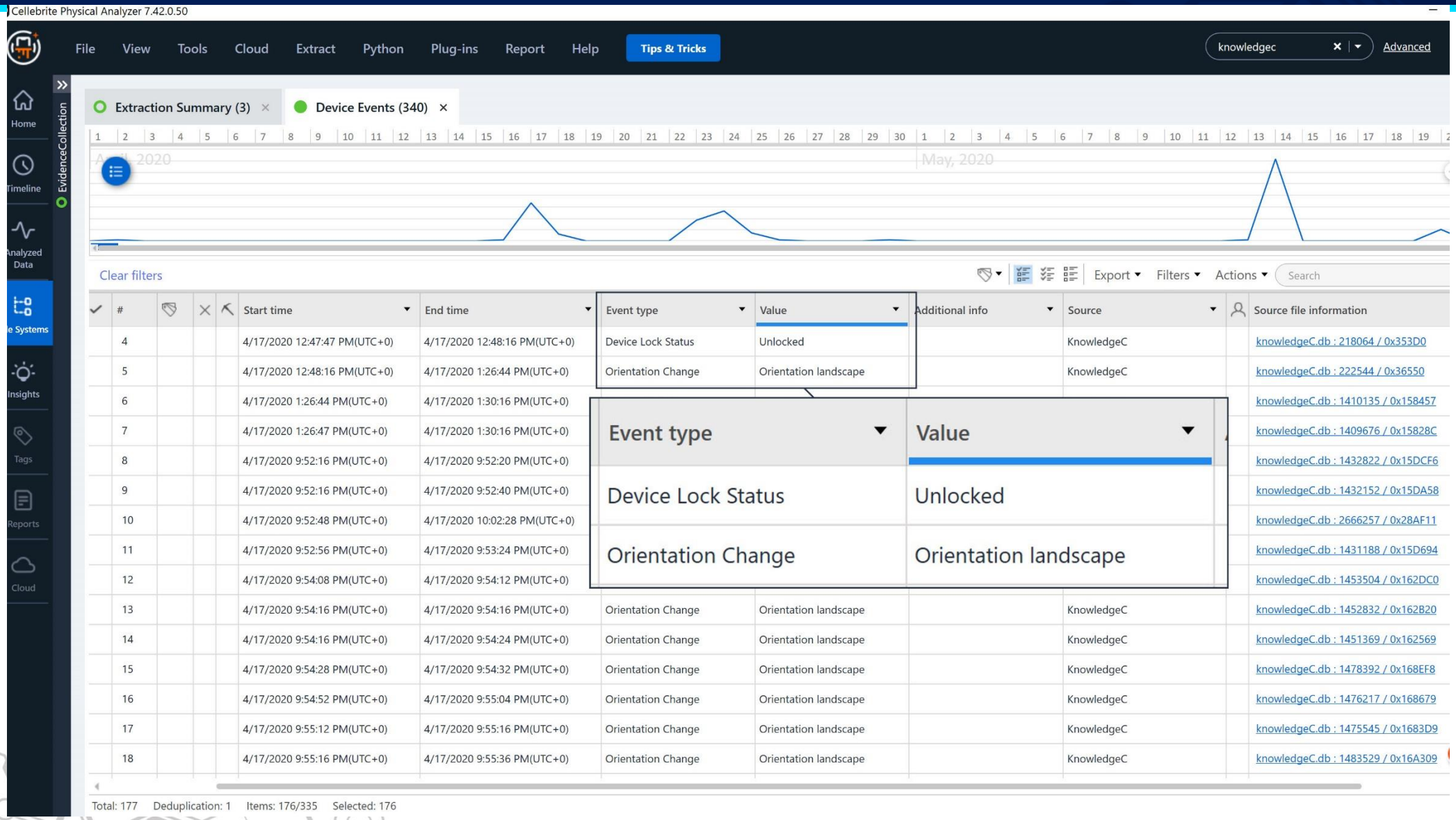
Identifier	Start time	End time
com.apple.CarPlaySplashScreen	7/28/2020 3:27:38 PM(UTC-5)	7/28/2020 3:27:38 PM(UTC-5)
com.apple.CarPlaySplashScreen	7/28/2020 4:44:02 PM(UTC-5)	7/28/2020 4:44:13 PM(UTC-5)
com.apple.CarPlaySplashScreen	7/28/2020 6:22:30 PM(UTC-5)	7/28/2020 6:22:38 PM(UTC-5)
com.apple.CarPlaySplashScreen	7/28/2020 9:06:25 PM(UTC-5)	7/28/2020 9:06:35 PM(UTC-5)
com.apple.CarPlaySplashScreen	7/29/2020 6:34:03 AM(UTC-5)	7/29/2020 6:34:14 AM(UTC-5)
com.apple.CarPlaySplashScreen	7/30/2020 6:36:57 AM(UTC-5)	7/30/2020 6:37:07 AM(UTC-5)
com.apple.CarPlaySplashScreen	7/30/2020 2:53:32 PM(UTC-5)	7/30/2020 2:53:45 PM(UTC-5)

The screen activates on connecting an iPhone via USB. (Some cars can use Bluetooth.)

Application Events – iPhone

Identifier	Start time	Additional info
com.apple.mobilephone	7/30/2020 7:20:16 AM(UTC-5)	Launch reason: com.apple.SpringBoard.transitionReason.homescreen
com.apple.InCallService	7/30/2020 7:20:18 AM(UTC-5)	
com.apple.InCallService	7/30/2020 7:20:38 AM(UTC-5)	Launch reason: com.apple.SpringBoard.backlight.transitionReason.idleTimer
com.apple.InCallService	7/30/2020 7:20:54 AM(UTC-5)	Launch reason: com.apple.SpringBoard.backlight.transitionReason.liftToWake
com.apple.InCallService	7/30/2020 7:20:54 AM(UTC-5)	
com.apple.mobilephone	7/30/2020 7:20:59 AM(UTC-5)	Launch reason: com.apple.SpringBoard.transitionReason.systemgesture
com.pandora	7/30/2020 7:21:07 AM(UTC-5)	Launch reason: com.apple.SpringBoard.transitionReason.homescreen
com.pandora	7/30/2020 7:21:30 AM(UTC-5)	Launch reason: com.apple.SpringBoard.backlight.transitionReason.idleTimer
com.pandora	7/30/2020 7:25:02 AM(UTC-5)	Launch reason: com.apple.SpringBoard.transitionReason.systemgesture

Device Events – User Interactions



Examination of Plaintiff's Phone

- Timelines

Time	Category	Item
11:48:44 AM(UTC-6)	DB	Phone (dialer.db)
11:48:44 AM(UTC-6)	Text File	com.android.dialer.xml
11:48:47 AM(UTC-6)	Picture	1841 task thumbnail.DELETED.png
11:48:55 PM(UTC-6)	E-Mail	Received E-Mail from [redacted] (Assistant Services)
11:49:17 AM(UTC-6)	SMS From: [redacted] Mother	Ohhhh, well if it can be gotten for less than$5 a sheet it might be worth it, but i don't think This truck could haul it all at once and 2 trips would probably break even with $12 delivered
11:49:17 AM(UTC-6)	SMS From: [redacted] Mother	Ohhhh, well if it can be gotten for less than$5 a sheet it might be worth it, but i don't think This truck could haul it all at once and 2 trips would probably break even with $12 delivered
11:51:02 AM(UTC-6)	Text File	rti.mqtt.counter.MqttLite.tp.DELETED.xml
11:52:23 PM(UTC-6)	Text File	event data [redacted]
11:55:47 AM(UTC-6)	Text File	BattStatsPrefs.DELETED 1.xml
11:55:48 AM(UTC-6)	Text File	com.google.android.gms.auth.devicesignals.DeviceSignalsStore.DELETED.xml
11:55:48 AM(UTC-6)	Text File	com.google.android.gms.tapandpay.service.TapAndPayServiceStorage.DELETED.xml
11:55:48 AM(UTC-6)	Text File	settings secure.DELETED.xml
11:56:14 AM(UTC-6)	Picture	1843 task thumbnail.png
11:59:00 AM(UTC-6)	Cookie: E-Mail	mail.google.com
11:59:00 AM(UTC-6)	Cookie: E-Mail	mail.google.com
11:59:00 AM(UTC-6)	Cookie: E-Mail	mail.google.com
11:59:00 AM(UTC-6)	DB	Gma l (Cookies)
11:59:02 PM(UTC-6)	Text File	AnalyticsPlatformPrefsFile.xml
11:59:02 PM(UTC-6)	Text File	AnalyticsPlatformPrefsFile.DELETED.xml
11:59:39 AM(UTC-6)	Text File	Account[redacted].DELETED.xml
11:59:58 AM(UTC-6)	Text File	com.google.android.gms.auth.authzen.cryptauth.DeviceStateSyncManager.xml
12:00:01 AM(UTC-6)	Text File	com.motorola.motodisplay.analytics.MD BREATHS.DELETED.xml
12:00:01 AM(UTC-6)	Text File	com.motorola.motodisplay.analytics.MD NOTIF.DELETED.xml
12:00:01 AM(UTC-6)	Text File	com.motorola.motodisplay.analytics.TOUCH.DELETED.xml
12:00:05 AM(UTC-6)	Text File	rti.mqtt.counter.MqttLite.tp.DELETED 1.xml
12:00:05 AM(UTC-6)	Text File	DebugAnalytics.DELETED 1.xml
12:00:20 PM(UTC-6)	Picture	IMG [redacted] 120016201.jpg
12:00:23 PM(UTC-6)	DB	Google Photos (media store extras)
12:00:23 PM(UTC-6)	Picture	IMG [redacted] 120021204.jpg
12:00:23 PM(UTC-6)	Text File	com.google.android.apps.photos preferences.DELETED 4.xml
12:00:24 AM(UTC-6)	Text File	BattStatsPrefs.DELETED 2.xml
12:00:24 PM(UTC-6)	Picture	IMG [redacted] 120022835.jpg
12:00:24 PM(UTC-6)	Text File	com.google.android.apps.photos preferences.DELETED 3.xml
12:00:25 PM(UTC-6)	DB	Google+ (trash.db)
12:00:25 PM(UTC-6)	Text File	com.google.android.apps.photos preferences.DELETED 2.xml
12:00:25 PM(UTC-6)	Text File	com.google.android.apps.photos preferences.DELETED 5.xml
12:00:26 PM(UTC-6)	Text File	com.google.android.apps.photos preferences.xml
12:00:26 PM(UTC-6)	Text File	com.google.android.apps.photos preferences.DELETED.xml
12:00:26 PM(UTC-6)	Text File	com.google.android.apps.photos preferences.DELETED 1.xml
12:00:58 PM(UTC-6)	Text File	MailAppProvider.DELETED 1.xml
12:00:59 AM(UTC-6)	Text File	Pmaps.xml
12:00:59 PM(UTC-6)	Text File	Account[redacted].DELETED 1.xml
12:00:59 PM(UTC-6)	Text File	MailAppProvider.DELETED.xml

Case Study: Distracted Driving

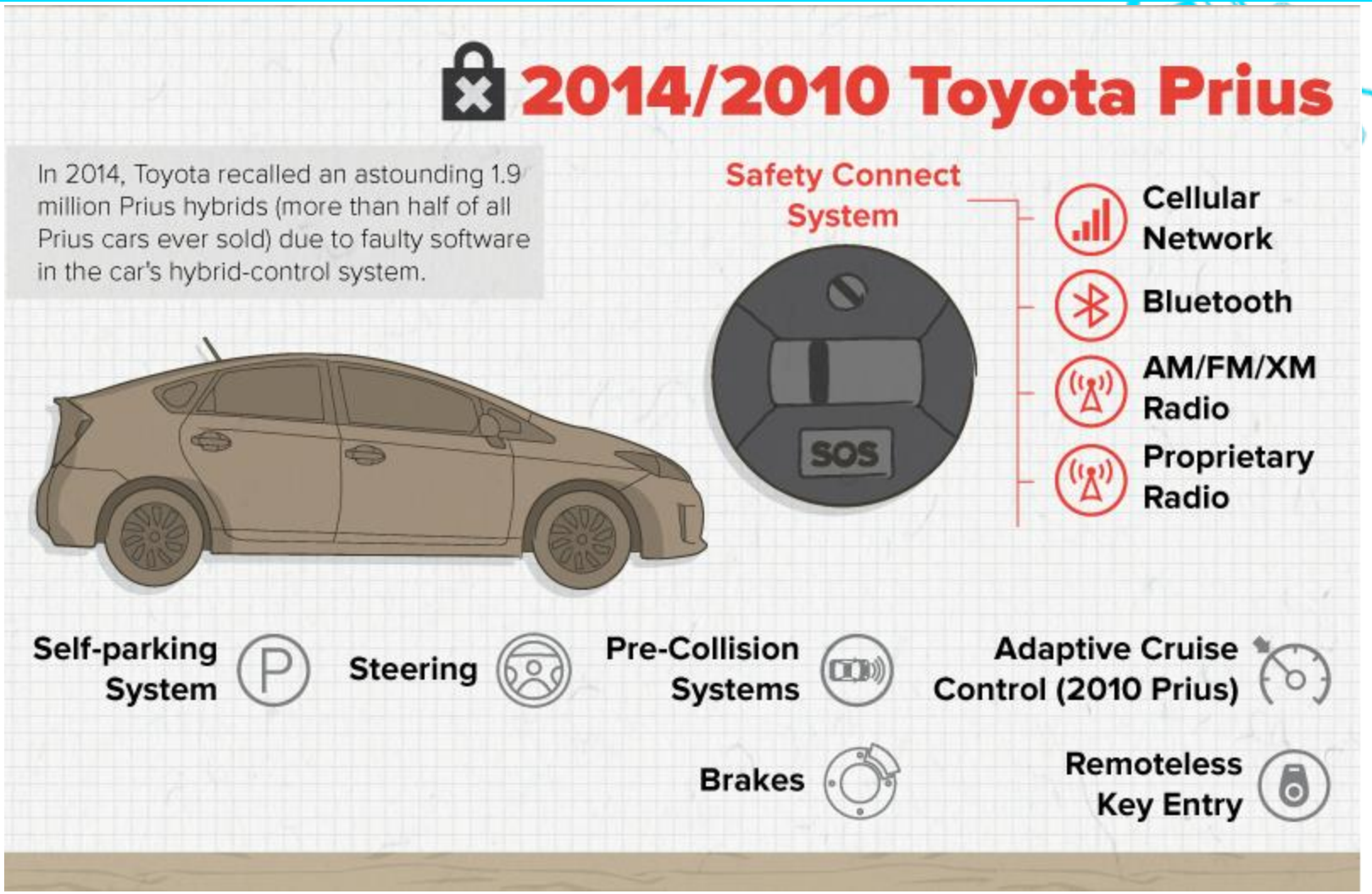
- Detailed timeline analysis at point of impact

Case Study: Distracted Driving

- Searching at time of impact

IoT Security Risks

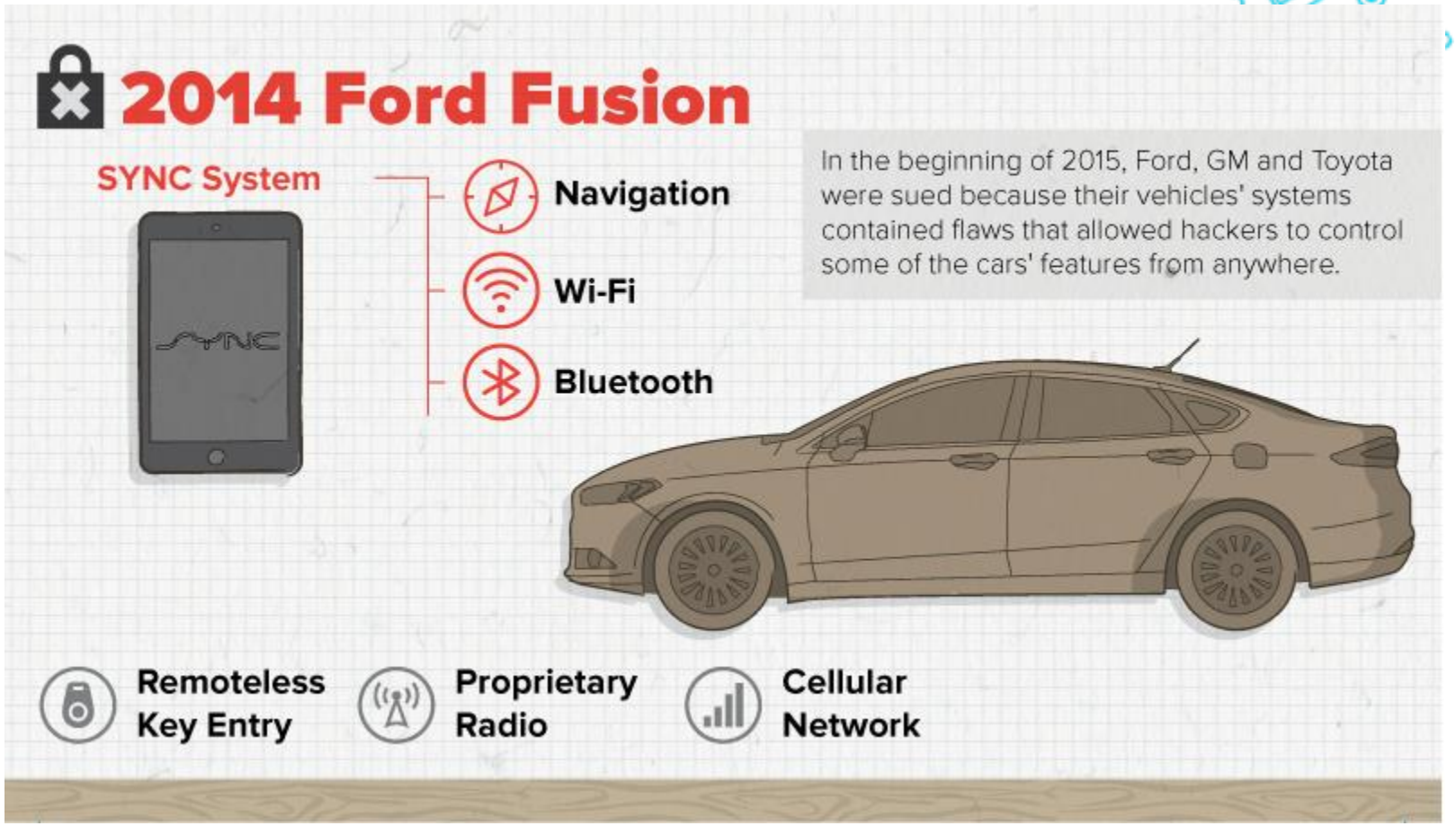
- Hacking
  - Connected vehicles



https://www.envistaforensics.com/news/the-most-hackable-cars-on-the-road-1

IoT Security Risks

- Hacking
  - Connected vehicles



https://www.envistaforensics.com/news/the-most-hackable-cars-on-the-road-1

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DATA SILOS

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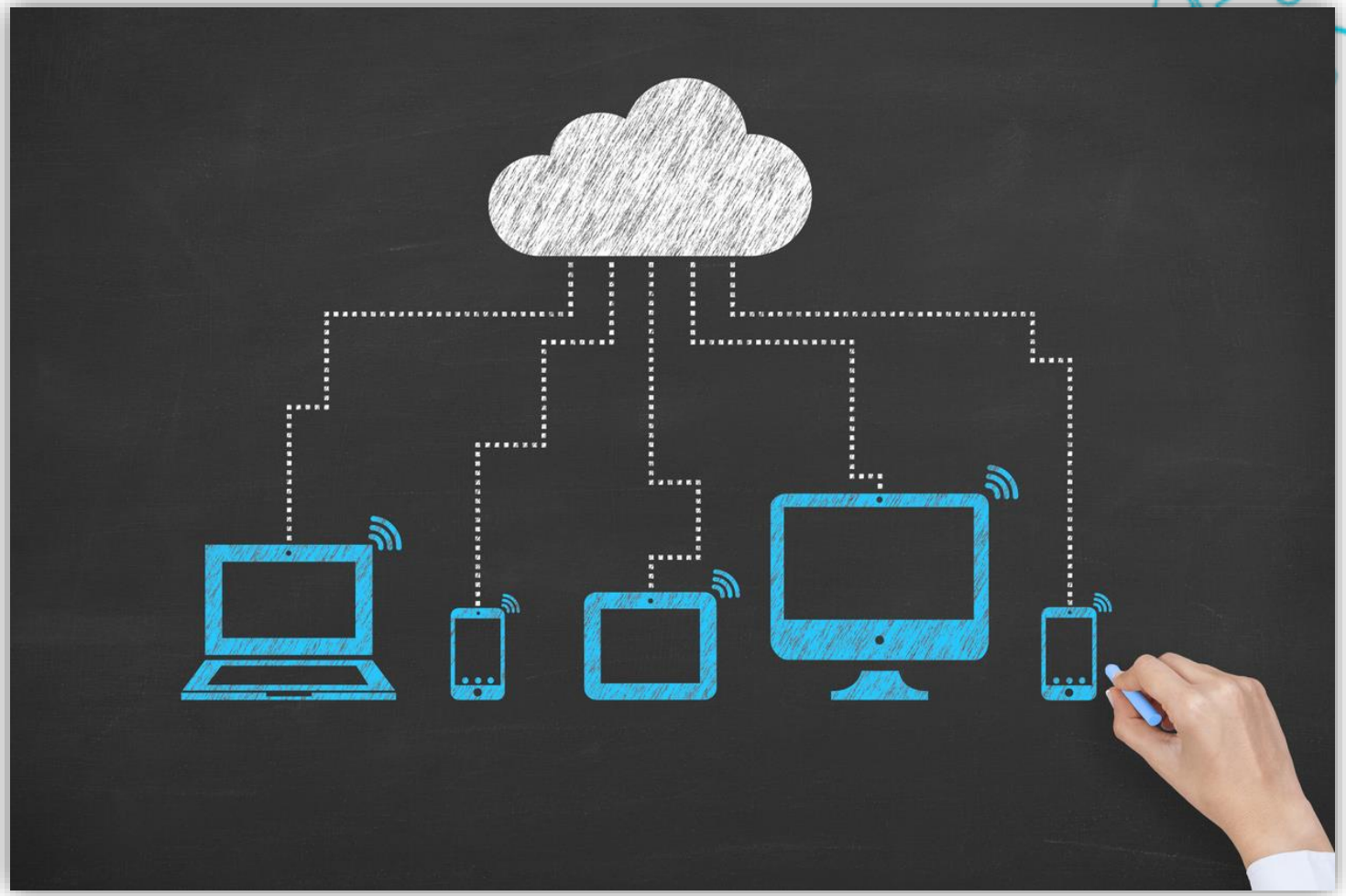
Data Silos

- IoT Devices lack
  - Processing power
  - Storage capacity
  - Transmission capabilities
- Data silos are
  - Computers
  - Cell phones
  - Online accounts



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WEARABLE DEVICES

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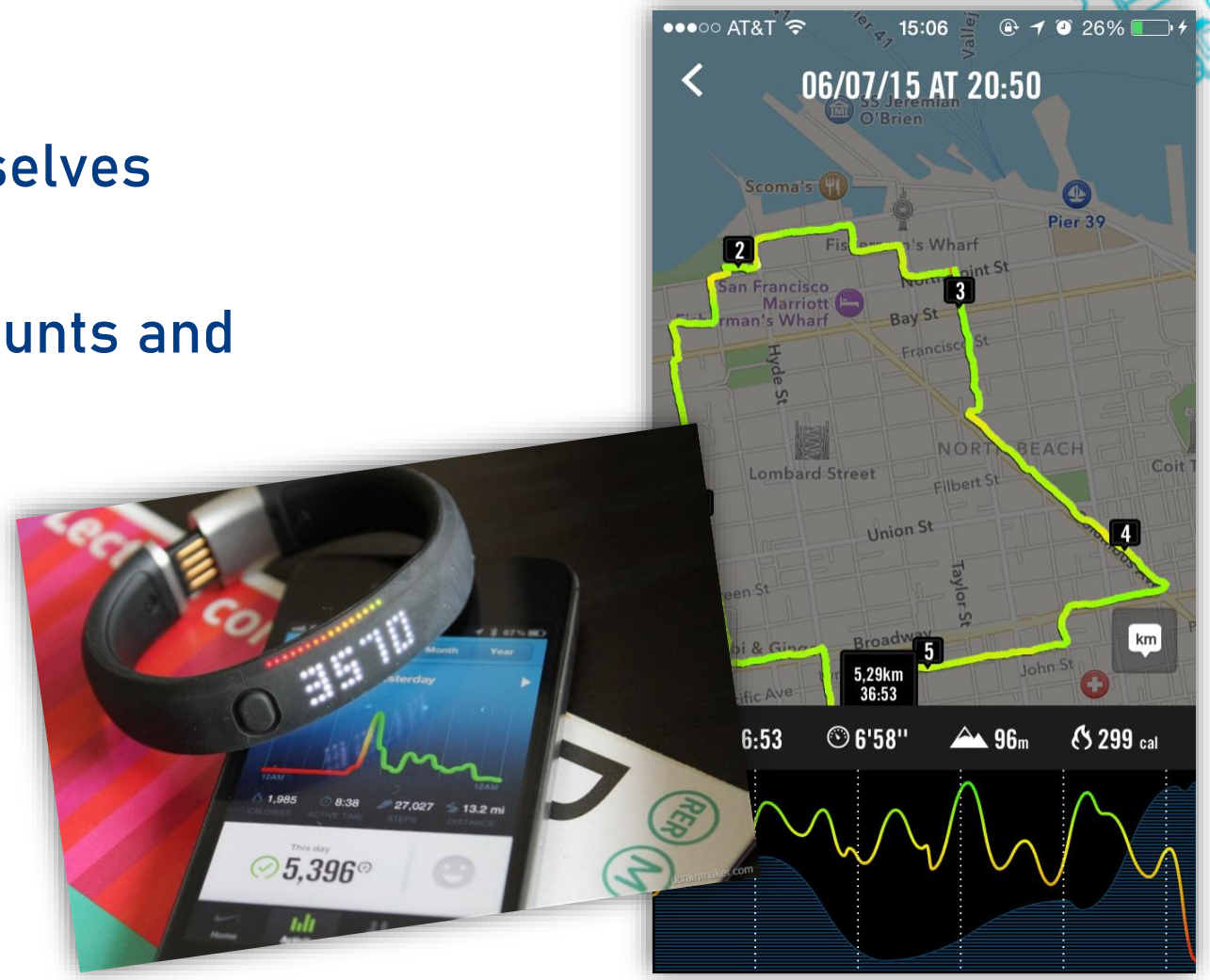
IoT Investigations

- Wearable Technology
  - Cell Phone Forensics
    - Data contained in apps themselves
  - Computer Forensics
    - Data contained in online accounts and local computer
  - Wearable Forensics
    - Data contained on actual wearable



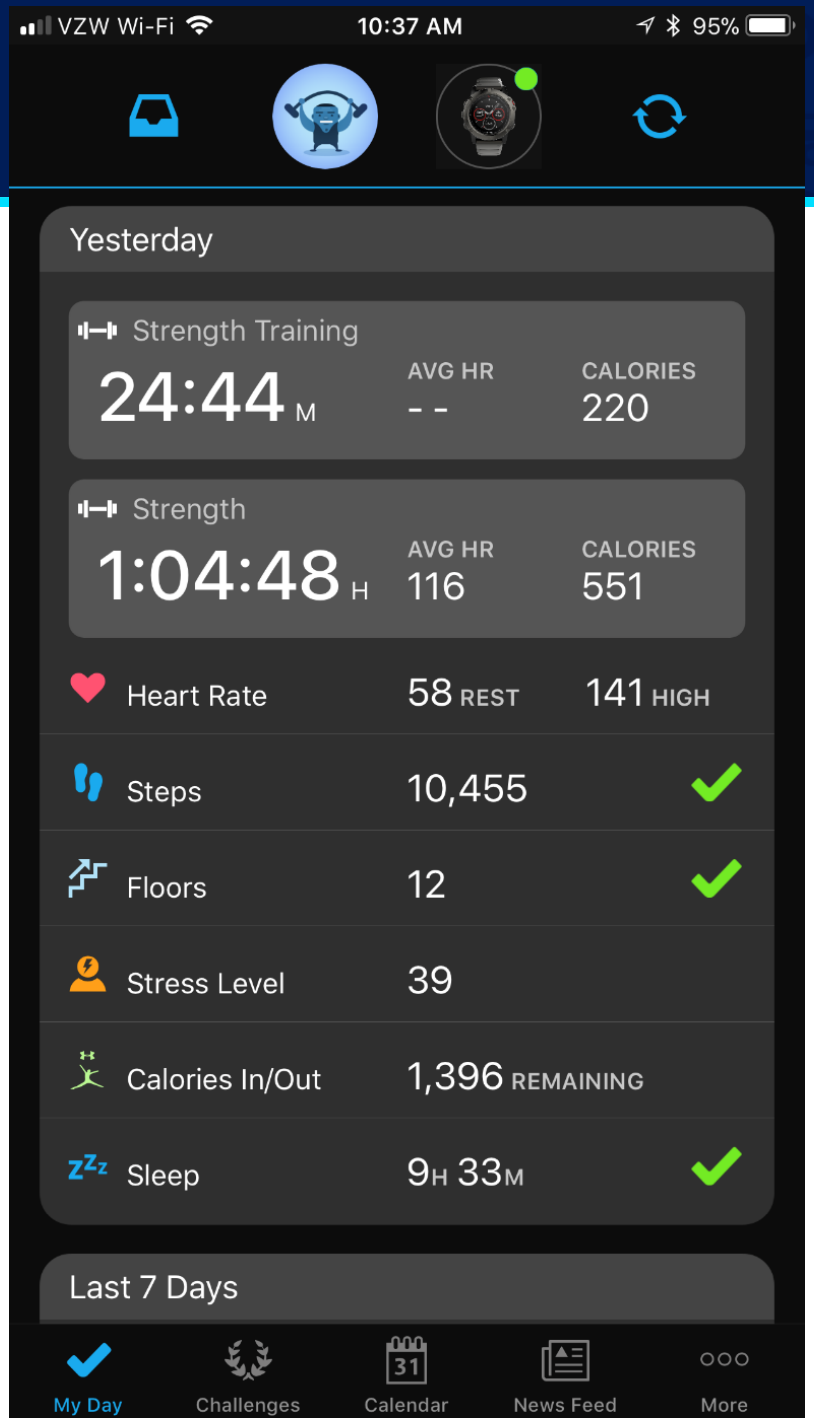
IoT Devices

- Garmin Fenix 5X
  - Unlimited timeline of activity / currently 1.5 years.

Image Licensed; (c) Lar

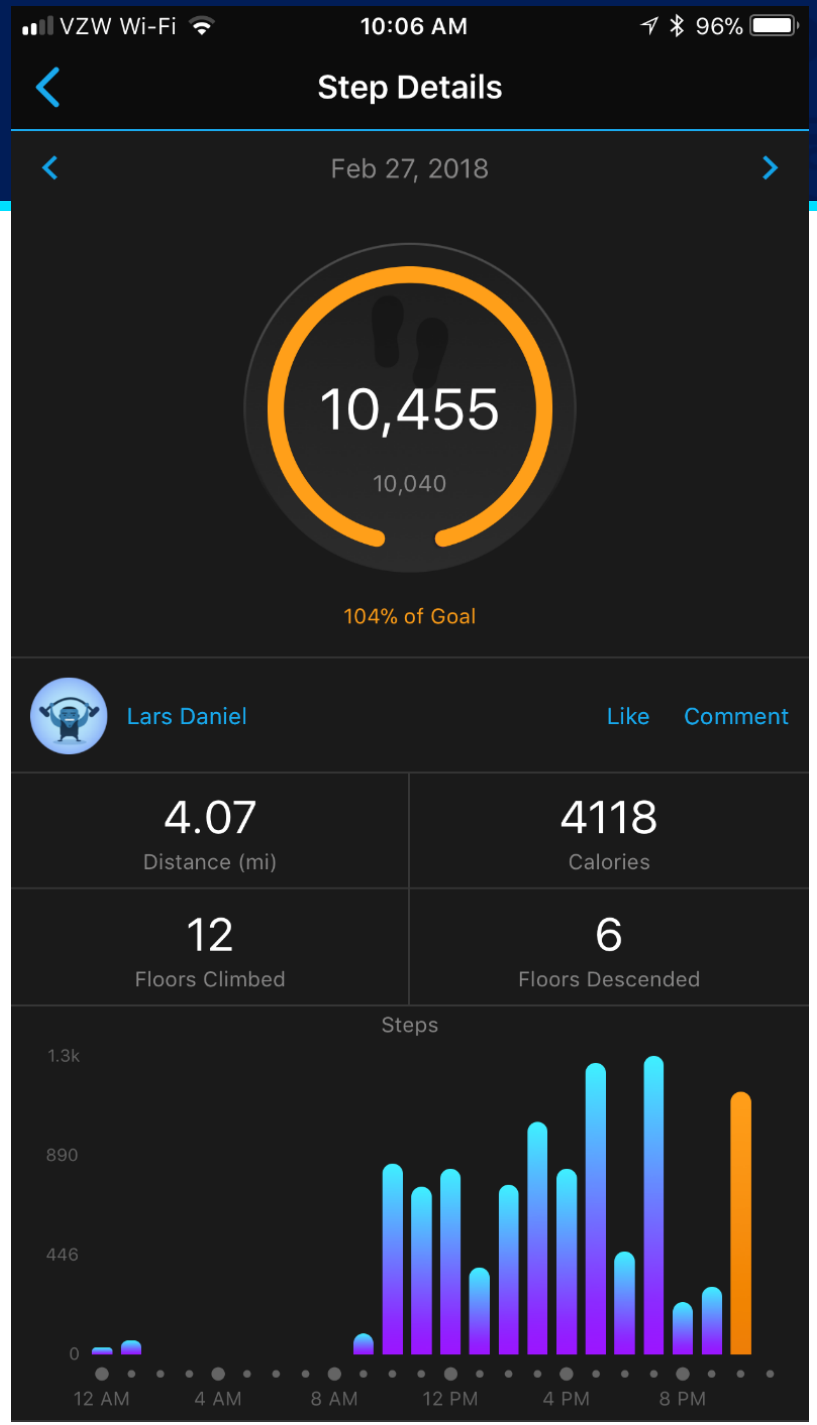
IoT Devices

- Garmin Fenix 5X
  - Tracks almost everything about me



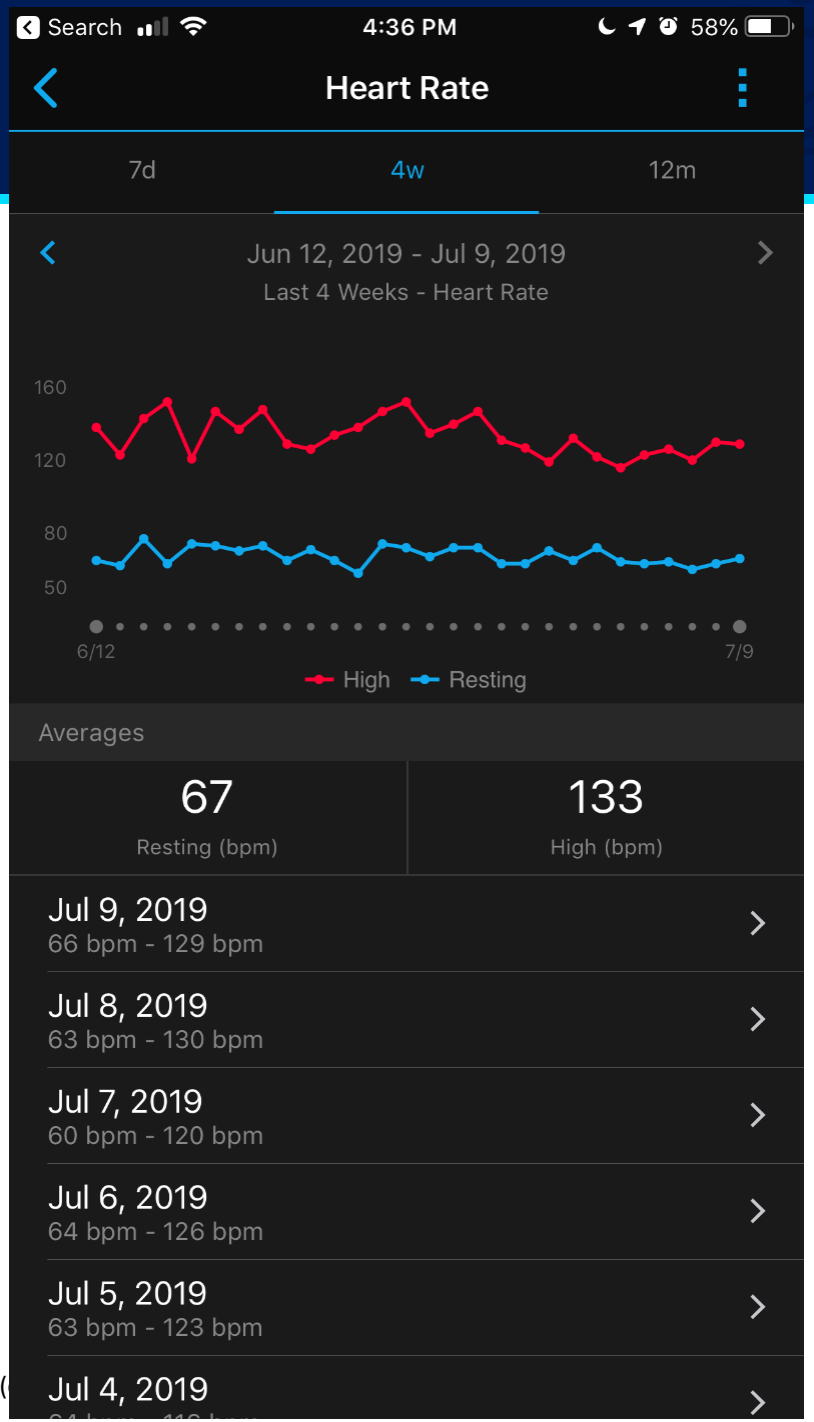
IoT Devices

- Garmin Fenix 5X
  - Tracks my performance metrics
    - Daily steps and when they were taken



IoT Devices

- Garmin Fenix 5X
  - Tracks almost everything about me
    - Down to the minute heartrate tracking



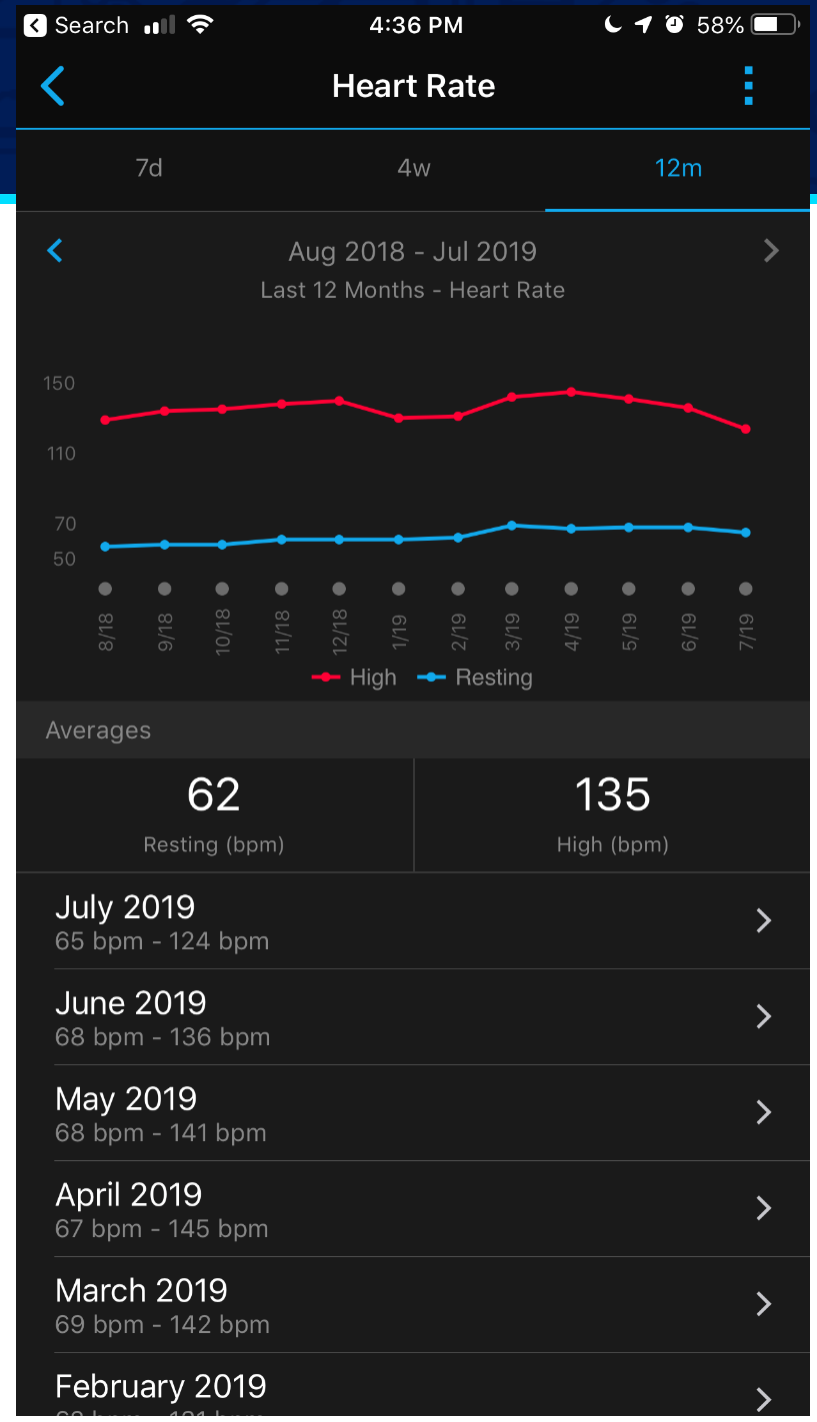
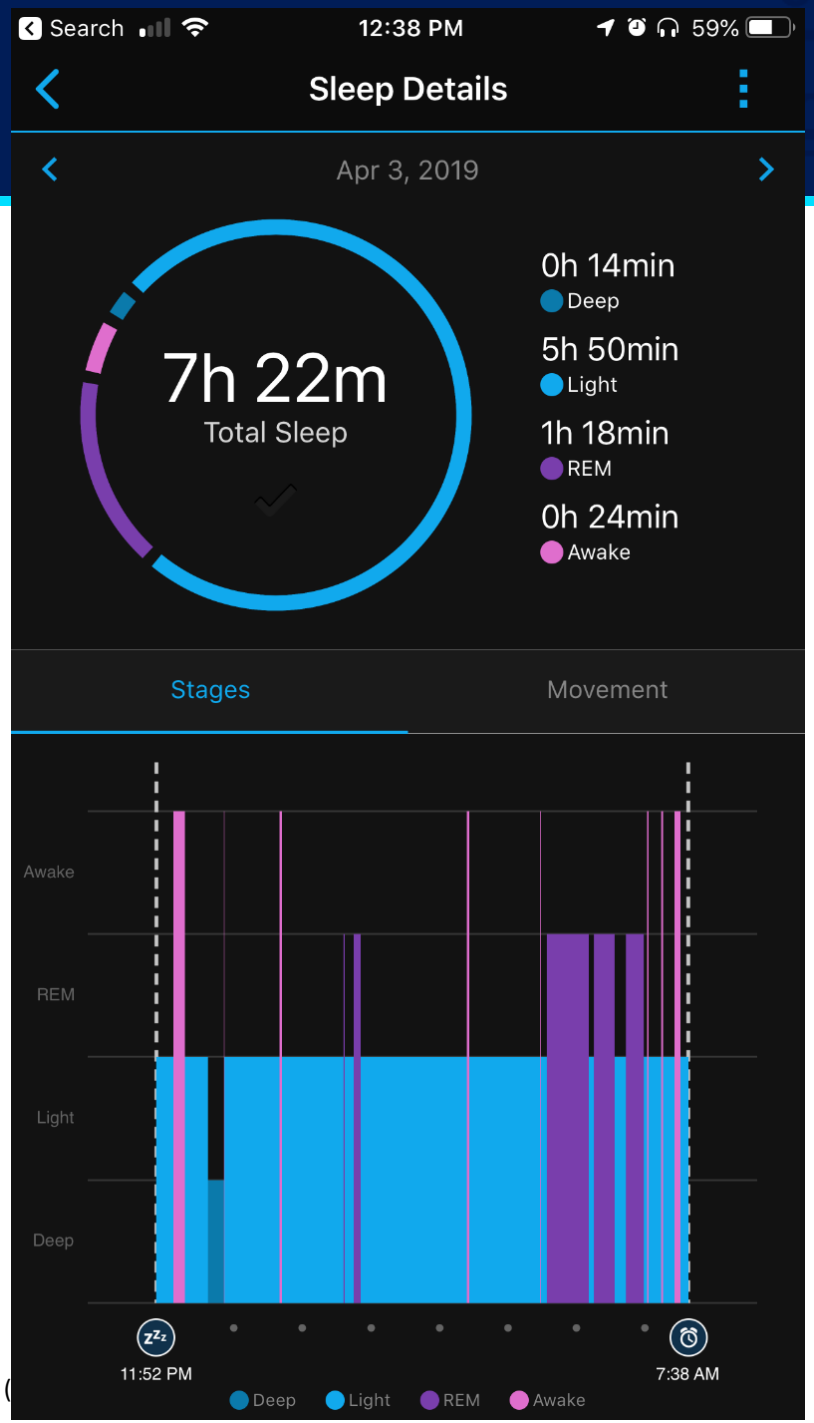


Image Licensed; (

IoT Devices

- Garmin Fenix 5X
  - Tracks sleep down to the minute



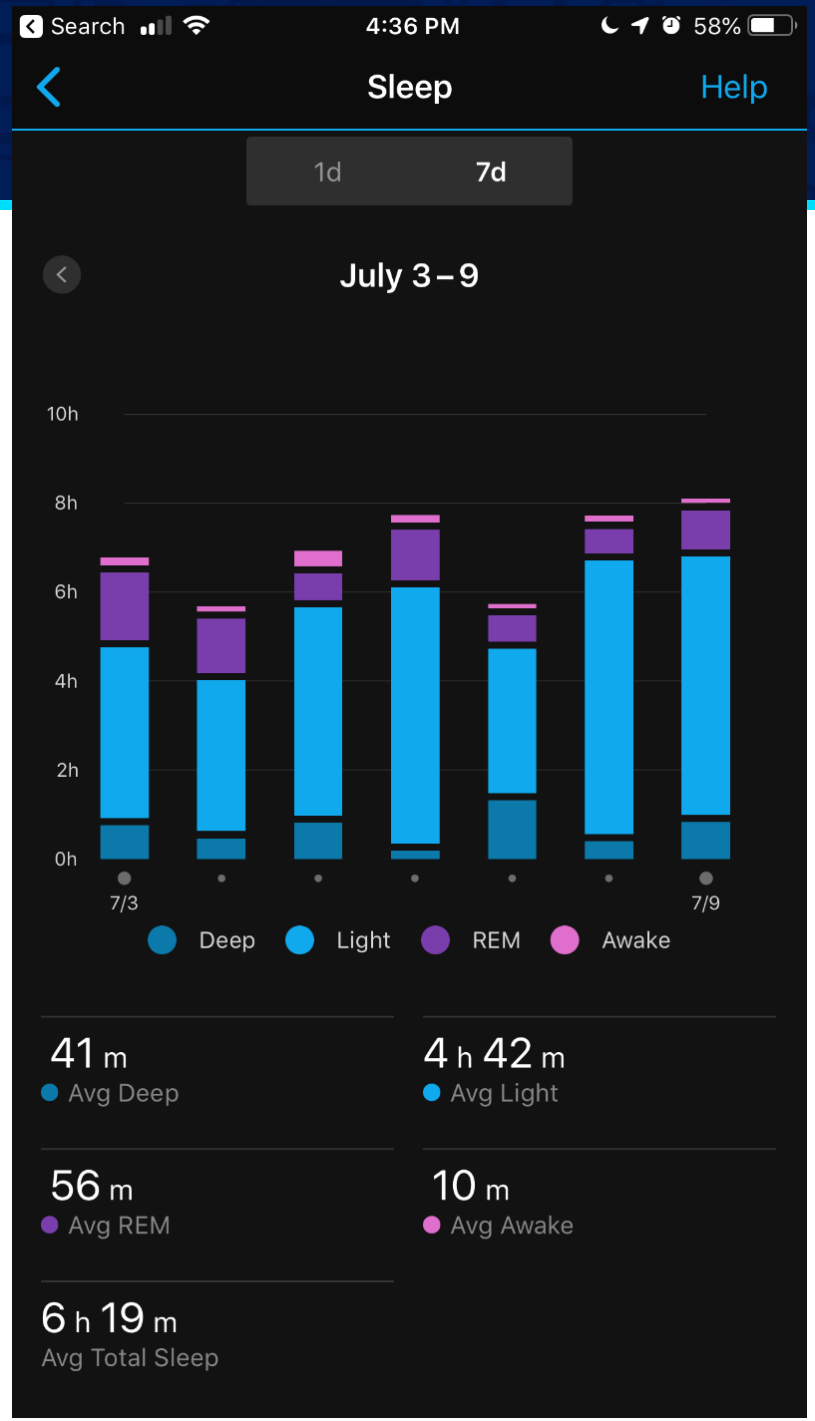


Image Licensed; (

IoT Devices

- Garmin Fenix 5X
  - Tracks almost everything about me
    - Stress analytics based upon heart rate and HRV (heart rate variability)

IoT Devices

- Garmin Fenix 5X
  - Tracks almost everything about me
    - Location activity, routes, maps, saved segments
    - Can contain maps inside the watch for almost the entire world

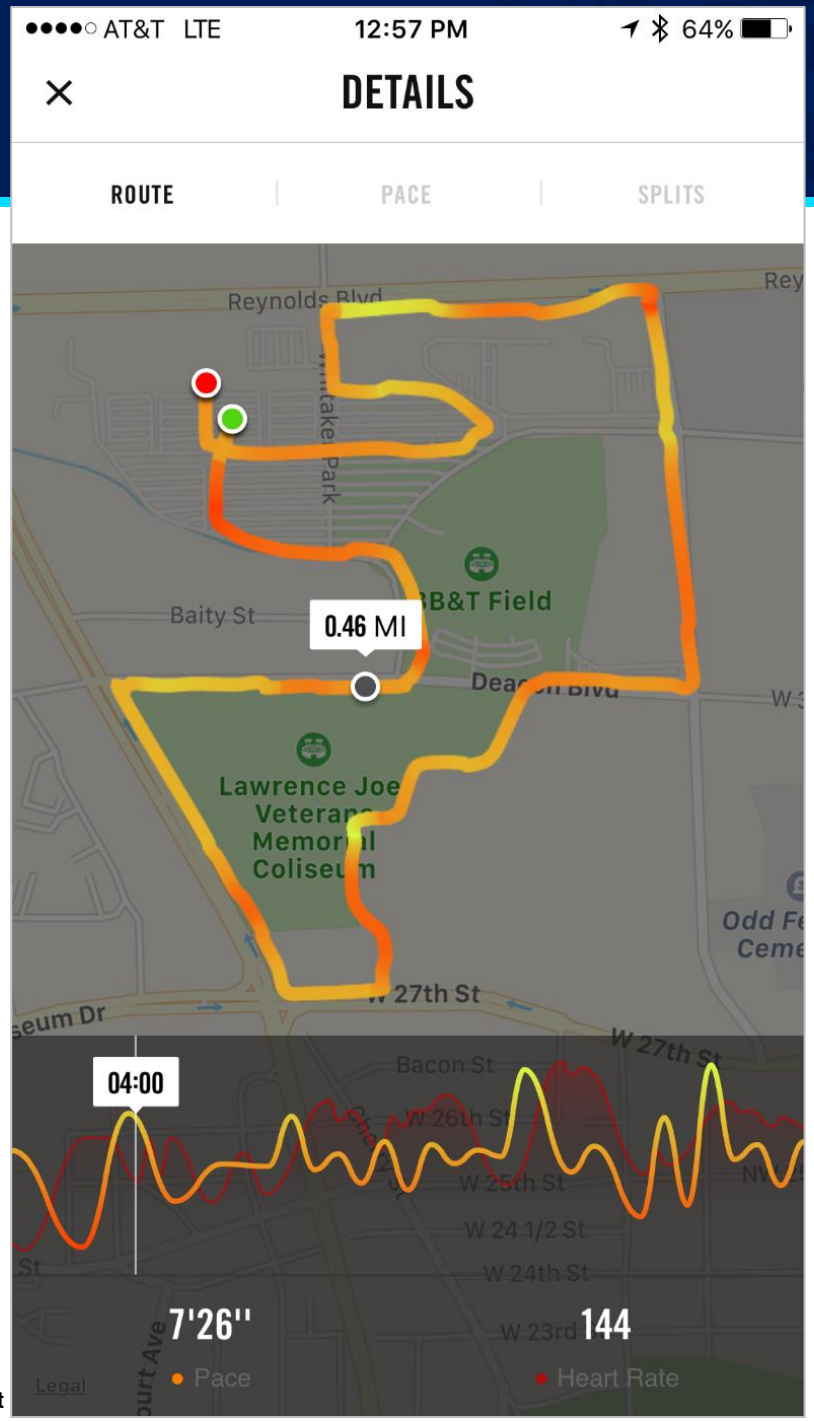
Fitness Wearables

- Fitness wearable (FitBit)
  - Victims husband told police that he was at home fighting off an intruder when his wife returned from the gym no later than 9 am. According to the husband, the intruder then shot his wife, tied him up, and ran out of the house. The police searched the wife's fitness wearable. Its data showed that the wife was still moving about the home a distance of 1,217 feet between 9:18 am and 10:05 am…he was having an affair and attempting to cash in on wife's life insurance

https://www.crowelldatalaw.com/2017/07/recent-iot-device-cases/.

Border Crossing

- Did defendant cross the border?
  - Data acquired from online account and the cell phone



Running at time of incident?

- Was suspect using treadmill?
  - Workout can be created after the fact – will be missing some data.

Did cyclist slow down?

- IoT Devices
  - Data Silo = Phone Application

Vector™ 3/3S

Measure power at the pedal to gauge your performance.

fēnix® 5 Series

Premium multisport GPS watches available in three sizes and a variety of styles, all featuring wrist-based heart rate

Case Example – Insurance Fraud

- Scenario
  - Employee is on business trip out of Country in Europe. Last night of the week stay, he explores the town and upon his return to work the following week the company notices large transactions on his corporate card. Prior to this time, no report of issues were made to the company. When questioned, the Employee advises he was the victim of a kidnapping and the charges were made when his card was stolen and used during that night.

Case Example – Insurance Fraud

- Scenario
  - Advised his card was compromised but not lost.
  - Alleges to be held for 6+ hours through the night.
  - Vivid details about the attackers, (action movie like)
  - No report of attack to company or authorities
  - A $100,000.00 claim was made to Insurance over the incident

Case Example – Insurance Fraud

- Evidence
  - We are contacted by SIU to assist in the investigation and complete a examinations
    - Apple Watch
    - iPhone XR
  - They also have videos, financial records and statements to compare detail to.

Case Example – Insurance Fraud

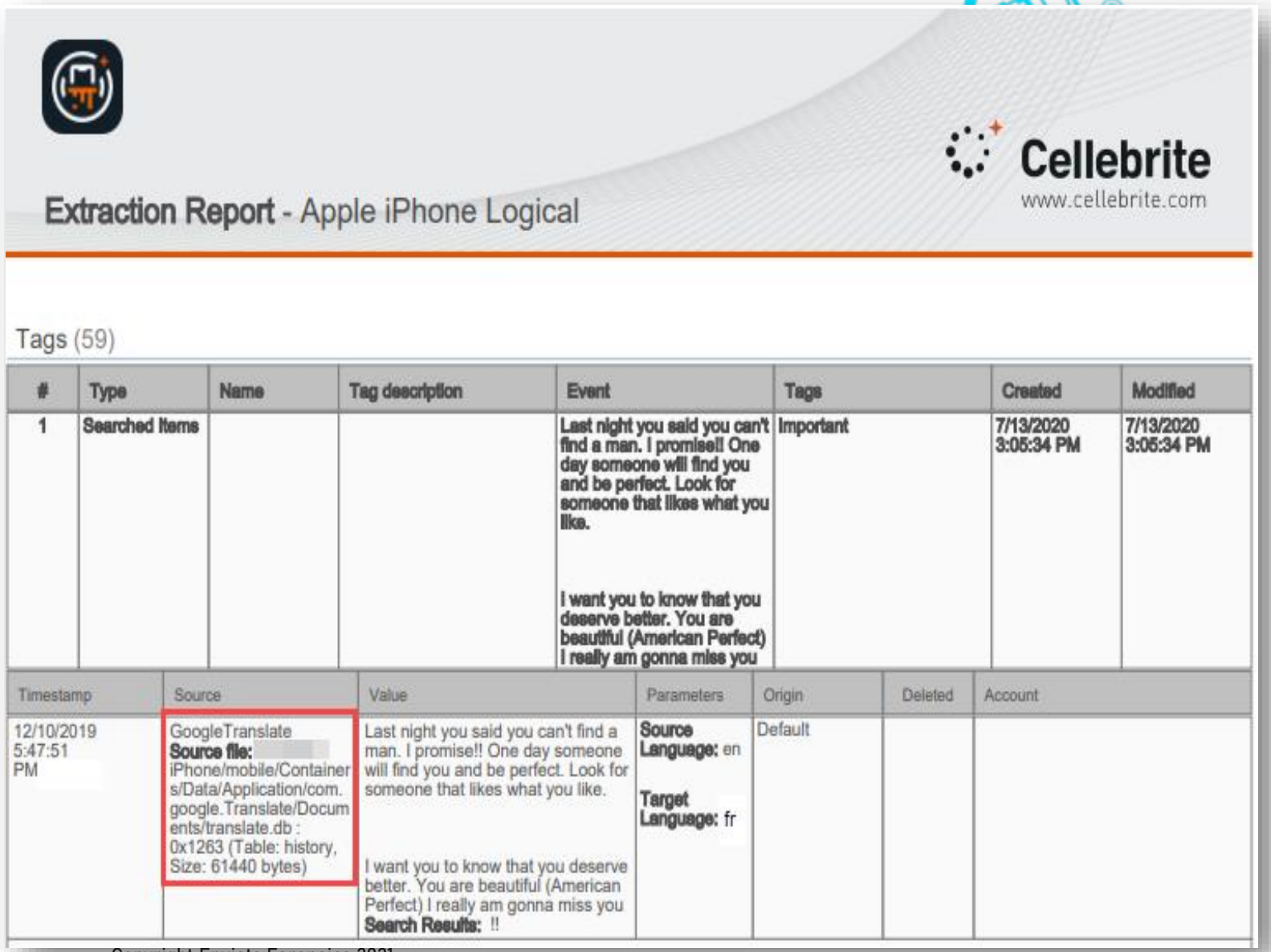
- Analysis
  - The Analysis yielded two critical data types allowing the SIU Investigator to call into question the statements give in the Interviews.
    - The health app on the evening of this incident was very active. Miles worth of steps were logged, contradictory of sitting still for 6+ hours while being held captive.

25	Activities				Important	7/13/2020 3:06:40 PM	7/13/2020 3:06:40 PM

Name	Originates from	Value	Time	Location	Source	Deleted
Steps and Distance	Device	174 Steps 89.90 Meters	**Last Launch:** 12/9/2019 7:19:32 PM(**Start time:** 12/9/2019 7:08:11 PM(**End time:** 12/9/2019 7:14:04 PM((		**Source:** Health **Source file:** iPhone/mobile/Library/Health/healthdb_secure.sqlite : 0x3A6839B (Table: samples, objects, Size: 113782784 bytes)	

Case Example – Insurance Fraud

- Analysis
- Right before taking off from the airport to come home, the employee crafted to messages in google translate, (the app had been removed from the device) to profess his love for the nice lady he spent the evening with “last night”, the evening of the incident.



Extraction Report - Apple iPhone Logical

Cellebrite
www.cellebrite.com

Tags (59)

#	Type	Name	Tag description	Event	Tags	Created	Modified
1	Searched Items			Last night you said you can't find a man. I promise!! One day someone will find you and be perfect. Look for someone that likes what you like. I want you to know that you deserve better. You are beautiful (American Perfect) I really am gonna miss you	Important	7/13/2020 3:05:34 PM	7/13/2020 3:05:34 PM

Timestamp	Source	Value	Parameters	Origin	Deleted	Account
12/10/2019 5:47:51 PM	GoogleTranslate **Source file:** iPhone/mobile/Containers/Data/Application/com.google.Translate/Documents/translate.db : 0x1263 (Table: history, Size: 61440 bytes)	Last night you said you can't find a man. I promise!! One day someone will find you and be perfect. Look for someone that likes what you like. I want you to know that you deserve better. You are beautiful (American Perfect) I really am gonna miss you **Search Results:** !!	**Source Language:** en **Target Language:** fr	Default		

Case Example – Insurance Fraud

- Outcome
  - Now armed with this information, SIU was able to confront the employee and his employer – claim was denied.

ENVISTA FORENSICS

LARRY DANIEL
TECHNICAL DIRECTOR– DIGITAL FORENSICS

MEDICAL DEVICES

INGESTIBLES AND INSERTABLES

DIGITAL FORENSICS //

Medical Ingestibles

- Late 2017
  - US Food and Drug Administration (FDA) approved first digital pill for general human consumption.
    - Part medication delivery system, part IoT device.
    - Inserted within tablet is an ingestible sensor
    - Tracks exact moment pill hits the stomach

https://www.godaddy.com/garage/the-iot-in-healthcare-forget-wearables-now-there-are-ingestibles/

Medical Ingestibles

- Proteus Digital Health
  - Designed to address patient non-compliance
    - 20 to 30 percent of patient prescriptions are never filled.
    - 50 percent of medications for chronic diseases are not taken as prescribed.
    - Typically, only one-half of a full prescription is consumed by the patient.
    - Non-compliance causes approximately 125,000 deaths annually and 10 percent of all hospitalizations.
    - This costs U.S. hospitals somewhere between $100 and $289 billion annually.

https://www.godaddy.com/garage/the-iot-in-healthcare-forget-wearables-now-there-are-ingestibles/

Medical Ingestibles

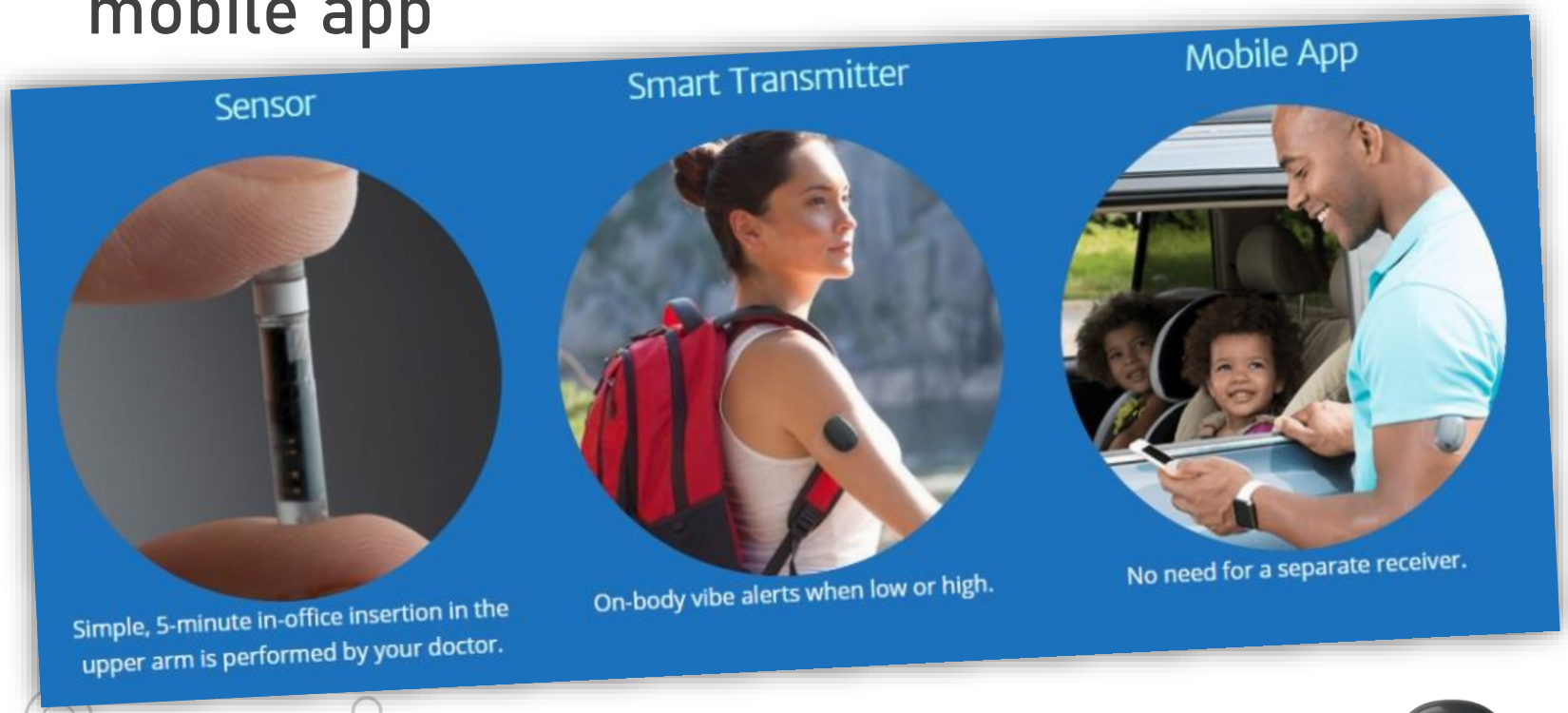
- Proteus Digital Health
  - Proteus Discover

Proteus Discover consists of an ingestible sensor the size of a grain of sand, a small wearable sensor patch, an application on a mobile device and a provider portal. The patient activates Proteus Discover by taking medication with an ingestible sensor. Once the ingestible sensor reaches the stomach, it transmits a signal to the patch worn on the torso. A digital record is sent to the patient's mobile device and then to the Proteus cloud where with the patient's permission, healthcare providers and caregivers can access it via their portal. The patch also measures and shares patient activity and rest.

https://www.godaddy.com/garage/the-iot-in-healthcare-forget-wearables-now-there-are-ingestibles/

Medical Implants

- Eversense CGM (Continuous Glucose Monitoring)
  - Remote monitoring by friends/family and providers via mobile app



https://ous.eversensediabetes.com/products/

Medical Implants

- Verichip

- The US Food and Drug Administration has approved Verichip, an implantable radiofrequency identification device for patients, which would enable doctors to access their medical records. Doctors hope that use of the device will result in be better treatment for patients in emergencies or when a patient is unconscious or lacks medical records. Some people have raised fears, however, that it could lead to infringements of patients' privacy. The chip is the size of a grain of rice and is implanted under local anaesthesia beneath the patient's skin in the triceps area of the right arm, where it is invisible to the naked eye. It contains a unique 16 digit identification number. A handheld scanner passed near the injection site activates the chip and displays the number on the scanner. Doctors and other medical staff use the identification number to access the patient's records on a secure database via encrypted internet access.

https://www.ncbi.nlm.nih.gov/pmc/articles/PMC526112/?fbclid=IwAR3f3EezRq0LP-bgVgVxFyXfhAEHKqWMHUye6AlTRRsu49YuwAyXjc3bVL8

ENVISTA FORENSICS

LARRY DANIEL
TECHNICAL DIRECTOR– DIGITAL FORENSICS

SMART VEHICLES

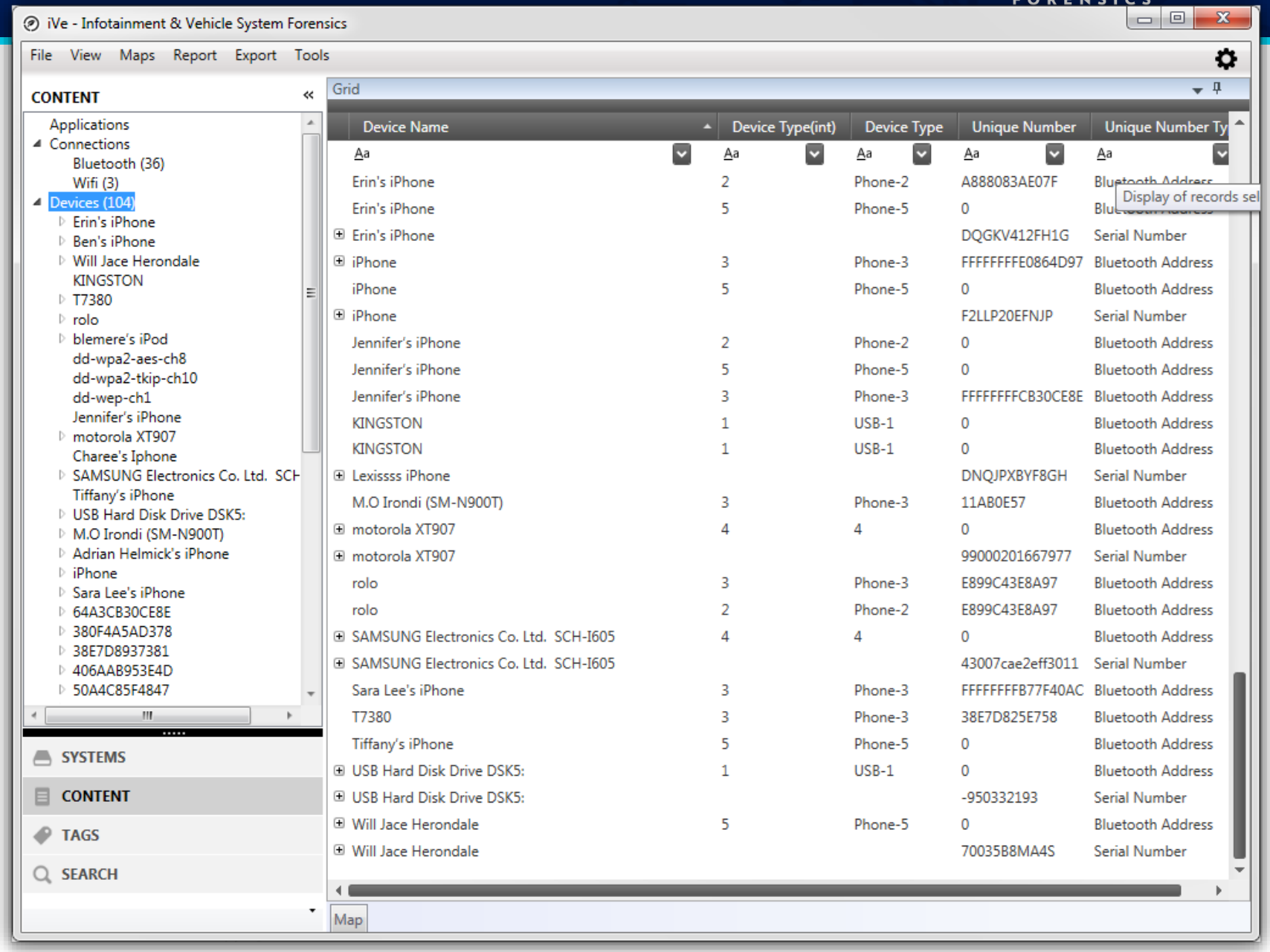
DIGITAL FORENSICS //

IoT Investigations

- Vehicle Forensics
  - In-vehicle infotainment
  - Vehicle telematics
- Data types
  - 3rd part application data
  - USB, Bluetooth, WiFi connections
  - Call logs, contact lists, messages
  - Pictures, videos, social media feeds
  - Location data, navigation information
  - Event data with associated time and location

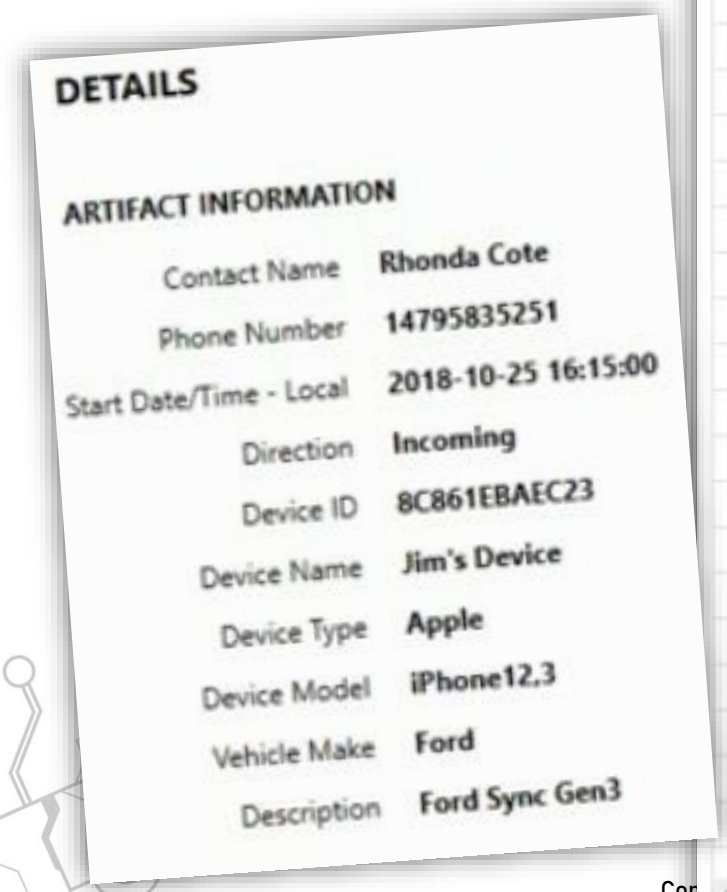
Forensic Artifacts

- Connected Devices
  - Rental Car



Forensic Artifacts

- Call Logs
  - Tied to specific account
  - Records Device ID



DETAILS

ARTIFACT INFORMATION

Contact Name	Rhonda Cote
Phone Number	14795835251
Start Date/Time - Local	2018-10-25 16:15:00
Direction	Incoming
Device ID	8C861EBAEC23
Device Name	Jim's Device
Device Type	Apple
Device Model	iPhone12,3
Vehicle Make	Ford
Description	Ford Sync Gen3

EVIDENCE (201)

Column view

Conta...	Phon...	Start...	Start Date/T...	Dire...	Device ID	Devi...	Devi...
Rhonda Cote	14795835251		2018-10-25 16:15:00	Incoming	8C861EBAEC23	Jim's Device	Apple
	3904567733		2018-10-26 16:12:00	Incoming	8C861EBAEC23	Jim's Device	Apple
Jin Contreras	9029306440		2018-10-25 13:43:00	Incoming	8C861EBAEC23	Jim's Device	Apple
Akeem Jensen	18612229018		2019-08-23 08:22:59	Incoming	8C861EBAEC23	Jim's Device	Apple
	8927942810		2018-10-25 07:53:00	Incoming	8C861EBAEC23	Jim's Device	Apple
Unknown	6876755339		2018-10-24 16:25:00	Incoming	8C861EBAEC23	Jim's Device	Apple
Hadley Bell	9042066849		2018-10-24 15:20:00	Incoming	8C861EBAEC23	Jim's Device	Apple
Akeem Jensen	18612229018		2018-10-24 15:18:00	Incoming	8C861EBAEC23	Jim's Device	Apple
	3904567733		2018-10-24 15:18:00	Incoming	8C861EBAEC23	Jim's Device	Apple
Rhonda Cote	14795835251		2018-10-24 08:17:00	Incoming	8C861EBAEC23	Jim's Device	Apple
Jin Contreras	9029306440		2018-10-23 20:03:00	Incoming	8C861EBAEC23	Jim's Device	Apple
	8927942810		2018-10-23 11:07:00	Incoming	8C861EBAEC23	Jim's Device	Apple
Unknown	6876755339		2018-10-22 17:22:00	Incoming	8C861EBAEC23	Jim's Device	Apple
Hadley Bell	9042066849		2018-10-22 15:05:00	Incoming	8C861EBAEC23	Jim's Device	Apple
Akeem Jensen	18612229018		2018-10-22 11:43:00	Incoming	8C861EBAEC23	Jim's Device	Apple
	3904567733		2018-10-22 08:03:00	Incoming	8C861EBAEC23	Jim's Device	Apple
Rhonda Cote	14795835251		2018-10-21 20:42:00	Incoming	8C861EBAEC23	Jim's Device	Apple
Jin Contreras	9029306440		2018-10-18 17:36:00	Incoming	8C861EBAEC23	Jim's Device	Apple
	8927942810		2018-10-18 14:44:00	Incoming	8C861EBAEC23	Jim's Device	Apple
Unknown	6876755339		2018-10-17 21:11:00	Incoming	8C861EBAEC23	Jim's Device	Apple
Hadley Bell	9042066849		2018-10-17 17:31:00	Incoming	8C861EBAEC23	Jim's Device	Apple
Akeem Jensen	18612229018		2018-10-17 16:50:00	Incoming	8C861EBAEC23	Jim's Device	Apple
	3904567733		2018-10-17 16:43:00	Incoming	8C861EBAEC23	Jim's Device	Apple
Akeem Jensen	18612229018		2018-10-29 13:37:00	Missed	8C861EBAEC23	Jim's Device	Apple
	3904567733		2018-10-29 13:06:00	Missed	8C861EBAEC23	Jim's Device	Apple
Rhonda Cote	14795835251		2018-10-29 09:25:00	Missed	8C861EBAEC23	Jim's Device	Apple
Jin Contreras	9029306440		2018-10-28 11:45:00	Missed	8C861EBAEC23	Jim's Device	Apple
	8927942810		2018-10-26 20:45:00	Missed	8C861EBAEC23	Jim's Device	Apple

Forensic Artifacts

- Contacts
  - All contact details contained on the phone are copied onto the vehicle.

ARTIFACT INFORMATION

First Name	**Akeem**
Last Name	**Jensen**
Phone Number(s)	**(579) 259-1955, (861) 222-9018, 1 (338) 123-4572, 1-663-721-0007**
Email Address	**eleifend.nunc@urnasuscipit.org**
Device ID	**8C861EBAEC23**
Device Name	**Jim's Device**
Device Type	**Apple**
Device Model	**iPhone12,3**
Vehicle Make	**Ford**
Description	**Ford Sync Gen3**

EVIDENCE (531) — Column view

First...	Last...	Com...	Phone Number(s)	Email Address
Akeem	Jensen		(579) 259-1955, (861) 222-9018, 1 (338) 123-4572, 1...	eleifend.nunc@urnasuscipit.org
Jin	Contreras		(493) 420-1022, (902) 930-6440, 1 (244) 824-2105, 1...	tristique.ac@tempusloremfring
Eleanor	Hardy		(390) 456-7733, (391) 733-8580, 1 (153) 205-8018, 1...	vestibulum@feugiat.net
Rhonda	Cote		(440) 951-4121, (479) 583-5251, 1 (502) 840-1172, 1...	scelerisque@aliquetodioEtiam.c
Macy	Salazar		(782) 888-4844, (892) 794-2810, 1 (133) 525-0453, 1...	felis.adipiscing@eunequepeller
Kenyon	Evans		(585) 254-8743, (687) 675-5339, 1 (933) 866-6243, 1...	Sed.eget.lacus@in.net
Hadley	Bell		(427) 295-4996, (904) 206-6849, 1 (297) 541-1052, 1...	quis@ametdiam.net
Ella	Osborne		(368) 223-5058, (720) 769-9476, 1 (934) 495-2224, 1...	lacus@maurisutmi.com
Ira	Hardy		(510) 450-6751, (556) 523-3644, 1 (556) 655-3936, 1...	neque@justosit.net
Kylee	Rodriguez		(354) 896-7542, (857) 992-3702, 1 (507) 413-6337, 1...	Praesent.luctus.Curabitur@sem
Uriah	Elliott		(407) 323-8458, (994) 626-3761, 1 (265) 473-3564, 1...	vitae.dolor@eros.com
Judith	York		(188) 831-1999, (612) 790-8488, 1 (416) 798-9428, 1...	Cum@famesac.com
Jason	Flynn		(335) 868-1488, (829) 356-6942, 1 (311) 805-8260, 1...	nisi@lorem.ca
Desirae	Burris		(604) 557-6137, (666) 372-4136, 1 (722) 234-8813, 1...	mus@Nullaeuneque.co.uk
Ivan	Gordon		(400) 240-5076, (454) 255-7337, 1 (558) 431-3125, 1...	lorem.ipsum@tristiquenequeve
Lucius	Mccall		(564) 573-3359, (811) 204-3672, 1 (268) 765-1722, 1...	neque.Sed.eget@Namconsequ
Aubrey	Crawford		(228) 148-2325, (474) 280-7997, 1 (652) 363-5802, 1...	scelerisque.mollis@luctuset.cor
Gay	Velazquez		(395) 395-5481, (763) 497-3142, 1 (261) 885-0766, 1...	nisi@fermentumvel.edu
Gavin	Carney		(208) 345-1346, (405) 719-8612, 1 (978) 560-4737, 1...	ipsum.non@congueln.net
Lara	Frost		(219) 627-9338, (380) 762-4623, 1 (551) 413-3181, 1...	auctor.ullamcorper.nisl@enimg
Chancellor	Cash		(244) 941-9707, (480) 399-4784, 1 (873) 923-8314, 1...	Sed.eu.nibh@luctusvulputateni
Genevieve	Cohen		(966) 690-3485, (992) 210-8874, 1 (955) 690-5521, 1...	nec.mauris@eget.com
Pandora	Foley		(145) 311-7506, (541) 750-8106, 1 (912) 628-6613, 1...	vitae.sodales.nisi@orcilobortis.c
Adrienne	David		(167) 226-8276, (438) 195-7026, 1 (963) 282-4840, 1...	risus@lacusNulla.org
Larissa	Crawford		(420) 818-4606, (717) 722-8172, 1 (574) 128-4868, 1...	non.leo@euismodet.net
Keith	Romero		(472) 614-8831, (635) 214-9549, 1 (919) 618-8352, 1...	Nullam.lobortis.quam@libero.o
Inga	Stark		(129) 933-9214, (132) 741-4811, 1 (892) 714-6440, 1...	molestie.Sed.id@interdum.co.u
Uriel	Bird		(241) 529-4711, (826) 300-6773, 1 (755) 522-8838, 1...	eget.nisi@felis.com

Forensic Artifacts

- Files
  - Lifestyle analysis
    - Listening History

File Path	C:\Users\Ben LeMere\Desktop\Truck\SG3-eMMC\p6\storage\bk1\MediaIAP2_28.db
Original Path	C:\SG3-eMMC\p6\storage\bk1\MediaIAP2_28.db
Device ID	8C861EBAEC23
Device Name	Jim's Device
Device Type	Apple
Device Model	iPhone12,3
Vehicle Make	Ford
Description	Ford Sync Gen3

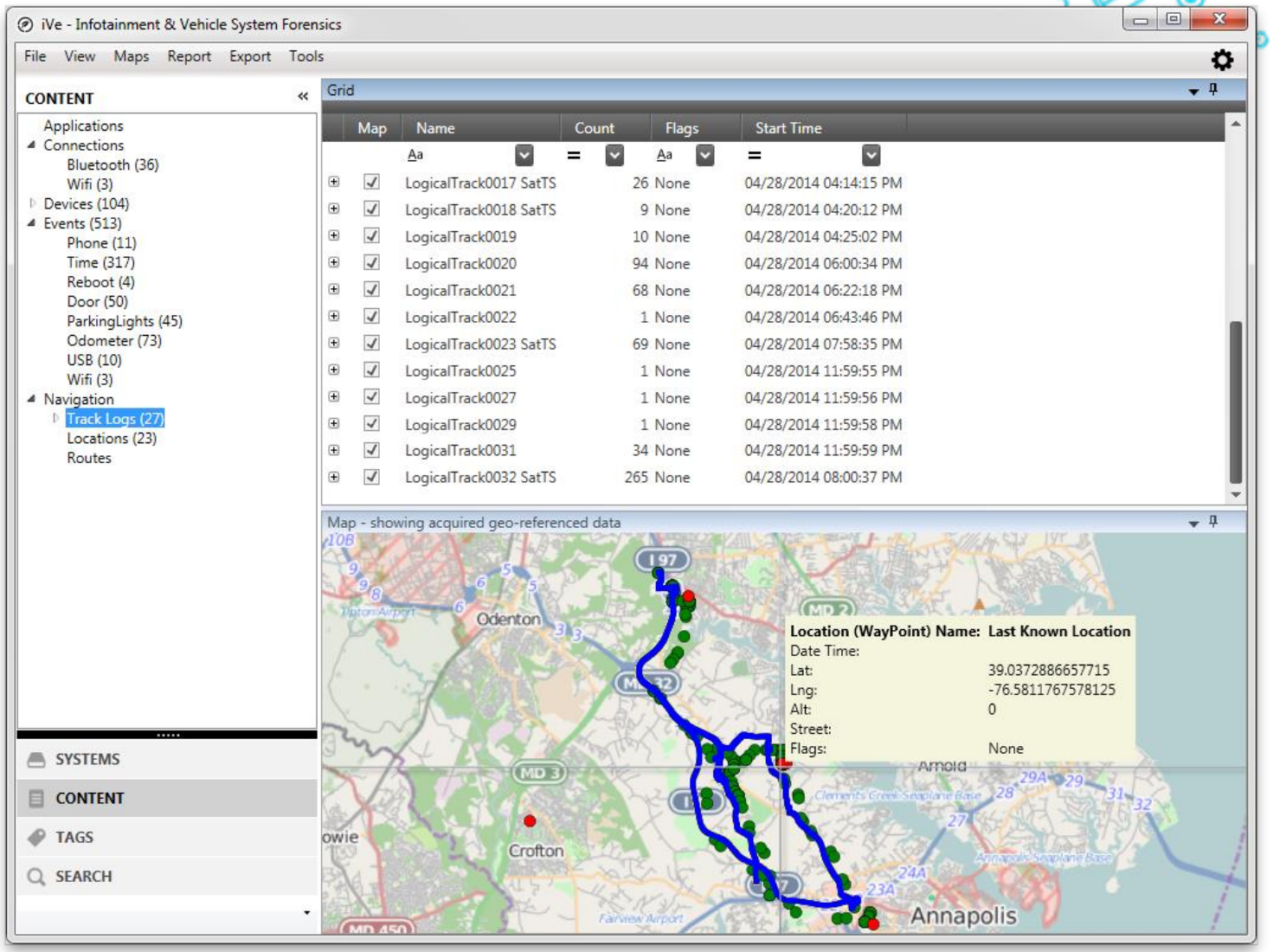
EVIDENCE (12,725)

Column view

File Name	File Path	Original Path
Roar	C:\Users\Ben LeMere\Desktop\Truck\SG3-eMMC\p6\sto...	C:\SG3-eMMC\p6
Live While We're Young	C:\Users\Ben LeMere\Desktop\Truck\SG3-eMMC\p6\sto...	C:\SG3-eMMC\p6
What Makes You Beautiful	C:\Users\Ben LeMere\Desktop\Truck\SG3-eMMC\p6\sto...	C:\SG3-eMMC\p6
Cruise	C:\Users\Ben LeMere\Desktop\Truck\SG3-eMMC\p6\sto...	C:\SG3-eMMC\p6
Story of My Life	C:\Users\Ben LeMere\Desktop\Truck\SG3-eMMC\p6\sto...	C:\SG3-eMMC\p6
028: The Price of Freedom	C:\Users\Ben LeMere\Desktop\Truck\SG3-eMMC\p6\sto...	C:\SG3-eMMC\p6
080: A Prisoner for Christ	C:\Users\Ben LeMere\Desktop\Truck\SG3-eMMC\p6\sto...	C:\SG3-eMMC\p6
082: Heatwave	C:\Users\Ben LeMere\Desktop\Truck\SG3-eMMC\p6\sto...	C:\SG3-eMMC\p6
087: Elijah, Part 1 Of 2	C:\Users\Ben LeMere\Desktop\Truck\SG3-eMMC\p6\sto...	C:\SG3-eMMC\p6
088: Elijah, Part 2 Of 2	C:\Users\Ben LeMere\Desktop\Truck\SG3-eMMC\p6\sto...	C:\SG3-eMMC\p6
088a: BONUS! Creating the Sounds for "Elijah"	C:\Users\Ben LeMere\Desktop\Truck\SG3-eMMC\p6\sto...	C:\SG3-eMMC\p6
089: That's Not Fair!	C:\Users\Ben LeMere\Desktop\Truck\SG3-eMMC\p6\sto...	C:\SG3-eMMC\p6
090: But, You Promised	C:\Users\Ben LeMere\Desktop\Truck\SG3-eMMC\p6\sto...	C:\SG3-eMMC\p6
091: A Mission for Jimmy	C:\Users\Ben LeMere\Desktop\Truck\SG3-eMMC\p6\sto...	C:\SG3-eMMC\p6
091a: BONUS! The Production of "a Mission for Ji...	C:\Users\Ben LeMere\Desktop\Truck\SG3-eMMC\p6\sto...	C:\SG3-eMMC\p6
092: The Ill-Gotten Deed	C:\Users\Ben LeMere\Desktop\Truck\SG3-eMMC\p6\sto...	C:\SG3-eMMC\p6
092a: BONUS! The Voices of Host Chris Anthony, f...	C:\Users\Ben LeMere\Desktop\Truck\SG3-eMMC\p6\sto...	C:\SG3-eMMC\p6
093: Rescue from Manatugo Point	C:\Users\Ben LeMere\Desktop\Truck\SG3-eMMC\p6\sto...	C:\SG3-eMMC\p6
102: The Treasure of LeMonde!	C:\Users\Ben LeMere\Desktop\Truck\SG3-eMMC\p6\sto...	C:\SG3-eMMC\p6
102a: BONUS! The Very First Focus dramas - Spar...	C:\Users\Ben LeMere\Desktop\Truck\SG3-eMMC\p6\sto...	C:\SG3-eMMC\p6
102b: BONUS! Spare Tire	C:\Users\Ben LeMere\Desktop\Truck\SG3-eMMC\p6\sto...	C:\SG3-eMMC\p6
102c: BONUS! House Guest	C:\Users\Ben LeMere\Desktop\Truck\SG3-eMMC\p6\sto...	C:\SG3-eMMC\p6
066: the Imagination Station, Pt. 1 of 2	C:\Users\Ben LeMere\Desktop\Truck\SG3-eMMC\p6\sto...	C:\SG3-eMMC\p6
067: the Imagination Station, Pt. 2 of 2	C:\Users\Ben LeMere\Desktop\Truck\SG3-eMMC\p6\sto...	C:\SG3-eMMC\p6
067A: the Creation of the Imagination Station (Bo...	C:\Users\Ben LeMere\Desktop\Truck\SG3-eMMC\p6\sto...	C:\SG3-eMMC\p6
072: an Encounter With Mrs. Hooper	C:\Users\Ben LeMere\Desktop\Truck\SG3-eMMC\p6\sto...	C:\SG3-eMMC\p6
073: a Bite of Applesauce	C:\Users\Ben LeMere\Desktop\Truck\SG3-eMMC\p6\sto...	C:\SG3-eMMC\p6
073A: the Inspiration For "A Bite of Applesauce" (...	C:\Users\Ben LeMere\Desktop\Truck\SG3-eMMC\p6\sto...	C:\SG3-eMMC\p6

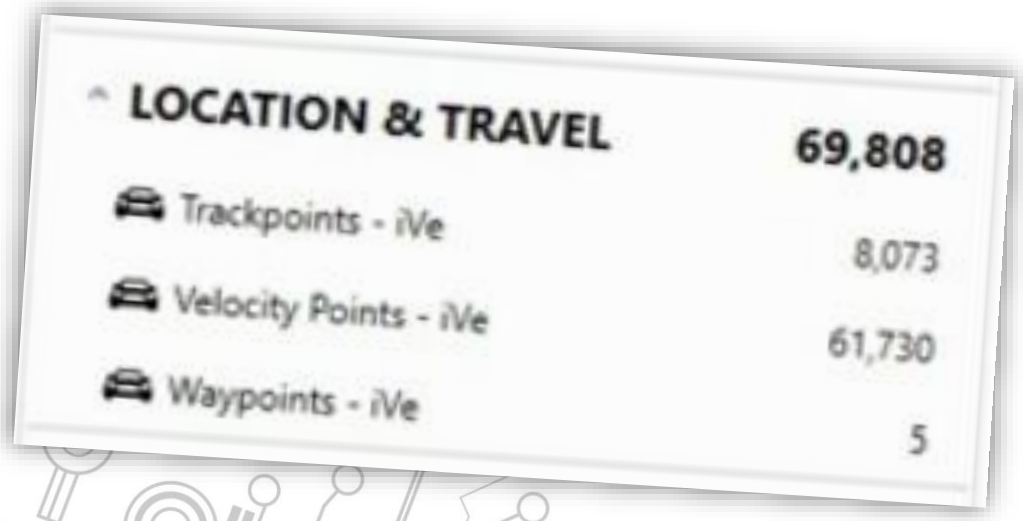
Track Logs

- Connected Devices
  - Rental Car



Forensic Artifacts

- Track Logs
  - Location history
  - Lifestyle analysis
  - Different that CDR (Crash Data Recorder)



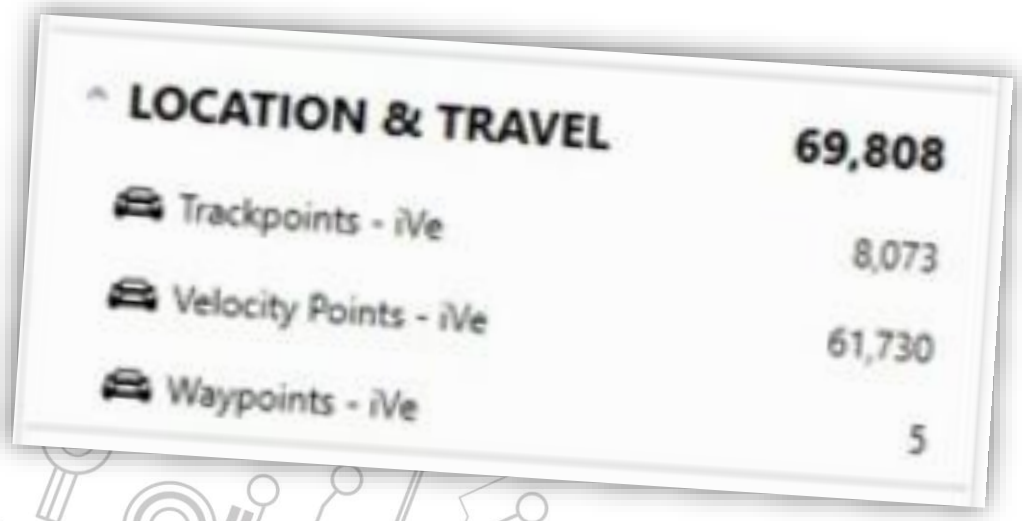
EVIDENCE (8,073)

Column view

Track Na...	Date/Time - Local Time	Latitude	Longitude	Geohash	
Track 001	2020-08-14 15:02:11	38.987276	-76.574943	dqctc3rv6e00	0
Track 001	2020-08-14 15:02:14	38.987167	-76.575157	dqctc3rstw8q	1
Track 001	2020-08-14 15:02:14	38.987186	-76.575184	dqctc3rsufhr	7
Track 001	2020-08-14 15:02:12	38.987124	-76.57517	dqctc3rsmnwv	3
Track 001	2020-08-14 15:02:20	38.987324	-76.575594	dqctc3rme7fw	1
Track 001	2020-08-14 15:02:21	38.987349	-76.575679	dqctc3rmc2e5	1
Track 001	2020-08-14 15:02:23	38.987379	-76.575757	dqctc3rjzw1n	1
Track 001	2020-08-14 15:02:23	38.987408	-76.575846	dqctc3rnj7we	1
Track 001	2020-08-14 15:02:24	38.987437	-76.57593	dqctc3rn7900	1
Track 001	2020-08-14 15:02:26	38.987466	-76.576015	dqctc3rn3w2t	1
Track 001	2020-08-14 15:02:27	38.987494	-76.576097	dqctc3qyxees	1
Track 001	2020-08-14 15:02:27	38.987522	-76.576186	dqctc3qyv8c5	1
Track 001	2020-08-14 15:02:28	38.987547	-76.576272	dqctc3qygt90	1
Track 001	2020-08-14 15:02:29	38.987566	-76.576358	dqctc3qz190f	1
Track 001	2020-08-14 15:02:30	38.987576	-76.576433	dqctc3qxpfcj	1
Track 001	2020-08-14 15:02:31	38.987584	-76.576509	dqctc3qxnh2m	1
Track 001	2020-08-14 15:02:32	38.98759	-76.57658	dqctc3qxhme3	1
Track 001	2020-08-14 15:02:34	38.987603	-76.57664	dqctc3qx4zyw	1
Track 001	2020-08-14 15:02:34	38.987628	-76.5767	dqctc3qx3s9u	1
Track 001	2020-08-14 15:02:36	38.987666	-76.576739	dqctc3qx8esy	1
Track 001	2020-08-14 15:02:36	38.987707	-76.576747	dqctc3qxb7qg	1
Track 001	2020-08-14 15:02:37	38.987744	-76.576729	dqctc3w80fhr	9
Track 001	2020-08-14 15:02:38	38.987797	-76.576682	dqctc3w83upk	1
Track 001	2020-08-14 15:02:39	38.987865	-76.576607	dqctc3w8g8z3	2
Track 001	2020-08-14 15:02:41	38.987945	-76.576522	dqctc3w9jxww	2
Track 001	2020-08-14 15:02:41	38.988031	-76.576431	dqctc3w9xzf8	2
Track 001	2020-08-14 15:02:43	38.988128	-76.576339	dqctc3wf3cz4	2
Track 001	2020-08-14 15:02:43	38.988229	-76.576251	dqctc3wfuh8t	3

Forensic Artifacts

- Velocity Points
  - Driving patterns
  - Different that CDR (Crash Data Recorder)



EVIDENCE (61,730)

Column view

Trac...	Point...	Date/Time - Local...	Velocity	Vehi...	Descrip...	Source
Track 001	85	2020-08-14 15:02:05.078	0.0	Ford	Ford Sync Gen3	Entire Disk (Micrc
Track 001	85	2020-08-14 15:02:05.465	0.15534275	Ford	Ford Sync Gen3	Entire Disk (Micrc
Track 001	85	2020-08-14 15:02:05.465	0.62758471	Ford	Ford Sync Gen3	Entire Disk (Micrc
Track 001	85	2020-08-14 15:02:07.965	0.8699194	Ford	Ford Sync Gen3	Entire Disk (Micrc
Track 001	85	2020-08-14 15:02:07.982	1.04390328	Ford	Ford Sync Gen3	Entire Disk (Micrc
Track 001	85	2020-08-14 15:02:08.006	1.37322991	Ford	Ford Sync Gen3	Entire Disk (Micrc
Track 001	85	2020-08-14 15:02:08.021	1.57206863	Ford	Ford Sync Gen3	Entire Disk (Micrc
Track 001	85	2020-08-14 15:02:08.023	1.65284686	Ford	Ford Sync Gen3	Entire Disk (Micrc
Track 001	85	2020-08-14 15:02:08.041	1.77712106	Ford	Ford Sync Gen3	Entire Disk (Micrc
Track 001	85	2020-08-14 15:02:08.042	1.82683074	Ford	Ford Sync Gen3	Entire Disk (Micrc
Track 001	85	2020-08-14 15:02:08.042	1.73362509	Ford	Ford Sync Gen3	Entire Disk (Micrc
Track 001	85	2020-08-14 15:02:08.097	1.59692347	Ford	Ford Sync Gen3	Entire Disk (Micrc
Track 001	85	2020-08-14 15:02:08.099	1.46643556	Ford	Ford Sync Gen3	Entire Disk (Micrc
Track 001	85	2020-08-14 15:02:08.108	1.23652829	Ford	Ford Sync Gen3	Entire Disk (Micrc
Track 001	85	2020-08-14 15:02:08.113	0.9941936	Ford	Ford Sync Gen3	Entire Disk (Micrc
Track 001	85	2020-08-14 15:02:08.126	0.75807262	Ford	Ford Sync Gen3	Entire Disk (Micrc
Track 001	85	2020-08-14 15:02:08.155	0.56544761	Ford	Ford Sync Gen3	Entire Disk (Micrc
Track 001	85	2020-08-14 15:02:08.155	0.35418147	Ford	Ford Sync Gen3	Entire Disk (Micrc
Track 001	85	2020-08-14 15:02:08.156	0.24233469	Ford	Ford Sync Gen3	Entire Disk (Micrc
Track 001	85	2020-08-14 15:02:08.156	0.1864113	Ford	Ford Sync Gen3	Entire Disk (Micrc
Track 001	85	2020-08-14 15:02:08.158	0.14291533	Ford	Ford Sync Gen3	Entire Disk (Micrc
Track 001	85	2020-08-14 15:02:08.174	0.08077823	Ford	Ford Sync Gen3	Entire Disk (Micrc
Track 001	85	2020-08-14 15:02:08.260	0.01864113	Ford	Ford Sync Gen3	Entire Disk (Micrc
Track 001	85	2020-08-14 15:02:08.266	0.0	Ford	Ford Sync Gen3	Entire Disk (Micrc
Track 001	85	2020-08-14 15:02:10.360	0.02485484	Ford	Ford Sync Gen3	Entire Disk (Micrc
Track 001	85	2020-08-14 15:02:10.470	0.31689921	Ford	Ford Sync Gen3	Entire Disk (Micrc
Track 001	85	2020-08-14 15:02:10.572	0.50952422	Ford	Ford Sync Gen3	Entire Disk (Micrc
Track 001	85	2020-08-14 15:02:10.680	0.69593552	Ford	Ford Sync Gen3	Entire Disk (Micrc

Forensic Artifacts

- Waypoints
  - When and Where

EVIDENCE (5)

Column view

Name	Date/Time - Local Time	Latitude	Longitude
300 W Station Square Dr, Pittsburgh, PA 15219, USA	2017-12-22 20:35:49	40.43495	-80.00745
152 Station Sq, Pittsburgh, PA 15219, USA	2018-05-04 22:33:49	40.4333367391304	-80.0043539130435
White River Junction, VT 05001, USA	2018-08-11 08:57:16	43.66375	-72.38827
2684 Lebanon Rd, Manheim, Rapho Twp, PA 17545,...	2019-02-13 14:36:14	40.22706	-76.43192
445 Defense Hwy, Annapolis, MD 21401, USA	2020-08-19 16:34:54	38.98896	-76.57628

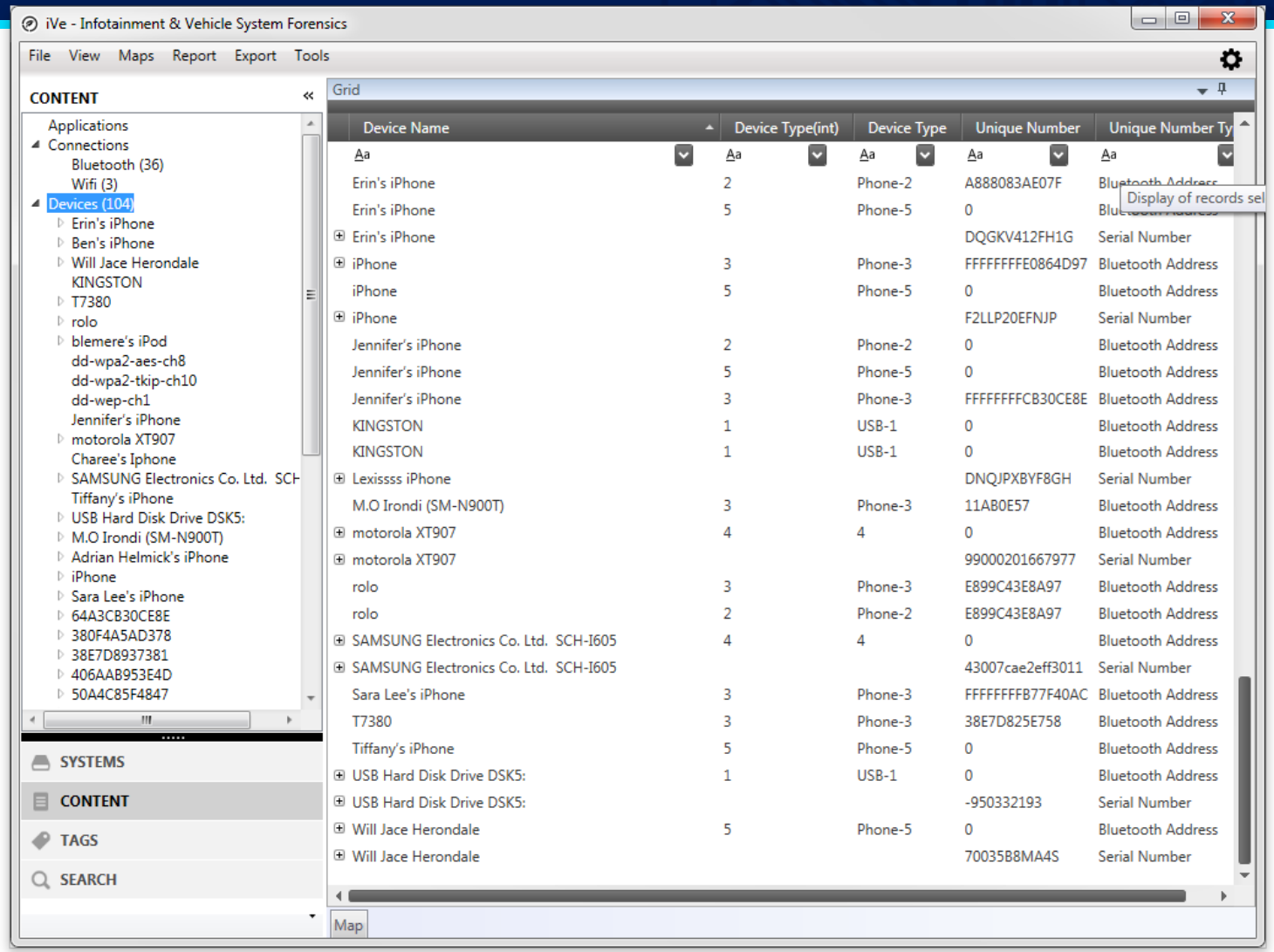
Forensic Artifacts

- Locally Accessed Files and Folders
  - Did they store files locally?
    - Data theft
    - Improper usage
    - Company policies

Path	Accessed Date/Time...
C:\Users\Accounting new\Desktop\Invoices\Picture [redacted]7.pdf	2019-06-14 14:55:00
C:\Users\Accounting new\Desktop\Invoices\Picture [redacted]7.pdf	
C:\Users\Accounting[redacted]	2019-06-14 14:57:16
C:\Users\Accounting new\AppData\Local\Packages\Microsoft.MicrosoftEdge_8w...	2019-05-22 14:35:33
C:\Users\Accounting new\Desktop\Paypal Transactions.csv.xlsx	2019-05-21 13:14:40
C:\Users\Accounting new\Desktop\SHOP INVENTORY SHEET-[redacted].xls	2019-05-21 15:14:58
C:\Users\Accounting new\Desktop\Invoices\M[redacted]5.pdf	2019-05-20 14:31:52
C:\Users\Accounting new\Desktop\Commercial Invoices\Bh[redacted]13...	2019-05-22 11:31:00
C:\Users\Accounting new\Dropbox\Public\pricelist[redacted]order_form_4-16-1...	2019-05-20 09:56:00
C:\Users\Accounting new\Desktop\Commercial Invoices\COMMERCIAL INVOICE...	2019-05-21 08:32:12
C:\Users\Accounting new\Desktop\PAYDATES.xlsx	2019-05-20 11:55:07
C:\Users\Accounting new\AppData\Local\Packages\Microsoft.MicrosoftEdge_8w...	2019-05-22 14:38:44
C:\Users\Accounting new\Desktop\Invoices\W[redacted].pdf	2019-05-23 14:54:13
C:\Users\Accounting new\Desktop\WIRE TRANSFER[redacted].doc	2019-05-20 14:35:15
C:\Users\Accounting new\Desktop\Credit Card Coding.xlsx	2019-05-21 13:52:59
C:\Users\Accounting new\Desktop\Commercial Invoices\Tracking number[redacted]...	2019-05-22 10:30:21

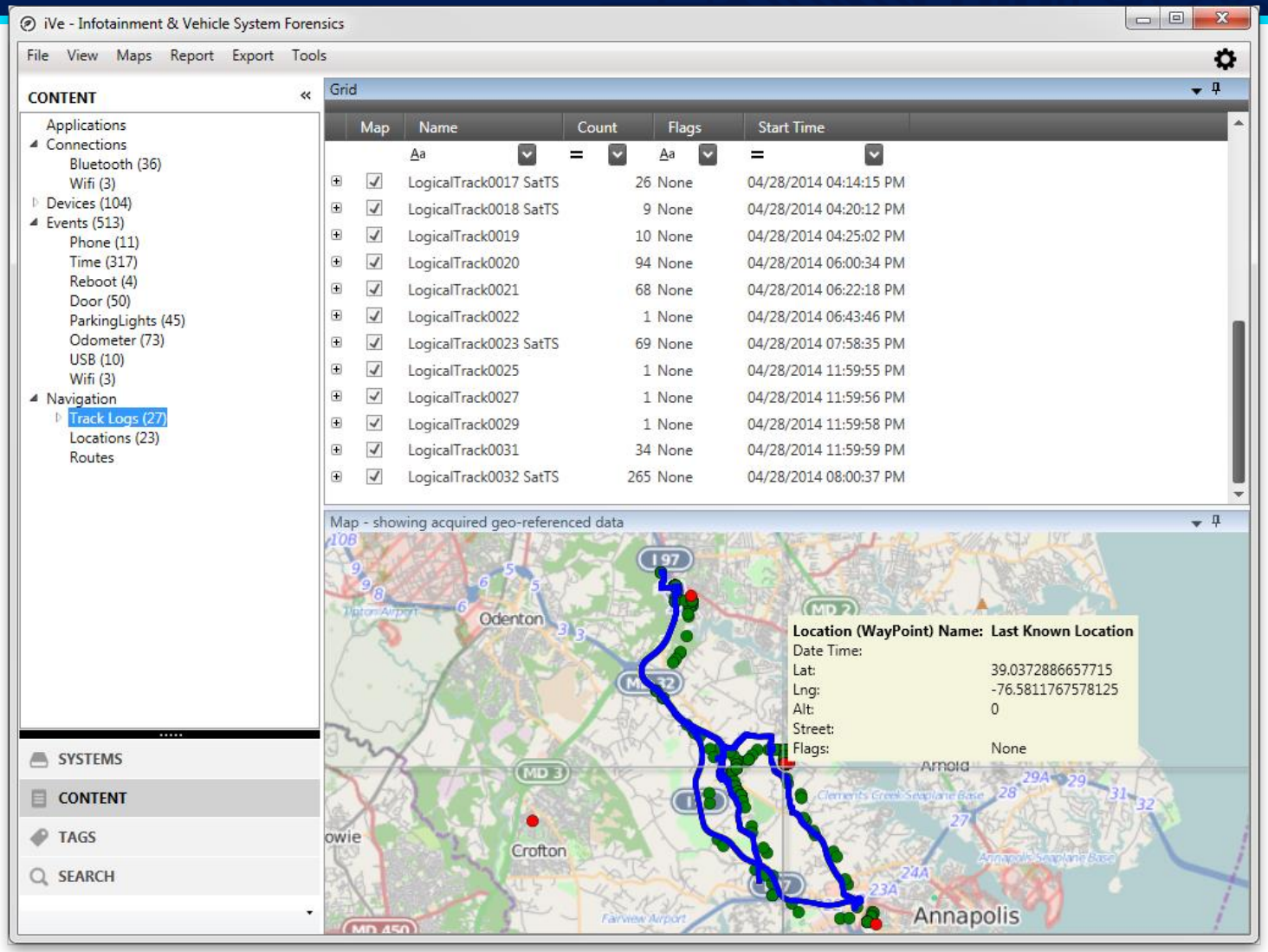
IoT Investigations

- Vehicle Forensics
  - In-vehicle infotainment
  - Vehicle telematics
- Connected devices



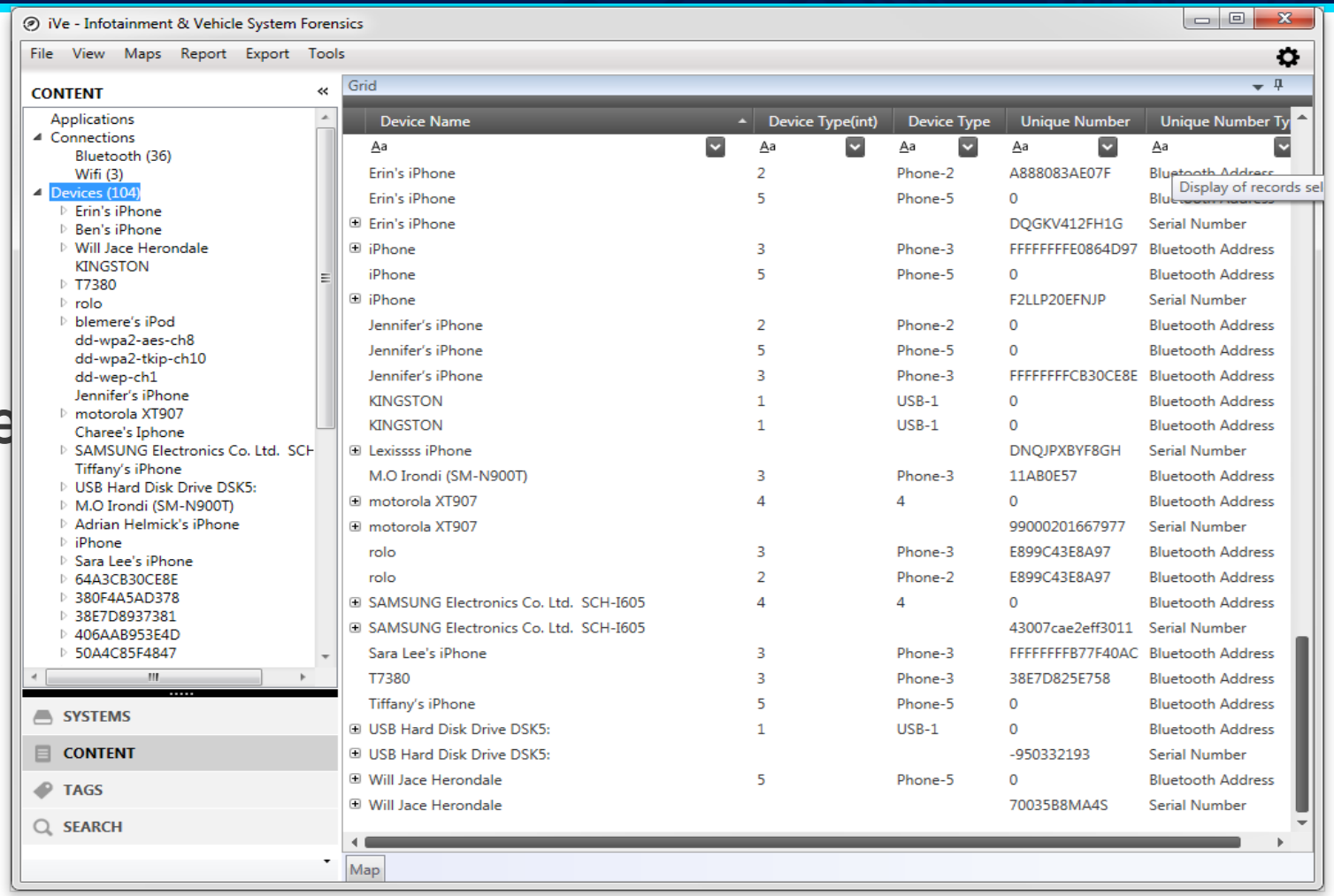
IoT Investigations

- Vehicle Forensics
  - In-vehicle infotainment
  - Vehicle telematics
- Track logs



IoT Investigations

- Vehicle Forensics
  - In-vehicle infotainment
  - Vehicle telematics
- Velocity Logs
  - Vehicle velocity and corre



Teleporting Car?

- Rental car location records
- Original data needed.

ENVISTA FORENSICS

LARRY DANIEL
TECHNICAL DIRECTOR– DIGITAL FORENSICS

SMART HOME

DIGITAL FORENSICS //

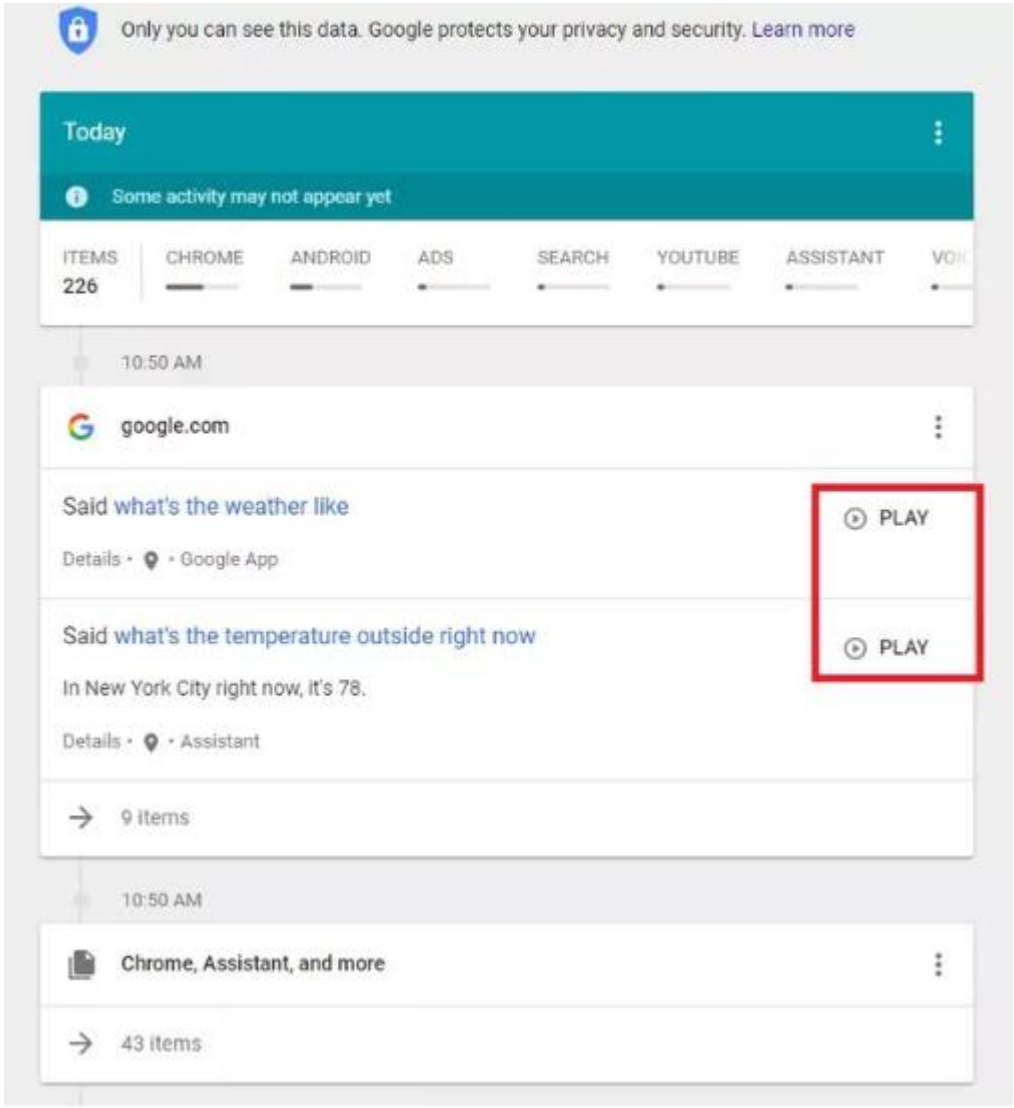
Alexa as a home assistant

- Murder case – *Arkansas v. Bates*, No. CR-2016-370 (Cir. Ct. Benton County, Arkansas).
  - Police seized the defendant's smart speaker believing it might contain evidence of what happened the night of the murder at defendant's home.
    - Amazon moved to quash warrant, contenting 1st amendment rights to publish and speak through the speaker
    - Motion later mooted when defendant gave manufacturer permission to turn over audio recordings
      - Recordings kept by Amazon, organized and identifiable (not-anonymized for "research")
      - Only contained provider side

https://www.crowelldatalaw.com/2017/07/recent-iot-device-cases/

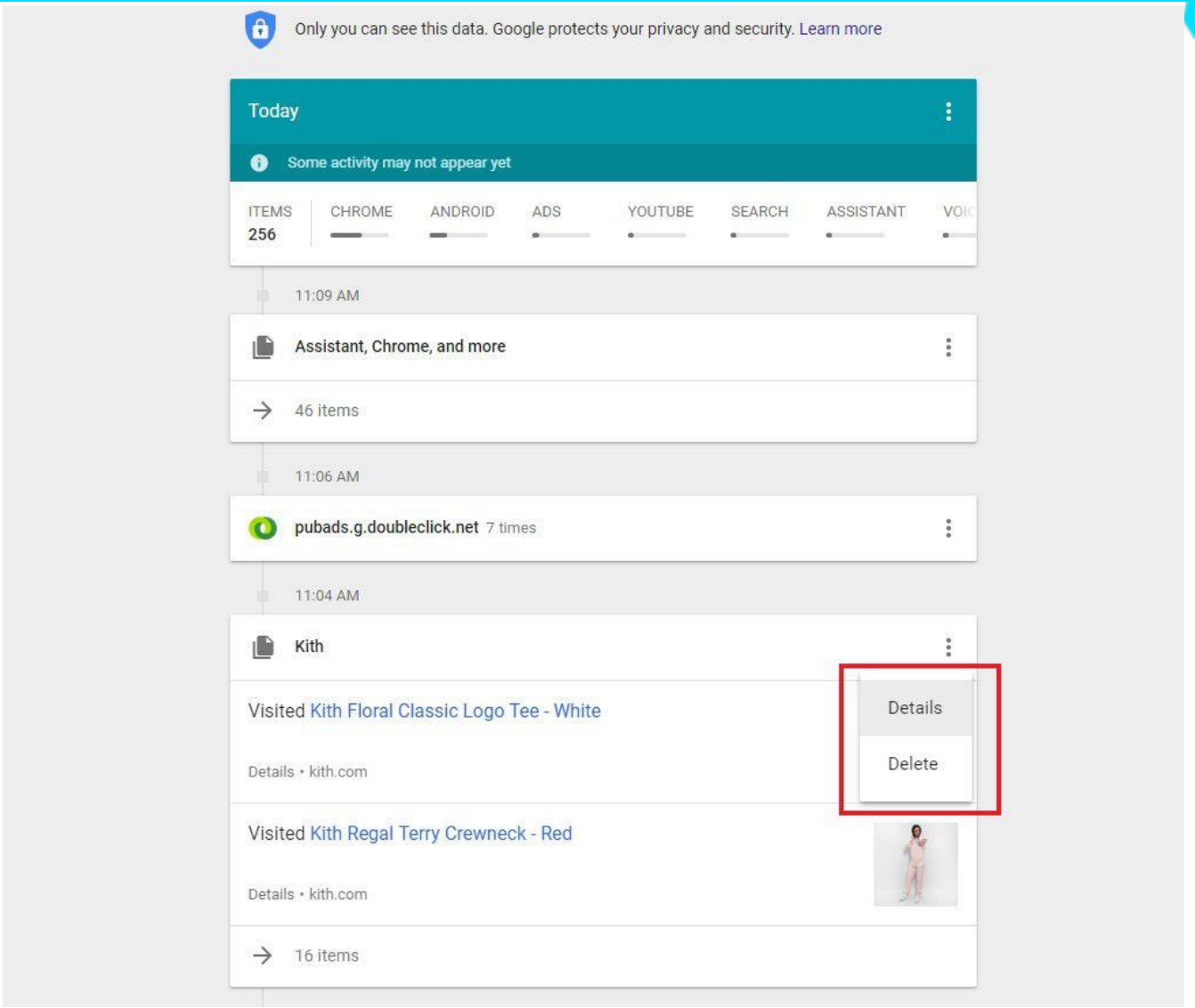
Smart Home Assistants

- Google Home
  - Google queries



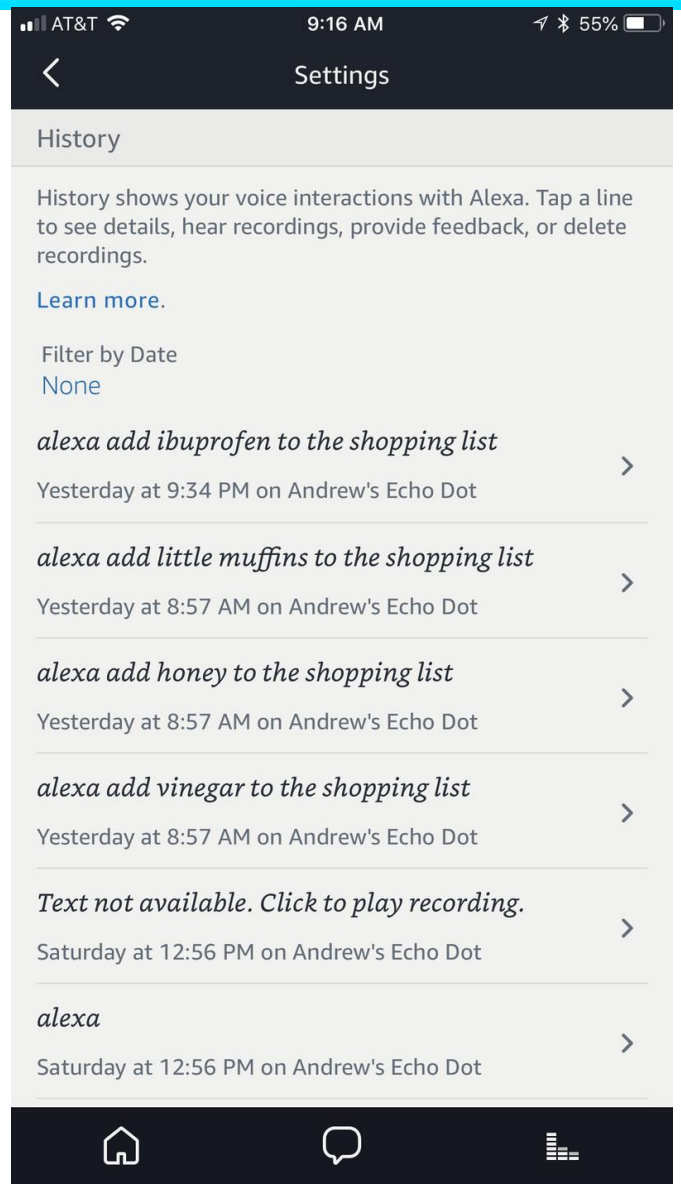
Smart Home Assistants

- Google Home
  - Shopping



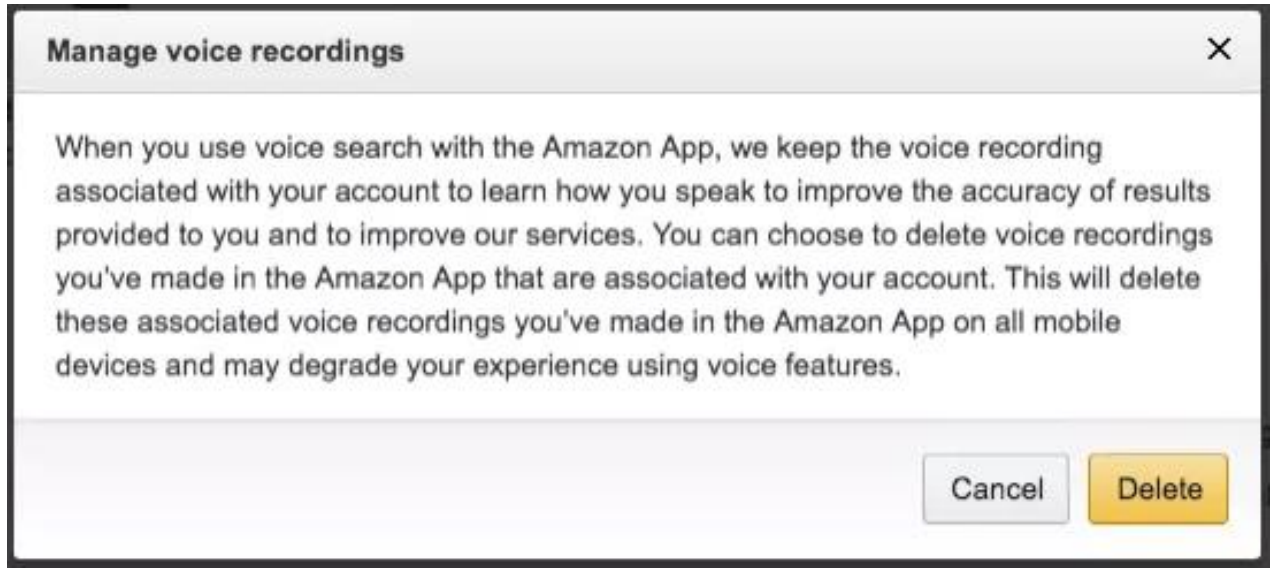
Smart Home Assistants

- Amazon Alexa
  - Search queries



Smart Home Assistants

- Amazon Alexa
  - Voice recordings



Smart Home Assistants

- Interrogate the device
  - Low tech works too…
    - Careful with the Christmas lists!

Smart Home Security

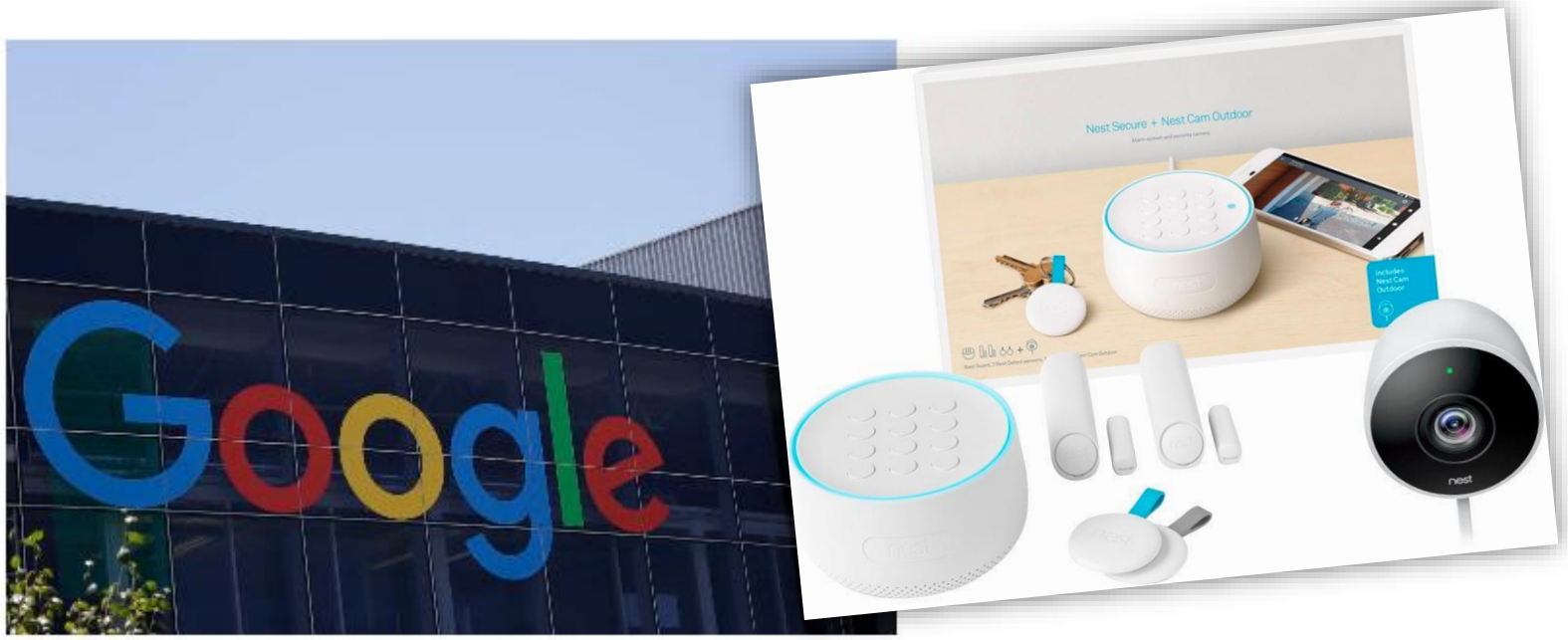
- Recording video
- Timeline data
- Account data

Smart Home Security

- Recording video
- Timeline data
- Account data
- Hidden microphone

Business

Google failed to notify customers it put microphones in Nest security systems



https://www.washingtonpost.com/business/2019/02/20/google-forgot-notify-customers-it-put-microphones-nest-security-systems/?noredirect=on&utm_term=.cfa73cc39212

Smart Home Security

- Nest – Neighbors home

Smart Home Security

- Nest – Neighbors home

https://nest.com/video/clip/burglar-tries-to-steal-nest-cam/

Smart Home Cameras

- Collecting Biometric Data
  - The Nest Hello doorbell recognizes familiar faces to tell you who's come calling and the Nest Cam IQ Indoor and Nest Cam IQ Outdoor both use it to keep tabs on who's at home or just outside.

ENVISTA FORENSICS

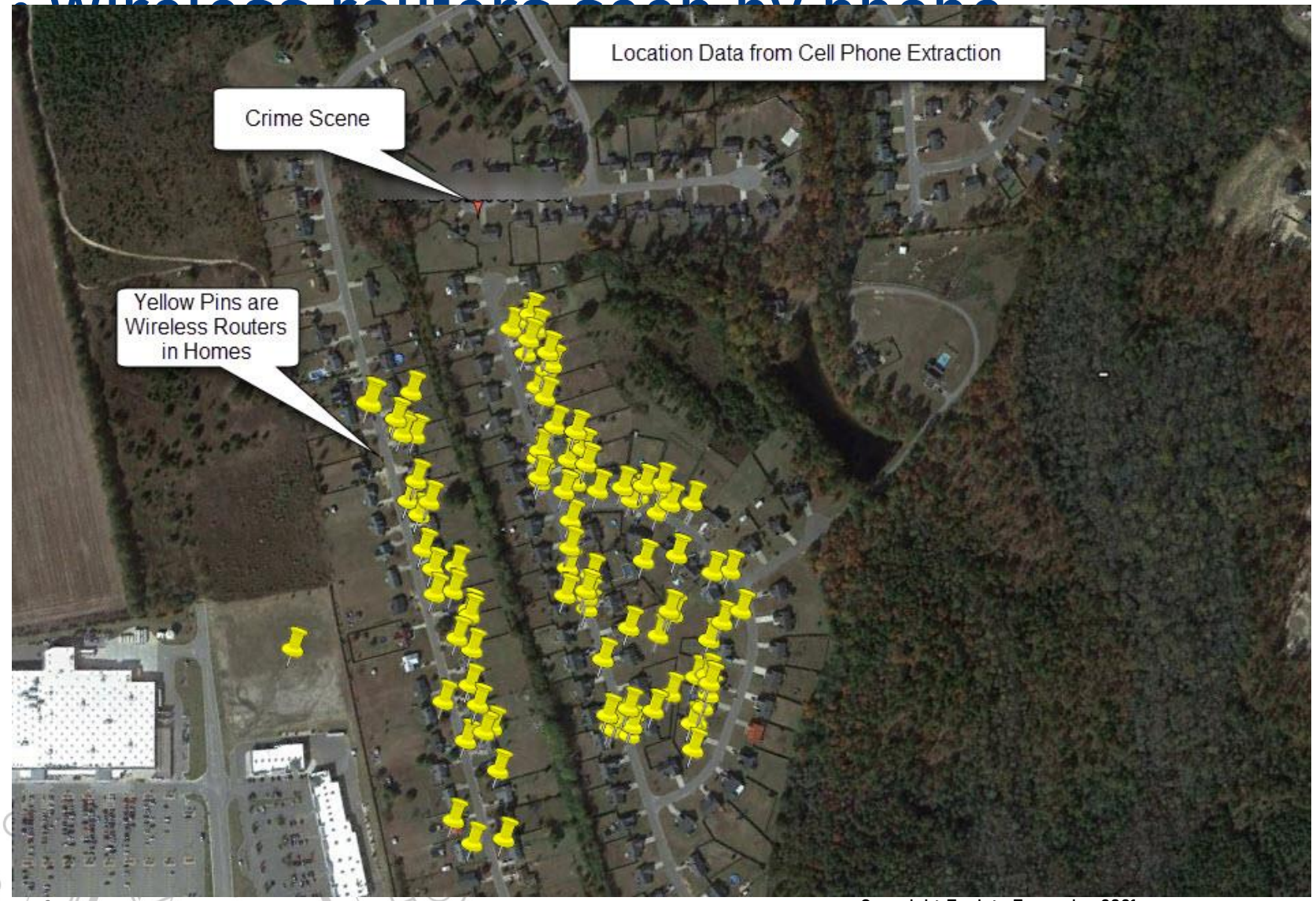
LARRY DANIEL
TECHNICAL DIRECTOR– DIGITAL FORENSICS

CASE EXAMPLES

DIGITAL FORENSICS //

Case Example: WiFi Phone Location

- Wireless routers seen by phone



Capabilities: Examples

- Location
  - Wireless Networks

	Timestamp	Description	Category	Name
	4/1/2016 9:30:32 AM(UTC-4)	GooglePlay	Wireless Networks	Bill Wi the Science Fi (e4:f4:c6:0b:5f:51)
	3/31/2016 12:26:16 PM(UTC-4)	GooglePlay	Wireless Networks	Bill Wi the Science Fi (e4:f4:c6:0b:5f:51)
	3/31/2016 12:06:15 PM(UTC-4)	GooglePlay	Wireless Networks	Bill Wi the Science Fi (e4:f4:c6:0b:5f:51)
	3/31/2016 12:00:30 PM(UTC-4)	GooglePlay	Wireless Networks	Bill Wi the Science Fi (e4:f4:c6:0b:5f:51)
	3/30/2016 10:38:17 AM(UTC-4)	GooglePlay	Wireless Networks	Bill Wi the Science Fi (e4:f4:c6:0b:5f:51)
	3/30/2016 8:13:03 AM(UTC-4)	YouTube	Wireless Networks	Bill Wi the Science Fi (e4:f4:c6:0b:5f:51)
	3/30/2016 8:08:37 AM(UTC-4)	YouTube	Wireless Networks	Bill Wi the Science Fi (e4:f4:c6:0b:5f:51)
	3/30/2016 8:04:30 AM(UTC-4)	YouTube	Wireless Networks	Bill Wi the Science Fi (e4:f4:c6:0b:5f:51)
	3/30/2016 8:00:35 AM(UTC-4)	YouTube	Wireless Networks	Bill Wi the Science Fi (e4:f4:c6:0b:5f:51)
	3/30/2016 7:56:44 AM(UTC-4)	YouTube	Wireless Networks	Bill Wi the Science Fi (e4:f4:c6:0b:5f:51)
	3/30/2016 7:53:09 AM(UTC-4)	YouTube	Wireless Networks	Bill Wi the Science Fi (e4:f4:c6:0b:5f:51)
	3/30/2016 7:49:32 AM(UTC-4)	YouTube	Wireless Networks	Bill Wi the Science Fi (e4:f4:c6:0b:5f:51)
	3/30/2016 7:45:45 AM(UTC-4)	YouTube	Wireless Networks	Bill Wi the Science Fi (e4:f4:c6:0b:5f:51)
	3/30/2016 7:21:48 AM(UTC-4)	GooglePlay	Wireless Networks	FiOS-TA0VP (48:5d:36:55:34:38)
	3/30/2016 7:20:43 AM(UTC-4)	GooglePlay	Wireless Networks	FiOS-TA0VP (48:5d:36:55:34:38)
	3/30/2016 7:18:22 AM(UTC-4)	GooglePlay	Wireless Networks	FiOS-TA0VP (48:5d:36:55:34:38)
	3/29/2016 11:39:26 PM(UTC-4)	YouTube	Wireless Networks	FiOS-TA0VP (48:5d:36:55:34:38)

Wireless Network

Go to

BSSID:	e4:f4:c6:0b:5f:51
SSId:	Bill Wi the Science Fi
Security Mode:	
Last Connected:	
Last Auto Connected:	
Timestamp:	4/1/2016 9:30:32 AM(UTC-4)
End Time:	
Package:	GooglePlay
Extraction:	File System
Source file:	

Map

Position:	[redacted]
Map Address:	[redacted]

Examination of Plaintiff's Phone

- Application data
  - Synced to account
  - and phone

Time	Category	Item
11:48:44 AM(UTC-6)	DB	Phone (dialer.db)
11:48:44 AM(UTC-6)	Text File	com.android.dialer.xml
11:48:47 AM(UTC-6)	Picture	1841 task thumbnail.DELETED.png
11:48:55 PM(UTC-6)	E-Mail	Received E-Mail from [redacted] (Assistant Services)
11:49:17 AM(UTC-6)	SMS From: [redacted] Mother	Ohhhh, well if it can be gotten for less than$5 a sheet it might be worth it, but i don't think This truck could haul it all at once and 2 trips would probably break even with $12 delivered
11:49:17 AM(UTC-6)	SMS From: [redacted] Mother	Ohhhh, well if it can be gotten for less than$5 a sheet it might be worth it, but i don't think This truck could haul it all at once and 2 trips would probably break even with $12 delivered
11:51:02 AM(UTC-6)	Text File	rti.mqtt.counter.MqttLite.tp.DELETED.xml
11:52:23 PM(UTC-6)	Text File	event data [redacted]
11:55:47 AM(UTC-6)	Text File	BattStatsPrefs.DELETED 1.xml
11:55:48 AM(UTC-6)	Text File	com.google.android.gms.auth.devicesignals.DeviceSignalsStore.DELETED.xml
11:55:48 AM(UTC-6)	Text File	com.google.android.gms.tapandpay.service.TapAndPayServiceStorage.DELETED.xml
11:55:48 AM(UTC-6)	Text File	settings secure.DELETED.xml
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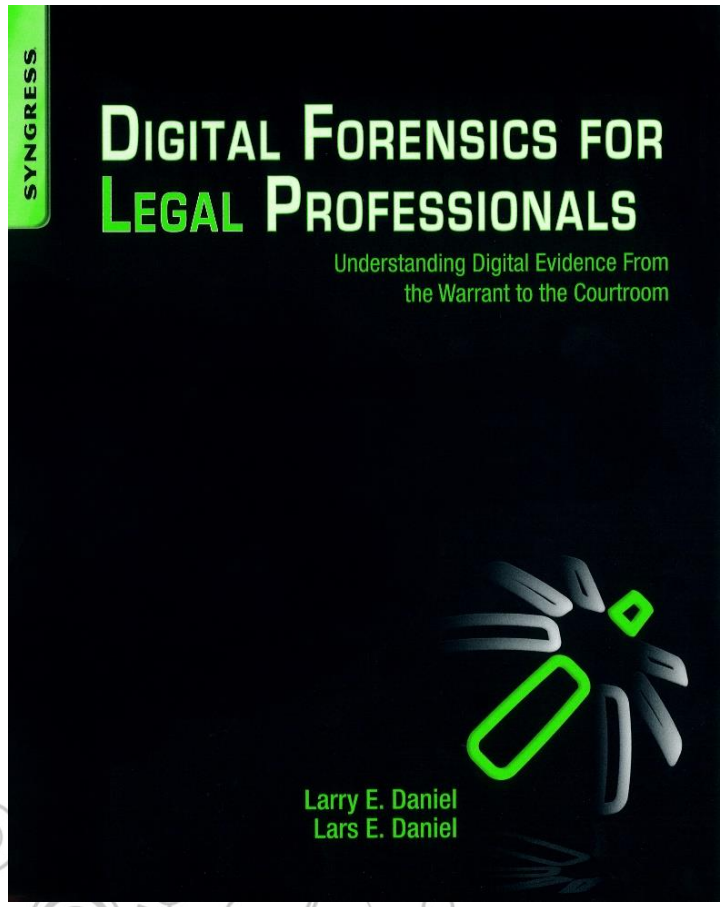
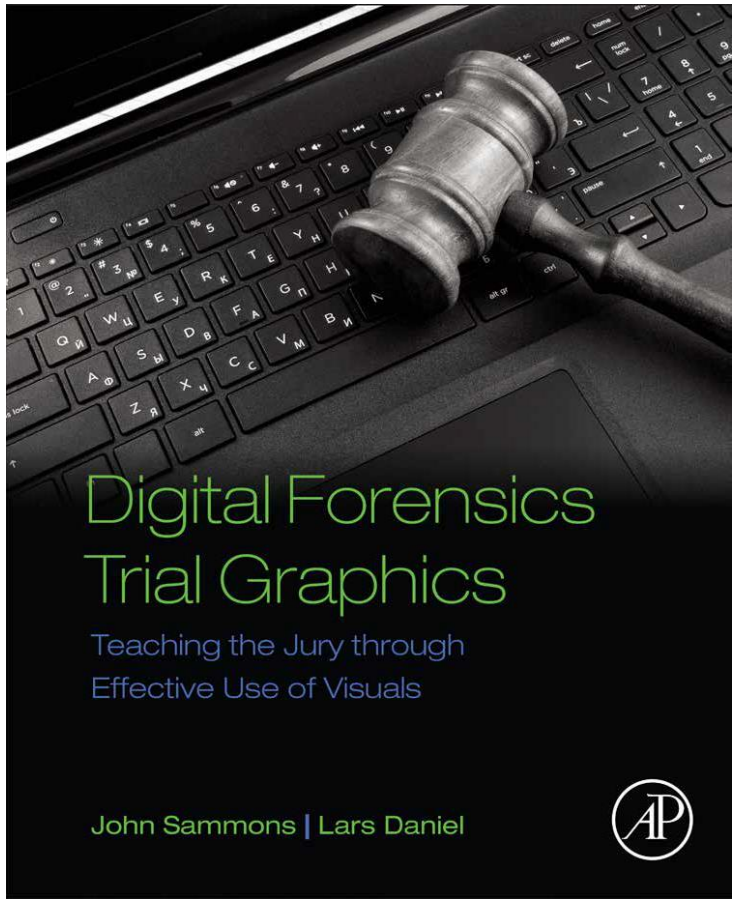
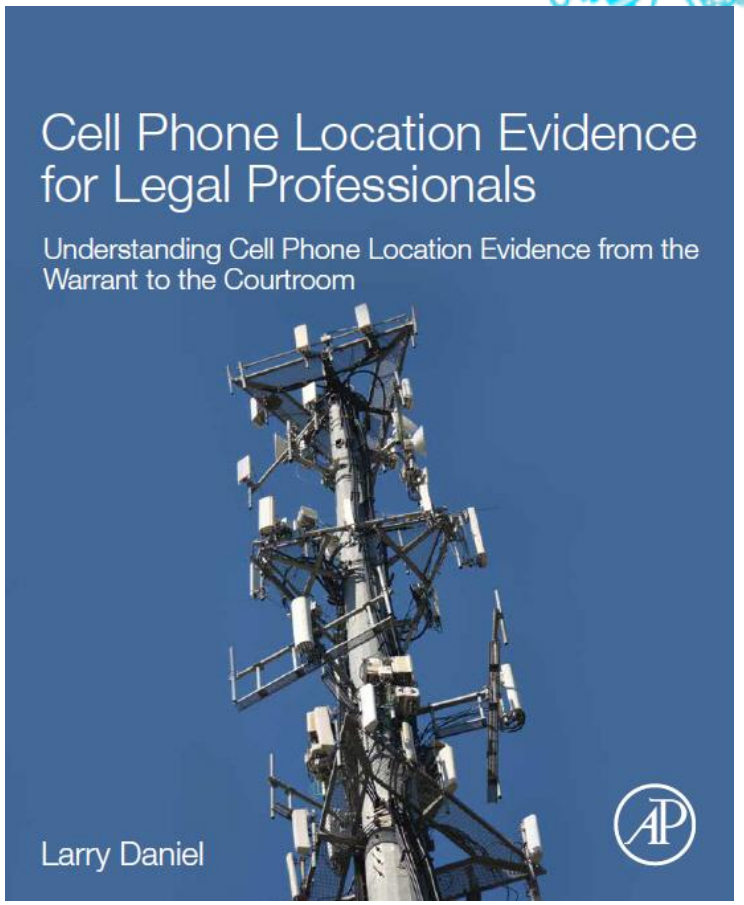
Questions?

lars.daniel@envistaforensics.com / 919-621-9335







Questions?

LARS DANIEL EnCE, CCO, CCPA, CTNS, CTA, CIPTS, CWA
PRACTICE LEADER – DIGITAL FORENSICS

M: 919-621-9335
E: lars.daniel@envistaforensics.com

Books Published
- Digital Forensics for Legal Professionals: Understanding Digital Evidence from the Warrant to the Courtroom, Syngess.
- Digital Forensics Trial Graphics: Educating the Jury Through Effective Use of Visuals", Published by Academic Press
- (2022) The Attorneys Field Guide to Digital Evidence: Mobile Phones

Certifications
- EnCase Certified Examiner (EnCE)
- Cellebrite Certified Logical Operator (CCLO)
- Cellebrite Certified Physical Analyst (CCPA)
- Certified Telecommunications Network Specialist (CTNS)
- Certified Wireless Analyst (CWA)
- Certified Internet Protocol Telecommunications Specialist (CIPTS)
- Certified Telecommunications Analyst (CTA)

Expert Testimony
- 33 times in State and Federal Court
- Qualified as an expert in computer forensics, digital forensics, cell phone forensics, video forensics, and photo forensics
- Testified for the defense and prosecution in criminal cases, and the plaintiff and defense in civil cases.

Case Experience
- Hundreds of cases involving murder, sex crimes, terrorism, kidnapping, intellectual property, fraud, wrongful death, employee wrongdoing, motor carrier accidents, and insurance losses among others.

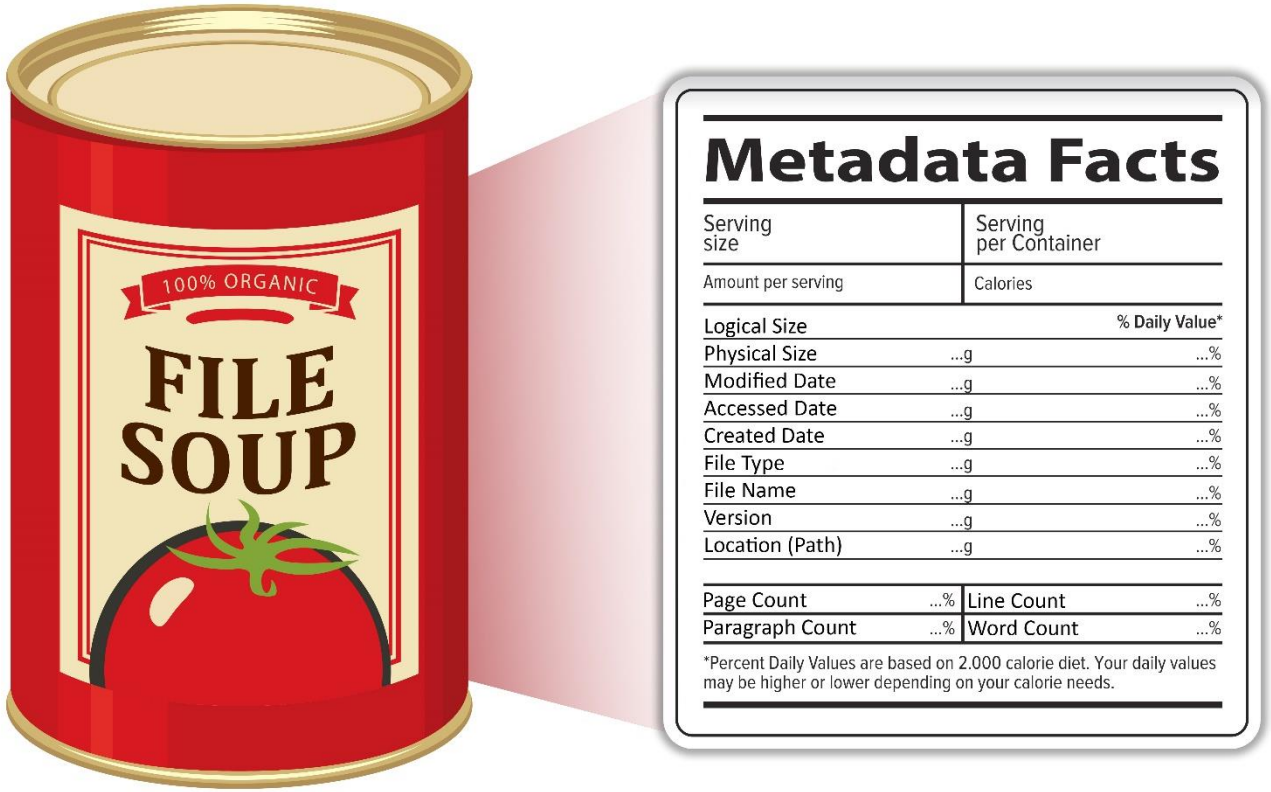
Speaking Engagements
- Largest Digital Forensics conference in the world, the Computer Enterprise Investigations Conference (CEIC, now EnFuse) in 2011, 2013, 2016, and 2019
- Over 300 CE and CLE classes taught across United States

Case Study: Distracted Driving

- Detailed timeline analysis at point of impact
  - Cell phone, event data recorder, online accounts

Case Example: Cell Phone Picture

- Photo Editing and Metadata
  - Web based (cloud) photo editing application



Civil Case Becomes Criminal

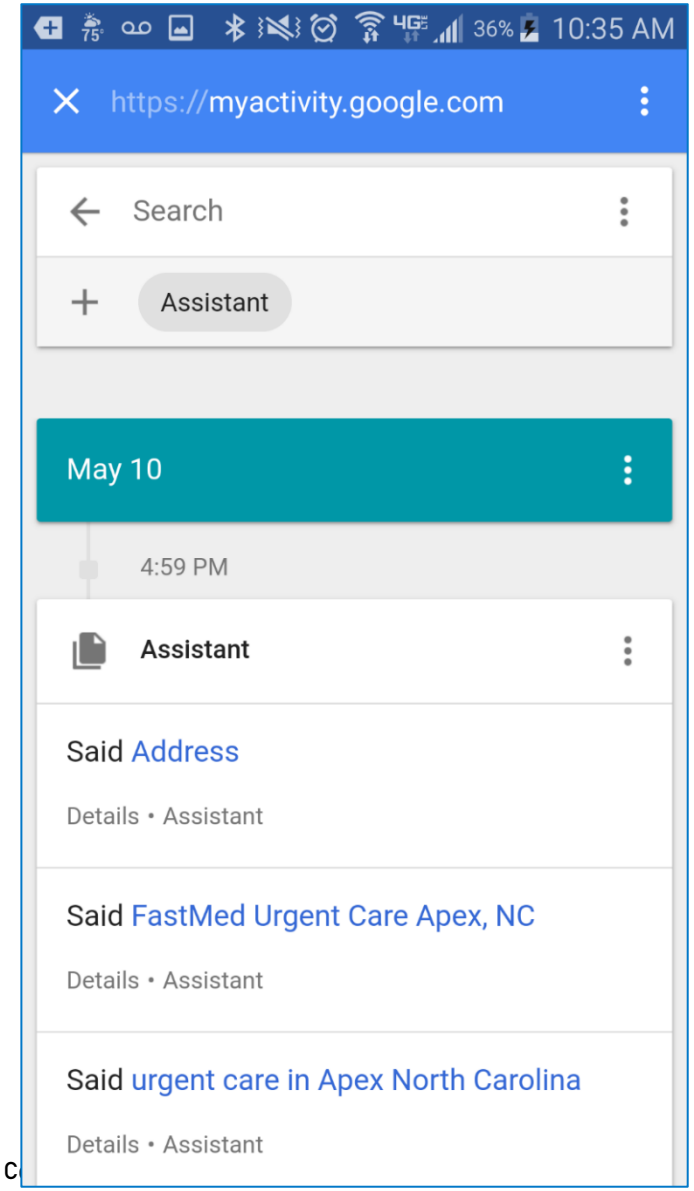
- Data theft turns criminal
  - Assisting Federal Marshalls
    - Data thief becomes a fugitive
    - Syncing between IOT devices p

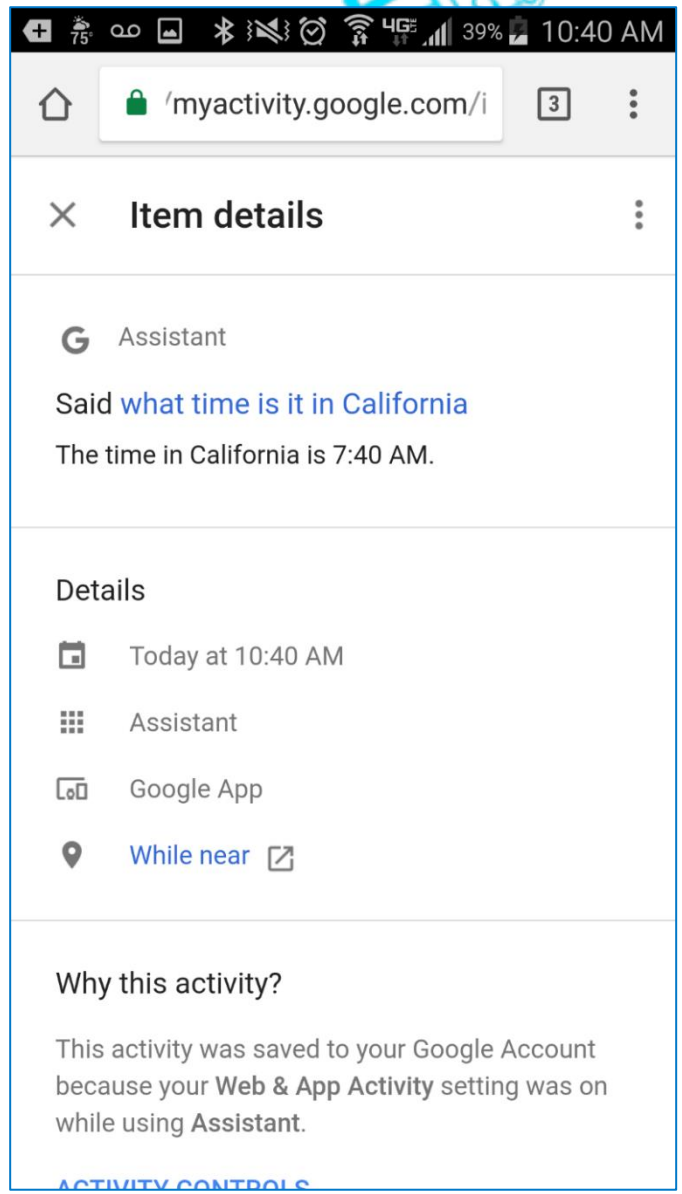
11. There is also a photograph stored on the Cell Phone that appears to be a picture of a New Mexico driver's license in the name of [redacted] with the date of birth of XX/XX/19XX. A copy of the photograph with the date of birth redacted is attached hereto as **Exhibit 4**.

Cell Phone:	**Hey! Want to make some fast cash?**
[redacted] Number:	**Who is this**
Cell Phone:	**[redacted] You moved my lazy boy chairs about 2 months ago. I am putting in for a name change and one of the many things they want is an affidavit attesting to my morel [sic]character. They want 2 of them. I already have them both ready to go so now I am just looking for 2 people that will sign them in front of a notary. I am offering $100 cash per person. Know anyone that might be interested?**
[redacted] Number:	**I will let y**
Cell Phone:	**Awesome!**
[redacted] Number:	**When and where. When do you have to have this done**
Cell Phone:	**Whenever is good for you will be fine. We can do it at the UPS store on [redacted] I think they have a notary there. If not then any bank would do but i am pretty sure that the UPS store has one.**

Capabilities: Examples

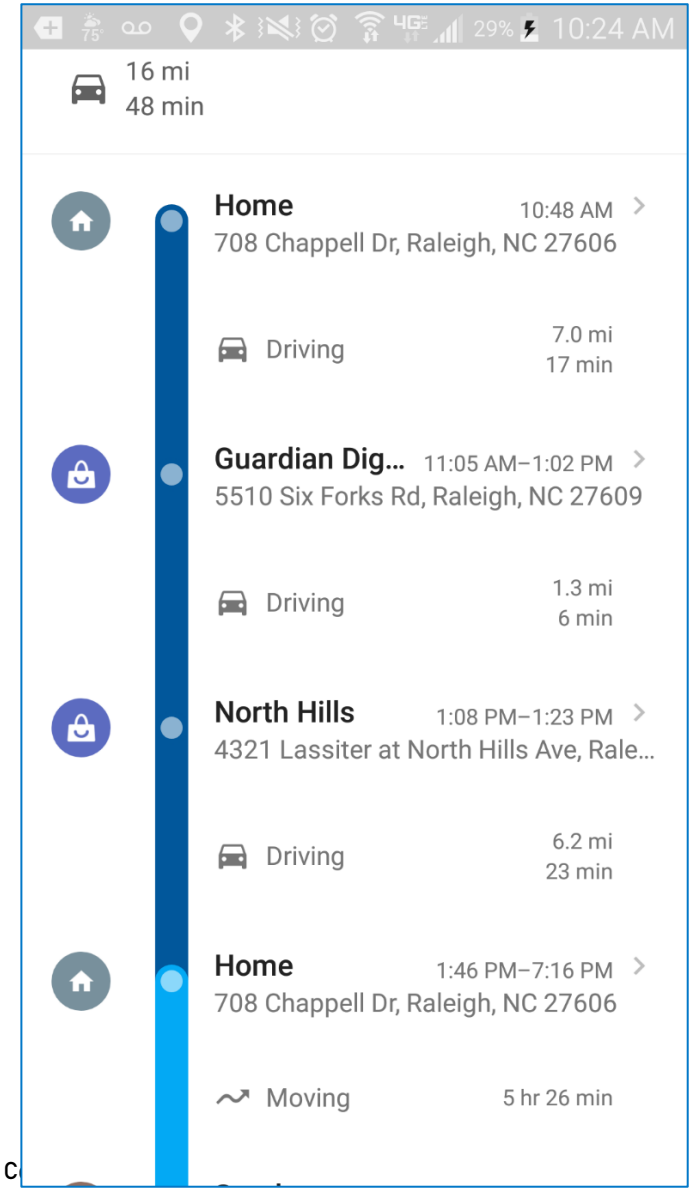
- Google is listening
  - Location activity
  - Full route

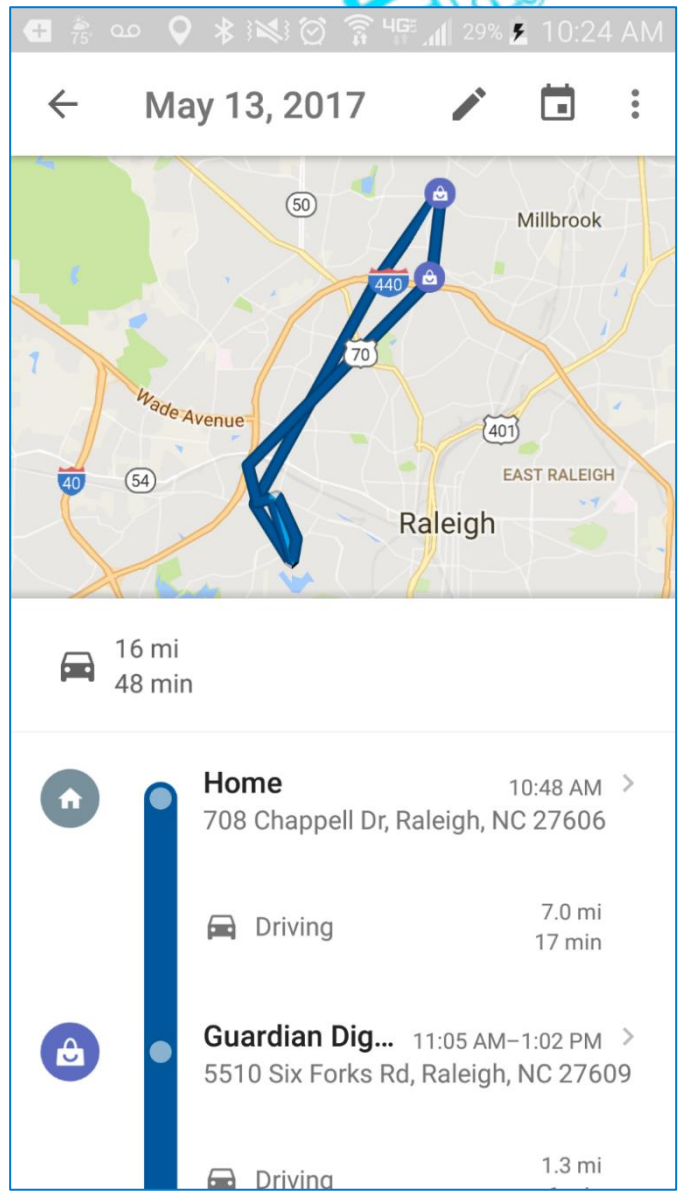




Capabilities: Examples

- Google is listening
  - Location activity
  - Full route





STATE OF NORTH CAROLINA

COUNTY OF XXXX

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. XXXXXXXXXXXXXXX

STATE OF NORTH CAROLINA

v.

XXXXXXXXXXXXX
Defendant.

****

REQUEST TO SHOW PROSPECTIVE JURORS A VIDEO ON UNDERSTANDING AND COUNTERING BIAS

****

NOW COMES Defendant, XXXXXXXXXXX, by and through undersigned counsel, and respectfully moves this Court that prospective jurors be shown the video, "Understanding and Countering Bias," from the UNC School of Government Judicial College ("the UNC Judicial College video"), as part of jury orientation, available at https://www.sog.unc.edu/resources/microsites/north-carolina-judicial-college/understanding-and-countering-bias (last checked May 8, 2022). Use of this video will help ensure that Defendant receives a fair and impartial jury whose decisions are not tainted by implicit bias. Further, use of this video will help protect Defendant's right to due process and to be free from cruel and unusual punishment. This Court should require the showing of this educational video on implicit bias pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I §§ 19, 23, 24 and 27 of the North Carolina Constitution.

[*Where such information would provide relevant context:* Defendant is [describe defendant identity]. One [or more] of the victims in this case, XXXXXXXXX, is XXXX.] There

is a long history of racial discrimination and racialized outcomes in the criminal justice system in this country and in this state. This problem persists today. *See* Michelle Alexander, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010). It is a multifaceted problem that is exacerbated by the phenomenon of implicit bias.

> Implicit biases are attitudes and stereotypes that people are not aware of, but that can influence their thoughts and behavior. These biases result from the brain's natural tendency to categorize stimuli into various categories or "schemas." All people rely on schemas to help sort the vast amount of information facing them each day, and schemas often involve stereotypes. As scholar john powell puts it, '[w]e cannot live without schemas. Having biases and stereotypes does not make us racist, it makes us human.' Research suggests that people may not be aware of their own biases. In fact, an implicit bias may conflict with a consciously held belief.

Alyson A. Grine and Emily Coward, RECOGNIZING AND ADDRESSING ISSUES OF RACE IN CRIMINAL CASES, University of North Carolina School of Government, Chapter One, page 1-6 (Sept. 2014) ("RECOGNIZING RACE MANUAL").

Implicit bias poses a threat to the guarantee of fair and impartial juries and the promise of equal justice under law. *See generally* Reshma M. Saujani, *"The Implicit Association Test": A Measure of Unconscious Racism in Legislative Decision-Making*, 8 MICH J. RACE & L. 395, 419 (2003) ("[T]he unconscious nature of juror bias prevents the voir dire from impaneling fair and impartial jurors"). Social science research demonstrates what most of us in the criminal justice system realize: Implicit bias can influence jurors' decisions. RECOGNIZING RACE MANUAL at 1-6-7. Numerous studies raise concerns about the potential impact of implicit biases on fair trials. *See, e.g.*, Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL SCI. 383 (2006); Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53

DEPAUL L. REV. 1539, 1542 (2004); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1195–96 (2009). While it is not possible to eliminate the impact of implicit bias, there are steps that can be taken to mitigate its influence on juror decision-making. RECOGNIZING RACE MANUAL at 1-7-8.

There has been a growing recognition of the importance of educating jurors about the phenomenon and consequences of implicit bias. In 2017, United States Supreme Court of the United States emphasized the importance of employing various strategies to safeguard against the influence of juror bias. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017) (addressing bias in the jury system enables "our legal system [to come] ever closer to the promise of equal treatment under the law that is so central to a functioning democracy"); *see also* Hon. Kenneth V. Desmond, Jr., *The Road to Race and Implicit Bias Eradication*, BOSTON BAR JOURNAL, Summer 2016, at 3 ("Throughout the past several decades, State and Federal appellate courts have candidly acknowledged the implicit biases of litigants and jurors."). Legal experts have developed innovative approaches to educating jurors about the importance of guarding against the influence of implicit bias on decision-making.

Perhaps no innovation has been as broadly embraced as the juror orientation video produced by and for the US District Court for the Western District of Washington ("the WDWA video"), whose creators have shared the video with jurisdictions across the country. *See* Unconscious Bias Video, USDC for the Western District of Washington, available at https://www.wawd.uscourts.gov/jury/unconscious-bias (last checked May 8, 2022); *see also Memorandum from Jury Administrator Jeff Humenik to Judge John C. Coughenour*, Summary Report - Implicit Bias Questionnaire for Jurors, (Apr. 16, 2019), available at https://civiljuryproject.law.nyu.edu/wp-content/uploads/2019/04/Implicit-Bias-Summary-Report-

Judge-Coughenour.pdf (last checked May 8, 2022) (survey results revealing that jurors overwhelmingly find WDWA video useful).

In North Carolina, Superior Court judges in several counties have granted motions to show the WDWA video to prospective jurors. In 2019, Buncombe County Senior Resident Superior Court Judge Alan Thornburg created a modified version of the WDWA video for use in Buncombe County jury orientation. In 2020, Durham County Senior Resident Superior Court Judge Orlando Hudson instructed that the modified WDWA video should be shown to all jurors oriented in Durham County Superior Court. The North Carolina Governor's Task Force for Racial Equity in Criminal Justice, in its 2020 report, called for providing "implicit bias training to all jury system actors" and recommended "that jurors receive education and instructions on implicit bias by using jury videos, pattern jury instructions, and a juror pledge."

The UNC Judicial College video identifies and addresses potential problems caused by implicit bias. It defines the concept of implicit bias and offers suggestions for noticing and countering the influence of such bias. Video content was "informed by [the WDWA video]" and created by a research and advisory group comprised of a wide array of court actors, including a current Senior Resident Superior Court Judge, retired Senior Resident Superior Court Judge, Chief District Court Judge, Trial Court Administrator, elected District Attorney, Indigent Defense Services Forensic Resource Counsel, Capital Defender Investigator, Law Professor, UNC School of Government Project Attorney, and a Court Management Specialist from the NC Administrative Office of the Courts. *See* North Carolina Judicial College: Understanding and Countering Bias, available at https://www.sog.unc.edu/resources/microsites/north-carolina-judicial-college/understanding-and-countering-bias (last checked May 8, 2022). The information in the video is delivered by experts in North Carolina law: retired North Carolina Court of

Appeals Chief Judge Linda McGee, Wake Forest Law Professor Kami Chavis, and UNC School of Government Professor James Drennan. *See* id. The video is neutral, clear, and evidence based, and it has the potential to reduce the influence of implicit bias on the administration of justice. The showing of this video would not be prejudicial to either side in a criminal case.

After years of experimenting with the use of a video produced for the US District Court for the Western District of Washington featuring Seattle attorneys and judges, North Carolina now has its own jury orientation video on understanding and countering bias. The need to address implicit bias with jurors is clear, and this court should use all tools at its disposal to minimize the possibility that implicit bias will undermine the integrity of juror decision-making in North Carolina jury trials.

[In this case, *and/or, if seeking an administrative order*: and as a standing matter], this Court should direct that the UNC Judicial College video be shown to potential jurors during juror orientation.

Respectfully submitted, this the _____ day of XXXXXXXX 20XX.

_____ _____

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing **Motion** by first class mail or by hand delivery upon:

XXXXXXXXXXXX
Assistant District Attorney
Office of the District Attorney
XX Prosecutorial District
XXXXXXXXXXXX
XXXXXXXXXXXX

This the ___ day of XXXXXXX, 20XX.

_____
XXXXXXXXXXX

STATE OF NORTH CAROLINA
COUNTY OF WAKE

FILED
2018 DEC 31 PM 2:43
WAKE CO., C.S.C.
BY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NOS. 16 CRS5702, 223351

STATE OF NORTH CAROLINA)
)
)
v.) **ORDER**
)
)
SEAGA E. GILLARD,)
Defendant)

THIS MATTER comes before the undersigned for hearing on December 20, 2018 upon the Defendant's Motion that Perspective Jurors be Shown a Video About Implicit Bias. In Defendant's motion, the Defendant requests that during the orientation process, jurors be shown a video prepared by the United States District Court, Western District of Washington for use in that court's jury orientation. (http://www.wawd.uscourts.gov/jury/unconsicous-bias).

Upon review of the motion, the arguments of counsel, and all matters of record, the Court, in its discretion ALLOWS the motion under the following conditions. Defendant shall provide to the jury clerk, no later than 2:00 p.m. Friday, January 4, 2019, a DVD with a copy of the video suitable for playing on a standard DVD player. The video shall be shown in the jury lounge only to those jurors who have been randomly selected to be included in the panel of prospective jurors for this trial.[1]

So ordered, this the 31st day of December, 2018.

Paul C. Ridgeway, Superior Court Judge

[1] The undersigned has obtained permission from the copyright holder, the US District Court for the Western District of Washington, to broadcast the video in connection with this trial.

Certificate of Service

THIS IS TO CERTIFY that a copy of the foregoing Order was served upon the following parties and persons by mailing a copy thereof by postage prepaid, first class mail or by otherwise approved delivery addressed as follows:

Kathryn Pomeroy
Assistant District Attorney
10th Prosecutorial District
Post Office Box 31
Raleigh, NC 27602

David J. Saacks
Assistant District Attorney
10th Prosecutorial District
Post Office Box 31
Raleigh, NC 27602

Jonathan Broun
Attorney for Defendant
Post Office Box 25397
Raleigh, NC 27611-5397

Edd K. Roberts, III
Attorney for Defendant
Post Office Box 1608
Raleigh, NC 27602

Luiza Harrell, Assistant Clerk
Wake County Clerk of Superior Court
Post Office Box 351
Raleigh, NC 27602

This, the 31st day of December, 2018.

Davis Cooper
Judicial Assistant
Wake County Superior Court Judges' Office

Bias Checklist for Defenders

2022

STEP ONE: **REVIEW THE RISK FACTORS**

- **Emotional state** – anger, disgust, stress, and fatigue exacerbate implicit bias
- **Pressured decision making** –stress, distraction, and time pressure increase risk of stereotyping
- **Low-effort cognitive processing** – less thoughtful, deliberative process = greater implicit bias
- **Easily-accessible social categories** – implicit bias more likely when a trait is easy to see
- **Ambiguity** – judgment calls based on vague criteria or information increases implicit bias
- **Lack of feedback** – less likely to check bias where no organizational feedback or checks

STEP TWO: **SLOW DOWN**

Take a moment to reflect on your mental state, stress, distractions, and time pressure.

Take your time. It is better to slow down now than cause harm later.

STEP THREE: **GENERAL BIAS CHECK**

- ✓ Do you have enough information? Are you making any assumptions?
- ✓ Are you requiring more from this person than you would from others?
- ✓ How would you feel if person's answers were given by a person of another demographic group?

STEP FOUR: **LISTEN, VALIDATE, COLLABORATE, ADVOCATE, REMAIN SELF-AWARE**

- **Communication** – Use clear, common language. Practice active, non-judgmental listening. Repeat, clarify, and validate client's concerns. Be mindful of the impact of your own identity and power/status as an attorney.
- **Prior Record** – Black and Latinx people are more likely to be arrested, charged, convicted, and incarcerated. Listen for how structural racism and racial trauma may have harmed your client.
- **Debiasing Strategies** – Notice when stereotypes arise. Combat them by learning about your client's life, understanding who and what are important to them, and gathering and referencing images of them at their best.
- **Advocate** – Notice and challenge when legal system actors make assumptions about your client.
- **Issues Specific to Your Case** – Consider the obvious and subtle ways racism or bias impacts your client's case, collaboratively craft a narrative that exposes this impact and reframes the story.
- **Support and Accountability Networks** – Discuss your bias check efforts with peers. Peer feedback loops support and sustain debiasing efforts. Make this practice habitual by combining your bias check with another regularly scheduled part of your week.

The Decarceration Project
TDP

TALKING WITH POTENTIAL JURORS ABOUT RACE

Emily Coward
Policy Director, the Decarceration Project

I. OVERVIEW

Racial bias in the jury system is a "familiar and recurring evil that, [] left unaddressed, [] risk(s) systemic injury to the administration of justice."[1] Discovering the racial attitudes of potential jurors during jury selection is an "important mechanism[] for discovering bias," and therefore a critical safeguard against this pernicious problem.[2] In this manuscript, I will address why, when, and how defense attorneys should discuss race and racial bias with potential jurors during voir dire, and explore the legal protections applicable to voir dire on the subject of race.

II. WHY SHOULD YOU ADDRESS RACE DURING VOIR DIRE?

Champions of racial justice-oriented criminal defense—including ACLU Deputy Legal Director Jeffery Robinson, Jonathan Rapping of Gideon's Promise, Dean Andrea Lyon of Valaparaiso Law School, and the late and legendary San Francisco Public Defender Jeff Adachi—agree that "[d]uring voir dire, defense counsel should [discuss] the problem of race bias and identify those jurors who appreciate its influence."[3] However, when I informally poll North Carolina criminal defense attorneys during sessions on this topic, I discover that very few of them have ever addressed race during voir dire. Reasons commonly cited for avoiding the topic of race during voir dire include the following:

- Concerns about making jurors uncomfortable; pessimism about jurors' willingness to discuss race honestly;
- Lack of experience and confidence discussing race generally;

[1] *Pena-Rodriguez v. Colorado*, 580 U.S. ___, 2017 WL 855760 (2017).
[2] *Id.*, slip op. at 16.
[3] Jonathan Rapping, *The Role of the Defender in a Racially Disparate System*, THE CHAMPION, July 2013, at 46, 50; *see also* Jeff Robinson & Jodie English, Confronting the Race Issue During Jury Selection, THE ADVOCATE, May 2008; Andrea D. Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 SEATTLE U. L. REV. 755 (2012); Jeff Adachi's Sample Motion to Allow Reasonable & Effective Voir Dire on Issues of Race, Implicit Bias & Attitudes, Experiences and Biases Concerning African Americans.

- "That won't fly in my jurisdiction" (aka "the jurisdictional defense");
- Concern that the lawyer's own racial, ethnic, or gender identity will interfere with their ability to connect with jurors on this topic;
- Lack of training/encouragement by supervisors/peers, "no one else is doing it";
- Worry that the judge will not permit this line of questioning;
- Unfamiliarity with legal protections applicable to voir dire on race;
- Perception that race is a historical phenomenon that is not relevant today;
- Impression that "color-blindness" is a norm that members of the bar are expected to uphold and a belief that all discussions of race amount to "playing the race card," which is frowned upon/discouraged.[4]

These worries are common, and they are real. However, they are outweighed by the critical importance of uncovering racial attitudes during voir dire, which will enable you to:

- Discover views on race that will impact potential jurors' assessment of evidence;[5]
- Discover which jurors appreciate that race matters and will be bold enough to discuss race thoughtfully during deliberations;[6]
- Discover how potential jurors respond to uncomfortable topics;
- Legitimize race/racial bias as a topic worthy of consideration and give jurors implicit permission to consider and discuss race/racial bias themselves;
- Improve your ability to exercise intelligent strikes/challenges;
- Avoid relying on stereotypes yourself;
- "Make race salient" and increase the likelihood that jurors will think critically about race and avoid reliance on stereotypes/bias.[7]

---

[4] *See* Jeff Robinson & Jodie English, *Confronting the Race Issue During Jury Selection*, THE ADVOCATE, May 2008, at 57 (discussing some of these concerns).

[5] Ira Mickenberg, Voir Dire and Jury Selection 2 (training material presented at 2011 North Carolina Defender Trial School).

[6] Discussing race during voir dire allows defenders to explore whether individuals are comfortable discussing issues of race and to consider striking "jurors who ignored the issue or who asserted that race did not matter." Anthony V. Alfieri & Angela Onwuachi-Willig, *Next Generation Civil Rights Lawyers: Race and Representation in the Age of Identity Performance*, 122 YALE L.J. 1484, 1526 (2013) (quoting L. Song Richardson, Professor of Law, Univ. of Iowa Coll. Of Law).

[7] Implicit bias researchers have found that when race issues are brought to the forefront of a discussion or "made salient," the influence of stereotypes and implicit biases on decision-making recendes. *See, e.g.,* Regina A. Schuller et al., *The Impact of Prejudice Screening Procedures on Racial Bias in the Courtroom*, 33 LAW & HUM. BEHAV. 320 (2009) (voir dire regarding racial bias appeared to diminish racial bias from assessments of guilt)l; Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not-Yet Post-Racial Society*, 91 N.C. L.Rev. 1555

If you avoid the issue, you may increase the likelihood that bias will influence deliberation. You can build your competence in this area by reviewing the resources listed below, watching demonstrations of voir dire on race, writing out your questions ahead of time, and, of course, practicing!

III. WHEN SHOULD YOU ADDRESS RACE DURING VOIR DIRE?

Former CDPL Director Tye Hunter once asked a group of attorneys, "How do you know if you have a case that involves race?" We thought for a moment until we realized it was a trick question. The answer is, "If you have a case." In other words, you should be thinking about the ways in which racial or ethnic stereotypes or biases may harm your client in *every single case*, not simply the cases with obvious racial overtones, such as an interracial crime of violence. Since implicit and explicit racial biases can influence the perceptions of guilt, you have a responsibility to keep people off your client's jury whose decision-making is particularly susceptible to such biases. If you fail to address race during jury selection, you are hamstrung in your ability to protect your client from racial bias on her/his jury.

Many, if not all, cases tried in front of a jury risk triggering racialized responses on the part of jurors. Here is a non-exhaustive list of scenarios in which a juror's racial attitudes or biases could influence their assessment of the evidence presented:

- All the key players in the case (the defendant, the victim, the police officers, and the witnesses) are Black;
- The defendant is married to a person of a different race;
- The defendant and the victim are White, and the arresting officer and witnesses are Black;
- The alleged crime occurred in a neighborhood that was recently the sight of a police shooting of an unarmed Black man;

(2013; Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 U. C. Irvine L. Rev. 843, 861 (2015); JERRY KANG, IMPLICIT BIAS: A PRIMER FOR COURTS, NATIONAL CENTER FOR STATE COURTS 4–5 (National Center for State Courts 2009) (collecting evidence that "implicit biases are malleable and can be changed").

- The officer stopped your client, at least in part, on the basis of her presence in a "high crime area"?
- Your client is an activist who speaks out on issues of racial justice;
- Your client is a Latinx resident of a rural area that, until recently, was nearly 100% White, and now has a growing Latinx community;
- Your client is White and lost his job at the local police department for complaining about discrimination against White officers;
- Your client is the only Black person in the courtroom.

Each of these scenarios, none of which is particularly unusual, involve racial dynamics that could trigger biased responses from jurors. While you may not decide to voir dire on race in all of these cases, you should consider doing so, and be prepared to do so, in every single case.

IV. HOW SHOULD YOU ADDRESS RACE DURING VOIR DIRE?

There is no one correct approach to voir dire on race. The following tips will help you to develop your own unique approach to this subject.

A. PREPARING TO DISCUSS RACE WITH JURORS: A STEP-BY-STEP APPROACH

1. Reflection Questions to Use when Preparing Voir Dire

As with all other voir dire questions, voir dire on race needs to be "tailored to your factual theory of defense in each individual case."[8] Before drafting your questions about race, consider asking yourself the following questions. Your answers will help you identify what information you are seeking from potential jurors and craft questions aimed at eliciting that information. Imagine, for example, that your client is a Latino man charged with sexually assaulting a White woman.

a. What scares me about this case?

[8] Ira Mickenberg, Voir Dire and Jury Selection 6 (training material presented at 2011 North Carolina Defender Trial School).

e.g. That a jury might convict my client based on stereotypes of Latino men or immigrants.

b. What biases or stereotypes could lead a juror to vote to convict my client?
e.g. That Latino men are more likely to sexually assault women. That White women who speak English are more credible than Latino men who speak Spanish.

c. What does a juror need to believe in order for us to win?
e.g. That eyewitness identification is unreliable and that cross-racial eyewitness identification is even more unreliable. That my client's ethnic identity and language doesn't make him any less credible than the victim.

d. What do I need to know about a juror to determine if they are open to our theory of the case?
e.g. Whether they are likely to jump to conclusions about the alleged behavior of my client because he is Latino, whether they are open to the possibility that a White victim could sincerely believe that she has identified her assailant when, in fact, she is mistaken.

2. Tools in your Toolkit

a. Move for extra time for voir dire. When you explore race with potential jurors, voir dire takes longer. For this reason, you may consider filing a motion for extra time to explore sensitive topics during voir dire to help prepare the court for a lengthier voir dire. Also, as you all know, feathers may get ruffled when you bring up the subject of race. As CDPL Staff Attorney Johanna Jennings has observed, if there's going to be an argument about your plan to discuss race during voir dire, there is some value to getting that argument over with before jury selection begins. By the time the jurors enter the courtroom, the tension over the topic may have dissipated somewhat, and, hopefully, your right to discuss race with potential jurors will

be recognized by both the judge and the prosecutor. *See* Jeff Adachi's Sample Motion to Allow Reasonable & Effective Voir Dire on Issues of Race, Implicit Bias & Attitudes, Experiences and Biases Concerning African Americans.

b. **Move for individual voir dire.** Potential jurors may be more willing to speak freely about a sensitive topic like race when questioned out of earshot of other jurors. Additionally, exploring race with potential jurors as a group may expose panelists to potentially disqualifying, prejudicial information. For these reasons, some attorneys who discuss race with potential jurors find it more effective to question jurors about racial attitudes individually. For an sample motion, *see* Johanna Jennings's Motion for Individual Voir Dire on Sensitive Subjects. Again, even if this motion is denied, filing and arguing it allows you to inform the judge and the prosecutor that you intend to get into the topic of race during voir dire before jury selection begins.

c. **Questionnaires.** Written questionnaires including questions about race may result in more revealing answers.[9] Additionally, written answers can serve as useful jumping off points for follow up questions during voir dire. Sample questionnaire questions on race can be found in ACLU Deputy Legal Director Jeffery Robinson's article, Jury Selection and Race: Discovering the Good, the Bad, and the Ugly. The questionnaire used in the trial of Derek Chauvin for the killing of George Floyd can be found here.

d. **Move to Show Jurors the 2022 UNC School of Government Judicial College Implicit Bias Video, *Understanding and Countering Bias*.** North Carolina has a new video available for educating jurors about implicit bias. If the potential jurors in your client's case see this implicit bias video, you can ask them about responses to the video during voir dire, uncover relevant

[9] Robert Hirschhorn. Jeff Robinson & Jodie English, *Confronting the Race Issue During Jury Selection*, THE ADVOCATE, May 2008, at 57, 60.

information about their perspectives on bias, and decrease the likelihood of successful objections to your questions about race and bias. A sample motion to show *Understanding and Countering Bias* is included in your materials.

3. How to Raise the Subject

a. Creating the Conditions for a Discussion of Race. Approach the subject of race intentionally and carefully; it should not be your first topic. Potential jurors, like all other people, generally appreciate a heads up before they asked sensitive or probing questions. You may try to get the jurors to introduce the topic themselves, (for example, "other than guilt, can you think of a reason someone might panic when questioned by police?"), or explicitly state that you are shifting gears to talk about race.

It can be helpful to name the discomfort that everyone feels when discussing race in a group of strangers. Acknowledge that it often makes people uncomfortable, including yourself. You may consider answering your own question to show you're not asking them to do something you're unwilling to do yourself.[10] Reassure panelists that you're not looking for any specific answers, and that there are no wrong answers. You are simply asking questions to help you determine if they are the right juror for this case.

b. What sort of questions should you ask? Your questions will vary depending on the facts of the case and your theory of the case. It goes without saying that direct questions about bias (i.e. "will racial bias influence your decision making in this case?") are ineffective.[11] After you've created the conditions for panelists to feel comfortable opening up, focus your questions on past, analogous behavior, stick with command superlative

[10] Ira Mickenberg, Voir Dire and Jury Selection 10 (training material presented at 2011 North Carolina Defender Trial School).
[11] Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C.L.REV. 1555 (2013).

analog method, and avoid asking questions that will provoke defensiveness. For example, you may ask, "Tell us about the worst experience you (or someone close to you) ever had because someone stereotyped you (or someone close to you) bc of race." Additional sample questions can be found in Jeff Robinson, Jill Otake, and Corrie Yackulic, Jury Selection and Race: Discovering the Good, the Bad, and the Ugly, and our manual, *Raising Issues of Race in North Carolina Criminal Cases,* Chapter 8. For a further discussion of how to construct such questions, see Ira Mickenberg, Voir Dire and Jury Selection 10 (training material presented at 2011 North Carolina Defender Trial School).

c. **Responding to Potential Jurors' Statements about Race.** When a juror answers a sensitive question relating to race or racial bias, thank them with almost over-the-top expressions of gratitude. This will encourage them to continue talking and send a message to other jurors that all views on race are welcome contributions to this conversation.[12] Only by encouraging frank comments on race will you succeed in uncovering jurors' views on race and discovering who to deselect from your client's jury. Your goal in jury selection is not to change juror attitudes on race. Instead, it is to discover racial attitudes that can harm your client, and to remove people who hold such attitudes from your client's jury.[13]

[12] Anthony V. Alfieri & Angela Onwuachi-Willig, *Next Generation Civil Rights Lawyers: Race and Representation in the Age of Identity Performance*, 122 YALE L.J. 1484, 1549 (2013) (quoting from telephone interview with Jeff Robinson).

[13] "Who can honestly believe that opinions on issues as sensitive as race, opinions which have been formed over a person's lifetime, could be changed in the time allowed for jury selection in a criminal case? If we cannot change people's opinions, we'd better get busy finding out what those opinions are, how strongly they are held, and how they may impact a verdict in our case. The challenge in jury selection is to get people to talk as forthrightly as possible about race so we can maximize our ability to intelligently exercise preemptory challenges and challenges for cause. If we succeed in getting people to talk about race, we may not change race relations in the world, but we may change the verdict in our case." Jeff Robinson, Jill Otake, and Corrie Yackulic, Jury Selection and Race: Discovering the Good, the Bad, and the Ugly, Materials accompanying 2015 ABA Event.

V. LEGAL PROTECTIONS APPLICABLE TO VOIR DIRE ON RACE

A. LEGAL PROTECTIONS APPLICABLE TO VOIR DIRE GENERALLY

"[P]art of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors."[14] North Carolina appellate courts have recognized that voir dire serves two basic purposes: 1) helping counsel determine whether a basis for a challenge for cause exists, and 2) assisting counsel in intelligently exercising peremptory challenges.[15] As you prepare your voir dire questions on the subject of race, keep these at the forefront of your mind so that you are always ready to link your questions to the purposes of voir dire.

B. THE NORTH CAROLINA SUPREME COURT HAS RECOGNIZED A RIGHT TO VOIR DIRE ON RACE

The right to voir dire on race has a long history in North Carolina. In 1870, our state Supreme Court found reversible error where a trial judge disallowed voir dire on racial bias.[16] In fact, North Carolina jurisprudence on this topic predates that of the US Supreme Court. An early US Supreme Court opinion relied in part on the *McAfee* ruling in reversing a conviction based on the court's refusal to inquire into possible racial bias where the defendant was Black and accused of an interracial crime of violence.[17] Both of these cases were decided before the U.S. Supreme Court cases clarifying the circumstances under which the right to voir dire on race is constitutionally protected. Those cases are discussed below.

C. WHAT ARE THE CONTOURS OF THE CONSTITUIONAL RIGHT TO VOIR DIRE ON RACE?

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[14] *Morgan v. Illinois*, 504 U.S. 719, 729 (1992).
[15] *State v. Wiley,* 355 N.C. 592 (2002); *State v. Anderson*, 350 N.C. 152 (1999); *State v. Brown*, 39 N.C. App. 548 (1979); *see also Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991) ("Voir dire examination serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges.").
[16] *State v. McAfee*, 64 NC 339, 340 (1870); *see also State v. Williams*, 339 N.C. 1, 18 (1994) (voir dire questions aimed at ensuring that "racially biased jurors [will] not be seated on the jury" are proper); *State v. Robinson*, 330 N.C. 1, 12–13 (1991) (trial judge retains discretion to determine the scope of questioning on racial bias).
[17] *Aldridge v. U.S.*, 283 U.S. 308 (1931).

In the recent US Supreme Court case of *Pena-Rodrigruez v. Colorado*, Justice Alito summarized the court's jurisprudence in this area as follows: "voir dire on the subject of race is constitutionally required in some cases, mandated as a matter of federal supervisory authority in others, and typically advisable in any case if a defendant requests it....Thus, while voir dire is not a magic cure, there are good reasons to think that it is a valuable tool."[18] This is powerful language that you should be quoting any time your attempt to address race during voir dire is met with skepticism. Practice this response in advance: *"Your honor, according to Justices Alito, Thomas, and Roberts, voir dire on race is 'constitutionally required in some cases' and 'typically advisable in any case if the defendant requests it.' In this case it's constitutionally required because…."*. The section below will help you finish that sentence.

1) Constitutionally Guaranteed Right to Voir Dire on Race when Case Involves "Special Factors"

A defendant has a constitutional right to ask questions about race on voir dire when "racial issues [are] inextricably bound up with the conduct of the trial."[19] For example, in *Ham v. South Carolina*, 409 U.S. 524 (1973), the U.S. Supreme Court held that a Black defendant, who was a civil rights activist and whose defense was that he was selectively prosecuted for marijuana possession because of his civil rights activity, was entitled to voir dire jurors about racial bias. In *Ristaino v. Ross*, 424 U.S. 589, 597 (1976), the Court held that the Due Process Clause does not create a general right in non-capital cases to voir dire jurors about racial prejudice, but such questions are constitutionally protected when cases involve "special factors," such as those presented in *Ham*.

In *Rosales-Lopez v. United States*, 451 U.S. 182, 192 (1981), the Court held that trial courts must allow voir dire questions concerning possible racial prejudice against a defendant when the defendant is

[18] Slip op at 13 n.9, Alito, J., dissenting, (citing authorities) (emphasis added).
[19] *Ristaino v. Ross*, 424 U.S. 589, 597 (1976).

charged with a violent crime and the defendant and victim are of different racial or ethnic groups.[20]

Any time your attempt to voir dire on race is met with objection, you should articulate the "special factors" that make such questions necessary and constitutionalize your asserted entitlement to voir dire on race. As explained in *Turner v. Murray*, 476 U.S. 28 (1986) (plurality opinion), special factors triggering constitutional protection for the right to voir dire on race are present whenever "there is a showing of a 'likelihood' that racial or ethnic prejudice may affect the jurors."[21] Given that the boundaries of the "special factors" category defy precise definition, you should be able to articulate such factors whenever you have reason to believe that racial attitudes or racial bias could influence the evaluation of the evidence in your client's case.

2) What About in All Other Cases?

In other cases, courts have held that whether to allow questions about racial and ethnic attitudes and biases is within the discretion of the trial judge.[22] Undue restriction of the right to voir dire is error.[23] If you encounter a judge who believes the issue of race is not relevant to your client's case, link your questions to the purposes of voir dire and present scholarly research concluding that "juror racial bias is most likely to occur in run-of-the mill trials without blatantly racial issues."[24]

3) Even in the Absence of a Constitutional Claim, the North Carolina Supreme Court Has Reversed a Conviction Based on the Court's Improper Refusal to Permit Voir Dire on Race.

[20] *See also Turner v. Murray*, 476 U.S. 28 (1986) (plurality opinion) (defendants in capital cases involving interracial crime have a right under the Eighth Amendment to voir dire jurors about racial biases).
[21] *Id.*, (Brennan, J., concurring in part, dissenting in part).
[22] *See State v. Robinson*, 330 N.C. 1, 12–13 (1991) (trial judge allowed defendant to question prospective jurors about whether racial prejudice would affect their ability to be fair and impartial and allowed the defendant to ask questions of prospective White jurors about their associations with Black people; trial judge did not err in sustaining prosecutor's objection to other questions, such as "Do you belong to any social club or political organization or church in which there are no black members?" and "Do you feel like the presence of blacks in your neighborhood has lowered the value of your property . . . ?").
[23] *See State v. Conner*, 335 N.C. 618, 629 (1994) (holding that pretrial order limiting right to voir dire to questions not asked by court was error).
[24] Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 601 (2006).

The North Carolina Supreme Court recently confronted this issue in *State v. Crump*, 376 N.C. 375 (2020), where a Black man was involved in a shootout and car chase with police officers and convicted on charges including armed robbery, kidnapping, assault with a deadly weapon with intent to kill, and assault of law enforcement officer with a firearm. During jury selection, the trial judge sustained objections to the defense attorney's questions about race and bias, ruling that they were impermissible "stake out" questions. The defendant preserved an objection to the judge's ruling but did not constitutionalize his objection. For this reason, the appellate courts reviewed the judge's refusal to permit these questions for abuse of discretion and prejudice rather than as a constitutional question. Nevertheless, even under this standard, the majority in *Crump* concluded that the trial "court abused its discretion and prejudiced defendant by restricting all inquiry into prospective jurors' racial biases and opinions regarding police-officer shootings of black men," and reversed the defendant's conviction. *Crump*, 376 N.C. at 393.

There are several key takeaways from *State v. Crump*. Again, in this case, the defendant did not argue that, because of the presence of "special factors," he had a constitutional right to explore racial bias during voir dire. For this reason, the appellate court did not engage consider whether such factors gave rise to a constitutional right to voir dire on race. In future cases, defendants should constitutionalize these objections to invoke even greater protection of the right to voir dire on race. Also, the majority held that by rejecting three questions on race, implicit bias, and officer shootings of civilians, the court demonstrated a total refusal to allow appropriate inquiry on a relevant topic. In the prejudice analysis, the North Carolina Supreme Court departed from the narrow approach taken by the Court of Appeals, treating the question as a broad one that accounted for the number of ways in which potential jurors' racial biases could "fairly and impartially determine whose testimony to credit, whose version of events to believe, and, ultimately, whether or not to find defendant guilty." The court held that questions regarding attitudes toward law

enforcement officers were no substitute for the missed opportunity to explore attitudes on race and officer shootings of Black men. Finally, the court held that the defendant does not need to exhaust his peremptory strikes to preserve this claim.

4) How Can you Protect Jurors Who Open up About Race During Voir Dire from Challenges for Cause?

What should you do if a juror opens up on the subject of race, expresses opinions that make you think they'd be a great juror in your client's case (for example, "I do have concerns about the practice of racial profiling"), and the prosecutor attempts to strike them for cause? In such a case, you can work to elicit a commitment on the part of the juror to keep an open mind, put their biases aside, and follow the law. Several North Carolina appellate opinions confirm that jurors expressing biases are competent to serve, so long as they commit to basing their judgments on the facts of the case. "The operative question is not whether the prospective juror is biased but whether that bias is surmountable with discernment and an obedience to the law…".[25] Additional support for the argument that this principle should also apply to jurors who express concerns about law enforcement can be found in *Commonwealth v. Quinton K. Williams*, in which the Massachusetts Supreme Judicial Court recently held that a juror cannot be struck for cause for expressing her belief that "the system is rigged against young, African American males."

V. TALKING TO JURORS ABOUT RACE: ADDITIONAL RESOURCES AND PUBLICATIONS

Jury Selection and Race: Discovering the Good, the Bad, and the Ugly by Jeff Robinson. In this piece, ACLU Deputy Legal Director and veteran criminal defense attorney Jeff Robinson explains the importance of discussing race with jurors and includes several pages of specific questions and techniques that have proven effective at getting jurors to share opinions

[25] *State v. Smith*, 352 N.C. 531, 545 (2000). *See also State v. Cummings*, 361 N.C. 438, 453-56 (2007); *State v. Moses*, 350 N.C. 741, 757 (1999); *State v. McKinnon*, 328 N.C. 668, 676-77 (1991) *State v. Whitfield*, 310 N.C. 608 (1984).

about this sensitive subject. It also contains a memorandum of law in support of a motion for individual voir dire, sample jury instructions on racial bias, and a sample legal argument in opposition to the introduction of a defendant's immigration status.

The Northwestern Law Review published three articles addressing the subject of discussing race with jurors. *Hidden Racial Bias: Why We Need to Talk with Jurors About Ferguson* was written by St Louis County Deputy District Public Defender Patrick C. Brayer. In it, he reflects on discussing race during voir dire in a trial that occurred just days after the killing of Michael Brown against the backdrop of protests on the streets and at the courthouse. In *Race Matters in Jury Selection*, Peter A. Joy argues that lawyers need to discuss the topics they fear the most – including race – during voir dire, and provides practical tips for doing so. He explains why it was essential for Patrick C. Brayer to talk about race with his jury and why it is important for all defense attorneys: "If the defense lawyer does not mention race during jury selection when race matters in a case, racial bias can be a corrosive factor eating away at any chance of fairness for the client." In *The #Ferguson Effect: Opening the Pandora's Box of Implicit Racial Bias in Jury Selection*, Sarah Jane Forman sounds a cautionary note by examining the uncertain state of research into the efficacy of discussing implicit bias with jurors and argues that "unless done with great skill and delicacy," this approach may backfire. Her piece reinforces the importance of careful preparation before diving into this challenging subject with potential jurors.

In *A New Approach to Voir Dire on Racial Bias* Cynthia Lee argues "that in light of the social science research on implicit bias and race salience, it is best for an attorney concerned about racial bias to confront the issue of race head on during jury selection." Her law review article on the value making race salient at trial, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, was cited twice by the North Carolina Supreme Court in cases addressing attempts to raise race with jurors.

Chapter Eight of the SOG's Indigent Defense manual, *Raising Issues of Race in North Carolina Criminal Cases*, contains a section on addressing race during jury selection and at trial, with subsections on identifying

stereotypes that might be at play in your trial, considering the influence of your own language and behavior on jurors' perceptions of your client, and reinforcing norms of fairness and equality.

Alyson Grine's North Carolina Bar Journal Article, *Questioning Prospective Jurors about Possible Racial or Ethnic Bias: Lessons From* Pena-Rodriguez v. Colorado, explores the Pena-Rodriguez decision in greater depth and helpfully dissects the case law governing the right to voir dire on race.

Mikah K. Thompson's *Bias on Trial: Toward and Open Discussion of Racial Stereotypes in the Courtroom*, helpfully collects resources and analysis related to discussions of race and racial bias during jury selection and during other stages of the criminal process.

OBJECT to any strike that could be viewed as based on race, gender, religion, or national origin.

"This motion is made under ***Batson v. Kentucky*, the 5th, 6th and 14th Amendments to the U.S. Constitution, Art. 1, Sec. 19, 23 and 26 of the N.C. Constitution, and my client's rights to due process and a fair trial."**

REMEMBER:

- **You can object to the first strike.** The Constitution bars "striking even a single prospective juror for a discriminatory purpose." *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008).
- **Your client does not have to be a member of the same cognizable class as the juror.** *Powers v. Ohio*, 499 U.S. 400 (1991).
- **You do not need to exhaust your peremptory challenges to preserve a *Batson* challenge.**
- ***Batson* applies to strikes based on race, gender, religion, and national origin.** *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); N.C. Const. Art. 1; Sec. 26.
- **Peremptory challenges exercised by the Defendant are not relevant to the question of whether the State discriminated.** *State v. Hobbs*, 374 N.C. 345, 357 (2020).

TIPS:

- Consider asking for strikes and objections to be made outside the presence of the jury.
- Whenever possible, make your objection immediately, before jurors are excused, so that they can be seated if your objection is granted.

SLOW DOWN

1. **A strong *Batson* objection is well-supported. Take the time you need to gather and argue your facts.**
2. **Check your own implicit biases**
   - Am I hesitant to object because of my own implicit biases or fear of talking about race?
   - Avoid "Reverse *Batson*" - Select jurors based on their answers, not stereotypes
     - What assumptions am I making about this juror?
     - How would I interpret that answer if it were given by a juror of another race?

STEP ONE: PRIMA FACIE CASE

You have burden to show an inference of discrimination

***Johnson v. California*,** 545 U.S. 162, 170 (2005).

Step one is "not intended to be a high hurdle for defendants to cross." *Hobbs,* 374 N.C. at 350 (2020).

"The burden on a defendant at this stage is one of production, not persuasion…At the stage of presenting a prima facie case, the defendant is not required to persuade the court conclusively that discrimination has occurred." *Hobbs*, 374 N.C. at 351.

Establishing a *Batson* violation does not require direct evidence of discrimination. *Batson v. Kentucky*, 476 U.S. 79, 93 (1986) ("Circumstantial evidence of invidious intent may include proof of disproportionate impact.")

"All circumstances" are relevant, including history.

Snyder, 552 U.S. at 478; *Hobbs*, 374 NC at 350-51.

- **Calculate and give the strike pattern/disparity.** *Miller-El v. Dretke*, 545 U.S. 231, 240-41 (2005).

> **"The State has stuck ___% of African Americans and ___% of whites"**
> **or**
> **"The State has used 3 of its 4 peremptory strikes on African Americans"**

- **Give the history of strike disparities and *Batson* violations by this DA's office/prosecutor.** *Miller-El*, 545 U.S. at 254, 264; *Flowers v. Mississippi,* 139 S.Ct. 2245 (2019) (Contact CDPL for supporting data from your county.)
- **State questioned juror differently or very little.** *Miller-El*, 545 U.S. at 241, 246, 255; *State v. Clegg*, 867 S.E.2d 885, 909-911 (N.C. 2022); *Hobbs*, 374 N.C. at 358-59.
- **Juror is similar to white jurors passed (describe how).** *Foster v. Chatman,* 578 U.S. 488, 505-506 (2016); *Snyder,* 552 U.S. at 483-85.
- **State the racial factors in case (race of Defendant, victim, any specific facts of crime).**
- **No apparent reason for strike.**

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STEP TWO: RACE-NEUTRAL EXPLANATION

Burden shifts to State to explain strike

***Hobbs*, 374 N.C. at 354.**

- **If the State volunteers reasons without prompting from the Court, the prima facie showing is assumed; move to step 3.** *Hobbs*, 374 N.C. at 354; *Hernandez v. New York*, 500 U.S. 352, 359 (1991).
- **Prosecutor must give a reason and the reason offered must be the actual reason.** *Clegg*, 867 S.E.2d at 903; *State v. Wright*, 189 N.C. App. 346 (2008).
- **Court cannot suggest its own reason for the strike.** *Miller-El*, 545 U.S. at 252; *Clegg*, 867 S.E.2d at 899-900.
- **Argue reason is not race-neutral (e.g., NAACP membership)**

STEP THREE: PURPOSEFUL DISCRIMINATION

You now have burden to prove it's more likely than not race was a significant factor

Judge must weigh all your evidence, including what you presented at Step One. *Clegg*, 867 S.E.2d at 907.

You do not need smoking gun evidence of discrimination. *Clegg*, 867 S.E.2d at 908.

Absolute certainty is not required. Standard is more likely than not, i.e. whether the risk of discrimination is unacceptable. *Clegg*, 867 S.E2d at 911.

Race does not have to be the only factor. It need only be "significant" in determining who was challenged and who was not. *Miller-El*, 545 U.S. at 252.

The defendant does not bear the burden of disproving every reason proffered by the State. *Foster*, 578 U.S. at 512 (finding purposeful discrimination after debunking only four of eleven reasons given).

The best way to prove purposeful discrimination is to show the prosecutor's Step Two reasons are pretextual

- **Reason applies equally to white jurors the State has passed.** Compared jurors don't have to be identical. *Miller-El,* 545 U.S. at 247, n.6; *Hobbs*, 374 N.C. at 358-59.
- **Reason is not supported by the record.** *Foster,* 578 U.S. at 502-503; *Clegg*, 867 S.E.2d at 906 (pretext shown when a prosecutor misstates, mischaracterizes, or simply misremembers).
- **Reason is nonsensical or fantastic.** *Foster*, 578 U.S. at 509.
- **Reason is race-related.** E.g., juror supports Black Lives Matter
- **State failed to ask the juror any questions about the topic the State now claims is disqualifying.** *Miller-El,* 545 U.S. at 241.
- **State questioned Black and white jurors differently.** *Miller-El,* 545 U.S. at 255.
- **State gave shifting reasons.** *Foster*, 578 U.S. at 507; *Clegg*, 867 S.E.2d at 906.

Reasons courts have found inherently suspect

- **Juror's demeanor or body language.** *Snyder*, 552 U.S. at 479, 488; *Clegg*, 867 S.E.2d at 907 (should be viewed with "significant suspicion.")
- **Juror's expression of hardship or reluctance to serve.** *Snyder*, 552 U.S. at 482 (hardship and reluctance **does not bias the juror** against any one side; only causes them to prefer quick resolution, which might in fact favor the State).
- **A laundry list of reasons.** *Foster*, 578 U.S. at 502.

REMEDY FOR *BATSON* VIOLATION

If the court sustains your *Batson* objection, the improperly struck juror(s) should be seated, or the entire venire should be struck. *State v. McCollum*, 334 N.C. 208, 235 (1993).

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For Cause: Rethinking Racial Exclusion and the American Jury

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FOR CAUSE: RETHINKING RACIAL EXCLUSION AND THE AMERICAN JURY

*Thomas Ward Frampton**

Peremptory strikes, and criticism of the permissive constitutional framework regulating them, have dominated the scholarship on race and the jury for the past several decades. But we have overlooked another important way in which the American jury reflects and reproduces racial hierarchies: massive racial disparities also pervade the use of challenges for cause. This Article examines challenges for cause and race in nearly 400 trials and, based on original archival research, presents a revisionist account of the Supreme Court's three most recent Batson *cases. It establishes that challenges for cause, no less than peremptory strikes, are an important—and unrecognized—vehicle of racial exclusion in criminal adjudication.*

Challenges for cause are racially skewed, in part, because the Supreme Court has insulated the challenge-for-cause process from meaningful review. Scholars frequently write that jury selection was "constitutionalized" in the 1970s and 1980s, but this doctrinal account is incomplete. In the interstices of the Court's fair-cross-section, equal protection, and due process jurisprudence, there is a "missing" law of challenges for cause. By overlooking challenges for cause, scholars have failed to notice the important ways in which jury selection remains free from constitutional regulation.

Challenges for cause as they exist today—effectively standardless, insulated from meaningful review, and racially skewed—do more harm than good. They hinder, more than help, the jury in its central roles: (1) protecting the individual against governmental overreach; (2) allowing the community a democratic voice in articulating public values; (3) finding facts; (4) bolstering the perceived legitimacy and fairness of criminal verdicts; and (5) educating jurors as citizens. We need to rethink who is qualified to serve as a juror and how we select them.

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INTRODUCTION

Peremptory strikes, and criticism of the permissive constitutional framework regulating them, have dominated the scholarship on race and the jury for the past several decades.[1] The standard critique is well known: *Bat-*

1. *See, e.g.*, Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153 (1989); Jeffrey Bellin & Junichi P. Semitsu, *Widening* Batson*'s Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075 (2011); Alafair S. Burke, *Prosecutors and Peremptories*, 97 IOWA L. REV. 1467 (2012); Leonard L. Cavise, *The* Batson *Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501; Russell D. Covey, *The Unbearable Lightness of* Batson*: Mixed Motives and Discrimination in Jury Selection*, 66 MD. L. REV. 279 (2007); Vida B. Johnson, *Arresting*

son v. Kentucky[2] notwithstanding, prosecutors in jurisdictions across the United States continue to wield peremptory strikes to exclude black prospective jurors at a rate far exceeding their elimination of other groups.[3] Causal explanations for these disparities vary—they may stem from overt racial discrimination,[4] or attorneys' implicit biases,[5] or the disparate effect of "race-neutral" criteria that correlate with race[6]—but the figures are troubling re-

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Batson*: How Striking Jurors Based on Arrest Records Violates* Batson, 34 YALE L. & POL'Y REV. 387, 414 (2016); Sheri Lynn Johnson, Batson *from the Very Bottom of the Well: Critical Race Theory and the Supreme Court's Peremptory Challenge Jurisprudence*, 12 OHIO ST. J. CRIM. L. 71 (2014); Nancy S. Marder, Batson *Revisited*, 97 IOWA L. REV. 1585 (2012); Nancy S. Marder, *Justice Stevens, the Peremptory Challenge, and the Jury*, 74 FORDHAM L. REV. 1683 (2006) [hereinafter Marder, *Justice Stevens*]; Theodore McMillian & Christopher J. Petrini, Batson v. Kentucky*: A Promise Unfulfilled*, 58 UMKC L. REV. 361 (1990); Kenneth J. Melilli, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447 (1996); Camille A. Nelson, Batson*, O.J., and* Snyder*: Lessons from an Intersecting Trilogy*, 93 IOWA L. REV. 1687 (2008); Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099 (1994); William T. Pizzi, Batson v. Kentucky*: Curing the Disease but Killing the Patient*, 1987 SUP. CT. REV. 97; Anna Roberts, *Asymmetry as Fairness: Reversing a Peremptory Trend*, 92 WASH. U. L. REV. 1503 (2015) [hereinafter Roberts, *Asymmetry as Fairness*]; Anna Roberts, *Disparately Seeking Jurors: Disparate Impact and the (Mis)use of* Batson, 45 U.C. DAVIS L. REV. 1359 (2012) [hereinafter Roberts, *Disparately Seeking Jurors*]; Ronald F. Wright et al., *The Jury Sunshine Project: Jury Selection Data as a Political Issue*, 2018 U. ILL. L. REV. 1407, 1431; Joshua Revesz, Comment, *Ideological Imbalance and the Peremptory Challenge*, 125 YALE L.J. 2535 (2016); Note, *Judging the Prosecution: Why Abolishing Peremptory Challenges Limits the Dangers of Prosecutorial Discretion*, 119 HARV. L. REV. 2121 (2006).

2. 476 U.S. 79 (1986).

3. For empirical studies documenting this phenomenon, see David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3 (2001); Ann M. Eisenberg et al., *If It Walks like Systematic Exclusion and Quacks like Systematic Exclusion: Follow-Up on Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases, 1997-2014*, 68 S.C. L. REV. 373 (2017); Ann M. Eisenberg, *Removal of Women and African Americans in Jury Selection in South Carolina Capital Cases, 1997-2012*, 9 NE. U. L.J. 299 (2017); Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1627 (2018); Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-*Batson *North Carolina Capital Trials*, 97 IOWA L. REV. 1531 (2012); Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 LAW & HUM. BEHAV. 695, 697 (1999); Billy M. Turner et al., *Race and Peremptory Challenges During Voir Dire: Do Prosecution and Defense Agree?*, 14 J. CRIM. JUST. 61 (1986); and Wright et al., *supra* note 1.

4. *See, e.g.*, Frampton, *supra* note 3, at 1627 (highlighting "reasons to suspect that the more overt variety of racially motivated exclusions—the narrow type of racially discriminatory action *Batson* aimed to ferret out—also remain common").

5. *See, e.g.*, Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson*, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 150 (2010).

6. *E.g.*, Roberts, *Disparately Seeking Jurors, supra* note 1; Wright et al., *supra* note 1, at 1431 ("It is also possible that prosecutors removed jurors based on a factor correlated with race . . . . Prosecutors might have been fully aware of the disparate racial impact of these choices and regretted that unintentional side effect of their removal strategy."). For a notable recent attempt to prohibit the use of justifications for peremptory strikes that highly correlate with

gardless.[7] There is now a broad scholarly consensus that *Batson* has failed to meaningfully limit systemic racial exclusion in jury selection.[8] And, to *Batson*'s most strident critics, studies documenting wide racial disparities in the use of peremptory strikes have validated the argument (urged by Justice Thurgood Marshall and others) that only by abolishing peremptory strikes can we purge the taint of racial bias from jury selection.[9]

Our myopic focus on peremptory strikes, however, has led to the neglect of an adjacent problem: equivalent racial disparities pervade the exercise of challenges for cause. Challenges for cause and peremptory strikes differ in important respects, of course. First, challenges for cause ostensibly "permit rejection of jurors on a narrowly specified . . . and legally cognizable basis of partiality";[10] peremptory strikes generally require no justification (unless they are contested, at which time the proponent's "implausible[,] fantastic[,] silly or superstitious" rationale may suffice).[11] Second, challenges for cause must always be approved by a judge; unless subject to a *Batson* challenge, peremptory strikes receive no such scrutiny. And third, peremptory strikes are limited in number by statute; a party may raise challenges for cause against every single potential juror, should they wish. But despite these differences, challenges for cause resemble peremptory strikes in one important respect: they both disproportionately reduce black jurors' participation on criminal juries. If the well-documented disparities in how legal actors exercise peremptory strikes are cause for concern (and they are), the existence of similar disparities in the use of challenges for cause should also set off alarm bells.

Yet too often, challenges for cause are treated as an afterthought. Like peremptory strikes, challenges for cause have a venerable common law pedigree,[12] and the Supreme Court often mentions them in passing.[13] But the

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prospective jurors' race, see WASH. GEN. R. 37(h) (declaring "presumptively invalid" rationales like "expressing a distrust of law enforcement" for exercising a peremptory strike).

7. Ronald Wright, Opinion, *Yes, Jury Selection Is as Racist as You Think. Now We Have Proof.*, N.Y. TIMES (Dec. 4, 2018), https://www.nytimes.com/2018/12/04/opinion/juries-racism-discrimination-prosecutors.html [https://perma.cc/39XZ-G8N7] (discussing "especially pernicious effects" of racial disparities "even [if it remains impossible] to say exactly why a prosecutor, defense attorney or judge decides to remove any particular juror in a single case").

8. *See supra* notes 1, 3. *But cf.* Jonathan Abel, Batson*'s Appellate Appeal and Trial Tribulations*, 118 COLUM. L. REV. 713 (2018) (acknowledging "*Batson*'s failings as a trial doctrine—its inability to prevent and remedy strikes in real time—but . . . focus[ing] [on] *Batson*'s virtues in appellate and postconviction proceedings").

9. *See* Miller-El v. Dretke, 545 U.S. 231, 266–67 (2005) (Breyer, J., concurring) (discussing empirical studies as bolstering Justice Marshall's argument for the abolition of peremptory strikes); *see also* Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 809–10 (1997) (discussing the problems with peremptory challenges from the perspective of a trial judge).

10. Swain v. Alabama, 380 U.S. 202, 220 (1965).

11. Purkett v. Elem, 514 U.S. 765, 768 (1995).

12. *See* 3 EDWARD COKE, FIRST INSTITUTE OF THE LAWS OF ENGLAND *447–504 (J.H. Thomas ed., Philadelphia, Robert H. Small 1826) (1644); 4 WILLIAM BLACKSTONE,

Court has established few rules governing when jurors may or must be excused "for cause": "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula."[14] Scholars, too, have shied away from the topic[15]: the leading treatise on the "law of juries" devotes seven pages to challenges for cause and seven times that to peremptory strikes.[16] The profound ways in which race shapes the process of "qualifying" the American jury has been overlooked and undertheorized.

This Article's central claim—that black jurors' "qualifications" for jury service, or lack thereof, operate as an important instrument of racial exclusion today—situates the present moment within a broader historical narrative. For over a century, both state and federal actors justified the exclusion of black jurors from criminal trials, in whole or in part, on the grounds that few possess the requisite objectivity (e.g., "sound judgment and fair character"[17]) to serve. Traditionally, this exclusion occurred when officials developed lists of prospective jurors from which individual trial venires were randomly drawn.[18] The ostensible lack of "qualified" black jurors has been invoked since black jury service began in the middle of the nineteenth century;[19] it remained a common refrain until the 1970s, when Congress[20] and the

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COMMENTARIES *342–44 (endorsing Coke's categories). Importantly, however, at common law the grounds for excluding prospective jurors "for cause" were far narrower than they are today. *See* G. Ben Cohen & Robert J. Smith, *The Death of Death-Qualification*, 59 CASE W. RES. L. REV. 87 (2008) (detailing development of death qualification of American juries); *infra* Section III.C.

13. *See, e.g.*, Flowers v. Mississippi, 139 S. Ct. 2228, 2238 (2019) ("The attorneys may challenge prospective jurors for cause, which usually stems from a potential juror's conflicts of interest or inability to be impartial.").

14. Skilling v. United States, 561 U.S. 358, 386 (2010) (quoting United States v. Wood, 299 U.S. 123, 145–46 (1936)).

15. NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 94 (2007) ("How often people are removed for cause has not been extensively studied."); Mary R. Rose & Shari Seidman Diamond, *Judging Bias: Juror Confidence and Judicial Rulings on Challenges for Cause*, 42 LAW & SOC'Y REV. 513, 513–14 (2008) ("The judge's behavior in making these decisions [on challenges for cause] has been almost entirely ignored by researchers, while other forms of judicial behavior have attracted substantial recent attention from scholars.").

16. *Compare* NANCY GERTNER ET AL., THE LAW OF JURIES §§ 3:4–:7 (10th ed. 2018), *with id.* §§ 4:1–:32.

17. *See, e.g.*, Gibson v. Mississippi, 162 U.S. 565, 588 (1896).

18. *See infra* Section II.A.

19. Histories of the American jury uniformly report that "the first African-Americans ever to serve on a jury in America were two who sat in Worcester, Massachusetts, in 1860." Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 884 (1994); *see also* JEFFREY ABRAMSON, WE, THE JURY 2 (1994) ("No African-American served on any trial jury in the United States, North or South, until 1860 during a criminal trial in Worcester, Massachusetts."); Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 31 (1990) ("Moreover, despite the *de jure* eligibility of many

Supreme Court[21] began insisting that jury pools comprise a "fair cross section" of the community.[22] But, through challenges for cause, the practice subtly continues: in courtrooms across America today, prosecutors allege (and judges confirm) that black jurors remain less "qualified" than white jurors to participate in an institution frequently touted as central to American democracy.

Part I reveals the stark racial disparities in how challenges for cause are wielded. Sections I.A and I.B provide an empirical examination of how prosecutors and defense attorneys exercise challenges for cause by analyzing 317 criminal jury trials in Louisiana and 74 criminal jury trials in Mississippi. Prosecutors overwhelmingly use such challenges to exclude black jurors. The racial disparities documented in the prosecutors' exercise of challenges for cause actually exceed the sizeable disparities in their use of peremptory strikes in both datasets. Then, to demonstrate how these general trends play out in individual cases (and to highlight our relative blindness to the phenomenon), Section I.C offers a revisionist account of the Supreme Court's three most recent cases involving racial discrimination in jury selection: *Flowers v. Mississippi* (2019),[23] *Foster v. Chatman* (2016),[24] and *Snyder v. Louisiana* (2008).[25] In each case, the Court took pains to parse prosecutors' justifications for using peremptory strikes against individual jurors, seeking to ascertain whether racial bias infected those decisions. But a return to the original trial records—including full voir dire transcripts and handwritten

qualified black people, northern juries remained all-white prior to 1860."); James Forman, Jr., Essay, *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895, 910 (2004) ("It is believed that 1860 was the first year in which African Americans served on juries, in either the North or the South."). Research for this Article has revealed at least one prior instance: a prominent Buffalo, New York abolitionist named Abner H. Francis served as a petit juror for a term in 1843. The unusual occurrence was noted in newspapers around the country. *See, e.g.*, *A Colored Juryman*, MILWAUKIE SENTINEL, Oct. 7, 1843, at 1 ("This is the first instance of the kind, we believe which has ever occurred in this country."); *A Negro Juryman*, BATON ROUGE GAZETTE, Sept. 30, 1843, at 2. The existence of (limited) black suffrage before the Civil War, *see* CHRISTOPHER MALONE, BETWEEN FREEDOM AND BONDAGE: RACE, PARTY, AND VOTING RIGHTS IN THE ANTEBELLUM NORTH (2008), and laws enacted to prohibit black citizens from serving as jurors, *see* FRANK U. QUILLIN, THE COLOR LINE IN OHIO: A HISTORY OF RACE PREJUDICE IN A TYPICAL NORTHERN STATE 23 (1913) (discussing 1831 Ohio law barring black jurors), suggest there may have been earlier examples.

20. Jury Selection and Service Act of 1968, Pub. L. No. 90-274, 82 Stat. 53 (current version at 28 U.S.C. §§ 1861–1869 (2018)).

21. Taylor v. Louisiana, 419 U.S. 522 (1975).

22. *See, e.g.*, Turner v. Fouche, 396 U.S. 346, 357 (1970) (noting that 171 of the 178 potential grand jurors struck from master list "either because of their being unintelligent or because of their not being upright citizens" were black); *cf.* South Carolina v. Katzenbach, 383 U.S. 301, 312–13 (1966) ("The good-morals requirement [for voter registration] is so vague and subjective that it has constituted an open invitation to abuse at the hands of voting officials.").

23. 139 S. Ct. 2228 (2019).

24. 136 S. Ct. 1737 (2016).

25. 552 U.S. 472 (2008).

attorney notes that were not before the Supreme Court—offers a much richer story. In each trial, challenges for cause, not peremptory strikes, eliminated most of the black prospective jurors and enabled the empaneling of an all-white (or nearly all-white) jury.

Part II weighs various explanations for these disparities and explains why they have remained hidden: existing constitutional doctrine offers little opportunity to contest what occurs at the challenge-for-cause stage of jury selection. During the 1970s and 1980s, the Court assertively "constitutionalized" important parts of the jury selection process: the drawing of jury venires and the exercise of peremptory strikes became subject to Sixth and Fourteenth Amendment regulation, respectively.[26] But the Court's simultaneous retreat from the regulation of challenges for cause—beginning just a week after the Court's landmark 1986 ruling in *Batson v. Kentucky*—has escaped notice. In cases involving the scope of the Sixth Amendment's fair-cross-section requirement,[27] the Fourteenth Amendment's Equal Protection Clause,[28] and the relationship between peremptory strikes and challenges for cause,[29] the Court quietly foreclosed criminal defendants' ability to meaningfully contest the challenge-for-cause process (and, in particular, the disproportionate removal of black jurors through such challenges). Jury selection might look very different—and the massive disparities identified in Part I might not exist—had the Court not ruled as it did.

Part III appraises challenges for cause as they exist today—and, relatedly, the contemporary vision of the "qualified" juror—in light of the traditional roles of the jury, the data presented in Part I, and the legal landscape outlined in Part II. The Framers, the Supreme Court, and legal scholars have defended and celebrated the jury as an institution that (1) protects the individual against governmental overreach;[30] (2) allows the community a democratic voice in articulating public values;[31] (3) finds facts;[32] (4) bolsters the perceived legitimacy and fairness of criminal verdicts;[33] and (5) educates jurors as citizens.[34] On each of these fronts, today's challenges for cause—effectively standardless, insulated from meaningful review, and racially skewed—do more harm than good. We should rethink who is qualified to serve as a juror and how we select them.

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26. *See* Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 GEO. L.J. 945, 946–47 (1998) ("The Supreme Court has had more to say about who sits on criminal juries in the last twenty years than it did in the previous 180.").

27. *Infra* Section II.A.

28. *Infra* Section II.B.

29. *See infra* Section II.C.

30. *See infra* Section III.A.

31. *See infra* Section III.B.

32. *See infra* Section III.C.

33. *See infra* Section III.D.

34. *See infra* Section III.E.

I. RACIAL EXCLUSION AND CHALLENGES FOR CAUSE

In study after study, scholars have shown that there are stark racial differences in whom prosecutors and defendants exclude through peremptory strikes.[35] But, unnoticed,[36] the same racial discrepancies that have been documented in the use of peremptory strikes exist in the use of challenges for cause, as well.

In this Part, I analyze data on race and the jury from Louisiana and Mississippi, and I reconstruct the trial record in the three most recent Supreme Court cases involving claimed *Batson* violations. In both Louisiana and Mississippi, teams of investigative journalists working on independent award-winning projects recently compiled a wealth of information on state-court criminal jury trials.[37] Much of these journalists' source material, including digital scans of court records and trial transcripts, is now available to the public and to researchers; it provides the basis for the analysis in Sections I.A

35. *See supra* note 3.

36. There has been little empirical work done on challenges for cause, but a few exceptions warrant mention. Two studies of peremptory strikes have shown that challenges for cause—taken as a whole—can distort the racial composition of the venire. The earliest examined thirteen felony trials involving 348 prospective jurors within a single North Carolina county. *See* Rose, *supra* note 3. The author found that black jurors were moderately overrepresented among those prospective jurors eliminated for cause: they made up 32% of prospective jurors and 38% of those excused for cause. *Id.* at 698. In a far more ambitious study involving more than 1,300 felony trials and almost 30,000 prospective jurors, a group of scholars recently collected trial data for an entire year's worth of trials throughout North Carolina. Wright et al., *supra* note 1. They found that judges removed black prospective jurors "for cause" 30% more frequently than white jurors (and judges removed "other" nonwhite jurors 110% more frequently than white jurors). *Id.* at 1426.

Relatedly, there have been several studies examining how the process of "death qualification" skews the racial composition of jury pools in capital cases. Professor Aliza Cover, for example, recently examined transcripts from eleven trials in Louisiana that resulted in a death verdict between 2009 and 2013. *See* Aliza Plener Cover, *The Eighth Amendment's Lost Jurors: Death Qualification and Evolving Standards of Decency*, 92 IND. L. REV. 113 (2016). In the seven trials for which the race of the prospective jurors was available, 35.2% of black prospective jurors were excluded on the basis of their opposition to the death penalty. A much smaller percentage (17%) of white jurors were removed on this basis, making the pool of eligible jurors significantly whiter than it would have otherwise been. *Id.* at 137. *See also* Justin D. Levinson et al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. REV. 513 (2014).

37. Both efforts received the George F. Polk Award in Journalism in 2019; the Louisiana project also won a Pulitzer Prize for Local Reporting. *See* Eileen Sullivan, New York Times *Wins Two George Polk Awards*, N.Y. TIMES (Feb. 19, 2019), https://www.nytimes.com/2019/02/19/us/politics/george-polk-awards.html [https://perma.cc/KW9V-MH24] (discussing Polk Award for American Public Media's investigation in Mississippi); Staff Report, The Advocate *Honored with George Polk Award for 'Tilting the Scales' Series on Split Jury Verdicts*, ADVOCATE (Feb. 19, 2019, 12:14 PM), https://www.theadvocate.com/baton_rouge/news/business/article_23f6b76a-3472-11e9-928d-2f446b73d815.html [https://perma.cc/5AKG-Q7VL]; Staff Report, The Advocate *Wins First Pulitzer Prize for Series that Helped Change Louisiana's Split-Jury Law*, ADVOCATE (Apr. 15, 2019, 2:15 PM), https://www.theadvocate.com/baton_rouge/news/article_dba87282-5f28-11e9-92b3-bfba0cf08ab2.html [https://perma.cc/BL8R-E4D6].

and I.B. In Section I.C, public records requests, visits to courthouse storage rooms, and the assistance of local trial attorneys supplied what was missing from the Supreme Court record: full voir dire transcripts and information sufficient to identify the race of (the vast majority of) prospective jurors.[38]

A. *Louisiana*

Over several years, investigative journalists in Louisiana examining the effect of nonunanimous verdicts[39] compiled a dataset ("the *Russell-Simerman* dataset") containing information from over 3,000 criminal jury trials conducted across Louisiana from 2009 to 2017.[40] For 316 jury trials, the dataset includes the race of (nearly) all jurors in the initial venire; the party responsible for successful challenges for cause; the party responsible for peremptory strikes; and the race of the empaneled jurors.

The dataset provides an unprecedented look at how deeply entwined race and challenges for cause are. In total, 14,616 prospective jurors were members of the initial venire for these 316 trials. While many of these jurors were simply "surplus" jurors—never questioned or challenged because the jury box was filled before they were needed—the racial demographics of this initial venire serve as a baseline. Of the prospective jurors, 32.6% were black; 61.7% were white; and 3.6% were Asian, Hispanic, or "Other." (Racial information was unavailable for 2.0% of prospective jurors.)

38. This information has been compiled in five appendices available for download online. Thomas Ward Frampton, *For Cause: Appendices*, GOOGLE DRIVE, https://drive.google.com/file/d/1x3piBF6dZwmKNnAjP-ow3YrOfFFK1AW2/view (on file with the *Michigan Law Review*). All of the data in Part I come from jurisdictions in the Deep South, and some caution is therefore warranted in drawing generalizations based on the patterns identified; future research will have to determine whether equivalent racial disparities in the use of challenges for cause exist across the United States. But it is noteworthy that the racial patterns identified in the use of challenges for cause in these jurisdictions match or exceed those involved in peremptory strikes. *See infra* Figures 2, 4. And there is good reason to believe that the ongoing use of racially motivated peremptory strikes is not a regional phenomenon. *See, e.g.*, State v. Saintcalle, 309 P.3d 326, 348 (Wash. 2013) (González, J., concurring) ("Peremptory challenges are used in trial courts throughout this state, often based largely or entirely on racial stereotypes or generalizations."), *abrogated by* Seattle v. Erickson, 398 P.3d 1124 (Wash. 2017); Baldus et al., *supra* note 3 (noting large racial disparities in use of peremptory challenges in Philadelphia capital cases in 1980s and 1990s).

39. *See* Frampton, *supra* note 3, at 1621.

40. For the collection methodology and raw data for the *Russell-Simerman* dataset, see Jeff Adelson, *Download Data Used in* The Advocate*'s Exhaustive Research in 'Tilting the Scales' Series*, ADVOCATE (Apr. 1, 2018, 8:00 AM), https://www.theadvocate.com/new_orleans/news/courts/article_6f31d456-351a-11e8-9829-130ab26e88e9.html [https://perma.cc/UEX3-B652].

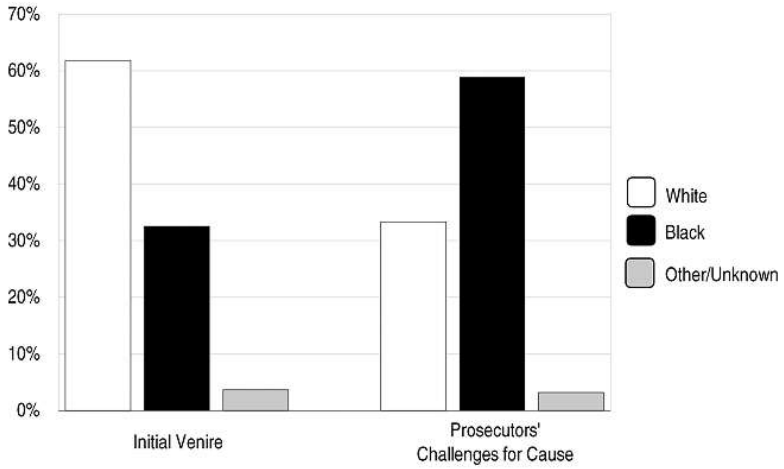
TABLE 1: RACIAL COMPOSITION OF INITIAL VENIRE (LOUISIANA)

	Raw Number	Percentage
White	9,019	61.7%
Black	4,770	32.6%
Other Nonwhite	531	3.6%
Unknown	296	2.0%
Total	**14,616**	**100.0%**

If race and the exercise of juror challenges or strikes were not correlated, the racial demographics of the challenged or struck jurors should match the racial demographics of the initial venire. In other words, we would expect roughly 62% of each party's challenges for cause and peremptory strikes to be directed at white jurors and 33% of challenges for cause and peremptory strikes to be directed at black jurors.

Instead, prosecutors overwhelmingly used challenges for cause to exclude nonwhite jurors. Of 967 successful challenges for cause by prosecutors—the *Russell-Simerman* dataset does not include information on attempted but unsuccessful challenges—58.9% of challenges (n = 570) removed black prospective jurors and only 34.4% (n = 333) removed white prospective jurors. The discrepancies between the composition of the original venire and the jurors excluded "for cause" by prosecutors are depicted in Figure 1.

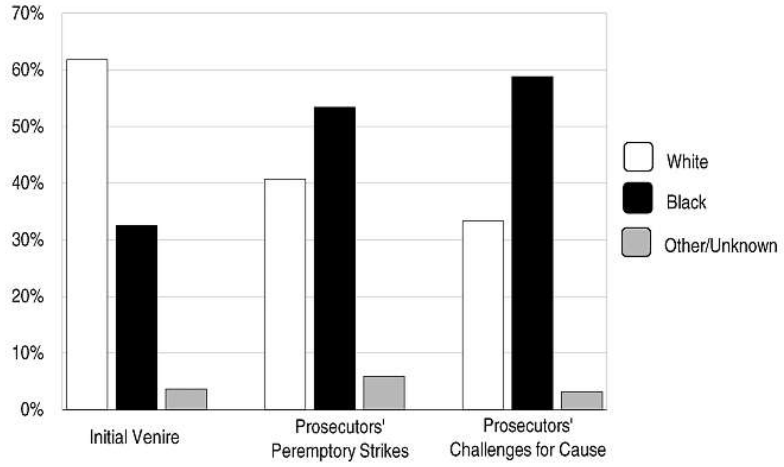
FIGURE 1: RACIAL DISPARITIES IN PROSECUTORS' USE OF CHALLENGES FOR CAUSE (LOUISIANA)



This means that prosecutors excluded black prospective jurors at 181% of the frequency we would expect if race and challenges for cause were not correlated and excluded white prospective jurors at just 56% of the frequency we would expect. Comparatively speaking, these disparities mean that black jurors were 3.24 times more likely than white jurors to be excluded by the government "for cause."

Notably, these disparities are even greater than the substantial racial disparities in the exercise of peremptory strikes in the same 316 trials. As with challenges for cause, prosecutors used peremptory strikes to "overstrike" black jurors and "understrike" white jurors, targeting the former group with 53.6% of their peremptory strikes and the latter with 40.5% of their peremptory strikes (despite the much larger number of white prospective jurors in the initial venire). This is a sizeable departure from the expected percentages if race were not correlated with the use of peremptory strikes: prosecutors were 2.50 times more likely to use a peremptory strike against any given black potential juror than any given white potential juror. But these disparities are still less dramatic than those involved with challenges for cause. A comparison of the relative disparities appears in Figure 2.

FIGURE 2: RACIAL DISPARITIES IN PROSECUTORS' USE OF PEREMPTORY STRIKES AND CHALLENGES FOR CAUSE (LOUISIANA)



B. *Mississippi*

As part of a lengthy investigation into the many murder trials of Curtis Flowers in central Mississippi,[41] American Public Media collected every available jury trial record from Mississippi's Fifth Judicial District (covering seven counties) from 1992 to 2017.[42] Their inquiry focused on racial disparities in the use of peremptory strikes,[43] but helpfully, the nonprofit media organization made available to the public all of their raw source material. For 83 trials (involving 4,717 prospective jurors), full voir dire transcripts and juror lists allow for an original analysis of racial disparities in the use of challenges for cause, as well.[44]

The racial composition of the initial venire in Mississippi's Fifth Judicial District is roughly similar to that in Louisiana (although virtually all prospective jurors are either black or white). As before, these figures provide a baseline for the expected challenge rates. If jurors' race and challenges for cause were not correlated, we would expect roughly 60% of each party's challenges to be directed at white prospective jurors and roughly 34% to be directed at black prospective jurors.

TABLE 2: RACIAL COMPOSITION OF INITIAL VENIRE (MISSISSIPPI)

	Raw Number	Percentage
White	2,823	59.8%
Black	1,614	34.2%
Asian	3	0.1%
Unknown	277	5.9%
Total	**4,717**	**100.0%**

The observed racial distribution of the actual challenges for cause, however, looked nothing like the expected results. Unlike in Louisiana, the trial judge initiated the vast majority (n = 760) of challenges for cause; the common practice was for the judge to identify a potential for-cause challenge and invite objections and argument from the parties. Those prospective jurors

41. *See* Section I.C.1.

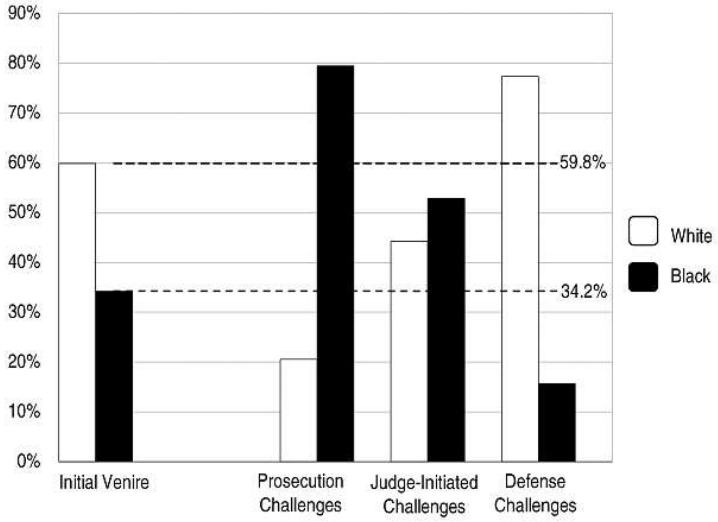
42. *In the Dark: S2 E8: The D.A.*, APM REP. (June 12, 2018), https://www.apmreports.org/story/2018/06/12/in-the-dark-s2e8 [https://perma.cc/F2BL-TXM9].

43. *Id.*

44. For source notes and a full methodology of American Public Media's study, see Will Craft, *Mississippi D.A. Has Long History of Striking Many Blacks from Juries*, APM REP. (June 12, 2018), https://features.apmreports.org/in-the-dark/mississippi-district-attorney-striking-blacks-from-juries/ [https://perma.cc/S58H-9CGN]. Although APM's dataset had ninety-one cases, eight of its cases do not include all of the information needed to independently verify and code who raised which challenge to each juror.

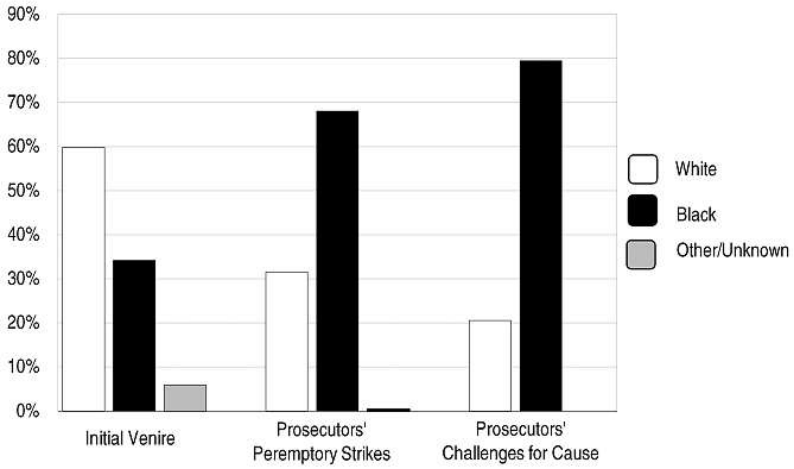
first identified by the judges were disproportionately black: although white jurors outnumbered black jurors by nearly two to one in the initial venires, 52.9% of the judge-proposed disqualifications were black jurors and 44.2% were white jurors. In all 83 trials, prosecutors *never once* objected to the judge-proposed dismissal of a black juror; in large part, it seems, prosecutors seemed content to allow the judge to remove those whom they would have targeted anyway. Defendants objected with more frequency to judge-proposed removals, and they did so roughly equally with black and white nominees for exclusion. Defendant-initiated challenges (n = 128) and prosecutor-initiated challenges (n = 73) occurred much less frequently, but when they occurred, the racial disparities were even more dramatic. Only 20.5% of prosecutors' challenges for cause were aimed at white prospective jurors, while 79.5% of their challenges aimed to remove black prospective jurors. Given their comparative representation in the initial venire, these disparities meant that prosecutors were 6.8 times more likely to initiate a challenge for cause against any given black prospective juror than any given white prospective juror. Defendants, meanwhile, targeted white prospective jurors with 77.3% of their challenges and black prospective jurors with 15.6% of their challenges.

FIGURE 3: RACIAL COMPOSITION OF THE VENIRE AND CHALLENGES FOR CAUSE (MISSISSIPPI)



As in Louisiana, prosecutors' challenges for cause were even more racially skewed than their peremptory strikes. In the same 83 trials, prosecutors used 68.1% of their peremptory strikes to exclude black prospective jurors and 31.6% to exclude white prospective jurors. While this figure represents a significant "overstriking" of black prospective jurors, it is again not as severe as the "overchallenging" of black prospective jurors for cause.

FIGURE 4: RACIAL DISPARITIES IN PROSECUTORS' USE OF PEREMPTORY STRIKES AND CHALLENGES FOR CAUSE (MISSISSIPPI)



C. *"I Didn't Think There Were Any Left": Reexamining Three* Batson *Cases*

Another way to see the role that challenges for cause play in the exclusion of nonwhite jurors—and the extent to which we fail to notice this consistent pattern—is by reconstructing the full jury selection process in individual cases. In *Flowers v. Mississippi* (2019), *Foster v. Chatman* (2016), and *Snyder v. Louisiana* (2008), the Supreme Court considered whether prosecutors' peremptory strikes were improperly motivated by race.[45] In each of these cases—all of which involved black defendants convicted of murder[46]—a majority of the Court found that lower courts had erred in failing to recognize that racial bias motivated prosecutors' use of peremptory strikes.[47] But the parties and the Court paid almost no attention to what

45. *See* Flowers v. Mississippi, 139 S. Ct. 2228 (2019); Foster v. Chatman, 136 S. Ct. 1737 (2016); Snyder v. Louisiana, 552 U.S. 472, 490 (2008).

46. *See Flowers*, 139 S. Ct. at 2234; *Foster*, 136 S. Ct. at 1742; *Snyder*, 552 U.S. at 474, 476.

47. *See Flowers*, 139 S. Ct. at 2235; *Foster*, 136 S. Ct. at 1755; *Snyder*, 552 U.S. at 485–86.

came first: a significant reduction in the pool of eligible black jurors through challenges for cause.

1. *Flowers v. Mississippi*

Curtis Flowers has been tried six times for a quadruple murder that occurred in 1996.[48] The killings took place inside a furniture store in the small, racially mixed town of Winona (population 5,000) in Montgomery County, Mississippi; Flowers is black, and three of the four victims were white. In Flowers's sixth trial, prosecutors accepted one black juror and then used five of six peremptory strikes to exclude black prospective jurors.[49] The jury (consisting of eleven white jurors and one black juror) convicted Flowers and recommended death.[50] In a 7–2 opinion authored by Justice Kavanaugh, the Court held that one of the five challenged peremptory strikes was unconstitutionally motivated by race.[51]

While the Court's opinion naturally focused on prosecutors' peremptory strikes, the full 1,300-page voir dire transcript (which was not included in the joint appendix submitted to the Court) shows how prosecutors used more than just peremptory strikes to assemble a nearly all-white jury in the case.[52]

Despite the skewed composition of the final petit jury, the initial pool of 156 prospective jurors was relatively racially balanced: 88 prospective jurors were white (56%), and 68 prospective jurors were black (44%).[53] Over the next several days of voir dire, however, these figures shifted. The first round

48. *Flowers*, 139 S. Ct. at 2234. Flowers's first five trials provide anecdotal evidence that the racial composition of a jury can be outcome determinative. Flowers's first trial was before an all-white jury. He was convicted and sentenced to death. *See id.* at 2236. The Mississippi Supreme Court reversed the conviction due to "numerous instances of prosecutorial misconduct," including improper questioning of witnesses and the introduction of impermissible other-crimes evidence. Flowers v. State (*Flowers I*), 773 So. 2d 309, 327 (Miss. 2000). In the second trial in 1999, prosecutors used peremptory strikes to eliminate the last five black prospective jurors; the trial court disallowed one of these strikes under *Batson*, empaneling a jury with eleven white jurors and one black juror. *See Flowers*, 139 S. Ct. at 2236. Flowers was again convicted and sentenced to death. As before, the Mississippi Supreme Court reversed on prosecutorial misconduct grounds. Flowers v. State (*Flowers II*), 842 So. 2d 531, 532 (Miss. 2003). In the third trial in 2004, prosecutors exercised all fifteen of their peremptory strikes against black prospective jurors, again producing a jury of eleven white jurors and one black juror; the sole black juror was seated after the State ran out of peremptory challenges. *See Flowers*, 139 S. Ct. at 2236–37. On appeal, the Mississippi Supreme Court reversed, with a plurality concluding that at least two of the strikes were racially motivated. Flowers v. State (*Flowers III*), 947 So. 2d 910, 916–17 (Miss. 2007). Flowers's fourth and fifth trials ended with hung juries; notably, the juries in those trials included five black jurors and three black jurors, respectively. *See Flowers*, 139 S. Ct. at 2237.

49. *Flowers*, 139 S. Ct. at 2235–36.

50. *Id.* at 2237.

51. *Id.* at 2235.

52. *See* Voir Dire Transcript at 477–1802, Flowers v. State, No. 2003-0071-CR (Miss. Cir. Ct. 2010).

53. Frampton, *supra* note 38, Appendix A.

of questioning, conducted exclusively by the judge, probed the prospective jurors' relationships with the parties, law enforcement, and potential witnesses (and whether those relationships would impact jurors' ability to be "fair and impartial").[54] Equivocal answers often led to heated disputes. For example, defense attorneys objected to the dismissal of a black female juror whose son had fathered a child by the defendant's sister (whose name the juror could not recall); the juror allowed that the relationship "probably" would impact her ability to be fair and impartial and conceded (upon leading questioning by the judge) that there were "doubts in [her] mind" about whether she could be fair.[55] Prosecutors were incensed by the defendant's objection to her excusal: "Your Honor, for the record I object to them only objecting to cause strikes on certain jurors. I think it is very clear that they are only objecting [to] cause on black jurors, and this is extremely improper."[56]

But both parties were following a similar playbook: In the coming days, when attorneys had the opportunity to question individual jurors, prosecutors objected exclusively to the proposed dismissal of white prospective jurors, while defense attorneys did the same regarding black prospective jurors.[57] And when the parties had the opportunity to raise challenges for cause on their own—the bulk of the for-cause dismissals were initially proposed by the judge, subject to the parties' objections[58]—prosecutors raised 11 of their 15 challenges (73%) to urge the elimination of black prospective jurors (nearly all were granted); 18 of the 19 challenges (95%) Flowers raised sought the exclusion of white prospective jurors (most were denied).[59]

In total, challenges for cause resulted in a significant "whitewashing" of the jury pool. A significant number of prospective jurors (30 white and 7 black) were removed because their relationship with the victims affected their ability to be fair and impartial; 32 prospective jurors (all black) were removed because of their relationship with Flowers.[60] "Death qualification"[61] disproportionately excluded black prospective jurors: 9 black jurors and 2 white jurors were removed based on opposition to capital punishment.[62]

54. *See, e.g.*, Voir Dire Transcript, *supra* note 52, at 750.

55. *See id.* at 751–52, 841.

56. *Id.* at 841–42.

57. Frampton, *supra* note 38, Appendix A; *see, e.g.*, Voir Dire Transcript, *supra* note 52, at 838–39, 844. In the only potential exception to this pattern, the prosecution *initially* objected to the for-cause dismissal of a black woman who was related to a victim, *id.* at 844, before ultimately moving to have her dismissed for cause, *id.* at 1262.

58. *See, e.g.*, Voir Dire Transcript, *supra* note 52, at 836–59.

59. *See* Frampton, *supra* note 38, Appendix A.

60. *See id.*; *see also, e.g.*, Voir Dire Transcript, *supra* note 52, at 836–58.

61. *See infra* notes 232–234 and accompanying text.

62. *See* Frampton, *supra* note 38, Appendix A; *see also, e.g.*, Voir Dire Transcript, *supra* note 52, at 1260–62.

And the remainder were struck for a variety of reasons,[63] usually (though not exclusively) after reporting doubts about their own impartiality.[64] At the end of voir dire, with over 100 jurors removed for cause, 45 jurors advanced to the peremptory-strike stage: 35 were white (78%) and only 10 were black (22%).[65] Thus, before peremptory strikes began, challenges for cause had already eliminated most black prospective jurors from the pool. More importantly, the process also reduced the *relative* share of black jurors in the jury pool from 44% of the initial venire to 22% of the "qualified" venire. Peremptory challenges reduced that percentage of black jurors even further to 8% (1 of 12 seated jurors),[66] of course, but the greater part of the racial exclusion in Flowers's sixth trial was attributable to challenges for cause.[67]

2. *Foster v. Chatman*

Timothy Foster, who is black, was convicted by an all-white jury and sentenced to death for the torture and murder of an elderly white woman in Rome, Georgia.[68] His original trial took place in 1987, but after his direct appeal, Foster obtained prosecutors' files through a Georgia Open Records Act request.[69] These documents, which included prosecutors' handwritten notes from jury selection, bolstered Foster's state habeas claim that prosecutors impermissibly targeted black jurors with their peremptory strikes.[70] In *Foster v. Chatman*, the Supreme Court sided with Foster and ordered a new trial.[71] Undertaking an extensive review of the available record, the Court conclud-

63. For example, 8 jurors (6 black and 2 white) were removed for cause after disclosing that they might be influenced by having had a close friend or family member prosecuted for unrelated criminal conduct. Nine white jurors were removed for personal or familial connections with law enforcement.

64. *See, e.g.*, Voir Dire Transcript, *supra* note 52, at 1481, 1510, 1536. One notable exception was a white juror successfully challenged by the defense. Although giving assurances that she could be fair and impartial, the juror began crying when recalling one of the victim's funerals, which she attended. *See, e.g.*, *id.* at 1634. The court granted the defendant's challenge (over prosecutors' objections): "I think if the mere asking about the case would reduce her to tears, then I think that would show an indication that she would have real difficulty being fair and impartial." *Id.*

65. *See* Frampton, *supra* note 38, Appendix A.

66. Flowers v. Mississippi, 139 S. Ct. 2228, 2237 (2019).

67. The ways in which challenges for cause altered the racial composition of the jury pool was not lost on all members of the Court: Justice Thomas mentioned it briefly in his dissent, though he dismissed the shift as a "statistical abnormality" of little significance. *See id.* at 2262 (Thomas, J., dissenting); *see also* Thomas Ward Frampton, *What Justice Thomas Gets Right About* Batson, 72 STAN. L. REV. ONLINE 1 (2019).

68. *See* Foster v. State, 374 S.E.2d 188, 190–91 (Ga. 1988).

69. Foster v. Chatman, 136 S. Ct. 1737, 1743 (2016).

70. *See id.* at 1744.

71. *Id.* at 1755.

ed that two of prosecutors' peremptory strikes targeting black jurors were "motivated in substantial part by discriminatory intent."[72]

But the full voir dire transcript provides a fuller portrait of racial exclusion. Unlike Flowers's case, the initial pool in Foster's prosecution was mostly white: Foster began with 98 prospective jurors, 87 of whom were white (88.8%) and 11 of whom were black (11.2%).[73] By the time the pool of 50 jurors was "qualified" for peremptory strikes, however, 7 of the 11 black jurors had already been excused or dismissed.[74] In absolute terms this marks only a modest decline in the total percentage of black jurors in the venire (from 11.2% to 8.0%), but comparatively, it marks a 29% drop in black jurors' "share" of the total.[75] The decline was significant enough that the trial judge acted surprised when defense counsel asked how the judge wished to handle (anticipated) *Batson* challenges during the final stage of jury selection. "I didn't realize we had any left," the judge remarked, referring to black jurors.[76]

Prosecutors seemed particularly keen to excuse black jurors using challenges for cause, even when the jurors' possible bias seemed to *favor* their side. One black prospective juror, for instance, gave conflicting answers as to whether she would "lean" in favor of the prosecution or the defense;[77] as to the death penalty, though, she indicated clearly that she would vote to impose death if the jury reached a "guilty" verdict ("If somebody has done killed somebody, yeah, an eye for an eye.").[78] Prosecutors, correctly,[79] recognized that this bias in favor of capital punishment provided grounds to challenge the juror and she was excused (without defense objection).[80] When white jurors demonstrated similar progovernment biases, however, prosecutors remained silent or fought to rehabilitate them.[81]

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72. *Id.* at 1754.

73. Frampton, *supra* note 38, Appendix B.

74. *Id.*; *see also Foster*, 136 S. Ct. at 1743.

75. *Cf.* Berghuis v. Smith, 559 U.S. 314, 323 (2010) (" 'Absolute disparity' is determined by subtracting the percentage of African-Americans in the jury pool (here, 6% in the six months leading up to Smith's trial) from the percentage of African-Americans in the local, jury-eligible population (here, 7.28%). By an absolute disparity measure, therefore, African-Americans were underrepresented by 1.28%. 'Comparative disparity' is determined by dividing the absolute disparity (here, 1.28%) by the group's representation in the jury-eligible population (here, 7.28%). The quotient (here, 18%) showed that, in the six months prior to Smith's trial, African-Americans were, on average, 18% less likely, when compared to the overall jury-eligible population, to be on the jury-service list.").

76. Voir Dire Transcript at 1330, Foster v. Chatman, 136 S. Ct. 1737, 1743 (2016) (No. 14-8349).

77. *Id.* at 780.

78. *Id.* at 782.

79. *See* Morgan v. Illinois, 504 U.S. 719, 719 (1992) (holding that "a capital defendant may challenge for cause any prospective juror who will automatically vote for the death penalty").

80. Voir Dire Transcript, *supra* note 76, at 782.

81. *See, e.g.*, *id.* at 920.

Race also seemed to have provided important subtext when the attorneys debated jurors' claims of hardship. For example, after an older black juror was qualified, prosecutors nevertheless urged that she be excused:

> Before we ask the other juror to come in, I just have one—you know, I don't know. . . . [C]onsidering that this case may or may not go into next week, the fact that Mrs. Hardge has a husband who is a double amputee; that has no reason—has no other help but herself, and she has claimed that this sequestered trial would be a hardship. . . . I also feel like that we ought to accommodate Mrs. Hardge and ask that she be excused, purely for the reasons—her reflections—her answer to the question.[82]

Moments later, however, prosecutors' solicitude was absent when a younger white juror protested that she "[a]bsolutely" had a reason not to be sequestered insofar as she "ha[d] an 18-month-old daughter who" needed her care.[83]

Apart from the exclusions first suggested by the court, prosecutors raised 10 challenges for cause (all but one of which were granted); of these, 4 aimed to eliminate black jurors and 6 aimed to eliminate white jurors.[84] Given the small percentage of black jurors in the initial venire (11.2%), the frequency of challenges for cause against black jurors (40%) was 357% what we would expect if race and challenges for cause were not correlated. All 11 of Foster's challenges sought the exclusion of white jurors, though this represents only a 13% increase over the "expected" frequency of challenges to white jurors; the court granted only 3 of Foster's challenges.[85]

3. *Snyder v. Louisiana*

Allen Snyder, who is black, was tried for capital murder before an all-white jury in Jefferson Parish, Louisiana, in 1996.[86] Of the 36 jurors remaining at the final stage of jury selection, 5 were black.[87] Prosecutors used 7 peremptory strikes against white prospective jurors and 5 against the remaining black prospective jurors, ensuring an all-white jury.[88] Snyder was convicted

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82. *Id.* at 420–21. The trial judge politely declined the invitation. *Id.* ("THE COURT: Well, when the Court sits here and sees the husband, the double amputee, get up and walk out unassisted, except by a cane, then he appears to the Court that he can get his own water, go to the bathroom, whatever is needed. So I don't believe he's helpless. [PROSECUTOR]: I noticed he was smiling as he left the courtroom too, and the way he waved . . . . THE COURT: Well, he's been knowing me, and I've been knowing him for close to a hundred years.").

83. *See id.* at 459; *see also id.* at 1069 (arguing, during defense questioning of a white prospective juror, "[n]obody wants to sit on the jury").

84. *See* Frampton, *supra* note 38, Appendix B.

85. *See id.*

86. Snyder v. Louisiana, 552 U.S. 472, 474–76 (2008).

87. *Id.* at 475–76.

88. *See* Frampton, *supra* note 38, Appendix C. For each of the jurors in the *Snyder* dataset, the "race" information was hand-collected by cross-referencing the jurors' addresses—drawn from the master jury list document from the court file, Listing of Jurors Assigned to

and sentenced to death.[89] In 2008, the Supreme Court reversed, concluding that the peremptory strike of at least one of the black jurors was motivated in substantial part by discriminatory intent.[90]

The all-white jury in Snyder's case was assembled from an initial pool that—although not reflecting the overall demographics of Jefferson Parish—looked relatively diverse. In the initial group of 138 potential jurors, 108 were white (78.3%), 24 were black (17.4%), and 6 were Asian, Hispanic, or "Other" (4.3%).[91] From the outset, prosecutors aggressively pursued potential challenges for cause against black jurors. One black juror, for instance, indicated that she might be unable to serve because she was "a diabetic, and I get so nervous a lot."[92] When defense attorneys assured the juror that the court "ha[d] a whole staff of people that [she] could call on if [she] felt nervous," the juror allowed that she might get nervous even with access to her medication: "Because you see, I had a son that was in jail, and he died in jail."[93] Prosecutors immediately interjected: "This is about the death penalty too, ma'am, you're going to see gruesome photos, and hear about murder. That's going to make you nervous?"[94] The reluctant juror allowed that it would, and she was excused for cause.[95]

As in Flowers's trial, the attorneys explicitly referenced prospective jurors' race while making challenges for cause. When prosecutors successfully removed one black juror for cause—the juror admitted to wanting to kill his wife's lover, in circumstances similar to the allegations against the defendant—defense attorneys objected and "note[d] for the record that [the prospective juror] is a black man."[96] The remark triggered a terse on-the-record argument between the two prosecutors, who debated whether they should proffer additional race-neutral justifications for their challenge.[97]

Overall, as in *Flowers* and *Foster*, there were unmistakable patterns in whom the parties challenged for cause (and when the parties objected). Prosecutors initiated 24 challenges for cause, 5 against black prospective ju-

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Case 955114, State v. Snyder, No. 95-5114 (La. Dist. Ct. Aug. 27, 1996)—with public records, including voter registration documents and criminal or traffic records.

89. *Snyder*, 552 U.S. at 474.

90. *Id.* at 485.

91. *See* Frampton, *supra* note 38, Appendix C.

92. Joint Appendix at 116, Snyder v. Louisiana, 552 U.S. 472 (2008) (No. 06-10119).

93. *Id.* at 117.

94. *Id.*

95. *Id.* at 117–18.

96. *Id.* at 562–63, 584.

97. *See id.* at 584–85 ("[PROSECUTOR 1]: Well, he's being excused for cause is my understanding. If the cause would not hold up, Judge, my reasoning– [PROSECUTOR 2]: No, you don't – Would you be quiet? You don't have to give one. [PROSECUTOR 1]: Jim, look, please don't do that again. [PROSECUTOR 2]: Fred – Okay. Don't put anything on the record that we don't have to put on. [PROSECUTOR 1]: Please don't do that again. [PROSECUTOR 2]: But don't – [PROSECUTOR 1]: Then don't – Just don't do that again. THE COURT: All right. Any other challenges for cause?").

rors and 2 against Asian prospective jurors.[98] This frequency of challenges against nonwhite prospective jurors (29.2%) was 35% greater than what one might expect based on nonwhite jurors' representation in the initial pool (21.7%). Prosecutors vocally objected to the dismissal of only 4 jurors for cause; all were white.[99] Defense attorneys, meanwhile, overwhelmingly targeted white prospective jurors: of their 35 challenges, 33 were made against white prospective jurors, and 2 targeted Hispanic or "Other" prospective jurors.[100] Defense counsel also objected mainly, although not exclusively, to the excusal of black jurors urged by prosecutors or suggested by the court.[101] While nearly a quarter of the initial venire comprised nonwhite jurors, the final pool before peremptory challenges comprised 31 white jurors (86%), 5 black jurors (14%), and no other nonwhite jurors.[102]

* * *

At the end of the voir dire process, peremptory strikes often have dramatic effects on the racial composition of the "qualified" venire: the final strikes in *Foster* and *Snyder*, for example, removed 100% of the potential black jurors remaining at that late point in the proceedings.[103] For all of our focus on how the last black jurors were removed in a case, however, we rarely ask what happened to the first, second, and third black jurors excused.[104] The data from Louisiana, from Mississippi, and from recent *Batson* cases suggest that challenges for cause also serve as an important, but overlooked, vehicle for racial exclusion.

II. THE MISSING LAW OF CHALLENGES FOR CAUSE

We lack a legal framework for addressing the form of racial exclusion detailed in Part I. Since the 1970s, the Supreme Court has "constitutionalized" parts of the jury selection process in important ways.[105] Under *Taylor*

98. *See* Frampton, *supra* note 38, Appendix C.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. Foster v. Chatman, 136 S. Ct. 1737, 1741 (2016); Snyder v. Louisiana, 552 U.S. 472, 476 (2008).

104. While this Article argues that challenges for cause merit greater attention in their own right, our failure to examine challenges for cause also undermines our ability to recognize the pernicious effects of peremptory strikes. Justice Marshall presciently touched upon the relationship between the two forms of exclusion in his *Batson* concurrence. *See* Batson v. Kentucky, 476 U.S. 79, 105 (1986) (Marshall, J., concurring) (arguing that "where only one or two black jurors survive the challenges for cause, the prosecutor need have no compunction about striking them from the jury because of their race" because it will be difficult for defendants to establish a prima facie case of discrimination).

105. *See* Leipold, *supra* note 26; William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 62–63 (1997).

v. Louisiana[106] and *Duren v. Missouri*,[107] criminal juries must be drawn from a representative cross section of the community; under *Batson v. Kentucky*[108] and its progeny, racially motivated peremptory strikes are forbidden.[109] But the Supreme Court's constitutional (de)regulation of challenges for cause complicates this narrative. Over the past several decades, the Court has quietly insulated the challenge-for-cause process, including racial exclusion through such challenges, from meaningful review. In the interstices of the Court's fair-cross-section, equal protection, and due process jurisprudence, there is a missing law of challenges for cause.

Before turning to the constitutional dimensions of the problem, though, it is helpful to think through what might be driving the disparities identified in Part I. Consider three possible accounts:

- The "disparate impact" theory—Prosecutors and judges are acting in a perfectly race-neutral manner, but certain disqualifying beliefs and experiences (e.g., opposition to capital punishment, negative views of law enforcement) are more prevalent among black potential jurors.[110] In a polarized community, even if prosecutors eschew any reliance on race during jury selection, such dynamics could lead to radically unrepresentative juries.
- The "mixed motive" theory—Prosecutors' principal aim is to exclude any jurors prone to acquit defendants, but they consider race as a method of identifying and targeting those jurors. Prosecutors thus ask leading questions of black prospective jurors designed to elicit disqualifying responses, while largely ignoring white prospective jurors.[111] The result is that prosecutors disproportionately identify and eliminate black jurors (many of whom may, in fact, be "biased" or "partial").

106. 419 U.S. 522 (1975).

107. 439 U.S. 357 (1979).

108. 476 U.S. 79.

109. In this regard, jury selection mirrors most other aspects criminal procedure from the Warren Court onward. *See* Stuntz, *supra* note 105, at 18 (discussing constitutional regulation of jury selection as parcel of larger constitutionalization of criminal procedure).

110. *See* Baldus et al., *supra* note 3 (noting stark racial differences in opinion polls tracking attitudes toward law enforcement); *see also* Jocelyn Simonson, Essay, *The Place of "the People" in Criminal Procedure*, 119 COLUM. L. REV. 249, 277–78 (2019) ("But these doctrines defining the composition of 'unbiased' juries exemplify a conception of criminal procedure that defines 'bias' as the tendency to side with defendants.").

111. *See* JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 152–53 (1977) (discussing training materials in Dallas County District Attorney's Office instructing prosecutors to avoid "any member of a minority group . . . they almost always empathize with the accused"); Roberts, *Asymmetry as Fairness*, *supra* note 1, at 1522–23 (discussing a prosecution training video in Philadelphia explicitly recommending reliance on prohibited group-based assumptions).

- The "judicial bias" theory—Rather than focusing on jurors or prosecutors, the problem rests with judges.[112] Perhaps judges generally are indulgent in granting challenges for cause raised by prosecutors and/or against black jurors and stingy when weighing equally worthy challenges raised by defendants and/or against white jurors. The result is a significant number of erroneous rulings on challenges for cause—incorrect findings that particular jurors are or are not sufficiently "impartial" to warrant removal—that skew the racial composition of the pool.

I suspect there is some merit to each of the foregoing explanations, and ascribing relative weight to each causal mechanism is beyond the scope of this Article. But if *any* of these accounts are accurate, we might expect the law to provide some meaningful relief. That assumption, it turns out, would be wrong.

Section II.A examines the Court's fair-cross-section jurisprudence and its relationship to challenges for cause. If the "disparate impact" theory is correct, the Sixth Amendment's fair-cross-section requirement would seem like a plausible vehicle for confronting this phenomenon. A jury pool from which most or all nonwhite potential jurors have been purged through challenges for cause hardly seems "fairly representative of the community,"[113] after all. And, unlike equal protection claims, fair-cross-section challenges do not require a showing of discriminatory bias, so the fact that prosecutors were acting in a scrupulously race-neutral manner when raising their challenges for cause should not pose any doctrinal obstacles.[114] But, as Section II.A explains, any Sixth Amendment fair-cross-section claim would likely fail if used to contest racial disparities attributable to challenges for cause.

Section II.B turns to the Court's equal protection jurisprudence, which since 1880 has limited (some forms of) racial discrimination in jury selection. If the "mixed motive" theory is correct—if prosecutors were invidiously relying upon potential jurors' race to decide which jurors to target for challenge and removal—we might think such a practice would offend the Equal Protection Clause's prohibition on "[r]acial discrimination in [the] selection of jurors."[115] Again, though, this assumption would be mistaken.

Finally, Section II.C examines the Court's approach to judges' errors in accepting or rejecting a challenge for cause; these cases typically turn on the Sixth Amendment's guarantee of an "impartial jury" and the Fourteenth Amendment's Due Process Clause. If the "judicial bias" theory is correct, we might expect to see a considerable body of case law dealing with the erroneous denial of defendants' challenges for cause or the erroneous granting of

112. Bennett, *supra* note 5, at 149–50 ("My own introduction to implicit bias was deeply unnerving. . . . [A]s a former civil rights lawyer and seasoned federal district court judge . . . I was eager to take the [implicit bias] test. I knew I would 'pass' with flying colors. I didn't.").

113. Taylor v. Louisiana, 419 U.S. 522, 538 (1975).

114. Duren v. Missouri, 439 U.S. 357, 368 n.26 (1979).

115. Batson v. Kentucky, 476 U.S. 79, 87 (1986).

prosecutors' challenges for cause. Yet, once more, the Court's rulings over the past several decades have foreclosed any meaningful avenue for defendants to obtain relief. Even glaring errors in such rulings, the Court has held, do not violate the constitutional rights of defendants.

A. *Fair Cross Section*

The argument that black citizens simply are not "qualified" to serve on juries in similar numbers as white citizens now seems deeply antithetical to basic constitutional norms. There is a solid constitutional basis for this intuition: the Sixth Amendment's guarantee of an "impartial jury" has been interpreted to encompass a defendant's right to a jury drawn from a "representative cross section of the community."[116] And importantly, the question of "discriminatory purpose" is irrelevant to claims alleging that an unrepresentative jury pool violates this fair-cross-section requirement; the Court long ago recognized that race-neutral practices in assembling venires could result in race and sex disparities sufficient to implicate the Sixth Amendment.[117] But this "representative" conception of the jury is of surprisingly recent vintage, and it remains modest in its reach.[118] Because the Court has limited its fair-cross-section inquiry only to the demographic composition of the initial venire (i.e., those summoned to the courthouse) and endorsed unrepresentative venires when "significant state interests" are implicated, even the complete exclusion of nonwhite jurors through challenges for cause would likely survive Sixth Amendment scrutiny.

To understand why, it is important to remember that for most of American history, the fact that petit juries were drawn from unrepresentative lists was not understood to be in tension with the Constitution; rather, it was assumed that juries would comprise only an elite (and thus, necessarily, disproportionately white and male) subset of the population.[119] From Reconstruction to the Civil Rights Era, criminal defendants occasionally succeeded in challenging convictions by arguing that local officials deliberately and completely excluded black jurors in violation of the Fourteenth Amendment's Equal Protection Clause.[120] But, for the most part, the eviden-

116. *Taylor*, 419 U.S. at 528.

117. *Duren*, 439 U.S. at 368 n.26 (distinguishing Sixth Amendment fair-cross-section claims from Fourteenth Amendment equal protection claims). *But see* Nina W. Chernoff, *Wrong About the Right: How Courts Undermine the Fair Cross-Section Guarantee by Confusing It with Equal Protection*, 64 HASTINGS L.J. 141 (2012).

118. Jeffrey Abramson, *The Jury and Democratic Theory*, 1 J. POL. PHIL. 45 (1993); *accord* Leipold, *supra* note 26, at 951 ("The phrase 'fair cross section of the community' sounds so natural to the modern ear that it is easy to believe that the requirement has always been part of the right to a jury trial. To the contrary . . . .").

119. *See* Alschuler & Deiss, *supra* note 19, at 894–95, 898–901 (providing detailed explanations of how women and people of color were excluded from jury service in the United States).

120. *See, e.g.*, Eubanks v. Louisiana, 356 U.S. 584 (1958); Hill v. Texas, 316 U.S. 400 (1942); Norris v. Alabama, 294 U.S. 587 (1935); Strauder v. West Virginia, 100 U.S. 303 (1880).

tiary burden required to prevail—typically, at minimum, a candid admission of racist intent and the total exclusion of the targeted group—made equal protection claims prohibitively difficult to assert successfully.[121]

Importantly, the bulk of this race-based (and sex-based) exclusion occurred by application of "neutral" criteria. In 1910, for example, the Supreme Court heard an appeal from a black South Carolina man—condemned to death by an all-white jury—challenging the state's jury selection process.[122] Under state law, jury commissioners were charged with preparing lists of prospective jurors of "good moral character" and "sound judgment"; the defendant urged that such arbitrary criteria permitted the complete exclusion of black jurors from venires.[123] The Court had little trouble upholding the law, since "nothing in this statute . . . discriminates against individuals on account of race or color . . . . [It] simply provides for an exercise of judgment in attempting to secure competent jurors of proper qualifications."[124] "Key man" systems—under which civic leaders, judges, or local officials would nominate citizens for jury service based on their reputations for intelligence or good character—were the norm for most of the twentieth century.[125] And as late as the 1970s, even while devoting greater scrutiny to the discriminatory application of such standards, the Court positively cited these Jim Crow–era precedents affirming the states' freedom to exclude from jury service those lacking "good intelligence, sound judgment, and fair character."[126] Of course, the potential for such race-neutral criteria to generate massive racial disparities in jury composition was never a secret.[127] But it was not until the Jury Selection and Service Act of 1968, which mandated random selection of prospective jurors from voter lists, that Congress finally abolished the practice in federal courts.[128]

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121. Frampton, *supra* note 3, at 1641–43.

122. Franklin v. South Carolina, 218 U.S. 161 (1910).

123. *Id.* at 167–68.

124. *Id.* at 168.

125. *See* Akhil Reed Amar, Note, *Choosing Representatives by Lottery Voting*, 93 YALE L.J. 1283, 1287 (1984); *see also* Carter v. Jury Comm'n of Greene Cty., 396 U.S. 320, 331 (1970) (upholding Alabama requirement that jurors be "generally reputed to be honest and intelligent and . . . esteemed in the community for their integrity, good character and sound judgment" (quoting ALA. CODE § 30-21 (Supp. 1967))); Turner v. Fouche, 396 U.S. 346, 353–54 (1970) (upholding requirement that jurors be "upright" and "intelligent").

126. *Carter*, 396 U.S. at 332 (citing Gibson v. Mississippi, 162 U.S. 565, 589 (1896)).

127. *See* Castaneda v. Partida, 430 U.S. 482 (1977); Norris v. Alabama, 294 U.S. 587 (1935). For a rich account of a legal challenge to the exclusion of Mexican American jurors in Los Angeles, see IAN F. HANEY LÓPEZ, RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE (2003).

128. Jury Selection and Service Act of 1968, Pub. L. No. 90-274, 82 Stat. 53 (codified at 28 U.S.C. §§ 1861–1869 (2018)).

The cross-sectional ideal was constitutionalized seven years later in *Taylor v. Louisiana*.[129] There, the Supreme Court first held that "the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial."[130] Four years later, in *Duren v. Missouri*,[131] the Court clarified its fair-cross-section inquiry. The Court explained that a prima facie violation of the fair-cross-section requirement is established where (1) a "distinctive" group is involved; (2) its underrepresentation in jury venires is "not fair and reasonable in relation to the number of such persons in the community"; and (3) this disparity is due to "systematic exclusion" in the jury selection process.[132] Upon such a showing, the State must identify a "significant state interest [that is] manifestly and primarily advanced by those aspects of the jury-selection process . . . that result in the disproportionate exclusion of a distinctive group."[133]

But there are at least two significant obstacles to countering the form of racial exclusion at issue in this Article—the continuing exclusion of nonwhite jurors through challenges for cause—under the Sixth Amendment's fair-cross-section requirement. First, while criminal defendants have a right to a jury drawn from a representative cross section of the community, the Court has been unwilling to extend its "representativeness" inquiry beyond the composition of the initial venire (*before* the "qualification" process). In 1986, a week after issuing its landmark opinion in *Batson v. Kentucky*, the Court issued an opinion rejecting a fair-cross-section claim based on the elimination of jurors unwilling to impose the death penalty (so-called "*Witherspoon*-excludable" jurors[134]) from the guilt phase of a bifurcated capital trial.[135] Such jurors, the Court held in *Lockhart v. McCree*, were not a "'distinctive' group in the community," so the defendant's fair-cross-section claim failed under *Duren*'s first prong.[136] But in expansive dicta, the Court also went much further:

> [W]e do not believe that the fair-cross-section requirement can, or should, be applied as broadly as [the appellate] court attempted to apply it. We have never invoked the fair-cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to re-

129. 419 U.S. 522, 526, 528 (1975). As Professor Leipold notes, *supra* note 26, at 952–55, the phrase "cross-section of the community" first appeared in the 1940s. *See* Ballard v. United States, 329 U.S. 187, 191 (1946); Thiel v. S. Pac. Co., 328 U.S. 217, 220 (1946); Glasser v. United States, 315 U.S. 60, 86 (1942).

130. *Taylor*, 419 U.S. at 528.

131. 439 U.S. 357, 358–60 (1979).

132. *Duren*, 439 U.S. at 364.

133. *Id.* at 367–68.

134. *See* Witherspoon v. Illinois, 391 U.S. 510 (1968).

135. Lockhart v. McCree, 476 U.S. 162 (1986).

136. *Id.*

> quire petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large.[137]

Four years later, in *Holland v. Illinois*, the Court returned to the issue, rejecting a claim that prosecutors' removal of the only two black jurors from a venire (through peremptory strikes) violated the Sixth Amendment's fair-cross-section requirement.[138] "[O]nce a fair hand is dealt," the Court explained, the Sixth Amendment had nothing to say about the "eliminat[ion of] prospective jurors belonging to groups [a party] believes would unduly favor the other side."[139]

But even if the Sixth Amendment fair-cross-section requirement dictated that petit juries be drawn from representative pools of *qualified* jurors (i.e., after the winnowing that occurs during challenges for cause)—as Justice Thurgood Marshall argued for, in dissent, in *Holland v. Illinois*[140]—racial disparities stemming from disproportionate challenges for cause might still be permissible: demographic disparities that advance a "significant state interest"[141] do not offend the Sixth Amendment. In *Duren*, the Court indicated that a state has such an interest in "assuring that those members of the family responsible for the care of children are available to do so"; sex disparities in jury venires arising from an "appropriately tailored" rule to further this goal, the Court said, would likely satisfy the Sixth Amendment.[142] The *Taylor* Court noted that significant disparities might also be permissible if arising from a state's decision to exempt "those engaged in particular occupations the uninterrupted performance of which is critical to the community's welfare."[143] The State's interest in excluding biased or partial jurors to ensure "the fairness and integrity of [the] judicial process"[144] would likely qualify as a "significant" interest, too.[145]

If there is a constitutional infirmity in the massively disproportionate exclusion of nonwhite jurors through challenges for cause, it does not lie in its inconsistency with the Sixth Amendment's fair-cross-section requirement, at least as presently constituted.

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137. *Id.* at 173.

138. 493 U.S. 474 (1990).

139. *Holland*, 493 U.S. at 481.

140. *See id.* at 497–98 (Marshall, J., dissenting) ("[N]o rational distinction can be drawn in the context of our fair-cross-section jurisprudence between the claims we accepted in *Taylor* and *Duren* and the claim at issue here.").

141. Duren v. Missouri, 439 U.S. 357, 367–68 (1979).

142. *Id.* at 370.

143. Taylor v. Louisiana, 419 U.S. 522, 534 (1975) (citing Rawlins v. Georgia, 201 U.S. 638 (1906)).

144. Georgia v. McCollum, 505 U.S. 42, 56 (1992).

145. *See infra* Section III.D (discussing case law emphasizing the importance of public perceptions that jury adjudication is fair).

B. *Equal Protection*

What if the disparities identified in Part I are, at least in part, attributable to challenging decisions that are, in fact, partially "based on race" (i.e., motivated by the sort of discriminatory intent *Batson* proscribes)? In the context of peremptory strikes, scholars generally assume that race- and sex-based decisionmaking remains rampant. Challenges for cause, of course, are different—proponents must articulate good justifications for their challenges, and courts must sign off on these rationales.[146] But an attorney's invocation of a cognizable for-cause justification does not foreclose the possibility that her decision to target and challenge that juror was also tainted by improper bias. If racial bias frequently motivates the decision to exercise a peremptory strike—clear constitutional prohibition notwithstanding—it seems improbable that such bias would play no role in the exercise of challenges for cause against the same prospective jurors. Challenges for cause offer attorneys a free bite at the apple, without the risk of sanction.[147]

To the extent racial bias does inform challenges for cause, one might assume the practice implicates the Fourteenth Amendment's Equal Protection Clause. Since *Strauder v. West Virginia*, a landmark case involving a state statute that on its face prohibited the summoning of black jurors, the Court has held that "discriminating in the selection of jurors . . . because of their color" denies criminal defendants equal protection of the laws in violation of the Fourteenth Amendment.[148] Shortly after *Strauder*, in *Neal v. Delaware*, the Court clarified that discriminatory practices in summoning potential jurors could also deny defendants "equal protection of the laws"[149] (even where "there was no law of the State forbidding" the selection of black jurors outright[150]). A century later, in *Batson*, the Court addressed racial bias in the exercise of peremptory strikes, but in broad terms reaffirmed the constitutional prohibition against any "[r]acial discrimination in [the] selection of jurors."[151] "[T]he State may not draw up its jury lists pursuant to neutral procedures," the Court explained, "but then resort to discrimination at 'other stages in the selection process.' "[152] If the Fourteenth Amendment prohibits intentional racial discrimination in the drawing of the venire (as in *Strauder*

146. *See* Flowers v. Mississippi, 139 S. Ct. 2228, 2238 (2019).

147. Attorneys currently face one (exceedingly minor) risk by engaging in nakedly biased practices when raising challenges for cause: this behavior can provide circumstantial evidence that their subsequent peremptory strikes were race motivated. *See* Miller-El v. Cockrell, 537 U.S. 322, 344 (2003) (discussing disparate questioning as evidence of improper motive).

148. 100 U.S. 303, 310 (1880).

149. 103 U.S. 370, 397 (1881) (quoting *Ex parte* Virginia, 100 U.S. 339, 347 (1880)).

150. *Neal*, 103 U.S. at 400 (Field, J., dissenting).

151. Batson v. Kentucky, 476 U.S. 79, 86–87 (1986).

152. *Id.* at 88 (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)); *see also* McCray v. New York, 461 U.S. 961, 968 (1983) (Marshall, J., dissenting from denial of certiorari) ("The systematic exclusion of prospective jurors because of their race is therefore unconstitutional at any stage of the jury selection process.").

v. Virginia and *Neal v. Delaware*) and at the peremptory-strike stage (as in *Batson v. Kentucky*), it is reasonable to think it prohibits discrimination that occurs in between.

But, as with the Sixth Amendment's fair-cross-section requirement, our existing equal protection doctrine offers little help when confronting racial exclusion in the challenge-for-cause context. The first, and more mundane, obstacle is same that plagues *Batson*: the practical problem of proof of discriminatory purpose. At the final stage of *Batson*'s familiar three-step framework, those challenging a peremptory strike carry the burden of proving that the proponent's race-neutral justification is merely "pretextual."[153] As Justice Thurgood Marshall foresaw, this burden will rarely be met unless the "proffered 'neutral explanation' plainly betrays an underlying impermissible purpose."[154] In the challenge-for-cause context, however, where the proponent has articulated a valid "for cause" basis for excluding the juror, the race-neutral explanation is (almost by definition) not completely frivolous or transparently thin. And, having just endorsed the sufficiency of the proponent's stated rationale, the trial court would be hard-pressed to then declare it pretextual. As with challenges to peremptory strikes, there may be ways to surmount this hurdle in exceptional circumstances[155]—for example, prosecutors' notes,[156] comparative analyses with unchallenged jurors,[157] disparate questioning,[158] historical evidence of racial bias[159]—but anything resembling the current *Batson* framework for identifying and eliminating racial bias in this context is structurally ill-suited to the task.[160]

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153. Purkett v. Elem, 514 U.S. 765, 767–68 (1995).

154. Wilkerson v. Texas, 493 U.S. 924, 928 (1989) (Marshall, J., dissenting from denial of certiorari); *accord* Bellin & Semitsu, *supra* note 1, at 1077–78 ("[T]he Supreme Court has decreed that before a trial court can find a *Batson* violation it must determine that an attorney has (1) exercised a racially motivated peremptory challenge and (2) lied to the court in an effort to justify the strike. The trial court must find all of this based almost solely on the attorney's demeanor. Accordingly, trial courts rightly hesitate to make the damning findings *Batson* requires on such paltry evidence. Add to this the fact that attorneys may not even be aware of the racial motivation for their own strikes, as well as the administrative difficulty of remedying *Batson* violations, and it should come as no surprise that *Batson*, in application, is all form and little substance." (footnote omitted)).

155. *See* Abel, *supra* note 8, at 726; *see also supra* note 111 and accompanying text (discussing discovery of discriminatory policies and training materials).

156. *Cf.* Foster v. Chatman, 136 S. Ct. 1737, 1743–44 (2016) (detailing documents, including prosecutors' notes, disclosed pursuant to Georgia Open Records Act request).

157. *Cf.* Snyder v. Louisiana, 552 U.S. 472, 483 (2008) ("A comparison between Mr. Brooks and Roland Laws, a white juror, is particularly striking.").

158. *Cf.* Miller-El v. Dretke, 545 U.S. 231, 256–57 (2005) ("The State concedes that this disparate questioning did occur but argues that use of the graphic script turned not on a panelist's race but on expressed ambivalence about the death penalty in the preliminary questionnaire. . . . This argument, however, . . . simply does not fit the facts.").

159. *Cf.* Craft, *supra* note 44.

160. *But see* Roberts, *Disparately Seeking Jurors*, *supra* note 1 (exploring flexibility of *Batson* framework to counter exclusionary justifications that have disparate impact).

But there is an antecedent problem: even if a proponent candidly admitted that racial bias motivated a successful challenge for cause, the federal courts' tepid equal protection jurisprudence (particularly in the jury selection context) leaves uncertain whether such discrimination would offend the Fourteenth Amendment at all. An analogous situation arises in the case of "dual motive" or "mixed motive" peremptory strikes. When a combination of permissible and impermissible considerations animate a peremptory strike, attorneys frequently argue that the impermissible bias, although present, was not "determinative" of the decision to exercise the strike.[161] The Supreme Court, in a footnote in *Foster*, declined to resolve whether this defense should be available in response to a *Batson* challenge.[162] But every federal court of appeals to consider the question has endorsed some version of the defense, essentially creating a "*Batson* Step 4." In the Second, Third, Fourth, Eighth, and Eleventh Circuits, the "person accused of discrimination [in jury selection may] avoid liability by showing that the same action would have been taken in the absence of the improper motivation."[163] The Ninth Circuit has endorsed a more modest version of the defense, allowing the use of peremptory strikes tainted by purposeful discrimination if such bias did not "in substantial part" motivate the decision.[164] (Many states, on the other hand, reject this approach.[165] If discriminatory reasons motivated the strike in any way, the juror's removal is *per se* unconstitutional.[166])

Were the courts to seriously scrutinize the role of racial bias in challenges for cause, a similar problem would undoubtedly arise.[167] Even if race

161. *See* Covey, *supra* note 1, at 289 (discussing mixed-motive peremptory challenges); *cf.* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 271–72 n.21 (1977) ("Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered. If this were established, the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose.").

162. Foster v. Chatman, 136 S. Ct. 1737, 1754 n.6 (2016).

163. Howard v. Senkowski, 986 F.2d 24, 26–27 (2d Cir. 1993); *see also* Gattis v. Snyder, 278 F.3d 222, 234–35 (3d Cir. 2002); Jones v. Plaster, 57 F.3d 417, 420 (4th Cir. 1995); United States v. Darden, 70 F.3d 1507, 1531 (8th Cir. 1995); Wallace v. Morrison, 87 F.3d 1271, 1275 (11th Cir. 1996).

164. Cook v. LaMarque, 593 F.3d 810, 815 (9th Cir. 2010) (quoting Snyder v. Louisiana, 552 U.S. 472, 485 (2008)).

165. People v. Douglas, 232 Cal. Rptr. 3d 305, 314–15 (Cal. Ct. App. 2018) (collecting cases).

166. *See id.*; *see also* Wilkerson v. Texas, 493 U.S. 924, 928 (1989) (Marshall, J., dissenting from denial of certiorari).

167. The difficulty here is *not* one of remedy. A common response to a *Batson* violation, if identified during jury selection, is the seating of the improperly challenged juror. *See* Jason Mazzone, Batson *Remedies*, 97 IOWA L. REV. 1613, 1624 (2012). When dealing with a bias-motivated challenge for cause, because there has already been a judicial finding that the challenged juror is "unqualified," seating that juror may be impossible. Bellin & Semitsu, *supra* note 1, at 1110. But trial courts may, and frequently do, remedy a *Batson* violation in other

played an important role in the decision to challenge a particular juror for cause, the proponent of the challenge could highlight that independent and sufficient reasons exist for the contested juror's removal. Of course, the fact that the same result could have been (but was not) achieved by lawful means does not necessarily render government conduct lawful, particularly in the criminal context. For example, the Equal Protection Clause bars the government from prosecuting a criminal defendant—no matter how guilty—where "the decision whether to prosecute [is] based on 'an unjustifiable standard such as race, religion, or other arbitrary classification' " (at least in theory).[168] But, to the extent the mixed-motive defense enjoys success when it comes to peremptory strikes, it is unsettled whether even the clearest showing of racial bias would matter when contesting an otherwise meritorious challenge for cause on equal protection grounds.

C. *Impartial Jury/Due Process*

Sections II.A and II.B have dealt with the relationship between challenges for cause and constitutional doctrines typically associated with race and the jury. But what of more straightforward claims—which may or may not implicate race—that the trial court erred in granting or denying a challenge for cause? Such systemic errors by judges, particularly if skewed in favor of prosecutors or certain categories of potential jurors, could also account for the disparities described in Part I.

If such slanted and erroneous rulings were a widespread problem, however, we would expect to see the issue frequently litigated (just as *Batson* claims are frequently pursued on appeal).[169] But this expectation presupposes the availability of meaningful relief. Traditionally, claims that the trial court erred in ruling on a challenge for cause have been litigated as implicating the defendant's right to an impartial jury under the Sixth Amendment or the defendant's right to due process under the Fourteenth Amendment.

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ways. Mazzone, *supra* at 1614. Dismissing the entire venire, stripping peremptory strikes from the offending party, or granting additional peremptory strikes to the opposing party (as well as disciplinary sanctions) are all responses to *Batson* violations that would apply equally well to a problematic challenge for cause. *Id.* at 1614, 1624; *see also* WAYNE R. LAFAVE ET AL., 6 CRIMINAL PROCEDURE § 22.3(d) (4th ed. 2015), Westlaw (database updated Dec. 2019).

168. United States v. Armstrong, 517 U.S. 456, 464 (1996) (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962)). The caveat "at least in theory" is necessary here in light of the courts' extraordinary reluctance to grant such claims. *See, e.g.*, Angela J. Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 COLUM. HUM. RTS. L. REV. 202, 213 (2007) (noting the difficult burden faced by defendants raising such claims); *see also* Hudson v. Michigan, 547 U.S. 586, 616 (2006) (Breyer, J., dissenting) (emphasizing that "[w]hat a man *could* do is not at all the same as what he *would* do" in context of inevitable discovery doctrine (quoting J.L. Austin, *Ifs and Cans*, 42 PROC. BRIT. ACAD. 109, 111–12 (1956))). *But see* Whren v. United States, 517 U.S. 806, 813 (1996) (holding arresting officer's subjective motivation irrelevant to Fourth Amendment analysis of lawfulness of stop). Thanks to Professor Russell Covey for suggesting the *Armstrong* analogy.

169. *See* Abel, *supra* note 8, at 733 (celebrating virtues of *Batson* in appellate litigation).

Once again, however, the Court has largely shut the door to such arguments in recent years.

1. Erroneous Grants of (Prosecutors') Challenges for Cause

The Term after *Batson*, the Court signaled it was prepared to devote similar scrutiny to other improper exclusions in the jury selection process. In 1987, the Court heard a capital case, *Gray v. Mississippi*, presenting the question whether an erroneous for-cause exclusion was subject to harmless-error review; in a 5–4 opinion, the Court indicated that the answer was "no."[170] In *Gray*, the trial court granted prosecutors' challenge for cause to a prospective juror who indicated moderate (but not disqualifying) reluctance to impose a death sentence.[171] The defendant was convicted and sentenced to death.[172] The Mississippi Supreme Court acknowledged that the juror's dismissal was erroneous, but it nevertheless held that the exclusion was "harmless error."[173] The Supreme Court reversed and vacated the death sentence.[174] Even if prosecutors had unexercised peremptory strikes remaining (i.e., strikes they might have used to eliminate the disputed juror), the Court explained, the complex and unpredictable "nature of the jury selection process defies any attempt to establish" what might have happened had a proper ruling been made.[175] The effect of adopting a harmless-error approach "would be to insulate jury selection error from meaningful appellate review."[176] The relevant inquiry was simply "whether the composition of the *jury panel as a whole* could possibly have been affected by the trial court's error."[177] When the trial court improperly excused a juror who should have remained, that bar was met.[178]

But the very next Term—with Justice Kennedy now occupying the seat formerly held by Justice Powell—the *Gray* dissenters gained a fifth vote and promptly issued an opinion clarifying that *Gray* should not be "applied literally."[179] In *Ross v. Oklahoma*—a case that involved the somewhat different issue of *defense* challenges for cause[180]—the Court went out of its way to cabin *Gray*: the prior opinion applied solely to the validity of a death sentence in

170. 481 U.S. 648, 660 (1987).

171. The trial court expressly found that the juror was capable of imposing death, and the Mississippi Supreme Court agreed that the juror "was clearly qualified to be seated as a juror under the *Adams* and *Witt* criteria." Gray v. State, 472 So. 2d 409, 422 (Miss. 1985).

172. *Id.* at 411.

173. *Id.* at 422–23.

174. *Gray*, 481 U.S. at 668.

175. *Id.* at 665.

176. *Id.*

177. *Id.* (quoting Moore v. Estelle, 670 F.2d 56, 58 (5th Cir. 1982) (Goldberg, J., concurring)).

178. *Id.* at 664–65.

179. Ross v. Oklahoma, 487 U.S. 81, 87 (1988).

180. *See infra* Section II.C.2.

a capital case where a prospective juror was erroneously found to be a "*Witherspoon*-excludable" juror (i.e., someone unable to impose the death penalty).[181] In every other setting in which a prosecutor's challenge for cause was erroneously granted, the inquiry should focus not on the improper exclusion of the qualified juror but rather on the impartiality of those replacement jurors who tried and convicted the defendant.[182] Even if the trial court erred (and perhaps spared prosecutors the need to exercise a peremptory challenge), the defendant could not complain of the impartiality of the actually empaneled petit jury.[183] Accordingly, his rights under the Sixth Amendment were not violated.[184]

A recent case from Massachusetts's high court, *Commonwealth v. Williams*,[185] illustrates the practical problems that defendants face when raising these sorts of claims (and, coincidentally, the ways that race may inform challenges for cause). There, during voir dire, a prospective juror shared her belief that "the system is rigged against young African American males," particularly with respect to drug prosecutions, and the trial court granted prosecutors' challenge for cause.[186] Surveying the nuanced distinction between strongly held personal beliefs and improper bias, the Supreme Judicial Court decided that the trial judge abused his discretion in excluding the juror.[187] The petit jury was thus (improperly) deprived of the input of a qualified juror whose views and beliefs, as a matter of law, in no way disqualified her from service.[188] And the absence of that perspective in the jury box might have made a real difference: the defendant was a young black male charged with a drug distribution offense.[189] But the court's discussion of these important issues was technically dicta.[190] Because the defendant was convicted by twelve jurors whose qualifications the defendant did not dispute, his conviction was affirmed.[191]

181. *Ross*, 487 U.S. at 87–88.

182. *See id.* at 86.

183. *See id.* at 85–86.

184. *Id.* at 88 ("So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated.").

185. 116 N.E.3d 609 (Mass. 2019).

186. *Williams*, 116 N.E.3d at 612–13.

187. *Id.* at 614–19.

188. *Id.* at 619.

189. *See id.* at 612–13.

190. *Id.* at 622.

191. *Id.* at 619; *accord* United States v. Padilla-Mendoza, 157 F.3d 730, 733–34 (9th Cir. 1998) (finding abuse of discretion in excusing jurors for cause who expressed opposition to drug laws, but affirming conviction for lack of prejudice); *see also* United States v. Brooks, 175 F.3d 605, 606 (8th Cir. 1999) (same). *But see* Mason v. United States, 170 A.3d 182, 190 (D.C. 2017) (ordering new trial on similar facts).

2. Erroneous Denials of (Defendants') Challenges for Cause

An erroneous ruling on a challenge for cause might also receive appellate scrutiny when the trial court rejects a meritorious request by the defendant to exclude a juror. Again, however, the Court has made it nearly impossible for a defendant to obtain relief in such circumstances.

In *Ross v. Oklahoma*,[192] the Court considered the mirror image of the problem posed in *Gray*: the trial court improperly rejected the defendant's meritorious challenge for cause to a juror in a capital case. During voir dire, the prospective juror revealed that he would automatically impose death if the defendant were found guilty,[193] rendering him automatically excludable.[194] Meritorious challenge for cause denied, the defendant then exercised a peremptory strike against the juror.[195] This strike was effectively required under Oklahoma law: a defendant waives her right to complain of an improperly denied challenge for cause if she fails to use an available peremptory strike against the juror.[196] (A similar requirement exists in most jurisdictions.[197]) But the Court upheld the conviction and death sentence. By striking the biased juror, the Court reasoned, the defendant had cured any Sixth Amendment violation: twelve impartial jurors heard his case, so the defendant was not deprived of his right to an impartial jury.[198] Nor did the effective taxing of the peremptory strike constitute a denial of due process. "[P]eremptory challenges are a creature of statute and are not required by the Constitution," and there was "nothing arbitrary or irrational" about Oklahoma's requirement that they be exhausted to cure an alleged error on a challenge for cause.[199] Thus, the defendant, having received exactly what state law provided he was entitled to, could not complain.

Twelve years later, in *United States v. Martinez-Salazar*,[200] the Court answered a question left open in *Ross*: whether the same result would obtain if the governing rules did *not* require a curative peremptory. Even after *Ross*, most federal courts had continued to follow an "automatic reversal" rule when a defendant's challenge for cause was erroneously denied.[201] The Fed-

192. 487 U.S. 81 (1988).

193. *Ross*, 487 U.S. at 83–84.

194. Wainwright v. Witt, 469 U.S. 412 (1985); Morgan v. Illinois, 504 U.S. 719 (1992).

195. *Ross*, 487 U.S. at 84.

196. William G. Childs, *The Intersection of Peremptory Challenges, Challenges for Cause, and Harmless Error*, 27 AM. J. CRIM. L. 49, 55 n.27 (1999).

197. William T. Pizzi & Morris B. Hoffman, *Jury Selection Errors on Appeal*, 38 AM. CRIM. L. REV. 1391, 1398 (2001); *accord* Childs, *supra* note 196, at 55 n.27.

198. *Ross*, 487 U.S. at 86.

199. *Id.* at 89–90.

200. 528 U.S. 304 (2000).

201. United States v. Polichemi, 201 F.3d 858, 862 (7th Cir. 2000) (citing United States v. Hall, 152 F.3d 381, 408 (5th Cir. 1998); United States v. Martinez-Salazar, 146 F.3d 653 (9th Cir. 1998); United States v. Cambara, 902 F.2d 144, 147 (1st Cir. 1990); United States v. Ruus-

eral Rules of Criminal Procedure lacked a "curative peremptory" requirement akin to Oklahoma's waiver rule, these courts noted, and without such a requirement a defendant was constitutionally "entitled to use his peremptory challenges solely to strike those jurors who would not otherwise be excused for cause."[202] In *Martinez-Salazar*, the Court disagreed. Whether the defendant was deprived of his peremptory by operation of statute or by choice was irrelevant; by voluntarily electing to strike the juror, the defendant had remedied the constitutional problem on his own.[203] Having eliminated the biased juror, the Court held, the defendant "cannot tenably assert any violation of his Fifth Amendment right to due process."[204] If the defendant wanted to contest the mistaken ruling on his challenge for cause, he "had the option of letting [the biased juror] sit on the petit jury and, upon conviction, pursuing a Sixth Amendment challenge on appeal."[205] This was a hard choice, the Court conceded, but "[a] hard choice is not the same as no choice."[206]

In practice, though, strategically leaving a biased juror on a petit jury is almost unthinkable. As the Seventh Circuit wrote in a case reheard immediately after *Martinez-Salazar* was announced: "[W]e suspect that prudent defense counsel will continue to use peremptory challenges to protect their clients against potentially biased jurors, rather than gambling everything on their ability to show bias after-the-fact and to obtain a reversal of a conviction on this basis."[207] And, as other scholars have noted, the rule has the curious effect of "invit[ing] defense lawyers . . . to intentionally infect the jury with a biased juror," an approach arguably in tension with "ethical duties that even criminal defense lawyers owe to the integrity of the judicial system."[208] In short, in all but the most unusual cases, the Court has shut the door on defendants' ability to contest either the erroneous grant or the erroneous denial of a challenge for cause.

* * *

It is not difficult to imagine a very different set of constitutional rules regulating challenges for cause. Justice Marshall's dissenting opinions in the cases surveyed in this Part—in particular *Lockhart v. McCree*,[209] *Holland v. Illinois*,[210] *Wilkerson v. Texas*,[211] and *Ross v. Oklahoma*[212]—sketch such a

ka, 883 F.2d 262, 268 (3d Cir. 1989); United States v. Ricks, 776 F.2d 455, 461 (4th Cir. 1985); and United States v. Hill, 738 F.2d 152, 153–54 (6th Cir. 1984)).

202. *Martinez-Salazar*, 146 F.3d at 658.

203. *Martinez-Salazar*, 528 U.S. at 307.

204. *Id.* at 317.

205. *Id.* at 315.

206. *Id.*

207. United States v. Polichemi, 219 F.3d 698, 704 (7th Cir. 2000).

208. Pizzi & Hoffman, *supra* note 197, at 1405.

209. *See* 476 U.S. 162, 184–86 (1986) (Marshall, J., dissenting).

210. *See* 493 U.S. 474, 490–94 (1990) (Marshall, J., dissenting).

211. *See* 493 U.S. 924, 924–26 (1989) (Marshall, J., dissenting from denial of certiorari).

doctrinal framework. If the Sixth Amendment's fair-cross-section requirement applied at the level of the "qualified" venire (as opposed to the level of the initial venire), for example, Curtis Flowers could have asserted a fair-cross-section claim once prosecutors' challenges for cause eliminated a significant share of the black potential jurors initially summoned to his Mississippi courthouse.[213] If the Court adopted a more robust approach to investigating and evaluating alleged equal protection violations, challenges for cause like those advanced in Timothy Foster's trial—where prosecutors curiously excluded black potential jurors whose biases seemed to favor the State[214]—might give rise to constitutional claims.[215] And if erroneous rulings on challenges for cause required automatic reversal, it seems likely that both attorneys and judges would treat the matter with far greater care than they do now.[216] Taken together, such changes might go a long way toward eliminating the disparities identified in Part I of this Article.

But that is not the path the Court pursued. In 1987, the Court warned that it was imperative not to "insulate jury selection error from meaningful appellate review."[217] By 2000, the Court had accomplished precisely that.

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212. *See* 487 U.S. 81, 91–92 (1988) (Marshall, J., dissenting).

213. Admittedly, ensuring that challenges for cause produced representative pools of "qualified" jurors would present some practical difficulties. Perhaps the trial court could continue qualifying nonwhite potential jurors until some semblance of representativeness was restored; in other contexts, though, the Court has explained that such "outright racial balancing . . . is patently unconstitutional," Grutter v. Bollinger, 539 U.S. 306, 330 (2003). Alternatively, the trial court could discharge the venire and begin again with a new slate of prospective jurors; in many cases, though, it seems likely that the same pattern would simply recur once the parties began qualifying the next batch of potential jurors.

214. *See* Voir Dire Transcript, *supra* note 76, at 782.

215. When a *Batson* violation is found at the trial court level, the typical remedy is to seat the improperly stricken juror; for obvious reasons, seating a biased potential juror would not be an attractive remedy for the species of equal protection violation contemplated here. *See* Mazzone, *supra* note 167, at 1619–20. But trial courts have discretion to craft an appropriate response when they encounter an equal protection violation during jury selection: they may begin jury selection anew, order the forfeiture of peremptory challenges by the offending party, grant additional peremptory challenges to the opposing party, or sanction attorneys. *Id.* at 1618–20, 1624. Each of these remedies would be entirely appropriate if a court found that racial bias unconstitutionally tainted a challenge for cause.

216. *Cf.* United States v. Antonelli Fireworks Co., 155 F.2d 631, 662 (2d Cir. 1946) (Frank, J., dissenting) ("A legal system is not what it says, but what it does. Our 'criminal law,' then, cannot be described accurately in terms merely of substantive prohibitions; the description must also include the methods by which those prohibitions operate in practice—must include, therefore, not the substantive and procedural rules as they appear in words but as they actually work, or, as Llewellyn puts it, 'the net operation of the whole official set-up, taken as a whole,' for it 'is that net operation—it is the substantive rule only as it trickles through the screen of action—which counts in life.' " (quoting K.N. Llewellyn, *Introduction* to JEROME HALL, THEFT, LAW AND SOCIETY, at xv, xxiii (1935))).

217. Gray v. Mississippi, 481 U.S. 648, 665 (1987).

III. CHALLENGES FOR CAUSE AND THE ROLES OF THE JURY

Racial disparities equivalent to those identified in Part I have prompted scholars and jurists to call for reforms in the rules governing peremptory strikes—or even for the abolition of such strikes altogether. These critiques vary in their emphasis and perspective, but generally critics highlight the ways in which peremptory strikes—or prosecutors' peremptory strikes, in particular[218]—are antithetical to the core functions of the jury.[219] But the problem goes deeper than most critics have realized: challenges for cause, as they exist in practice today, raise many similar concerns. Effectively standardless, insulated from meaningful review, and profoundly racially skewed, our current system of challenges for cause is far more problematic than we have realized.

This Part repurposes an approach taken by previous scholars of jury selection: it "consider[s] the various roles we expect the jury to fulfill and . . . ask[s] whether [challenges for cause] hinder or help the jury to fulfill these roles."[220] These functions sometimes bleed into one another, and sometimes they work at cross-purposes, but among those most frequently invoked by the Supreme Court and scholars are (1) protecting the individual against governmental overreach; (2) enabling democratic control over the judiciary; (3) finding facts; (4) bolstering the perceived legitimacy and fairness of criminal verdicts; and (5) serving as a "practical school of free citizenship"[221] (i.e., teaching ordinary citizens about their rights and duties).[222] On each front, challenges for cause—and, particularly, prosecutors' challenges for cause—raise grave concerns. Our reflexive ascription of objectivity, legitimacy, and utility to challenges for cause is unwarranted.

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218. *See, e.g.*, Roberts, *Asymmetry as Fairness*, *supra* note 1.

219. *See, e.g.*, Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041, 1045 (1995).

220. *Cf. id.* (discussing peremptory challenges). In her appraisal of peremptory strikes, Professor Marder—to whom this Part owes a significant debt—consolidates some of the themes I address in Sections III.A and III.B under the heading "The Jury's Role in Articulating Public Values." *Id.* at 1052–66. I have opted to disaggregate these two ideas for reasons discussed in Section III.B.

Despite the possible tension between these roles, the Court often emphasizes the various functions of the jury in tandem. The opening paragraph of the Court's recent opinion in *Peña-Rodriguez v. Colorado*, for instance, touches in rapid succession on four of the five roles discussed in this Part. 137 S. Ct. 855, 860 (2017) ("The jury is a central foundation of our justice system and our democracy. Whatever its imperfections in a particular case, the jury is a necessary check on governmental power. The jury, over the centuries, has been an inspired, trusted, and effective instrument for resolving factual disputes and determining ultimate questions of guilt or innocence in criminal cases. Over the long course its judgments find acceptance in the community, an acceptance essential to respect for the rule of law. The jury is a tangible implementation of the principle that the law comes from the people.").

221. FRANCIS LIEBER, ON CIVIL LIBERTY AND SELF-GOVERNMENT 236 (Theodore D. Woolsey ed., Philadelphia, J.B. Lippincott Co. 3d ed., rev. 1891) (1853).

222. *See, e.g.*, Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1183–88 (1991).

The purpose of this exercise is not to advocate for the abolition of challenges for cause (although I am persuaded that alternative models, including jury selection by lottery,[223] would not be radically inferior to our current regime). Rather, the point is to interrogate more carefully what we want the jury to accomplish and whether our current system of challenges for cause is furthering those purposes. Apart from rethinking the constitutional framework governing challenges for cause, as discussed in Part II, this inquiry necessarily forces us to confront an antecedent question: Who should be "qualified" to participate in the jury system today?

A. *Government Overreach*

In *Duncan v. Louisiana*—a case that stemmed from a racially charged confrontation between white and black teenagers and a locally notorious segregationist judge[224]—the Supreme Court explained that the "right to a jury trial is granted to criminal defendants in order to prevent oppression by the Government."[225] The jury, the Framers recognized, was "an inestimable safeguard" for the individual defendant against the "overzealous prosecutor" and the "compliant, biased, or eccentric judge."[226] Fifty years later, in yet another case implicating racial bias within the jury, the Court reaffirmed this vision of the jury: "Whatever its imperfections in a particular case, the jury is a necessary check on governmental power."[227]

This understanding of the jury, as "introduc[ing] a slack into the enforcement of law,"[228] extends to its role as a buffer against harsh penal sanctions, including the death penalty. As Blackstone noted in his *Commentaries*, English jurors regularly violated their oaths to avoid returning verdicts that would result in capital punishment; in a trial for grand larceny ("stealing above the value of twelvepence"), for instance, jurors might value the stolen item at a lesser amount, notwithstanding clear evidence to the contrary.[229] Such "pious perjury" was evidently commonplace and, in Blackstone's estimation, altogether proper.[230] Early American juries likewise were familiar

223. *See* Amar, *supra* note 125, at 1287–89 (discussing democratic virtues of lottery regimes, including in the selection of jury venires).

224. *See* Nancy J. King, Duncan v. Louisiana*: How Bigotry in the Bayou Led to the Federal Regulation of State Juries*, *in* CRIMINAL PROCEDURE STORIES 261, 261–66 (Carol S. Steiker ed., 2006).

225. 391 U.S. 145, 155 (1968).

226. *Duncan*, 391 U.S. at 156; *accord* THE FEDERALIST NO. 83, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (lauding trial by jury as a check against "arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions").

227. Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 860 (2017).

228. United States *ex rel.* McCann v. Adams, 126 F.2d 774, 776 (2d Cir. 1942) (Hand, J.).

229. 4 BLACKSTONE, *supra* note 12, at *238–39.

230. Julia Simon-Kerr, *Pious Perjury in Scott's* The Heart of Midlothian, *in* SUBVERSION AND SYMPATHY: GENDER, LAW, AND THE BRITISH NOVEL 101, 104–05 (Martha C. Nussbaum & Alison L. LaCroix eds., 2013) (quoting 4 BLACKSTONE, *supra* note 12, at *239).

with the sanctions that would attach to convictions for various offenses, and they tailored verdicts accordingly.[231]

Whatever the other merits of challenges for cause, they generally harm (rather than help) the jury in its role as a restraint on excessive state power. This dynamic is most acute in the capital context, where under *Witherspoon v. Illinois* and its progeny prosecutors may exclude "for cause" prospective jurors who harbor strong opposition to the death penalty.[232] (This rule appears to date to 1820. Justice Joseph Story, riding circuit, authored an opinion endorsing the removal of two Quaker jurors from a capital case on the grounds their service would "corrupt[] the very sources of justice."[233]) The result of this rule on modern death penalty cases is "well documented and profound": juries empaneled after the "death qualification" process "are, on the whole, uncommonly conviction- and death-prone, as well as disproportionately punitive and inclined toward believing the prosecution."[234]

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231. *See generally* United States v. Polizzi, 549 F. Supp. 2d 308 (E.D.N.Y. 2008) (Weinstein, J.) (providing lengthy overview of colonial-era practices regarding nullification and sentencing).

232. 391 U.S. 510, 522 n.21 (1968); *see also* Wainwright v. Witt, 469 U.S. 412, 419–20 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)).

233. United States v. Cornell, 25 F. Cas. 650, 655–56 (C.C.D.R.I. 1820) (No. 14,865a) ("To compel a Quaker to sit as a juror on such cases, is to compel him to decide against his conscience, or to commit a solemn perjury. Each of these alternatives is equally repugnant to the principles of justice and common sense. To insist on a juror's sitting in a cause when he acknowledges himself to be under influences, no matter whether they arise from interest, from prejudices, or from religious opinions, which will prevent him from giving a true verdict according to law and evidence, would be to subvert the objects of a trial by jury, and to bring into disgrace and contempt, the proceedings of courts of justice. We do not sit here to procure the verdicts of partial and prejudiced men; but of men, honest and indifferent in causes. This is the administration of justice which the law requires of us; and I am not bold enough to introduce a practice, which corrupts the very sources of justice."). *See generally* Cohen & Smith, *supra* note 12, at 93 (detailing development of death qualification of American juries).

234. Cover, *supra* note 36, at 121. Capital defendants receive the reciprocal benefit of excluding "automatic death" jurors (i.e., those unwilling to impose a life sentence, rather than death, if they conclude the defendant is guilty), *see* Morgan v. Illinois, 504 U.S. 719 (1992), but this advantage is relatively modest. First, because most jurisdictions require a unanimous recommendation of death to impose a capital sentence, the empanelment of a single "*Witherspoon*-excludable" juror (whose opinion, standing alone, could block a death recommendation) would greatly benefit a capital defendant; the defendant's ability to exclude a single "automatic death" juror achieves comparatively little, insofar as that juror would still have to convince eleven fellow jurors that her support for the death penalty was warranted to alter the outcome. *See* Cover, *supra* note 36, at 122. Second, the segment of the general population rendered ineligible under *Morgan* is smaller than the segment of the general population rendered ineligible under *Witherspoon*: there are simply more people with scruples against capital punishment than those "who believe[] literally in the Biblical admonition 'an eye for an eye.' " Adams v. Texas, 448 U.S. 38, 49 (1980). And third, even with *Morgan* in place, studies have shown that a significant number of "automatic death" jurors still make it into the jury box. Cover, *supra* note 36, at 122 (citing John H. Blume et al., *Probing "Life Qualification" Through Expanded Voir Dire*, 29 HOFSTRA L. REV. 1209, 1212 & n.8 (2001), and William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 CRIM. L. BULL. 51, 62–63 (2003)). Thus, the "cumulative impact of

But the distorting effects of challenges for cause extend to noncapital cases as well, wherever prospective jurors may harbor conscientious scruples against particular enforcement practices or the criminalization of certain conduct (e.g., drug offenses, nonviolent property offenses). Notably, the American tradition of excluding jurors "for cause" due to moral objections to a particular law (or enforcement practice) again has its origins in America's fraught racial politics: "Slavery, or more specifically challenges to the slavery regime, marks the first context where [for cause] challenges to jurors with 'conscientious scruples' against a particular law appeared in cases."[235]

A defendant's challenges for cause do serve as an important "check on governmental power" in some ways—excluding prospective jurors who automatically credit police witnesses,[236] or expect the defendant to testify,[237] or disregard the presumption of innocence[238]—but, again, the gains must be placed in context. Direct admissions of bias are rare,[239] and except in extreme situations, the courts have shown reluctance to find "implied bias" based on a prospective juror's personal connections with law enforcement or prosecutors.[240] Moreover, the net "whitewashing" of venires described in Part I suggests that the overall effect of challenges for cause does not accrue to the defendant's benefit, even where defendants aggressively attempt to exclude those perceived as hostile to their side.[241] Finally, to the extent that defendants' challenges for cause do occasionally serve this function, it is an argument for preserving the defendant's ability to raise them; it says nothing about the merits of the greater share of challenges for cause (i.e., those urged by prosecutors or suggested by judges).[242]

Witherspoon proceedings—even as moderated by *Morgan*—is to yield juries more death prone than the communities from which their members were drawn." Cover, *supra* note 36, at 123.

235. Cohen & Smith, *supra* note 12, at 93; *cf.* Reynolds v. United States, 98 U.S. 145, 157 (1879) (holding no error in trial court granting government's challenges for cause against two prospective jurors who were Mormon and bigamists in federal prosecution for bigamy).

236. *See, e.g.*, United States v. Sithithongtham, 192 F.3d 1119 (8th Cir. 1999); State v. Draper, 675 S.W.2d 863 (Mo. 1984).

237. *See, e.g.*, Overton v. State, 801 So. 2d 877, 888–93 (Fla. 2001); State v. Stewart, 692 S.W.2d 295 (Mo. 1985).

238. *See, e.g.*, People v. Bludson, 761 N.E.2d 1016 (N.Y. 2001); Green v. Commonwealth, 546 S.E.2d 446 (Va. 2001).

239. LAFAVE ET AL., *supra* note 167, § 22.3(c) ("Direct admissions of bias, however, are not frequently made; it is 'unlikely that a prejudiced juror would recognize his own personal prejudice—or knowing it, would admit it.'" (quoting ALFRED FRIENDLY & RONALD L. GOLDFARB, CRIME AND PUBLICITY 103 (1967))).

240. In *Smith v. Phillips*, 455 U.S. 209 (1982), for example, the Supreme Court affirmed a defendant's murder conviction where a juror submitted a job application to the prosecutors' office midtrial (and prosecutors were aware of this fact). *See also* United States v. Mitchell, 690 F.3d 137 (3d Cir. 2012) (finding no implied bias where juror was coworker of key government witnesses).

241. *See supra* Sections I.A and I.B.

242. *Cf.* Roberts, *Asymmetry as Fairness*, *supra* note 1 (arguing for the asymmetrical allocation of peremptory strikes).

B. *Democratic Control*

Apart from any potential benefits to those accused of criminal offenses, the American jury also constitutes an institution embodying core republican values, "a political institution . . . [representing] a mode of the sovereignty of the people."[243] It was this vision of the jury that Thomas Jefferson invoked when he wrote that

> in America . . . it is necessary to introduce people into every department of government as far as they are capable of exercising it . . . . Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the legislative.[244]

The jurors of whom Jefferson wrote were, of course, almost uniformly freeholding or taxpaying white men,[245] and (as this Article has attempted to illustrate) our commitment to the jury as a truly representative institution remains qualified today. But this democratic conception of the jury—that it is not just "a valued right of persons accused of crime, [but] also an allocation of political power to the citizenry"[246]—enjoys a central place in the American legal imagination.[247]

Even stripped of its traditional prerogative to determine both the facts and the law, the jury still "defines for the community the duties that its members owe to each other and the standard of conduct to which a reasona-

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243. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 261 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000) (1835). While this role of the jury may frequently overlap with that discussed in Section III.A, it may also conflict. During Reconstruction, for instance, black activists' efforts to integrate the jury were animated largely by the legal system's "failure to protect black victims of white violence." Forman, *supra* note 19, at 897. The participation of black jurors was seen as a means of countering the impunity guaranteed by all-white juries, which regularly acquitted or failed to indict white perpetrators. *Id.* at 931. *But see* Frampton, *supra* note 3, at 1601–02 (arguing that by the end of the nineteenth century, "securing fair treatment for black defendants" surpassed other concerns—including affirming the citizenship of black jurors and countering impunity for white purveyors of racial violence—in organizing efforts against "the Jim Crow jury").

244. Letter from Thomas Jefferson to the Abbé Arnoux (July 19, 1789), *in* THE COMPLETE BILL OF RIGHTS 595, 595–96 (Neil H. Cogan ed., 1997); *see also* Laura I Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IND. L. REV. 397, 398 (2009) ("I go further still, claiming that even the Sixth Amendment jury trial right, which sounds grammatically like a right of the accused, is actually a restatement of the collective right in Article III."); Amar, *supra* note 125, at 1287–89.

245. Alschuler & Deiss, *supra* note 19, at 877.

246. *Id.* at 876.

247. *See, e.g.*, Powers v. Ohio, 499 U.S. 400, 407 (1991) ("[W]ith the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process."). For a more thorough and nuanced examination of "[t]he 'juries and democracy' linkage," see William Ortman, Chevron *for Juries*, 36 CARDOZO L. REV. 1287, 1326–31 (2015) (disentangling related claims associating the jury with democracy).

ble person is held."[248] For better or worse, we trust the criminal jury, on behalf of the community it embodies, to "make judgements as to public values"[249] and to articulate and enforce community norms: whether a sexual encounter was consensual,[250] whether a killing was justified,[251] whether a politician acted with corrupt intent.[252]

Challenges for cause are "antidemocratic" in the same basic way that "key man" jury selection regimes and peremptory strikes are: they remove from the jury "a range of values and perspectives," and if "a range of views is lost to the jury, then the verdict is less likely to reflect public values."[253] To be sure, there may be good reason to police the jury box for such disfavored values and perspectives; limiting the practice would strike many as reckless and detrimental to the administration of justice.[254] But it is worth remembering that the relatively recent shift to more democratic "lottery" venires—now ubiquitous—was no less abhorrent to champions of the "key man" system.[255] Many of the arguments were the same. As Professor Akhil Amar has written:

> [A] tension clearly exists in democratic theory between the conception of democratic representatives as citizens of moderation and stature—men of the middle who each *represent* the soundest instincts and values of the community—and the conception of representatives as a cross-sectional group that collectively will be *representative of* all important subgroups within the community.[256]

248. Marder, *supra* note 219, at 1058–59.

249. *Id.* at 1056.

250. *E.g.*, Timothy Williams, *What Was Different for Jurors this Time?*, N.Y. TIMES, Apr. 27, 2018, at A19 (examining whether #MeToo movement swayed jury in retrial of Bill Cosby after initial trial ended in hung jury).

251. *Compare* Lizette Alvarez & Cara Buckley, *Zimmerman Is Acquitted in Trayvon Martin Killing*, N.Y. TIMES, July 14, 2013, at A1, *with* Mitch Smith, *Jurors Believed Their Eyes, Not Officer's Words*, N.Y. TIMES, Oct. 7, 2018, at A17 (discussing jury conviction of Chicago police officer Jason Van Dyke of second-degree murder).

252. *Compare* Kim Severson & John Schwartz, *Edwards Acquitted on One Count; Mistrial on 5 Others*, N.Y. TIMES, June 1, 2012, at A1 (discussing acquittal of John Edwards), *with* Monica Davey & Emma G. Fitzsimmons, *Ex-Governor Found Guilty of Corruption*, N.Y. TIMES, June 28, 2011, at A1 (discussing jury conviction of former governor of Illinois Rod R. Blagojevich).

253. *Cf.* Marder, *supra* note 219, at 1045, 1064 (discussing peremptory strikes).

254. *But see* Simonson, *supra* note 110, at 249 (challenging the premise "that the rules of criminal procedure must limit direct public participation to an illusory, limited subset of the public that is deemed 'neutral' and 'unbiased' ").

255. VAN DYKE, *supra* note 111, at 14–15 (discussing opposition to Jury Selection and Service Act of 1968).

256. Amar, *supra* note 125, at 1288.

In the context of the American jury, the latter vision has been ascendant for the last half century, and few voices today would argue that this radical expansion of jury service in recent decades has been unwise.[257]

In this sense, challenges for cause are undemocratic regardless of the racial disparities they reflect or generate—as would be a restriction on electoral franchise for those with strong partisan views[258]—but the data presented in Part I greatly amplify the core concern. As has already been articulated across forty-five years of fair-cross-section jurisprudence and countless scholarly critiques of *Batson*, large racial disparities in the jury selection process undermine any claim that the criminal jury serves as an authentically democratic body.

One might counter that challenges for cause, by eliminating extreme views on both sides, in fact aid the jury in its democratic role, facilitating the jury's ability to serve and speak as the true conscience of the community.[259] Put succinctly: "The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed for them, and not otherwise."[260] But proponents of this view should acknowledge that it is (quite literally) the same rationale advanced by the Court's majority in *Swain v. Alabama* and by the dissenters in *Batson v. Kentucky*.

C. *Factfinding*

Juries find facts.[261] It is frequently said that factfinding is the primary, or even sole, role of the jury ("although it is not clear that anyone believes this").[262] And there is a longstanding debate as to whether juries are particularly *adept* at accurately finding facts.[263] Indeed, the jury's efforts in this re-

257. *But see* Berghuis v. Smith, 559 U.S. 314, 334 (2010) (Thomas, J., concurring) (arguing the "conclu[sion] that the Sixth Amendment guarantees a defendant the right to a jury that represents 'a fair cross section' of the community . . . seems difficult to square with the Sixth Amendment's text and history").

258. For an analysis of the utility (and limits) of this analogy, see Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203 (1995).

259. *Cf.* ROBERT W. BENNETT, TAMING THE ELECTORAL COLLEGE 15 (2006) ("The theory of the electoral college was that a body of men should be chosen . . . who would be distinguished by their eminent ability and wisdom, who would be independent of popular passion, who would not be influenced by tumult, cabal, or intrigue, and that in the choice of the President they would be left perfectly free to exercise their judgment in the selection of the proper person." (quoting S. REP. NO. 43-395, at 3 (1874))).

260. Batson v. Kentucky, 476 U.S. 79, 120 (1986) (Burger, C.J., dissenting) (quoting Swain v. Alabama, 380 U.S. 202, 219 (1965)).

261. For an overview of the debates surrounding the jury as factfinder, see Marder, *supra* note 219, at 1066–68.

262. HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 116 (1966).

263. *Compare* Letter from Thomas Jefferson, *supra* note 244 ("[The public] are not qualified to judge questions of law; but they are capable of judging questions of fact. In the form of

gard are impeded by a host of constitutional and subconstitutional rules that are antagonistic to the "truth-seeking function" of the trial.[264] But, to the extent possible without sacrificing other values, a jury that is more accurate in its factfinding would seem preferable to one that is less so. Indeed, as Professor Richard Primus has argued in defending the unanimity requirement, jury accuracy (defined there as "the factually correct application of the law to the case at hand") may be democratically required.[265]

Unquestionably there are many instances where the exclusion of "biased" or "partial" jurors through challenges for cause is consistent with (or even required by) the factfinding role of the jury. As Chief Justice John Marshall, sitting as circuit judge, explained in the trial of Aaron Burr, "[S]trong and deep impressions which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony, and resist its force, do constitute a sufficient objection to [a prospective juror]."[266] Were it otherwise, Marshall declared, the constitutional guarantee of an "impartial jury" would mean very little.[267]

But the question whether, all told, challenges for cause advance or inhibit the jury's factfinding role is a different matter. Consider two of the most frequent bases for excusing jurors for cause: (1) the prospective juror has some prior association with the defendant, the alleged victim, or likely witnesses (or some other prior knowledge of the allegations),[268] and (2) the prospective juror acknowledges that, for some other reason (e.g., skepticism of law enforcement, being a victim of a similar crime), she fears she will not be entirely "fair" or "impartial" if empaneled.[269] There may be good policy reasons for excluding such jurors, particularly when it comes to the public per-

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juries they determine all matters of fact . . . . [Though i]t is therefore left to the juries, if they think the permanent judges are under any bias whatever in any cause, to take upon themselves to judge the law as well as the fact."), *with* Robert J. MacCoun, *Comparing Legal Factfinders: Real and Mock, Amateur and Professional*, 32 FLA. ST. U. L. REV. 511 (2005) (discussing inherent difficulties measuring factfinding ability of juries).

264. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961).

265. Richard A. Primus, *When Democracy Is Not Self-Government: Toward a Defense of the Unanimity Rule for Criminal Juries*, 18 CARDOZO L. REV. 1417, 1424, 1457 (1997).

266. United States v. Burr, 25 F. Cas. 49, 51 (C.C.D. Va. 1807) (No. 14,692g).

267. *Id.* at 50; *cf.* Powers v. Ohio, 499 U.S. 400, 425 (1991) (Scalia, J., dissenting) ("In a criminal-law system in which a single biased juror can prevent a deserved conviction or a deserved acquittal, the importance of [a means of winnowing out possible . . . sympathies and antagonisms on both sides] should not be minimized.").

268. *See* ABRAMSON, *supra* note 19, at 45–46.

269. *See, e.g.*, C. La Rue Munson, *Selecting the Jury*, 4 YALE L.J. 173, 184 (1895) ("In a general way, the proper rule has been well stated in an able note to Commonwealth *v.* Brown, 9 Am. State Rep. 746: 'Whenever a juror shows upon his examination that he himself fears that his deliberations cannot be impartial, or where he expresses a state of feeling from which it appears that his mind is in an improper condition, he will generally be excluded.' "); *see also* ABRAMSON, *supra* note 19, at 47 ("Beyond these problems, the *Burr* standard more or less required judges to take jurors at their word.").

ception of the jury trial as fair,[270] but neither category of exclusion, I contend, advances the factfinding role of the jury.

The version of the "impartial jury" that now reigns in American criminal procedure—distant, dispassionate, ignorant of the parties and allegations—contrasts with the "local jury" that predominated (and was celebrated, particularly in Anti-Federalist writings) at the country's founding.[271] Though the history of the Sixth Amendment is "scanty,"[272] the heated debates over vicinage[273] reveal a "vision of jury deliberation enriched by the ability of local jurors to know the context in which events on trial took place."[274] Narrowing the geography from which jurors were drawn, vicinage proponents argued, aided the factfinding mission of the jury.[275] Local jurors, for example, would know whether the defendant is "habitually a good or bad man"; such knowledge might be dispositive if the case turned on whether the defendant performed a deed "maliciously or accidentally."[276] Jurors of the vicinage would also be acquainted with the character and reliability of the alleged victim and potential witnesses.[277] They might even have useful knowledge of the incident itself, "which would permit them to evaluate better the testimony concerning the incident given at the trial."[278] And, if not, those closest to the alleged wrongdoing were still best suited to interpret "the mannerisms, colloquialisms, and fashions of the participants, as well as the names of roads, locations, and businesses constituting the setting in which the incident occurred."[279]

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270. *See infra* Section III.D.

271. ABRAMSON, *supra* note 19, at 17–55.

272. Apodaca v. Oregon, 406 U.S. 404, 409 (1972).

273. *See generally* Drew L. Kershen, *Vicinage* (pts. 1–4), 29 OKLA. L. REV. 801 (1976), 30 OKLA. L. REV. 1 (1977).

274. ABRAMSON, *supra* note 19, at 22.

275. *Id.* at 27; Kershen, *supra* note 273, at 75–79.

276. *See* ABRAMSON, *supra* note 19, at 27 (quoting Agrippa, Letter V (Dec. 11, 1787), *in* 4 THE COMPLETE ANTI-FEDERALIST 78 (Herbert Storing ed., 1981)); *see also* Patrick Henry, Address at the Virginia Ratifying Convention (June 14, 1788), *in* THE COMPLETE BILL OF RIGHTS, *supra* note 244, at 434, 435 ("[P]erson[s] accused may be carried from one extremity of the state to another, and be tried, *not by an impartial jury of the vicinage, acquainted with his character and the circumstances of the fact, but by a jury unacquainted with both* . . . ." (emphasis added)). *But see* Christopher Gore, Address at the Massachusetts Ratifying Convention (Jan. 30, 1788), *in* THE COMPLETE BILL OF RIGHTS, *supra* note 244, at 419, 421 ("The great object is to determine on the real merits of the cause, uninfluenced by any personal considerations; if therefore, the jury could be perfectly ignorant of the person in trial, a just decision would be more probable.").

277. Kershen, *supra* note 273, at 834; *see also* ABRAMSON, *supra* note 19, at 28 (quoting James Wilson: "When jurors can be acquainted with the characters of the parties and witnesses . . . they not only hear the words, but they see and mark the features of the countenance; they can judge of weight due to such testimony.").

278. Kershen, *supra* note 273, at 834; *see also* ABRAMSON, *supra* note 19, at 28.

279. Kershen, *supra* note 273, at 834; *see also* ABRAMSON, *supra* note 19, at 28. To be sure, much of the Anti-Federalists' regard for local juries, and their opponents' ambivalence,

At Burr's trial, this "local knowledge" model of the jury collided with a much different (and, today, more familiar) model, in which the jurors' distance from the events assured impartiality. Marshall's opinion rejected the "local knowledge" model and "outlined the portrait of the impartial juror we still try to sketch today."[280] But even Marshall was unwilling to reject entirely the common law rule, then still widely accepted, that a potential juror could serve despite having formed opinions about the case based on the juror's personal knowledge of events.[281] "Impartiality" was a critical value, to be sure, but there was still broad adherence to the view that jurors' "personal knowledge about the criminal case [was] an attribute, not a defect, of the jury."[282]

The point here is not to rehash or resolve these old debates but simply to emphasize that a certain form of knowledge is lost through challenges for cause as they now operate. Few jurors today would be seated if they revealed during voir dire that, knowing the defendant from work, they would view skeptically her account of where the missing money went. Or that, living on the block where the alleged drug transaction took place, they mistrusted the narcotics officers who claimed to observe a hand-to-hand transaction. Or that, knowing the victim and her family for many years, they considered it improbable she would submit a false police report. Excluding these jurors might be justifiable on other grounds, but it does not necessarily *enhance* the factfinding role of the jury; if anything, it deprives the jury of valuable information.[283]

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went beyond "accurate" factfinding. Both sides candidly admitted as much. *See* THE COMPLETE BILL OF RIGHTS, *supra* note 244, at 435–39. At the Virginia Ratifying Convention, defending Article III's lack of a vicinage provision, James Madison explained, "If it could have been done with safety, it would not have been opposed. It might happen that a trial would be impracticable in the country. Suppose a rebellion in a whole district; would it not be impossible to get a jury?" *Id.* at 435–36. Patrick Henry answered, "This gives me comfort—that, as long as I have existence, my neighbors will protect me. Old as I am, it is probable I may yet have the appellation of *rebel*." *Id.* at 438.

280. ABRAMSON, *supra* note 19, at 42.

281. *See* United States v. Burr, 25 F. Cas. 49, 52 (C.C.D. Va. 1807) (No. 14,692g) ("Without determining whether the case put by Hawk. bk. 2, c. 43, § 28, be law or not, it is sufficient to observe that this case is totally different. The opinion which is there declared to constitute no cause of challenge is one formed by the juror on his own knowledge; in this case the opinion is formed on report and newspaper publications."); *see also* ABRAMSON, *supra* note 19, at 42–43 ("Marshall was careful to stress that a person did not lose his ability to be an impartial juror simply because he had read the papers.").

282. Kershen, *supra* note 273, at 77.

283. *Cf.* Roger C. Park, *Character at the Crossroads*, 49 HASTINGS L.J. 717, 777 (1998) (arguing for abandonment of existing character evidence rules). *But cf.* Eleanor Swift, *One Hundred Years of Evidence Law Reform: Thayer's Triumph*, 88 CALIF. L. REV. 2437, 2475–76 (2000) ("A basic principle of our criminal law is that persons be judged for their acts, not for their personalities or their membership in discrete, identifiable groups. Evidence law's ban on character evidence [supports] . . . the moral norms that underlie our system of criminal justice. The harm done to the liberal ideal of judging the act, not the actor, cannot be calculated on a case-by-case basis, or factored into the balancing process of probative value versus prejudice.

Relatedly, the challenge-for-cause process today is dominated by prospective jurors' self-assessments of their own biases.[284] Only in the rarest of cases will appellate courts find that it was improper to seat a juror who confidently asserted she would try the case fairly and impartially;[285] I have found no reported case finding error by a trial court in excusing a juror who acknowledged doubts about her fairness and impartiality. This approach may be sound, but it is equally plausible that juror confidence acts as a heuristic for judges that is unrelated to the jurors' actual ability to accurately find facts.[286] Perhaps the familiar ritual even has a perverse effect: those who are most conscientious in interrogating their own biases (and, thus, the most capable factfinders) are eliminated, while those most blind to their own biases (and, thus, the least capable factfinders) are empaneled.[287]

The limited experimental research conducted in this field lends support to the hypothesis. In one study on voir dire, researchers exposed mock jurors to various forms of prejudicial pretrial publicity; asked questions to assess whether they could serve as fair and impartial jurors; and, finally, recorded the jurors' "verdicts."[288] The results came as a surprise: juror's self-assessments of their own bias (i.e., whether they had formed an opinion that they strongly doubted they could set aside) were largely independent of their final verdict preferences.[289] In another study, researchers presented judges and laypeople with experimental vignettes setting forth criminal allegations, a prospective juror's biography, and that prospective juror's self-assessed impartiality.[290] The vignettes were then modified to reflect differing levels of confidence in the juror's self-reported impartiality (e.g., "I'm pretty sure I could be fair" versus "Yes, yes I can"), and the respondents were asked to assess whether the prospective juror should be excused.[291] Judges' assessments of bias closely tracked the prospective juror's level of confidence, while the changes in self-confidence were effectively meaningless to the lay respond-

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Bright-line rules excluding character to prove conduct can instantiate and send a message about these moral norms.").

284. VIDMAR & HANS, *supra* note 15, at 94; Rose & Diamond, *supra* note 15, at 515.

285. *See* Mary R. Rose, *A Dutiful Voice: Justice in the Distribution of Jury Service*, 39 LAW & SOC'Y REV. 601, 607 (2005) (observing that no prospective juror who stated he or she would be fair was dismissed for cause in study of thirteen felony trials).

286. *Cf.* Siegfried Ludwig Sporer et al., *Choosing, Confidence, and Accuracy: A Meta-Analysis of the Confidence–Accuracy Relation in Eyewitness Identification Studies*, 118 PSYCHOL. BULL. 315 (1995) (noting limited correlation between confidence and accuracy in eyewitness identifications).

287. Cynthia Lee, *Awareness as a First Step Toward Overcoming Implicit Bias*, *in* ENHANCING JUSTICE: REDUCING BIAS 289 (Sarah E. Redfield ed., 2017). *See generally* Anna Roberts, *(Re)Forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827 (2012) (arguing that juror education on implicit bias can ameliorate its harms).

288. Norbert L. Kerr et al., *On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity: An Empirical Study*, 40 AM. U. L. REV. 665, 668–69 (1991).

289. *Id.* at 695.

290. Rose & Diamond, *supra* note 15, at 519–20.

291. *Id.* at 522–24.

ents.[292] Such results are disquieting in light of previous work by legal anthropologists and other scholars, who have documented that "those with less education and lower occupational status[] are more prone to 'powerless language' " than others.[293] Taken together, the two studies undermine our dominant approach to identifying jurors who would make bad factfinders: self-reporting appears to be (at best) meaningless, and rulings on challenges for cause may be skewed by judges' class, race, sex, and status biases.[294]

Finally, juries find facts collectively: we hope (and there is some reason to believe) that deliberation has a "curative effect" on the biases all jurors bring into jury room.[295] Indeed, much of the Court's fair-cross-section jurisprudence is premised on the idea that "[w]hen any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable."[296] The product is a "diffused impartiality,"[297] where a diversity of perspectives ensures that the relevant facts "will be carefully and critically examined."[298] And to the extent challenges for cause have the effect of rendering petit juries more racially homogenous—which we know they do—there is strong evidence that such exclusions significantly undermine the accuracy of the jury's factual determinations.[299]

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292. *Id.* at 538.

293. *Id.* at 541.

294. In this regard, it is notable that at common law, challenges for cause involving "probable circumstances of suspicion, as acquaintance, and the like," were not determined by the judge. 3 BLACKSTONE, *supra* note 12, at *363. Rather, such challenges

> must be left to the determination of *triors*, whose office it is to decide whether the juror be favourable or unfavourable. The triors, in case the first man called be challenged, are two indifferent persons named by the court; and, if they try one man and find him indifferent, he shall be sworn; and then he and the two triors shall try the next; and when another is found indifferent and sworn, the two triors shall be superseded, and the two first sworn on the jury shall try the rest.

Id.

295. Hoffman, *supra* note 9, at 858 ("Our system of peremptory challenges, on the other hand, substantially devalues both the ability of jurors to set those biases aside and the curative effect of deliberation.").

296. *E.g.*, Taylor v. Louisiana, 419 U.S. 522, 532 n.12 (1975) (quoting Peters v. Kiff, 407 U.S. 493, 503 (1972)); *see also* Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491, 531 (1978) ("All jurors' experiences have shaped their values and attitudes, and these, in turn, are likely to shape jurors' perceptions of the trial evidence and hence their votes. In this sense, 'prejudice' is not only ineradicable but often indistinguishable from the very values and attitudes of the community that we expect the jurors to bring to the trial.").

297. *Taylor*, 419 U.S. at 530 (quoting Thiel v. S. Pac. Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)).

298. Marder, *Justice Stevens*, *supra* note 1, at 1725.

299. *See* Roberts, *Asymmetry as Fairness*, *supra* note 1, at 1523 ("A reduction in jury diversity is a significant loss, not least because diversity appears to enhance a jury's effectiveness

D. *Legitimacy*

Another critical feature of our jury system, distinct from its actual fairness, is the perception of the jury as an instrument for impartial justice. Time and again, the Court has emphasized that the jury system is both "dependent on the public's trust"[300] and a mechanism for maintaining "public confidence in the fairness of our system of justice."[301] Fostering "acceptance in the community" of the jury's verdict is thought "essential to respect for the rule of law."[302] "[C]onfidence in jury verdicts," the Court recently wrote, "is a central premise of the Sixth Amendment trial right."[303] Indeed, particularly in its *Batson* jurisprudence, the Court has placed the *perception* of fairness alongside *actual* fairness as a paramount interest. Allowing bias to infect the jury selection process "invites cynicism respecting the jury's neutrality and its obligation to adhere to the law";[304] it "create[s] the impression that the judicial system has acquiesced in suppressing full participation by one [group]" and that the " 'deck has been stacked' in favor of one side."[305]

A strong argument for retaining our system of challenges for cause, both by the defendant and the prosecution, can be grounded in the desirability of maintaining popular confidence in the jury system.[306] Few would accept as legitimate an acquittal where the defendant's mother sat in the jury, or a conviction where the defendant's romantic rival did the same. At worst, verdicts that (rightly or wrongly) are perceived as contrary to the evidence can spark riots or vigilantism.[307] And, because of our longstanding aversion to postverdict "impeachment" of the jury's verdict[308]—a rule thought essential

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in many ways, including imposing some sort of limitation on the operation of bias."); *see also id.* at 1523 n.132 (collecting sources).

300. Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 860 (2017).

301. Batson v. Kentucky, 476 U.S. 79, 87 (1986).

302. *Peña-Rodriguez*, 137 S. Ct. at 860.

303. *Id.* at 869.

304. Powers v. Ohio, 499 U.S. 400, 412 (1991).

305. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 140 (1994); *see also* Tracey L. Meares & Tom R. Tyler, *Justice Sotomayor and the Jurisprudence of Procedural Justice*, 123 YALE. L.J.F. 525, 526–27 (2014) ("[T]he primary factor that people consider when they are deciding whether they feel a decision is legitimate and ought to be accepted is whether or not they believe that the authorities involved made their decision through a fair procedure, irrespective of whether members of the public are evaluating decisions made by the Supreme Court or by local courts, or reacting to the decisions made or rules enacted by any legal authorities. Research clearly shows that procedural justice matters more than whether or not people agree with a decision or regard it as substantively fair.").

306. *Cf.* Georgia v. McCollum, 505 U.S. 42, 50 (1992) ("Just as public confidence in criminal justice is undermined by a conviction in a trial where racial discrimination has occurred in jury selection, so is public confidence undermined where a defendant, assisted by racially discriminatory peremptory strikes, obtains an acquittal.").

307. *See, e.g.*, ABRAMSON, *supra* note 19, at 103–04.

308. *See* FED. R. EVID. 606(b)(1) ("During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any

to protecting the integrity and independence of juries—identifying and eliminating juror bias during voir dire assumes significant import.[309]

But against this undeniable benefit must be weighed the delegitimizing force of how challenges for cause are currently conducted. Some of these critiques are old. Mark Twain, in 1872, pilloried the manner in which upstanding community leaders were disqualified from serving as jurors because they had read newspaper coverage of a crime: "[T]he [jury selection] system rigidly excludes honest men and men of brains . . . . Ignoramuses alone [are entrusted to] mete out unsullied justice."[310] A century later, Judge John Sirica famously made a similar point during Watergate. Questioning prospective jurors, Judge Sirica was astonished when "a handful [of prospective jurors] indicated they had not heard of the scandal"; he "indicated that those persons ought perhaps to be the least qualified to sit on the jury."[311] There are nontrivial legitimacy costs to be paid for empaneling the form of "unbiased" jurors to which we have become accustomed.

The graver concern, though—which has not been recognized previously—stems from the racial disparities identified in Part I. As presently constituted, challenges for cause (and, specifically, prosecutors' challenges for cause) systemically reduce the representation of nonwhite jurors on petit juries. They do so to an even greater extent than peremptory strikes.[312] Whether or not these disparities alter any given verdict, and whether or not they stem from overt "racial bias" (as understood in the *Batson* sense), we know from decades of scholarship that unrepresentative juries "threaten the public's faith in the . . . legal system and its outcomes."[313] If there is a danger that

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juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters."); Tanner v. United States, 483 U.S. 107, 120–21 (1987). *But see Peña-Rodriguez*, 137 S. Ct. at 869 ("[T]he Court now holds that where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.").

309. *See* Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 551 (1975); *see also* Ham v. South Carolina, 409 U.S. 524, 526–27 (1973) (emphasizing importance of voir dire in identifying and eliminating racial bias). *But see* Barbara Allen Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. CIN. L. REV. 1139, 1147 (1993) ("What I failed to recognize . . . was that, even though no words were spoken, tides of racial passion swept through the courtroom when the peremptory challenges were exercised.").

310. MARK TWAIN, ROUGHING IT 341–42 (Shelley Fisher Fishkin ed., Oxford Univ. Press 1996) (1872); *see also Saturday Night Live, Season 34, Ep. 2 ("OJ Jury Selection")* (NBC television broadcast Sept. 20, 2008) ("DEFENSE ATTORNEY: Juror No. 4? JUROR NO. 4: [*barking*]. PROF. DAVENPORT: Perhaps I can explain. . . . I just discovered this woman in the Arctic tundra. She was raised by wolves and has no knowledge of human language or culture. DEFENSE ATTORNEY: Excellent.").

311. VAN DYKE, *supra* note 111, at 143–44.

312. *See supra* Sections I.A and I.B.

313. Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KENT L. REV. 1033, 1038 (2003); *see also* Nancy J.

peremptory strikes undermine public confidence in the fairness of jury adjudication by altering the jury's overall racial composition, the same danger exists with respect to challenges for cause.

In some ways, the legitimacy harms stemming from racial disparities in the government's challenges for cause may be even greater than those harms inflicted by commensurate disparities in the government's peremptory strikes. Both categories of exclusions seem predicated on "the widely held belief that, at least in certain types of cases, a juror's [group characteristic] has some statistically significant predictive value as to how the juror will behave."[314] Such conduct is pernicious and constitutionally impermissible—though perhaps not altogether irrational[315]—in large part due to the harmful lesson it communicates to excluded jurors and the public.[316] But challenges for cause differ from peremptory strikes insofar as they delimit, on a more fundamental level, who has the legal capacity to participate in the administration of law as a juror in the first instance. When the government pursues one racial group for legal disqualification with such disparate vigor, the insult is more profound: it is, as the Supreme Court said in 1880, "practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to [further] race prejudice."[317] There would be widespread indignation (one would hope) if an elected official announced, "In general, our black citizens are simply much less qualified than our white citizens to be jurors." Yet this is the precise message that prosecutors and judges communicate on a daily basis when raising and ruling upon challenges for cause.

It might be answered that this claim (that challenges for cause undermine perceptions of fairness by eliminating minority jurors) is undercut by the relative obscurity of the problem—how could challenges for cause be a source of public disillusionment if we are only just noticing that they are problematic? I suspect that, on the ground, the issue is not invisible. Consider the trial of Curtis Flowers, wherein challenges for cause significantly reduced the percentage of black prospective jurors.[318] Immediately before peremptory strikes began, Flowers's lawyer raised a concern: "Your Honor, we are dealing with a venire [after challenges for cause] that is [now] so blaringly disproportionate to the population of this county."[319] The trial court

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King, *The Effects of Race-Conscious Jury Selection on Public Confidence in the Fairness of Jury Proceedings: An Empirical Puzzle*, 31 AM. CRIM. L. REV. 1177, 1181, 1182–85 (1994) ("Existing research confirms that . . . racially representative juries[ ]can enhance perceptions of jury fairness.").

314. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 157 (1994) (Scalia, J., dissenting).

315. *See* Frampton, *supra* note 3, at 1635–39 (documenting racial disparities in jurors' votes in nonunanimous verdicts).

316. Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 742–50 (1992).

317. Strauder v. West Virginia, 100 U.S. 303, 308 (1880).

318. *See supra* Section I.C.1.

319. Voir Dire Transcript, *supra* note 52, at 1736.

patiently explained that there was no legal infirmity in the "whitewashing" of the venire:

> You have got to look into the purpose, the reason. And the reason why is because Mr. Flowers has a number of brothers and sisters. His parents are well-known. [Curtis's father] Mr. Archie Flowers is apparently one of the most well-thought of people in this community.
>
> . . . Mr. Flowers [has the right] to be tried in his home county. . . . But he cannot then come around and complain because people are excused because they know him.
>
> . . . [I]f there is a statistical abnormality now, it is because almost every African-American that has been excused for cause, other than those on the death question, were because they knew him.
>
> . . . .
>
> So you know, there is—nothing the State has done has caused this statistical abnormality.
>
> . . . It is strictly because of the prominence of his family.[320]

This account probably persuaded few black onlookers of the fairness of the proceedings when the (nearly all-white) jury returned its recommendation of death.

E. *Education*

Finally, the jury is thought to "play[] an important role as educator of the citizenry in the lessons of democracy."[321] In the early republic, "[j]ury service came to be viewed as an educational opportunity, whereby each citizen learned the workings of the law and received training in the pursuit of justice."[322] Jury service promised "crucial civic education and moral transformation [for] the common man."[323] Alexis de Tocqueville described the jury as a "school, free of charge and always open, where each juror comes to be instructed in his rights, where he enters into daily communication with the most instructed and most enlightened members of the elevated classes."[324] Whether or not it benefited the immediate parties to the litigation, the jury was still "one of the most efficacious means for the education of the

320. *Id.* at 1736–39.

321. Marder, *supra* note 219, at 1083.

322. Benjamin Justice & Tracey L. Meares, *How the Criminal Justice System Educates Citizens*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 159, 167 (2014); *accord* THE FEDERAL FARMER, NO. 4 (Oct. 12, 1787), *in* THE COMPLETE BILL OF RIGHTS, *supra* note 244, at 446, 447 (describing trial by jury as the "fortunate invention[]" that allows "common people . . . to acquire information and knowledge in the affairs and government of the society").

323. ABRAMSON, *supra* note 19, at 32–33.

324. DE TOCQUEVILLE, *supra* note 243, at 262.

people which society can employ."[325] These perceived benefits of the jury are still regularly invoked by scholars[326] and by the Court.[327]

It would be a mistake, I think, to dismiss such sentiments as antiquated or patronizing. There are precious few institutions in American democracy that compel private individuals to engage meaningfully with those from different racial or socioeconomic backgrounds; there are fewer still that ask those assembled individuals to seek consensus.

But jury service also teaches less salubrious lessons, which challenges for cause compound. As Professors Benjamin Justice and Tracey L. Meares have argued, "the jury system offers an empty symbol of civic education at best, and a consistently racist civic education at worst."[328] Disproportionate exclusions of various groups "send[] a clear message that some people are worthy citizens whose opinions and judgments are valued, while other citizens' views do not count."[329]

The widespread (and understudied) exclusion from jury service of one class of "presumptively biased" prospective jurors, persons convicted of criminal offenses, offers a paradigmatic example.[330] To the extent our commitment to the jury system stems from a faith in the "civic education and moral transformation" such participation provides, certainly these individuals (and others who disclose strong potential biases outside of the community's norms) should be leading candidates for such tutelage. Yet every state except for Maine and Colorado limits jury participation for those convicted of felonies in some way, and twenty-eight states impose complete bans.[331] Thirteen states disqualify at least some potential jurors based on misdemeanor convictions.[332] The sole empirical study examining the pretrial biases of this group, however, reveals that levels of pro-defense and anti-

325. Powers v. Ohio, 499 U.S. 400, 407 (1991) (quoting 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 334–37 (Henry Reeve trans., Schocken Books 1961) (1835)).

326. Andrew Guthrie Ferguson, *Jury Instructions as Constitutional Education*, 84 U. COLO. L. REV. 233, 242–73 (2013).

327. Miller-El v. Dretke, 545 U.S. 231, 273 (2005) (Breyer, J., concurring); *Powers*, 499 U.S. at 407.

328. Justice & Meares, *supra* note 322, at 169.

329. *Id.*

330. *See* Anna Roberts, *Casual Ostracism: Jury Exclusions on the Basis of Criminal Convictions*, 98 MINN. L. REV. 592 (2013); *see also* Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 67 (2003) ("Perhaps more surprising is that scholars have ignored 'felon exclusion' despite a mass of legislation and appellate litigation, and despite the glaring racial disparities.").

331. James M. Binnall, *Summonsing Criminal Desistance: Convicted Felons' Perspectives on Jury Service*, 43 LAW & SOC. INQUIRY 4, 4 (2018); COLO. REV. STAT. § 13-71-105(3) (2018) (excluding convicted felons from serving on grand juries, but not on trial juries). *But see* Kenneth Lovett, *Harlem State Senator's Bill Would Allow Felons to Serve on Juries After Completing Their Sentences*, N.Y. DAILY NEWS (Nov. 25, 2018, 6:00 AM), https://www.nydailynews.com/news/politics/ny-pol-benjamin-parole-felons-juries-20181121-story.html [https://perma.cc/NEH3-ACG7].

332. Roberts, *supra* note 330, at 593.

prosecution pretrial biases among those convicted of felonies roughly match those of law students.[333] And recent qualitative research into this group's experience serving on criminal juries in Maine has found that those convicted of felonies typically "seek to conform to what they perceive as the state's expectations of an exemplary juror, and ultimately incorporate the characteristics of the juror role into their own self-concepts."[334] For many of the study's subjects, the experience was validating and transformative, a "recognition of their reformation."[335] In short, the jury-as-educator model may have much to recommend it, if we have the courage to fully embrace it.

* * *

The foregoing suggests the advantages that might flow from adopting a more expansive view of who is "qualified" to serve as a juror (and, correspondingly, sharply limiting the role that challenges for cause play in jury selection). To be sure, in limited circumstances—particularly when necessary to ensure the defendant's Sixth Amendment right to an impartial jury—challenges for cause could continue to play an important role in how juries are empaneled. But many potential jurors ordinarily excluded from service should be "qualified" to serve, including many of those familiar with the parties or events in question, those harboring strong views about specific laws or law enforcement generally, those with prior convictions, and even those who disclose good-faith reservations about their own partiality. Our jury system could survive such changes; in many ways, they would make it stronger. And, perhaps more than any of the doctrinal shifts suggested in Part II, such changes might reduce the extraordinary racial disparities that presently pervade challenges for cause today.

CONCLUSION

As Justice Sotomayor recently wrote (albeit not in a discussion of challenges for cause), "racial bias is 'a familiar and recurring evil' " afflicting the American jury; it "can and does seep into the jury system," often "subtly."[336] This is a valuable insight, and one that seems to anticipate the limits of even the most ambitious current proposals for reform (e.g., abolition of peremptory strikes). "The work of 'purg[ing] racial prejudice from the administration of justice,' " she wrote, "is far from done."[337] In a racially stratified society, where worldviews, life experiences, and opinions on criminal justice

333. James M. Binnall, *A Field Study of the Presumptively Biased: Is There Empirical Support for Excluding Convicted Felons from Jury Service?*, 36 LAW & POL'Y 1, 18 (2014).

334. Binnall, *supra* note 331, at 10.

335. *Id.* at 15.

336. Tharpe v. Ford, 139 S. Ct. 911, 913 (2019) (Sotomayor, J., concurring in denial of certiorari) (quoting Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 868 (2017)).

337. *Id.* (quoting Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 859 (2017)).

issues are often shaped by race, it should come as little surprise that challenges for cause continue to reflect and reproduce racial hierarchies, too.[338] We are past due for recognizing this phenomenon and developing ways to structure our jury system to address it.

338. *Cf.* Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218, 2218 (2019) ("In a racially stratified world, any method of prediction will project the inequalities of the past into the future. This is as true of the subjective prediction that has long pervaded criminal justice as it is of the algorithmic tools now replacing it.").

Memo re Sample Motion & Order to Preserve and Provide Jury Formation Documents (For Fair Cross Section Claims)

By: Attorney Hannah Autry, Center for Death Penalty Litigation, hautry@cdpl.org
Date: 10/2021

As explained below, these motions are time-sensitive: in most counties, they will be effective only if filed in or around October of each odd-numbered year. However, counsel should still be encouraged to review and file the materials outside of that time frame in an effort to demonstrate due diligence in attempting to collect the necessary information for any potential fair cross-section challenges.

To raise a fair cross-section claim at trial through a Motion to Quash the venire, the *Duren* standard requires that attorneys prove that underrepresentation of a "distinctive group" (generally groups defined by race, gender, or ethnicity) is caused by some systematic factor. If counsel begins jury service and notices that a group is underrepresented in the venire, it is difficult if not impossible to prove that the underrepresentation is "systematic" unless counsel has requested demographic information about the jury list for the county and about the jury formation process. Underrepresentation could be "systematic" for a number of potential reasons – it could be that the source lists (the DMV list of licensed drivers and BOE list of registered voters) disproportionately excludes distinctive groups; it could be that distinctive groups are disproportionately removed during the editing process to form the master list; it could be that distinctive groups appear for jury service at lower rates because members of those groups move more frequently and therefore are less likely to receive a summons that was based on a stale address. We can't know what step in the process the underrepresentation is occurring unless look at the data, and we can't get the data unless we request it from the court.

In nearly all counties, the jury lists are formed every two years. The DMV sends the list of potential jurors (the drivers and voters) to the county in the Fall before the next biennium so that the Master jury list can be formed and counties can start using the list in January. The new biennium begins in 2022; therefore, the process of creating that master jury list is happening now. The list that the DMV sends to the county contains all demographic information about the potential juror; however, my knowledge and belief is that the demographic information generally is not uploaded into the jury formation software. Additionally, the AOC policies do not require the Clerk's office to maintain the list from the DMV past it's use – i.e. after the master list is formed. **So, if counsel waits to file this motion next year, the jury list with the demographic information may be disposed of already, which would make it impossible to examine each step in the jury formation process to determine if a systematic factor was causing underrepresentation.**

Counsel are encouraged to adopt and file the Motion to Preserve and Provide Jury Formation Documents with the Proposed Order. If the court denies the request for information, it is a potential appellate issue that could be preserved by filing a motion to quash at the beginning of

jury selection and alleging a denial of a constitutional right to discovery. A sample draft of a motion to quash will be available on the NC REN website.

To familiarize yourself with this area of the law, a helpful overview of fair cross section law is included in the School of Government trial and race manuals.

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
COUNTY OF XXXX	FILE NO.

STATE OF NORTH CAROLINA	)
	)
v.	)
	)
DEFENDANT,	)
Defendant.	)

****

MOTION TO PRESERVE AND PROVIDE DOCUMENTS RELATED TO THE JURY FORMATION PROCESS; PROPOSED ORDER

****

NOW COMES Defendant, by and through counsel, and respectfully moves this Court to order preservation of documentation related to the jury formation process in [YOUR COUNTY] so counsel may adequately investigate, develop and, if necessary, litigate claims concerning whether the venire in this case represents a fair cross section of the [YOUR COUNTY] community. Such information is necessary to ensure Defendant's rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article I, §§ 24 and 26 of the North Carolina Constitution, *Duren v. Missouri,* 439 U.S. 357 (1979), and *State v. Williams,* 355 N.C. 501, 549 (2002).

Factual Basis

Every two years (i.e. biennium) [replace with "Every year" if in a county with annual list updates], a "raw" list of potential jurors is sent from the Department of Motor Vehicles ("DMV") to the [YOUR COUNTY] Clerk of Superior Court pursuant to N.C. Gen. Stat. §§ 9-2 and 20-43.4. This "raw" list contains registered voters and licensed drivers in the [YOUR COUNTY]. Upon information and belief, beginning in 2020, this "raw" list also includes race and ethnicity information of the potential jurors. After receiving the "raw" list, various editing of the list takes place utilizing both computer

software and manual editing by the jury commission. After editing, the "master" jury list for the [YOUR COUNTY] is formed, and jurors for the grand jury and petit juries are randomly summonsed from this "master" list for grand jury sessions and trials occurring during the upcoming two-year [or one-year] period. According to N.C. Gen. Stat. § 9-7, "[t]he names of persons summonsed for jury service and the date or dates on which each person served" is recorded on the master jury list and retained for two years.

According to the attached retention policies from the Administrative Office of the Courts, the original "raw" list sent by the DMV to the [YOUR COUNTY] is retained only until the "administrative/reference value to the clerk has ended" and then the list is "destroy[ed] without NCAOC approval." See Exhibit 1, Page 9.6. Upon information and belief, this list typically arrives to the clerk's office via a thumb drive in the Fall before the next biennium. Therefore, this "raw" list from the DMV that is used to form the "master" jury list for the 2022-2023 biennium will arrive in the clerk's office in the Fall of 2021. The Clerk's office does not have the capability to recreate the "raw" list from the resulting "master" list once the raw list is destroyed/disposed. The "raw" list is usually destroyed/disposed after the "master" jury list for the [YOUR COUNTY] is formed, as the "raw" list has no further "administrative/reference value to the clerk" at that point.

Additionally, upon information and belief, any documentation reflecting the editing process from the "raw" list to the finalized "master" jury list for [YOUR COUNTY] is not currently preserved. Finally, upon information and belief, any returned summons marked "undeliverable," are not recorded or preserved.

Law and Argument

Defendant is seeking information in order to investigate whether the venire in his case comports with his Sixth Amendment rights to an impartial jury, interpreted by *Taylor v. Louisiana,* 419 U.S. 522,

528 (1975) to mean a jury selected from a fair cross-section of the community. The inherent importance of fairly representing all groups in jury service has long been recognized. "When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented." *Peters v. Kiff*, 407 U.S. 493, 503–04 (1972).

To demonstrate a fair cross-section violation, a defendant must show "[1] that the group alleged to be excluded is a 'distinctive' group in the community; [2] that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and [3] that this underrepresentation is due to the systematic exclusion of the group in the jury-selection process." *State v. Williams*, 355 N.C. 501 (2002) (quoting *Duren v. Missouri*, 439 U.S. 357 (1979)).

Defendant has no burden to demonstrate issues of underrepresentation of distinctive groups as a threshold to access the information he is seeking. Requiring him to meet such a burden would be "putting the proverbial cart before the horse by requiring defendants to demonstrate a problem with the jury selection system in order to access records that would tell them whether there is a problem with the jury selection system," and would be inconsistent with rulings from federal courts. Nina W. Chernoff, *No Records, No Right: Discovery & the Fair Cross-Section Guarantee*, 101 Iowa L. Rev. 1719, 1757 (2016); *See also United States v. Royal*, 100 F.3d 1019, 1025 (1st Cir. 1996) ("[t]o avail himself of the right of access to jury selection records, a litigant need only allege that he is preparing a motion to challenge the jury selection process."); *Government of Canal Zone v. Davis*, 592 F.2d 887 889 (5th Cir.

1979); *United States v. Lawson*, 670 F.2d 923 (10th Cir. 1982); *United States v. Alden*, 776 F.2d 771, 773 (8th Cir. 1985); *United States v. Macano-Garcia*, 622 F.2d 12, 18 (1st Cir. 1980); *United States v. Beaty*, 465 F.2d 1376, 1380 (9th Cir. 1972). "This cross-section requirement would be without meaning if a defendant were denied all means of discovery in an effort to assert that right." *State ex rel. Garrett v. Saitz,* 594 S.W.2d 606, 608 (Mo. 1980).

A. Standards for demonstrating "systematic exclusion"

The information sought is critical and necessary in determining the third prong of the *Duren* test – whether any underrepresentation in Defendant's venire is due to systematic exclusion of a distinctive group in the jury selection process. Because the *Duren* test falls under the Sixth Amendment right to a fair jury, the question is whether there is underrepresentation of a distinctive group due to systematic exclusion, not whether there is intent to discriminate. *United States v. Green*, 389 F. Supp. 2d 29, 51 (D. Mass. 2005) (emphasis in original) (internal citations omitted), *rev'd on other grounds,* 426 F.3d 1 (1st Cir. 2005); *see also United States v. Gelb*, 881 F.2d 1155, 1161 (2d Cir. 1989) (observing that the Sixth Amendment is stricter than the Equal Protection Clause because it is unconcerned with motive)

"Systematic exclusion" may occur as a result of any number of typically invisible steps in the jury formation process: for example, a glitch in a software system that inadvertently removes residents living within a certain zip code from the juror list. *See United States v. Jackman,* 46 F.3d 1240, 1242-43 (2d Cir. 1995) (citing *United States v. Osorio*, 801 F. Supp. 966, 972-73) (D. Conn. 1992)). Or "systematic exclusion" may occur as it did in *Duren* where an inherent product of the jury selection mechanism results in underrepresentation, or if the underrepresentation results from a rule or practice over which the state actor had control. *Id.,* 439 U.S. at 366 (violation found where Missouri's jury selection process systematically excluded women from the jury pool). Without the opportunity to examine the process by which the juror list is formed, systematic factors producing underrepresentation

remain hidden and their effect on the jury list unabated. "One denial leads to another: denial of the motion for disclosure leaves [defendant] with no way to prove his…jury did not represent a cross-section of the community, and that would be a denial of due process." *Garrett*, 594 S.W.2d at 608.

The *Duren* three-part test places the burden on the defendant to show systematic exclusion. Without access to the information requested, the Defendant cannot investigate whether a meritorious challenge exists. See, e.g., *State v. Gettys*, 243 N.C. App. 590 (2015) (rejecting fair-cross challenge to County's use of a computer program to select venire members where defendant failed to show systemic exclusion, even where distinctive groups are underrepresented in a given venire); *State v. Bowman*, 349 N.C. 459 (1998) ("[d]efendant's only evidence in the instant case consisted of the statistical makeup of this particular jury venire"; court found that evidence failed to show systemic exclusion under third prong of *Duren* test).

B. Right to Information

The Supreme Court has recognized that access to jury formation records is necessary for enforcing the fair cross-section guarantee: "Without inspection, a party almost invariably would be unable to determine whether he has a potentially meritorious jury challenge." *Test v. United States*, 420 U.S. 28, 30 (1975). Federal law guarantees access to such information by statute through the Jury Service and Selection Act ("JSSA"). 28 U.S.C. §§ 1861-1878 (2012). While North Carolina does not have a parallel statute, Defendant nevertheless has a constitutional right to information related to his fair cross-section challenge. Courts in other states that do not have statutory equivalents to the JSSA nonetheless have granted the defendant's requests for jury formation discovery on constitutional grounds, recognizing that such access is necessary to the enforcement of the fair cross-section right. Most recently in Iowa, the state's highest court recognized that while it had a similar statutory counterpart to the JSSA, it nevertheless found a constitutional right to the defendant's requests for

information about the jury panel for the prior six month period. *State v. Plain*, 898 N.W.2d 801, 828 (2017). ("[T]he constitutional fair-cross section purpose alone is sufficient to require access to the information necessary to prove a prima facie case."). The court further stated, "[t]o the extent Plain did not meet his prima facie case with respect to the third prong of the test, we conclude he lacked the opportunity to do so because he was not provided access to the records to which he was entitled." *Id.*

Courts in three other jurisdictions have similarly affirmed the constitutional right to access the information Defendant is seeking, without any threshold showing of a fair cross-section violation. *See Garrett*, 594 S.W.2d at 608 (finding "[t]he court is bound…by the United States Supreme Court's determination of a state court defendant's constitutional right to have his case considered by a grand jury drawn from a fair cross-section of his community" where a defendant requested data maintained by the circuit clerk relating to the master grand jury list that he could use to determine race and ethnicity data.); *Afzali v. State*, 326 P.3d 1, 3 (Nev. 2014) (finding "this court is bound by Supreme Court precedent, and... a defendant has a constitutional right to a grand jury drawn from a fair cross-section of the community" when defendant made a pretrial request for information that would identify the racial composition of the grand jury); *State v. Ciba-Geigy Corp*., 573 A.2d 944, 946 (N.J. Super. Ct. App. Div. 1990) (affirming defendants' claim to right to information based "upon both federal and state constitutional precepts" when he requested information concerning the race and ethnic background of the grand jurors.) As stated in *Garrett*, "[t]his cross-section requirement would be without meaning if a defendant were denied all means of discovery in an effort to assert that right." 594 S.W. 2d at 608.

While these cases involved the request for information about the grand jury lists, the request for information also invariably applies to the formation of the venire for the trial jury, as the law is clear that Defendant has a federal and state right to a petit jury drawn from a fair cross section of the community.

As such, Defendant similarly has a constitutional right to access the requested information in order to preserve and ensure his constitutional right to a fair trial.

CONCLUSION

Therefore, Defendant requests that the following detailed information is preserved and provided to him so that he may, through counsel, investigate and potentially litigate challenges to the jury venire in his case. Defendant does not otherwise have access to this information unless court actors voluntarily gather such information or the Court orders that they do so.

WHEREFORE, Defendant requests the Court grant the following requested relief:

That the following information is preserved and provided to counsel for the Defendant:

1. Any documentation reflecting the jury formation process maintained by the Office of the Clerk of Court and the jury software program it utilizes; and

2. [YOUR COUNTY] Jury Commission meeting minutes for creating the [YOUR COUNTY] "master" jury list for the 2022-2023 biennium [replace with "2022" and strike "biennium" if in county with annual list updates]; and

3. A copy of the "raw" list of potential jurors, which includes the potential juror's name, race, ethnicity, gender and zip code for [YOUR COUNTY] that is created by the DMV and sent to the Clerk of Court; and

4. All materials, in electronic or paper form, including but not limited to any hand-made edits by the Jury Commission, that are made in the process of editing this "raw" list of potential jurors for [YOUR COUNTY] received by the DMV in order to create the "master" list of potential jurors; and

5. An electronic copy of the [YOUR COUNTY] Master Jury List for the 2022-2023 biennium [replace with "2022" and strike "biennium" if in county with annual list updates]; and

6. An electronic copy of the [YOUR COUNTY] Master Jury list which denotes the names of persons summonsed for jury service and the dates which each person served for the 2018-2019 and 2020-2021 bienniums [replace with "2019, 2020 and 2021" and strike "bienniums" if in county with annual list updates]; and

7. An electronic copy of list of jurors who were summonsed, and a notation of those who appeared, for any trial sessions of superior court between January 1, 2022 and [insert date certain for your defendant's trial or leave as "and defendant's trial"]; and

8. An electronic copy of the list of jurors summonsed for the session of court for defendant's trial; and

9. All summons returned as "undeliverable," or otherwise returned as not served on the potential juror for any trial sessions of superior court between January 1, 2022 and [insert date certain for your defendant's trial or leave as "and defendant's trial"], including defendant's trial, are preserved and made available for inspection and copying; and

10. A response in writing of what steps, if any, [YOUR COUNTY] takes to address undeliverable summons; and

11. Any policies and procedures for addressing deferrals and excuses prior to jury service; and

12. Any documentation reflecting the excusal or deferral of jurors prior to their appearance in court for jury service in the defendant's trial is preserved and made available for inspection and copying; and

13. A response in writing of what steps, if any, [YOUR COUNTY] takes to address jurors not reporting when summonsed.

14. An electronic copy of the list of jurors who appear for jury service for the session of court for defendant's trial; and

15. Any and all other relief the Court deems appropriate to effectuate the purpose of this Motion.

Respectfully submitted, this the ___ day of _____, 2021.

_____
SIGNATURE LINE

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that the undersigned attorney served a copy of the foregoing Motion on the State of North Carolina by hand delivery:

DA Office

Clerk of Superior Court [Be sure to serve a copy on the Clerk]

This the ____ day of _____, 2021.

_____
SIGNATURE LINE

STATE OF NORTH CAROLINA	Records of the Clerks of Superior Court
Records Retention and Disposition Schedule	IX. Miscellaneous, Registrations and Other documents not associated with a specific case
The records listed below are effective as of **May 1, 2018**	

- All items listed require NCAOC approval for transfer to State Archives (AOC-A-120) or destruction of records (AOC-A-119) unless specifically stated otherwise.
- Where scanning is required, NCAOC audit of scans must be completed prior to destruction of records.

RRS No.	Record Type	AKA's	Description	Disposition Instructions
9.1.<	**Miscellaneous & Registration Filings**	▪ See Appendix A for listing of document types that are included in this item.	These include: judges administrative orders, bail bondsmen licenses, powers of attorney, records of resumption of maiden name, and records of confiscated weapons.	RETAIN UNTIL: microfilm is approved THEN: Return to the files or Destroy without NCAOC approval.
9.2.A	**Apprenticeship Indentures**	▪ Apprentice Bonds	Contracts of apprenticeship usually filled in on printed forms, showing name of master and apprentice, trade to be taught, details of contract, amount of master's bond, and names of sureties.	Transfer to State Archives at any time.
9.3.1	**Bail Bondsmen – Monthly Report**		This report is completed by each bail bondsman and filed with the clerk monthly. It provides information on the number and amount of bonds issued by the bondsman. A copy of this is also filed with the Insurance Commissioner in Raleigh.	See RRS No. 9.1.< for Miscellaneous and Registration Filings

* If a Clerk has signed the Electronic Records and Imaging Policy and paper files have been scanned in accordance with its procedures, the electronic version becomes the official record copy and must be retained in accordance with this Schedule. Then, upon NCAOC approval, paper files may be destroyed before the end of the retention period.

Records Retention and Disposition Schedule	IX. Miscellaneous, Registrations and Other documents not associated with a specific case
The records listed below are effective as of **May 1, 2018**	

- Where scanning is required, NCAOC audit of scans must be completed prior to destruction of records.

RRS No.	Record Type	AKA's	Description	Disposition Instructions
9.4.<	**Bills of Costs**	▪ State Judgment Docket ▪ Court Costs	Itemized bills of costs in civil and criminal cases, showing fees of court officers and witnesses and jurors, State court process tax, and other costs. Usually filed with judgment roll of case.	File in referenced case file.
9.5.A	**Board of Superintendents of Common Schools, Minutes of**		Record of proceedings consisting chiefly of allotments of funds to local school districts.	Transfer to State Archives at any time.
9.6.<	**Books to Magistrates, Record of**	▪ Justice of the Peace, Record of Books Delivered to	Record of loan of volumes of laws and Supreme Court reports to each Justice of the Peace and their return.	Destroy at any time.
9.7.<	**Campaign Expense Accounts**	▪ Candidates' Expense Accounts ▪ Campaign Records/ Election Return Abstracts	Sworn statements of campaign receipts and expenditures filed with clerk by candidates for county offices.	See RRS No. 9.1.< for Miscellaneous and Registration Filings
9.8.T	**Corporation Papers**		Charters and certificates of dissolution of corporations and correspondence relative thereto.	Transfer to local county Register of Deeds at any time.
9.9.<	**County Claims**		List of claims against county audited and approved, showing claimant and amount of each claim.	Destroy at any time.

* If a Clerk has signed the Electronic Records and Imaging Policy and paper files have been scanned in accordance with its procedures, the electronic version becomes the official record copy and must be retained in accordance with this Schedule. Then, upon NCAOC approval, paper files may be destroyed before the end of the retention period.

Records Retention and Disposition Schedule	IX. Miscellaneous, Registrations and Other documents not associated with a specific case
The records listed below are effective as of **May 1, 2018**	

- Where scanning is required, NCAOC audit of scans must be completed prior to destruction of records.

RRS No.	Record Type	AKA's	Description	Disposition Instructions
9.10.<	**Destruction and Transfer of Records Requests**	▪ Record Destruction Requests	Form AOC-A-119 (Destruction Request) and AOC-A-120 (Transfer to Archives Request)	See RRS No. 9.1.< for Miscellaneous and Registration Filings
9.11.<	**Detention Home Records**		Local forms containing numbers and names of children in homes, meals served etc. and statistical reports.	Destroy at any time.
9.12.A	**Elections, Record of**		A record of the total number of votes cast for each candidate in each election in the county.	Transfer to State Archives at any time.
9.13.10	**Election Returns**	▪ Campaign Records/ Election Return Abstracts	Abstracts of votes cast for each candidate in election, filed with clerk by precinct registrar and judge of election.	See RRS No. 9.1.< for Miscellaneous and Registration Filings
9.14A.<	**Grand Jury Reports**		Prior to Court Reform:	Destroy at any time.
9.14B.10			Since Court Reform:	RETAIN WITH: the minutes of the superior court UNTIL: 10 years THEN: destroy
9.15A.<	**Habeas Corpus, Writs of**		Prior to court reform: These were handled as a separate type of record.	Destroy at any time.
9.16B.F			Since court reform:	Always file in a case file.
9.17.A	**Homestead Returns**			Transfer to State Archives at any time.

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Records Retention and Disposition Schedule	IX. Miscellaneous, Registrations and Other documents not associated with a specific case
The records listed below are effective as of **May 1, 2018**	

- Where scanning is required, NCAOC audit of scans must be completed prior to destruction of records.

RRS No.	Record Type	AKA's	Description	Disposition Instructions
9.18.A	**Hospital Files**		Mentally disordered, inebriates, drug addicts, etc.	Transfer to State Archives as soon as possible.
9.19.	**Indigent Representation Plan**		Lists attorneys and the order in which they will be appointed to represent indigent defendants.	
9.20A.<			Prior to Court Reform	Destroy at any time.
9.20B.<			Since Court Reform: These should be treated as a miscellaneous filing and be microfilmed/ scanned.	RETAIN UNTIL: microfilm is approved THEN: Destroy at any time
9.21.<	**Jail Lists**	▪ Jail Logs ▪ Prisoners Confined, List of	This is a list of prisoners being held in jail waiting disposition of their court cases. It is designed to alert the court as to who is being held, and thus ensure the prompt disposition of their case.	RETAIN UNTIL: 6 months THEN: Destroy at any time without NCAOC approval.
9.22.5	**Judicial Disclosure Filings**			RETAIN UNTIL: 5 years THEN: Destroy

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Records Retention and Disposition Schedule	IX. Miscellaneous, Registrations and Other documents not associated with a specific case
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RRS No.	Record Type	AKA's	Description	Disposition Instructions
9.23.	**Jurors, Record of**		Alphabetical list of grand and petit jurors showing the record of service for each juror (excused, served, no show), dates of service and if the person served as a grand juror, whether they served a partial or full term.	
9.23A.<			Prior to Court Reform:	Destroy at any time.
9.23B.7			Since Court Reform:	RETAIN UNTIL: 7 years from the last date of the jury list period (either the last day of the list year or the last day of the list biennium on whether the county prepares a list for each year or for a biennium) THEN: Destroy
9.24.7	**Jury Commission Reports**		This report explains the procedures followed by the Jury Commission in preparing the master jury list.	RETAIN UNTIL: 7 years from the last date of the jury list period (either the last day of the list year or the last day of the list biennium depending on whether the county prepares a list for each year or for a biennium) THEN: Destroy

* If a Clerk has signed the Electronic Records and Imaging Policy and paper files have been scanned in accordance with its procedures, the electronic version becomes the official record copy and must be retained in accordance with this Schedule. Then, upon NCAOC approval, paper files may be destroyed before the end of the retention period.

Records Retention and Disposition Schedule	IX. Miscellaneous, Registrations and Other documents not associated with a specific case
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RRS No.	Record Type	AKA's	Description	Disposition Instructions
9.25.7	**Jury Excuses/ Returned Jury Summons**			RETAIN UNTIL: 7 years form the last date of the jury list period (either the last day of the list year or the last day of the list biennium depending on whether the county prepares a list for each year or for a biennium) THEN: Destroy
9.26A.R	**Jury Lists, Raw**		Every two years (or annually where a master list is prepared every year), a raw list of persons for each county is prepared by the Department of Motor Vehicles (DMV) which combines a list of county drivers and a list of county voters as provided to the DMV by the Board of Elections.	RETAIN UNTIL: administrative/ reference value to the clerk has ended THEN: Destroy without NCAOC approval

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Records Retention and Disposition Schedule	IX. Miscellaneous, Registrations and Other documents not associated with a specific case
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RRS No.	Record Type	AKA's	Description	Disposition Instructions
9.27B.7	**Jury Lists, Master**		From the raw list, the master list of jurors is created by the jury commission that will be used to summon jurors during the coming biennium (or annually where a master list is prepared every year).	RETAIN UNTIL: 7 years from the last date of the jury list period (either the last day of the list year or the last day of the list biennium depending on whether the county prepares a list for each year or for a biennium) THEN: Destroy
9.28.	**Jury Tickets**	Repealed August 24, 2014		
9.29.<	**Microfilm Logs**		These list what documents are filmed on the individual rolls of microfilm. The log itself is filmed on the end of the reel it covers.	RETAIN UNTIL: microfilm is approved THEN: Destroy
9.30.	**Official Bonds**	▪ Bonds	Prior to Court Reform	see Records Retention Schedule VIII, Official Bonds RRS No. 56A.D
9.31.<			Since Court Reform: Bonds of all county officers except clerk (whose bond is kept by Register) filed with clerk after having been recorded by Register. These should be indexed as a miscellaneous filing.	See RRS No. 9.1.< for Miscellaneous and Registration Filings

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Records Retention and Disposition Schedule	IX. Miscellaneous, Registrations and Other documents not associated with a specific case
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RRS No.	Record Type	AKA's	Description	Disposition Instructions
9.32.T	**Partnership Papers**		Certificates showing names of owners of businesses operating under names which do not reveal the owners identity.	Transfer to local county Register of Deeds at any time.
9.33.A	**Pension Papers**		Applications for state pensions to confederate veterans and their widows and correspondence matters.	Transfer to State Archives at any time.
9.34.<	**Quarterly Report of Clerks of Court State Process Tax** (Form B-209)		See N.C.G.S 105-93	Destroy at any time
9.35.<	**Railroad Police Bonds**			Destroy at any time.
9.36.<	**Receipts for Transaction other than Fees**			Destroy at any time.
9.37.<	**Rules and Regulations of Local Governmental Units**	▪ City government/ agency documents	These are provided to the clerks' offices for informational purposes only. They are not microfilmed nor are they considered a "miscellaneous" filing.	RETAIN UNTIL: 1 year THEN: Destroy without NCAOC approval
9.38.<	**Statistics, Civil and Criminal, Report to Chief Justice**		This is an inactive record series type which was discontinued in 1970. It was replaced by the AOC Statistical Reporting System.	Destroy at any time.

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Records Retention and Disposition Schedule	IX. Miscellaneous, Registrations and Other documents not associated with a specific case
The records listed below are effective as of **May 1, 2018**	

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RRS No.	Record Type	AKA's	Description	Disposition Instructions
9.39.<	**Statistical Reporting System, AOC**		This is composed of a number of different tally sheets and reporting forms. The originals of these are forwarded to the NCAOC and the clerks retain copies.	RETAIN UNTIL: the North Carolina Annual Report is published containing the information collected by these documents THEN: Destroy without NCAOC approval
9.40.10	**Weapons, Permits to Purchase**	▪ Hand gun permits denied/ approved	In some counties, the clerk issues these permits instead of the Sheriff	See RRS No. 9.1.< for Miscellaneous and Registration Filings
9.41.<	**Welfare Liens**	▪ Lien		See RRS No. 9.1.< for Miscellaneous and Registration Filings

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Records Retention and Disposition Schedule	IX. Miscellaneous, Registrations and Other documents not associated with a specific case
The records listed below are effective as of **May 1, 2018**	

- Where scanning is required, NCAOC audit of scans must be completed prior to destruction of records.

Appendix A: Documents and Filings categorized as Miscellaneous or Registrations for purposes of Retention and Disposition Schedule see 9.1. <.

- Affidavit (Criminal)
- Appeal for Administrative Hearing
- Arbitration Fee
- Attachment
- Authorization – Cancel/Credit Judgment
- Bankruptcy Documents
- Banks and Miscellaneous, Paper of
- Bondsman License (Pre-June 2002)
- Bondsman's License
- Bail Power of Appointment/Attorney
- Bulk Sale
- Civil Registrations
- Claim and Delivery
- Claim of Lien
- Costs – Appellate Division
- Criminal Registrations
- DA/School Board Service Designation
- Emancipation
- Employment Security Commission Liens
- Federal Government/Agency Documents
- Institutional Liens (Hospitals)
- Inter-State Witness Testimony
- Intervene
- Federal Tax Lien
- Jury Fine
- Lien
- Lis Pendens
- Miscellaneous
- Misdemeanor Confinement Program Transfer
- NC Certificate of Tax Liability
- Notice of Contract
- Notice of Escheat of Property
- Notice of Lien – Contract
- Oaths of Office
- Order – District/Superior Judge Admin
- Order of Discipline/Disability
- Order – Sale of Destruction of Property
- OSHA Judgment
- Parole Preliminary Hearing
- Parole Revocation Hearing
- Power of Attorney
- Post-Release Contempt Proceeding
- Post-Release of Parole Attorney Fee
- Post-Release Preliminary Hearing
- Post-Release Revocation Hearing
- Signature Facsimile
- Suspension of State Bar License
- Suspend/Revoke License (Real Estate)
- Tax Delinquency
- US District Court Judgment
- Renounce to Qualify
- Restoration of Citizenship
- Reinstatement from Order of Discipline
- Remove Court Official
- Resumption of Former Name
- Search Warrants – Civil and Criminal
- Sale of Surplus Property
- State Government/Agency Documents
- Temporary Guardianship – Minor
- Termination of Oath
- Termination of Bondsman License
- Towing/Storage of Motor Vehicle

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STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
COUNTY OF XXXXXXX	FILE NOS. XXXXXXX

STATE OF NORTH CAROLINA	)
	)
v.	)
	)
DEFENDANT,	)
Defendant.	)

****

MOTION TO QUASH JURY VENIRE

****

NOTE: THIS DRAFT MOTION IS WRITTEN TO LEAVE ROOM FOR TWO SCENARIOS – 1.) THAT YOU WERE DENIED THE INFORMATION ABOUT THE JURY FORMATION PROCESS AND THE RACE DATA OF THE POTNEITAL JURORS THAT YOU PREVIOUSLY YOU REQUESTED; 2.) THAT YOU WERE PROVIDED THIS INFORMATION AND THERE IS AN UNDERREPRESENTATION OF A DISTINCTIVE GROUP PRESENT IN YOUR CASE. IN BOTH SCENARIOS, PLEAD THE 3-STEPS OF *DUREN* AS BEST YOU CAN, AND ARITCULATE WHERE YOU CANNOT PROVIDE MORE DETAILS DUE TO INSUFFICIENT INFORMATION. CONTACT HANNAH AUTRY, HAUTRY@CDPL.ORG FOR CONSULTATION IF DESIRED.

PURSUANT TO N.C.G.S. 15A-1211(c), THIS MOTION MUST BE MADE AND DECIDED PURSUANT TO THE QUESINONING OF ANY JUROR.

NOW COMES Defendant, by and through counsel, moves to quash the jury venire in this case. This motion is made pursuant to Defendant's rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 24 and 26 of the North Carolina Constitution.

A criminal defendant is entitled to a jury that comes from a cross section of the community. *Taylor v. Louisiana*, 419 U.S. 524 (1975); *State v. McNeill*, 326 N.C. 712 (1990). In order to establish a *prima facie* violation of the fair cross-section requirement, a defendant must show: (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process. *Duren v. Missouri*, 439 U.S. 357, 364 (1979). If Defendant

succeeds in making out a prima facie fair cross-section violation, the burden shifts to the State to prove that "a significant state interest [is] manifestly and primarily advanced by those aspects of the jury selection process…that result in the disproportionate exclusion of a distinctive group." *Id.* at 367-68.

The questions of disproportionate representation is determined on a case-by-case basis. *State v. Golphin*, 352 N.C. 364, 393 (2000). To show "systematic exclusion" of a protected group, Defendant does not have to show that any party acted with discriminatory motive or intent. Underrepresentation is "systematic" if it was an "inherent" product of the jury selection mechanism that was used or if it resulted from a rule or practice over which the state actor had no control. *Duren*, 439 U.S. at 366. Defendant does not have to be a member of the excluded group of the excluded group to have standing to raise a Sixth Amendment fair cross-section challenge. *Taylor*, 419 U.S. 522 (1975) (male could challenge systematic exclusion of females); *Holland v. Illinois*, 493 U.S. 474 (1990) (white person has standing to challenge exclusion of African-Americans). The number of the distinctive group members in the community usually may be demonstrated with census data reflecting the total population. *Teague v. Lane*, 489 U.S. 288, 301 n.1 (1989); *Duren*, 439 U.S. 357, 365. *Castaneda v. Partida*, 430 U.S. 482, 495–96 (1977) (equal protection case in which the Supreme Court relied on total population figures in reviewing a challenge to grand jury composition); *U.S. v. Rodriguez-Lara*, 421 F.3d 932, 942 (9th Cir. 2005) ("the Supreme Court's acceptance of comparisons using total population figures clearly indicates that a defendant is not required to gather data reflecting the age-eligible population of the distinctive group in question"), *overruled on other grounds, United States v. Hernandez-Estrada*, 749 F.3d 1154 (9th Cir. 2014); *Azania v. State*, 778 N.E.2d 1253, 1259 (Ind. 2002) (noting that courts generally uphold the use of census figures in challenges to jury procedures).

STATEMENT OF FACTS

[IF GRANTED INFORMATION ABOUT THE JURY FORMATION PROCESS AND RACE DATA OF POTENTIAL JURORS – INCLUDE A DISCUSSION OF WHAT INFORMATION WAS PROVIDED AND WHAT THE INFORMATION SHOWS AND PROVIDE EXHIBITS FOR

SUPPORT. CONSIDER CONSULTING WITH AN EXPERT WHO CAN ASSIST WITH ANALYZING THIS INFORMATION.]

[At the time of the filing of this motion, the information provided shows…]

[Include a discussion of the percentages of the distinctive group at issue at each step of the formation process – including but not limited to the breakdown of the jurors on DMV list originally provided to the clerk, the breakdown of the master list for the county, the breakdown of the jurors who were summonsed but did not appear, and the breakdown of the jurors who appeared for jury service].

[IF DENIED INFORMATION ABOUT THE JURY FORMATION PROCESS AND RACE DATA OF POTENTIAL JURORS, OR IF SUCH INFORMATION IS NOT AVAILABLE, INCLUDE A DISCUSSION OF WHAT ALL HAS BEEN DONE TO ACCESS THAT INFORMATION]

[At the time of the filing of this motion, Defendant has insufficient information to adequately investigate and develop a prima facie case pursuant to *Duren*. Because Defendant was denied access to the information sought, Defendant moves to quash his jury venire. Defendant states the factual basis with as much information as he currently has. Defendant reserves the right to supplement this motion with any additional information that is learned throughout the jury selection process and throughout trial.]

LAW AND ARGUMENT

A. Distinctive group

The first prong of the *Duren* test requires that Defendant show that the group alleged to be excluded is a "distinctive" group in the community. Black jurors, Latino jurors, and female jurors represent "distinctive" groups in the community. *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975); *see State v. Golphin*, 352 N.C. 364, 393 (2000) (noting that "[t]here is no question . . . that defendants satisfied the first prong . . . because African-Americans are unquestionably a 'distinct' group for purposes of [this] analysis"); *see also* Paula Hannaford-Agor, *Systematic Negligence In Jury*

Operations: Why The Definition Of Systematic Exclusion In Fair Cross Section Claims Must Be Expanded, 59 DRAKE L. REV. 761, 763 (2011) ("It is fairly well-settled that the first prong of *Duren* refers to gender, race, and ethnicity, or in rare circumstances, religious affiliation and national origin." (footnotes omitted)). The distinctive group at issue in this case is [insert distinctive group].

B. Unfair and unreasonable representation of the distinctive group

As to the second prong of the *Duren* test, that the representation of this group in the venires from which Defendant's jury will be selected is not fair and reasonable in relation to the number of such persons in the community, Defendant provides the information available below.

Based on the information provided on the juror questionnaires, it appears that the potential jurors comprise the following racial and ethnic groups: White (X); Black/African-American (X); Hispanic (X); Asian (X); and Unknown (X). Out of X responses on the jury questionnaires, the racial makeup of the potential jurors correlate to: White (X%); Black/African-American (X%); Hispanic (X%); Asian (X%); Unknown (X%). According to U.S. Census Data most recently collected, available at XXXXX, persons who identify as White Alone comprise X% of the XXXXXX County population, followed by X% Black or African American, X% Hispanic or Latino Origin, X% some Other race alone, X% Asian Alone, X% Two or more races, X% American Indian and Alaska native alone, and X% Native Hawaiian and Other Pacific native alone (Exhibit X).

With the information provided, it appears there is an absolute disparity of X when comparing the number of distinctive group members that identify as [insert distinctive group at issue] in the community and the number of distinctive group members that identify as [insert distinctive group at issue] in Defendant's pool. The apparent underrepresentation is more pronounced when the comparative disparity is calculated. It appears that the comparative disparity between the representation of [insert distinctive group at issue] venire members and [insert distinctive group at issue] community members is XX%. Comparative disparity, a calculation that measures the percentage by which the number of

distinctive group members in the venire undercounts the number of distinctive group members in the community, is a useful tool for measuring underrepresentation, especially when the distinctive group at issue is a relatively small group in the community. In *Berghuis v. Smith*, 559 U.S. 314, 329 (2010), the U.S. Supreme Court stated that there is no perfect test for underrepresentation, and quoted with approval the Michigan Supreme Court's holding that, "[p]rovided . . . the parties proffer sufficient evidence . . . the results of all of the tests [of underrepresentation, including absolute disparity, comparative disparity, and standard deviation,] should be considered." *Id.* (internal quotations omitted).

C. Systematic exclusion

As to the final prong of the *Duren* test, Defendant must show evidence of systematic exclusion. *See State v. Bowman*, 349 N.C. 459 (1998) ("[d]efendant's only evidence in the instant case consisted of the statistical makeup of this particular jury venire"; court found that evidence failed to show systematic exclusion under third prong of *Duren* test). Systematic exclusion could occur at any stage of the jury process that is invisible to Defendant preceding when potential jurors enter the courtroom. When evaluating this prong, North Carolina courts have focused on the venire in the defendant's case, and considered composition of the venires over time in analysis of the third prong as opposed to the second prong. *See State v. Jackson*, 215 N.C. App. 339, 343-44 (2011) (noting that the *Duren* court considered composition of venires over time in analysis of third prong).

[If you have the information you requested, detail as best you can why the underrepresentation is systematic. Examples would include if the source lists (the DMV list of licensed drivers and BOE list of registered voters) disproportionately excludes distinctive groups; if distinctive groups are disproportionately removed during the editing process to form the master list; if distinctive groups appear for jury service at lower rates because members of those groups move more frequently and therefore are less likely to receive a summons that was based on a stale address. Additionally, if underrepresentation is happening consistently over a period of time, there is an argument that the

underrepresentation must be systematic, as it was in *Duren*.]

[If you don't have the information you requested, detail why you cannot meet this prong because defendant's constitutional right to this information was not provided]

In order to provide evidence of systematic exclusion to make a prima facie case under *Duren*, Defendant must be provided with information about the jury formation process the race data the of potential jurors at each step of the jury formation process, and must have access to demographical data of jury pools in XXX County over a period of time. Defendant has insufficient information to support such claim because requests for such information was denied/the race of the list of potential jurors at each step of the jury formation process was no longer available because it was not preserved.

"Systematic exclusion" may occur as a result of any number of typically invisible steps in the jury formation process: for example, a glitch in a software system that inadvertently removes residents living within a certain zip code from the juror list. *See United States v. Jackman,* 46 F.3d 1240, 1242-43 (2d Cir. 1995) (citing *United States v. Osorio*, 801 F. Supp. 966, 972-73) (D. Conn. 1992)). Or "systematic exclusion" may occur as it did in *Duren* where an inherent product of the jury selection mechanism results in underrepresentation, or if the underrepresentation results from a rule or practice over which the state actor had control. *Id.,* 439 U.S. at 366 (violation found where Missouri's jury selection process systematically excluded women from the jury pool). Without the opportunity to examine the process by which the juror list is formed, systematic factors producing underrepresentation remain hidden and their effect on the jury list unabated. "One denial leads to another: denial of the motion for disclosure leaves [defendant] with no way to prove his…jury did not represent a cross-section of the community, and that would be a denial of due process." *Garrett,* 594 S.W.2d at 608.

The Supreme Court has recognized that access to jury formation records is necessary for enforcing the fair cross-section guarantee: "Without inspection, a party almost invariably would be unable to determine whether he has a potentially meritorious jury challenge." *Test v. United States,* 420

U.S. 28, 30 (1975). Federal law guarantees access to such information by statute through the Jury Service and Selection Act ("JSSA"). 28 U.S.C. §§ 1861-1878 (2012). While North Carolina does not have a parallel statute, Defendant nevertheless has a constitutional right to information related to his fair cross-section challenge. Courts in other states that do not have statutory equivalents to the JSSA nonetheless have granted the defendant's requests for jury formation discovery on constitutional grounds, recognizing that such access is necessary to the enforcement of the fair cross-section right. Most recently in Iowa, the state's highest court recognized that while it had a similar statutory counterpart to the JSSA, it nevertheless found a constitutional right to the defendant's requests for information about the jury panel for the prior six month period. *State v. Plain*, 898 N.W.2d 801, 828 (2017). ("[T]he constitutional fair-cross section purpose alone is sufficient to require access to the information necessary to prove a prima facie case."). The court further stated, "[t]o the extent Plain did not meet his prima facie case with respect to the third prong of the test, we conclude he lacked the opportunity to do so because he was not provided access to the records to which he was entitled." *Id.*

Courts in three other jurisdictions have similarly affirmed the constitutional right to access the information Defendant is seeking, without any threshold showing of a fair cross-section violation. *See Garrett*, 594 S.W.2d at 608 (finding "[t]he court is bound…by the United States Supreme Court's determination of a state court defendant's constitutional right to have his case considered by a grand jury drawn from a fair cross-section of his community" where a defendant requested data maintained by the circuit clerk relating to the master grand jury list that he could use to determine race and ethnicity data.); *Afzali v. State*, 326 P.3d 1, 3 (Nev. 2014) (finding "this court is bound by Supreme Court precedent, and... a defendant has a constitutional right to a grand jury drawn from a fair cross-section of the community" when defendant made a pretrial request for information that would identify the racial composition of the grand jury); *State v. Ciba-Geigy Corp*., 573 A.2d 944, 946 (N.J. Super. Ct. App. Div. 1990) (affirming defendants' claim to right to information based "upon both federal and state

constitutional precepts" when he requested information concerning the race and ethnic background of the grand jurors.) As stated in *Garrett,* "[t]his cross-section requirement would be without meaning if a defendant were denied all means of discovery in an effort to assert that right." 594 S.W. 2d at 608.

While these cases involved the request for information about the grand jury lists, the request for information also invariably applies to the formation of the venire for the trial jury, as the law is clear that Defendant has a federal and state right to a petit jury drawn from a fair cross section of the community. As such, Defendant similarly has a constitutional right to access the requested information in order to preserve and ensure his constitutional right to a fair trial.

Defendant has suffered prejudice from the denial/lack of availability of the requested information detailing the jury formation process and showing the race data of the potential jurors, because without it, he is unable to effectively investigate and litigate challenges to his constitutional right to have a jury drawn from a fair-cross section of the community. Without the requested information, and without the time and the opportunity to effectively develop his evidence using that discovery, Defendant is deprived of the ability to fully, fairly, and effectively litigate his challenge.

CONCLUSION

Wherefore, Defendant requests that this jury be discharged.

Respectfully submitted, this the ____ day of _____.

_____
SIGNATURE BLOCK

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that the undersigned attorney served a copy of the foregoing Motion on the State of North Carolina by hand delivery:

DISTRICT ATTORNEY'S OFFICE

This, the ____ day of _____

_____
SIGNATURE BLOCK

STATE OF NORTH CAROLINA COUNTY OF _____	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION File No. __ CRS ____

STATE OF NORTH CAROLINA	)	
	)	**DEFENDANT'S MOTION**
v.	)	**TO DISTRIBUTE JUROR**
	)	**QUESTIONNAIRE AND TO**
	)	**NOTE RACE AND GENDER OF**
	)	**EVERY POTENTIAL JUROR**
	)	**EXAMINED IN THIS CASE**
	)	
_____	)	

COMES NOW the Defendant, by and through counsel, pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Section §§ 19, 24 and 26 of the North Carolina Constitution and respectfully moves the Court to allow the Defendant to distribute the proposed attached questionnaires to be answered by jurors who have been called for jury duty at the time of the Defendant's trial and prior to any voir dire of those jurors. In support of this motion, the Defendant shows unto the Court:

1. The attached questionnaire (Exhibit A) would simplify the questioning of jurors, as well as save valuable court time by eliminating the necessity of questioning jurors concerning basic factual information.
2. A defendant may not protect his rights under *Batson v. Kentucky*, 476 U.S. 79 (1986) and *J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127 (1994), in the absence of a clear record of the race and gender of each juror examined during voir dire. *See State v. Campbell*, ____ N.C.App. ___, 846 S.E.2d 804 (2020); *State v. Mitchell*, 321 N.C. 650 (1988); *State v. Brogden*, 329 N.C. 534 (1991).
3. Additionally, a defendant may not protect his rights to a jury drawn from a fair cross section pursuant to *Duren v. Missouri*, 439 U.S. 357 (1979) and *State v.*

Williams, 355 N.C. 501, 549 (2002) without a clear record of the race and gender of each juror summonsed for jury service.

4. A questionnaire is less intrusive and more efficient than asking jurors to identify their race and gender in open court and consequently is the best method of establishing a clear record. *See State v. Payne*, 327 N.C. 194, 199, 394 S.E.2d 158, 160 (1990) (inappropriate to have court reporter note race of potential jurors; an individual's race "is not always easily discernible, and the potential for error by a court reporter acting alone is great").
5. If a juror neglects to fill in his or her race, Defendant requests that the Court make inquiry of the juror as to his or her race and gender prior to either party questioning that juror.
6. In the alternative, should the Court decline to order distribution of a questionnaire, Defendant requests that the Court inquire as to the race and gender of every juror prior to the questioning of that juror by either party.

Respectfully submitted, this the ____ day of _____.

_____
COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that Defendant's Motion to Distribute Juror Questionnaire has been duly served by first class mail upon _____, Office of District Attorney, _____, by placing a copy in an envelope addressed as stated above and by placing the envelope in a depository maintained by the United States Postal Service.

This the _____ day of _____.

_____
COUNSEL FOR DEFENDANT

JUROR QUESTIONNAIRE

Please make sure your answers are legible.

1. Name: _____
(First) (Middle) (Last) (Maiden)

2. Age: _____

3. Gender that best describes you:
_____Female
_____Male
_____Non-binary
_____Other (write more if desired)

Preferred Pronouns:
____she/her/hers
____ he/him/his
____they/them/theirs
_____Other (write more if desired)

4. Are you of Hispanic, Latino, or Spanish origin? (Mark (X) ONE box)

____ **No,** not of Hispanic, Latino, or Spanish Origin

____ Yes, Mexican, Mexican Am., Chicano

____ Yes, Puerto Rican

____ Yes, Cuban

____ Yes, another Hispanic, Latino or Spanish Origin – *Print origin, for example, Argentinean, Colombian, Dominican, Nicaraguan, Salvadoran, Spaniard, and so on:*

_____

5. What is your race? (Mark (X) one or more boxes).

____ White

____ Black or African Am.

____ American Indian or Alaska Native – *Print name of enrolled or principal tribe:*_____

____ Asian Indian ____ Japanese ____ Native Hawaiian ____ Chinese ____ Korean

____ Guamanian ____ Filipino ____ Vietnamese ____ Samoan or Chamorro

____ Other Asian- *Print race, for example, Hmong, Laotian, Thai, Pakistani, Cambodian, and so on*: _____

____ Other Pacific Islander – *Print race, for example, Fijan, Tongan, and so on:*_____

____ Some other race – *Print race:* _____

6. Today's Date: _____

STATE OF NORTH CAROLINA COUNTY OF _____	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION File No. __ CRS ____
STATE OF NORTH CAROLINA v. _____	) **DEFENDANT'S MOTION FOR**) **COMPLETE RECORDATION**) **OF ALL PRETRIAL AND TRIAL**) **PROCEEDINGS**)

NOW COMES the Defendant, and respectfully moves the Court for an order directing the Court Reporter to take down and record all hearings on motions, all bench conferences, all jury voir dire, opening statements, closing arguments, all testimony and each and every proceeding involved in pretrial and trial proceedings in the above-numbered case.

Such complete recordation is required under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, §§ 19, 23, 24, and 27 of the North Carolina Constitution and N.C. Gen. Stat. § 15A-1241. In the absence of complete recordation, unrecorded errors may not be preserved for appeal. Indeed, failure to request complete recordation may constitute ineffective assistance of counsel.

In *State v. Campbell*, 272 N.C. App. 554, 846 S.E.2d 804 (2020), defense counsel explicitly declined to request recordation of jury selection. During the course of voir dire, the prosecutor exercised three of four peremptory strikes against African Americans, and defense counsel made an objection under *Batson v. Kentucky*, 476 U.S. 79 (1986), which was overruled. On appeal, the Court of Appeals noted that "if a defendant anticipates making a *Batson* discrimination argument, it is extremely difficult to prevail on such grounds without a transcript of jury selection," *Campbell*, 846 S.E.2d at 807, and held:

> From the transcript of the hearing, we… do not know the

> victim's race, the race of key witnesses, questions and statements of the prosecutor that tend to support or refute a discriminatory intent, or the State's acceptance rate of potential African American jurors. Finally, we see nothing in the record from which we can ascertain the final racial composition of the jury....
>
> Without more information … defendant has not shown us that the trial court erred in its finding that no *prima facie* showing had been made. Therefore, we uphold the trial court's ruling on the merits of defendant's *Batson* claim.

846 S.E.2d at 810-11. The Court concluded by "urgently" counseling Defendants to request recordation:

> Defendants are entitled to have their *Batson* claims and the trial court's rulings thereon subjected to appellate scrutiny. To do so, it is incumbent on counsel to preserve a record from which the reviewing court can analyze the *Quick* factors. **Thus, we urgently suggest that all criminal defense counsel follow the better practice and request verbatim transcription of jury selection.**

Id. at 811 (emphasis added).

In order to properly preserve all potential trial errors for any appellate proceedings and to ensure Defendant receives effective assistance of counsel, Defendant requests complete recordation of these proceedings.

Respectfully submitted, this the ____ day of _____.

_____
COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that Defendant's Motion for Complete Recordation Of All Pretrial and Trial Proceedings has been duly served by first class mail upon _____, Office of District Attorney, _____, by placing a copy in an envelope addressed as stated above and by placing the envelope in a depository maintained by the United States Postal Service.

This the _____ day of _____.

_____
COUNSEL FOR DEFENDANT

STATE OF NORTH CAROLINA COUNTY OF	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION File No. CRS

STATE OF NORTH CAROLINA	)	
	)	**DEFENDANT'S MOTION**
v.	)	**TO DISTRIBUTE JUROR**
	)	**QUESTIONNAIRE AND TO**
	)	**NOTE RACE AND GENDER OF**
	)	**EVERY POTENTIAL JUROR**
	)	**EXAMINED IN THIS CASE**
	)	
	)	

COMES NOW the Defendant, by and through counsel, pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Section 19 and 26 of the North Carolina Constitution and respectfully moves the Court to allow the Defendant to distribute one of the proposed attached questionnaires to be answered by jurors who have been called for jury duty at the time of the Defendant's trial and prior to any voir dire of those jurors. In support of this motion, the Defendant shows unto the Court:

1. The attached questionnaire (Exhibit A) would simplify the questioning of jurors, as well as save valuable court time by eliminating the necessity of questioning jurors concerning basic factual information.
2. A defendant may not protect his rights under *Batson v. Kentucky*, 476 U.S. 79 (1986) and *J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127 (1994), in the absence of a clear record of the race and gender of each juror examined during voir dire. *See State v. Campbell*, 272 N.C.App. 554, 846 S.E.2d 804 (2020); *State v. Mitchell*, 321 N.C. 650 (1988); *State v. Brogden*, 329 N.C. 534 (1991).
3. A questionnaire is less intrusive and more efficient than asking jurors to identify their race and gender in open court and consequently is the best method of

establishing a clear record. *See State v. Payne*, 327 N.C. 194, 199, 394 S.E.2d 158, 160 (1990) (inappropriate to have court reporter note race of potential jurors; an individual's race "is not always easily discernible, and the potential for error by a court reporter acting alone is great").

4. Further, the questionnaire would enable both the State and the Defendant to focus their voir dire of prospective jurors on any issues raised by the questionnaire regarding a juror's qualifications to serve in this particular case.
5. At a minimum, the defendant requests the distribution of the attached questionnaire (Exhibit B) in order to record the race and gender of each prospective juror.
6. If a juror neglects to fill in his or her race, Defendant requests that the Court make inquiry of the juror as to his or her race and gender prior to either party questioning that juror.
7. In the alternative, should the Court decline to order distribution of a questionnaire, Defendant requests that the Court inquire as to the race and gender of every juror prior to the questioning of that juror by either party.

Respectfully submitted, this the ____ day of _____.

_____
COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that Defendant's Motion to Distribute Juror Questionnaire has been duly served by first class mail upon _____, Office of District Attorney, _____, by placing a copy in an envelope addressed as stated above and by placing the envelope in a depository maintained by the United States Postal Service.

This the _____ day of _____.

_____
COUNSEL FOR DEFENDANT

JUROR QUESTIONNAIRE

(Please print and make sure your answers are legible)

1. Full Name: _____
   (Last) **(First)** **(Middle)** **(Maiden)**

2. Age: _____

3. **Gender that best describes you:**
   _____Female
   _____Male
   _____Non-binary
   _____Other
   (write more if desired)

   Pronouns:
   ____she/her/hers
   ____ he/him/his
   ____they/them/theirs
   _____Other
   (write more if desired)

4. **Are you of Hispanic, Latino, or Spanish origin?** (Mark (X) ONE box)

____ **No,** not of Hispanic, Latino, or Spanish Origin

____ Yes, Mexican, Mexican Am., Chicano

____ Yes, Puerto Rican

____ Yes, Cuban

____ Yes, another Hispanic, Latino or Spanish Origin – *Print origin, for example, Argentinean, Colombian, Dominican, Nicaraguan, Salvadoran, Spaniard, and so on:* _____

5. **What is your race?** (Mark (X) one or more boxes).

____ White

____ Black or African Am.

____ American Indian or Alaska Native – *Print name of enrolled or principal tribe:*_____

____ Asian Indian ____ Japanese ____ Native Hawaiian ____ Chinese

____ Korean ____ Guamanian ____ Filipino ____ Vietnamese

____ Samoan or Chamorro ____ Other Asian- *Print race, for example, Hmong, Laotian, Thai, Pakistani, Cambodian, and so on*: _____

____ Other Pacific Islander – *Print race, for example, Fijan, Tongan, and so on:*_____

____ Some other race – *Print race:* _____

6. Area of county where you currently live (**Not your address**): _____
   a. Zip code: _____
   b. How long have you lived at your current address: _____
   c. How long have you lived in Durham County? _____

7. Are you: ☐ Employed ☐ Unemployed ☐ Retired ☐ Full-Time Parent ☐ Student ☐Other

   If you are employed or retired:

d. What type of work do/did you do? _____
e. Where do/did you work? _____
    i. When did you begin work there? _____
f. Do/did you have any supervisory responsibilities? _____
    i. How many people do/did you supervise? _____

8. What is the single highest grade of high school or college you have completed? _____

School: _____ major/minor_____

9. Marital status: ☐ single ☐ married ☐ divorced ☐ separated ☐ widowed ☐ Other

10. Do you have children? ☐ Yes ☐ No. If yes, please continue:
Age and identified gender: _____ Employment: _____
Age and identified gender: _____ Employment: _____
Age and identified gender: _____ Employment: _____
Age and identified gender: _____ Employment: _____
Age and identified gender: _____ Employment: _____

11. If presently married or sharing a household with someone (other than a child), are they:
☐ Employed ☐ Unemployed ☐ Student ☐ Retired ☐ Full-Time Parent ☐ Other

If employed:
a. Where do they work? _____

b. What do they do? _____

c. How long have they worked there? _____

12. Have you or any close friends/relatives been employed in law enforcement? ☐ Yes ☐ No

If yes, what agency and position? _____

13. Have you ever been charged with a crime of theft or violence? ☐ Yes ☐ No. If yes,

When? _____ Where? _____

14. Have you ever been a defendant in a jury trial? ☐ Yes ☐ No

g. If yes, what was the offense? _____

15. Has a family member or friend been charged with a crime of theft or violence? ☐ Yes ☐ No

h. If yes, when? _____ where? _____
i. Offense? _____
j. What is your relationship to that person? _____

16. Have you ever been a witness in a criminal case? ☐ Yes ☐ No
    k. If yes, was it for the ☐ State? ☐ Defense?

17. Have you ever been sued or called as a witness in a civil case? ☐ Yes ☐ No

18. Have you ever served on a jury in State or Federal court? _____

    l. If so, when and where was the most recent time? _____
    m. Was it a civil or a criminal case? _____
    n. Were you the foreperson of any jury on which you served? _____
    o. Was the jury able to reach a verdict? **(Do Not State the Verdict)** ☐ Yes ☐ No

19. Have you or any member of your family been the victim of a crime? ☐ Yes ☐ No. If yes:

    p. Who was the victim? _____
    q. What was the crime? _____
    r. Was anyone arrested, charged, or convicted? _____

20. Have you ever served in the armed forces? ☐ Yes ☐ No

    s. If yes, list branch and highest rank: _____
    t. Dates and duties: _____

Print Your Full Name: _____ Date: _____

JUROR QUESTIONNAIRE

Please make sure your answers are legible.

1. Name: _____
(First) (Middle) (Last) (Maiden)

2. Age: _____

3. Gender that best describes you:
_____Female
_____Male
_____Non-binary
_____Other (write more if desired)

Pronouns:
____she/her/hers
____ he/him/his
____they/them/theirs
_____Other (write more if desired)

4. Are you of Hispanic, Latino, or Spanish origin? (Mark (X) ONE box)

____ **No,** not of Hispanic, Latino, or Spanish Origin

____ Yes, Mexican, Mexican Am., Chicano

____ Yes, Puerto Rican

____ Yes, Cuban

____ Yes, another Hispanic, Latino or Spanish Origin – *Print origin, for example, Argentinean, Colombian, Dominican, Nicaraguan, Salvadoran, Spaniard, and so on:*

_____

5. What is your race? (Mark (X) one or more boxes).

____ White

____ Black or African Am.

____ American Indian or Alaska Native – *Print name of enrolled or principal tribe:*_____

____ Asian Indian ____ Japanese ____ Native Hawaiian ____ Chinese ____ Korean

____ Guamanian ____ Filipino ____ Vietnamese ____ Samoan or Chamorro

____ Other Asian- *Print race, for example, Hmong, Laotian, Thai, Pakistani, Cambodian, and so on*: _____

____ Other Pacific Islander – *Print race, for example, Fijan, Tongan, and so on:*_____

____ Some other race – *Print race:* _____

6. Today's Date: _____

STATE OF NORTH CAROLINA COUNTY OF _____	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION FILE NOS. __ CRS _____

STATE OF NORTH CAROLINA	)	**DEFENDANT'S MOTION TO PROHIBIT IMPERMISSIBLY-MOTIVATED PEREMPTORY STRIKES AND TO CONSIDER HISTORICAL EVIDENCE OF JURY DISCRIMINATION**
	)	
	)	
v.	)	
	)	
_____	)	

NOW COMES the Defendant, and respectfully moves the Court to prohibit the exercise of peremptory strikes motivated by race, gender, or any other impermissible motivation. Defendant makes this motion based on the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, §§ 1, 19, and 26 of the North Carolina Constitution, and *Batson v. Kentucky*, 476 U.S. 79 (1986); *Miller-El v. Cockrell* (*Miller-El I*), 537 U.S. 322 (2003); *Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231 (2005); *Snyder v. Louisiana*, 552 U.S. 472 (2008); *Foster v. Chatman*, 578 U.S. 488 (2016); *Flowers v. Mississippi,* 139 S.Ct. 2228 (2019); *State v. Cofield*, 320 N.C. 297, 357 S.E.2d 622 (1987) ("The people of North Carolina have declared that they will not tolerate the corruption of their juries by racism . . . and similar forms of irrational prejudice."); *State v. Hobbs*, 841 S.E.2d 492 (2020); and *State v. Clegg*, 867 S.E.2d 885 (N.C. 2022).

Defendant also moves that this Court consider the evidence outlined below regarding the history of jury discrimination in [_____ County and] the State of North Carolina.

In support of the motion, Defendant shows the following:

I. THIS COURT MUST APPLY THE PRECEDENTS OF THE NORTH CAROLINA AND UNITED STATES SUPREME COURTS IN ADJUDICATING THE CONSTITUTIONALITY OF ANY CHALLENGED PEREMPTORY STRIKES.

Defendant intends to object to the use of any peremptory challenges exercised in violation of the Constitutions of the United States or of the State of North Carolina, or otherwise in violation of the law, and asks this Court to disallow any impermissible strikes. The United States and North Carolina Constitutions prohibit the consideration of race in exercising peremptory strikes. *Batson v. Kentucky*, 476 U.S. 79 (1986); *State v. Cofield*, 320 N.C. 297, 357 S.E.2d 622 (1987). The state and federal constitutions likewise prohibit discrimination on the basis of gender in the exercise of peremptory strikes. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); N.C. Const. Art 1, Sec. 26.

Batson identified a trifecta of harm caused by race discrimination in jury selection. First, the person being prosecuted is denied "the protection that a trial by jury is intended to serve." 476 U.S. at 87. Second, "by denying a person participation in jury service on account of [] race, the State unconstitutionally discriminate[s] against the excluded juror." *Id*. Third, "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." *Id*.

For people charged with crimes and facing trial, the protections of *Batson* are critical to securing a fair trial. Social science research indicates that diverse juries are significantly more able to assess reliability and credibility, avoid presumptions of guilt, and fairly judge a criminally accused, while non-diverse juries tend to spend less time deliberating, make more errors, and consider fewer perspectives. *See State v. Clegg*, 867 S.E.2d at 917, Earls, J., concurring (research confirms "what seems obvious from reflection: more diverse juries result in fairer trials"); *see also* Jerry Kang et al., *Implicit*

Bias in the Courtroom, 59 UCLA L. REV. 1124, 1180 (2012) (discussing Samuel R. Sommers, *On Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Delib*eration, 90 J. PERSONALITY & SOC. PSYCHOL. 597 (2006)) (diverse juries focus more on the evidence, make fewer inaccurate statements, and make fewer uncorrected statements).

Turning to the substantive law, the North Carolina Supreme Court has explained the *Batson* framework this way:

> [I]n step one (and in subsequent rebuttal), the defendant places his reasoning on the scale; in step two (and in subsequent rebuttal), the State places its counter-reasoning on the scale; in step three, the court carefully weighs all of the reasoning from both sides to ultimately decide whether it was more likely than not that the challenge was improperly motivated.

Clegg, 867 S.E.2d at 903 (cleaned up).

Defendant draws the Court's attention to the following principles enunciated by the Supreme Courts of North Carolina and the United States:

- **A single race-based strike violates the Constitution**. *Flowers*, 139 S.Ct. at 2244 ("The Constitution forbids striking even a single prospective juror for a discriminator reason), *citing Foster*, 578 U.S. at 499; *State v. Clegg*, 867 S.E.2d at 903 (citing *Snyder*).

- **The Defendant's prima facie burden is light**. "[A] defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." *Hobbs*, 841 S.E.2d at 497, *quoting Johnson v. California*, 545 U.S. 162, 170 (2005); *State v. Hoffman*, 348 N.C. 548, 553 (2008) ("Step one of the *Batson* analysis . . . is not intended to be a high hurdle for defendants to cross."). "The burden on a defendant at this stage is one of production, not persuasion… At the stage of presenting a prima facie case, the defendant is not required to persuade the court conclusively that discrimination has occurred." *Hobbs*, 841 S.E.2d at 498.

- **At the prima facie stage, the court must consider all relevant circumstances, including history.** "A defendant may rely on 'all relevant circumstances' to raise an inference of purposeful discrimination." *Hobbs,*

841 S.E.2d at 497, *quoting Miller-El II*, 545 U.S. at 240. Specifically, in determining whether the prima facie case has been met, "a court must consider historical evidence of discrimination in a jurisdiction." *Hobbs*, 841 S.E.2d at 498.

- **The ultimate question under *Batson* is not whether race was the sole factor for the *s*trike, but whether race was significant in the decision**. The question before the Court is whether race is "significant in determining who was challenged and who was not." *Miller-El II, 54*5 U.S. at 252 (2005). Put another way, "the ultimate inquiry is whether the State was motivated in substantial part by discriminatory intent." *Hobbs*, 841 S.E.2d at 499, quoting *Flowers*, 139 S.Ct. at 2244 and *Foster*, 578 U.S. at 512. A defendant need *not* show race was the *sole* factor for the strike. *State v. Waring*, 364 N.C. 443, 480 (2010); *Hobbs* 841 S.E.2d at 513, n. 2.

- **The burden on a *Batson* claimant is preponderance of the evidence, i.e. whether it is *more likely than not* race was a significant factor in the strike decision.** *Johnson*, 545 U.S. at 170; *Clegg*, 867 S.E.2d at 903, *citing Hobbs*, 374 N.C. at 351.

- **A finding of a *Batson* violation is not a definitive determination that the prosecutor is racist or even that the prosecutor discriminated.** Ultimately, "the finding of a *Batson* violation does not amount to an absolutely certain determination that a peremptory strike was the product of racial discrimination. Rather, the *Batson pr*ocess represents our best, if imperfect, attempt at drawing a line in the sand establishing the level of risk of racial discrimination that we deem acceptable or unacceptable." *Clegg*, 867 S.E.2d at 911.

- **Evidence supporting the prima facie case must also be considered at Step Three.** *Clegg*, 867 S.E.2d at 912.

- **Establishing a *Batson* violation does not require direct evidence of discrimination.** *See Batson*, 476 U.S. at 93 (noting that "circumstantial evidence," including "disproportionate impact" may establish a constitutional violation); *Flowers*, 139 S.Ct. at 2243 ("Our precedents allow criminal defendants raising Batson challenges to present a variety of evidence to support a claim that a prosecutor's peremptory strikes were made on the basis of race.") "[A] defendant may present a wide variety of direct and circumstantial evidence in supporting a *Batson* challenge." *Clegg*, 867 S.E.2d at 908 (citing *Flowers*, 139 S.Ct. at 2243).

- **Establishing a *Batson* violation does not require "smoking gun evidence of discrimination.** *Clegg*, 867 S.E.2d at 908.

- **Disparate treatment of similarly-situated jurors is evidence of racial bias**. When prospective jurors of another race provided similar answers

but were not the subject of a peremptory challenge, this is evidence the strike is motivated by race. *See Hobbs*, 841 S.E.2d at 502 (trial court erred in failing to "examin[e] the comparisons in the white and black potential jurors' answers."); *Flowers*, 139 S.Ct. at 2248 ("comparison of [prospective jurors who were struck and not struck] can suggest that the prosecutor's proffered explanations for striking black prospective jurors were a pretext for discrimination."); *Miller-El II*, 545 U.S. at 241 ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination."); *see also Clegg*, 867 S.E.2d at 911 ("disparate questioning and exclusion of [a potential Black juror] compared to substantially comparable white potential jurors who were questioned and accepted by the prosecutor," should have been considered by the trial court and failure to do so was erroneous).

- **The Defendant does not have the burden of proving an exact comparison**. When comparing white venire members who were passed with jurors of color sought to be struck, the Court must not insist the prospective jurors are identical in all respects. Indeed, a "per se rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters." *Miller-El II*, 545 U.S. at 247 n. 6; *see also Flowers* 139 S.Ct. at 2249 ("a defendant is not required to identify an identical white juror for the side-by-side comparison to be suggestive of discriminatory intent.").

- **Disparate treatment of Black and white potential jurors with regard to a single trait is probative of discrimination**. *See Flowers*, 139 S.Ct. at 2249 (comparing jurors who knew individuals involved in the case); *Foster*, 578 U.S. at 505-506, 512 (comparing different jurors with regard to marital status, age, and employment history); *Snyder*, 552 U.S. at 483 (comparing "relevant jurors" with a "shared characteristic, i.e., concern about serving on the jury due to conflicting obligations"); *Clegg*, 867 S.E.2d at 909-910 (disparate treatment analysis limited to single trait of work distractions).

- **A prosecutor's misrepresentation of the record is evidence of racial bias.** When prosecutors justify their strikes with statements about black prospective jurors that are factually inaccurate, this is evidence of pretext. *See Flowers*, 139 S.Ct. at 2243, 2250 ("When a prosecutor misstates the record in explaining a strike, that misstatement can be another clue showing discriminatory intent…. The State's pattern of factually inaccurate statements about black prospective jurors suggests that the State intended to keep black prospective jurors off the jury."); *Foster*, 578 U.S. at 512 (discounting prosecutor's explanation where the "trial transcripts clearly indicate the contrary"). Furthermore, a prosecutor's misrepresentation of the record need not be intentional. In *Clegg*, the Court found the

prosecutor's reasoning during the initial *Batson* inquiry was plainly contradicted by the record and held that "[w]hether the initial misstatement was the product of accidental 'misremembering,' as the trial court found, or intentional 'mischaracterization' does not change the fact that the proffered reason was plainly unsupported by the record." 867 S.E.2d at 906.

- **Differential questioning is evidence of racial bias**. When jurors of different races are asked significantly more questions or different questions, this is evidence the strike is motivated by race. *See Miller-El II*, 545 U.S. at 255 ("contrasting *voir dire* questions" posed respectively to black and white prospective jurors "indicate that the State was trying to avoid black jurors"). In finding a *Batson* violation, the court in *Clegg* noted the prosecutor asked fifteen potential jurors about their ability to focus and singled out only one, a Black woman, for further questioning while failing to ask any further questions of another potential juror, a white man, despite his answers indicating his professional obligations might affect his ability to focus. *Clegg*, 867 S.E.2d at 910.

- **An absence of questioning is evidence of racial bias**. When the juror is not questioned on the area of alleged concern, this is evidence the strike is motivated by race. *See Miller-El II*, 545 U.S. at 246 ("failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination") (internal citation omitted).

- **Overly-broad justifications referencing a juror's demeanor or body language should be viewed with "significant suspicion."** *Clegg*, 867 S.E.2d 907; *see also Snyder*, 552 U.S. at 477 (refusing to credit uncorroborated demeanor-based justification); *Alexander*, 274 N.C. App. at 44 (recognizing that demeanor-based justifications "are not immune from scrutiny or implicit bias" and holding "that trial court erred in failing to address Defendant's argument that prosecutor's justifications were based on "racial stereotypes.").

- **Evidence that prosecutors were trained in how to evade the strictures of *Batson* is evidence of racial bias.** *See Miller-El II*, 545 U.S. at 264 (considering evidence of a jury selection manual outlining reasons for excluding minorities from jury service); *Clegg*, 867 S.E.2d at 907 (in explaining evidence to be considered in a *Batson* analysis, noting that "as recently as 1995, prosecutorial training sessions conducted by the North Carolina Conference of District Attorneys included a 'cheat sheet' titled '*Batson* Justifications: Articulating Juror Negatives.'"); *see also Foster v. Chatman*, Brief of Amici Curiae of Joseph diGenova, et al., available at http://www.scotusblog.com/case-files/cases/foster-v-humphrey/ at 8 (describing North Carolina prosecution seminar in 1994 that "train[ed] their prosecutors to deceive judges as to their true motivations").

- **Historical evidence that prosecutors discriminated in other cases is evidence of racial bias.** In *Hobbs*, the North Carolina Supreme Court held the trial court had erred at *Batson*'s third step when it failed to weigh "the historical evidence that Mr. Hobbs brought to the trial court's attention." 841 S.E.2d at 502; *see also Flowers,* 139 S.Ct. at 2245 (considering "the history of the prosecutor's peremptory strikes in Flowers' first four trials"); *Miller-El II*, 545 U.S. at 263-64 (considering policy of district attorney's office of systematically excluding black from juries, which was in place "for decades leading up to the time this case was tried"); *Clegg*, 867 S.E.2d at 907 (Recognizing the "well-established national history of prosecutors employing peremptory challenges as tools of covert racial discrimination" and considering "this historical context" in rejecting prosecutor's justification for strike of Black juror.)

- **The peremptory challenges exercised by the defendant are not relevant to the question of whether the State discriminated.** *Hobbs,* 841 S.E.2d at 502 (finding the trial court erred in considering the pattern of defense strikes because "the peremptory challenges exercised by the defendant are not relevant to the State's motivations").

- **The Defendant does not bear the burden of disproving each and every reason proffered by the prosecutor**. In *Foster*, the petitioner challenged the prosecution's strikes of two African Americans. As to both potential jurors, the prosecution offered a "laundry list" of reasons why these two African Americans were objectionable. 578 U.S. at 502. The Court did not analyze all of the reasons proffered by the State. Rather, after unmasking and debunking four of eleven reasons for the strike of one venire member and five of eight reasons for the other strike, the Court concluded that the strikes of these jurors were "motivated in substantial part by discriminatory intent." *Id*. at 1754, quoting *Snyder* v. *Louisiana*, 552 U.S. at 485. *See also State v. Montgomery*, 331 N.C. 559, 576-77 (1992) ("To allow an ostensibly valid reason for excusing a potential juror to 'cancel out' a patently discriminatory and unconstitutional reason would render Article 1, Section 26 [of the North Carolina Constitution] an empty vessel.") (Frye, J., Exum, C.J., and Whichard, J. concurring in the result).

Defendant asks this Court to apply these principles in adjudicating any objections under *Batson*,[1] and thereby prohibit race discrimination in the selection of Defendant's jury.

[1] The same principles apply to challenges to strikes impermissibly based on gender, religion, and national origin. *J.E.B.*, 511 U.S. at 144-45; N.C. Const., Art. I, § 26.

II. THIS COURT MUST CONSIDER HISTORICAL EVIDENCE OF JURY DISCRIMINATION.

In *Hobbs*, the North Carolina Supreme Court held "a court *must* consider historical evidence of discrimination in a jurisdiction" when determining whether defendant has established a prima facie case of discrimination. *Hobbs,* 841 S.E.2d at 498 (emphasis added). The *Hobbs* court further held that the trial court had erred in failing to consider, at *Batson*'s third step, "the historical evidence that Mr. Hobbs brought to the trial court's attention." *Id.* at 502. More recently, in holding the trial court had properly rejected the prosecutor's generalized rationale for striking a prospective Black juror, the North Carolina Supreme Court held in *Clegg* that "[w]hen placed within our well-established national history of prosecutors employing peremptory challenges as tools of covert racial discrimination, this historical [evidence] cautions courts against accepting overly broad demeanor-based justification without further inquiry or corroboration." *Clegg*, 867 S.E.2d at 907. The *Clegg* court went on to say "the trial court acted properly in considering defendant's statistical evidence regarding the disproportionate use of peremptory strikes against Black potential jurors in both this case and statewide." *Id*.

Therefore, Defendant requests that the court consider the following studies showing racial disparities in jury selection in North Carolina criminal cases, including capital cases. These studies include:

- A 2010 Michigan State University (MSU) study of North Carolina capital cases from 1990-2010. The MSU researchers analyzed more than 7,400 peremptory strikes made by North Carolina prosecutors in 173 capital cases tried between 1990 and 2010. The study showed prosecutors struck 53 percent of eligible African-American jurors and only 26 percent of all other eligible jurors in those capital proceedings. The researchers found that the probability of this disparity occurring in a race-neutral jury selection was less than one in 10 trillion. After adjusting for non-racial characteristics that might reasonably affect strike decisions, for example, reluctance to impose

the death penalty, researchers found prosecutors struck black jurors at 2.5 times the rate they struck all other jurors. The study findings are described in Grosso, Catherine and O'Brien, Barbara, *A Stubborn Legacy: the Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*, 97 Iowa L. Rev. 1531 (2012), a copy of which is attached to this notice as Exhibit A.

- A 2017 study conducted by Wake Forest University School of Law professors found that in North Carolina felony trials in 2011– which included data on nearly 30,000 potential jurors in just over 1,300 cases – prosecutors struck non-white potential jurors at a disproportionate rate. In these cases, prosecutors struck non-white jurors about twice as often as they excluded white jurors. The Wake Forest findings are discussed in Wright, Ronald F. and Chavis, Kami, Parks, Gregory Scott, *The Jury Sunshine Project: Jury Selection Data as a Political Issue* (June 28, 2017), a copy of which is attached as Exhibit B.
- A 1999 study of the use of peremptory strikes in Durham County showed that African Americans were much more likely to be excused by the State. Approximately 70 percent of African Americans were dismissed by the State, while less than 20 percent of whites were struck by the prosecution. The Durham findings are detailed in Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County,* 23 LAW & HUM. BEHAV. 695, 698-99 (1999), a copy of which is attached as Exhibit C.

Add any other history regarding this prosecutor or your county, for example prior sustained *Batson* objections, county-specific MSU or WFU data, or a pattern of prior cases with disparate strike rates. Contact CDPL for more information on your county or prosecutorial district.

Respectfully submitted, this the ____ day of _____.

_____
COUNSEL FOR DEFENDANT

Certificate of Service

I hereby certify that Defendant's Motion to Prohibit Peremptory Strikes Based on Race has been duly served by first class mail upon _____, Office of District Attorney, _____, by placing a copy in an envelope addressed as stated above and by placing the envelope in a depository maintained by the United States Postal Service.

This the _____ day of _____.

_____
COUNSEL FOR DEFENDANT

STATE OF NORTH CAROLINA COUNTY OF _____	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION File No. __ CRS ____
STATE OF NORTH CAROLINA)) v.)) _____)	**DEFENDANT'S MOTION FOR DISCOVERY OF INFORMATION PERTAINING TO THE LITIGATION OF *BATSON* OBJECTIONS**

NOW COMES the Defendant, and respectfully moves the Court for an order directing the State to provide to the defense information concerning any policy or training, past or present, written or informal, regarding the use of peremptory strikes in jury selection, and notice of any prior findings that this prosecutor struck a juror based on race, ethnicity or gender. This information is required under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, §§ 1, 19, and 26 of the North Carolina Constitution. *See Batson v. Kentucky*, 476 U.S. 79 (1986); *J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127 (1994); *Miller-El v. Cockrell* (*Miller-El I*), 537 U.S. 322 (2003); *Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231 (2005); *Snyder v. Louisiana*, 552 U.S. 472 (2008); *Foster v. Chatman*, 578 U.S. 488 (2016); *Flowers v. Mississippi,* 139 S.Ct. 2228 (2019); *State v. Hobbs*, 374 N.C. 345 (2020); *State v. Clegg*, 867 S.E.2d 885 (2022); and *State v. Cofield*, 320 N.C. 297, 302, 357 S.E.2d 622, 625 (1987) ("The people of North Carolina have declared that they will not tolerate the corruption of their juries by racism . . . and similar forms of irrational prejudice."). In support of this motion, Defendant states the following:

Grounds for Motion

Under the Supreme Court's decision in *Batson*, courts must consider a history of prosecutorial strikes based on race, ethnicity, or gender. The North Carolina Supreme Court has recognized a "well-established national history of prosecutors employing peremptory challenges as tools of covert racial discrimination." *Clegg*, 867 S.E.2d at 907. In *Hobbs*, 374 N.C. at 358, the North Carolina Supreme Court held the trial court erred in not "consider[ing] historical evidence of the State's discriminatory peremptory strikes from past trials in the jurisdiction." *See also Flowers,* 139 S.Ct. at 2245 (considering "the history of the prosecutor's peremptory strikes in Flowers' first four trials"); *Miller-El II*, 545 U.S. at 263-64 (considering policy of district attorney's office of systematically excluding black from juries, which was in place "for decades leading up to the time this case was tried"). This history need not be specific to an individual prosecutor in a given case. *Clegg*, 867 S.E.2d at 907 ("the trial court acted properly in considering defendant's statistical evidence regarding the disproportionate use of peremptory strikes against Black potential jurors in both this case and statewide . . . such data is included among the many types of evidence that a defendant may present, and a court may consider, within a *Batson* challenge) (citing *Flowers*, 139 S.Ct. at 2243).

Evidence that training materials providing instruction on how to evade the strictures of *Batson* are available to the prosecution is unquestionably relevant to the question of whether a strike is motivated by race. In *Miller-El II*, the Court considered the following training evidence in reaching its conclusion that the Texas prosecutor had violated *Batson*:

> A manual entitled 'Jury Selection in a Criminal Case' [sometimes known as the Sparling Manual] was distributed to prosecutors. It contained an

> article authored by a former prosecutor (and later a judge) under the direction of his superiors in the District Attorney's Office, outlining the reasoning for excluding minorities from jury service. Although the manual was written in 1968, it remained in circulation until 1976, if not later, and was available at least to one of the prosecutors in Miller–El's trial.

545 U.S. at 264 (bracket in original, citation omitted).

It is notable the petitioner in *Miller-El II* did not present evidence that the attorneys who personally prosecuted his case actually studied the training manual at issue. Rather, the Supreme Court focused on the fact that the training materials were "available." Additionally, in *Miller-El II*, the discriminatory training materials predated the defendant's trial by approximately a decade. Nonetheless, the *Miller-El II* Court concluded,

> If anything more is needed for an undeniable explanation of what was going on, history supplies it. The prosecutors took their cues from a 20-year-old manual of tips on jury selection.

Id. at 266.

It is significant also that we know that North Carolina prosecutors have been trained in how to justify strikes of African Americans. At a 1994 seminar called *Top Gun*, prosecutors were given a list of race-neutral reasons to cite when *Batson* challenges were raised. This list, or "cheat sheet," titled "*Batson* Justifications," included "attitude," "body language," and a "lack of eye contact with Prosecutor" — the types of justifications that prosecutors routinely give for striking black jurors in North Carolina. The Supreme Court of North Carolina recently acknowledged evidence that that prosecutors in North Carolina attended the "Top Gun" training which taught them how to articulate facially-neutral reasons for striking African American jurors and then used those exact reasons to justify striking a Black juror. *State v. Robinson*, 375 N.C. 173,

181, 846 S.E.2d 711, 717 (2020). In *State v. Augustine*, 375 N.C. 376, 847 S.E.2d 729, 732 (2020), the Court referred to the *Top Gun* handout as a "cheat sheet" for use in responding to *Batson* objections. In holding historical context must be considered when conducting a *Batson* analysis, the North Carolina Supreme Court in *Clegg* noted that "as recently as 1995, prosecutorial training sessions conducted by the North Carolina Conference of District Attorneys included a 'cheat sheet' titled '*Batson* Justifications; Articulating Juror Negatives.'" *Clegg*, 867 S.E.2d at 907.

A group of prominent former prosecutors filed a friend-of-the-court brief in *Foster v. Chatman* and described the *Top Gun* cheat sheet as an effort to "train their prosecutors to deceive judges as to their true motivations." Brief of Amici Curiae of Joseph diGenova, et al., available at http://www.scotusblog.com/case-files/cases/foster-v-humphrey/ at 8. "[T]he *Batson* process represents our best, if imperfect, attempt at drawing a line in the sand establishing the level of risk of racial discrimination that we deem acceptable or unacceptable." *Clegg*, 867 S.E.2d at 911. Unfortunately, as the existence of the *Top Gun* handout demonstrates, "the use of race- and gender-based stereotypes in the jury-selection process seems better organized and more systematized than ever before," *Miller-El II*, 545 U.S. at 270 (Breyer, J., concurring), creating an unacceptable risk that "even a single prospective juror [was struck] for a discriminatory purpose." *Clegg*, 867 S.E.2d at 903 (internal quotations omitted).

Wherefore, Defendant asks the Court to enter an order directing the prosecutor to turn over to the defense all information pertaining to any policy or training, past or present, written or informal, regarding the use of peremptory strikes in jury selection, and

any prior findings by any court that the prosecutor struck a juror based on his or her race, ethnicity, or gender.

Respectfully submitted, this the ____ day of _____.

_____
COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that Defendant's Motion for Discovery of Information Pertaining to Jury Selection Training has been duly served by first class mail upon _____, Office of District Attorney, _____, by placing a copy in an envelope addressed as stated above and by placing the envelope in a depository maintained by the United States Postal Service.

This the _____ day of _____.

_____
COUNSEL FOR DEFENDANT

STATE OF NORTH CAROLINA COUNTY OF _____	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION FILE NOS. __ CRS _____
STATE OF NORTH CAROLINA))) v.)) _____)	**DEFENDANT'S MOTION TO EXERCISE STRIKES OUTSIDE PRESENCE OF POTENTIAL JURORS**

NOW COMES the Defendant, and respectfully moves the Court to direct the parties to exercise peremptory strikes outside the presence of potential jurors so that, in the event the Court determines that either party has attempted to exercise an unconstitutional peremptory strike, the Court can seat as a juror the citizen subject to discrimination.

Defendant makes this motion based on the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, §§ 1, 19, and 26 of the North Carolina Constitution, and *Batson v. Kentucky*, 476 U.S. 79 (1986); *Miller-El v. Cockrell* (*Miller-El I*), 537 U.S. 322 (2003); *Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231 (2005); *Snyder v. Louisiana*, 552 U.S. 472 (2008); *Foster v. Chatman*, 578 U.S. 488 (2016); *Flowers v. Mississippi,* 139 S.Ct. 2228 (2019); *State v. Cofield*, 320 N.C. 297, 357 S.E.2d 622 (1987) ("The people of North Carolina have declared that they will not tolerate the corruption of their juries by racism . . . and similar forms of irrational prejudice."); *State v. Hobbs*, 841 S.E.2d 492 (2020); and *State v. Clegg*, 867 S.E.2d 885 (N.C. 2022). In support of the motion, Defendant shows the following:

The United States and North Carolina Constitutions prohibit the consideration of race in exercising peremptory strikes. *Batson v. Kentucky*, 476 U.S. 79 (1986); *State v.*

Cofield, 320 N.C. 297, 357 S.E.2d 622 (1987). The state and federal constitutions likewise prohibit discrimination on the basis of gender, religion, and national origin in the exercise of peremptory strikes. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); N.C. Const. Art 1, Sec. 26.

Batson identified three distinct ways that race discrimination in jury selection causes harm. First, defendants facing trial are harmed when they are denied "the protection that a trial by jury is intended to serve." 476 U.S. at 87. Second, citizens called for jury duty and subjected to discrimination are harmed. In "denying a person participation in jury service on account of [] race, the State unconstitutionally discriminate[s] against the excluded juror." *Id*. Third, the legitimacy of the entire criminal punishment system is damaged. "The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." *Id*. Specifically, "selection procedures that purposefully exclude black persons from juries undermine public confidence in our system of justice." *Id*.

The Supreme Court of North Carolina has likewise described the three-part harm of jury selection discrimination. In *Cofield*, the Court observed that "the judicial system of a democratic society must operate evenhandedly . . . [and] be perceived to operate evenhandedly." 320 N.C. at 302. Discrimination in the selection of jurors "deprives both an aggrieved defendant and other members of his race of the perception that he has received equal treatment at the bar of justice." *Id*.

In the event this Court grants a *Batson* objection, the Court should seat the juror because this remedy for the constitutional violation vindicates both of the injured parties: the Defendant and the struck juror. In *State v. McCollum*, 334 N.C. 208 (1993), the trial

judge sustained the Defendant's objections under *Batson*. Defense counsel asked that the three citizens subject to the prosecutor's unconstitutional strikes be seated on the jury. Instead, the trial judge struck the venire and restarted jury selection. 334 N.C. at 235.

On appeal, the Defendant argued that the trial judge had erred in declining to seat as jurors the citizens subject to unconstitutional strikes. *Id*. The Supreme Court rejected the defendant's argument and concluded that the trial judge had not erred in striking the venire and starting jury selection anew. *Id*. at 236.

Significantly, in *McCollum*, the venire was present when the State exercised its strikes. In addressing the proper remedy, the Supreme Court noted that both the right of the defendant to a fair trial and the struck juror's right not to face discrimination had been violated. *Id*. at 235. The Court also noted that the Defendant had standing to raise this remedy question on behalf of the citizen who faced discrimination in jury selection. *Id*. The decisive consideration for the Court was this:

> To ask jurors who have been improperly excluded from a jury because of their race to then return to the jury to remain unaffected by that recent discrimination, and to render an impartial verdict without prejudice toward the State or the defendant, would be to ask them to discharge a duty which would require near superhuman effort and which would be extremely difficult for a person possessed of any sensitivity whatsoever to carry out successfully.

Id. at 236. The Court concluded that, in view of the extreme difficulty a citizen would face in attempting to put aside an experience of discrimination, the "simpler" and "fairer" approach was to restart jury selection with a "new panel of prospective jurors who cannot have been affected by any prior *Batson* violation." *Id*.

There is no need to trade off a citizen's right to serve on a jury regardless of race and the right to a fair trial. This Court can simply direct the parties to exercise

peremptory strikes outside the presence of the venire. In this way, if a *Batson* objection is raised, and found to be meritorious, the improperly struck venire member can be seated. Importantly, conducting strikes outside the presence of the jurors will ensure that this Court can protect the right to a fair trial without vitiating the right of citizens of all races to serve as jurors.

WHEREFORE, Defendant asks the Court to direct the parties to exercise peremptory strikes outside the presence of potential jurors.

Respectfully submitted, this the ____ day of _____.

_____
COUNSEL FOR DEFENDANT

Certificate of Service

I hereby certify that Defendant's Motion to Prohibit Peremptory Strikes Based on Race has been duly served by first class mail upon _____, Office of District Attorney, _____, by placing a copy in an envelope addressed as stated above and by placing the envelope in a depository maintained by the United States Postal Service.

This the _____ day of _____.

_____
COUNSEL FOR DEFENDANT

STATE OF NORTH CAROLINA
COUNTY OF _____

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
File No. __ CRS ____

STATE OF NORTH CAROLINA)
)
v.)
)
_____)

DEFENDANT'S MOTION TO PRESERVE ALL NOTES, QUESTIONNAIRES, AND OTHER DOCUMENTS FROM JURY SELECTION

COMES NOW the Defendant, by and through counsel, pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Section 26 of the North Carolina Constitution and respectfully moves the Court to enter an order directing that all notes, questionnaires, and other documents collected in preparation for voir dire or used during jury selection in this case be preserved. Defendant makes this motion based on the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, §§ 1, 19, and 26 of the North Carolina Constitution, and *Batson v. Kentucky*, 476 U.S. 79 (1986); *Miller-El v. Cockrell* (*Miller-El I*), 537 U.S. 322 (2003); *Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231 (2005); *Snyder v. Louisiana*, 552 U.S. 472 (2008); *Foster v. Chatman*, 578 U.S. 488 (2016); and *State v. Cofield*, 320 N.C. 297, 357 S.E.2d 622 (1987). In support of this motion, the Defendant shows unto the Court the following.

Grounds for Motion

Defendant has a right to a jury selected without regard to race. *Batson v. Kentucky*, 476 U.S. 79 (1986); *State v. Cofield*, 320 N.C. 297, 357 S.E.2d 622 (1987). If convicted, Defendant is entitled to appeal. *See* N.C. Gen. Stat. § 15A-1444. In order to vindicate Defendant's constitutional rights on appeal, Defendant must establish a full record of the constitutional violation. *See* N.C. App. R. 9. Indeed, it has long been established that is it the duty of the appellant to see that the record is properly preserved.

State v. Atkinson, 275 N.C. 288 (1969). Where a defendant does not include in the record any matter tending to support the grounds for objection, the defendant has failed to carry the burden of showing error. *State v. Duncan*, 270 N.C. 241 (1967). Assignments of error based on matters outside the record are improper and must be disregarded on appeal. *State v. Hilton*, 271 N.C. 456 (1967).

With regard to ensuring a proper record for any alleged violations of *Batson*, the following materials are unquestionably relevant to any inquiry in the appellate division concerning whether race was significant in the strike decision:

- **Jury questionnaires**. The jury questionnaires, completed by each juror questioned during voir dire, are the best record of juror race. *See State v. Payne*, 327 N.C. 194, 199, 394 S.E.2d 158, 160 (1990) (inappropriate to have court reporter note race of potential jurors; an individual's race "is not always easily discernible, and the potential for error by a court reporter acting alone is great"). In addition to including self-identification of race by each prospective juror, the questionnaires also include basic demographic information – age, gender, marital status, employment, and so on – pertinent to determining whether or not race was a factor in jury selection. *See Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231, 241 (2005) ("side-by-side comparisons" of black venire panelists who were struck and white panelists allowed to serve constitutes "powerful" evidence "tending to prove purposeful discrimination"); *Snyder v. Louisiana*, 552 U.S. 472, 483-84 (2008) (reversing conviction and granting *Batson* relief based on the "significant" and "particularly striking" similarities between a black venire member excused by the prosecution and two passed white venire members).

- **Prosecution notes**. The Supreme Court has made clear that the contents of the prosecution's file, including lists of jurors coded by race, highlighted racial designations, and notes on particular jurors are relevant to the *Batson* inquiry. *See Foster*, 136 S. Ct. at 1747-48 (considering prosecutor notes as evidence of discrimination); *id*. at 1749-50 (using prosecution notes to rebut prosecution's proffered explanation for strike); *id*. at 1753 (prosecutor's handwritten note "fortifies our conclusion that [the proffered reason] was pretextual"); *id*. at 1755 ("The contents of the prosecution's file, however, plainly belie the State's claim that it exercised its strikes in a 'color-blind' manner. The sheer number of references to race in that file is arresting.") (record citation omitted).

- **Training materials**. Evidence that prosecutors were trained in how to evade the strictures of *Batson* is relevant to the determination of whether race was significant in the strike decision. *See Miller-El II*, 545 U.S. at 264 (considering evidence of a jury selection manual outlining reasons for

excluding minorities from jury service); *State v. Robinson*, 375 N.C. 173, 181, 846 S.E.2d 711, 717 (2020) (citing evidence that prosecutors in North Carolina attended a "Top Gun" training which taught them how to articulate facially-neutral reasons for striking African American jurors and then used those exact reasons to justify striking a Black juror); *State v. Augustine*, 375 N.C. 376, 847 S.E.2d 729, 732 (2020) (noting evidence of the prosecutor's use of a "cheat sheet" to respond to *Batson* objections); State v. Clegg, 867 S.E.2d 885, 907 (N.C. 2022) (noting 1995 prosecutorial training sessions included a 'cheat sheet' titled '*Batson* Justifications; Articulating Juror Negatives'"). *See also Foster v. Chatman*, Brief of Amici Curiae of Joseph diGenova, et al., available at http://www.scotusblog.com/case-files/cases/foster-v-humphrey/ at 8 (describing North Carolina prosecution seminar in 1994 that "train[ed] their prosecutors to deceive judges as to their true motivations").

- **Criminal record checks**. To the extent the State bases strike decisions on the criminal records of prospective jurors or their family members, evidence that the prosecutor selectively reviewed the criminal records of certain racial groups is relevant to the *Batson* inquiry. *See Kandies v. Polk*, 385 F.3d 457, 475 (4th Circ. 2004) (denying relief on *Batson* claim and noting petitioner could have met his burden by establishing that the prosecution only discussed prospective African-American jurors with the local police department).[1]

Accordingly, Defendant asks the Court to direct the prosecution to preserve all of its jury questionnaires, notes, training materials, criminal record checks, and any other documents collected in preparation for voir dire or used during jury selection in this case.

Respectfully submitted, this the ____ day of _____.

_____
COUNSEL FOR DEFENDANT

[1] The United States Supreme Court subsequently granted the petitioner's request for a writ of *certiorari*, vacated the judgment and remanded the case for further consideration in light of *Miller-El II*. *Kandies v. Polk*, 545 U.S. 1137 (2005).

CERTIFICATE OF SERVICE

I hereby certify that Defendant's Motion to Preserve has been duly served by first class mail upon _____, Office of District Attorney, _____, by placing a copy in an envelope addressed as stated above and by placing the envelope in a depository maintained by the United States Postal Service.

This the _____ day of _____.

_____
COUNSEL FOR DEFENDANT

1-1-2012

A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials

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A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-*Batson* North Carolina Capital Trials*

*Catherine M. Grosso & Barbara O'Brien***

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** Catherine Grosso and Barbara O'Brien are associate professors at the Michigan State University College of Law.

I. INTRODUCTION

Among those who laud its mission, it seems that the only people not disappointed in *Batson* are those who never expected it to work in the first place. Scholars, judges, and practitioners have criticized the decision for its failure to curb the role of racial stereotypes in jury selection.[1] Likewise, previous research in North Carolina has suggested both that race continues to play a role in jury selection and that courts are reluctant to enforce *Batson* rigorously.[2] Recently, however, the North Carolina General Assembly passed legislation aimed at curing this defect by providing trial courts a unique opportunity to consider the role of race in peremptory challenges from a different angle.

The North Carolina Racial Justice Act of 2009 ("RJA") created a state claim for relief for defendants currently on death row who can show that race was a significant factor in the exercise of peremptory challenges in their cases.[3] A defendant who makes such a showing is entitled to have a death sentence reduced to life without parole.[4] The RJA expressly deems a broad range of evidence relevant by allowing claimants to prove their cases using "statistical evidence or other evidence, including, but not limited to, sworn testimony of attorneys, prosecutors, law enforcement officers, jurors, or other members of the criminal justice system or both."[5] This Article presents the results of a study undertaken in order to evaluate the potential for statistical evidence to support claims under this part of the RJA.

In particular, we examined how prosecutors exercised peremptory challenges in capital trials of all defendants on death row in North Carolina as of July 1, 2010, to assess whether potential jurors' race played any role in those decisions.[6] We found substantial disparities in which potential jurors prosecutors struck. Over the twenty-year period we examined, prosecutors struck eligible black venire members at about 2.5 times the rate they struck eligible venire members who were not black. These disparities remained consistent over time and across the state, and did not diminish when we

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1. *See infra* notes 19–21 and accompanying text.

2. *See* Amanda S. Hitchcock, Recent Development, *"Deference Does Not by Definition Preclude Relief": The Impact of* Miller-El v. Dretke *on* Batson *Review in North Carolina Capital Appeals*, 84 N.C. L. REV. 1328 (2006) (reviewing North Carolina Supreme Court's highly deferential approach to reviewing Batson claims in capital cases); Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 LAW & HUM. BEHAV. 695 (1999) (studying jury selection in one North Carolina county).

3. *See* N.C. GEN. STAT. §§ 15A-2010–12 (2011) (creating a cause of action if the court finds race was a significant factor in the prosecutor's decision to seek or impose a death sentence).

4. *Id.* § 15A-2012(a)(3).

5. *Id.* § 15A-2011(b).

6. A list of current death row inmates is available at http://www.doc.state.nc.us/dop/deathpenalty/deathrow.htm.

controlled for information about venire members that potentially bore on the decision to strike them, such as views on the death penalty or prior experience with crime.[7]

In Part II, we review the prior research on jury selection, particularly on the issue of racial bias. In Part III, we present our study methodology and design. Part IV presents the statewide unadjusted racial disparities in prosecutors' exercise of peremptory strikes, and Part V presents the results of analyses controlling for other factors potentially relevant to jury selection.

II. THE STUBBORN LEGACY OF RACE IN JURY SELECTION: THE RULES AND THE REALITY

The Supreme Court has grappled with barriers to racial diversity in juries for decades.[8] Indeed, even while characterizing the peremptory challenge as a tool vital to the accused, the *Swain v. Alabama* Court held that a prosecutor's systematic exclusion of black jurors was "at war with our basic concepts of a democratic society and a representative government."[9] Jurors, the Court asserted, "should be selected as individuals, on the basis of individual qualifications, and not as members of a race."[10] The Court elaborated this view in *Batson v. Kentucky*, when it noted that purposefully excluding people from jury service based on their race undermines public confidence in our justice system.[11] The Court later clarified that excluding jurors because of their race harmed not only the defendant, but the wrongly excluded jurors as well,[12] and that defense counsel must abide by the same rules as prosecutors.[13] The Court has extended the doctrine to prohibit gender-based strikes,[14] and some lower courts have prohibited strikes based on religious affiliation.[15]

While the Court established an elaborate three-step process for challenging a peremptory challenge as based on race (or gender), parties

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7. Please see Part III.E and Appendix A for more information on this coding.

8. Duren v. Missouri, 439 U.S. 357 (1979); Castaneda v. Partida, 430 U.S. 482 (1977); Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (juries exist "to guard against the exercise of arbitrary power"); Glasser v. United States, 315 U.S. 60, 86 (1942) (juries must not be "the organ of any special group or class"), *superseded on other grounds by rule*, FED. R. EVID. 104(a), *as recognized in* Bourjaily v. United States, 483 U.S. 171 (1987).

9. Swain v. Alabama, 380 U.S. 202, 204 (1965) (quoting Smith v. Texas, 311 U.S. 128, 130 (1940)) (internal quotation marks omitted), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986).

10. *Id.* (quoting Cassell v. Texas, 339 U.S. 282, 286 (1950)) (internal quotation marks omitted).

11. *Batson*, 476 U.S. at 87.

12. Powers v. Ohio, 499 U.S. 400, 425 (1991).

13. Georgia v. McCollum, 505 U.S. 42 (1992).

14. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994).

15. United States v. Brown, 352 F.3d 654 (2d Cir. 2003); Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 GEO. L.J. 945 (1998).

can readily defeat the challenge by proffering a plausible race-neutral reason for the strike decision.[16] Trial courts rarely reject these explanations (in the third step) as disingenuous, or "pretextual."[17] Moreover, the Court designed the *Batson* regime to counter intentional discrimination. Significant psychological research suggests that racial bias can operate below the level of conscious awareness to affect people's perceptions and behaviors.[18] As a result, a party who is subconsciously influenced by a juror's race might offer in good faith a race-neutral reason for the strike. *Batson*'s focus on the credibility rather than reasonableness of the proffered explanation authorizes trial courts to uphold such strikes even though they may be actually (if unintentionally) driven by race.

The difficulty of uncovering racial bias—whether deliberate or unconscious—has led many to conclude that the *Batson* regime cannot counter discrimination in jury selection.[19] Many scholars and several judges have called for the wholesale abolition of peremptory challenges.[20] Others have suggested less drastic reforms, such as reducing the number of peremptories available to each side, so as to limit the opportunity for race-

16. In the first stage, the defendant carries the burden of establishing a prima facie case. In the second, the prosecution carries a burden of producing a race-neutral explanation for the strike or strikes. Finally, in the third stage, the defendant carries the burden of proving that the explanations offered by the prosecution with respect to one or more venire members were pretextual, thereby supporting an inference that one or more was racially motivated. *Batson*, 476 U.S. at 96–98.

17. Miller-El v. Dretke, 545 U.S. 231, 278 (2005) (Thomas, J., dissenting); Kenneth J. Melilli, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 483–84 (1996).

18. Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, *in* THE HANDBOOK OF SOCIAL PSYCHOLOGY 357, 357–411 (Daniel T. Gilbert, Susan T. Fiske & Gardner Lindzey eds., 4th ed. 1998); Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5 (1989).

19. *Batson*, 476 U.S. at 102–08 (Marshall, J., concurring); Edward S. Adams & Christian J. Lane, *Constructing a Jury That Is Both Impartial and Representative: Utilizing Cumulative Voting in Jury Selection*, 73 N.Y.U. L. REV. 703, 706–07 (1998); Leonard L. Cavise, *The* Batson *Doctrine: The Supreme Court's Utter Failure To Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501; Sheri Lynn Johnson, Batson *Ethics for Prosecutors and Trial Court Judges*, 73 CHI.-KENT L. REV. 475 (1998); Deborah Ramirez, *Affirmative Jury Selection: A Proposal To Advance Both the Deliberative Ideal and Jury Diversity*, 1998 U. CHI. LEGAL F. 161, 173–74.

20. *Batson*, 476 U.S. at 102–08 (Marshall, J., concurring); Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 199–211 (1989); William G. Childs, *The Intersection of Peremptory Challenges, Challenges for Cause, and Harmless Error*, 27 AM. J. CRIM. L. 49 (1999); Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 809 n.2 (1997) (listing and citing judges and academics who have voiced strong concerns about peremptory challenges); Vivien Toomey Montz & Craig Lee Montz, *The Peremptory Challenge: Should It Still Exist? An Examination of Federal and Florida Law*, 54 U. MIAMI L. REV. 451 (2000); Arielle Siebert, Batson v. Kentucky*: Application to Whites and the Effect on the Peremptory Challenge System*, 32 COLUM. J.L. & SOC. PROBS. 307 (1999).

based jury selection.[21] The RJA adopts none of these policy recommendations. Rather, it authorizes a new approach to examining the role of race in the exercise of peremptory challenges based on a broad range of evidence.

As noted earlier, the RJA created a state statutory claim for defendants facing a death sentence who can show that race was a significant factor in the exercise of peremptory challenges "in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed."[22] The geographical scope of a potential claim makes it distinct from a typical *Batson* claim as does the range of evidence expressly authorized. Claimants may prove their cases using "statistical evidence or other evidence, including, but not limited to, sworn testimony of attorneys, prosecutors, law enforcement officers, jurors, or other members of the criminal justice system or both."[23]

This Article presents evidence relevant to a claim under the RJA. Anecdotal evidence suggests that race weighs heavily in decisions to exercise peremptory strikes[24]—a conclusion bolstered by systematic research. Previous research on jury selection generally, and the role of race in the exercise of peremptory studies more specifically, typically evaluates different aspects of *Batson*'s legal framework. While this framework does not apply directly to an RJA claim, the central question remains constant: Did race play a significant role in the exercise of peremptory challenges?

A. EXPERIMENTAL AND MOCK-JURY STUDIES

Experimental and other laboratory work with mock jurors lends support to those who suspect that race continues to play a role in jury selection.[25] For example, a number of studies conducted before the *Batson* Court prohibited consideration of race in jury selection demonstrated its importance in decision making. George Hayden, Joseph Senna, and Larry Seigel examined the types of information relevant to prosecutorial decision making in voir dire among twenty randomly selected prosecutors from four Boston-area

21. Adams & Lane, *supra* note 19; Amy Wilson, *The End of Peremptory Challenges: A Call for Change Through Comparative Analysis*, 32 HASTINGS INT'L & COMP. L. REV. 363 (2009).

22. N.C. GEN. STAT. § 15A-2011(a) (2011).

23. *Id.* § 15A-2011(b).

24. In a 1986 training video, Philadelphia District Attorney Jack McMahon emphasized the importance of striking certain black venire members, such as "blacks from low-income areas" and blacks who are "real educated." Videotape: Jury Selection with Jack McMahon (DATV Prods. 1987), *available at* http://video.google.com/videoplay?docid=-5102834972975877286, *cited in* David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 41–43 (2001).

25. Samuel R. Sommers & Michael I. Norton, *Race and Jury Selection: Psychological Perspectives on the Peremptory Challenge Debate*, 63 AM. PSYCHOLOGIST 527, 533 (2008).

counties.[26] The researchers presented the prosecutors with categories of information about potential jurors for two hypothetical cases, one involving a black defendant and the other a white defendant.[27] Prosecutors could seek information about potential jurors from one category at a time, and then decide whether to strike the juror or to seek more information.[28] Prosecutors typically sought information about potential jurors' gender, age, residence, occupation, demeanor, and appearance.[29] In the case involving the black defendant, however, prosecutors sought information on race of the venire member significantly more often than they did in the case involving the white defendant.[30]

More recently, Michael Norton and Samuel Sommers presented three groups of study participants—college students, law students, and trial attorneys—with the facts of a criminal case involving a black defendant.[31] The researchers told participants to assume the role of the prosecutor, and that they had only one peremptory strike left to use in deciding which of two prospective jurors to strike.[32] The prospective jurors each had qualities that pretesting suggested would be troubling to prosecutors: one was a journalist who had investigated police misconduct and the other had indicated skepticism about statistics relevant to forensic evidence that the state would offer.[33] Participants were randomly assigned to one of two conditions: one in which the first prospective juror was black and the second white, and another in which the race of the prospective jurors was reversed.[34]

Participants challenged the black juror more often than the white juror, regardless of whether the juror was presented as the journalist or the statistics skeptic.[35] Yet, when asked to explain why they struck the juror they did, the study participants almost never mentioned race; participants tended to offer the first juror's experience writing about police misconduct when

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26. George Hayden, Joseph Senna & Larry Siegel, *Prosecutorial Discretion in Peremptory Challenges: An Empirical Investigation of Information Use in the Massachusetts Jury Selection Process*, 13 NEW ENG. L. REV. 768 (1978).

27. *Id.* at 781–82.

28. *Id.* at 782–83.

29. *Id.* at 784–85, 784–85 tbl.II.

30. *Id.*

31. Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the* Batson *Challenge Procedure*, 31 LAW & HUM. BEHAV. 261, 266 (2007).

32. *Id.*

33. *Id.* at 265–66.

34. *Id.* at 266–67.

35. *Id.* at 267, 267 tbl.I. The effect was statistically significant for college ($n = 90$) and law students ($n = 81$) ($p < .05$), and marginally significant in the smaller attorney sample ($n = 28$). *Id.* at 266–67.

striking him, and cited the second juror's skepticism about statistics when striking him.[36]

In another study, Norbert Kerr and colleagues had attorneys view videotaped voir dire of mock jurors in a criminal case, and assigned each the role of judge, defense attorney, or prosecutor—usually based on their current position or past experience in the respective role.[37] They asked participants to rate the desirability of the potential jurors and to indicate which ones they would strike.[38] The researchers found that attorneys assigned the role of prosecutor were far more likely to strike black prospective jurors than jurors of another race.[39]

Studies that examine jury selection in hypothetical settings are limited by the artificial nature of the decision making.[40] Their strength, however, is that they allow researchers greater control over the variables in question in order to identify causal factors. These studies offer substantial evidence that race plays a significant role in jury selection, especially when considered in light of the research on jury selection in real trials set forth below.[41]

B. STUDIES EXAMINING JURY SELECTION IN ACTUAL TRIALS

Only a handful of published studies have examined how parties exercise peremptory challenges in actual trials. In one study, Billy Turner and colleagues examined strikes by both the prosecution and defense in 121 criminal trials in one Louisiana parish from 1976–1981.[42] The authors compared the percentage of struck jurors who were black (44%) to the percent of the population in the Louisiana parish that was black at the time of the study (18%), and inferred from this twenty-six-point disparity that jury selection was not race neutral.[43]

John Clark and colleagues analyzed jury selection in twenty-eight trials in two adjacent counties in a southeastern state.[44] Across the eleven criminal

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36. *Id.* at 267–68.

37. Norbert L. Kerr, Geoffrey P. Kramer, John S. Carroll & James J. Alfini, *On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity: An Empirical Study*, 40 AM. U. L. REV. 665, 676 (1991).

38. *Id.* at 677–78.

39. *Id.* at 692.

40. *See* Sommers & Norton, *supra* note 31, at 270–71 (noting limitations of experimental jury-selection studies).

41. *See id.* at 270 (noting convergence of experimental and archival data analysis of the effect of race in jury selection).

42. Billy M. Turner, Rickie D. Lovell, John C. Young & William F. Denny, *Race and Peremptory Challenges During Voir Dire: Do Prosecution and Defense Agree?*, 14 J. CRIM. JUST. 61, 63 (1986).

43. *Id.*

44. John Clark, Marcus T. Boccaccini, Beth Caillouet & William F. Chaplin, *Five Factor Model Personality Traits, Jury Selection, and Case Outcomes in Criminal and Civil Cases*, 34 CRIM. JUST. & BEHAV. 641, 647 (2007).

trials they examined, race was a statistically significant predictor of both prosecution and defense strikes, but in reverse patterns: the state struck disproportionally more black potential jurors while the defense struck disproportionally fewer.[45]

Mary Rose examined peremptory strike decisions in thirteen non-capital felony trials in North Carolina.[46] Prosecutors used 60% of their strikes against black jurors, who constituted only 32% of the venire.[47] In comparison, defense attorneys used 87% of their strikes against white jurors, who made up 68% of the venire.[48]

A third study conducted by Richard Bourke and Joe Hingston at the Louisiana Crisis Assistance center examined jury selection in 390 jury trials involving 13,662 prospective jurors in Jefferson Parish, Louisiana.[49] In both six- and twelve-person juries, prosecutors struck "black prospective jurors at more than three times the rate" they struck their white counterparts.[50]

David Baldus and colleagues examined strike decisions over a seventeen-year period in 317 Philadelphia County capital murder trials.[51] They found that prosecutors struck on average 51% of the black jurors they had the opportunity to strike, compared to only 26% of comparable non-black jurors.[52] Defense strikes exhibited a nearly identical pattern in reverse: defense counsel struck only 26% of the black jurors they had the opportunity to strike, compared to 54% of comparable non-black jurors.[53] The disparate effect of race on jury selection held even when the researchers controlled for various non-racial characteristics of the jurors, such as age, occupation, education, and responses to certain questions asked in voir dire.[54]

Journalists at the *Dallas Morning News* replicated the methodology of the Philadelphia study to examine the exercise of peremptory challenges in 108 of 381 non-capital felony trials in Dallas County, Texas, during the first ten months of 2002.[55] Like Baldus and colleagues, the journalists considered in

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45. *Id.* at 651.

46. Rose, *supra* note 2, at 697.

47. *Id.* at 698–99.

48. *Id.*

49. RICHARD BOURKE & JOE HINGSTON, BLACK STRIKES: A STUDY OF THE RACIALLY DISPARATE USE OF PEREMPTORY CHALLENGES BY THE JEFFERSON PARISH DISTRICT ATTORNEY'S OFFICE 5 (2003).

50. *Id.* at 7–8.

51. David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 10 (2001).

52. *Id.* at 53.

53. *Id.*

54. *Id.* at 70–72.

55. Steve McGonigle et al., *A Process of Juror Elimination: Dallas Prosecutors Say They Don't Discriminate, but Analysis Shows They Are More Likely To Reject Black Jurors*, DALL. MORNING NEWS, Aug. 21, 2005, at 1A [hereinafter *A Process of Juror Elimination*], *available at* 2005 WLNR

the analyses the impact of non-racial characteristics of potential jurors.[56] The *Dallas Morning News* study found that prosecutors "excluded eligible blacks from juries at more than twice the rate they rejected eligible whites."[57] The disparate effect of race on jury selection held even when they controlled for non-racial characteristics of the jurors. The journalists concluded that "being black was the most important personal trait affecting which jurors prosecutors rejected."[58]

A major strength of the Philadelphia and Dallas County studies was the inclusion of race-neutral factors about jurors that might bear on a party's decision to strike.[59] One possible explanation for racial disparities in strike rates is that race is associated with other race-neutral factors that drive strike decisions. If members of one race are disproportionately less supportive of the death penalty, for example, prosecutors' disproportionately high strike rates against that group may be driven by group members' views rather than their race. Controlling for various race-neutral factors that may bear on the decision to strike allows the researcher to rule out at least some alternative explanations of racial disparities.

C. STUDIES ANALYZING APPELLATE DECISIONS REVIEWING BATSON *CLAIMS*

We are aware of no study directly assessing *Batson*'s effectiveness in countering consideration of race in jury selection, such as by comparing strike rates against black jurors in trials before *Batson* was decided to those that came after. However, the consistency of researchers' findings of racial disparities in studies spanning several decades suggests that *Batson* has not

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24658335 (presenting part of the findings of the study). The *Dallas Morning News* published the results of this research in a set of feature stories between Sunday, August 21 and Tuesday, August 23. *See About the Series*, DALL. MORNING NEWS, Aug. 21, 2005, at 19A, *available at* 2005 WLNR 24658085 (describing the series); *How the Analysis Was Done*, DALL. MORNING NEWS, Aug. 21, 2005, at 19A, *available at* 2005 WLNR 2457224 (reporting study design and methodology). The *Dallas Morning News* published a similar study on jury selection in Dallas County in 1986. *See* Steve McGonigle & Ed Timms, *Race Bias Pervades Jury Selection*, DALL. MORNING NEWS, Mar. 9, 1986, at 1A, *available at* 1986 WLNR 1683009. This study analyzed the impact of peremptory strikes on jury composition in "100 randomly selected felony" jury trials in 1983 and 1984 and found blacks largely excluded from jury service. *Id.* We are aware of one other study on peremptory challenges by journalists. This study reached similar results. Douglas Frantz, *Many Blacks Kept Off Juries Here*, CHI. TRIB., Aug. 5, 1984, at 1 (reporting on jury selection for all 31 criminal jury trials in Cook County Circuit Courts in July 1984).

56. *A Process of Juror Elimination*, *supra* note 55. The journalists consulted with David Baldus and George Woodworth, the principle authors of the Philadelphia study, in conducting this research. *Id.*

57. *Id.*; *see also* Steve McGonigle et al., *Jurors' Race a Focal Point for Defense: Rival Lawyers Reject Whites at Higher Rates*, DALL. MORNING NEWS, Aug. 22, 2005, at 1A, *available at* 2005 WLNR 24659140 (presenting findings with respect to jury selection by defense attorneys).

58. *A Process of Juror Elimination*, *supra* note 55.

59. Baldus et al., *supra* note 51, at 65–72, tbls.6 & 7.

been especially successful in purging consideration of race from jury selection.

One possible reason *Batson* has been so ineffective is the ease with which parties can generate race-neutral explanations for challenged strike decisions. Research on the exercise of *Batson* challenges indicates that courts commonly accept reasons proffered to justify challenged strikes based on little more than stereotyping and guesswork.[60] Kenneth Melilli analyzed all published *Batson* decisions from 1986 to 1993, and concluded that proffered explanations were often grounded in stereotypes and, to a lesser degree, attorneys' intuition about favorability of a potential juror.[61] A second similar study concluded that the reasons courts often find acceptable may merely obfuscate race discrimination. Jeffrey Beilin and Junichi Semitsu surveyed all published and unpublished federal decisions from 2000 to 2009 that reviewed state or federal trial courts' denials of *Batson* challenges.[62] After reviewing decisions in 269 cases, they reported that their "most revealing discovery was the substantial list of acceptable reasons that could conceivably implicate a juror's likelihood of being impartial but were likely to disproportionately impact specific racial or ethnic groups."[63]

Two papers examining the implementation of *Batson* in North Carolina concluded that the significant deference the North Carolina Supreme Court gives to trial courts weakened *Batson*'s impact in that state.[64] The first paper evaluated the first five years of *Batson* appeals in North Carolina and found that "[n]either the North Carolina Supreme Court nor the North Carolina Court of Appeals ever ha[d] held for a defendant on the merits of a *Batson* claim."[65] In particular, the paper documents the court's almost complete

60. *See* Melilli, *supra* note 17, at 484–502; *see also* Jeffrey Bellin & Junichi P. Semitsu, *Widening* Batson*'s Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1116–20 (2011). We are aware of one other study of appellate opinions concerning *Batson* challenges. This study noted that most litigants lose *Batson* appeals and that most of the venire members reviewed in *Batson* challenges were black. Shaun L. Gabbidon et al., *Race-Based Peremptory Challenges: An Empirical Analysis of Litigation from the U.S. Court of Appeals, 2002–2006*, 33 AM. J. CRIM. JUST. 59 (2008).

61. Melilli, *supra* note 17, at 487, 497 tbl.III-R (noting that 52.48% of the explanations involved group stereotypes); *id.* at 498 tbl.III-S (listing the group stereotypes employed and the frequency with which they were employed).

62. Bellin & Semitsu, *supra* note 60, at 1092.

63. *Id.* at 1092, 1096. The authors noted, for example, that overrepresentation of black males in prison and the finding that 32% of black men are likely to be imprisoned at least once during their lifetime (compared to much lower rates for white men, for example) suggest that "striking all persons with a relative who is or has been in prison will disproportionately exclude minority venirepersons." *Id.* at 1097.

64. Hitchcock, *supra* note 2, at 1356; Paul H. Schwartz, Comment, *Equal Protection in Jury Selection? The Implementation of* Batson v. Kentucky *in North Carolina*, 69 N.C. L. REV. 1533, 1577 (1991).

65. Schwartz, *supra* note 64, at 1535.

deference to prosecutors' proffered explanations.[66] In the second paper, Amanda Hitchcock reached a similar conclusion based on her analysis of North Carolina Supreme Court rulings in all sixty-one capital cases involving a *Batson* claim between 1986 and 2005.[67] The North Carolina court deferred to trial courts in almost every case "because *Batson* determinations often turn on the credibility of the prosecutor's stated reasons for the objectionable challenges."[68] Hitchcock documents the court's reluctance to rely upon statistical evidence to state a claim, its strict requirement of a complete match in side-by-side comparisons of jurors, and its lack of interest in claims based on disparate questioning.[69]

While the Supreme Court has established a framework intended to limit the consideration of race in the exercise of peremptory challenges, the research reviewed here suggests that it continues to play a role. The study we present below provides further evidence that race not only weighs in jury selection, but weighs heavily. Moreover, its influence cannot be explained by ostensibly race-neutral factors that happen to correlate with race.

III. METHODOLOGY

The North Carolina RJA study follows the methodology used in the Philadelphia and Dallas County studies discussed above[70] by including analysis of race-neutral factors about jurors that might bear on a party's decision to strike. It improves on the Philadelphia study with more complete race and strike information.[71] In addition, unlike any of the studies presented above, this study includes cases from multiple counties. In fact, it includes data about jury selection in more than one-half of the counties in North Carolina.

We analyzed the role of race in strike decisions in two phases. First, we compared the rate at which prosecutors struck eligible black venire members to the rate at which they struck eligible venire members of other races. We then analyzed the role that characteristics other than race played in prosecutors' decisions to strike or pass potential jurors, and whether any of those characteristics could account for racial disparities in who gets struck.

A. STUDY POPULATION

We examined jury selection in at least one proceeding for each inmate who resided on North Carolina's death row as of July 1, 2010, for a total of

66. *Id.* at 1561–63.
67. Hitchcock, *supra* note 2, at 1328–30.
68. *Id.* at 1344.
69. *Id.* at 1345–47, 1349–50.
70. *See supra* text accompanying notes 51–59.
71. Baldus et al., *supra* note 51.

173 proceedings.[72] For each proceeding, we sought to include every venire member who faced a peremptory challenge as part of jury selection. For the purposes of this study a "venire member" included anyone who was subjected to voir dire questioning and not excused for cause, including potential alternates. Each proceeding involved an average of 42.9 strike-eligible venire members, producing a database of 7,421 strike decisions. Of these, 3,952 (53.3%) were women, and 3,469 (46.7%) were men. The venire members' racial composition was as follows: white (6,057, 81.6%); black (1,211, 16.3%); Native American (79, 1.1%); Latino (21, 0.3%); mixed race (20, 0.3%); Asian (13, 0.2%); other (11, 0.1%); Pacific Islander (2, 0.03%); and unknown (7, 0.1%).

B. DATA COLLECTION

We created an electronic and paper case file for each proceeding in the study. The case file contains the primary data for every coding decision. The materials in the case file typically include some combination of juror seating charts, individual juror questionnaires, and attorneys' or clerks' notes. Each case file also includes an electronic copy of the jury selection transcript and documentation supporting each race coding decision.

C. OVERVIEW OF DATABASE DEVELOPMENT

Staff attorneys completed all coding and data entry at Michigan State University College of Law in East Lansing, Michigan, under the direct supervision of the primary investigators.[73] Staff attorneys received detailed training on each step of the coding and data entry process.

We collected information about the proceeding generally, including the number of peremptory challenges used by each side, and the name of the judge and attorneys involved in the proceeding, as well as basic demographic and procedural information specific to each venire member.

Coding also required staff attorneys to determine strike eligibility for each potential juror. "Strike eligibility" refers to which party or parties had the chance to exercise a peremptory strike against a particular venire member. For instance, if the prosecution struck someone before the defense had a chance to question that person, that juror would be strike eligible to the prosecution only. Likewise, if a party had exhausted its peremptory challenges by the time it reached a potential juror, the failure to strike reveals nothing about how that party exercised its discretion. This

72. We included proceedings for all current death-row inmates to ensure the inclusion of every defendant with a potential claim under the Racial Justice Act. We also focused our analysis on defendants with an active death sentence because of the availability of data in such cases. In addition, we were confident that the decision making in 173 proceedings would provide a large enough sample for meaningful statistical analysis. We were able to include all but one proceeding, Jeffrey Duke's 2001 trial, in which the case materials are unavailable.

73. A total of twelve staff attorneys and five law students worked on this project.

determination refines the analysis of strike decisions to examine only those instances in which that party actually had a choice to pass or strike a juror, and excludes those when the decision was out of the party's hands.[74]

In the second part of the study, staff attorneys used juror questionnaires (when available) and jury selection transcripts to code information relating to the following: (1) demographic characteristics (e.g., gender, marital status, employment, and educational background); (2) prior experiences with the legal system (e.g., prior jury service and experience as a criminal defendant or victim); and (3) attitudes about potentially relevant matters (e.g., ambivalence about the death penalty[75] and skepticism about, or greater faith in, the credibility of police officers).

D. RACE CODING

In order to analyze potential racial disparities in peremptory strikes, it was necessary to identify the race of each venire member. Any potential findings about racial disparities in strike decisions would turn on the accuracy of this coding. Strike information was straightforward in that it could be extracted directly from the transcripts. As explained more fully below, race information was equally straightforward in a good number of cases. But for the cases that required the staff attorneys to look deeper to determine the race of venire members, we implemented a rigorous protocol to produce data in a way that is both reliable and transparent.

We obtained information about potential jurors' race from three sources. First, we collected juror questionnaires for many of the venire members in our study. These questionnaires almost always asked the venire member's race, and the vast majority of respondents provided that information. We considered potential venire members' self-reports of race to be highly reliable and were able to get this information from juror questionnaires for 62.3% (4,623/7,421) of the eligible venire members.

For a second group of venire members, race was noted explicitly in the trial record. More than six percent (6.4%, 478/7,421) stated their race on

74. In one case (Gary Trull), the defense successfully challenged the prosecution's exercise of a peremptory strike against a black venire member, and the court seated him as an alternate juror. Thus, although this venire member ultimately served on the jury, we nevertheless treated him as struck by the prosecution in the analysis.

75. A court could properly remove for cause a venire member who expressed unwillingness to impose the death penalty under any circumstances under *Lockhart v. McCree*, 476 U.S. 162 (1986), *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and *Witt v. Wainwright*, 470 U.S. 1039 (1985), and thus such venire members are not included in our analysis. Sometimes, however, a venire member expressed reservations or ambivalence about the death penalty that fell short of outright opposition. Such a venire member would still be eligible to serve on the jury, but a prosecutor could reasonably base a decision to exercise a peremptory strike on this basis. *See* Witherspoon v. Illinois, 391 U.S. 510, 519–20 (1968). Accordingly, this is one of the many venire member characteristics we included in our analysis.

the record in a manner that appears in the voir dire transcript.[76] Similarly, a court clerk's chart noting the race of potential jurors that was officially made part of the trial record or a statement by an attorney on the record provided race information for a smaller percent of the venire members (0.5%, 40/7,421).[77]

Finally, for the remaining 30.6% (2,273/7,421) of venire members, we used electronic databases to find race information and record the race and source of race information. Staff attorneys used the North Carolina State Board of Elections website, LexisNexis "Locate a Person (Nationwide) Search Non-regulated," LexisNexis Accurint, and the North Carolina Department of Motor Vehicles online database. Many of the case files included juror-summons lists with addresses, which allowed staff attorneys to match online records to the information about the potential juror with a high level of certainty.

The primary investigators prepared a strict protocol for use of these websites for race coding and trained staff attorneys on that protocol in a half-day session. One objective of this protocol was to minimize the possibility of researcher bias. In addition, staff attorneys who searched for venire members' information on electronic databases were (whenever possible) blind to strike decisions.[78]

Throughout this process, we instructed staff attorneys to code a venire member's race as "unknown" unless they were able to meet strict criteria ensuring that the person identified in the public record was in fact the venire member and not just someone with the same name.[79] Staff attorneys were not to rely on a record containing information that was not wholly consistent with whatever information we had about a particular venire member. For instance, staff attorneys would not rely on a public record in which the person's middle initial was inconsistent with that of the venire

76. In these instances, the judges asked potential jurors to state their race for the record.

77. Importantly, we did not rely on clerks' or attorneys' observations about potential jurors' race unless incorporated into the record and thus subject to dispute if a party or the court objected to the classification. For instance, we considered reliable an attorney's mention of a potential juror's race during an argument regarding a *Batson* challenge with the assumption that the other party or the court would challenge that assessment if the attorney was mistaken. In contrast, we did not rely on a clerk's notes about the race of potential jurors on a jury chart unless it was clear that the parties had a chance to review that document and challenge any perceived inaccuracies.

78. Staff attorneys seeking race information from public sources knew about strikes only when they had to turn to the transcript for information to help them find that venire member's race. For instance, venire members often indicated during voir dire precisely where they lived and for how long. For cases lacking a summons list with addresses, this information was useful in public records searches where we lacked direct information about race.

79. For instance, staff attorneys were instructed to use information such as the venire member's middle name or year of birth to link the venire member to records of someone with the same name. When at all in doubt, staff attorneys were instructed to code the venire member's race as unknown.

member, unless they were able to document a name change to account for the discrepancy (for instance, a record that indicated that a venire member started using her maiden name as a middle name). If staff attorneys found someone with the same name as the venire member but with a different address, they were to use that record only if they could trace the person's address back to that of the venire member. Staff attorneys saved an electronic copy of all documents used to make race determinations.[80]

Because of the importance of the race coding, we conducted a reliability study on this methodology. Staff attorneys and law students used public records to code race for 1,897 venire members for whom we also had juror questionnaires reporting race or express designations of race in a voir dire transcript.[81]

We then compared the data from public records to the presumably more reliable self-reported data in the jury questionnaires. Staff attorneys using public records were unable to determine a venire member's race to the level of reliability required by the study protocol in 242 of 1,897 cases (12.8%).[82] In the remaining 1,655 cases, the race extracted from the public records matched that taken from the presumably more reliable sources for 97.9% of the venire members. This suggests that the method we used is highly reliable.

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80. For instance, if a staff attorney identified the race of a venire member through the North Carolina Board of Elections website, he or she would save the record with the venire member's race designation (usually as an Adobe Acrobat file but sometimes as a screen shot). If the staff attorney relied upon an address provided in the juror-summons list to identify a venire member had moved since the time of the trial, the staff attorney would also save records of the venire member's change of addresses over the years. This information was often available in the Lexis-Nexis Locate a Person Database, which allowed the staff attorney to trace the venire member's address from the juror-summons list to his or her current address reflected in the North Carolina Board of Elections website. For each step in the process linking current information about each venire member to information recorded at the time of the trial, staff attorneys saved a copy of the electronic record.

81. The staff attorneys did not have access to the questionnaires or voir dire transcripts when they conducted the public-records research.

82. We instructed staff attorneys to code a venire member's race as unknown unless they could rule out the possibility that the record on which they were relying referred to someone besides the venire member. In cases where we had juror summons lists with addresses, a staff attorney usually had no trouble identifying the venire member from two people with the same name. Lacking specific identifying information, however, staff attorneys were sometimes unable to meet the strict criteria for extracting race. We expected that this method of extracting data on race would lead to a moderate amount of missing data.

In the full study, we expended additional efforts to find the missing data. In most instances, our staff attorneys reviewed transcripts more closely to gather identifying information that allowed them to link the venire members to the appropriate public records. For example, venire members often stated in voir dire where they lived and worked. This additional information often allowed staff attorneys to narrow down public records for people with the same name even when we lacked a juror-summons list.

Staff attorneys and law students did not expend this level of effort in tracking down race through public-record databases solely for the reliability check.

The methods described in this section allowed us to document race for all but 7 of the 7,421 eligible venire members in our study. In other words, our database includes race information for 99.9% of the eligible venire members, as well as the source of that information for each venire member.

E. CODING RACE-NEUTRAL CONTROL VARIABLES (DESCRIPTIVE INFORMATION)

Strike and race information allows for the calculation of strike rates by race. To account for other factors that might bear on the decision to strike, more detailed information about individual venire members must be considered. Thus, in addition to basic demographic information about each eligible venire member, we coded more detailed information on approximately sixty-five variables for a random sample of venire members. We sought to identify the variables that consistently and reliably predicted whether the state would strike or pass a potential juror. Appendix A provides a partial list of our race-neutral control variables. These variables document information such as views on the death penalty; education, marital, and employment status; religious affiliation; and experience with crime.

Because this process is labor intensive,[83] we drew a random sample of venire members from the database[84] and coded detailed descriptive information for almost a quarter of the venire members in the database (1,753/7,421).[85]

The following sections of this Article present the research in increasing levels of analytical complexity. We start with the unadjusted racial disparities in prosecutorial strikes, and then present disparities controlling, one at a time, for potentially relevant race-neutral variables. Finally, we present the disparities that emerge via fully controlled logistic regression analysis of a randomly selected sample of a quarter of the study population for whom we coded detailed individual-level information.

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83. We instituted procedures for double coding of descriptive information to ensure accuracy and intercoder reliability.

84. We used the SPSS random-select function to draw the sample. The demographic profile of the random sample strongly resembled that of the complete study population. Of these 1,753 jurors, 1,749 were eligible to be struck by the state. We determined the race of all but two jurors (83.6% non-black (1,465), 16.3% black (286), and 0.1% missing (2)). These percentages mirror those in the full sample (83.6% non-black (6,203), 16.3% black (1,211), and 0.1% missing (7)). The random sample also reflects the relative proportions of men and women: The smaller sample included 51.9% women (910) and 48.1% men (843); the full data set included 53.3% women (3,952) and 46.7% men (3,469).

85. A few of the venire members who were randomly selected to be included in the sample could not be coded due to the poor quality or unavailability of the case materials. The transcript for the case of Wayne Laws was too faded to be made searchable, and no venire members were coded for descriptive information. No transcript was available in the more recent case of Michael Ryan.

F. STATEWIDE UNADJUSTED PROSECUTORIAL STRIKE PATTERNS

The statewide database includes information about 7,421 venire members. Of those, 7,400 (99.7%) were eligible to be struck by the state. We analyzed prosecutorial-strike patterns using only those venire members who were eligible to be struck by the state. Among strike-eligible venire members, the overwhelming majority were either white (6,039, 81.6%) or black (1,208, 16.3%); just 2.0% (153) were other races. As noted above, we are missing race information for 7 (0.1%) venire members.

Prosecutors exercised peremptory challenges at a significantly higher rate against black venire members than against all other venire members. As seen in Table 1, across all strike-eligible venire members in the study, prosecutors struck 52.6% (636/1,208) of eligible black venire members, compared to only 25.7% (1,592/6,185) of all other eligible venire members.[86]

In addition, Table 2 shows that the average rate per case at which prosecutors struck eligible black venire members is significantly higher than the rate at which they struck other eligible venire members.[87] Of the 166 cases that included at least one eligible black venire member, prosecutors struck an average of 56.0% of eligible black venire members, compared to only 24.8% of all other eligible venire members.[88]

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86. *See infra* Table 1. This difference is statistically significant, $p < .001$; put differently, there is less than a one in one thousand chance that we would observe a disparity of this magnitude if the jury selection process were actually race neutral. Several different chi-squared tests (Pearson Chi-Squared, Continuity Correction, Likelihood Ratio, Fischer's Exact Test, and Linear-by-Linear Association) were used to calculate the *p*-values, and the results were consistent regardless of the test used.

87. The analyses presented in Tables 1 and 2 are very similar, but differ in their unit of analysis. Table 1 shows strikes against all venire members in the study pooled across cases (7,400 strike eligible venire members across 173 cases). Table 2 compares the strike rates calculated per case. Thus, only those cases with at least one eligible black venire member (166) were included, and each case represents one data point. We present both ways of calculating these disparities to demonstrate that the effect is robust and does not depend on which method is used.

88. *See infra* Table 2. This difference is statistically significant, $p < .001$. When we exclude those venire members whose race we coded from public records, the pattern is substantially the same: Of 139 cases, prosecutors struck an average of 55.7% of eligible black venire members compared to only 22.1% of all other eligible venire members. This difference is statistically significant, $p < .001$. This suggests that the patterns we observed are not skewed in some way by the source of information about potential jurors' race.

The disparities between mean prosecutorial strike rates against eligible black venire members versus those of other races are consistent across time: 57.4% versus 25.9%, $p < .001$ (1990–1994, forty-two cases); 54.7% versus 24.0%, $p < .001$ (1995–1999, eighty cases); 57.2% versus 25.0%, $p < .001$ (2000–04, twenty-nine cases); and 56.4% versus 25.4%, $p < .01$ (2005–2010, fifteen cases).

TABLE 1

Statewide Prosecutorial Peremptory Strike Patterns

(Strikes against venire members aggregated across cases)

		A	B	C	D
		Black Venire Members	**All Other Venire Members**	**Unknown**	**Total**
1.	**Passed**	572 (47.4%)	4,593 (74.3%)	3 (42.9%)	5,168 (69.9%)
2.	**Struck**	636 (52.6%)	1,592 (25.7%)	4 (57.1%)	2,232 (30.1%)
3.	**Total**	1,208 (100.0%)	6,185 (100.0%)	7 (100.0%)	7,400 (100.0%)

*Chi-squared tests (Pearson Chi-Squared, Continuity Correction, Likelihood Ratio, Fischer's Exact Test, and Linear-by-Linear Association) indicate that these differences in strike rates are significant at $p < .001$.

TABLE 2

Statewide Average Rates of State Strikes

(Strike rates calculated in individual cases and averaged across cases)

	A	B
	Average Strike Rate	**Number of Cases Averaged**
1. **Strike Rates Against Black Qualified Venire Members**	56.0% (*SD* = 24.6%)	166
2. **Strike Rates Against All Other Qualified Venire Members**	24.8% (*SD* = 7.0%)	166

*A paired-sample t-test indicates that this difference in strike rates is significant at $p < .001$.

As seen in Table 3, disparities were even greater in cases involving black defendants. In cases with non-black defendants, the average strike rate was 51.4% against black venire members and 26.8% against all other venire members.[89] In cases with black defendants, the average strike rate was 60.0% against black venire members and 23.1% against other venire members.[90]

89. *See infra* Table 3. Out of 166 cases with black eligible venire members, ninety involved black defendants and seventy-six involved defendants of other races.

90. *See infra* Table 3.

The difference in the magnitude of the disparity between black and other defendants is statistically significant.[91] In other words, although state strike rates are always higher against black venire members than against other venire members, the disparity is significantly greater in cases with black defendants.

TABLE 3
Disparities in Strike Patterns by Race of Defendant
(Strike rates calculated in individual cases and averaged across cases)

		A	B	C
	Race of Defendant	**Strikes Against**	**Average Strike Rate**	**Number of Cases Averaged**
1.	**Black**	**Black Qualified Venire Members**	60.0% (*SD* = 30.0%)	90
2.		**All Other Qualified Venire Members**	23.1% (*SD* = 6.9%)	
3.	**Non-Black**	**Black Qualified Venire Members**	51.4% (*SD* = 25.8%)	76
4.		**All Other Qualified Venire Members**	26.8% (*SD* = 6.6%)	

*Analysis of variance (*F*-test) indicates that this difference between the disparities in strike rates by race of defendant is significant at $p < .03$.

IV. THE EFFECT OF RACE AFTER CONTROLLING FOR VENIRE MEMBERS' PERSONAL CHARACTERISTICS ON THE EXERCISE OF PEREMPTORY STRIKES

The disparate strike rates in the first stage of the analysis are compelling evidence of racial discrimination in jury selection, but testing alternative explanations for the observed disparities provides a more complete picture. For instance, Baldus and colleagues found that jurors who expressed concern about imposing the death penalty faced markedly higher odds of being struck by the prosecution.[92] Public opinion research indicates that attitudes about the death penalty differ across racial groups.[93] By collecting

91. Note, however, that we were unable to find a statistically significant effect of defendant's race on the likelihood that a black potential juror would be struck in a fully controlled model.

92. Baldus et al., *supra* note 51.

93. For example, a 2003 Gallup poll of 1,017 randomly sampled adults found that 67% of white respondents supported the death penalty compared to only 39% of African American respondents. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL

and controlling for information about a wide variety of juror characteristics, we can examine the possibility that variables that happen to correlate with race (rather than race itself) account for the observed disparities.[94]

We first controlled for race-neutral variables by analyzing strike disparities within subsets of the study population. For example, we excluded all of the venire members who expressed any ambivalence about the death penalty and then analyzed the strike patterns for the remaining venire members. Because none of the remaining venire members expressed ambivalence about the death penalty, any racial disparity in strike patterns we observed could not be attributable to the possibility that relevant attitudes vary along racial lines. We looked at five different subsets in this manner, removing (1) venire members who expressed any reservations about the death penalty, (2) unemployed venire members, (3) venire members who had been accused of a crime or had a close relative accused of a crime, (4) venire members who knew any trial participant, and finally, (5) all venire members with any one of the first four characteristics. The disparities identified through the unadjusted analysis persisted in each and every subset, as seen in Table 4.

JUSTICE STATISTICS 2003, at 146, tbl.2.52, *available at* http://www.albany.edu/sourcebook/pdf/section2.pdf.

94. Our analysis did not include any potential jurors removed for cause. As a result, any characteristic that would make someone ineligible to serve on a death penalty jury (such as categorical opposition to the death penalty) has already been "controlled for" in that people with these characteristics are not included in the analysis.

TABLE 4
Strike Patterns when State-Strike Eligible Venire Members with Potentially Explanatory Variables Are Removed from Equation

		A	B	C	D
	Variable	**Number of Venire Members Removed from Analyses**	**Strike Rates**	**Strike Rate Ratio**	***p*-value***
1.	**Venire Member with Death Penalty Reservations**	185	44.5% (Black VMs) vs. 20.8% (All others)	2.1	<.001
2.	**Unemployed Venire Member**	25	49.0% (Black VMs) vs. 24.7% (All others)	2.0	<.001
3.	**Venire Member or Close Other Accused of Crime**	398	50.3% (Black VMs) vs. 23.7% (All others)	2.1	<.001
4.	**Venire Member Knew a Trial Participant**	47	53.2% (Black VMs) vs. 25.4% (All others)	2.1	<.001
5.	**Venire Member with Any One of Above Characteristics**	580	39.7% (Black VMs) vs. 19.0% (All others)	2.1	<.001

*Chi-squared tests (Pearson Chi-Squared, Continuity Correction, Likelihood Ratio, Fischer's Exact Test, and Linear-by-Linear Association) were used to calculate the *p*-values.

The disparities in prosecutorial strike rates against eligible black venire members persist even when other characteristics one might expect to bear on the decision to strike are removed from the equation. Table 4 provides a simple way of comparing apples to apples. However, the decision to strike or pass a potential juror can turn on a number of factors in isolation or combination. In the following section, we provide the results of a fully controlled logistic regression model, taking into account a number of

potentially relevant factors to examine whether the racial disparities can be explained by some combination of race-neutral factors.

As noted above, we collected individual-level descriptive information for a significant randomly selected portion (1,753/7,421) of the venire members in the study. Even after controlling for other factors potentially relevant to jury selection, a black venire member had 2.48 times the odds of being struck by the state as did a venire member of another race.[95] In other words, while many factors one might expect to bear on the likelihood of being struck did matter, none—alone or in combination—accounts for the disproportionately high strike rates against qualified black venire members.[96]

The coding process described above produced close to sixty-five variables potentially relevant to whether a venire member was struck or passed. We sought to identify the variables that consistently and reliably predicted whether the state would strike or pass a potential juror. The resulting model combines those factors to distinguish venire members based on how objectionable (or desirable) they were to prosecutors as potential jurors.

Using the Logistic Regression command in SPSS, we started the analysis with a simple model using only venire members' race[97] and tested each candidate control variable both individually and in small groups. This process allowed us to identify the most important control variables for the decision to strike or pass an eligible venire member. This process produced about twenty-five variables that bore a significant relation (either in isolation

95. We used a logistic regression model with the dependent variable that the strike-eligible venire member was struck or passed on by the state. A few words are in order about the choice of this model in lieu of a multilevel model. One assumption of logistic regression is that the data are independent. That assumption comes into question in this context, as a party's decision to use one of its strikes is likely to be affected by who else is in the pool. This can present a problem in that it might increase the risk of Type I error; that is, it could increase the chances that the researcher will improperly find a result statistically significant. One way to gauge whether a particular dataset presents such a risk is to look at interclass correlations. If subjects (i.e., venire members) nested within settings (i.e., trials) are in fact more similar to each other than are subjects between settings, the researcher should use a multilevel model. We examined the interclass correlations for the 173 cases in this study and found a negative interclass correlation. That means that venire members within a case were no more alike as to the outcome of interest (struck or passed) than were venire members between cases. In fact, that the interclass correlation was negative suggests that the results of the logistic regression analysis are likely conservative. For this reason, using a multilevel model was unnecessary and a traditional logistic regression model was appropriate. *See* David A. Kenny, Deborah A. Kashy & Niall Bolger, *Data Analysis in Social Psychology*, *in* THE HANDBOOK OF SOCIAL PSYCHOLOGY 237 (Daniel T. Gilbert, Susan T. Fiske & Gardner Lindzey eds., 4th ed. 1998).

96. *See infra* Table 5.

97. Including the race variable in this model helps to identify which variables are potentially significant in the complete model independent of race. To get the clearest picture possible, we also tested potential control variables without including race in the model, but this did not produce a different list of potential control variables.

or in combination) to the odds of being struck. We then tested these variables in various combinations, both by forcing them into the model and by allowing the computer program to assess which of the candidate variables provided the best fitting model. Through this process, we were able to build a model estimating the effects of various venire member characteristics on strike decisions.

Table 5 presents the final logistic regression model for prosecutorial strike decisions. A venire member is coded "1" if struck by the state and "0" if strike-eligible but not struck. The "Black" variable in Row 2 shows the regression coefficient, the standard error of that estimated coefficient, the odds ratio, the confidence interval for that odds ratio, and the *p*-value for the effect that being black has on the odds of being struck by the state. This model estimates that after controlling for several other race-neutral factors, black venire members face odds of being struck by the state that were 2.48 times those faced by all other venire members.[98]

The results of the logistic regression model are consistent with the unadjusted disparities we observed looking simply at the relative strike rates against black and other venire members. None of the factors we controlled for in the regression analysis eliminated the effect of race in jury selection. While we found many non-racial factors that were highly relevant to the decision to strike, none was so closely associated with race or so frequent that it could serve as an alternative explanation of the racial disparities. Note that throughout the process of building this model, we found no factor or combination of factors that rendered the effect of race non-significant. In other words, the statistically significant influence of race on the odds of being struck was robust; its predictive power did not depend on the inclusion or exclusion of any particular variable or variables in the model.[99] A black venire member was still more than twice as likely (2.48 to 1) to be struck by the state even when other relevant characteristics were held constant.

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98. $p < .001$. *See infra* Table 5.

99. If we were missing data for an individual juror regarding *any* of the variables under analysis, this model excluded that juror from the analysis completely (even though we have data about that juror for some of the other variables). To determine whether exclusion of these cases with missing data skewed the model, we used a method known as multiple imputation. *See* DONALD B. RUBIN, MULTIPLE IMPUTATION FOR NONRESPONSE IN SURVEYS 2 (1987); J.L. SCHAFER, ANALYSIS OF INCOMPLETE MULTIVARIATE DATA 104–05 (1997). This method allows us to use the information we do have about a juror to impute a value for the missing variable using what we know about other jurors for whom we have complete information on the variable in question. We then conducted another logistic regression analysis using these data (original data supplemented by imputed values for the missing). This model produced estimates that were very close to the estimates presented in Table 5, in which we used only jurors for whom we have complete information. This suggests that the information we were missing about venire members was missing randomly, and thus did not skew the analysis.

This finding is notable because it speaks to the concern that we have failed to account for other race-neutral factors that might explain the disparity. For instance, while we have accounted for many race-neutral factors that bear on jury selection, we cannot account for a venire member's physical appearance or body language—factors litigators often cite as relevant to their decision to strike.[100] But factors like these should generally be unrelated to the race of the venire member. Moreover, even if these factors were associated more with some racial groups than others, that association would have to be very strong and the factor quite frequent to explain the observed racial disparities.

100. *See, e.g.*, Ben Rubinowitz & Evan Torgan, *Jury Selection: Time Constraints and Weaknesses in Cases*, N.Y. L.J., Aug. 29, 2007, at 8 (emphasizing the importance of a "juror's demeanor [and] ability to maintain eye contact" in assessing potential bias); Jeff Strange, *Jury Selection in 30 Minutes or Less*, PROSECUTOR (Tex. Dist. & Cnty. Atty's Ass'n, Austin, Tex.). Sept.–Oct. 2009, *available at* http://www.tdcaa.com/node/5267 (emphasizing the importance of noting how a potential juror dresses and interacts with other members of the panel to assess whether they are "conformists who accept societal norms and expect others to do the same").

TABLE 5
Statewide Fully Controlled Logistic Regression Model

	A	B	C	D	E	F	G
	Variable Name	**Variable Description**	**Coefficient**	**S.E.**	**Odds Ratio**	**C.I.**	***p*-value**
1.	**Intercept**		-1.714	0.137	0.16		<.001
2.	**Black**	**Venire member is black**	**0.906**	**0.19**	**2.48**	**1.71, 3.58**	**<.001**
3.	**DP_Reservations**	Venire member expressed reservations about the death penalty	2.437	0.23	11.44	7.23, 18.09	<.001
4.	**SingleDivorced**	Venire member is not married	0.543	0.17	1.72	1.23, 2.41	<.01
5.	**JAccused**	Venire member accused of a crime	0.730	0.23	2.07	1.33, 3.24	<.01
6.	**Hardship**	Venire member worried serving would impose a hardship	1.094	0.31	2.99	1.61, 5.54	<.01
7.	**Homemaker**	Venire member is a homemaker	0.799	0.32	2.22	1.18, 4.17	<.02
8.	**JLawEnf_all**	Venire member or close other works in law enforcement	-0.466	0.19	0.63	0.44, 0.90	<.02
9.	**JKnewD**	Venire member or venire member's immediate family knew the defendant	2.156	0.66	8.63	2.37, 31.41	<.01
10.	**JKnewW**	Venire member knew a witness	-0.615	0.25	0.54	0.33, 0.88	<.02
11.	**JKnewAtt**	Venire member knew one of the attorneys in the case	0.744	0.25	2.11	1.29, 3.44	<.01
12.	**LeansState**	Venire member expresses view that suggests view favorable to state (e.g., problems with presumption of innocence, right not to testify)	-1.966	0.54	0.14	0.05, 0.40	<.001
13.	**PostCollege**	Venire member went to graduate school	0.996	0.27	2.71	1.59, 4.63	<.001
14.	**VeryYoung**	Venire member is 22 or younger	0.920	0.40	2.51	1.14, 5.55	<.03

R^2 = .32

V. CONCLUSION

How North Carolina courts interpret and apply the RJA to claims of racial bias in jury selection is an open question pending the outcome of cases currently in litigation.[101] In the past, North Carolina trial courts have not been especially willing to sustain *Batson* objections, and reviewing courts have shown almost complete deference to those rulings.[102] The RJA's express authorization to look at patterns that emerge in strike decisions across cases shifts the focus from a question of a particular prosecutor's credibility in a particular case to what the data tell us about what drives strike decisions generally. Justifications for strike decisions that seem plausible in the limited context of a single case—even with the aid of side-by-side comparisons of struck and unstruck jurors authorized by *Miller-El v. Dretke*—might not hold up when the universe of potential comparators expands to include jury selection in other cases.[103]

101. The study presented in this Article was the focus of a two-and-a-half week hearing in Cumberland County, North Carolina in early 2012. Death row inmate Marcus Robinson's RJA claim as to racial disparities in prosecutors' use of peremptory strikes in capital jury selection was the first such claim to go to a hearing. On April 20, 2012, the trial court issued its ruling that race had been a significant factor in the state's decision to exercise peremptory strikes, finding the analyses presented here "to be a valid, highly reliable, statistical study of jury selection practices in North Carolina capital cases between 1990 and 2010." Order Granting Motion for Appropriate Relief at 45, State v. Robinson, No. 91 CRS 23143 (N.C. Super. Ct. Apr. 20, 2012), *available at* http://www.aclu.org/files/assets/marcus_robinson_order.pdf. The defendant's death sentence was vacated, and he was resentenced to life in prison without the possibility of parole.

102. *See* Amanda S. Hitchcock, *Recent Development, "Deference Does Not by Definition Preclude Relief": The Impact of* Miller-El v. Dretke *on* Batson *Review in North Carolina Capital Appeals*, 84 N.C. L. REV. 1328 (2006) (reviewing North Carolina Supreme Court's highly deferential approach to reviewing *Batson* claims in capital cases).

103. *See* Sommers & Norton, *supra* note 31, at 269 (finding evidence of racial bias in mock jury selection experiment but noting that "[w]e observed bias against Black venire members only when examining decisions made by several participants; indeed, for any given participant, we are unable to determine whether the peremptory was influenced by race or whether the justification provided was valid").

APPENDIX A

PARTIAL LIST OF VARIABLES FROM DATA COLLECTION INSTRUMENT

Part A. General Codes

Variable Name	Label
DName	Defendant's name
VM_Name	Juror's name
VM_Race	Juror's race
SourceRace	Source of race information (e.g., juror questionnaire, public record)
StrikeState	StrikeState = 1 if state used a peremptory strike against the juror (all else = 0)
StrikeDef	StrikeDef = 1 if defense used a peremptory strike against the juror (all else = 0)
Status	Juror's ultimate status (e.g., struck, seated as an alternate juror)
Gender	0 = Female; 1 = Male
Age	Juror's age in years
Marital	Juror's marital status (e.g., married, widowed, single)
Children	0 = No children; 1 = Children
ReligiousOrg	1 = Belongs to a religious organization; 0 = all else
Education	Juror's education level (e.g., high school graduate, attended graduate school)
Military	1 = Served in military; 0 = all else
Employment	See below for a portion of the coding appendix used to code jurors' employment
SpouseEmployment	Employment of married jurors' spouses (same codes used for jurors' employment)
Descriptives	Up to 10 codes used to capture experiences and attitudes expressed in jury selection. See below for a partial list of codes.

Part B. Employment Codes
(excluding subparts capturing different types of jobs within those listed as examples)

Code	Category	Examples
10	*Management & Professional*	Management and business; computers; legal; medical; engineering
20	*Sales and Office Occupations*	Sales; office and administrative support
30	*Farming, Fishing, and Forestry*	
40	*Service*	Healthcare support; fire fighting; law enforcement; food preparation
50	*Military*	Enlisted or officer
60	*Construction, Extraction, Maintenance, & Repair*	
70	*Production & Transportation*	
80	*Outside of Labor Force*	Student; retired; homemaker; unemployed

Part C. Codes for Juror Characteristics
(excluding subparts capturing more detailed juror characteristics)

Code	Category	Examples
100	*Hardship*	Emotional difficulty; caretaking obligation
300	*Juror/Friend/Family Was Victim of Crime*	
400	*Juror/Friend/Family Was Accused of Criminal Activity*	
700	*Admitted Bias or Other Reason S/he Could Not Be Fair*	Premature opinion; admitted bias
800	*Expressed View Contrary to Applicable Law, Not Including Death Qualification*	Difficulty presuming innocence; draws adverse inferences from failure to testify
900	*Prior Familiarity with Parties*	Knows parties or attorneys
1200	*Moral or Religious Reservations about Imposing the Death Penalty*	Ambivalence about death penalty (short of refusal to impose under any circumstances)

THE JURY SUNSHINE PROJECT: JURY SELECTION DATA AS A POLITICAL ISSUE

*Ronald F. Wright**
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In this Article, the authors look at jury selection from the viewpoint of citizens and voters, standing outside the limited boundaries of constitutional challenges. They argue that the composition of juries in criminal cases deserves political debate outside the courtroom. Voters should use the jury selection habits of judges and prosecutors to assess the overall health of local criminal justice: local conditions are unhealthy when the full-time courtroom professionals build juries that exclude parts of the local community, particularly when they exclude members of traditionally marginalized groups such as racial minorities. Every sector of society should participate in the administration of criminal justice.

This political problem starts as a public records problem. Poor access to records is the single largest reason why jury selection cannot break out of the litigator's framework to become a normal topic for political debate. As described in Part III, the authors worked with dozens of students, librarians, and court personnel to collect jury selection documents from individual case files and assembled them into a single database, which we call "The Jury Sunshine Project." The database encompasses more than 1,300 felony trials and almost 30,000 prospective jurors.

Part IV presents some initial findings from the Jury Sunshine Project to illustrate how public data might generate political debate beyond the courtroom. Part V explores the possible explanations for the racial patterns observed in jury selection. Some accounts of this data point to be-

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nign nonracial factors as the real explanation for the patterns observed. Other interpretations of the data treat these patterns as a new type of proof of discriminatory intent: evidence that cuts across many cases might shed new light on the likely intent of prosecutors, defense attorneys, or judges in a single case. A third perspective emphasizes the community effects of exclusion from jury service. Finally, Part VI generalizes from the data about the race of jurors to ask more generally how accessible public records could transform criminal justice. Sunshine will open up serious community debates about what is possible and desirable in local criminal justice systems.

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I. INTRODUCTION

Lawyers treat jury selection—no surprise here—as an issue to litigate. They file motions, objecting to mistakes by the clerk of the court when she calls a group of potential jurors to the courthouse for jury duty. After those potential jurors arrive in the courtroom, lawyers file further motions, testing the

reasons that judges give for removing a prospective juror. The lawyers also watch for signs that their opponents might rely on improper reasons, such as race or gender, to remove potential jurors from the case. Again, there is a motion for that. The law of jury selection has plenty of enforcers who stand ready to litigate.

In this Article, we stand outside the litigator's role and look at jury selection from the viewpoint of citizens and voters. As citizens, we believe that the composition of juries deserves political debate outside the courtroom. Voters should consider the jury selection habits of judges and prosecutors when deciding whether to re-elect the incumbents to those offices. More generally, jury selection offers a stress test for the overall health of local criminal justice. Conditions are unhealthy when full-time courtroom professionals build juries that exclude parts of the local community, particularly when they exclude traditionally marginalized groups such as racial minorities. Every sector of society should play a part in the administration of criminal justice.

This political problem starts as a public records problem. As we discuss in Part II of this Article, the legal doctrines related to jury selection focus too much on single cases, and limited public access to court data makes that myopia worse. Poor access to courtroom records is the single largest reason why jury selection cannot break out of the litigator's framework to become a normal topic for political debate.[1]

The paperwork in the typical case file, found in the office of the clerk of the court, does record a few details about which residents the clerk called to the courthouse, which panel members the judge and the attorneys excluded from service, and which people ultimately served on the jury. But many details about jury selection go unrecorded. And even more important, it is practically impossible to see any patterns across the case files in many different cases. The clerk normally does not hold the data in aggregate form or in electronically searchable form. Thus, there is no place to go if a citizen (or a news reporter or candidate for public office) wants to learn about the actual jury selection practices of the local judges or prosecutors. There is no vantage point from which to see the whole of jury selection, rather than the selection of a single jury.[2]

Until now. As we describe in Part III, we worked with dozens of students, librarians, and court personnel to collect jury selection documents from individual case files. Then we assembled them into a single database, which we call "The Jury Sunshine Project." The paper records, housed in 100 different courthouses, depict the work of lawyers and judges in more than 1,300 felony trials, as they decided whether to remove almost 30,000 prospective jurors. The assembled data offer a panorama of jury selection practices in a state court system during an entire year.

1. *See infra* Section II.D.

2. For a review of periodic efforts to assemble jury selection data related to specialized categories of cases (particularly in capital cases), see *infra* Section II.D.

In Part IV, we present some initial findings from the Jury Sunshine Project to illustrate how public data might generate political debate beyond the courtroom. Our analysis shows that prosecutors in North Carolina—a state with demographics and legal institutions similar to those in many other states—excluded nonwhite jurors about twice as often as they excluded white jurors. Defense attorneys leaned in the opposite direction: they excluded white jurors a little more than twice as often as nonwhite jurors. Trial judges, meanwhile, removed nonwhite jurors for "cause" about 30% more often than they removed white jurors. The net effect was for nonwhite jurors (especially black males) to remain on juries less often than their white counterparts.

The data from the Jury Sunshine Project also show differences among regions and major cities in the state. Prosecutors in three major cities—Greensboro, Raleigh, and Fayetteville—accepted a higher percentage of nonwhite jurors than prosecutors in three other cities—Charlotte, Winston-Salem, and Durham. While there may be reasons why prosecutors choose different jurors than judges or defense attorneys do, why would prosecutors in some cities produce such different results from their prosecutor colleagues in other cities?

Part V explores possible explanations for the racial patterns that we observed in jury selection. Some accounts of these data point to benign nonracial factors as the real explanation for the patterns we observed. Other interpretations of the data treat these patterns as a new type of proof of discriminatory intent: evidence that cuts across many cases might shed new light on the likely intent of prosecutors, defense attorneys, or judges in a single case.

A third perspective emphasizes the *effects* of exclusion from jury service. This system-wide perspective does not concentrate on what a single attorney or judge was thinking at the moment of removing a juror. Instead, what matters is how the work of all the attorneys, judges, clerks, and ordinary citizens in the courthouse forms a pattern over time. When courtroom actors exclude a portion of the community from jury duty in a persistent and predictable way, that outcome—regardless of the intent of the actors—undercuts the legitimacy of local criminal justice.

Finally, in Part VI, we generalize from our data about the race of jurors to ask more generally how accessible public records could transform criminal justice. We believe that sunshine will open up serious community debates about what is possible and desirable in the local criminal justice system. By widening the frame of vision from a litigant's arguments about a single case, the quality of justice becomes a comparative question. For instance, voters and residents who learn about jury selection patterns will naturally ask, "How do the jury selection practices of my local court compare to practices elsewhere?" Researchers and reporters can answer those questions with standardized public data, comparing prosecutors and judges with their counterparts in different districts.

Data-based comparisons such as these make it possible to hold prosecutors and judges directly accountable to the public, in a world where voters generally have too little information about how these public servants perform their

work. When challengers raise the issue during the re-election campaign of the chief prosecutor or the judge, and reporters write stories about the latest jury selection report, it could shape the selection of jurors across many cases.

With the help of public records—assembled to make it easy to compare places, offices, times, and crimes—the selection of juries could become something more than an insider's litigation game of dueling motions. The patterns, visible in those public records, could prompt a public debate about what the voters expect from their judges and prosecutors. It takes a democratic movement, not just a constitutional doctrine, to bring the full community into the jury box.

II. CASE-LEVEL DATA AND DOCTRINES

Every defendant has a legally enforceable right to an impartial and representative jury, so lawyers and judges raise constitutional and statutory claims during criminal and collateral proceedings to protect that right. The litigators' concerns about jury selection, however, keep the focus narrow. In this Part, we briefly review some of the legal doctrines that litigators use to enforce the ideals of jury selection, noting the doctrinal emphasis on single cases.

We then show how current public records laws and the practices of jury clerks reinforce the single-case orientation of the constitutional doctrine. As a result, it is nigh impossible to view jury selection at the overall system level. The existing archival empirical studies of jury selection reflect this difficulty: they deal with specialized crimes or targeted locations, making it difficult to draw general lessons about juries and the overall health of criminal justice systems.

A. Judge Removes Jurors for Cause

Before the start of a jury trial, lawyers for the prosecution and the defense may challenge jurors for cause. The judge, responding to these objections from the attorneys, must confirm that each potential juror meets the general requirements for service, such as residency and literacy requirements.[3] At that point, the judge also evaluates possible sources of juror bias against the defendant or against the government.

The "cause" for removal might be a prospective juror's relationship with one of the parties or lawyers.[4] The judge also inquires into the prior experiences of the jurors; for instance, the judge might ask if any of the jurors was ever a

3. *See* 42 PA. CONS. STAT. § 4502 (2016) (declaring that citizens are not qualified to be jurors if they are "unable to read, write, speak and understand . . . English . . . ;" are not able to "render efficient jury service" due to mental infirmity; or have been "convicted of a crime punishable by imprisonment for more than one year . . . ."); TEX. CODE CRIM. PROC. ANN. art. 35.16 (West 2016) (allowing a challenge for cause for jurors with felony or misdemeanor convictions).

4. Judges encounter special problems during for-cause removals in death penalty cases. A juror who declares that he or she would always vote to impose the death penalty, or not to impose the death penalty, will be excluded for cause. *See* Witherspoon v. Illinois, 391 U.S. 510, 520–23 (1968).

victim of a crime. A juror who brings prior knowledge about the events surrounding the alleged crime receives special scrutiny. There is no limit to the number of jurors a judge might exclude on these grounds.[5]

The statutes and judicial opinions dealing with for-cause removals share two important features. First, the standards defer to trial judges. Appellate courts apply an "abuse of discretion" standard to these questions and rarely overturn the trial judge's decision to grant or deny a party's request to remove a juror for cause.[6] Second, the law of for-cause removal of jurors looks to one trial at a time. Any challenge to the judge's decision begins with a review of the court transcript for evidence of the individual juror's alleged bias. A comparison to some other juror in the same case might be relevant, but the judge's habits across many cases—or the actions of the local judiciary more generally during questions of removal—do not matter for litigators. Indeed, there are no aggregate data sources that could show how often trial judges remove jurors for cause. Litigators see this issue case by case, and appellate courts normally conclude that the trial judge acted within her discretion, whatever she chose.

B. Attorneys Remove Jurors with Peremptory Challenges

After the parties argue to the judge about removals for cause, lawyers for the prosecution and defense use peremptory challenges to strike a designated number of jurors.[7] True to the name, peremptory strikes require no explanation. Perhaps one side wants to exclude jurors with certain political attitudes because the attorneys believe those jurors may not sympathize with their client's side of the case. There are only a few ways that lawyers can take their peremptory strikes too far: they may not use peremptory challenges to exclude jurors based on race, gender, or other "suspect" categories for equal protection purposes. To do so would violate the Constitution.[8]

The method for litigants to prove racial discrimination in the use of peremptory challenges has changed over the years. Under the approach laid out in *Swain v. Alabama*,[9] a party claiming discrimination had to present evidence reaching beyond the opponent's behavior in the case at hand. The defendant would need to show that "in criminal cases prosecutors have consistently and systematically exercised their strikes to prevent any and all Negroes on petit jury venires from serving on the petit jury itself."[10]

5. *See* MO. REV. STAT. § 494.470 (2016) ("A prospective juror may be challenged for cause for any reason mentioned in this section and also for any causes authorized by the law."); N.C. GEN. STAT. § 15A-1214(d)–(e) (2016).

6. *See* Oswalt v. State, 19 N.E.3d 241, 245 (Ind. 2014); State v. Lindell, 629 N.W.2d 223, 239–40.

7. *See* OHIO R. CRIM. P. 24(D) (2009) ("[E]ach party peremptorily may challenge three prospective jurors in misdemeanor cases, four prospective jurors in felony cases other than capital cases . . . ."); TENN. CODE ANN. § 40-18-118 (2016) (providing eight strikes for each side in cases punishable by imprisonment for more than one year but not death, and three for each side if crime is punishable by less than one year).

8. *See* Miller-El v. Dretke, 545 U.S. 231, 237–39 (2005); Batson v. Kentucky, 476 U.S. 79, 89 (1986).

9. 380 U.S. 202, 222–23 (1965); Norris v. Alabama, 294 U.S. 587, 589 (1935).

10. *Swain*, 380 U.S. at 223.

Two decades later, the Court in *Batson v. Kentucky*[11] expanded the options for a party trying to prove intentional racial discrimination during jury selection. A litigant now may rely solely on the facts concerning jury selection in the individual case. Under this analysis, the attorneys try to reconstruct the state of mind of a single prosecutor (or a single defense attorney) who removed a prospective juror in a single trial. The relevant factual question is a familiar one in criminal court: what was the state of mind of a single actor at one moment in the past?

The *Batson* Court developed an oddly detailed constitutional test: a three-step analysis (plus one prerequisite) for examining invidious racial discrimination in the use of peremptory strikes during jury selection. As a prerequisite, the litigant must identify jurors belonging to a constitutionally relevant group, such as a group based on race, ethnicity, or gender.[12] At that point, the moving party takes the first step by showing facts (such as disproportionate use of peremptory challenges against jurors of one race, or the nature of the questions posed on *voir dire*) to create a prima facie inference that the other attorney excluded jurors based on race.[13]

Second, the burden shifts to the nonmoving party to give neutral explanations for its challenges. The explaining party cannot simply deny a discriminatory intent or assert good faith. The attorney must point to some reason other than the assumption that jurors of a particular race would be less sympathetic to the party's claims at trial.[14] Finally, in the third step, the moving party offers reasons to believe that the other party's supposedly neutral reasons for the removal of jurors were actually pretextual. On the basis of these arguments, the court decides if the nonmoving party's explanation was authentic or pretextual.

Critics immediately spotted the potential weakness of the *Batson* framework and argued that it is too easy for attorneys to fabricate race-neutral reasons, after the fact, to exclude minority jurors.[15] Appellate courts affirm convic-

11. 476 U.S. at 96–97.

12. *See* United States v. Mensah, 737 F.3d 789, 803 (1st Cir. 2013) (Asian Americans); United States v. Heron, 721 F.3d 896, 902 (7th Cir. 2013) (recognizing circuit split and state court split on religion-based challenges); United States v. Roan Eagle, 867 F.2d 436, 440–41 (8th Cir. 1989) (Native Americans); Commonwealth v. Carleton, 641 N.E.2d 1057, 1058–59 (Mass. 1994) (Irish Americans).

13. *See* People v. Bridgeforth, 769 N.E.2d 611, 616–17 (N.Y. 2016) (holding that removal of dark-skinned juror can satisfy step one); Hassan v. State, 369 S.W.2d 872 (Tex. Crim. App. 2012) (applying step one); City of Seattle v. Erickson, 398 P.3d 1124, 1131 (Wash. 2017) (holding that removal of only minority juror in pool can establish prima facie case).

14. *See* People v. Gutierrez, 395 P.3d 186, 198 (Cal. 2017) (rejecting adequacy of proffered race-neutral reasons); State v. Bender, 152 So. 3d 126, 130–31 (ruling that prosecutor not required to present arrest records in order to support race-neutral explanation for peremptory strike); People v. Knight, 701 N.W.2d 715, 730 (Mich. 2005) (finding prosecutor presented adequate race-neutral reasons for excusing prospective jurors).

15. *See* Wilkerson v. Texas, 493 U.S. 924, 928 (1989) (Marshall, J., dissenting) ("To excuse such prejudice when it does surface, on the ground that a prosecutor can also articulate nonracial factors for his challenges, would be absurd. . . . If such 'smoking guns' are ignored, we have little hope of combating the more subtle forms of racial discrimination."); Michael J. Raphael & Edward J. Ungvarsky, *Excuses, Excuses: Neutral Explanations Under* Batson v. Kentucky, 27 U. MICH. J.L. REFORM 229, 236 (1993) ("[I]n almost any situation a prosecutor can readily craft an acceptable neutral explanation to justify striking black jurors because of their race.").

tions even when prosecutors invoke "nonracial" reasons that correlate with race-specific behaviors or stereotypes,[16] and they sometimes affirm when prosecutors rely on the race-neutral reason only for nonwhite jurors.[17] Some courts also uphold the use of peremptories where the attorney had mixed motives for the removal and at least one of the motives was nonracial.[18] Several studies of published opinions confirm that appellate courts rarely reverse convictions based on *Batson* claims.[19]

Judges stress the fact-specific nature of their rulings on *Batson* claims.[20] The Court's latest case involving race and juror selection, *Foster v. Chatman*,[21] reinforced this aspect of the doctrine: to use a bit of an understatement, the case did not involve subtle discrimination. Documents related to the jury selection in that case showed that the prosecutors made notations about the race of several

16. *See* United States v. Herrera-Rivera, 832 F.3d 1166, 1173 (9th Cir. 2016) (finding that government's proffered reasons for striking potential juror were not pretextual and that strike was based on juror's having criminal history and family members who used drugs); United States v. White, 552 F.3d 240, 251 (2d Cir. 2009) (accepting the explanation that a juror had "an angry look that she wasn't happy to be here"); Lingo v. State, 437 S.E.2d 463, 471 (Ga. 1993) (prosecutor excluded black male juror who appeared "angry"); Clayton v. State, 797 S.E.2d 639, 643–45 (Ga. Ct. App. 2017) (State's reliance on fact that prospective black juror had gold teeth was not race-neutral); State v. Clifton, 892 N.W.2d 112, 126–27 (Neb. 2017) (holding that trial court did not err in finding race-neutral the prosecutor's rationale that juror had years of alcohol and crack addiction).

17. *See* Lewis v. Bennett, 435 F. Supp. 2d 184, 191–92 (W.D.N.Y. 2006) (striking unmarried juror); State v. Collins, No. M2015-01030-CCA-R3-CD, 2017 WL 2126704, at *14 (Tenn. Crim. App. May 16, 2017) (jurors had family members affected by drug abuse, prosecutor removed the only black juror).

18. *See* Cook v. LaMarque, 593 F.3d 810, 817 (9th Cir. 2010) (using comparative analysis of stricken versus nonstricken jurors rather than a mixed-motive test); Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 YALE L.J. 1106, 1116–17 (2018).

19. *See* Jeffrey Bellin & Junichi P. Semitsu, *Widening* Batson*'s Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1092 (2011) (examining 269 *Batson* challenges in federal court from 2000–2009); James E. Coleman Jr. & David C. Weiss, *The Role of Race in Jury Selection: A Review of North Carolina Appellate Decisions*, N.C. ST. B. J., Fall 2017, at 13–14 (comparing reversals in North Carolina to other southern states); Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate* Batson *Record*, 94 N.C. L. REV. 1957, 1961 (2016).

20. *See* Gray v. Brady, 592 F.3d 296, 301 (1st Cir. 2010) ("[W]hether to draw an inference of discriminatory use of peremptories is an intensely case and fact-specific question . . . .") (quoting Gray v. Brady, 588 F. Supp. 2d 140, 146 (D. Mass. 2008)). Despite the doctrinal emphasis on fact-specific judicial review of jury selection, the parties often present formulaic, prepackaged arguments to explain their removal of jurors. Litigation in this area has unearthed training materials from local prosecutor's offices, listing ready-made "neutral" justifications that prosecutors might use to overcome a *Batson* challenge. *See, e.g.*, Commonwealth v. Cook, 952 A.2d 594, 601 (Pa. 2008) (describing a training video for new prosecutors calling for prosecutors to strike black people and women from juries and explaining how to conceal discriminatory strikes). Lawyers litigating claims of racial bias in the North Carolina criminal justice system collected materials demonstrating such prosecutor training practices. *See generally* Catherine M. Grosso et al., *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in Post-*Batson *North Carolina Capital Trials*, 97 IOWA L. REV. 1531, 1535 (2012). In some instances, trainers specifically instructed prosecutors to exclude members of racial minority groups from juries. *See, e.g.*, Miller-El v. Dretke, 545 U.S. 231, 265–66 (2005) (Dallas County); Robert P. Mosteller, *Responding to* McCleskey *and* Batson*: The North Carolina Racial Justice Act Confronts Racial Peremptory Challenges in Death Cases*, 10 OHIO ST. J. CRIM. L. 103, 104 (2012); Brian Rodgers, *Local DA Encourages Blocking Blacks from Juries, Wharton County Prosecutor Says*, HOUS. CHRON. (Mar. 22, 2016, 9:51 PM), http://www.houstonchronicle.com/news/houston-texas/houston/article/Local-DA-encourages-blocking-blacks-from-juries-6975314.php.

21. 136 S. Ct. 1737, 1743–45 (2016).

potential jurors, writing the letter "b" alongside their names, highlighting their names in green, and placing these jurors in a category labeled, "definite NO's." It is hard to imagine many *Batson* claims with evidence this strong, certainly not for cases litigated after attorneys became more sophisticated in preparing for possible *Batson* claims.[22]

Since the Court decided *Batson*, critics have proposed improvements to the test.[23] Chief among them, scholars persistently call for the abolition of peremptory strikes.[24] At the end of the day, however, the *Batson* test has endured, more or less in its original form. *Batson* marks the boundaries of constitutional enforcement and these boundaries do not seem likely to move any time soon.[25]

C. Venire *Selection*

Litigants also sometimes object to the composition of the jury *venire*—the local residents whom the clerk of the court summons to the courthouse on any given day for potential jury service. Constitutional doctrine plays only a limited backstop role here, as it does with peremptory challenges.

The Supreme Court does read the Equal Protection Clause to prevent states from excluding racial groups from the jury *venire* by statute.[26] The Court

22. *See, e.g.*, *Ex parte* Floyd, 227 So. 3d 1, 13 (Ala. 2016) (affirming conviction after remand to reconsider in light of *Foster*, despite prosecutor use of list designating jurors by race).

23. *See* Aliza Plener Cover, *Hybrid Jury Strikes*, 52 HARV. C.R.-C.L. REV. 357, 372 (2017); Scott Howe, *Deselecting Biased Juries*, 2015 UTAH L. REV. 289, 337 (2015); Nancy S. Marder, Foster v. Chatman*: A Missed Opportunity for* Batson *and the Peremptory Challenge*, 49 CONN. L. REV. 1137, 1176 (2017) (proposing allowing defendants to obtain more information, such as prosecutor notes, or inferring discriminatory intent from discriminatory effect or practice); Caren Myers Morrison, *Negotiating Peremptory Challenges*, 104 J. CRIM. L. & CRIMINOLOGY 1, 22 (2014); Anna Roberts, *Asymmetry as Fairness: Reversing a Peremptory Trend*, 92 WASH. U. L. REV. 1503, 1541 (2015); *cf.* Andrew G. Ferguson, *The Big Data Jury*, 91 NOTRE DAME L. REV. 935, 969 (2016).

24. *See* Rice v. Collins, 546 U.S. 333, 344 (2006) (Breyer, J., concurring) ("I continue to believe that we should reconsider *Batson*'s test and the peremptory challenge system as a whole."); Bellin & Semitsu, *supra* note 19, at 1107; Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099, 1149 (1994); Antony Page, Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 179 (2005); Amy Wilson, *The End of Peremptory Challenges: A Call for Change Through Comparative Analysis*, 32 HASTINGS INT'L & COMP. L. REV. 363, 371 (2009); David Zonana, *The Effect of Assumptions About Racial Bias on the Analysis of* Batson*'s Three Harms and the Peremptory Challenge*, 1994 ANN. SURV. AM. L. 203, 241.

25. *See* Leonard L. Cavise, *The* Batson *Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501, 528 (decrying the doctrine's "useless symbolism"); Camille A. Nelson, Batson, *O.J., and* Snyder*: Lessons from an Intersecting Trilogy*, 93 IOWA L. REV. 1687, 1689 (2008) ("*Batson*'s promise of protection against racially discriminatory jury selection has not been realized."); Bryan Stevenson, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, HUM. RTS. MAG. (Fall 2010), http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol37_2010/fall2010/illegal_racial_discrimination_in_jury_selection.html. Change might occur instead at the subconstitutional level. In April 2018, the Washington Supreme Court approved a new procedural rule that removed a showing of discriminatory intent as a basis for disallowing an improper peremptory challenge. *See* WASH. STATE CT. GEN. R. 37.

26. In the first case to deal with the question, *Strauder v. West Virginia*, the Court sustained an equal protection challenge to a statute excluding black people from the jury *venire*. 100 U.S. 303, 309 (1880). In later cases, the Court did not require the defendant to show complete exclusion of a racial group from jury service: a substantial disparity between the racial mix of the county's population and the racial mix of the *venire*, together

has also established that defendants may challenge the process of creating the *venire*, a right that stems from the Sixth Amendment's promise of an impartial jury.[27] A defendant who challenges the *venire* must show that a distinctive group (such as a racial group) is underrepresented in the pool, meaning that its jury *venire* numbers are "not reasonable in relation to" the number of such persons in the community.[28] After showing a gap between the general population and the composition of the *venire*, the defendant must identify some aspect of the jury selection process that causes a "systematic" exclusion of the group.[29]

Statistics matter in proving the defendant's claim. State courts and lower federal courts use several different techniques to measure the gap between the presence of a distinctive group in the population and on the jury *venire*.[30] In that sense, the litigation related to jury *venires* places more weight on the pattern of outcomes and less on the intent of particular actors in a single trial.[31] Nevertheless, litigators in this arena still look to a small set of trials—a single *venire*, typically a single day's worth of trials—for the relevant evidence.[32] Moreover, a judicial finding for defendants who challenge the composition of the *venire* is rare.[33] Like the legal doctrines related to judicial removals for cause and litigant removals through peremptory challenges, the litigation surrounding the jury *venire* leaves most jury selection choices undisturbed—including some troubling outcomes.[34]

D. Public Records and Past Jury Selection Studies

As we have seen, when entire segments of the community remain underrepresented in jury service, constitutional doctrines provide a remedy only in

with an explanation of how the jury selection process had created this outcome, would be enough to establish a prima facie case of discrimination. The government would then have to rebut the presumption of discrimination. *See* Castaneda v. Partida, 430 U.S. 482, 499 (1977) (underrepresentation of Mexican Americans); Turner v. Fouche, 396 U.S. 346, 359 (1970) (underrepresentation of black people).

27. In *Taylor v. Louisiana*, the Court held that a Louisiana law placing on the *venire* only those women who affirmatively requested jury duty violated the Sixth Amendment's requirement that the jury represent a "fair cross section" of the community. 419 U.S. 522, 530 (1975).

28. Missouri v. Stewart, 714 S.W.2d 724, 727 (Mo. Ct. App. 1986).

29. *See* Duren v. Missouri, 439 U.S. 357 (1979). At that point, the burden of proof shifts to the government to show a "significant state interest" that justifies use of the method that systematically excludes a group.

30. The Court, in *Berghuis v. Smith*, described three different measures of the participation gap: the absolute disparity test, the comparative disparity test, and the standard deviation test. 559 U.S. 314, 316 (2010); *see also* State v. Plain, 898 N.W.2d 801, 826–27 (Iowa 2017) (challenges to jury pools can be based on multiple analytical models).

31. *See* Jessica Heyman, *Introducing the Jury Exception: How Equal Protection Treats Juries Differently*, 69 N.Y.U. ANN. SURV. AM. L. 185, 203 (2013).

32. *Id.*

33. *See* United States v. Fadiga, 858 F.3d 1061, 1063–64 (7th Cir. 2017) (holding that evidence that 20% of the population in the two counties that provided jurors for the district court were black and that no juror on defendant's forty-eight person *venire* was black was insufficient to establish prima facie case of discrimination); United States v. Best, 214 F. Supp. 2d 897, 902–03 (N.D. Ind. 2002) (holding that jury *venire* did not violate Sixth Amendment fair cross-section requirement, even if percentage of black people in counties from which *venire* was drawn was 19.6% and percentage of black people on this *venire* was only 4.8%).

34. *See* David M. Coriell, Note, *An (Un)Fair Cross Section: How the Application of* Duren *Undermines the Jury*, 100 CORNELL L. REV. 463, 465 (2015).

the most extreme individual cases. They do so without checking the broader context of courtroom practices. Unfortunately, record-keeping about jury selection compounds the doctrinal problem of single-case myopia.

State courts maintain records (typically in a nonelectronic format) about the construction of individual juries: which prospective jurors sat in the box, which jurors the judge removed for cause, and which jurors the two attorneys removed through peremptories.[35] But aggregate data is another thing entirely: clerks do not traditionally compile data on the rate at which parties or judges exclude minority jurors over long periods of time.[36] Even if state courts were to compile and publish their records to show jury selection practices across many cases, the case files are not fully comparable from place to place. The lack of data not only makes it difficult for litigants to ferret out racial discrimination in particular cases, but it also makes it difficult to identify patterns of behavior that supervisors might address through better training and accountability.[37]

Because of the fragmented nature of public records dealing with jury selection, researchers have not created many databases on this topic, and the limited data they have managed to collect focus on specialized crimes or on trials in a handful of locations. Comparisons across many locations, time periods, or types of crimes have not been possible.

For instance, most of the efforts of scholars and litigants to collect records about jury selection at the trial court level have related to capital murder trials.

35. Clerks in some states also maintain a record of the order of removal. Jurisdictions vary in how much information they collect and retain about individual jurors. *See, e.g.*, MD. CODE ANN., CTS. & JUD. PROC. § 8-314(a) (West 2016) ("A jury commissioner shall document each . . . decision with regard to disqualification, exemption, or excusal from, or rescheduling of, jury service."); MINN. GEN. R. PRACTICE R. 814 (2017) ("[N]ames of the qualified prospective jurors drawn and the contents of juror qualification questionnaires . . . must be made available to the public . . . ."); 42 PA. CONS. STAT. § 4523(a) (2016) ("The jury selection commission shall create and maintain a list of names of all prospective jurors who have been disqualified and the reasons for their disqualification. The list shall be open for public inspection.").

36. For an exception, see N.Y. JUD. LAW § 528 (McKinney 2016).

> The commissioner of jurors shall collect demographic data for jurors who present for jury service, including each juror's race and/or ethnicity, age and sex, and the chief administrator of the courts shall submit the data in an annual report to the governor, the speaker of the assembly, the temporary president of the senate and the chief judge of the court of appeals.

Id. We are unaware of any state that requires the clerk of the court to collect information about the removal of jurors from the *venire* at the case level, in all jury trials, and to report that data routinely, both at the case level and in aggregate form. *See* S.B. 576, 2017 Leg. (Cal. 2017) (requiring jury commissioner to develop a form to collect specified demographic information about prospective jurors, prohibiting disclosure of the form, but also requiring jury commissioner to release biannual reports with aggregate data).

37. The best overview of these shortcomings in the public records appears in Catherine M. Grosso & Barbara O'Brien, *A Call to Criminal Courts: Record Rules for* Batson, 105 KY. L.J. 651, 654 (2017); *see also* Russell D. Covey, *The Unbearable Lightness of* Batson*: Mixed Motives and Discrimination in Jury Selection*, 66 MD. L. REV. 279, 322 (2007) ("[T]here is extremely little evidence available even in a full-blown *Batson* hearing to shed much light on the question of whether an explanation is credible."); Peter A. Joy & Kevin C. McMunigal, *Racial Discrimination and Jury Selection*, 31 CRIM. JUST., Summer 2016, at 43, 45 ("[E]very jurisdiction needs to do a better job of collecting data both on the composition of the jury venires and on the use of peremptory challenges."); Mary R. Rose & Jeffrey B. Abramson, *Data, Race, and the Courts: Some Lessons on Empiricism from Jury Representation Cases*, 2011 MICH. ST. L. REV. 911, 954–56 (noting poor quality of juror data that courts maintain and report).

Researchers have tallied jury statistics in capital cases in Pennsylvania,[38] North Carolina,[39] South Carolina,[40] and elsewhere.[41]

Other studies have ventured beyond capital murder trials but remained limited to a small number of county courthouses.[42] The most comprehensive of these efforts includes a study of criminal trial juries based on records from two counties in Florida.[43] Several studies focused on the creation of the jury *venire*, prior to any removals by judges and attorneys.[44] Litigators—perhaps frustrated

38. *See* David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post*-Furman *Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1662 (1998); David C. Baldus et al., *Statistical Proof of Racial Discrimination in the Use of Peremptory Challenges: The Impact and Promise of the* Miller-El *Line of Cases as Reflected in the Experience of One Philadelphia Capital Case*, 97 IOWA L. REV. 1425, 1449 (2012).

39. *See* Grosso et al., *supra* note 20, at 1533; Barbara O'Brien & Catherine M. Grosso, *Beyond* Batson*'s Scrutiny: A Preliminary Look at Racial Disparities in Prosecutorial Preemptory Strikes Following the Passage of the North Carolina Racial Justice Act*, 46 U.C. DAVIS L. REV. 1623, 1627 (2013).

40. *See* Ann M. Eisenberg et al., *If It Walks like Systematic Exclusion and Quacks like Systematic Exclusion: Follow-Up on Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases, 1997–2014*, 68 S.C. L. REV. 373, 373 (2017); Ann M. Eisenberg, *Removal of Women and African Americans in Jury Selection in South Carolina Capital Cases, 1997–2012*, 9 NE. U. L. REV. 299, 302 (2017).

41. *See* David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 22–28 (2001); Aliza Plener Cover, *The Eighth Amendment's Lost Jurors: Death Qualification and Evolving Standards of Decency*, 92 IND. L.J. 113, 116 (2016) (qualitative study of *Witherspoon* strikes in eleven Louisiana trials resulting in death verdicts from 2009 to 2013); Brandon L. Garrett et al., *Capital Jurors in an Era of Death Penalty Decline*, 126 YALE L. J.F. 417, 419 (2017) (survey of persons reporting for jury duty in Orange County, California, asking questions about eligibility to serve on hypothetical death penalty case); Justin D. Levinson et al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. REV. 513, 520 (2014) (analyzing nonarchival study of 445 jury-eligible citizens in six death penalty states).

42. Two noncapital studies analyzed single parishes in Louisiana. *See* LA. CRISIS ASSISTANCE CTR., BLACKSTRIKES: A STUDY OF THE RACIALLY DISPARATE USE OF PEREMPTORY CHALLENGES BY THE JEFFERSON PARISH DISTRICT ATTORNEY'S OFFICE 2 (2003), http://www.blackstrikes.com; Billy M. Turner et al., *Race and Peremptory Challenges During* Voir Dire*: Do Prosecution and Defense Agree?*, 14 J. CRIM. JUST. 61, 63 (1986) (examining data from 121 criminal trials in one Louisiana parish). Another working paper analyzed 351 jury trials from Los Angeles County, Maricopa County (Arizona), Bronx County, and Washington, D.C. *See* Jee-Yeon K. Lehmann & Jeremy Blair Smith, *A Multidimensional Examination of Jury Composition, Trial Outcomes, and Attorney Preferences* 9 (2013), http://www.uh.edu/~jlehman2/papers/lehmann_smith_jurycomposition.pdf.

43. *See* Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Q.J. ECON. 1017, 1026 (2012). Some of the single-jurisdiction studies collected data about juries for a remarkably small number of cases. *See* Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 LAW & HUM. BEHAV. 695, 697 (1999) (compiling data from thirteen noncapital felony criminal jury trials in North Carolina; black people were much more likely to be excluded by the prosecution and white people by the defense).

44. *See* MAUREEN M. BERNER ET AL., A PROCESS EVALUATION AND DEMOGRAPHIC ANALYSIS OF JURY POOL FORMATION IN NORTH CAROLINA'S JUDICIAL DISTRICT 15B, at 2 (2016), https://www.sog.unc.edu/publications/reports/process-evaluation-and-demographic-analysis-jury-pool-formation-north-carolina's-judicial-district; BOB COHEN & JANET ROSALES, RACIAL AND ETHNIC DISPARITY IN MANHATTAN JURY POOLS: RESULTS OF A SURVEY AND SUGGESTIONS FOR REFORM 1 (2007), http://www.law.cuny.edu/academics/social-justice/clore/reports/Citizen-Action-Jury-Pool-Study.pdf; James Michael Binnall, *A Field Study of the Presumptively Biased: Is There Empirical Support for Excluding Convicted Felons from Jury Service?*, 36 LAW & POL'Y 1, 3 (2014); Edward J. Bronson, *On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado* Veniremen, 42 U. COLO. L. REV. 1, 4 (1970); Ted M. Eades, *Revisiting the Jury System in Texas: A Study of the Jury Pool in Dallas County*, 54 SMU L. REV. 1813, 1814 (2001).

by silence from the academy—have also assembled some statistics regarding prosecutor exclusions from juries in single counties.[45] Journalists have also assembled a few localized studies.[46]

Finally, a few studies have analyzed jury selection in the trial court through the lens of published opinions. Some studies used these opinions as a way to understand typical practices in trial courts, despite the selection bias problems involved.[47] Other studies based on published appellate opinions restricted their analyses to the role of appellate judges in this litigation.[48]

What is missing from the archival research on jury selection is the power to look across all criminal trials, comparing different jurisdictions and different types of trials. Without that systemic view, judges and lawyers in one county can only speculate about whether the findings of specialized studies are generalizable to their home jurisdiction.

III. THE JURY SUNSHINE PROJECT

Public data, collected routinely in the criminal courts, could expand the frame of reference. If jury selection records were published in comparable form across jurisdictions, available without physical travel between courthouses, it would become feasible to compare one prosecutor's or public defender's office to another, and to compare one jurisdiction to another. Such comparisons might be valuable to supervising prosecutors, judges with administrative duties, researchers, voters, or even litigants.

To demonstrate how this data collection might operate, we set a goal to learn about jury selection for all felony trials in a single year, for an entire state. We chose felony trials in 2011 in North Carolina.[49] Our main contribution to

45. *See* EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 4 (2010), https://eji.org/sites/default/files/illegal-racial-discrimination-in-jury-selection.pdf (summarizing statistics indicating racial disparities among prosecutors during jury selection for eight southern states: Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, South Carolina, and Tennessee); Grosso & O'Brien, *supra* note 37, at 657 (summarizing collection of jury selection data in capital litigation context).

46. *See* Steve McGonigle et al., *Striking Differences*, DALL. MORNING NEWS, Aug. 21–23, 2005 (finding that in felony trials in Dallas County, Texas, prosecutors tended to reject black jurors, while defense attorneys tended to retain them).

47. *See* Kenneth J. Melilli, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 463 (1996) (inferring that criminal defendants make approximately 90% of *Batson* claims; only 17% of challenges with black people as the targeted group were successful, 13% for Hispanic people, and 53% for white people).

48. *See* Shaun L. Gabbidon et al., *Race-Based Peremptory Challenges: An Empirical Analysis of Litigation from the U.S. Court of Appeals, 2002–2006*, 33 AM. J. CRIM. JUST. 59, 62 (2008) (analyzing 184 race-based peremptory challenge cases, concluding that appellants rarely win such challenges); Pollitt & Warren, *supra* note 19, at 1962. In light of the challenges of assembling archival data, some researchers opt instead for experimental studies. *See* Samuel R. Sommers & Michael I. Norton, *Race and Jury Selection: Psychological Perspectives on the Peremptory Challenge Debate*, 63 AM. PSYCHOLOGIST 527, 533–34 (2008).

49. We began this effort in the fall of 2012, so we chose the most recent complete year of records. The state constitution at the time guaranteed that all felony trials in the state would be tried to a jury. N.C. CONST. art. I, § 24. Only a few misdemeanor charges were decided by juries: those "appealed" from the district court to

the existing public records was to connect the dots, pulling into one location the insights about public servants and public actions that are currently dispersed among paper files, voter records, and office websites. Although each data point comes from a public record, linking them is no easy job. In our case, it became a run through an elaborate obstacle course.

A. Traveling to the Courthouses

The first obstacle on the course was to identify trial files, separating them from the much more common cases that did not produce a trial. The North Carolina Administrative Office of the Courts ("NCAOC") reports the number of charges tried each year, but they do not specify which cases are resolved through trial and which end with guilty pleas, dismissals, or other outcomes.[50] NCAOC declined our request to generate a list of file numbers for all cases that were resolved through jury trials in 2011, citing resource limitations.[51] We needed, therefore, a path around this obstacle.

Putting aside a few customized situations,[52] our most useful strategy relied on public data from NCAOC to specify the trial cases. NCAOC posts raw data of court dispositions in a format not easily accessible by the public. After persistent and creative efforts by the information technology staff at our law school, we were able to download this data and format it for our purposes.[53] On the basis of this NCAOC data, we generated a list of cases that led to a jury trial in each county.

In all likelihood, our lists from these various sources were incomplete. Some felony jury trials probably occurred in 2011 that never came to our attention. But based on comparisons between the number of trials we located and the number of trials that NCAOC listed in their annual reports,[54] we are confident that we obtained a strong majority of the trials for that year. There is no reason

the superior court for a trial *de novo*. *See* N.C. GEN. STAT. § 7A-271(b) (2016) (providing for appeals from district court to superior court).

50. Annual case activity reports for felonies, misdemeanors, and infractions appear at *Case Activity Reports—Fiscal Year 2016–2017*, N.C. CT. SYS., http://www.nccourts.org/Citizens/SRPlanning/Statistics/CAReports_fy16-17.asp (last visited May 18, 2018).

51. Our contact in NCAOC had cooperated with past data requests, with minimal burden on the office, but asserted that NCAOC leadership appointed by the governor who was elected in 2012 had instructed employees not to cooperate with this type of request. Recent litigation established that court records are housed in the clerks' offices, not in a centralized file housed with the NCAOC. *See* LexisNexis Risk Data Mgmt., Inc. v. N.C. Admin. Office of the Courts, 775 S.E.2d 651, 656 (N.C. 2015).

52. A few counties (such as Guilford and Mecklenburg) maintained their own records about the cases that proceeded to trial. In those cases, we relied on the county clerk's records to identify cases that proceeded to trial. In one case (New Hanover County), our researcher focused on "thick files" in the collection as a rough proxy for the cases that went to trial. In other cases, we asked the county clerk to request from the NCAOC a list of trials for that county. NCAOC treated requests from the county clerk of the superior court as a legal obligation, unlike statewide requests from scholars.

53. We are grateful to Trevor Hughes and Matt Nelkin for their work on this project.

54. NCAOC data track the number of criminal charges resolved through trials, while our database records the number of criminal trials, treating multi-charge or multi-defendant cases as a single trial. We collected jury selection data on 1,307 trials, while NCAOC listed 2,112 charges resolved by jury trial for fiscal year 2011–2012.

to believe that our collected trials differ from the remaining trials for any relevant characteristic.[55]

The typical file for a felony trial, stored in the county clerk's office, contains a jury selection form. The one-page form includes space for twelve separate jury boxes. In each box, an assistant clerk records the names of the jurors seated in that box.[56] Other documents in the file indicate the judge, defense attorney, and prosecutor assigned to the case; the charges filed; the jury's verdict for each charge in the case; and the sentence that the judge imposed.

In the fall of 2012, we conducted a pilot project in one county to test the viability of our collection plans, gathering the available file information for a few dozen trials. From that point forward, we relied on law students, law librarians, and undergraduate students to travel to most of the clerks' offices for the 100 counties in North Carolina, between early 2013 and the summer of 2015.[57] Remarkably, the clerks in 10 of the 100 counties reported that *no jury trials at all* occurred in their counties between 2011 and 2013.[58]

B. Completing the Picture for Jurors, Judges, and Attorneys

The clerk in each county summons prospective jurors who reside in that county,[59] so we knew the name and county of residence of each prospective juror. Based on the research of Grosso and O'Brien in the capital trial context,[60] we also knew that North Carolina maintains open public records about jurors who are also registered voters, so we assigned a cohort of student researchers to pursue the biographical background for each juror.[61] Some prospective jurors were not present in the voter database because they were summoned for jury

55. We also plan to keep this research project open for some years and will add further trials to the 2011 data as they come to our attention.

56. We were disappointed to find that some clerks recorded only the fact that a prospective juror was removed from the box without indicating which courtroom actor was responsible for the removal. We coded these jurors as "Removed." The jury form also usually indicated the order of removals for any particular actor (that is, the form showed that a prospective juror was the third peremptory challenge by the defense or the fourth removal for cause by the judge) but not the overall order of removal of jurors in the *voir dire* process. One county (Guilford) adopted a notation that did capture this information about the overall order of removals.

57. Based on what we learned from the pilot study, we refined a data collection protocol for students, as recorded in a codebook and standard spreadsheet. The field researchers focused on trials in 2011, but in smaller counties with very few trials per year, they also collected information for trials in 2010 and 2012. We are grateful to Elizabeth Johnson, a reference librarian at the school of law, for coordinating this complex field operation. *See* Liz McCurry Johnson, *Accessing Jury Selection Data in a Pre-Digital Environment*, 41 AM. J. TRIAL ADVOC., Summer 2017, at 45, 49.

58. The counties with no jury trials were Bertie, Camden, Chowan, Clay, Franklin, Madison, Mitchell, Montgomery, Pamlico, and Warren.

59. *See* N.C. GEN. STAT. § 9-4 (2016).

60. *See* Grosso et al., *supra* note 20, at 1533.

61. The board of elections provides online data including the name, home address, gender, race, age, and party affiliation of each voter. *See Voter Search*, N.C. ST. BOARD ELECTIONS & ETHICS ENFORCEMENT, https://vt.ncsbe.gov/RegLkup/ (last visited May 18, 2018). A few counties (including Mecklenburg) adopted notation techniques that included a record of each juror's race and gender within the clerk's file. Students worked on matching juror profiles with voter records between spring 2013 and summer 2016.

duty based on their driver's license,[62] but we did obtain the background information for a strong majority of the prospective jurors based on the voter database.[63]

The file for each trial indicated the judge, prosecutor(s), and defense attorney(s) assigned to the case. For most of these full-time courtroom actors, research assistants were able to identify race, gender, date of admission to the state bar (a proxy for the actor's level of experience), and the judge's date of appointment to the bench.[64]

In addition to the case-specific information about each trial and its participants, we also obtained information about each county, judicial district, and prosecutorial district.[65] These data points included census information about the population and racial breakdown of each county and case-processing statistics about each prosecutorial district.

After all of the data road trips and Internet searches were done, we held records for 1,306 trials.[66] This phase of the Jury Sunshine Project contains information about 29,624 removed or sitting jurors, 1,327 defendants, 694 defense attorneys, 466 prosecutors, and 129 superior court judges. We connected all of those bits of information into a single relational database.[67]

62. *See* N.C. GEN. STAT. § 9-2(b) ("In preparing the master list [of prospective jurors], the jury commission shall use the list of registered voters and persons with driver's license records supplied to the county by the Commissioner of Motor Vehicles . . . .").

63. We gave researchers a protocol to follow when deciding whether a prospective juror from the clerk's records matched a voter from the online board of elections records. The clerks in some offices provided us with the jury *venire* lists, which they maintained separately from the files for each trial; the *venire* lists provided home addresses for the jurors, increasing our confidence that the jurors listed in the clerk's records matched the voters listed in the voter records for the county. After clerks learned that we were asking for access to file information about jurors, some superior court judges issued orders prohibiting the clerks from releasing the juror *venire* lists to anyone other than the parties to the case. The North Carolina General Assembly also amended the statute to restrict access to the addresses and birthdates recorded on the jury *venire* lists. *See* N.C. GEN. STAT. § 9-4(b); 2013 N.C. Sess. Laws 166; 2012 N.C. Sess. Laws 180.

64. In some cases, this information was available from the public data stored on the site of the North Carolina State Bar regarding licensed attorneys. *See Search for a North Carolina Lawyer*, N.C. ST. B., https://www.ncbar.gov/for-lawyers/directories/lawyers/ (last visited May 18, 2018). We also learned which office defense attorneys worked in (private firm or public defender's office). In North Carolina, the public defender service covers sixteen of the judicial districts in the state. The remaining districts operate with appointed counsel. *See* N.C. GEN. STAT. § 7A-498.7. Students followed a written protocol to search in standard locations and a prescribed order for the professional biographies of the courtroom actors.

65. North Carolina divides the state into forty-four different prosecutorial districts and thirty different superior court districts. *See* N.C. GEN. STAT. § 7A-41. The judicial districts break into eight different divisions; judges spend six months each year in their home district and six months traveling to other districts within the division.

66. The NCAOC data list a total of 2,112 charges that were resolved through trial for fiscal year 2011–2012. The breakdown of charges for individual counties suggests that we obtained the records for almost every felony trial that occurred in the state during calendar year 2011. The total number of defendants who faced trial in North Carolina in 2011 remains speculative because each prosecutor retains the discretion to file separate counts either as separate file numbers in the office of the clerk or as separate counts covered under a single file number.

67. We checked the quality of the field data during the process of loading county-specific spreadsheets into the central database. Another statewide version of the data exists in spreadsheet form, as assembled by Dr. Francis Flanagan of the Wake Forest University Department of Economics. *See generally* Francis X. Flanagan, *Peremptory Challenges and Jury Selection*, 58 J.L. & ECON. 385 (2015); Francis X. Flanagan, Race, Gender,

IV. ILLUSTRATIVE COMPARISONS OF JURY SELECTION PRACTICES

These data open up a new universe of questions about jury selection and performance. They shed light on simple descriptive issues about the relative contributions of judges, prosecutors, and defense attorneys in building a jury. They also allow us to compare jury practices in more serious felonies to those in the trials of lesser crimes. Because the data include the jury's verdict on each charge,[68] we can compare outcomes for a defendant with a single charge to outcomes in trials with multiple defendants and charges. It is possible to track case outcomes from juries of different compositions, based on juror age, gender, or race. Any of these questions might prove interesting to taxpayers and voters who want to understand their criminal courts.

But you have to start somewhere. In this Part, we present evidence related to racial disparities in jury service. We treat this as a demonstration project, to imagine in concrete terms the sort of public debate that might spring up when jury data become available in accessible form, allowing comparisons among jurisdictions.

Our first observations relate to the flow of prospective jurors through the courtroom. Table 1 indicates the contributions of each of the three courtroom actors.

TABLE 1: TOTAL JURORS REMOVED AND RETAINED

DISPOSITION	JURORS	%
Juror Retained for Service	16,744	57
Judge Removed	3,277	11
Prosecutor Removed	3,002	10
Defense Attorney Removed	4,187	14
Removed, Source Unknown	2,414	8
TOTAL	29,624	100

As Table 1 indicates, 57% of the jurors who sat in the jury box ultimately served on that jury. Defense attorneys were the most active courtroom figures, removing 14% of the total with peremptory challenges; judges removed 11% of the jurors for cause; and prosecutors exercised their peremptory challenges against 10% of the prospective jurors called into the box. Records did not indicate the source of the removal for 8% of the jurors.[69]

We know something about the order of removal because state statute creates a uniform framework for some aspects of the selection process.[70] At the

and Juries: Evidence from North Carolina (2017) (unpublished article) (on file with the author) [hereinafter Flanagan, North Carolina Jury Evidence].

68. Our field researchers entered separate codes for guilty as charged, guilty of lesser charge, mistrial, and acquittal.

69. These unexplained removals were based on incomplete records in a few counties. If we assume that the courtroom actors accounted for the "unknown" removals at the same rate that they did for the recorded cases, then defense attorneys removed a total of 15% of the pool, judges excluded 12% for cause, and prosecutors removed 11%.

70. *See* N.C. GEN. STAT. § 15A-1214.

outset, the clerk of the court randomly selects prospective jurors from the *venire* to seat in the jury box. The judge instructs the jury about the general nature of the upcoming trial[71] and then may ask jurors about their "general fitness and competency."[72] The parties "may personally question prospective jurors individually."[73]

The judge removes jurors for cause before the parties make their peremptory challenges, basing this decision in part on motions from the attorneys. The judge rules first on the prosecutor's motions, and the clerk replaces any jurors removed. After that, the prosecutor exercises challenges to the twelve jurors in the box. Again, the clerk refills any empty seats before the judge and prosecutor repeat the process. The defense attorney takes the next shift, asking the judge to remove jurors for cause and striking any jurors from the group of twelve that the prosecutor and judge left in the box.[74] The judge and prosecutor again take the first turn on any replacement jurors who arrive in the box after the defense attorney is done with the first set of challenges.[75]

71. *See id.* § 15A-1213.

72. *See id.* § 15A-1214(b).

73. The judge sometimes removes jurors for cause before the parties ask their questions, but the judge always remains free to remove additional jurors in light of their answers to attorney questions. Defense attorneys examine jurors only after prosecutors tender a complete set of twelve jurors. *See id.* § 15A-1214(c).

74. When jurors are replaced at any step along the way, the initiative passes again to the judge and the prosecutor, who may remove any new juror before the prosecutor "tenders" the newest set of retained jurors to the defense attorney. *See id.* § 15A-1214(d), (f). In capital cases, the process may advance one juror at a time. *See id.* § 15A-1214(j).

75. Local variations in this removal process and gaps in the file records leave us uncertain about the precise order of removals of jurors from any given trial. For instance, it is possible for the judge and the prosecutor to retain all twelve jurors initially placed in the box, for the defense attorney to exercise all six of the available peremptories, and then for the judge and prosecutor to remove some of the replacement jurors for those six boxes. In most counties, the clerk records the order of jurors removed by each particular actor (for instance, "D3" would indicate the third juror removed by defense counsel), but not the order of removals as between parties. Only one county (Guilford) tracked the order of removal overall.

A. Demographic Differences Among Removed Jurors

Table 2 indicates the racial breakdown of jurors who were retained and removed. We identified 60% of our jurors as white, 16% as black, and 2% as some other race (including Hispanic ethnicity).[76] The race was not indicated in our data for 22% of the jurors.[77]

The data indicate that black jurors and other nonwhite jurors serve on juries at a slightly lower rate than white jurors. The retention rate for white jurors was 58%, while the rate for black jurors was 56% and for jurors of other races was 50%.

TABLE 2: JUROR DISPOSITION, BY RACE OF JUROR

DISPOSITION	WHITE	%	BLACK	%	OTHER	%	UNKNOWN	%
Juror Retained	10,402	58	2,628	56	324	50	3,389	53
Judge Removed	1,729	10	574	12	133	21	841	13
Prosecutor Removed	1,437	8	755	16	94	15	716	11
Defense Removed	2,960	17	288	6	63	10	876	14
Removed, Source Unknown	1,351	8	427	9	36	6	600	9
TOTAL	17,879		4,672		650		6,422	

76. The voter registration and juror records use the racial categories white, black, Asian, Hispanic, Native American, and other. Voters self-identify and do not have the option of choosing more than one race. Because of the small numbers recorded in four of those categories, we combine them into a single "other" category. Based on current census figures, we believe that these figures underestimate the number of Hispanic or Latino citizens called for jury service in felony trials today. White residents (excluding Hispanic or Latino ethnicity) comprised 65.3% of the 2010 population, while "Black or African American alone" residents made up 21.5%, and "Hispanic or Latino" residents made up 8.4% of the state population at that time. *See Quick Facts: North Carolina*, U.S. CENSUS BUREAU (July 1, 2017), https://www.census.gov/quickfacts/NC.

77. These jurors did not appear in the voter database or appeared in the voter database with race not indicated. Jurors not appearing in the voter database were placed into the juror pool in the county based on their appearance on the list of licensed drivers. The race of licensed drivers is not publicly available data in North Carolina. If the jurors whose race was unknown were assigned a racial identity in proportion to the rest of the pool, black jurors would constitute 20% of the pool. Under this scenario, white jurors would constitute 77% of the total pool, and other races would make up 3%.

When it comes to the race of the jurors, a remarkable pattern appears in Table 2. The data show that judges removed nonwhite jurors at a higher rate than they did for white jurors.[78] Then prosecutors removed nonwhite jurors at about twice the rate that they did white jurors. But in the end, defense attorneys *nearly* rebalanced the levels of jury service among races by removing more jurors than the judges or the prosecutors did and by using their peremptory challenges more often against white jurors than they did against black and other nonwhite jurors.

To bring these racial effects into focus, we express the differences in the form of a "race removal ratio." In Table 3, we express the ratio of removal rates for black jurors to removal rates for white jurors: a ratio of exactly 1.0 would mean that the judges or attorneys removed black jurors and white jurors in exactly the same percentages.[79] A ratio above 1.0 means that the actors removed black jurors at a higher rate than they removed white jurors. Conversely, a ratio below 1.0 means that actors removed white jurors more often. We adjusted the calculations for each courtroom actor to reflect the pool of jurors available at the time of that actor's removal decision.[80]

TABLE 3: REMOVAL RATIOS, BY RACE, FOR COURTROOM ACTORS

ACTOR	BLACK-TO-WHITE RATIO	OTHER-TO-WHITE RATIO
Judge	1.3	2.1
Prosecutor	2.1	2.0
Defense Attorney	0.4	0.7

Table 3 indicates that prosecutors excluded black jurors at more than twice the rate that they excluded white jurors (for a 2.1 ratio, or 20.6% to 9.7%); similarly, they used peremptory challenges against other nonwhite jurors at twice their rate of exclusion for white jurors (producing a 2.0 ratio, or 19.5% to 9.7%). Defense attorneys, by contrast, excluded black jurors less than half as often as they excluded white jurors (with a 0.4 ratio, or 9.9% to 22.2%). Interestingly, the judges excluded black jurors for cause a bit more often (a 1.3 ratio, or 13.5% to 10.5%) but they excluded other nonwhite prospective jurors at a much higher rate (with a 2.1 ratio, or 21.7% to 10.5%).

78. The different removal rates for jurors of different races by each of the three courtroom actors are all statistically significant, using the chi-square test for significance.

79. We calculated this ratio after excluding the removals by unknown parties and the removal of jurors of unknown race. In every case, the rate of removal of jurors of unknown race sat in between the rate of removal for white jurors and for nonwhite jurors.

80. Judges have access to the entire pool. Prosecutors choose from the jurors remaining after the judge has chosen, while defense attorneys make their decisions regarding the jurors left after the prosecutors and judges have acted. There is some imprecision in this method because after one of the parties has exercised its full complement of peremptories, the clerk might place additional jurors into the box. While the attorneys may still challenge these additional jurors for cause, the removal depends on establishing the relevant legal basis for removal. The number of jurors that a party "retains" therefore includes some jurors that the party did not actively choose.

The gender of prospective jurors complicates the selection patterns. On the whole, women and men served on juries at much the same rate. Judges, prosecutors, and defense attorneys did not differ much in their choices based on gender, at least when we look at all felony trials together.[81] When race and gender intersected, however, the courtroom actors each pursued a different strategy.

TABLE 4: TOTAL REMOVALS, BY RACE AND GENDER

DISPOSITION	BLACK MALE	%	BLACK FEMALE	%	WHITE MALE	%	WHITE FEMALE	%
Juror Retained	1,011	53	1,609	58	5,028	57	5,346	59
Judge Removed	255	13	318	12	813	9	910	10
Prosecutor Removed	345	18	407	15	805	9	625	7
Defense Removed	105	6	183	7	1,438	16	1,518	17
Removed, Source Unknown	186	10	238	9	677	8	671	7
TOTAL	1,902		2,755		8,761		9,070	

Black male jurors were scarce from the outset. They made up only 6.4% of the total pool of summoned jurors (compared to 9.3% for black females). Once the selection process began, judges and prosecutors removed black males at a higher rate than other jurors. Table 5 summarizes the removal rates for each of the courtroom actors.[82]

TABLE 5: RATES OF REMOVAL OF AVAILABLE JURORS

	BLACK MALE	BLACK FEMALE	WHITE MALE	WHITE FEMALE
Judge	14.9%	12.6%	10.1%	10.8%
Prosecutor	23.6%	18.5%	11.1%	8.3%
Defense	9.4%	10.2%	22.2%	22.1%

81. The retention rate for female jurors overall was 55%; for male jurors it was 55.4%. Judges removed 13% of females and 11.7% of males; prosecutors removed 12.1% of female and 13.8% of male jurors available to them; defense attorneys removed 21.5% of female and 20.6% of male jurors available to them. It is possible, on the basis of Jury Sunshine Project data, to compare the treatment of male and female prospective jurors in particular categories of cases, such as sexual assault or domestic violence charges. We reserve those questions for another time, concentrating here on the insights one can gain from exploring all felony trials as a group.

82. The percentages in Table 5 are based on the pool of jurors after excluding those with an unknown removal source. The percentages for prosecutors and defense attorneys also reflect the reduced pool of jurors available to those actors at the relevant point in the process. The differences in treatment between white and nonwhite jurors are statistically significant, using the chi-square test. For each group of actors, the p-value is < 0.00001.

Defense attorneys did not remove male and female jurors of the same race at meaningfully different rates. Prosecutors, however, used their challenges proportionally more often against black male jurors (striking 23.6% of those available in the pool at that point in the process) than they did against black female jurors (18.5% of those available). A similar, but less pronounced, gap appeared in judicial removals for cause: judges removed 14.9% of the black male jurors and 12.6% of the black female jurors. All told, black males started the process underrepresented in the pool and ended up comprising only 6% of the jurors who served.[83]

B. Geographical Differences in Juror Removal Practices

Judges, prosecutors, and defense attorneys have different objectives at a trial and value different characteristics in jurors. It does not surprise us, therefore, to find that these courtroom actors produce different demographic patterns when they choose jurors.

Comparisons *within* these groups, however, are another matter. What might explain two different prosecutor's offices that behave quite differently in their selection of juries? We explored this question through a comparison of the six largest cities in the state, all with populations larger than 200,000. Table 6 lists the removal ratios for the courtroom actors in the counties where those cities are located.

TABLE 6: REMOVAL RATIOS IN URBAN COUNTIES

CITY (COUNTY)	Judges Black-to-White	Judges Other-to-White	Prosecutors Black-to-White	Prosecutors Other-to-White	Defense Black-to-White	Defense Other-to-White
Winston-Salem (Forsyth)	1.6	2.7	3.0	4.0	0.6	0.8
Durham (Durham)	1.1	1.0	2.6	1.5	0.5	0.3
Charlotte (Mecklenburg)	1.0	1.9	2.5	2.3	0.3	0.5
Raleigh (Wake)	1.2	1.4	1.7	1.9	0.4	1.0
Greensboro (Guilford)	0.9	0.4	1.7	1.6	0.4	1.0
Fayetteville (Cumberland)	0.9	1.2	1.7	1.2	0.5	0.4

The prosecutor's offices appear to fall into two groups. Greensboro, Raleigh, and Fayetteville all produced a removal ratio of 1.7 for black jurors; Greensboro and Durham also showed relatively low removal ratios for other nonwhite jurors. On the other hand, the prosecutor's offices in Durham, Char-

83. Black males make up approximately 11% of the state population overall. We note for future research the potential relevance of the race and gender of the judges, prosecutors, and defense attorneys who select the jurors.

lotte, and Winston-Salem excluded black jurors at a higher rate than elsewhere in the state. In the most extreme case, the prosecutors in Forsyth County removed black jurors from the box three times more often than they removed white jurors: that is, among the 151 black jurors reporting for duty in felony trials, the prosecutors exercised their peremptory challenges to remove 27.5% of the jurors available to them after the judges removed some jurors for cause. Out of 541 total white jurors, the prosecutors in Forsyth County removed 9.3% of the available candidates.

One more geographical comparison deserves our attention: the differences between urban and rural counties.[84] Despite the differences in jury selection among the six largest cities in the state, urban counties as a group shared some features that distinguished them from rural counties. Table 7 summarizes the results.

TABLE 7: REMOVAL RATIOS, URBAN AND RURAL COUNTIES

	Judges, Black-to-White	Prosecutors, Black-to-White	Defense, Black-to-White
Urban	1.2	2.3	0.5
Rural	1.1	1.7	0.3

For the judges and the prosecutors, it appears that the racial disparities in removal rates are most pronounced in urban counties. Defense attorneys, on the other hand, produced more racially imbalanced results in rural areas; their ratio of black-to-white removal rates became even smaller in rural counties.[85]

V. PREVIEW OF A POLITICAL DEBATE

The data from the Jury Sunshine Project speak only to outcomes in the jury selection process. The numbers show what judges and attorneys did when they picked jurors, but they do not show why. The competing—and complementary—explanations for these racial disparities in the jury selection process are a fitting topic for political debate.

In this Part, we preview the sorts of arguments that prosecutors, judges, defense attorneys, and interested community members are likely to advance during this debate. Some of these explanations for racial disparity emphasize

84. We designate the most rural counties as the thirty-three counties with the lowest population densities in the state. *See North Carolina Population Density County Rank*, USA.COM, http://www.usa.com/rank/north-carolina-state--population-density--county-rank.htm (last visited May 18, 2018). Among those thirty-three counties, eight conducted no jury trials at all and eleven recorded generic removals without attributing them to the judge or a party. Those counties made choices regarding 2,706 jurors (or 2,199 when excluding the jurors with an unknown removal source). For purposes of Table 7, we designated the most urban counties as the eleven counties with the highest population densities, covering all cities with populations more than 80,000. Those counties made choices about 13,037 jurors. The racial differences in rates of juror removal for each of the actors, as well as the urban-rural differences reflected in the removal ratios in Table 7, are statistically significant.

85. All three courtroom actors—judges, prosecutors, and defense attorneys—removed fewer available jurors in rural counties than they did in urban counties. Judges removed 15.7% of available jurors in urban counties, and only 8.1% in rural counties. The comparable figures for prosecutors were 14.3% and 8.4%; for defense attorneys, they were 22.3% and 12.3%.

the intent of the judges and attorneys when they exclude jurors. Others put intent to the side and ask instead about the effects of systematic exclusion on defendants and the community.

A. Intent-Based Interpretations

What might explain the patterns in jury selection that we observed in Part IV? Starting with the defense attorneys, who used their removal powers at the highest rate, perhaps the simplest explanation is best: they used all the available *voir dire* clues (including the race of the prospective jurors) to seat jurors who were more sympathetic to human frailty, or those who were more skeptical of local police. Perhaps the use of the jurors' race was the explicit basis for the defense attorney's choice, or maybe the race correlated with other clues, such as expressions of general respect for authority. Put simply, defense attorneys may have used race as one factor to pick a jury to win a trial.

As a matter of trial strategy, such choices are rational. Flanagan used our jury data to calculate the performance differences among juries of different racial compositions. He found that juries composed of more black men were more likely to acquit any defendant.[86] Conversely, juries with more white men were more likely to convict, particularly when the defendant was a black man.[87] Thus, it is easy to see why defense attorneys might want to save more of their peremptory challenges for white male jurors.[88]

As for the judges, it is more difficult to reconstruct the reasons why they removed a higher percentage of black jurors from the *venire*. The 30% increase in the rate of removal among black jurors, when compared to white jurors, might reflect greater economic stresses among black jurors, such as transportation difficulties or pronounced hardship from missing days away from a job.[89] The higher rate of judicial removals for cause for nonwhite jurors might also reveal how judges align themselves with prosecutors, and respond more favorably to their requested removals for cause.

And then there are the prosecutors. One potential explanation for the race removal ratios higher than 1.0 would be intentional strategic decisions that incorporate race.[90] Perhaps line prosecutors relied on race as a clue about the general receptiveness of jurors to a law enforcement perspective. Like the defense attorneys, the prosecutors may have relied in part on race to pick a winning jury.

86. *See* Flanagan, North Carolina Jury Evidence, *supra* note 67, at 14.

87. *Id.* at 13–15. Flanagan used instrumental variable regressions, using the demographic composition of the randomly selected jury pool as an instrument for the composition of the jury.

88. There is also another possible explanation for the exclusion pattern on the defense side: perhaps defense attorneys were aware that nonwhite jurors were underrepresented on the *venire* that the clerk called to the courthouse. Their removal of white jurors, then, might have revealed an effort to restore the jury to a racial balance that better reflected the community. *See* BERNER ET AL., *supra* note 44, at 7.

89. The judges' different treatment of white jurors and nonwhite jurors other than black jurors is equally puzzling. It might reflect a greater incidence of language barriers within this group, but that is speculation.

90. *Cf.* Michael Selmi, *Statistical Inequality and Intentional (Not Implicit) Discrimination*, 79 LAW & CONTEMP. PROBS. 199, 206 (2016).

It is also possible that prosecutors removed jurors based on a factor correlated with race—most prominently, jurors with a felony conviction, a prior arrest, or close family members who had negative experiences in the criminal justice system.[91] Prosecutors might have been fully aware of the disparate racial impact of these choices and regretted that unintentional side effect of their removal strategy.

Again, our data suggest that such choices by prosecutors are strategically rational. Flanagan found that for every peremptory challenge that the prosecutor used, the conviction rate for black male defendants increased by 2–4%.[92]

None of these intent-based accounts, for any of the courtroom actors, can explain jury selection choices in individual cases. Racial disparities in aggregate jury selection outcomes speak only about averages. They reveal incentives that shape the larger patterns of removal. These arguments, therefore, might not win the day in the courtroom under current constitutional doctrine. But the reasons why prosecutors and judges exclude black jurors (especially males) at a high rate could be relevant to voters and community groups outside the courtroom as they discuss local criminal justice conditions.

B. The Effects of Juror Exclusion

A political debate about the exclusion of jurors might extend beyond the possible intent of courtroom actors. The discussion, based on data-driven comparisons of different places and actors, might also include the *effects* of juror exclusion.

Having a diverse jury can have life-changing implications for criminal defendants. White jurors are more likely to convict and are more likely to inflict harsh punishments on black defendants accused of killing white victims.[93]

The exclusion of minority jurors from service also affects the jurors themselves and the community where the trial occurs. Jury service creates a forum for popular participation in criminal justice.[94] When major segments of the community remain outside the courtroom, with other more "favored" people issuing the verdicts, the legitimacy of the system suffers. Statewide statistics reveal in more systematic and detailed ways how different parts of the community find it easier or harder to serve on juries.

91. *See* Binnall, *supra* note 44, at 3; Vida B. Johnson, *Arresting* Batson*: How Striking Jurors Based on Arrest Records Violates* Batson, 34 YALE L. & POL'Y REV. 387, 389 (2016); Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 MINN. L. REV. 592, 593 n.12 (2013).

92. *See* Flanagan, North Carolina Jury Evidence, *supra* note 67, at 14. Among the 1,327 defendants in our database, 666 (50%) are black males and 385 (29%) are white males. The race is unknown for 71 male defendants (5%). There are 74 (6%) black female defendants and 63 (5%) white female defendants.

93. *See* Bellin & Semitsu, *supra* note 19, at 1082–83.

94. *See* AKHIL R. AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 15, 205 (2005); STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 70 (2012).

1. Impact on Excluded Jurors

In addition to the harm to criminal defendants, courts have long recognized that individuals who are excluded because of racial discrimination also experience a cognizable harm. For example, in *Carter v. Jury Commission of Greene County*, the Court noted, "People excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion."[95]

Even when courts have declined to hold that serving on a jury is an enforceable right, they have still agreed that jury service is a "'badge of citizenship' worn proudly by all those who have the opportunity to do so and that it would, indeed, be desirable for all citizens to have that opportunity."[96] Many courts have noted that exclusion of qualified groups not only violates the Constitution but also undermines "our basic concepts of a democratic society and representative government."[97] When state actors participate in this exclusion, it deepens the harm. As one court noted long ago, "When Negroes are excluded from jury service because of their color, the action of the state 'is practically a brand upon them, affixed by the law, an assertion of their inferiority.'"[98]

2. Impact of Juror Exclusion on the Community

The exclusion of minority jurors also has a detrimental impact on the community. It is a basic notion of democracy that a jury should reflect the community. A jury that is "made up of representatives of all segments and groups of the community" is "more likely to fit contemporary notions of neutrality" and a combined "commonsense judgment of a group of laymen."[99]

95. 396 U.S. 320, 329 (1970).

96. *See* United States v. Conant, 116 F. Supp. 2d 1015, 1020–22 (E.D. Wis. 2000) ("While no court has yet recognized a constitutional right to serve on a jury, the possibility that such a right might exist is to be given the most careful scrutiny.").

97. *See* Ciudadanos Unidos de San Juan v. Hidalgo Cty. Grand Jury Comm'rs, 622 F.2d 807, 825 (5th Cir. 1980) (quoting Smith v. Texas, 311 U.S. 128, 130 (1940)).

> It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government.

Id.; *see also* Cassell v. Texas, 339 U.S. 282, 303–04 (1950) (Jackson, J., dissenting).

> Qualified Negroes excluded by discrimination have available, in addition, remedies in courts of equity. I suppose there is no doubt, and if there is this Court can dispel it, that a citizen or a class of citizens unlawfully excluded from jury service could maintain in a federal court an individual or a class action for an injunction or mandamus against the state officers responsible.

Cassell, 339 U.S. at 303–04.

98. White v. Crook, 251 F. Supp. 401, 406 (M.D. Ala. 1966) (quoting Strauder v. West Virginia, 100 U.S. 303, 308 (1879)); *see also* Nancy Leong, *Civilizing* Batson, 97 IOWA L. REV. 1561, 1564 (2012) (proposing suits by prospective jurors to overcome informational obstacles to *Batson* challenges).

99. *See* Hiroshi Fukurai, *Race, Social Class, and Jury Participation: New Dimensions for Evaluating Discrimination in Jury Service and Jury Selection*, 24 J. CRIM. JUST., no. 1, 1996, at 71, 72 (quoting Apodaca v. Oregon, 406 U.S. 404, 410 (1972)).

The Supreme Court has long recognized the importance of the role of jury participation in our society and has explicitly examined the impact that such exclusion has on the broader community. For example, in *Taylor v. Louisiana*, the Supreme Court recognized the importance in selecting a fair representation of jury members because of the potential impact on a community.[100] The Court explained that the fair representation requirement was essential in (1) guarding against "the exercise of arbitrary power" and invoking the "commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor," (2) upholding "public confidence in the fairness of the criminal justice system," and (3) sharing the administration of justice as "a phase of civic responsibility."[101]

Systemic exclusion harms the community because jury service creates a forum for popular participation in criminal justice.[102] When major segments of the community remain outside the courtroom, with other people issuing the verdicts, the legitimacy of the system suffers. In *Georgia v. McCollum*, the Court explained that improper exclusion of jurors on the basis of race not only affects the juror, but that the harm also extends beyond the rejected juror "to touch the entire community"[103] because discriminatory proceedings "undermine public confidence in the fairness of our system of justice."[104]

The problems related to the systemic exclusion of racial minorities on juries are particularly acute when the subject matter of the case involves racial violence. The Court has long recognized the danger that such cases might create distrust within minority communities. For example, in *McCollum*, Justice Blackmun discussed cases involving racial violence in which peremptory challenges had resulted in the striking of all black jurors:

> In such cases, emotions in the affected community will inevitably be heated and volatile. Public confidence in the integrity of the criminal jus-

100. *See* Taylor v. Louisiana, 419 U.S. 522, 526–27 (1975).

101. *Id.* at 530–31 (internal quotation marks omitted) (quoting Thiel v. S. Pac. Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)). Similarly, after the Court's decision in *Batson*, the Court decided in *Powers v. Ohio*, 499 U.S. 400 (1991), to expand the right to complain against discriminatory use of peremptory challenges to defendants who were not members of the same race as the excluded jurors. The harm done to the community's interest in jury service served as a key justification: "Jury service is an exercise of responsible citizenship by all members of the community, including those who otherwise might not have the opportunity to contribute to our civic life." *Powers*, 499 U.S. at 402.

102. *See* AMAR, *supra* note 94, at 15, 205; Vikram David Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915, 981–94 (1998) (exploring historical basis for treating jury selection as a political right affecting the community).

103. 505 U.S. 42, 49 (1992) (quoting Batson v. Kentucky, 476 U.S. 79, 87 (1986)). The *McCollum* Court noted that "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." *Id.* (internal quotation marks omitted) (quoting *Batson*, 476 U.S. at 87).

104. *Batson*, 476 U.S. at 87. This is a key insight from the "procedural justice" literature. *See* Richard R. Johnson, *Citizen Expectations of Police Traffic Stop Behavior*, 27 POLICING: INT'L J. POLICE STRATEGIES & MGMT. 487, 488 (2004) (noting that studies have shown that people are more likely to "defer to the law and refrain from illegal behavior" when police treat them fairly); Tom R. Tyler & Jeffery Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities*, 6 OHIO ST. J. CRIM. L. 231, 233 (2008).

> tice system is essential for preserving community peace in trials involving race-related crimes. Be it at the hands of the State or the defense, if a court allows jurors to be excluded because of group bias, it is a willing participant in a scheme that could only undermine the very foundation of our system of justice—our citizens' confidence in it.[105]

A homogenous jury, on the surface, does not look like a fair jury. The appearance of prejudice in the jury selection process leads to continuing pessimism and distrust concerning the operation of the criminal justice system among the omitted groups.[106] The excluded community perceives that it is "shut out." The court's participation in discrimination and racism undermines its moral authority as the enforcer of antidiscrimination policies.[107]

The public at large also shares an interest in "demonstrably fair trials that produce accurate verdicts."[108] Diversity itself enhances the deliberations of juries. In *Peters v. Kiff*,[109] Justice Marshall identified this contribution of a representative jury:

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience . . . . [E]xclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.[110]

In sum, excluding minorities from jury selection has negative implications beyond the harms that a criminal defendant might raise in the courtroom. Like other systemic issues in the criminal justice system, visible and systematic barriers to jury service can erode community trust and decrease legitimacy.[111]

The accountability of judges and prosecutors to the community is also compromised when particular races, neighborhoods, ages, or other social

105. *See* Tyler & Fagan, *supra* note 104, at 235–36. The 1980 Miami urban rebellion resulted in the death of eighteen people and $200 million in property damage and other losses. This rebellion followed an all-white jury acquitting four white police officers for the beating death of a black insurance executive after a change of venue from Miami to Tampa and after the defendants had used their peremptory challenges to exclude all black people on the jury *venire*. *See* Ihosvani Rodriguez, *McDuffie Riots Shook Miami*, SUN SENTINEL (May 16, 2005), http://articles.sun-sentinel.com/2005-05-16/news/0505150370_1_liberty-city-blacks-and-police-black-man. The Florida governor's report of the disturbance specifically identified the practice of excluding black people from juries in racially sensitive cases as a cause of the riots and a reason for black people in Dade County to distrust the criminal justice system. GOVERNOR BOB GRAHAM'S DADE CTY. COMM., REPORT OF GOVERNOR'S DADE COUNTY CITIZENS COMMITTEE 60–61 (Oct. 30, 1980), https://www.floridamemory.com/items/show/329091?id=1.

106. Adam Benforado, *Flawed Humans, Flawed Justice*, N.Y. TIMES (June 13, 2015), https://www.nytimes.com/2015/06/14/opinion/flawed-humans-flawed-justice.html.

107. *See* M. Shanara Gilbert, *An Ounce of Prevention: A Constitutional Prescription for Choice of Venue in Racially Sensitive Criminal Cases*, 67 TUL. L. REV. 1855, 1928 (1993).

108. Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 749 (1992).

109. 407 U.S. 493 (1972).

110. *Id.* at 503–04.

111. There is an ironic aspect to the Jury Sunshine Project: publication of data about uneven community access to jury service might exacerbate the problem by making it more visible. If the public debate never results in greater equality of jury service, that outcome is a sobering possibility.

groups cannot contribute their fair share to the jury system. In particular, prosecutors who can exclude parts of the community from jury service effectively shield themselves from full accountability to the public.[112] They can choose for themselves which segments of the population will set their priorities in the charging and resolution of cases.

Whether such disparities are the result of purposeful discrimination is difficult to prove, but even the perception that discrimination is occurring has important implications for the criminal justice system.[113] These practices deserve scrutiny outside the courtroom, beyond the confines of constitutional doctrine.

VI. ACCESS TO DATA AND CRIMINAL JUSTICE REFORM

In Part IV we highlighted data, for illustrative purposes, to address the question of exclusion from juries on the basis of race. But racial equity is only one possible objective for those who might use open jury data. In this Part, we explain how file data, made available in a searchable form that is comparable across district boundaries, could create an informed and engaged role for the public in positive criminal justice reform.

A. The Analogy to Traffic Stop Data

Constitutional doctrines such as *Batson* have not opened the door to jury service for minority groups.[114] But is there any better (or quicker) alternative than advocating for changes in the constitutional doctrine? The American experience with traffic stops and pedestrian stops by police over the last two decades suggest that there is, in fact, a better way. In that setting, a frustrating and limited constitutional doctrine does not tell the whole story. The increased availability of data about the patterns of police stops created a political debate that continues to shape police conduct. Through the political process, members of these communities are able to insist on changes in police department policies with the aim of reducing racial profiling.

Just as in the jury selection context under *Batson*, the Supreme Court's approach to racial profiling under the Fourth Amendment allows law enforcement officials to cloak constitutionally impermissible conduct in race-neutral terms. Equal Protection jurisprudence insulates these practices from systemic reform.

112. This compounds the other weaknesses of the electoral check on the prosecutor's performance in office. *See* Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69, 88–89 (2011); Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 582–83 (2009).

113. *See* Stephen Clarke, *Arrested Oversight: A Comparative Analysis and Case Study of How Civilian Oversight of the Police Should Function and How It Fails*, 43 COLUM. J.L. & SOC. PROBS. 1, 2 (2009); Kami Chavis Simmons, *Beginning to End Racial Profiling: Definitive Solutions to an Elusive Problem*, 18 WASH. & LEE J.C.R. & SOC. JUST. 25, 30 (2011).

114. *See supra* Section II.B.

The centerpiece of this evasion is *Whren v. United States*.[115] The case involved two vice squad officers' decision to stop a car. One possible ground for the stop was illegal driving (making a right turn without a signal); another plausible reason for the stop was the officers' unsupported hunch that the driver and passenger were involved in drug distribution. Which was the true reason? The Court said that it didn't matter. As long as the circumstances give officers reasonable suspicion to believe a driver violated a *traffic* law, courts treat the stop as reasonable under the Fourth Amendment.[116] An officer can use race as a basis for suspicions about criminal behavior, stop suspects of only one race, and shroud those discriminatory stops in race-neutral language.[117] David Harris summed up the impact of constitutional law on pretextual stops this way: a judicial finding of racial profiling is "the legal equivalent of lightning bolts hurled by Zeus."[118]

As a result, constitutional litigation standing alone has not changed field practices very much. Numerous studies conducted over several decades have demonstrated that law enforcement officers disproportionately select racial minorities for traffic stops, disproportionately search them during these stops, and disproportionately subject minority drivers to "stop and frisk" practices.[119]

The greater impact of constitutional litigation was delayed and indirect. Some of the earliest statistical clues about racial profiling practices came to light during litigation over constitutional claims, which routinely ended in losses for plaintiffs who wanted to change these police practices.[120] Eventually, advocates changed the venue for their arguments. They broadened their strategy

115. 517 U.S. 806 (1996); *see also* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."); Carlos Torres et al., *Indiscriminate Power: Racial Profiling and Surveillance Since 9/11*, 18 U. PA. J.L. & SOC. CHANGE 283, 285 (2015).

116. *Whren*, 517 U.S. at 819.

117. *See* MICHAEL L. BIRZER, RACIAL PROFILING 72 (2013). A few examples confirm the limited power of equal protection doctrine to respond to racial profiling. In *United States v. Avery*, 137 F.3d 343 (6th Cir. 1997), the court turned aside the defendant's equal protection claim and rejected statistics showing that police disproportionately targeted black people because the officers had a plausible, nonracial reason for detaining the defendant. Similarly, in *Bingham v. City of Manhattan Beach*, 329 F.3d 723, 736 (9th Cir. 2003), the Ninth Circuit affirmed summary judgment because the appellant failed to provide evidence to refute the officer's race-neutral explanation for the traffic stop. *See also* Johnson v. Crooks, 326 F.3d 995, 999–1000 (8th Cir. 2003) (denying relief because plaintiff failed to provide evidence of discrimination to counter the officer's race-neutral justification of the traffic stop).

118. David A. Harris, *Racial Profiling Redux*, 22 ST. LOUIS U. PUB. L. REV. 73, 75 (2003).

119. *See, e.g.*, David Barstow & David Kocieniewski, *Records Show New Jersey Police Withheld Data on Race Profiling*, N.Y. TIMES (Oct. 12, 2000), http://www.nytimes.com/2000/10/12/nyregion/records-show-new-jersey-police-withheld-data-on-race-profiling.html; DAVID A. HARRIS, AM. CIVIL LIBERTIES UNION, DRIVING WHILE BLACK: RACIAL PROFILING ON OUR NATION'S HIGHWAYS ACLU (June 1999), https://www.aclu.org/report/driving-while-black-racial-profiling-our-nations-highways (describing statistics from Maryland and Illinois). More recent data related to New York City's "stop and frisk" policy tell a consistent story. Nearly nine out of every ten people that the New York Police Department stopped and frisked were completely innocent. Although black people and Hispanic people account for a little over half of the city's population, 83% of the people stopped were black or Hispanic. *See Racial Discrimination in Stop-and-Frisk*, N.Y. TIMES (Aug. 12, 2013), http://www.nytimes.com/2013/08/13/opinion/racial-discrimination-in-stop-and-frisk.html.

120. *See* Harris, *supra* note 118, at 78.

and took their claims to legislatures. As a result, many states enacted legislation to address racial profiling, including some laws that require law enforcement to collect and report data about their stop practices.

As part of a strategy to prevent racial profiling, about eighteen states now require, by law, mandatory data collection for all stops and searches.[121] Public agencies now make these data available to the public, sometimes through a centralized entity and at other times through individual law enforcement agencies.[122]

Private individuals and groups have stepped forward as intermediaries to monitor and interpret these data, making the information accessible and useful for the public and for policy entrepreneurs. Researchers employed in universities produced some studies,[123] while policy advocacy organizations performed some of their own analyses.[124]

Journalists also found stories within these numbers. Some news outlets reported the results of academic and advocacy studies.[125] In addition, teams of reporters created their own analyses, sorting and summarizing the overwhelming databases for their readers. For instance, the *New York Times* examined police traffic stop records between 2010 and 2015. In consent searches in Greensboro, North Carolina, "officers searched blacks more than twice as often but

121. See NAACP, BORN SUSPECT: STOP-AND-FRISK ABUSES & THE CONTINUED FIGHT TO END RACIAL PROFILING IN AMERICA app.1 (Sept. 2014), http://www.naacp.org/criminal-justice-issues/racialprofiling/; Patrick McGreevy, *Brown Signs Legislation to Protect Minorities from Racial Profiling and Excessive Force*, L.A. TIMES (Oct. 4, 2015, 3:00 AM), http://www.latimes.com/local/politics/la-me-pol-sac-brown-racial-profiling-20151004-story.html. In 1999, North Carolina became the first state to mandate data collection regarding race for police who stop drivers. N.C. GEN. STAT. § 143B-902 (2016); R.I. GEN. LAWS § 31-21.2-5(e) (2016).

122. Since 2002, all state highway patrol and police departments in North Carolina have collected the data and sent them to the North Carolina Department of Justice, which publishes the data through its website. *See North Carolina Traffic Stop Statistics*, N.C. DEP'T PUB. SAFETY, http://trafficstops.ncsbi.gov (last visited May 18, 2018).

123. One such academic study, by Frank Baumgartner, reported that black drivers were on average 73% more likely to be searched than white drivers in North Carolina. *See* Frank R. Baumgartner, *NC Traffic Stops*, U.N.C. CHAPEL HILL, https://www.unc.edu/~fbaum/traffic.htm (last updated Dec. 13, 2017) (concluding that Hispanic drivers were 96% more likely to be searched than white drivers and black male drivers were 97% more likely to be searched, yet black men were 10% less likely to have illegal substances than white men in probable cause searches; during consent searches, black men were 18% less likely to have illegal substances than their white counterparts).

In a separate study based on 4.5 million traffic stop records, Sharad Goel and other researchers at Stanford University found that 5.4% of black drivers were searched, compared to 3.1% of white drivers. *See* Camelia Simoiu et al., *The Problem of Infra-Marginality in Outcome Tests for Discrimination*, 11 ANNALS APPLIED STAT. 1193, 1206 (2017), https://5harad.com/papers/threshold-test.pdf (revealing that, in nearly every department, black and Hispanic drivers were subject to a lower threshold of suspicion than their white and Asian counterparts; statewide, the thresholds for searching white people were 15%, for Asian people 13%, for black people 7%, and for Hispanic people 6%).

124. *See* Richard A. Oppel, Jr., *Activists Wield Search Data to Challenge and Change Police Policy*, N.Y. TIMES (Nov. 20, 2014), https://www.nytimes.com/2014/11/21/us/activists-wield-search-data-to-challenge-and-change-police-policy.html. In 2015, the Southern Coalition for Social Justice published an interactive map on their website that allows a viewer to search the North Carolina stop data by police department. *See Open Data Policing*, S. COALITION SOC. JUST., https://opendatapolicingnc.com (last visited May 18, 2018).

125. *See* Tonya Maxwell, *In Traffic Stops, Disparity in Black and White*, ASHEVILLE CITIZEN-TIMES (Aug. 27, 2016, 2:34 PM), http://www.citizen-times.com/story/news/local/2016/08/27/traffic-stops-disparity-black-and-white/89096656/ (describing Simoiu et al., *supra* note 123).

found contraband only 21 percent of the time, compared with 27 percent of the time with whites."[126]

The collection, publication, and interpretation of traffic stop data fundamentally changed the conversation. Advocates claim that collecting data about race is the best way to gather tangible evidence of widespread unconscious bias toward minorities during police traffic stops.[127] Compared to case studies or anecdotal evidence of an individual who was harmed due to police brutality or over-policing, statistical evidence might persuade a wider range of people.[128]

The public discussion of data also changes internal management for police departments. When the police know that data analysts and reporters are watching them work, they work more carefully.[129] Where this transparency exists, reform advocates can target more precisely the local police practices that they suspect are most troubling. In some cases, the data will reveal no problems; in others, they might confirm for police leadership the factual basis for a complaint that once seemed amorphous or speculative.[130]

When the government collects and publishes data in a format that allows for comparisons between places, reports give the public and local police leaders a benchmark for police performance. One department that stands out from other law enforcement agencies across the state—either in a positive or negative way—can reflect on the reasons for those local differences. Similarly, data collected over time may identify trends, allowing police leaders to see in a concrete way whether a new policy is working.

In sum, the move from constitutional argument in the courtroom to political argument in the public arena loosened a stalemate on the question of police

126. *See* Sharon LaFraniere & Andrew W. Lehren, *The Disproportionate Risks of Driving While Black*, N.Y. TIMES (Oct. 25, 2015), http://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html (city's driving population is 39% black; 54% of those pulled over were black); *see also* Matthew Kauffman, *Data: Minority Motorists Still Pulled Over, Ticketed at Higher Rates than Whites*, HARTFORD COURANT (Sept. 22, 2015, 7:02 PM), http://www.courant.com/news/connecticut/hc-racial-profiling-0923-20150922-story.html.

127. LORIE FRIDELL ET AL., RACIALLY BIASED POLICING: A PRINCIPLED RESPONSE 116–17 (2001), http://fairandimpartialpolicing.com/docs/rbp-principled.pdf; *cf.* Stephen Rushin, *Using Data to Reduce Police Violence*, 57 B.C. L. REV. 117, 129–31 (2016).

128. FRIDELL ET AL., *supra* note 127, at 128. For a discussion of methodology issues in these studies, see JOYCE MCMAHON ET AL., U.S. DEP'T JUSTICE, OFFICE OF CMTY. ORIENTED POLICING SERVICES, HOW TO CORRECTLY COLLECT AND ANALYZE RACIAL PROFILING DATA: YOUR REPUTATION DEPENDS ON IT! 35 (2002), https://ric-zai-inc.com/Publications/cops-p044-pub.pdf (last visited May 18, 2018). Critics argue that unless the record of the stop includes very specific data points, down to the cross streets where the stop occurred (which in many cases is not a required data point), there is no record of which areas of the jurisdiction are facing the most police presence. The specific location of the stop, according to this argument, is necessary to put the stop into context.

129. Martin Kaste, *Police Are Learning to Accept Civilian Oversight, but Distrust Lingers*, NPR (Feb. 21, 2015, 10:18 AM), https://www.npr.org/2015/02/21/387770044/police-are-learning-to-accept-civilian-oversight-but-distrust-lingers.

130. Sometimes, of course, police leaders offer benign interpretations of the data and deny any need for policy changes. *See* Joey Garrison, *Nashville Police Chief Slams Racial Profiling Report as 'Morally Disingenuous,'* TENNESSEAN (Mar. 7, 2017, 12:58 PM), https://www.tennessean.com/story/news/2017/03/07/nashville-police-chief-slams-racial-profiling-report-morally-disingenuous/98856754/.

traffic stops.[131] We believe that something similar can happen if government agencies collect and report jury selection data and if academics, advocates, and journalists step forward to interpret and publicize those data.[132]

B. The Effects of Sunshine Across Different Criminal Justice Areas

The transformative power of data, in our view, is not limited to traffic stops or jury selection. We place our proposal in the larger context of using transparency to change criminal justice practices for the better.

1. Use of Data to Regulate a Range of Actors

As Andrew Crespo has pointed out, the criminal courts already collect useful facts that remain hidden because they are scattered in single files or inaccessible formats.[133] An effort to assemble these facts in aggregate form could improve the courts' efforts to regulate the work of other criminal justice players, such as police and prosecutors.

Careful record-keeping and transparency regarding the collected data already contributes to accountability in diverse parts of the criminal justice system. In the context of correctional institutions, transparency of data has been instrumental in ensuring fair treatment of prisoners, as Alabama and other states' courts have held that their state open-record acts apply to prisoners.[134] While correctional institutions have been hesitant to comply, this requirement has shed light on prison deaths, suicides, beatings, and other prison conduct, hopefully holding these correctional institutions accountable and giving the legislature a chance to address misconduct.[135]

Similarly, experts have pushed for increased transparency in the context of officer-involved shootings, arguing that a lack of transparency surrounding

131. As a result of the *New York Times* investigation in 2015, the Greensboro police chief ordered officers to refrain from stopping drivers for minor infractions involving vehicle flaws, which are stops that are subject to individual officer discretion and stops for which black people and Hispanic people were more likely to be pulled over. *See* Sharon LaFraniere, *Greensboro Puts Focus on Reducing Racial Bias*, N.Y. TIMES (Nov. 11, 2015), http://www.nytimes.com/2015/11/12/us/greensboro-puts-focus-on-reducing-racial-bias.html; Oppel, *supra* note 124.

> After having initially rejected protesters' demands, the city [of Durham, North Carolina] . . . agreed to require the police . . . to obtain written consent to search vehicles in cases where they do not have probable cause. . . . "Without the data, nothing would have happened," said Steve Schewel, a Durham City Council member . . . .

Oppel, *supra* note 124.

132. For an example of news coverage drawing on relevant, but limited, demographic information related to jury selection, see Pam Kelley & Gavin Off, *Wes Kerrick Jury Won't Mirror Mecklenburg's Diversity*, CHARLOTTE OBSERVER (July 27, 2015, 8:51 PM), http://www.charlotteobserver.com/news/local/crime/article29073877.html (comparing jury pool in the criminal trial of a police officer who shot a suspect with overall county population demographics).

133. *See* Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2109–10 (2016).

134. *See* Sarah Geraghty & Melanie Velez, *Bringing Transparency and Accountability to Criminal Justice Institutions in the South*, 22 STAN. L. & POL'Y REV. 455, 460 (2011).

135. *Id.* at 458–63.

these incidents has impeded reform.[136] In a test of the reform power of data, President Obama signed the Death in Custody Reporting Act.[137] This law requires states and local law enforcement agencies that receive federal money to make quarterly reports about the deaths of any persons who are detained, arrested, or incarcerated.[138] The theory is that national data will help policymakers "identify not only dangerous trends and determine whether police use force disproportionately against minorities, but best practices, and thus ultimately develop policies that prevent more deaths."[139] The next few years might reveal whether this government-mandated reporting regime can produce more comprehensive results than the more decentralized efforts of newspapers and others in the private sector to build databases of police-involved shootings.[140]

2. Internal Management Uses of Data

The practical impact of jury selection data depends, in part, on how prosecutors, judges, court clerks, and others use the data once the information becomes available. These criminal justice professionals have the capacity to collect for themselves the jury selection statistics and to generate reports on the topic.[141] Managers in the prosecutor's office, the chief judge's chambers, or the clerk's office might be more open to the use of jury selection data if they were to collect the data themselves.

On the other hand, data collection mandated by statute, statewide regulation, or rule of procedure could produce more uniform results in different localities and allow for the sort of place-to-place comparisons that make it easier to diagnose local problems. For example, the Florida legislature recently passed a pathbreaking law that requires key criminal justice actors to collect and post criminal justice data in a format that will allow comparisons across localities.[142]

136. Mark Berman & Mark Guarino, *Chicago Releases 'Unprecedented' Evidence from Nearly 100 Investigations into Police Shootings, Use of Force*, WASH. POST (June 3, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/06/03/chicago-set-to-release-massive-trove-of-evidence-from-100-investigations-into-police-shootings-alleged-misconduct/?utm_term=.dc838ad9f343.

137. Death in Custody Reporting Act of 2013, Pub. L. No. 113-242, 128 Stat. 2860 (2014).

138. *Id.* § 2(a).

139. *See* Kami Chavis Simmons, *No Way to Tell Without a National Database*, N.Y. TIMES: ROOM FOR DEBATE (July 13, 2016, 10:53 AM), https://www.nytimes.com/roomfordebate/2015/04/09/are-police-too-quick-to-use-force/no-way-to-tell-without-a-national-database.

140. *See* Geoffrey P. Alpert, *Toward a National Database of Officer-Involved Shootings: A Long and Winding Road*, 15 CRIMINOLOGY & PUB. POL'Y 237, 238–39 (2015); *2015 Washington Post Database of Police Shootings*, WASH. POST, https://www.washingtonpost.com/graphics/national/police-shootings/ (last visited May 18, 2018) (displaying police shooting data drawn from "news reports, public records, Internet databases and original reporting").

141. *See* Alafair S. Burke, *Prosecutors and Peremptories*, 97 IOWA L. REV. 1467, 1485, 1485 n.97 (2012) (collecting proposals that would require prosecutors to maintain jury selection statistics); Jason Kreag, *Disclosing Prosecutorial Misconduct*, 72 VAND. L. REV. (forthcoming 2019) (proposing the use of standardized letters to disclose prosecutor discovery violations to affected parties).

142. *See* FLA. STAT. ANN. § 900.05(3), (4) (2018); John Kennedy, *Governor Signs Sweeping Court Data Collection*, SARASOTA HERALD-TRIBUNE (Mar. 30, 2018), www.heraldtribune.com/news/20180330/governor-signs-sweeping-court-data-collection.

A sense of professionalism among judges or prosecutors might motivate them to take data seriously when it shows a departure from the standard practices of their colleagues elsewhere in the state.[143] After learning about patterns in jury selection across many cases, they might change practices on their own initiative. For instance, accessible data might convince supervisors to train prosecutors to avoid racial bias during jury selection.

3. External Public Uses of Data

Internal management use of routine criminal justice data is only half the story. In the end, we look to public accountability—through the ballot box or other forms of democratic input into criminal justice practices[144]—to convert jury selection data and other comparable datasets into drivers of change.

The information visible to the public about how prosecutors and judges perform, compared to their peers, is historically thin.[145] That is starting to change. Private nonprofit organizations, such as Measures for Justice, are funding, collecting, and disseminating data that allow citizens to compare their local courts to others in the same state and elsewhere.[146] Data such as this could make it possible to evaluate practices across time and across places. When news reporters, advocates, academics, and analysts interpret that data for the general public, the data could shift public priorities. It could create more informed accountability in a world where criminal court professionals get very little feedback from the communities they serve.

We do not claim to know how voters will ultimately react when these data about the criminal courts become accessible to them. It is possible that in some places, the most politically engaged members of the community will not care about jury selection; they might even resist the idea of expanding jury participation to include every population group. But local variety is built into the

143. *See* Sidney Shapiro & Ronald F. Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside-Out*, 65 U. MIAMI L. REV. 577, 587–90 (2011) (analyzing the restraining power of professional norms in bureaucracies such as prosecutor's offices).

144. *See* Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1621 (2017); Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2177 (2014).

145. *See* Russell M. Gold, *"Clientless" Prosecutors*, 51 GA. L. REV. 693, 701 (2017); Jason Kreag, *Prosecutorial Analytics*, 94 WASH. U. L. REV. 771, 776–77 (2017); Ronald F. Wright, *Beyond Prosecutor Elections*, 67 SMU L. REV. 593, 594 (2014). For a remarkable recent example of a prosecutor committing to regular release to the public of its own statistics about charging decisions, see Tanveer Ali, *Cook County Felony Weapon Cases Up 43 Percent in 2017, Data Shows*, CHI. SUN-TIMES (Feb. 21, 2018, 3:24 PM), https://chicago.suntimes.com/
news/felony-weapon-cases-up-43-percent-in-2017-county-data-shows (reporting change in office practices based on data set that Cook County prosecutor released voluntarily).

146. *See Overview*, MEASURES FOR JUSTICE, https://measuresforjustice.org/about/overview/ (last visited May 18, 2018); Amy Ellis, *MacArthur Foundation Awards FIU $1.7 Million to Study Prosecutor Behavior*, FIU NEWS (Mar. 9, 2018, 10:26 AM), https://news.fiu.edu/2018/03/macarthur-foundation-awards-fiu-1-7-million-to-study-prosecutor-behavior/120350.

criminal justice systems in the United States.[147] Voters and engaged community groups in most places, we hope, will value inclusive practices in their criminal courts and will expect their agents, operating in the sunshine, to deliver the results.

VII. CONCLUSION

The fulcrum that could move jury practices sits in the office of the clerk of the court. Public employees in those offices already collect some basic background facts about prospective jurors and record the decisions by judges, prosecutors, and defense attorneys to remove jurors or to keep them. And if the clerk's office is the fulcrum, the lever to shift the entire jury selection process in the direction of greater inclusion will be public records laws, embodied in state statutes, local court rules, and office policies.

It is startling that public courts, in an age when electronic information surrounds us on all sides, make it so difficult to track jury selection practices across different cases. It should not require hundreds of miles of driving between courthouses; access to the data should not depend on special requests for judicial approval.[148] Information about the performance of public servants in the criminal courts, in aggregate form, would be easy to collect and to publish. Jury selection goes to the heart of public participation in criminal justice: this is precisely where the sun needs to shine first.

147. *See* Ronald F. Wright, *The Wickersham Commission and Local Control of Criminal Prosecution*, 96 MARQ. L. REV. 1199, 1200 (2013). *But cf.* William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1973 (2008) (describing decline of local influence in last half of twentieth century).

148. Careful disclosure policies can protect the legitimate privacy interests of jurors without requiring case-by-case judicial approval of jury selection information. *See* Grosso & O'Brien, *supra* note 37, at 667–68; Nancy J. King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Trials*, 49 VAND. L. REV. 123, 152 (1996).

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The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County

Mary R. Rosel

Some view the peremptory challenge as crucial to a fair jury selection process, whereas for others, it is a tool for invidious race or gender discrimination. Nevertheless, debates utilize little empirical data regarding uses of this challenge. Data are reported from observation of a small number of criminal trials in one, largely biracial southeast. ern county. In the aggregate, there was no association between race and selection for a jury, and only a modest relationship for gender and selection. However, the null finding for race masks a pattern of strikes by each party: When dismissed, Whites were likely to be excused by the defense, and African Americans by/he state. A trial-by-trial analysis showed that when disparities between venire and jury composition existed. the direction usually pointed to ouerrepresentation of African Americans and women on juries. Despite limited generaIizability, the data suggest the need for a more informed debate about the peremptory challenge's use in modern criminal trials.

In the last decade, members of the judiciary *(Alen v. State,* 1992; Broderick, 1992; Hoffman, 1997; *People v. Bolling,* 1992) as well as legal commentators (e.g., Bray, 1992; Marder, 1995) have all expressed concerns about the merits of eliminating citizens from petit juries through the peremptory challenge. Supreme Court rulings have established the Equal Protection rights of prospective jurors in jury selection (e.g., *Powers v. Ohio,* 1991; *Edmonson v. Leesville Concrete Co.,* 1991; *Georgia v. McCollum,* 1992; *J.E.B. v. Alabama, ex retT.B.,* 1994). Thus, some have suggested that constitutional violations to eliminated jurors are of greater import than potential harms to litigants resulting from abandoning or drastically limiting the peremptory (which is not grounded in the Constitution; see Bader, 1996; Leipold, 1998; Un~ derwood, 1992). Recently, a sizable faction of a panel convened to suggest jury reforms in the District of Columbia favored eliminating the peremptory, although this reform was not ultimately adopted (Council for Court Excellence, 1998).

Supporters of the peremptory challenge, such as former Chief Justice Burger *(Batson v. Kentucky,* 1986) have argued that it is essential to a fair jury selection

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process. An early article by Babcock (1972) outlined four functions the peremptory serves, including the appearance of fairness engendered by litigants' having control over choosing a jury, the ability to leave unstated any concerns about jurors'[2] biases, the ability to overrule jurors' natural reluctance to admit partiality, and, finally, as a "shield for the exercise of the challenge for cause" (1972, p. 554)—that is, a mechanism to excuse a juror one may have alienated during intensive voir dire questioning. As these rationales suggest, the peremptory can serve as a check on judicial control of the jury selection process.

These alleged advantages notwithstanding, critics posit several harms engendered by the peremptory (for a recent overview, see Hoffman, 1997). The primary dissatisfaction revolves around the doctrinal goal of having juries that are representative of the community. In this regard, the peremptory has been called "the last best tool of Jim Crow" (Hoffman, 1997, p. 827). Indeed, it was not until the Supreme Court's ruling in *Batson v. Kentucky* (1986) that any reasonable legal mechanism prohibited the state from using the peremptory to systematically exclude African Americans from serving on juries (cf. *Swain v. Alabama,* 1965). The Supreme Court has likewise prohibited race-based peremptories by the defense (*Georgia v. McCollum,* 1992) and in civil trials (*Edmonson v. Leesville Concrete Co.,* 1991). Race-based peremptories are illegal irrespective of the race of the defendant (*Powers v. Ohio,* 1991), and gender-based peremptories are forbidden (*J.E.B. v Alabama, ex rel T.B.,* 1994).

Despite these rulings, there is concern that, aided by pretext, discrimination against jurors continues (Charlow, 1997; Sutphen, 1995). Melilli (1996) reviewed reasons proffered by attorneys who must account for challenges and deemed many "silly, if not offensive" (Melilli, 1996, p. 499). For example, when accused of *Batson* violations, lawyers have asserted that the jurors were challenged because they were "from New York," "from Texas," were the "same build as the opposing party," or had "too much education" (Melilli, 1996, p. 498). A Maryland appellate court upheld a trial court's ruling against the peremptory dismissal of a set of White jurors; according to the defense, one juror reminded the attorney of her Catholic school teacher and another dressed well and "seemed rather studious" (*Gilchrist v. State,* 1993, pp. 47–49; see Raphael and Ungvarsky, 1993, for a review of appellate rulings on allegedly "neutral" explanations). Additionally, the procedures in place to oversee peremptory challenges (which are no longer "peremptory") have been termed a burden on the courts (e.g., *Alen v. State,* 1992, p. 1088; *Gilchrist v. State,* 1993, p. 55). Thus, it is argued, given its potential for abuse and problems with enforcement, the peremptory challenge should be eliminated (see *Batson v. Kentucky,* 1986, p. 103, Marshall, J., concurring).

Banning the peremptory would constitute a revolution in jury selection procedures. Nevertheless, debates over the challenge have generally proceeded in the absence of empirical data bearing on the current use of the peremptory. Instead, as evidence, critics sometimes rely upon assertions by other commentators (e.g., Bray, 1992, p. 564, quoting Altman, 1986, who summarizes others, n. 8) or upon

[2]For ease of description, I use the term "juror" to refer to persons both selected for and excused from a jury panel.

the fact that a number of *Batson*-type cases have reached the appellate levels and the Supreme Court (e.g., Marder, 1995, n. 189).

Available social science data on voir dire and the peremptory do not directly address issues of jury representativeness. Instead, such research has focused on the extent to which lawyers successfully identify biased jurors (Broeder, 1965; Johnson & Haney, 1994; Seltzer, Venuti, & Lopes, 1991) or even potentially favorable jurors (Finkelstein & Levin, 1997; Zeisel & Diamond, 1978); juror disclosure to judges versus attorneys (Jones, 1987); and voir dire as a remedy for pretrial publicity exposure (Kerr, Kramer, Carroll, & Alfini, 1991). In the pre-*Batson* era, lawyers reported using race in decision making about potential jurors (Diamond, Ellis, & Schmidt, 1997), and a post-*Batson* study also found that prosecutors disproportionately eliminated African-American mock jurors (Kerr *et al,* 1991). Nevertheless, data on jury selection outcomes in recent trials are largely unavailable.

Thus, modern, systematic records of how the peremptory challenge is used—on whom and by whom—are lacking. What effect does the peremptory have upon the racial or gender composition of petit juries in criminal trials? This paper presents data gathered through trial observation in a North Carolina courthouse. I investigate how prosecutors and defense attorneys use the peremptory challenge and how characteristics of seated jury panels compare to those of the venire.

METHOD

The data come from a larger study investigating jurors' perceptions of voir dire questioning, especially their concerns about privacy. A portion of the research entailed court observation and record keeping about who was excused and who was selected for trials. Thirteen noncapital, felony criminal jury trials in a single North Carolina county were observed. Cases were selected after consulting with court officials about which cases, if any, were likely to proceed to trial in a given week. From these, the most serious felony charge slated for trial was selected for observation. Due to the small size of the courthouse, usually only one trial would be held in a given week. Hence, although not randomly selected, the cases represent a sizable proportion of all felony jury trials held during the study period.

The 13 criminal trials involved 4 cases of homicide (3 second-degree murder and 1 involuntary manslaughter); 1 case of felonious assault (which included first-degree sex offenses); 2 cases of robbery with a dangerous weapon (1 of which was a car-jacking, the other an armed robbery); 2 felony drug offenses; 2 accusations of breaking and entering/possession of stolen goods; and 2 cases of obtaining property by false pretenses. There were 18 defendants: one trial had 4 defendants, one had 3, and the rest had a single defendant. All but 1 of the accused were African American (the other was White); only 2 defendants were female.

In this jurisdiction, lawyers conducted the majority of voir dire questioning. Customarily, the judge introduced the nature of the case and the parties, obtained basic information on the jurors (e.g., employment, marital status), and sometimes assessed whether there were clear hardships or obvious conflicts among the panel. The judge then oversaw voir dire questioning but was largely passive. For example,

although one judge informed attorneys that he disapproved of open-ended questions (e.g., "How do you feel about . . ."), he did not forbid inquiries framed in this manner unless one of the parties objected.

Three hundred and forty-eight people called for jury service in the 13 trials were questioned during voir dire. The county used a "sequential method" of questioning (Bermant & Shapard, 1981), in which the prosecutor asked all of his or her questions and exercised challenges; new jurors replaced those excused. Once the prosecution had passed a panel of 12, the defense questioned the remaining set of jurors and exercised challenges. Decisions at each round were final: When jurors were passed by each side, they could not be excused later through the peremptory. The process was repeated until 12 jurors and at least 1 alternate were seated. In noncapital cases, each side was allowed six peremptory challenges (per defendant), with one additional peremptory per alternate. There were no *Batson* claims asserted by any party during these cases.

This county has a high proportion of African Americans, who were 32% of those questioned (and, according to 1990 census data, are 37% of the population). In addition, the county is essentially biracial, as 97% of residents are either White or African American; 2% are Asian or Pacific Islander. The sample largely reflects this composition: Only two jurors were Asian, and the remainder were African American or White. Fifty-three percent of the venire were female. Racial and gender categorizations of this sample were based upon researcher observation of jury selection.

RESULTS

Aggregate Analysis

The peremptory challenge was the most common means of excusing a juror: Only 19% of the 181 people excused were eliminated through a challenge for cause (38% of these people were African American and 74% were male). In 6 trials, lawyers made unsuccessful challenges for cause (n = 11 motions). All but one of these jurors were later excused through a peremptory challenge. In all, lawyers exercised 147 peremptory challenges (range: 5–33 per trial).[3] In the majority of trials (n = 10), neither side used all available peremptories (the defense did so in 2). The majority of peremptories came from the defense, which exercised 66% of all such challenges (range: 45%–100%).

Overall, compared to Whites, African Americans were no more likely to be excused from the jury via the peremptory challenge: 42% of African Americans were peremptorially excused compared 49% of Whites, χ^2 = 1.04, ns. However, when excused, African Americans were much more likely to be dismissed by the State: 71% of African Americans dismissed from service were excused by the prosecution. The reverse was true for Whites: 81% of White persons excused were

[3]The high figure of 33 peremptory challenges comes from the trial with four defendants. In this case, the prosecutor used 6 challenges, as did one of the defense attorneys. The remaining three defense attorneys each used their full complement of 7 strikes (6, plus 1 for the alternate).

dismissed by the defendant. This association between prosecution/defense and the race of the juror who was excused was highly significant, $\chi^2 = 36.20$, $p < .001$. Across cases, 60% of the state's peremptories were exercised on African Americans (range within trials: 0%–100%). In contrast, 87% of the defendants' challenges were used on Whites (range: 40%–100%).

In an analysis of gender, men were somewhat more likely to be excused through the peremptory than were women (54% of men vs. 41% of women), $\chi^2 = 5.67$, $p < .05$. However, this relationship was nonsignificant when one outlier case—in which women made up 85% of the final panel—was eliminated from analysis ($\chi^2 = 1.71$, ns). In addition, there was no association between gender of the juror and their likelihood of being excused by one side or the other through the peremptory, $\chi^2 = 0.003$, ns.

Trial-Level Analysis

The ruling in *Batson v. Kentucky* (1986) held that the appropriateness of any particular jury selection process is necessarily examined at the trial level. The following is a descriptive picture of the resulting juries in the 13 trials.

Although race was not associated with the likelihood of being selected when data are collapsed across trials, representation of African Americans on juries, given their representation in the venire, varied greatly across trials. In 5 trials, the percentage of African-Americans on the final panel differed from their representation in the venire by no more than 5 percentage points, usually in the direction of overrepresentation (e.g., 33% of the venire, 38% of the final jury panel). In another 6 cases, the difference ranged between 6 and 11 percentage points; 4 of these resulted in overrepresentation and 2 in underrepresentation. In the remaining 2 trials discrepancies between African-American representation on the venire and on the final jury were more stark. In one case, African Americans were 40% of the venire, but only 14% of the final jury. In another, they were 35% of the venire but were fully 71% of the final jury panel. Across cases, African Americans were underrepresented on jury panels to any extent in only 4 of the 13 trials observed and overrepresented in 5 of 13.

An analysis for gender reveals comparable results. In 7 trials, women's representation on juries paralleled their representation in the venire, differing by no more than 5 percentage points. In 3 trials, the number of women on the final panel exceeded their representation on the venire by between 7 and 14 percentage points. Finally, in the remaining 3 cases, there were marked differences, always resulting in overrepresentation of women on the final panels. Specifically, in one case women were 45% of the venire, but 79% of the final panel; in another, it was 46% of the venire and 69% of the jury; and in the third, it was 67% of the venire versus 85% of the jury panel.

DISCUSSION

According to this research, news about the peremptory is best seen as both good and bad. Aggregating across trials, in a county in which the minority group

is one-third of the jury-eligible population, African Americans were no more or no less likely to be excused from jury service than Whites. In this sense, the peremptory had no "disparate impact" upon the minority participation in juries in this county. On the other hand, a closer look reveals that this result comes about in large part because of the adversary system and "disparate treatment" by prosecutors and defense attorneys of both racial groups. If an African American was excused from the jury, it was more often than not the result of a prosecutor's peremptory challenge; if a White person was excused, it was likely attributable to the defense's strike.

These results are similar to New Mexico data reported by Van Dyke (1977, p. 159). However, in that study, White jurors appeared to be the primary focus of the adversaries: Prosecutors eliminated 6% of Whites, whereas the defense eliminated 27%. Members of the predominant minority group in that state (Hispanics) were eliminated by both sides at equivalent rates (just above 10%). With respect to gender, although the present data suggest women were slightly more likely to be selected, this was due largely to discrepancies in one particular trial. Of note, another study reported women as more likely than men to be selected for juries (Cipriani, 1994). However, in that study, as in this one, there was not strong evidence that the two parties showed contradictory preferences for female versus male jurors, rendering the result somewhat difficult to explain. Reviews of research suggest that gender usually provides little predictive utility for verdicts, despite much "folklore" (Fulero & Penrod, 1990); however, it may be that parties' ideas about which gender is better for its side tend to be case-specific and thus variable.

A trial-by-trial analysis of the present data indicates that minority-group and gender representation on juries mirrored the population profile in most cases. However, in approximately one third of the trials observed, the final panel showed marked discrepancies from the venire in terms of race, gender, or both. Interestingly, more often than not, the minority group members tended to be *overrepresented* on the petit jury compared to their numbers in the venire. When discrepancies were evident by gender, it was always in the direction of overrepresentation of women. Certainly such a result is likely to be of little solace to those who oppose peremptory challenges, as juries did not uniformly reflect the venire panels from which they were drawn. Nonetheless, it seems evident that the peremptory challenge's harm to jury composition is not a settled issue in this county.

There are several limitations to these data. First, they are derived from a single county, one with a fairly high proportion of jury-eligible African Americans (32%). Harm to jury representativeness and jury diversity certainly could be more acute in jurisdictions with lower base rates of minorities. In addition, defendants in the sample were primarily African American. Thus, with these data it was not possible to determine whether the defendant's race influences how peremptories are exercised. For instance, it could be that the adversary striking of African Americans and Whites is an indicator of attorneys' assumptions about defendant–juror similarity rather than of generalized views about the two groups' leniency or conviction proneness. Finally, the cases represent a nonrandom (albeit sizable) proportion of the total cases within a defined period, and the sample size is small.

The thrust of these limitations warrants explicitness: Standing alone, the data cannot and should not eliminate concerns about the peremptory challenge's effect

on jury composition. Instead, they provide an example of the type of empirical evidence lacking in the debates surrounding the peremptory. Jury selection in some criminal trials may result in panels that do not mirror the community, but how often does this occur? In what types of cases? Which groups tend to be overrepresented or underrepresented? Why? A large-scale survey of cases across jurisdictions would help shed light upon the legitimacy of charges that the peremptory harms jury representativeness.

Were the peremptory challenge eliminated, litigants would lose direct control over decision making regarding juror fitness—a situation that many attorneys fear, even as they advocate for greater jury representativeness (Brown, 1994). Without diminishing the importance of the principle established in *Batson*—namely, that an injustice in any individual case needs to be addressed—it seems unwise to make drastic policy changes without having substantially more information regarding the use of the peremptory challenge in the modern trial.

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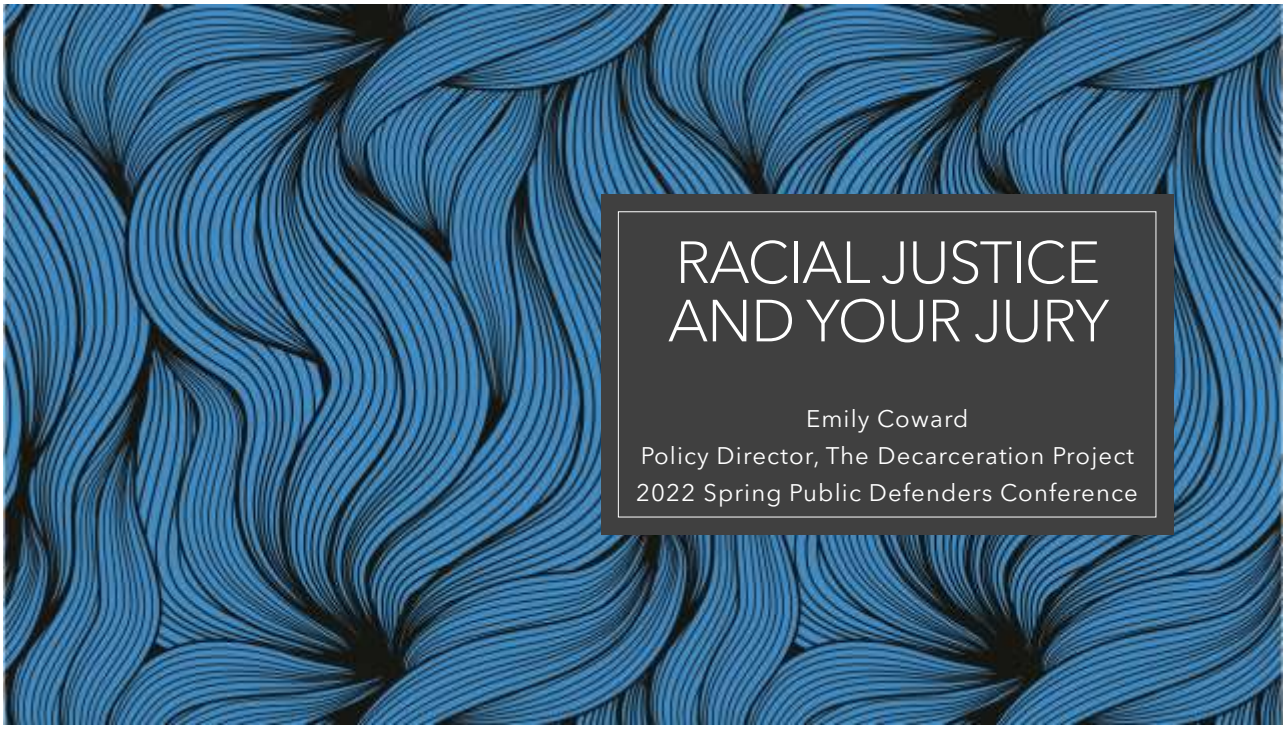

RACIAL JUSTICE AND YOUR JURY
Emily Coward
Policy Director, The Decarceration Project
2022 Spring Public Defenders Conference

1


❖ Legacy of Racial Exclusion
❖ Fair Cross-Section Challenges to the Jury Pool
❖ Addressing Bias
❖ *Batson* Challenges to Improperly Motivated Strikes
❖ Challenges for Cause
❖ Working Towards a Future of Diverse, Inclusive Juries

2

Legacy of Racial Exclusion in North Carolina Juries

3

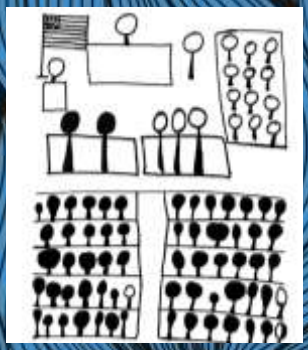
Racial Exclusion on North Carolina Juries

"The same racially oppressive beliefs that fueled segregation manifested themselves through public lynchings, the disproportionate application of the death penalty against African American defendants, and the exclusion of African Americans from juries."

4

WFU Jury Sunshine Project - Prosecutor Black/White Removal Ratios for Largest Cities in NC (2011)

Winston-Salem (Forsyth)	3.0
Durham (Durham)	2.6
Charlotte (Mecklenburg)	2.5
Raleigh (Wake)	1.7
Greensboro (Guilford)	1.7
Fayetteville (Cumberland)	1.7



5

"Black people and other people of color are excluded from participating in our jury system at every step of the jury selection process . . . all-white juries spend less time deliberating, consider fewer perspectives, and make more mistakes . . . [and] unconscious associations between Blackness and criminality increase the risk of wrongful convictions."

Equal Justice Initiative, "Race and the Jury: Illegal Racial Discrimination in Jury Selection" (2021)

6

Fair Cross-Section Challenges to the Jury Pool

7

Fast Facts: Fair Cross Section Guarantee

Three-part test from *Duren v Missouri*:

- Distinctive group
- Not fairly and reasonably represented
- Systematic exclusion- something inherent in process

8

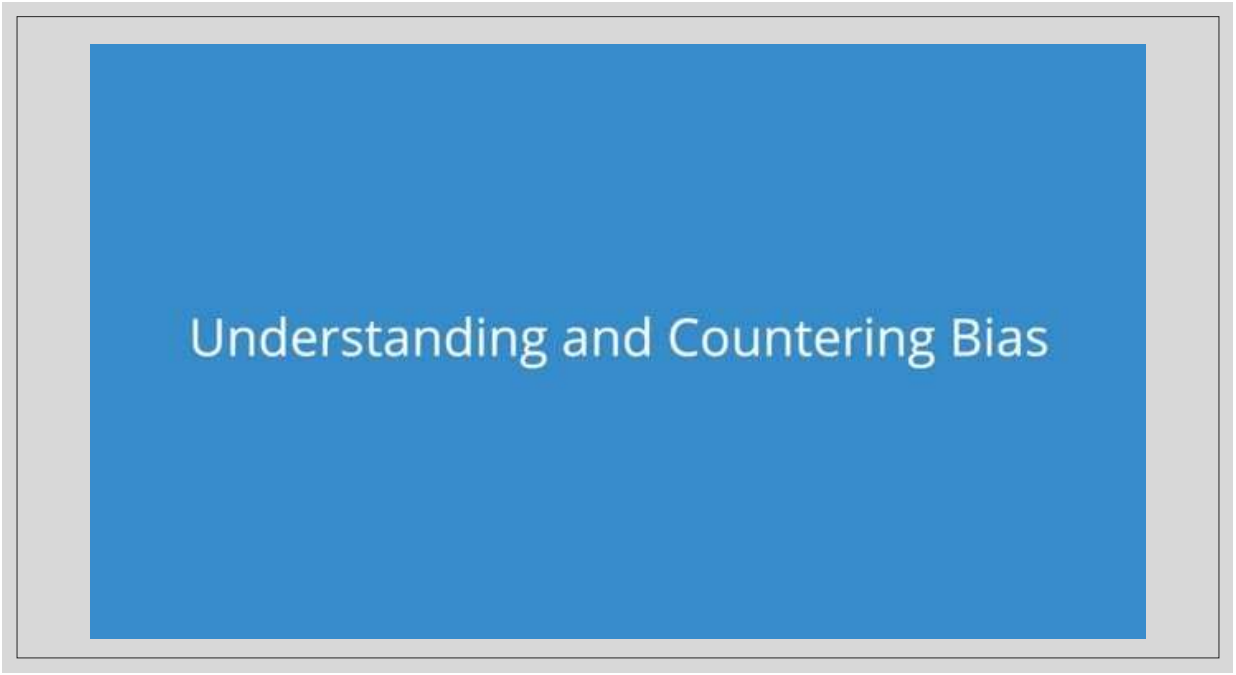
9

Fair Cross-Section Litigation: Step by Step

- Write to Clerk of Court to seek information
- File motion for discovery and distribution of questionnaires
- Analyze collected data
- File Motion to Quash Venire

10

11



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Bias Checklist for Defenders

STEP ONE: **REVIEW THE RISK FACTORS**

- **Emotional state** – anger, disgust, stress, and fatigue exacerbate implicit bias
- **Pressured decision making** –stress, distraction, and time pressure increase risk of stereotyping
- **Low-effort cognitive processing** – less thoughtful, deliberative process = greater implicit bias
- **Easily-accessible social categories** – implicit bias more likely when a trait is easy to see
- **Ambiguity** – judgment calls based on vague criteria or information increases implicit bias
- **Lack of feedback** – less likely to check bias where no organizational feedback or checks

STEP TWO: **SLOW DOWN**

Take a moment to reflect on your mental state, stress, distractions, and time pressure.

Take your time. It is better to slow down now than cause harm later.

STEP THREE: **GENERAL BIAS CHECK**

- ✓ Do you have enough information? Are you making any assumptions?
- ✓ Are you requiring more from this person than you would from others?
- ✓ How would you feel if person's answers were given by a person of another demographic group?

STEP FOUR: **LISTEN, DEBIAS, ADVOCATE**

- **Communication** – Use clear, common language. Practice non-judgmental listening. Repeat, clarify, and validate client's concerns. Be mindful of the impact of your own identity and power/status as an attorney.
- **Debiasing Strategies** – Notice when stereotypes arise. Combat them by learning about your client's life, understanding who and what are important to them, and gathering and referencing images of them at their best.
- **Prior Record** – Black and Latinx people are more likely to be arrested, charged, convicted, and incarcerated. View with skepticism habitual charges or other ways in which your client is treated more harshly due to prior convictions.
- **Issues Specific to Your Case** – Consider the obvious and subtle ways racism or bias impacts your client's case. Work with your client to tell their story.
- **Advocate** – Notice and challenge when legal system actors make assumptions about your client.
- **Accountability**– Regularly discuss your bias check efforts with peers. Tie this bias check to another habit or regularly scheduled part of your week.

The Decarceration Project TDP

13

14

Importance of Overcoming Concerns

- By ***making race salient*** you increase the likelihood that jurors will think critically about race and avoid reliance on stereotypes/bias
- If you avoid the issue, you may increase the likelihood that bias will influence decisions made in your client's case
- Concerned about incompetence addressing race? PRACTICE!

Ellsworth, Phoebe C. "*'Race Salience' in Juror Decision-making: Misconceptions, Clarifications, and Unanswered Questions.*" Behav. Sci. & L. 27, no. 4 (2009): 599-609.

15

Embrace the Discomfort!

- "If you are too uncomfortable to address race and racism, you should not be representing clients of color. That's ineffective assistance of counsel." ~Twyla Carter, the Bail Project
- "[I]neffectiveness claims based on the failure to guard against a violation of a client's Sixth Amendment right when counsel fails to inquire into racial bias may be an emerging area of law." ~The Honorable Alyson A. Grine, *Questioning Prospective Jurors about Possible Racial or Ethnic Bias*, NC Bar Journal, Summer 2017

16

Legal Support for Addressing Race: Recent Opinions

US Supreme Court	NC Supreme Court
Ramos v Louisiana 140 S. Ct. 1390 (2020)	*State v. Clegg* __N.C. __(2022)
Pena-Rodriguez v. Colorado 137 S. Ct. 855 (2017)	*State v. Crump* 376 N.C. 375 (2020)
Flowers v. Mississippi 139 S. Ct. 2228 (2019)	*State v. Robinson* 375 N.C. 173 (2020)
Foster v. Chatman 136 S. Ct. 1737 (2016)	*State v. Hobbs* 374 N.C. 345 (2020)
	State v. Bennett 374 N.C. 579 (2020)
	State v. Copley 374 N.C. 224 (2020)

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Batson Challenges to Improperly Motivated Strikes

18

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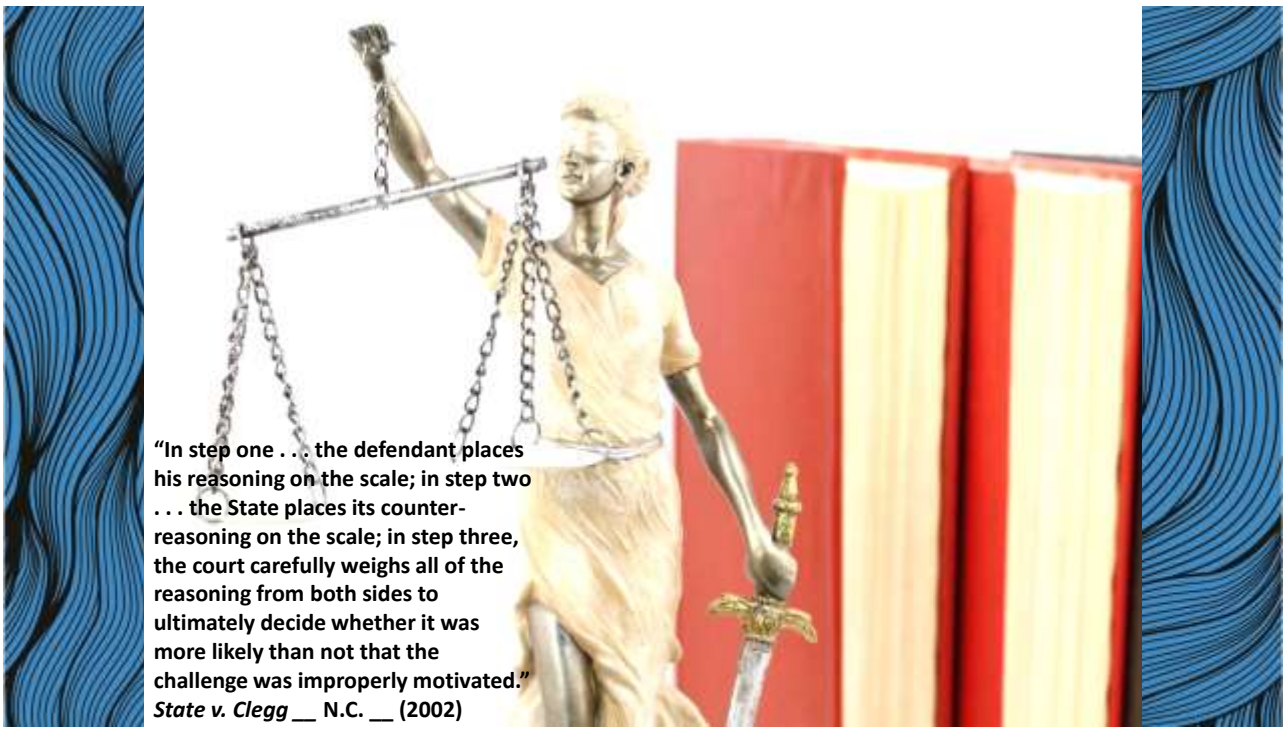


"In step one . . . the defendant places his reasoning on the scale; in step two . . . the State places its counter-reasoning on the scale; in step three, the court carefully weighs all of the reasoning from both sides to ultimately decide whether it was more likely than not that the challenge was improperly motivated."
State v. Clegg **__ N.C. __ (2002)**

20

21

Request Complete Recordation and
Self-Identification by Race/Ethnicity/Gender
at Every Single Trial

"Defendants are entitled to have their *Batson* claims . . . subjected to appellate scrutiny. To do so, it is incumbent on counsel to preserve [the] record . . . Thus, we urgently suggest that all criminal defense counsel . . . request verbatim transcription of jury selection.

Without such information, it is highly improbable that such a challenge will succeed."

State v. Campbell, 272 N.C. App. 554 (2020) (PDR granted)

22

Key Takeaways from *State v. Hobbs* and *State v. Bennett*

State v. Bennett

- Trial judges Must Show Their Work (we really mean it this time!)
- Strikes and Objecting Party are relevant
- Review of History is Required
- Comparative Jury Analysis is Required
- Prima Facie Case Moot When Race Neutral Reason is Shared

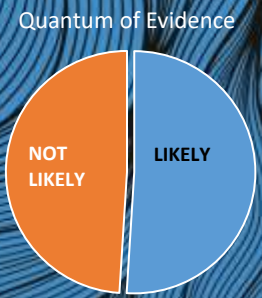
23

Batson Burden of Proof

At step 3, court must determine whether it was

"more likely than not" that the . . . "strike [was] motivated in substantial part by race."

State v. Hobbs, 374 N.C. 345 at 351, 353



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25

Use the Quick Guide, Know and Raise History, Make a Record

Podcast Episode:
"Object Anyway"
More Perfect
WNYC Radio
July 16, 2016

26

Challenges for Cause

27

PAY ATTENTION TO RACIALIZED CHALLENGES FOR CAUSE

"To many people, excluding qualified Black jurors based on their negative experiences with law enforcement or the justice system must seem like adding insult to injury.
It is time to reassess whether the law should permit the real-life experiences of our Black citizens to be devalued in this way. At stake is nothing less than public confidence in the fairness of our system of justice."

People v. Triplett,
48 Cal. App. 5th 655, 665 (2020)

28

Working Towards a Future of Diverse, Inclusive Juries

29

NC GOVERNOR'S TASK FORCE FOR RACIAL EQUITY IN CRIMINAL JUSTICE

JURY RECOMMENDATIONS

SOLUTION #	SECTION HEADER	RECOMMENDATION	SOLUTION
91	Eliminating Racial Disparities in the Courts	Facilitate fair trials	**Increase representation of North Carolinians serving on juries through expanded and more frequent sourcing, data transparency, and compensation**
92	Eliminating Racial Disparities in the Courts	Facilitate fair trials	**Broaden protection against the use of preemptory challenges in jury selection for discriminatory purposes**
93	Eliminating Racial Disparities in the Courts	Facilitate fair trials	**Provide implicit bias training to all jury system actors**
94	Eliminating Racial Disparities in the Courts	Facilitate fair trials	**Establish a state commission on the jury system, with an eye towards comprehensive reform**

30

Watch this space….
Suggested Jury Practices for District and Superior Court judges: Coming Soon!

https://ncdoj.gov/trec

Model Policies and Publications

31

Dorian Hamilton "was disappointed that the opportunity for her to serve on a jury was taken away. She also admits to feeling a little naive for thinking that the reason could have been for something other than her race. 'It was just the fact that it was who I was,' she said, 'that made it so they didn't want me.'"

Jacob Biba, *Race Neutral*, The Intercept, Nov. 8, 2021

32

33

THANK YOU

Questions?
emily@tdpnc.org

34

2013 FEO 2

- *if, after providing an incarcerated criminal client with a summary/explanation of the discovery materials in the client's file, the client requests access to any of the discovery materials, the lawyer must afford the client the opportunity to meaningfully review relevant discovery materials unless certain conditions exist.*

1

RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

2

2007 FORMAL ETHICS OPINION 2

- a lawyer may not take possession of a client's contraband if possession is itself a crime and, unless there is an exception allowing disclosure of confidential information, the lawyer may not disclose confidential information relative to the contraband.

3

a flow chart and list of questions to ask the agent, that no matter how the agent answered he would ultimately be impeached.

During one of our calls Noell expressed some concern. After he had read all of the evidence I had provided, including the flow chart of questions to impeach the agent and seeing how iron-clad my evidence was, Noell was worried about the Agent getting caught for perjury and possibly doing jail time?

After Noell Tin got my money and realized what kind of proof I had against this agent he began refusing to accept most my prepaid phone calls from prison; his secretaries would always put me on hold and come back with a lame excuse that he was not there or was out to lunch. Even more egregious, Noell didn't answer and/or wasn't "in the office" for scheduled Attorney-Client calls that had takes weeks to arrange through prison officials.

At my resentencing hearing, prior to the Court coming to order, I reiterated my request that he cross-examine and impeach the agent. Noell Tin utterly refused to call the Agent to testify (who was in the Court room)!!! Yes,

4

2020 FORMAL ETHICS OPINION 1

- a lawyer is not permitted to include confidential information in a response to a client's negative online review but is not barred from responding in a professional and restrained manner.

5

Rule 3.3 Candor toward the Tribunal

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

6

Rule 3.3 regarding a defendant's right to testify

- Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify.

7

Rule 3.6 Trial Publicity

A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

8

2018 FORMAL ETHICS OPINION 5

- Lawyers must never use deception, dishonesty, or pretext to gain access to a person's restricted social network presence. Rules 4.1 and 8.4(c). When seeking access to a person's restricted social network presence, a lawyer must not state or imply that he is someone other than who he is or that he is disinterested. Furthermore, lawyers may not instruct a third party to use deception.

9

Rule 3.8 Special Responsibilities of a Prosecutor

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate; the prosecutor's duty is to seek justice, not merely to convict or to uphold a conviction. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions.

10

2003 Formal Ethics Opinion 5.

- neither a defense lawyer nor a prosecutor may participate in the misrepresentation of a criminal defendant's prior record level in a sentencing proceeding even if the judge is advised of the misrepresentation and does not object.

11

PROFESSIONAL RESPONSIBILITY IN A PANDEMIC

The duty to communicate with a client is more important now than ever. Rule 1.4 recognizes that effective lawyer-client communication is a two-way street: the rule requires lawyers to keep their clients “reasonably informed” about the status of their matter, and the rule anticipates client inquiries by requiring lawyers to “promptly comply with reasonable requests for information” from their clients.

Technology enables lawyers to work remotely in a more productive and smoother manner than ever before. However, along with the ease of bringing the entire case file/client database/law firm home comes the increased vulnerability to the precious data that makes up a client’s case and the lawyer’s practice.

12

RULE 1.3 DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client.

13

RULE 1.4 Communication

a) A lawyer **shall**:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(f), is required by these Rules;

(2) **reasonably** consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) **promptly** comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

14

Working with Victims

Marsy's Law-

- Who is in charge of the plea offer?
- How do you balance your ethical responsibilities as a prosecutor with a victim's rights?

15

Rule 8.6 Information About a Possible Wrongful Conviction

(a) Subject to paragraph (b), when a lawyer knows of credible evidence or information, including evidence or information otherwise protected by Rule 1.6, that creates a reasonable likelihood that a defendant did not commit the offense for which the defendant was convicted, the lawyer shall promptly disclose that evidence or information to the prosecutorial authority for the jurisdiction in which the defendant was convicted and to North Carolina Office of Indigent Defense Services or, if appropriate, the federal public defender for the district of conviction.

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NORTH CAROLINA TASK FORCE FOR RACIAL EQUITY IN CRIMINAL JUSTICE

END OF YEAR REPORT 2021

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DEAR GOVERNOR COOPER,

Last year, you created the Task Force for Racial Equity in Criminal Justice and charged us with finding real solutions to eliminate racial disparities and inequities in our criminal justice system. We spent nearly six months immersed in this effort and in December 2020, we submitted 125 recommendations to you spanning every part of the criminal justice system. And while that report was a milestone in our work to make North Carolina a more equal state, our work was not complete.

This year, we've worked to turn those recommendations into reality. Implementation is not an easy or simple process. Our criminal justice system is vast, and the inequities that unfairly harm Black North Carolinians and North Carolinians of color are deeply entrenched in its policies and, often unintentionally, in the ways we carry them out. But this work is urgent. This year has been proof that while change will not happen overnight, it is possible.

In concert with our Task Force members, local leaders, community advocates, elected representatives, and many others, North Carolina has made significant progress to address disparities in our criminal justice system. This year, Task Force members organized themselves into committees based on how our solutions would be implemented – executive, judicial, legislative, and local policy. We've also created communications and data committees to support the ongoing information and data needs of the other committees and the Task Force as a whole. Our committees have met monthly, and the full Task Force has met quarterly.

Committees have worked to establish strategies that would best realize their assigned recommendations, including, but not limited to, shaping training offerings, providing model policies and assistance, promoting collaboration between law enforcement and local governments, finding and leveraging funding opportunities, and raising awareness with the public.

Earlier this year, our Task Force supported several pieces of landmark legislation that advance many of our recommendations. The General Assembly passed and you signed into law several changes that will improve our criminal justice system. Those include improving law enforcement accountability by establishing a duty to intervene, requiring more enhanced data on officer-involved use of force incidents, and better training law enforcement officers to address the myriad of issues they face in communities while maintaining their own mental and physical health. These laws will also help stem the school-to-prison pipeline and keep many young people out of our criminal justice system, strengthen pretrial system practices, and ensure more dignity for pregnant women and other vulnerable people while they are incarcerated.

We are grateful to you for taking action to implement some of our recommendations, such as creating the Juvenile Sentence Review Board. We've worked to address state policies with other appropriate state actors – on substance use treatment, charging decisions, crisis intervention programs, school safety and discipline, and pretrial practices, among others. We've also partnered with local governments and community organizations to help them find ways to fund and develop these solutions in their communities. After all, many of our recommendations are local in nature and will be most successful if they are tailored to the unique needs of each community. We call on all North Carolinians to help champion our recommendations in their communities.

This is only a snapshot of some of the work the Task Force has accomplished in the past year. More details are included in the following pages of this report. All of these efforts are rooted in the hard work of so many North Carolinians from every corner of the state. Members of the Task Force and its staff have put countless hours toward these efforts, as have community advocates, directly impacted people, law enforcement, public health and public safety experts, researchers, legislators, and victims and survivors. Their contributions have led to much-needed improvements to our law enforcement and criminal justice systems in 2021.

Our work is by no means finished. Our state has a distance yet to go to create a fairer North Carolina – one where every person is guaranteed equal justice under the law. We need teamwork and collaboration at every level of government and from every stakeholder in our communities. We thank you for your continued dedication and interest in this work. As co-chairs of the Task Force, we are committed to working alongside you to create a safer, more just North Carolina for all.

Sincerely,

Anita Earls
Associate Justice
Supreme Court of North Carolina

Josh Stein
Attorney General
North Carolina

Co-Chairs of the North Carolina Task Force for Racial Equity in Criminal Justice

CO-CHAIR

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Associate Justice, Supreme Court of North Carolina

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Sheriff, Durham County

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Mayor, Fayetteville

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Healthier Together Regional Director, Region 1, NC Counts Coalition

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THE HONORABLE JAMES RAEFORD WOODALL, JR.

District Attorney, Prosecutorial District 18

Committees: Judicial Branch Action

PROGRESS

LEGISLATION PASSED

North Carolina made important progress toward accomplishing a number of Task Force for Racial Equity in Criminal Justice (TREC) recommendations when Governor Cooper signed the following pieces of legislation into law in 2021:

SENATE BILL 300
(SESSION LAW 2021-138)

Recommendations #6-9: Strengthen community policing practices.

- Part 11 of SB 300. Expands mandatory in-service training to include community policing.

Recommendations #31-35: Revise use of force policies.

- Part 3 of SB 300. Requires the Criminal Justice Standards Division to create and maintain a statewide database for law enforcement agencies that tracks all critical incident data of law enforcement officers in North Carolina. A "Critical Incident" is defined as an incident involving use of force by a law enforcement officer that results in death or serious bodily injury to a person.
- Part 8 of SB 300. Requires law enforcement agencies to create an early warning system within the agency to monitor officer actions and behaviors, including discharge of a firearm, use of force, vehicle collisions, and citizen complaints.
- Part 14 of SB 300. Establishes a duty for law enforcement officers to intervene and report excessive use of force by another officer.

Recommendations #36-46: Improve law enforcement accountability and culture.

- Part 1 of SB 300. Requires the North Carolina Sheriffs' Education and Training Standards Commission and the North Carolina Criminal Justice Education and Training Standards Commission (Standards Commissions) to develop and maintain a statewide database accessible to the public on its website that contains all revocations and suspensions of law enforcement officer certifications.

- Part 2 of SB 300. Provides a process to have all law enforcement officers' fingerprints entered in state and federal databases and authorizes agencies to participate in the Rap Back service which would alert the State Bureau of Investigation (SBI) if the officer has a subsequent arrest. The Rap Back Program would maintain and continuously compare fingerprints to arrest records throughout the United States so that the Standards Commissions can quickly and efficiently identify when a certified individual has been arrested and take appropriate investigative action.
- Part 3 of SB 300. Requires the Criminal Justice Standards Division to create and maintain a statewide database for law enforcement agencies that tracks all critical incident data of law enforcement officers in North Carolina. A "Critical Incident" is defined as an incident involving use of force by a law enforcement officer that results in death or serious bodily injury to a person.
- Part 5 of SB 300. Requires the Standards Commissions to develop uniform, statewide minimum standards for law enforcement officers and justice officers and adopt these standards as rules.
- Part 7 of SB 300. Requires a psychological screening prior to initial certification.
- Part 8 of SB 300. Requires law enforcement agencies to create an early warning system within the agency to monitor officer actions and behaviors, including discharge of a firearm, use of force, vehicle collisions, and citizen complaints.
- Part 10 of SB 300. Requires the SBI to investigate upon the request of the governor or a sheriff, chief of police, district attorney, head of a state law enforcement agency, or the commissioner of prisons if a law enforcement officer uses force against an individual that results in the death of the individual.

Recommendation #51: Recruit and retain a racially equitable work force.

- Part 9 of SB 300. Requires the Standards Commissions to develop a best practice guide to help law enforcement agencies recruit and retain a diverse workforce.

Recommendations #56-59: Train law enforcement to promote public safety and earn community support.

- Part 11 of SB 300. Expands mandatory in-service training to include community policing, minority sensitivity, use of force, duty to intervene and report, mental health for criminal justice officers, ethics, response to domestic violence cases, and juvenile justice issues.
- Part 12 of SB 300. Allows the Standards Commissions to revise law enforcement training requirements more quickly in response to changes in the field.

Recommendation #60: Enhance the law enforcement profession.

- Part 7 of SB 300. Requires the Standards Commissions to jointly study the benefits, if any, of requiring physical fitness testing throughout the career of a law enforcement officer and if it should be incrementally adjusted based upon the age of the law enforcement officer.

Recommendations #74-78: Shrink the criminal code.

- Part 13 of SB 300. Limits some local ordinances that may impose a criminal penalty and provides a compliance defense for certain violations.
- Part 20 of SB 300. Creates a legislative study of the criminal code.

Recommendations #79-83: Improve pre-trial release and accountability practices.

- Part 14 of SB 300. Requires first appearance within 72 hours (This legislation was later amended to allow first appearances to be held within 96 hours when the court is closed for more than 72 hours) for all charges when the defendant is in custody.

These new laws represent necessary reforms to our public safety system that advance criminal justice policy in our state. But there is more to do to improve our general statutes to address disparities so people are treated fairly and our communities are made safer.

SENATE BILL 207
(SESSION LAW 2021-123)

Recommendations #66-70: Stem the school to prison pipeline and rethink juvenile justice.

- Part 4 of SB 207. Allows a prosecutor to decline to prosecute in superior court a matter that would otherwise be subject to mandatory transfer if the juvenile allegedly committed an offense that would be a Class D, E, F, or G felony if committed by an adult. This would allow 16- and 17- year-olds to remain in the juvenile justice system with the district attorney's consent.
- Part 5 of SB 207. Raises the minimum age of juvenile jurisdiction from six to ten, unless the juvenile is alleged to have committed an A-G felony, in which case the minimum age is eight.

HOUSE BILL 608
(SESSION LAW 2021-143)

Recommendation #106: Protect pregnant people in jails and prisons.

- Part 2 of HB 608. Prohibits the North Carolina Department of Public Safety (DPS) and correctional employees from applying restraints on a pregnant woman incarcerated during the second and third trimester of pregnancy, during labor and delivery, and during the postpartum recovery period. An incarcerated person who is in the postpartum recovery period may only be restrained if a correctional facility employee makes an individualized determination that an important circumstance exists. In this case, only wrist handcuffs held in front of the incarcerated person's body may be used and only when she is ambulatory.

B

EXECUTIVE ORDER ISSUED

Recommendation #70: Establish a juvenile review board within the Governor's Clemency Office.

In April 2021, Governor Cooper formed the Juvenile Sentence Review Board based on TREC's recommendation. The four-person advisory board, established by Executive Order 208, is tasked with reviewing certain sentences imposed in North Carolina on individuals who were tried and sentenced in adult criminal court for acts committed before turning 18. The review board makes recommendations to the governor concerning clemency and commutation of such sentences when appropriate.

NEW STATE GOVERNMENT FUNDING OPPORTUNITIES ALIGNED WITH TREC RECOMMENDATIONS

THE GOVERNOR'S CRIME COMMISSION

The Governor's Crime Commission (GCC) approved several new priorities for Federal Fiscal Year (FFY) 2022 that are based on TREC recommendations. These new priorities were included in the FFY 2022 request for applications (RFA) released on Nov. 1, 2021. The RFA will solicit applicants for grant projects that begin performance on Oct. 1, 2022.

Recommendation #1: Respond more appropriately to situations concerning mental illness, autism, intellectual disabilities, substance abuse, homelessness, and other non-emergency situations.

GCC approved the implementation of two new priorities for FFY 2022 Byrne Justice Assistance Grants (JAG) federal funds. One of the new JAG priorities seeks to fund three to five pilot programs providing mental health diversion and co-responder projects. Models that can be used include those that are promoted by the National Alliance on Mental Illness. These pilot projects must show collaboration among local law enforcement agencies, mental health service providers, and local governments.

Recommendation #2: Add crisis intervention training for current law enforcement officers.

The other new FFY 2022 Byrne JAG priority will provide grants to law enforcement agencies that are seeking to utilize the Memphis crisis intervention training (CIT) model. The funding can be used by law enforcement agencies working to ensure that their officers complete CIT, an important TREC recommendation. Funds will also be available to support the North Carolina Justice Academy (Justice Academy) and/or other community partners' efforts to broaden and enhance the Crisis Intervention Model as implemented in North Carolina.

Recommendation #4: Develop and provide funding to help communities build violence prevention programs.

Recommendation #61: Establish and fund restorative justice programs in local communities across the state and at various points of the criminal justice system.

GCC recently approved a new funding priority for Victims of Crime Act funds. The new priority, victim-focused violence intervention, will focus on funding agencies that provide the following services: a) community violence intervention, b) hospital-based violence intervention, and c) restorative justice.

THE NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES

Recommendation #16: Establish and expand access to diversion programs.

Recommendation #17: Treat addiction as a public health crisis.

Recommendation #89: Study and adopt evidence-based reforms for reducing and eventually eliminating racial disparities in charging decisions and prosecutorial outcomes.

In October 2021, the North Carolina Department of Health and Human Services (DHHS) released a funding opportunity that will award a total of $5.8 million to at least nine organizations statewide to increase access to high-quality opioid use disorder treatment for people in the criminal justice system. This funding will help establish or expand programs including pre-arrest or pre-conviction diversion, comprehensive jail-based medication assisted treatment programs, and overdose prevention education and naloxone distribution upon release programs. This funding is responsive to several TREC recommendations, including the goal to treat addiction as a public health crisis.

Recommendation #1: Respond more appropriately to situations concerning mental illness, autism, intellectual disabilities, substance abuse, homelessness, and other non-emergency situations.

DHHS also is working to help local communities establish non-law enforcement responses to public health issues. They recently received a planning grant for mobile crisis teams. While the state can support these efforts, regional collaboration is also important to build the expertise and framework needed for pilot programs. Localities like Pitt County, Chapel Hill, Durham, Greensboro, and Buncombe County have been willing to share their expertise and experiences with interested local leaders.

THE GOVERNOR'S HIGHWAY SAFETY PROGRAM

The Governor's Highway Safety Program also funds data-driven initiatives related to traffic safety and may support a number of projects that align with TREC recommendations.

$5.8 Million

to be awarded by DHHS to at least 9 organizations statewide to expand addiction treatment in the criminal justice system

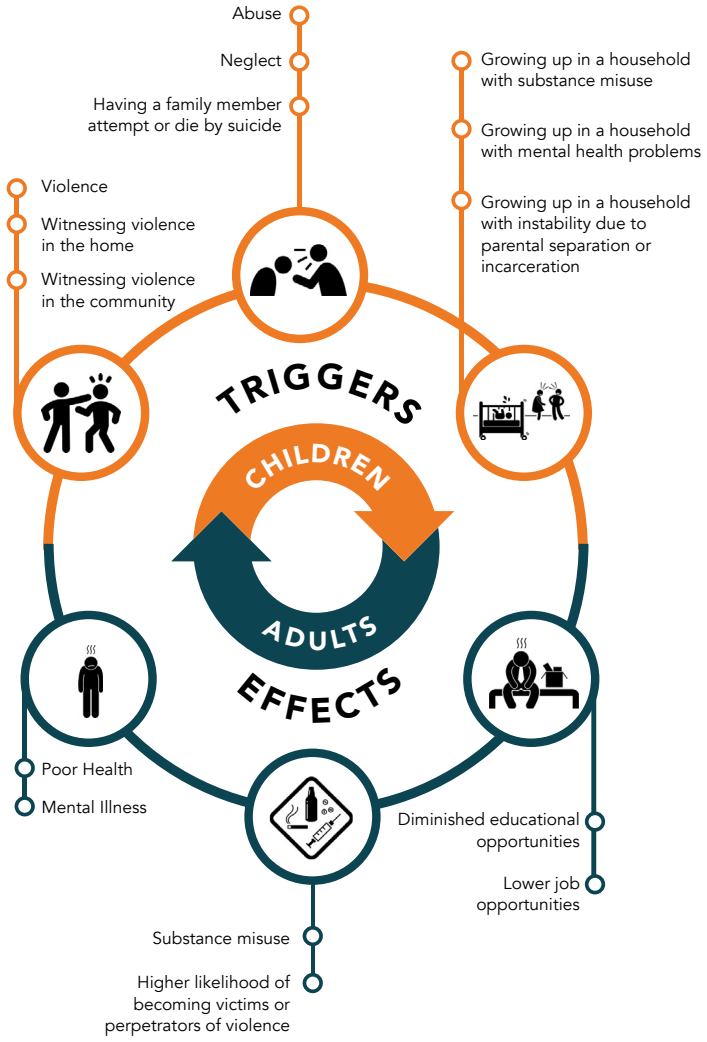
STATE AGENCY POLICY REFORMS

ADMINISTRATIVE OFFICE OF THE COURTS

In our 2020 report, we identified Adverse Childhood Experiences (ACEs) and their impact as a key area of study to improve our criminal justice system. As such, TREC was heartened to learn about the establishment of the Chief Justice's Task Force on ACEs-Informed Courts, which will help ensure that the judicial system is responsive to the needs of individuals who have experienced or are experiencing trauma. We look forward to collaboration with the new Task Force as we explore implementation of ACEs-informed TREC recommendations relevant to the judicial system.

Recommendation #101: In December 2021, the North Carolina Supreme Court issued an Order Adopting Rule 28 of the General Rules of Practice for Superior and District Courts that creates a procedure for defendants to file a motion for an assessment of their ability to pay legal financial obligations. Once a defendant files a motion, the court must consider the motion and, if necessary, conduct a hearing prior to imposing costs, fees, fines, restitution or other monetary obligations. This rule provides defendants across the state the opportunity to advocate for relief from financial penalties they are unable to pay and requires courts to consider defendants' economic status. The official motion form, AOC-CR-415 "Request for Relief from Fines, Fees, and Other Monetary Obligations," can be accessed here.

Recommendation #82: Promote court appearance strategies and develop alternative responses to failure to appear. Additionally, the Administrative Office of the Courts is advancing its court reminder system initiative to improve compliance with court dates and reduce the need for pretrial detention.

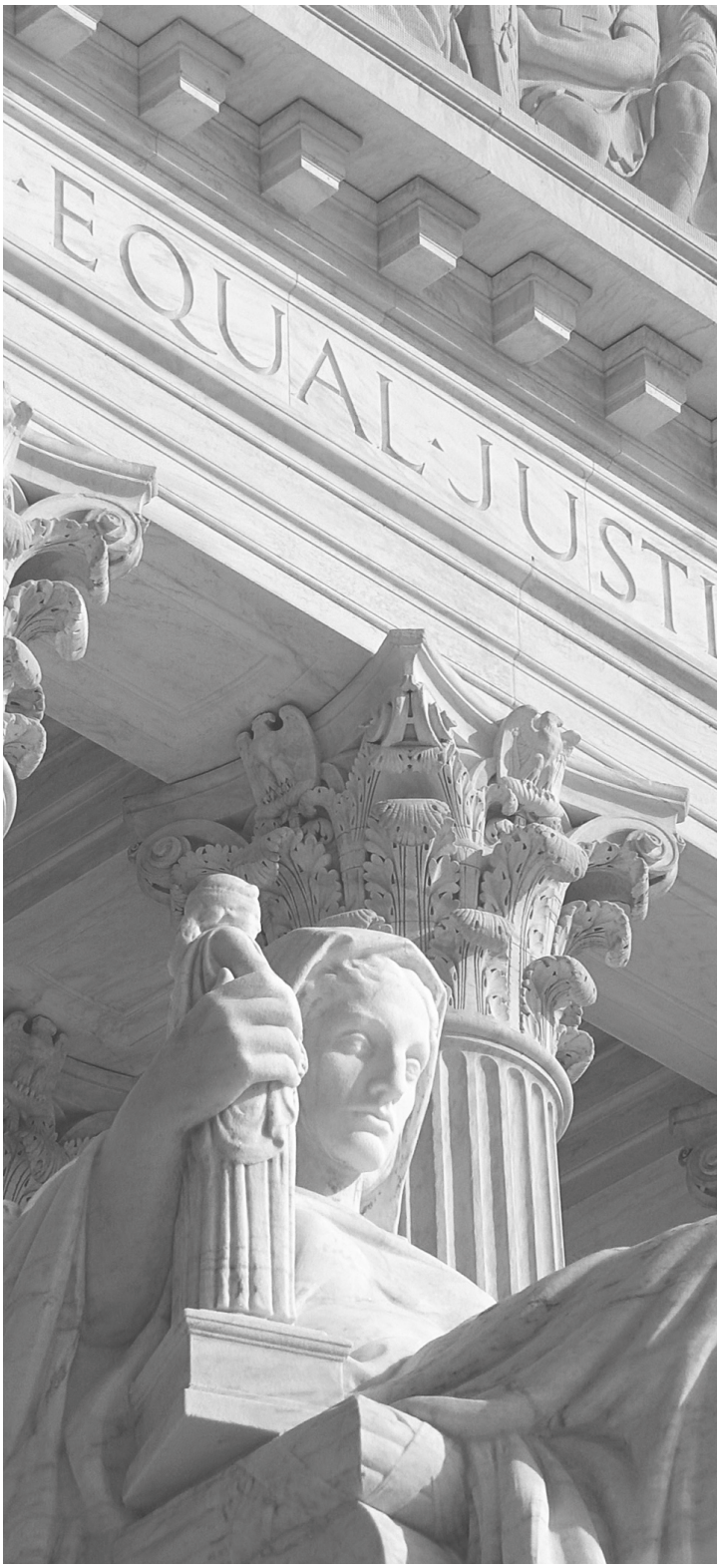


Court reminder systems have been shown to decrease failures to appear by up to 26%

Source: https://nccriminallaw.sog.unc.edu/improving-north-carolinas-criminal-court-date-notification-system/

DEPARTMENT OF PUBLIC SAFETY

Over the past year, DPS has proactively addressed a variety of TREC recommendations in support of strengthening public safety while also eliminating disparate outcomes in the criminal justice system for communities of color. Below are some highlights of TREC recommendations being addressed by DPS entities.



DPS LAW ENFORCEMENT

Recommendation #2: Reimagine public safety and reinvest in communities.

All DPS law enforcement agencies have either already implemented or are scheduled to implement CIT.

Recommendation #14: Require all consent searches to be based on written, informed consent.

State Highway Patrol (SHP) policy requires troopers to obtain owner/operator written consent to search a vehicle whenever practical.

Recommendation #27: Adopt a mandatory statewide policy on law enforcement facilitation of peaceful demonstrations.

In April 2021, State Capitol Police (SCP) updated its policies to better facilitate peaceful demonstrations. SCP adopted written directive 900-02 Response to Protests and Civil Disturbances. It states that SCP recognize the First Amendment right of citizens to peaceably assemble and articulates its policy to respect and facilitate lawful First Amendment activity.

Recommendation #31: Strengthen use of force practices including to prohibit neck holds and require the use of the minimum amount of force necessary.

SHP, SCP, and Alcohol Law Enforcement (ALE) policies all prohibit chokeholds and require the minimum amount of force necessary to apprehend a suspect.

Recommendation #32: Require officers to have first aid kits and render aid.

All DPS law enforcement agencies require their sworn members to render medical aid, when safe to do so, to persons in their custody who are injured. All state troopers, ALE agents, SCP officers, Community Corrections officers, and Special Operations and Intelligence Unit officers have been issued first aid kits.

Recommendation #33: Enact agency policies requiring a duty to intervene and report excessive use of force or other abuse.

All DPS law enforcement agencies require their sworn members to intervene and report in any case where a law enforcement officer may be a witness to what they know to be excessive use of force by another officer.

Recommendation #34: Establish early intervention systems for officers repeatedly violating use of force policies.

All DPS law enforcement agencies have early intervention systems in place to identify patterns of misconduct that could be mitigated through early intervention.

Recommendation #44: Support psychological screenings for all law enforcement officers.

All DPS law enforcement agencies require psychological screening as part of their pre-employment hiring process. Additionally, adult correctional officers and juvenile justice officers also are required to pass psychological screening prior to hiring.

DPS OFFICE OF VICTIM SERVICES

Recommendation #63: Improve and expand access to North Carolina's victim compensation fund to increase racial equity.

The Office of Victims Services (OVS) is working to improve data collection and analysis capabilities to better focus victim compensation outreach and education on under-served and under-represented communities. Additionally, OVS recently launched a GCC grant-funded public communications and outreach campaign to raise awareness of programs and services OVS offers. The campaign utilizes multiple media formats including television, display banners, newspaper, social media, DMV video boards, and radio.

DPS PRISONS

DPS Prisons has pursued new policies and either introduced or augmented programs as a direct result of TREC's recommendations to amend correctional facilities' practices and programming and address prison discipline.

Recommendation #64: Screen incarcerated individuals for victimization and provide appropriate services.

Prisons utilizes a comprehensive screening process through intake, case management, and internal transfer targeting physical, emotional, or sexual abuse and previous trauma. Prisons recently implemented screening within 24 hours of intake (previously screenings occurred within 72 hours of intake). Prisons has also implemented screening 30 days after intake as part of its regular case management process. Additionally, a variety of programs for victims are offered, to include trauma-informed therapy, mental health counseling, anger management, and stress management. The Juvenile Justice Section also screens for victimization upon admission to youth development centers and provides programming and treatment targeted towards individual juvenile needs.

Recommendation #108: Increase funding for mental health services and programs in prisons.

Prisons currently operates five therapeutic diversion units (TDU) with expansion to a sixth site in progress. TDUs provide an evidence-based treatment approach for incarcerated persons diagnosed with serious and persistent mental illness. Prisons has also implemented a new disciplinary credit program, incentivizing good behavior by reducing disciplinary sentences for those who remain infraction free.

Recommendation #110: Expand use of restorative justice and rehabilitation programming.

Availability and quality of programming available to individuals while incarcerated is crucial to their success once released. To this end, Prisons is actively implementing enhanced rehabilitative programming through cognitive behavioral interventions (e.g., Carey Guides for use by case managers). Prisons has also launched a tablet initiative that will expand access to rehabilitative programming, self-help, and increased family contact through tablet computers. A variety of other restorative justice and targeted programming is being implemented, to include expanding the rehabilitative diversion unit (RDU) at Pasquotank Correctional Institute and restorative justice circles at Central Prison and N.C. Correctional Institute for Women.

There are many recommended changes still under consideration and Prisons will continue to keep TREC updated on the progress of the efforts highlighted below.

Recommendation #96: Increase DPS flexibility on incarcerated individuals' release dates.

Approximately 81 percent of the 20,000 people released from prison annually receive sentence credits. Prisons currently awards sentence credits for working prison jobs, attending schools, good behavior, disciplinary release credits and credits for becoming fully vaccinated for COVID-19.

Prisons established a work group to evaluate additional types of sentence credits, as well as to review and recommend updates for policies dealing with the medical release of those who are ill and/or disabled, extension of limits of confinement, and advanced supervised release.

Recommendation #105: Transform the use of restrictive housing

Prisons established a work group to become American Correctional Association (ACA) -compliant with restrictive housing and special management expected practices by reviewing policies that need to be changed to reduce the number of incarcerated people assigned to restrictive housing, increasing the use of special management housing instead of restrictive housing, decreasing the types of infractions that result in restrictive housing, and reviewing locations which can provide step down facilities and additional TDUs and RDUs.

Recommendation #106: Protect pregnant people in jails and prisons

Prisons established a work group to review maternity leave programs in other jurisdictions for operational details. Prisons is also ensuring its compliance with the Dignity of Women who are Incarcerated Act (Session Law 2021-143).

Recommendation #107: Enhance prison personnel.

Prisons is currently working to implement CIT for all staff, making it a part of annual in-service training, and offering an introductory version during basic training. As of September 2021, more than 4,800 Prisons staff had completed crisis intervention training. Additionally, Prisons staff have completed an online racial bias training, and the Office of Staff Development and Training developed and received approval for a racial equity

and implicit bias training for correctional officer basic training students which will begin in January 2022. Furthermore, the General Assembly recently recently passed and Governor Cooper signed into law a step pay plan for correctional officers that will help Prisons with recruiting and retention.

Recommendation #109: Increase due process protections for people accused of disciplinary offenses.

- Prisons established a working group to review potential changes to disciplinary processes. Process changes will align with ACA standards. This involves reviewing other states' disciplinary processes to gather innovative ideas. To date, nine policies from other state jurisdictions have been received, reviewed, and compared to North Carolina's policies. They have initiated ongoing focus groups with staff and incarcerated persons regarding possible improvements.
- Prisons established a working group to review security risk group (SRG) management and additional expansion of the security threat group management unit (STGMU) program model that Foothills Correctional Institution uses. Expansion of STGMU beds will occur, as well as the tablet program to include programming of this nature.
- Prisons has collected demographic data of disciplinary hearing officers (DHOs) and people who are incarcerated who were involved in the hearing process and is currently analyzing the information and discussing ways to track the process through an easily accessible method such as a dashboard or automated report.
- Prisons revised policy B .0200 - Offender Disciplinary Procedures - and is currently reviewing potential cost/benefit outcomes to enacting the changes by conducting mock hearings using the revised disciplinary language on previously heard cases.
- Prisons completed its review of how confidential information is reviewed during the disciplinary process. Current data obtained shows that Prisons' policy is consistent on this topic with other states. The goal is to ensure accuracy and truthfulness of confidential statements or sources and that the process remains safe for all persons involved while also ensuring that accused persons are provided with what is needed to defend themselves during the hearing. Prisons continues to expand its training plan for new and existing DHOs and new and existing facility staff.
- In July 2021, Prisons trained 90 staff members on proper referrals for STGMU. The survey submitted to field staff regarding improvements in the SRG process is pending results.

DPS JUVENILE JUSTICE

Recommendation #33: Collect data on discipline in schools.

DPS recently released a public-facing school discipline dashboard, which details school-based offense data by juvenile judicial district. It includes information on race and sex and exists as a resource to School Justice Partnerships (SJPs) across the state in assessing progress toward goals.

Additionally, the State Board of Education published Phase 1 of its strategic dashboard monitoring tool, which displays information at the state, district, and school level on a range of educational metrics, including exclusionary discipline practices. Information on subgroups like gender, race, and disability status is also available in many instances.

Recommendation #67: Require a school administrator or school social worker to sign a school-based petition initiated by an SRO before it can be accepted for filing in juvenile court.

Although statewide application of this recommendation would require legislation, its spirit was to have better controls on when and how children are referred to the juvenile justice system. In addition to the legislature's raising the age of minimum jurisdiction, this work can be advanced by augmenting training opportunities for SROs. Juvenile Justice has been conducting trainings with SROs across the state and educating them on the types of matters that will not be accepted to discourage inappropriate referrals from schools.

Recommendation #84: Require racial equity training for court system personnel, including judges, DAs, and public defenders.

Juvenile Justice was awarded a $237,000 GCC grant, of which $177,787 was federally funded through the Office of Juvenile Justice and Delinquency Prevention (OJJDP). This grant, effective Jan. 1, 2022, will provide racial equity training to all Juvenile Justice staff and community program providers. Juvenile Justice is seeking another competitive opportunity with Georgetown University to convene local decision-makers and stakeholders in one North Carolina jurisdiction to create opportunities where barriers to racial equity exist in their communities. If selected, the "Transforming the Youth Justice System" grant will provide intensive, action-focused training designed to support local jurisdictions in their efforts to reduce racial and ethnic disparities and transform the role of the justice system.

POST RELEASE SUPERVISION AND PAROLE COMMISSION

Recommendation #85: Require implicit bias and racial equity training for parole staff.

Post Release Supervision and Parole Commission staff have completed both an "Implicit Bias Workshop" and a "Fairness and Bias in Risk Assessment" training. Community Corrections will begin to incorporate implicit bias training into its annual in-service training curriculum in Spring 2022.

$237,000 GCC Grant

awarded to DPS Juvenile Justice to expand racial equity training

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CRIMINAL JUSTICE AND SHERIFFS' TRAINING AND STANDARDS COMMISSIONS AND NORTH CAROLINA JUSTICE ACADEMY

The Standards Commissions are critical partners in the successful implementation of TREC's law enforcement-focused recommendations. Similarly, the Justice Academy develops and delivers law enforcement training. In the section below, we discuss progress and efforts related to TREC recommendations under the purview of the Commissions and the Justice Academy.

CHANGES TO LAW ENFORCEMENT TRAINING

Recommendation #2: Add crisis intervention training.

Recommendation #29: Review and update protest training.

Recommendation #56: Revamp basic law enforcement training.

Recommendation #57: Recommend changes to in-service trainings.

Prior to the work of TREC, law enforcement training was an area of intense focus and reform in North Carolina. Over the past several months, numerous stakeholder groups have engaged with the Justice Academy and the Standards Commissions on the right trainings for law enforcement officers and the frequency of those trainings. TREC was heartened to know that many of its training recommendations related to basic law enforcement training (BLET) either have been or will have an opportunity to be implemented as the new BLET is developed. The new BLET is the result of a long-term revamp with input from law enforcement officers, leaders, community advocates, and the general public. It will be released in 2023. Woven throughout the new BLET is a focus on ensuring that officers have a guardian mindset as opposed to a warrior mindset. It will have an increased emphasis on de-escalation, crisis/mental health training, and implicit bias. The Justice Academy has also created many other training topics, such as training on protest response and an optional de-escalation training model as a "train-the-trainer" course in April of this year. To date, 180 officers from 179 agencies have received this training.

As this reform work was ongoing, legislation was passed (Session Law 2021-138) which allows both Standards Commissions to more quickly set in-service training topics instead of going through administrative rulemaking. This change will enable the Standards Commissions to make changes more efficiently in response to immediate needs and should prove critical to the success of the state's law enforcement training efforts.

Going forward, the Standards Commissions' Joint In-Service Training (Joint IST) committee has identified its plan to set new training requirements periodically that are consistent with these new legislative mandates, advancements in the field, and the call for policing reform. In this context, TREC recently presented several recommendations to the Standards Commission's Joint IST committee, including updates to baseline crisis intervention training, duty to intervene, protest response, and robust de-escalation training as periodic requirements. Other stakeholders, from advocacy groups to the SBI, have made similar recommendations, and the Standards Commissions are considering all options.

Recommendation #22: Train all public school employees and SROs on the proper role of SROs.

The Standards Commissions have already recognized that SROs need specialized training and have created a mandate accordingly. At the same time, TREC recommended that both SROs and school personnel receive training on the proper use of an SRO to keep the juvenile system out of areas that should be handled by school discipline and/or restorative practices. The North Carolina Department of Public Instruction's Center for Safer Schools is working to develop a training on this issue and the Justice Academy is considering updates to its SRO training on this topic.

RULE CHANGES UNDERWAY AT THE COMMISSIONS

Recommendation #27: Adopt a mandatory statewide policy on law enforcement facilitation of peaceful demonstrations.

Recommendation #28: Create and update protest guidelines to consider best practices and First Amendment concerns.

Recommendation #40: Revise standards to require that officers not engage in excessive or unjustified use of force or abuse the power of the position.

Recommendation #41: Expand authority to allow for suspension, revocation, or denial of certification based upon an officer's excessive use of force or abuse of power.

Recommendation #42: Require notification by both the officer and the agency for specific use of force incidents.

Recommendation #43: Increase transparency about officer discipline and decertification through a publicly available database.

Recommendation #44: Support psychological screenings for all law enforcement officers.

Recommendation #45: Repeat psychological evaluations either after a certain number of years of service or before promotion.

Recommendation #46: Strengthen the ongoing development of a statewide law enforcement accreditation program.

Recommendation #51: Develop and disseminate best practices guide for recruitment and retention.

Recommendation #52: Expand Criminal Justice Fellows program statewide.

Recommendation #53: Collect data on law enforcement recruitment and diversity efforts.

Recommendation #55: Require law enforcement agencies of a certain size to create a diversity task force.

Recommendation #60: Study the effects of officers' physical and mental health on job performance.

TREC presented to both Standards Commissions regarding its policy recommendations to improve accountability for use of force, mandate accreditation statewide, and the creation of diversity task forces for law enforcement agencies. Both Standards Commissions agreed to refer our recommendations to the appropriate committees for rulemaking consideration. The Standards Commissions have developed a voluntary pilot NC Law Enforcement Accreditation program using GCC funding.

We look forward to the Standards Commissions' consideration of these important ideas. In the case of accreditation, the General Assembly would need to require the mandate, but the Standards Commissions' collaboration and support is critical.

LOCAL IMPLEMENTATION OF TREC RECOMMENDATIONS

Many of the recommendations made in TREC's December 2020 report require local implementation. Depending on the specific nature of the recommendation and/or the locality in question, a variety of different stakeholders, from law enforcement to non-profits to court officials, can be the principal instigator for change. Much of our work to date has been creating materials that clarify the exact steps different local actors can take to implement these system-changing programs and policies.

Our local strategy moving forward will rely on these materials to promote change in cities and counties across the state. The details of our strategy can be found in the sections below. But first, we would like to highlight some of the great and numerous ways localities around North Carolina have implemented the TREC recommendations in the past year.

EXAMPLES OF TREC SOLUTIONS IN PRACTICE

Across North Carolina, communities are working to implement racial equity reforms recommended in the TREC report. In May, Wake County approved changes to the role of SROs in schools. In June, Buncombe County approved a plan to improve justice outcomes for communities impacted by racial inequity, which included a number of criminal justice recommendations. In June, Fayetteville approved plans to create a citizen's advisory board. In September, New Hanover County committed to funding violence prevention and invention programs in the wake of school violence. In September, the city of Durham earned a partnership with the Harvard Kennedy School Government Performance Lab to implement an alternative responder program. The Greensboro Police Department deployed a co-responder team to respond to mental health calls. The Raleigh Police Department trained its entire department on its duty to intervene policy. In June, the town of Chapel Hill issued a "Reimagining Community Safety" Task Force report, which built on many ideas from the TREC report. Several communities are engaging in the process to create SJPs, including Judicial District 13 in Jackson County which formalized their SJP in October 2021. Judicial districts are continuing to participate in court reform pilot projects like the newly launched UNC School of Government's Court Appearance project in New Hanover, Orange, and Robeson counties. Bond policy revisions and pretrial reforms are also are also underway, including a new bond policy in Cumberland County as of September 2021 and an ongoing reform project in Orange County. These changes represent progress toward implementing TREC's recommendations and promoting racial equity in communities across the state. TREC's informational materials and presentations aim to build on these local efforts.

JUDICIAL DISTRICT SURVEYS

TREC made clear in the December 2020 report that quantitative research and empirical evidence are critical to understanding the scope of our challenges and track our progress. This includes collecting data related to our own recommendations and their implementation status. Therefore, over the summer of 2021, TREC drafted three separate surveys for all law enforcement agencies, prosecutors, and superior and district court judges in North Carolina on their current policies and practices in areas covered in the TREC report. We will use the results to understand how these stakeholders are addressing TREC-recommended changes, to serve as a baseline for assessing implementation progress, and to direct resources and assistance.

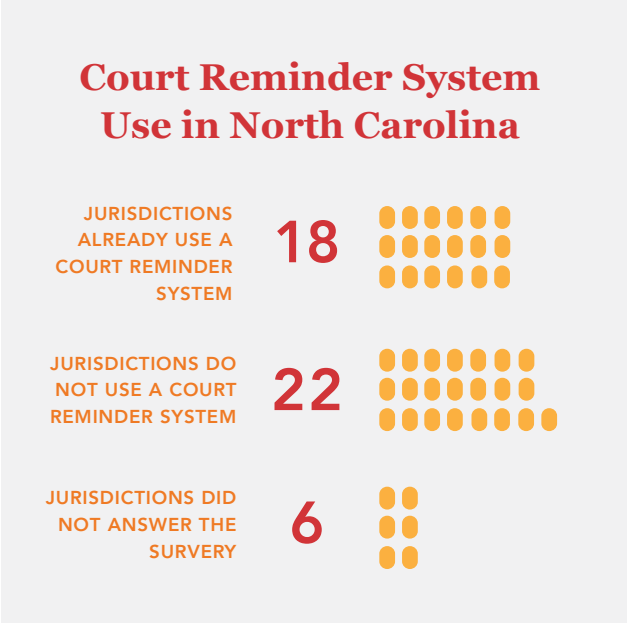
TREC partnered with the Duke School of Science and Law to analyze the results of the judicial survey. The researchers found that most judicial jurisdictions are interested in policy reforms, but the time investment needed for policy development and a lack of partnerships pose barriers to change for many. TREC aims to work with jurisdictions to expand the below recommended policies, along with others included in the survey, to more judicial jurisdictions across the state.

We will conduct a survey again in one year to assess adoption of model policies and implementation of recommended programs.

COURT REMINDER SYSTEM

Recommendation #82: Automatically enroll defendants for the NCAOC's court reminder system.

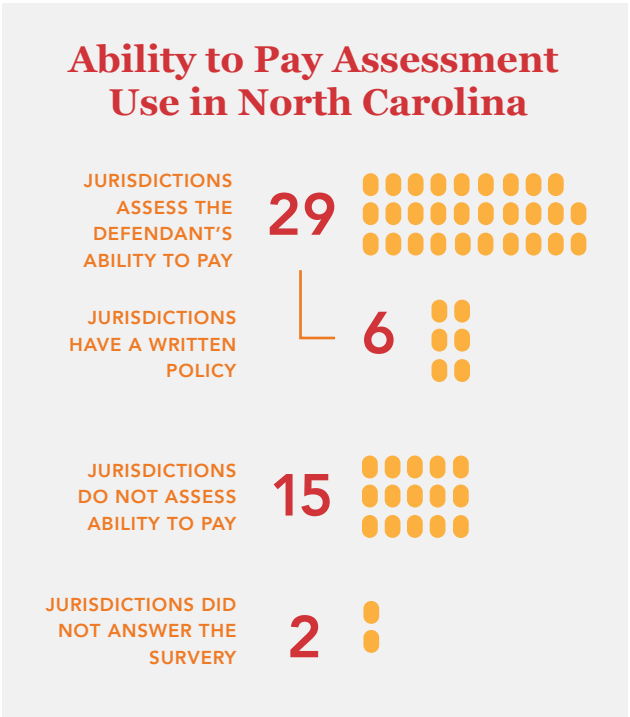
There are administrative changes that could be adopted to help mitigate some of the disproportionate burdens people of color face when interacting with the criminal justice system. That includes implementing a court reminder system to improve attendance and reduce the chances an individual fails to appear in court.



ASSESSMENT OF ABILITY TO PAY

Recommendation #101: Assess a defendant's ability to pay prior to levying any fines and fees.

Trial court judges retain significant discretion under existing law to waive or reduce certain fines and fees imposed on individuals in criminal or civil proceedings, and the Supreme Court of North Carolina could enact a general rule of practice addressing some aspects of this issue.



MODEL POLICY DEVELOPMENT

Many recommendations by TREC advocated for the implementation of specific policies or establishment of new programs. Over the past year, we realized a resource gap exists for many stakeholders to research and draft policies on top of their regular duties. On the programmatic front, getting started can be the hardest part – gathering best practices, understanding funding options and thinking through necessary partnerships can be a big lift for already busy stakeholders.

To advance local reform, TREC has established a project to create or collect model policies and information sheets for TREC recommended programs. We have also created one-pagers to distill the TREC report into immediate, actionable steps to be taken by a specific system actor. These will help guide North Carolina's law enforcement agencies implementing these policies and programs that advance racial equity and uphold public safety.

Several documents are already live on the TREC model policy package webpage, and the catalogue will continue to grow. These will serve as an integral part of our local implementation strategy.

MODEL POLICIES

- Traffic Stops
- Consent Searches
- Early Intervention Systems
- Suggested Jury Practices to Judges
- Nonpayment of Fines and Fees
- Prosecutor Guide
  - Data Collection
  - Habitual Felony Review Process/Restrictions
  - Officer Involved Use of Force
  - Minimum Age of Prosecution
  - School-based Referrals
  - Ability to Pay
  - Advanced Supervised Release
  - Bail / Pretrial Policy
  - Juries
  - Dismissal of Criminal Justice Debt
  - Expunction Efforts
  - De-prioritization of Low-Level Offenses: Marijuana / Traffic Offenses / Class 3 Misdemeanors

INFORMATION SHEETS

- Pre-Arrest Diversion
- Post-Arrest Diversion
- Reimaging 911
- Use of Force
- Violence Prevention
- Restorative Justice

ONE PAGERS

- Prosecutors
- Judges and Judicial Officers
- Local Government Officials
- Juvenile Justice System Actors
- Local Law Enforcement

COMMUNITY ENGAGEMENT

Since its formation, TREC has been committed to engaging with the public and key partners in the implementation of the report's recommendations. TREC's outreach has been ongoing and responsive to a range of identified opportunities and needs for local decision-makers. Outreach events have provided education for the public on complex topics and for local elected officials on best practices and time-sensitive funding opportunities. Additionally, TREC has continued to welcome and receive feedback from citizens committed to a fairer justice system.

LEARNING SERIES

TREC's "Learning Series" presents an opportunity to dive deeper into complex, cross-cutting issues relating to racial disparities in the criminal justice system. These sessions bring together experts, practitioners, advocates, and community members for an honest, in-depth conversation, with the goal of building knowledge and a shared commitment to advancing TREC's mission. To date, TREC has hosted four learning sessions.

The first learning session, "Race, Data, and Policing," examined law enforcement's increased reliance on data and predictive analytics to make policing decisions and the ways this reliance can have the unintended consequence of exacerbating the racial discrimination and disparity in the criminal legal system. The second session, "Victims of Color," explored whether victims of color are treated differently than white victims by police, prosecutors, judges, and juries, in general or in specific kinds of cases. The third session, "Local Solutions to Substance Misuse," discussed the public health crisis of addiction and local solutions to help those struggling with substance use. The fourth session, "Embracing Inclusive Juries," explored the challenges and possibilities of racially-equitable jury system reform. Going forward, TREC will continue to host learning series to spotlight important and emerging issues.

TREC's "Learning Series" present an opportunity to dive deeper into complex, cross-cutting issues.

COUNTY COMMISSIONERS

Local government actors are critical to the system changes that TREC has recommended. This includes county commissioners, who provide funding for schools, court systems, and community-based interventions to public safety issues. In 2021, the North Carolina Association of County Commissioners (NCACC) agreed to forge an ongoing partnership with TREC to discuss these ideas among county commissioners across the state. In August 2021, TREC presented to the NCACC's annual meeting and brought experts on pretrial services, emergency response reform, and diversion/ school justice partnerships. TREC will continue collaboration with the NCACC's Justice and Public Safety Steering Committee to continue these conversations with local government leaders.

COUNCIL OF GOVERNMENTS

TREC presented to regional councils of government (COGs) across the state whose boards are comprised entirely of municipal and county officials. To date, teams have presented to eight COGs including the statewide Board of Council of Governments. More presentations are scheduled.

ARP SESSIONS

3 technical assistance sessions

for local communities preparing to utilize their American Rescue Plan (ARP) funding

500+ attendees participated on these calls

PUBLIC COMMENT SESSIONS

14 members of the public

reached out across four public comment sessions

75+ letters recieved in 2021 sharing constituents perspectives

COUNCIL OF GOVERNMENT

8 COG presentations

given by our teams

including the statewide Board of Council of Governments

STAKEHOLDER GROUPS FORMED

From its beginnings, TREC has sought to engage stakeholder groups in its work. As we seek to implement recommendations, particularly on the local level, it is important to consult with stakeholder groups. That means continuing to consult with partners like the GCC and the North Carolina Commission on Racial and Ethnic Disparities. We also created new stakeholder groups including the Law Enforcement Advisory Group (LEAG) to provide real world insight into policing policy recommendations. TREC believes that law enforcement engagement and buy-in is critical in our work. The LEAG has met a half a dozen times and has provided valuable input. We will be starting similar groups for prosecutors, victims/survivors, and victim advocates in the coming months.

THE WORK AHEAD

Significant work remains to accomplish TREC's recommendations to improve law enforcement and the courts in North Carolina and make these systems more racially equitable. Priority areas for 2022 include continuing to:

- Improve policing practices, including our recommendations around training and use of force.
- Enhance law enforcement accountability, including recommendations such as establishing a statewide sentinel event review process and a comprehensive public use of force database, requiring body-worn cameras, releasing footage promptly during critical incidents, and further addressing the wandering officer problem.
- Invest in community-based solutions to reduce violence.
- Reduce reliance on fines and fees, and financial conditions in the pretrial period.
- Improve data systems so that policymakers, researchers, and the public better understand the criminal justice system and its impacts.
- Promote ideas that reduce the number of school-based juvenile justice system referrals, including hiring more behavioral health professionals in schools, and better equipping all adults with the tools they need to work with our children by training them on mental health, first aid, cultural competence/ diversity/inclusion, and developmental disability.

TREC will advance its goals through a variety of strategies including:

- Pursuing a legislative agenda in the short session
- Working with state agencies
- Partnering with local governments and law enforcement agencies and promoting regional collaboration
- Leveraging funding opportunities within state government and working with philanthropic partners
- Developing trainings, model policies, and resources to aid stakeholders in implementation, and
- Educating the public about our recommendations and the need to improve racial equity in the criminal justice system.

The following TREC committees will continue to meet and refine implementation strategies throughout 2022: executive, legislative, local policy, judicial, data, and communications.

Recognizing that there are a variety of different perspectives on the state of the criminal justice system in North Carolina, we will continue to work with all interested stakeholders and identify common ground in order to continue making tangible progress.

Finally, TREC recommendations were not intended to be the final word on changes necessary to improve criminal justice in North Carolina. The nature of ambitious and far-reaching recommendations is that they are unlikely to be accomplished in a single year or two, and as changes are implemented and the results studied and understood, new goals and needs will emerge. To that end, TREC recommended its work be institutionalized in state government beyond 2022. Next year, we will explore sustainability strategies so that the work of advancing racial equity in criminal justice continues.

IMPLEMENTATION STATUS CHARTS

The charts below reflect the status of TREC's 125 Recommendations as of December 2021. The listed solutions, recommendations, and necessary actions were defined in the original report published in December 2020. The implementation effort and status columns reflect TREC's progress over the past year.

DEFINITIONS OF THE RECOMMENDATION STATUSES

Success: Recommendation and/or necessary action identified by TREC is complete.

Partial Success: Part of the recommendation and/or necessary action is complete and additional effort is needed to fulfill the full recommendation or accomplish implementation.

Under Consideration: TREC has presented the recommendation to relevant stakeholders associated with the determined implementation effort and they are considering enactment.

Strategy in Development by Task Force: TREC is actively developing a strategy on this recommendation, including the development of model policies, stakeholder convenings and meetings, facilitation of funding opportunities, and other advocacy.

Not Accomplished: Implementation efforts have not been successful to date or have not yet begun.

Reimagining Public Safety

Solution Number	Recommendation	Soution	Necessary Action	Implementation Effort	Status
1	Reimagine public safety and reinvest in communities	Respond more appropriately to situations concerning mental illness, autism, intellectual disabilities, substance abuse, homelessness, and other non-emergency situations	Local policy change; Administrative rule change by Standards Commissions; Legislative change	Governor's Crime Commission / DHHS - Funding Opportunity	Partial Success
2	Reimagine public safety and reinvest in communities	Add crisis intervention training for current law enforcement officers	Local policy change; State administrative rule change by the Standards Commissions; Legislative change	Standards Commissions	Under Consideration
3	Reimagine public safety and reinvest in communities	Fund grassroots organizations that employ promising and peaceful strategies to help communities promote public safety	Local policy change; State policy change	Local Implementation Work	Under Consideration
4	Reimagine public safety and reinvest in communities	Develop and provide funding to help communities build violence prevention programs	Local policy change; State policy change	Governor's Crime Commission - Funding Opportunity	Partial Success
5	Reimagine public safety and reinvest in communities	Form local Community Safety and Wellness Task Forces to examine public safety and wellness needs	Local policy change	Local Implementation Work	Under Consideration

Improving Policing Practices

Solution Number	Recommendation	Soution	Necessary Action	Implementation Effort	Status
6	Strengthen community policing practices	Adopt community policing philosophies and plans in collaboration with the communities law enforcement serve	Local agency policy change; State agency policy change	Local Implementation Work	In Development
7	Strengthen community policing practices	Train law enforcement agency heads on community policing	State policy change by North Carolina Justice Academy	Legislative	Partial Success
8	Strengthen community policing practices	Encourage or require officers to spend non-enforcement time, or live in, the neighborhoods they serve	Local agency policy change; State agency policy change; Local government policy change	Local Implementation Work	In Development
9	Strengthen community policing practices	Publicly acknowledge mistakes by law enforcement to build trust and transparency	Local agency policy change; State agency policy change	Local Implementation Work	In Development
10	Reform investigations	Improve law enforcement drug enforcement data collection and reporting	Legislative change	Legislative	Not Accomplished
11	Reform investigations	Use data and objective criteria, instead of officers' subjective perceptions and beliefs, to drive the level of police presence in neighborhoods	State policy change; Local policy change	Recommendation with Task Force	Not Accomplished
12	Reform investigations	Deemphasize felony drug posession arrests for trace quantities under .25 grams	State agency policy change; Local agency policy change	Local Implementation Work - Model Policy	In Development
13	Reform investigations	Prioritize traffic stops that improve traffic safety	State agency policy change; Local agency policy change	Local Implementation Work - Model Policy	In Development
14	Reform investigations	Require all consent searches to be based on written, informed consent	State agency policy change; Local agency policy change; Legislative change	Local Implementation Work - Model Policy	In Development
15	Reform investigations	Restrict state law enforcement use of asset forfeiture on low-level seizures where there is no conviction	Agency policy change; Task Force collaboration; Legislative change	Recommendation with Task Force	Not Accomplished
16	Promote diversion and other alternatives to arrest	Establish and expand access to diversion programs	State policy change; Local policy change; Legislative change	Department of Health and Human Services - Funding Opportunity; Inclusion in Budget	Partial Success
17	Promote diversion and other alternatives to arrest	Treat addiction as a public health crisis, including substance use addictions that disproportionately impact Black and brown communities, such as crack cocaine	State policy change; Task Force collaboration	Local Implementation Work - Model Policy	In Development

Improving Policing Practices

Solution Number	Recommendation	Soution	Necessary Action	Implementation Effort	Status
18	Promote diversion and other alternatives to arrest	Encourage citations and summons in lieu of arrest whenever possible	State agency policy change; Local agency policy change; Legislative change	Local Implementation Work - Model Policy	In Development
19	Revise the role of School Resource Officers	Hire behavioral health professionals in schools	Local policy change; Legislative change	Legislative	Under Consideration
20	Revise the role of School Resource Officers	Fund school personnel training on mental health, first aid, cultural competence/ diversity/inclusion, and developmental disability	Local policy change; Legislative change	Legislative	Not Accomplished
21	Revise the role of School Resource Officers	Develop inclusive processes for selecting and overseeing SROs	Local policy change	Local Implementation Work	Under Consideration
22	Revise the role of School Resource Officers	Train all public school employees and SROs on the proper role of SROs	State policy change by the Department of Public Instruction and the Justice Academy	North Carolina Center for Safer Schools/ North Carolina Justice Academy	Under Consideration
23	Revise the role of School Resource Officers	Collect data on discipline in schools and school-based referrals to the juvenile courts	State policy change by the Department of Public Instruction and the Department of Public Safety; Local agency policy change	Department of Public Safety	Success
24	Revise the role of School Resource Officers	Encourage School Justice Partnerships to reduce students' juvenile court involvement	Local policy change	Adminstrative Office of the Courts	Partial Success/Under Consideration
25	Revise the role of School Resource Officers	Support Task Force on Safer Schools State Action Plan	Task Force collaboration	Recommendation with Task Force	Success
26	Codify judicial approval of no-knock warrants and clarify requirements for use of force in serving search warrants	Change entry by force statute to require the necessary probable cause be specifically listed in the warrant before breaking and entering to execute a warrant and to clarify the meaning of unreasonable delay after an officer announces presence in the execution of a search warrant	Legislative change	Legislative	Not Accomplished

Improving Policing Practices

Solution Number	Recommendation	Soution	Necessary Action	Implementation Effort	Status
27	Peacefully facilitate protests and demonstrations	Adopt a mandatory statewide policy on law enforcement facilitation of peaceful demonstrations	Local agency policy change; State agency policy change; State administrative rule change by the Standards Commissions	Department of Public Safety	Partial Success
28	Peacefully facilitate protests and demonstrations	Create and update protest guidelines to consider best practices and First Amendment concerns	State administrative rule change by the Standards Commissions	Standards Commissions	Under Consideration
29	Peacefully facilitate protests and demonstrations	Review and update protest and demonstration training	State policy change by North Carolina Justice Academy; State administrative rule change by the Standards Commissions; Task Force collaboration	North Carolina Justice Academy	Success
30	Peacefully facilitate protests and demonstrations	Commission a study on racial disparities in how protests and demonstrations are policed in North Carolina	State policy change	Study	In Development
31	Revise use of force policies	Strengthen use of force practices including to prohibit neck holds and require the use of the minimum amount of force necessary	Local agency policy change; State agency policy change; Legislative change	Legislative	Not Accomplished
32	Revise use of force policies	Require officers to have first aid kits and render aid	Local agency policy change; State agency policy change	Legislative	Not Accomplished
33	Revise use of force policies	Enact agency policies requiring a duty to intervene and report excessive use of force or other abuse	Local agency policy change; State agency policy change	Legislative	Partial Success
34	Revise use of force policies	Establish early intervention systems for officers repeatedly violating use of force policies	Local agency policy change; State agency policy change; Legislative change	Legislative	Success
35	Revise use of force policies	Define and collect use of force data	Local agency policy change; State agency policy change	Legislative	Partial Success

Enhancing Accountability

Solution Number	Recommendation	Soution	Necessary Action	Implementation Effort	Status
36	Improve law enforcement accountability and culture	Expand investigative and oversight authority of local citizen oversight boards	Local policy change; Legislative change	Legislative	Not Accomplished
37	Improve law enforcement accountability and culture	Reform investigation and prosecution procedures for officer-involved use of force incidents	Legislative change	Legislative	Partial Success
38	Improve law enforcement accountability and culture	Establish statewide sentinel event reviews to evaluate law enforcement practices and suggest policy changes	State agency policy change by Standards Commission; Local agency policy change; Legislative change	Recommendation with Task Force	Not Accomplished
39	Improve law enforcement accountability and culture	Support Rap Back Program	Task Force collaboration; Legislative change	Legislative	Success
40	Improve law enforcement accountability and culture	Revise standards to require that officers not engage in excessive or unjustified use of force or abuse the power of the position	State administrative change by Standards Commissions	Standards Commissions	Under Consideration
41	Improve law enforcement accountability and culture	Expand authority to allow for suspension, revocation, or denial of certification based upon an officer's excessive use of force or abuse of power	State administrative change by Standards Commissions	Standards Commissions	Under Consideration
42	Improve law enforcement accountability and culture	Require notification by both the officer and the agency for specific use of force incidents	State administrative change by Standards Commissions; Task Force collaboration	Standards Commissions	Under Consideration
43	Improve law enforcement accountability and culture	Increase transparency about officer discipline and decertification through a publicly available databse	NCDOJ policy and procedure change; Task Force collaboration	Legislative	Success
44	Improve law enforcement accountability and culture	Support psychological screenings for all law enforcement officers	State administrative change by Standards Commissions	Legislative	Success

Enhancing Accountability

Solution Number	Recommendation	Soution	Necessary Action	Implementation Effort	Status
45	Improve law enforcement accountability and culture	Repeat pscyhological evaluations either after a certain number of years of service or before promotion	State administrative change by Standards Commissions	Standards Commissions	Under Consideration
46	Improve law enforcement accountability and culture	Strengthen the ongoing development of a statewide law enforcement accreditation program	Administrative rule change by Standards Commissions; Task Force collaboration; Legislative change	Standards Commissions	Under Consideration
47	Mandate use of body worn/ dashboard cameras and increase transparency of footage	Mandatory body worn cameras for all law enforcement agencies	Legislative change	Legislative	Not Accomplished
48	Mandate use of body worn/ dashboard cameras and increase transparency of footage	Deploy dashboard cameras in all patrol and field vehicles, except for undercover vehicles	Local agency policy change; State agency policy change; Legislative change	Legislative	Not Accomplished
49	Mandate use of body worn/ dashboard cameras and increase transparency of footage	Provide citizen oversight boards and local government governing bodies access to law enforcement recordings	Local agency policy change; State agency policy change; Legislative change	Legislative	Not Accomplished
50	Mandate use of body worn/ dashboard cameras and increase transparency of footage	Require police recordings of critical incidents to be publicly released within 45 days	Legislative change	Legislative	Not Accomplished

Strengthening Recruitment, Training, and the Profession

Solution Number	Recommendation	Soution	Necessary Action	Implementation Effort	Status
51	Recruit and retain a racially equitable work force	Develop and disseminate best practices guide for recruitment and retention	Local agency policy change; State agency policy change; Administrative rule change by Standards Commissions; Task Force collaboration; Legislative change	Legislative	Success
52	Recruit and retain a racially equitable work force	Expand Criminal Justice Fellows program statewide	Legislative change	Legislative	Partial Success
53	Recruit and retain a racially equitable work force	Collect data on law enforcement recruitment and diversity efforts	Local agency policy change; State agency policy change; Administrative rule change by Standards Commissions; Legislative change	Standards Commissions	Under Consideration
54	Recruit and retain a racially equitable work force	Ensure the North Carolina Administrative Code provisions regarding Minimum Standards and Revocation, Denial, and Decertification are the same for both Commissions	Administrative rule change by Standards Commissions	Standards Commissions	Success
55	Recruit and retain a racially equitable work force	Require law enforcement agencies of a certain size to create a diversity task force	Local agency policy change; State agency policy change; Task Force collaboration; Legislative change	Standards Commissions/ Legislative	Under Consideration
56	Train law enforcement to promote public safety and earn community support	Revamp basic enforcement training	State policy change by the Standards Commissions and the North Carolina Justice Academy; Administrative code changes; Legislative change	North Carolina Justice Academy	Partial Success
57	Train law enforcement to promote public safety and earn community support	Recommend changes to in-service training	State policy change by North Carolina Justice Academy; Administrative rule change by Standards Commissions; Legislative change	Legislative	Partial Success

Strengthening Recruitment, Training, and the Profession

Solution Number	Recommendation	Soution	Necessary Action	Implementation Effort	Status
58	Train law enforcement to promote public safety and earn community support	Require trainings on internal law enforcement agency policies	Local agency policy change; State agency policy change	North Carolina Justice Academy	Under Consideration
59	Train law enforcement to promote public safety and earn community support	Evaluate law enforcement training programs for effectiveness and desired outcomes	State policy change by North Carolina Justice Academy; Task Force collaboration; Legislative change	North Carolina Justice Academy	Under Consideration
60	Enhance the law enforcement profession	Study the effects of officers' physical and mental health on job performance	Local agency policy change; State agency policy change; State administrative rule change by the Standards Commissions	Standards Commissions	Partial Success

Eliminating Racial Disparities in the Courts

Solution Number	Recommendation	Soution	Necessary Action	Implementation Effort	Status
61	Support restorative justice initiatives and victim equity	Establish and fund restorative justice programs in local communities across the state and at various points of the criminal justice system	Local policy change	Governor's Crime Commission - Funding Opportunity	Partial Success
62	Support restorative justice initiatives and victim equity	Form a victim advisory group to help develop restorative justice programs and other equity programs for crime victims	Local policy change; Task Force collaboration	Recommendation with Task Force	In Development
63	Support restorative justice initiatives and victim equity	Improve and expand access to North Carolina's Victim Compensation Fund to increase racial equity	State policy change by the Department of Public Safety	Department of Public Safety	Not Accomplished
64	Support restorative justice initiatives and victim equity	Screen incarcerated individuals for victimization and provide appropriate services	State policy change by the Department of Public Safety	Department of Public Safety	Under Consideration
65	Support restorative justice initiatives and victim equity	Recognize racial equity and the rights and perspectives of, and the potential consequences to, harmed parties, survivors, and their families during the justice system process and when any reform is proposed	State policy change; Task Force collaboration	Recommendation with Task Force	In Development
66	Stem the school to prison pipeline and rethink juvenile justice	Raise the minimum age of juvenile court jurisdiction to 12	Legislative change	Legislative	Partial Success
67	Stem the school to prison pipeline and rethink juvenile justice	Require a school administrator or school social worker to sign a school-based petition initiated by a School Resource Officer before it can be accepted for filing in juvenile court	Legislative change	Legislative	Not Accomplished
68	Stem the school to prison pipeline and rethink juvenile justice	Allow prosecutors the discretion to accept pleas in juvenile court for juveniles charged with Class A through G felonies, in line with the Raise the Age Act	Legislative change	Legislative	Partial Success

Eliminating Racial Disparities in the Courts

Solution Number	Recommendation	Soution	Necessary Action	Implementation Effort	Status
69	Stem the school to prison pipeline and rethink juvenile justice	Replace juvenile life without parole with life with parole sentences and parole eligibility after twenty-five years for first degree murder convictions	Legislative change	Legislative	Not Accomplished
70	Stem the school to prison pipeline and rethink juvenile justice	Establish a juvenile review board within the Governor's Clemency Office	State policy change	Executive Order	Success
71	Decriminalize marijuana possession	Deprioritize marijuana-related arrests and prosecution	State agency policy change; Local agency policy change; Prosecutorial policy change	Local Implementation Work - Model Policy	In Development
72	Decriminalize marijuana possession	Decriminalize the possession of up to 1.5 ounces of marijuana	Legislative change	Legislative	Not Accomplished
73	Decriminalize marijuana possession	Convene a task force of stakeholders to study the pros and cons and options for legalization of possession, cultivation and/or sale of marijuana	State policy change; Legislative change	Legislative	Not Accomplished
74	Shrink the criminal code	Reclassify Class III misdemeanors that do not impact public safety or emergency management as noncriminal/civil infractions	Legislative change	Legislative	Partial success
75	Shrink the criminal code	Enact legislation with a sunset provision for all local ordinance crimes that criminalize poverty or behavior in public places	Legislative change	Legislative	Success
76	Shrink the criminal code	Eliminate citizen-initiated criminal charges	Legislative change	Legislative	Not Accomplished
77	Shrink the criminal code	Review and recommend changes to the criminal code	Legislative change	Legislative	Success
78	Shrink the criminal code	Provide for the appointment of counsel in cases where the defendant is facing a $200 fine	Legislative change	Legislative	Not Accomplished
79	Improve pre-trial release and accountability practices	Eliminate cash bail for Class I, II, and III misdemeanors unless risk to public safety	Judicial policy change; State policy change by Administrative Office of the Courts; Legislative change	Local Implementation Work - Model Policy	In Development

Eliminating Racial Disparities in the Courts

Solution Number	Recommendation	Soution	Necessary Action	Implementation Effort	Status
80	Improve pre-trial release and accountability practices	Require first appearance within 48 hours or next day in which District Court is in session	Judicial policy change; State policy change by Administrative Office of the Courts; Legislative change	Legislative	Partial Success
81	Improve pre-trial release and accountability practices	Require preventative detention hearing within five days and repeal bond doubling	Legislative change	Legislative	Not Accomplished
82	Improve pre-trial release and accountability practices	Promote court appearance strategies and develop alternative responses to failure to appear	Judicial policy change; State policy change by Administrative Office of the Courts; Local policy change; Legislative change	Legislative/Local Implementation Work	In Development
83	Improve pre-trial release and accountability practices	Create independent pretrial services and improve data collection	Local policy change; State policy change by Administrative Office of the Courts	Local Implementation Work	Under Consideration
84	Implement racial equity training for court system actors	Require racial equity training for court system personnel, including judges, DAs, and public defenders	State policy change by Admistrative Office of the Courts	State Agency Work	Partial Success
85	Implement racial equity training for court system actors	Require implicit bias and racial equity training for parole staff	State policy change by the Department of Public Safety	Department of Public Safety	Success
86	Implement racial equity training for court system actors	Require racial equity and victim services training for Victim Compensation Fund employees and members	State policy change by the Department of Public Safety	Department of Public Safety	In Development
87	Promote racially equitable prosecutorial practices	Educate prosecutors, their staff, and officers of justice on unconscious bias in the criminal justice process and prosecutorial decision-making	State policy change by the Conference of District Attorneys	Conference of District Attorneys	Under Consideration
88	Promote racially equitable prosecutorial practices	Enhance prosecutors' data collection, technology, training opportunities, and staffing	Prosecutorial policy change; Legislative change	Local Implementation Work - Model Policy	In Development

Eliminating Racial Disparities in the Courts

Solution Number	Recommendation	Soution	Necessary Action	Implementation Effort	Status
89	Promote racially equitable prosecutorial practices	Study and adopt evidence-based reforms for reducing and eventually eliminating racial disparities in charging decisions and prosecutorial outcomes	Prosecutorial policy change; Legislative change	Local Implementation Work - Model Policy	In Development
90	Promote racially equitable prosecutorial practices	Establish working groups led by district attorneys to review and approve every habitual felony charging decision	Prosecutorial policy change	Local Implementation Work - Model Policy	In Development
91	Facilitate fair trials	Increase representation of North Carolinians serving on juries through expanded and more frequent sourcing, data transparency, and compensation	Local policy change; Local policy change by county jury commisions; Judicial change by senior resident superior court judges; Task Force collaboration; Legislative change	Study	In Development
92	Facilitate fair trials	Broaden protection against the use of preemptory challenges in jury selection for discriminatory purposes	Administrative rule change by North Carolina Supreme Court	Rule change by North Carolina Supreme Court	Not Accomplished
93	Facilitate fair trials	Provide implicit bias training to all jury system actors	State policy change; State policy change of the Administrative Office of the courts; Local judicial district change; Local judicial district change by clerks of court; Task Force collaboration; Legislative change	Administrative Office of the Courts	Not Accomplished
94	Facilitate fair trials	Establish a state commission on the jury system, with an eye towards comprehensive reform	State policy change; Legislative change	Study	In Development

Promoting Racial Equity
Post-Conviction

Solution Number	Recommendation	Soution	Necessary Action	Implementation Effort	Status
95	Reduce current sentencing and incarceration disparities	Increase funding for Governor's Clemency Office and Parole Commission	State policy change; State policy change by the Parole Commission; Legislative change; legislative appropriations	Legislative	Not Accomplished
96	Reduce current sentencing and incarceration disparities	Increase NCDPS flexibility on incarcerated individuals' release dates	State policy change by Department of Public Safety	Department of Public Safety	Under Consideration
97	Reduce current sentencing and incarceration disparities	Establish a Second Look Act to reduce racially disparate sentences through the review and action of those currently incarcerated	Legislative change	Legislative	Not Accomplished
98	Reduce current sentencing and incarceration disparities	Create and fund an independent Conviction Integrity Unit with representation from prosecutors and defense lawyers and to ensure Indigent Defense Services has significant funding to pay lawyers who handle post-conviction work	Legislative change	Legislative	Not Accomplished
99	Reduce current sentencing and incarceration disparities	Amend Motion for Appropriate Relief statute to allow a judge to overcome technical defects in the interest of justice or where the petition raises a significant claim of race discrimination	Legislative change	Legislative	Not Accomplished
100	Reduce current sentencing and incarceration disparities	Reinstate the Racial Justice Act for individuals sentenced to death	Legislative change	Legislative	Not Accomplished
101	Reduce use of fines and fees	Assess a defendant's ability to pay prior to levying any fines and fees	Administrative rule change by North Carolina Supreme Court	Rule change by North Carolina Supreme Court	Success
102	Reduce use of fines and fees	Reduce court fines and fees	Legislative change	Legislative	Not Accomplished
103	Reduce use of fines and fees	Eliminate state government reliance on fines and fees	Legislative change	Inclusion in Budget	Partial Success

Promoting Racial Equity
Post-Conviction

Solution Number	Recommendation	Soution	Necessary Action	Implementation Effort	Status
104	Reduce use of fines and fees	Develop a process to eliminate criminal justice debt	State agency policy change; Local government action; NC Supreme Court rule change; Task Force collaboration; Legislative change	Local Implementation Work - Model Policy	In Development
105	Amend incarceration facilities' practices and programming and address prison discipline	Transform the use of restrictive housing	State policy change by Department of Public Safety	Department of Public Safety	Under Consideration
106	Amend incarceration facilities' practices and programming and address prison discipline	Protect pregnant people in jails and prisons	State policy change by Department of Public Safety	Legislative	Success
107	Amend incarceration facilities' practices and programming and address prison discipline	Enhance prison personnel	State policy change by Department of Public Safety; Legislative changes	Legislative	Partial Success
108	Amend incarceration facilities' practices and programming and address prison discipline	Increase funding for mental health services and programs in prisons	State policy change by Department of Public Safety	Department of Public Safety	In Development
109	Amend incarceration facilities' practices and programming and address prison discipline	Increase due process protections for people accused of disciplinary offenses	State policy change by the Department of Public Safety	Department of Public Safety	Under Consideration

Promoting Racial Equity
Post-Conviction

Solution Number	Recommendation	Soution	Necessary Action	Implementation Effort	Status
110	Amend incarceration facilities' practices and programming and address prison discipline	Expand use of restorative justice and rehabilitation programming	State policy change by Department of Public Safety	Department of Public Safety	Partial Success
111	Study and revise future sentencing guidelines	Broaden the use of Advanced Supervised Release	Prosecutorial policy change; Legislative change	Local Implementation Work - Model Policy	In Development
112	Study and revise future sentencing guidelines	Eliminate the future use of Violent Habitual Felony Status	Legislative change	Legislative	Not Accomplished
113	Study and revise future sentencing guidelines	Eliminate future use of Habitual Felony Status for individuals under the age of 21 or convicted of non-violent drug offenses	Legislative change	Legislative	Not Accomplished
114	Study and revise future sentencing guidelines	Amend the habitual felony statute to limit the "look back" period to within 8 years of the charged offense	Legislative change	Legislative	Not Accomplished
115	Study and revise future sentencing guidelines	Analyze and report on racial disparities in sentencing laws and recommend possible changes	State policy change by the Sentencing Commission	Study	In Development
116	Study and revise future sentencing guidelines	Review all future sentences after 20 years or before	Legislative change	Legislative	Not Accomplished
117	Study and revise future sentencing guidelines	Prohibit capital punishment for people with serious mental illness and people 21 or younger at the time of the offense and prohibit the use of juvenile adjudications to be considered as aggravating factors	Legislative change	Legislative	Not Accomplished
118	Study and revise future sentencing guidelines	Establish a truth and reconciliation commission to study North Carolina's history of criminal justice and race	State policy change; Legislative change	Recommendations with Task Force	Not Accomplished

Promoting Racial Equity
Post-Conviction

Solution Number	Recommendation	Soution	Necessary Action	Implementation Effort	Status
119	Reduce collateral consequences of criminal convictions	Expand voting rights to those on probation, parole, or post-release supervision for a felony conviction	Legislative change	Legislative	Not Accomplished
120	Reduce collateral consequences of criminal convictions	Opt out entirely of federal ban on SNAP benefits for individuals convicted of certain felony drug charges, eliminating 6-month disqualification period and other eligibility requirements	Legislative change	Legislative	Not Accomplished
121	Reduce collateral consequences of criminal convictions	Allow NCDMV hearing officers to waive license restoration fees and other service fees for failure to appear or failure to pay	Legislative change	Legislative	Under Consideration
122	Reduce collateral consequences of criminal convictions	Reform the Certificate of Relief petition process to create efficiencies for individuals with multiple convictions across multiple counties	Legislative change	Legislative	Not Accomplished
123	Reduce collateral consequences of criminal convictions	Support the Statewide Reentry Council Collaborative's recommendations	State agency policy changes; Local government policy changes; Task Force collaboration; Legislative changes	Recommendation with Task Force	Success

Criminal Justice Data Collection and Reporting

Solution Number	Recommendation	Soution	Necessary Action	Implementation Effort	Status
124	Improve data collection	Identify the places along the criminal justice system where data collection directly impacts the implementation, evaluation, and monitoring of the Task Force's recommendations and broader questions of racial equity within the criminal justice system	State agency policy changes; Local government policy changes; Task Force collaboration; Adminstrative rule change; Legislative changes	Fact finding / Research	In Development

Going Forward

Solution Number	Recommendation	Soution	Necessary Action	Implementation Effort	Status
125	Create permanent structure	Establish the Commission for Racial Equity in the Criminal Justice System as a permanent, independent commission.	State policy change; Task Force collaboration; Legislative changes	Recommendation with Task Force	Not Accomplished