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2023 Public Defender Spring Conference

May 10-12, 2023
Winston-Salem, NC

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

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ATTORNEY AGENDA

This conference offers 13.75 hours of CLE credit.
All hours are general credit hours unless otherwise noted.

WEDNESDAY, MAY 10

11:00 a.m.-12:20 p.m.	**Check-In**
12:20-12:30 p.m.	**Welcome**
12:30-1:00 p.m.	**Awards with the Chief Justice** Chief Justice of the North Carolina Supreme Court Raleigh, NC
1:00-1:30 p.m.	**IDS Update and Recognitions [30 min.]** Mary Pollard, Executive Director Dawn Baxton, Chief Public Defender NC Indigent Defense Services, Durham, NC
1:30-2:30 p.m.	**Conflicts of Interest [60 min. – ETHICS CREDIT]** Kelley DeAngelus, Deputy Counsel Brian Oten, Director of Ethics and Special Programs North Carolina State Bar, Raleigh, 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
4:00-5:00 p.m.	**Emerging Issues in Fourth Amendment Law [60 min.]** Sterling Rozear, Assistant Appellate Defender Michele Goldman, Assistant Appellate Defender Office of the Appellate Defender, Durham, NC
5:00 p.m.	*Adjourn*
5:15 p.m.	**Social Gathering (optional)** – *details to be announced*

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Summer Criminal Case Law Update
Spring Public Defender and Investigator Conference
Winston-Salem, NC
May 10, 2023

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 November 4, 2022, and May 2, 2023. State cases were summarized by Alex Phipps and Fourth Circuit cases were summarized by Phil Dixon. 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

Reasonable suspicion that defendant was armed and dangerous justified frisk of vehicle

State v. Scott, COA22-326, ___ N.C. App. ___; 883 S.E.2d 505 (Feb. 7, 2023). In this New Hanover County case, the defendant appealed his conviction for possessing a firearm as a felon, arguing error in the denial of his motion to suppress (among other issues). The Court of Appeals found no error.

In February of 2020, a Wilmington police officer observed the defendant enter a parking lot known for drug activity and confer with a known drug dealer. When he exited the parking lot, the officer followed, and eventually pulled the defendant over for having an expired license plate. During the stop, the officer determined that the defendant was a "validated gang member," and had previously been charged with second-degree murder; the officer was also aware that a local gang war was underway at that time. Slip op. at 2. The officer frisked him and did not find a weapon, but the defendant told the officer there was a pocketknife in the driver's door compartment. When the officer went to retrieve the pocketknife, he did not find it, but while looking around the driver's area he discovered a pistol under the seat.

Reviewing the defendant's appeal, the court first noted that the initial traffic stop for an expired plate was proper. The frisk of the defendant's person and vehicle required the officer to have "a reasonable suspicion that the suspect of the traffic stop is armed and dangerous." *Id*. at 7, quoting *State v. Johnson*, 378 N.C. 236 (2021). The court found the totality of the officer's knowledge about defendant satisfied this standard, as he had just exited a parking lot known for drug transactions, had a history of being charged with murder, was a known gang member, and was in an area experiencing a local gang war. Because the officer had a reasonable suspicion that defendant might be armed and dangerous, the frisk of the vehicle leading to the discovery of the pistol was acceptable.

Threat to arrest the defendant for trespassing unless he consented to a frisk was a seizure unsupported by reasonable suspicion; denial of motion to suppress reversed by divided court

U.S. v. Peters, 60 F.4th 855 (Feb. 24, 2023). Two officers were patrolling housing authority property in the Eastern District of Virginia around 5:30 pm when they noticed two men walking down the sidewalk.

The officers knew one of the men was not authorized to be present in the area; they also knew the other man (the defendant) had been charged with trespassing in 2011 but could not determine the disposition of that arrest or the location involved. About a month before this interaction, one of the officers was tipped off by an informant that a man by a certain nickname was selling drugs from an address within the housing authority property. The informant provided a physical description of the alleged drug dealer. The officer showed a photo of the suspected dealer to the informant, who identified the defendant as the suspect. This caused the officer to pull the defendant's criminal history. That history included various "alerts" on the defendant—that he was a gang member in 2011; that he was a user or seller of illegal drugs in 2009; and that he was "probably armed" in 2009. The same information indicated that the defendant did not live in the neighborhood but was silent as to when the information had last been updated. Seeing the two men and armed with this information, the officers approached and activated their body cams. The officers told the men in a "stern" tone that they were not allowed on the property. The men continued walking and officers asked if either man had possessed any guns. Both men denied having a gun. The officers asked the men to raise their shirts. One man did so, but the defendant only partially lifted his shirt. The two officers stood on either side of the defendant three to five feet away. They addressed the defendant under his supposed nickname and asked for identification. The defendant denied having any. He also claimed he was not barred from being present on the property and asked police to verify that he was not on the banned persons list. One of the officers asked the defendant if he minded being patted down. The defendant refused consent. One of the officers threatened to arrest him for trespassing and continued seeking consent to frisk. The defendant reiterated that he was lawfully present in the area. At this point, one of the officers jumped towards the defendant with a "sudden forward movement," apparently in an attempt to draw a reaction from the defendant. About a minute later, the defendant lifted his shirt and officers saw the shape of a gun muzzle in his pants. He was arrested and indicted for possession of firearm by felon.

The defendant moved to suppress, arguing that officers lacked reasonable suspicion to detain him. The officers testified at the suppression hearing that the initial encounter began as a trespassing investigation and stated that they began suspecting the defendant was armed based on his "skinny jeans" and refusal to fully lift his shirt. The district court denied the motion. The defendant pled guilty, was sentenced to 120 months, and appealed. A divided Fourth Circuit reversed.

The court first examined whether the defendant was seized or, as the Government argued, the encounter was consensual. The court found that the defendant was seized within one minute of the police encounter. When the armed, uniformed officers threatened to arrest him for trespassing and indicated he would need to consent to a frisk or be arrested, this was a show of authority that a reasonable person would not feel free to disregard. The court went on to find that the seizure was unsupported by reasonable suspicion. Given the age of the defendant's criminal history and lack of accompanying detail, that information did not contribute to reasonable suspicion that the defendant was trespassing. Without more, the court rejected the notion that historical "caution data" from police databases added to reasonable suspicion. Though the defendant repeatedly asked the officers to double check their databases to confirm he was not a person prohibited from the property, they declined to do so. In fact, the defendant's 2011 arrest for trespass had not resulted in a conviction, and he correctly informed the officers that he was allowed on the property. The informant's tip about the defendant dealing drugs also failed to add to the reasonable suspicion calculus, as the officer acknowledged that he had done nothing to corroborate the tip in the month since receiving it and nothing about the behavior of the men during the encounter indicated drug activity. Neither did the tip point to evidence of trespassing. That the defendant was walking in front of the building identified by the informant as the place where drugs were being sold also failed to meaningfully contribute to the officer's suspicions here,

as the men were simply walking in front of the building down the sidewalk and had not been seen entering, exiting, or loitering by the building. That the defendant was walking with another person who was banned from the property was also not sufficient, as it was not specific to the defendant. While the officer testified at suppression that he had confidential informant information that men with skinny jeans often tuck a gun into their waistbands, this too added little to the equation. In the words of the court:

> A general tip 'that men specifically were wearing skinny jeans' to 'wedge a firearm in their waistband' does not justify the seizure here, because it is not at all particular to Peters. The argument that this rises to the level of reasonable suspicion is premised, at least in part, on the belief that individuals like Peters—present in public housing communities like Creighton Court—must lift their shirts upon request to prove they are unarmed. Such a belief cannot provide reasonable suspicion because 'a refusal to cooperate' alone does not justify a seizure. To hold otherwise would seemingly give way to the sort of general searched that we, as an en banc court, have found to violate the Fourth Amendment. *Peters* Slip op. at 21 (*citing U.S. v. Curry*, 965 F.3d 313 (4th Cir. 2020) (en banc)).

The seizure being unsupported by reasonable suspicion, the district court's denial of the suppression motion was reversed, the conviction vacated, and the matter remanded for any additional proceedings.

Judge Traxler dissented and would have affirmed the district court.

Despite the lack of canine alert, officers had probable cause to search vehicle based on totality of the circumstances

State v. Aguilar, 2022-NCCOA-903, ___ N.C. App. ___ (Dec. 29, 2022). In this Union County case, the defendant appealed his conviction for trafficking by possession and transportation of heroin, arguing error in the denial of his motion to suppress the results of a warrantless search of his vehicle. The Court of Appeals found no error.

In January of 2020, the Union County Sheriff's Office was observing several individuals involved in drug trafficking based on information from two confidential informants. Based on the observations and information received, officers ended up detaining the defendant and searching his vehicle, finding heroin in the car. Although a canine unit was present, the dog did not alert on a search around the perimeter of the car. Despite the lack of alert, the officers believed they had probable cause based on "the tips provided by two unrelated confidential informants and officers' observations that confirmed these specific tips." Slip op. at 4. The defendant subsequently pleaded guilty to charges of trafficking heroin but reserved his right to appeal the dismissal of his motion to suppress.

The court walked through each challenged finding of fact and conclusion of law, determining that none of the issues highlighted by the defendant represented error. In particular, the court explained that the lack of an alert from the canine unit did not prevent the officers from having probable cause, and noted that the"[d]efendant has cited no case, either before the trial court or on appeal, holding that officers cannot have probable cause to search a vehicle if a canine search is conducted and the canine fails to alert . . . [n]or did we find such a case." *Id*. at 29. Because the totality of the circumstances supported probable cause, the court found no error in the trial court's conclusion.

Motion to suppress was improperly granted where (1) police had reasonable suspicion for *Terry* frisk, (2) subsequent "plain view" doctrine seizure was lawful, (3) protective sweep of house was justified by circumstances, and (4) smell of marijuana was not only basis for probable cause to support search warrant for house

State v. Johnson, COA22-363, ___ N.C. App. ___ (April 18, 2023); *temp. stay allowed*, ___ N.C. ___ (April 26, 2023). In this Vance County case, the State appealed from an order granting the defendant's motion to suppress evidence seized from his person and inside a house. The Court of Appeals reversed and remanded the matter to the trial court.

While attempting to arrest the defendant for an outstanding warrant, officers of the Henderson Police Department noticed the odor of marijuana coming from inside the house where the defendant and others were located. All of the individuals were known to be members of a criminal gang. After frisking the defendant, an officer noticed baggies of heroin in his open coat pocket. The officers also performed a protective sweep of the residence, observing digital scales and other drug paraphernalia inside. After a search of the defendant due to the baggies observed in plain view during the frisk, officers found heroin and marijuana on his person, along with almost $2,000 in fives, tens and twenties. After receiving a search warrant for the house, the officers found heroin, marijuana, drug paraphernalia, and firearms inside. The defendant was indicted on drug possession, criminal enterprise, and possession of firearm by a felon charges. Before trial, the trial court granted the defendant's motion to suppress, finding that there was no probable cause to detain the defendant or to enter the residence.

The Court of Appeals first established the basis for detaining and frisking the defendant, explaining that officers had a "reasonable suspicion" for frisking the defendant under *Terry v. Ohio*, 392 U.S. 1 (1968), as they had a valid arrest warrant for the defendant for a crime involving a weapon, knew he was a member of a gang, and saw another individual leave the house wearing a ballistic vest. Slip op. at 14. Applying the "plain view" doctrine as articulated in *State v. Tripp*, 381 N.C. 617 (2022), and *State v. Grice*, 367 N.C. 753 (2015), the court found that the search was constitutional and the arresting officer's eventual seizure of the "plastic baggies he inadvertently and 'plainly viewed'" was lawful. Slip op. at 16.

The court then turned to the trial court's ruling that the warrantless entry of officers into the house to conduct a protective sweep was unlawful. Noting applicable precedent, the court explained "[t]he Supreme Court of the United States, the Supreme Court of North Carolina, and this Court have all recognized and affirmed a law enforcement officer's ability to conduct a protective sweep both as an exigent circumstance and for officer's safety when incident to arrest." *Id*. at 16-17. The court found that the officers had both justifications here, as the defendant was a member of a gang and known for violence involving weapons, and the officers were unsure whether any other people remained inside the house.

Finally, the court examined the probable cause supporting the search warrant for the house. The defendant argued that the smell of marijuana could not support probable cause due to it being indistinguishable from industrial hemp. Looking to applicable precedent such as *State v. Teague*, 2022-NCCOA-600 (2022), the court noted that the Industrial Hemp Act did not modify the State's burden of proof, but also noted that like in *Teague*, the smell of marijuana was not the only basis for probable cause in this case. Slip op. at 25. Here, the court found the drugs in the defendant's pocket and the drug paraphernalia observed during the protective sweep also supported probable cause.

Searches

Probable cause supported search of defendant's cellphone found in vehicle linked to home invasion

State v. Byrd, 2022-NCCOA-905, ___ N.C. App. ___ (Dec. 29, 2022). In this Johnson County Case, the defendant appealed the denial of his motion to suppress evidence obtained from his cellphone. The Court of Appeals affirmed the trial court's denial of the motion.

The defendant was convicted of burglary, robbery, kidnapping, conspiracy, and habitual felony status for a home invasion in September of 2018. The evidence supporting defendant's conviction came from a search of his cellphone found in a vehicle tied to the home invasion. He argued at trial that the search warrant for his cellphone was not supported by probable cause, but the trial court denied the motion to suppress.

The Court of Appeals explained that probable cause to support the warrant came from the totality of the circumstances around the cellphone. Here, the cellphone was found in a car identified by an eyewitness as leaving the scene and the car was owned by the defendant's cousin. This same cousin told law enforcement that the defendant was the owner of a white LG cellphone, matching the phone found in the car after a search. The car also contained a distinctive Tourister case stolen from the home in question. The court found that "[u]nder the totality of the circumstances, these facts show a nexus between [d]efendant's white LG cellphone and the home invasion." Slip op. at 8.

Miranda

Brief questioning of defendant in a public park after hours did not rise to the level of custody for purposes of *Miranda;* denial of motion to suppress affirmed

U.S. v. Leggette, 57 F.4th 406 (Jan. 10, 2023). In this case from the Middle District of North Carolina, Winston-Salem police officers noticed a car parked in the lot of a public park around 11:30 pm. The park closed at 10:30 pm, and officers decided to investigate the potential trespass. The defendant and a companion were present in the park and approached the officer. A backup officer arrived and found a gun inside of a nearby trash can. The first officer performed a frisk of the defendant and asked him three times about ownership of the gun. This occurred over the course of around 90 seconds. The defendant denied knowing anything about the weapon in response to the first two questions, but admitted to being a felon. The officer stated that honesty would "go a long way" and asked a third time, at which point the defendant admitted ownership of the gun. At the detention center, officers read the defendant a *Miranda* warning and the defendant again confessed. He was charged with being a felon in possession and moved to suppress his statements, arguing a *Miranda* violation based on the officer's questions in the park. The district court denied the motion, finding that the defendant was not in custody at the time of his inculpatory statements. The defendant pled guilty, reserving his right to appeal the suppression issue. He was sentenced to 180 months and appealed. A unanimous panel of the Fourth Circuit affirmed.

The court noted that a person may not be free to leave an encounter with police but still may not be considered "in custody" for purposes of *Miranda*. According to the court:

> …[A] *Terry* stop does not constitute Miranda custody. Just like the subject of a traffic stop, the person cannot leave. But, like traffic stops, Terry stops lack the necessary coercion, and so do not curtail a person's freedom of action to a degree associated with formal arrest. *Leggette* Slip op. at 7 (cleaned up).

The court noted that only one officer questioned the defendant and the officer asked "only a handful of questions," aimed at discovering information about the gun. The officer spoke politely and did not draw his firearm. Other than the initial frisk, the officer did not touch or restrain the defendant during the questioning. The questioning occurred in a public place, with the defendant's companion beside him, and within a short window of time. These circumstances did not rise to the functional equivalent of an arrest and therefore did not amount to custody for purposes of *Miranda*. The district court was therefore affirmed. Concluding, the court observed:

> *Miranda* warnings are not required every time an individual has their freedom of movement restrained by a police officer. Nor are they necessarily required every time questioning imposes some sort of pressure on suspects to confess. Instead, they are only required when a suspect's freedom of movement is restrained to the point where they do not feel free to terminate the encounter and the circumstances reveal the same inherently coercive pressures as the type of stationhouse questioning at issue in *Miranda*. *Id*. at 12-13 (cleaned up).

Eyewitness Identification

(1) Showing eyewitness a single picture of defendant during trial preparation conference was impermissibly suggestive but did not create substantial likelihood of irreparable misidentification; (2) showing witness the single picture of defendant was not a lineup or show-up for EIRA purposes

State v. Morris, COA22-3, ___ N.C. App. ___ (March 7, 2023). In this Duplin County case, the defendant appealed his convictions for sale and delivery of cocaine, arguing error (1) in denying his motion to suppress certain eyewitness testimony for due process violations, (2) denying the same motion to suppress for Eyewitness Identification Reform Act ("EIRA") violations, (3) in permitting the jury to examine evidence admitted for illustrative purposes only, and (4) in entering judgment for both selling and delivering cocaine. The Court of Appeals affirmed the denial of defendant's motion and found no plain error with the jury examining illustrative evidence, but remanded for resentencing due to the error of sentencing defendant for both the sale and delivery of cocaine.

In December of 2017, the Duplin County Sheriff's Office had confidential informants performing drug buys from defendant in a trailer park. The informants purchased crack cocaine on two different days from defendant, coming within three to five feet of him on clear days. At a trial preparation meeting in October of 2020, the prosecutor and a detective met with the lead informant; at the meeting, the informant saw a DMV picture of defendant with his name written on it, and responded "yes" when asked if that was the person from whom the informant purchased cocaine. No other pictures were shown to the informant at this meeting. Defense counsel subsequently filed a motion to suppress the testimony of the informant based on this meeting, as well as motions *in limine*, all of which the trial court denied.

The Court of Appeals first considered (1) the denial of defendant's motion to suppress, where defendant argued that the identification procedure violated his due process rights. The due process inquiry consists of two parts: whether the identification procedure was "impermissibly suggestive," and if the answer is yes, "whether the procedures create a substantial likelihood of irreparable misidentification" after a five-factor analysis. Slip Op. at 9-10, quoting *State v. Rouse*, 284 N.C. App. 473, 480-81 (2022). Applying the *Rouse* framework and similar circumstances in *State v. Malone*, 373 N.C. 134 (2019) and *State v. Jones*, 98 N.C. App. 342 (1990), the court determined that "[the informant] seeing the photo of Defendant in the file during the trial preparation meeting was impermissibly suggestive," satisfying the first part. *Id*. at 18. However, when the court turned to the five-factor analysis, it determined that only the third factor (accuracy of the prior description of the accused) and the fifth factor (the time between the crime and the confrontation of the accused) supported finding of a due process violation. The court concluded that "[b]ecause there was not a substantial likelihood of irreparable misidentification, the identification did not violate due process." *Id*. at 24.

The court also considered (2) defendant's argument that the EIRA applied and supported his motion to suppress. After reviewing the scope of the EIRA, the court applied *State v. Macon*, 236 N.C. App. 182 (2014), for the conclusion that a single-photo identification could not be a lineup for EIRA purposes. Slip Op. at 28. The court then considered whether the procedure was a show-up:

> In contrast to our longstanding description of show-ups, the procedure here was not conducted in close proximity to the crime and, critically, it was not conducted to try to determine if a suspect was the perpetrator. The identification here took place during a meeting to prepare for [trial]. As a result, the State, both the police and the prosecution, had already concluded Defendant was the perpetrator. The identification acted to bolster their evidence in support of that conclusion since they would need to convince a jury of the same. Since the identification here did not seek the same purpose as a show-up, it was not a show-up under the EIRA.*Id*. at 30.

The court emphasized the limited nature of its holding regarding the scope of the EIRA, and that this opinion "[did] not address a situation where the police present a single photograph to a witness shortly after the crime and ask if that was the person who committed the crime or any other scenario." *Id*. at 32.

Pleadings

Indictment's statement of specific facts showed malice aforethought

State v. Davis, 2023-NCCOA-4, ___ N.C. App. ___ (Jan. 17, 2023). In this New Hanover County case, defendant appealed after being found guilty of two counts of first-degree murder and three counts of attempted first-degree murder, arguing (1) the indictment for attempted first-degree murder failed to include an essential element of the offense, (2) error in denying his motion to dismiss one of the attempted murder charges, and (3) error in admitting evidence of past acts of violence and abuse against two former romantic partners. The Court of Appeals found no error.

In August of 2014, after defendant assaulted his girlfriend, a protective order was granted against him. On December 22, 2014, defendant tried to reconcile with his girlfriend, but she refused; the girlfriend went to the house of a friend and stayed with her for protection. Early the next morning, defendant

tried to obtain a gun from an acquaintance, and when that failed, he purchased a gas can and filled it with gas. Using the gas can, defendant set fires at the front entrance and back door of the home where his girlfriend was staying. Five people were inside when defendant set the fires, and two were killed by the effects of the flames. Defendant was indicted for first-degree arson, two counts of first-degree murder, and three counts of attempted first-degree murder, and was convicted on all counts (the trial court arrested judgment on the arson charge).

The Court of Appeals explained that "with malice aforethought" was represented in the indictment by "the specific facts from which malice is shown, by 'unlawfully, willfully, and feloniously . . . setting the residence occupied by the victim(s) on fire.'" Slip op. at 10. Because the ultimate facts constituting each element of attempted first-degree murder were present in the indictment, the lack of "with malice" language did not render the indictment flawed.

City ordinance was not properly pleaded where charging documents did not include the caption of the ordinance

State v. Miller, COA22-561, ___ N.C. App. ___ (Feb. 21, 2023). In this Union County case, defendant appealed his convictions for attempted first degree murder, going armed to the terror of the people, possession of a handgun by a minor, and discharge of a firearm within city limits, arguing (in part) error by denial of his motion to dismiss the discharge of a firearm charge. The Court of Appeals agreed, remanding the case and vacating the discharge of a firearm conviction.

The court found that the arrest warrant and indictment were both defective as they did not contain the caption of the relevant ordinance. Under G.S. 160A-79(a), "a city ordinance . . . must be pleaded by both section number and caption." *Id*. at 8. Here, the charging documents only reference the Monroe city ordinance by number, and failed to include the caption "Firearms and other weapons." The court found the State failed to prove the ordinance at trial, and vacated defendant's conviction for the discharge of a firearm within city limits charge.

Nature of location is an essential element for G.S. 14-277.2 possession of a dangerous weapon at a demonstration charge

State v. Reavis, 2022-NCCOA-909, ___ N.C. App. ___ (Dec. 29, 2022). In this Chatham County case, the Court of Appeals overturned defendant's conviction for possession of a firearm at a demonstration, finding that the indictment failed to specify the type of land where the violation took place.

Defendant attended a protest in Hillsborough over the removal of a confederate monument in 2019. During the protest, an officer observed defendant carrying a concealed firearm. Defendant was indicted for violating G.S. 14-277.2, and at trial moved to dismiss the charges, arguing that the misdemeanor statement of charges was fatally defective for not specifying the type of location for the offense, specifically the required location of a private health care facility or a public place under control of the state or local government. Defendant's motion was denied and she was convicted of the misdemeanor.

Reviewing defendant's appeal, the court agreed with defendant's argument that her indictment was defective. Although the State moved to amend the location in the statement of charges, and the superior court granted that motion, the Court of Appeals explained that this did not remedy the defect. The court explained that "if a criminal pleading is originally defective with respect to an essential

element . . . amendment of the pleading to include the missing element is impermissible, as doing so would change the nature of the offense." Slip op. at 8-9. The court looked to analogous statutes and determined that the specific type of location for the offense was an essential element of G.S. 14-277.2, and that the State had failed to specify the location in either the statement of charges or the police report provided with the statement. Instead, the statement and police report simply listed the street address and described the location as "[h]ighway/[r]oad/[a]lley/[s]treet/[s]idewalk[,]" failing to specify the essential element related to the type of location. *Id*. at 16-17.

Judge Inman concurred only in the result.

Indictment did not specifically identify facilitating flight following commission of felony as purpose of kidnapping; underlying felony of rape was completed before the actions of kidnapping occurred, justifying dismissal

State v. Elder, 383 N.C. 578 (Dec. 16, 2022). In this Warren County case, the Supreme Court affirmed the Court of Appeals decision finding that the second of defendant's two kidnapping charges lacked support in the record and should have been dismissed because the rape supporting the kidnapping charge had already concluded before the events of the second kidnapping.

The two kidnapping charges against defendant arose from the rape of an 80-year-old woman in 2007. Defendant, posing as a salesman, forced his way into the victim's home, robbed her of her cash, forced her from the kitchen into a bedroom, raped her, then tied her up and put her in a closet located in a second bedroom. The basis for the kidnapping charge at issue on appeal was tying up the victim and moving her from the bedroom where the rape occurred to the second bedroom closet. Defendant moved at trial to dismiss the charges for insufficiency of the evidence and argued that there was no evidence in the record showing the second kidnapping occurred to facilitate the rape.

The Supreme Court agreed with the Court of Appeal majority that the record did not support the second kidnapping conviction. The court explored G.S. 14-39 and the relevant precedent regarding kidnapping, explaining that kidnapping is a specific intent crime, and the State must allege one of the ten purposes listed in the statute and prove at least one of them at trial to support the conviction. Here, the State alleged "that defendant had moved the victim to the closet in the second bedroom *for the purpose of facilitating the commission of rape*." Slip Op. at 30. At trial, the evidence showed that defendant moved the victim to the second bedroom "after he had raped her, with nothing that defendant did during that process having made it any easier to have committed the actual rape." *Id*. Because the State only alleged that defendant moved the victim for purposes of facilitating the rape, the court found that the second conviction was not supported by the evidence in the record. The court also rejected the State's arguments that *State v. Hall*, 305 N.C. 77 (1982) supported interpreting the crime as ongoing, overruling the portions of that opinion that would support interpreting the crime as ongoing. Slip Op. at 42.

Chief Justice Newby, joined by Justice Berger, dissented and would have allowed the second kidnapping conviction to stand. *Id*. at 45.

Capacity and Commitment

Defendant did not assert a constitutional right to competency hearing; defendant waived statutory right to competency hearing by failing to assert right at trial

State v. Wilkins, 2022-NCCOA-911, ___ N.C. App. ___ (Dec. 29, 2022). In this Caswell County case, Defendant appealed his conviction for drug possession charges, arguing error by the trial court for the lack of a competency evaluation and admission of testimony regarding his silence at a traffic stop. The Court of Appeals found no error.

Defendant was in the front seat of an SUV stopped in 2018 under suspicion of throwing contraband into a prison yard. A search of the vehicle found two footballs cut open and filled with drugs; defendant was silent during the stop and search of the vehicle. While awaiting trial, defense counsel moved for a competency hearing; the trial court entered an order finding defendant's competency in question, and ordering an evaluation of defendant. However the defendant was never evaluated and no finding was ever entered as to his competency, as he was instead released on bail. By the time defendant reached trial in 2021, he had new counsel, who did not assert the right to a competency evaluation, and defendant was convicted of drug possession.

Reviewing defendant's appeal, the court noted that defendant never objected to the lack of a hearing or evaluation on his competency at trial, and this represented waiver of the statutory right to a competency evaluation and hearing. Defendant failed to assert a due process clause claim for the competency hearing, preventing consideration of the constitutional issue. The court explained that the statutory right to a competency hearing comes from G.S. 15A-1002, and under *State v. Young*, 291 N.C. 562 (1977), "our Supreme Court repeatedly has held that 'the statutory right to a competency hearing is waived by the failure to assert that right at trial.'" Slip op. at 4, quoting *State v. Badgett*, 361 N.C. 234 (2007). Reviewing defendant's objection to the admission of testimony about his silence, the court found no plain error, and noted it was unclear if the issue was even reviewable on appeal. *Id*. at 9-10.

Judge Inman dissented by separate opinion and would have granted defendant's right to competency hearing. *Id*. at 11.

Order for involuntary medication affirmed; extended commitment of defendant in an attempt to restore capacity was reasonable

U.S. v. Tucker, 60 F.4th 879 (Feb. 24, 2023). Under *Sell v. U.S.*, 539 U.S. 166, 179 (2003), forced medication to restore competency to stand trial for a serious crime may be permitted. Due process requires that forced medication is only available when the Government shows by clear and convincing evidence that important governmental interests are at stake, that forced medication will advance those interests, that the medication is needed in light of those interests, and that the involuntary treatment is "medically appropriate." *Id.* Under *Jackson v. Indiana,* 406 U.S. 715, 738 (1972), civil commitment to restore competency is allowed, but a defendant may not be held for more time than is reasonably necessary to determine whether the defendant is likely to become competent. The defendant was charged with various child pornography offenses in the Middle District of North Carolina in 2017. He was quickly found to lack competency to proceed and civilly committed in hopes of restoration. The commitment was extended without defense objection. In 2018, the court was informed that the defendant remained incompetent but would likely regain competency with continued treatment and medication. The commitment was again extended without defense objection. In 2019, the treating psychologist reported that the defendant had responded well to treatment and was close to competency, but the defendant refused to consistently comply with medication. The doctor sought an order permitting forced medication as needed to restore his competency. The district court ultimately found that involuntary medication was appropriate and entered that order along with an extension of commitment. That order was appealed, and the Fourth Circuit stayed the order pending resolution of

the appeal. Around two years later, the Government sought a remand to the district court, which was granted. The district court again concluded that involuntary treatment was appropriate, and the defendant again appealed, leading to the present matter. Analyzing the *Sell* factors, the court affirmed. While the defendant has been in custody for over five years, the Government's interest in prosecuting him for child pornography offenses was significant. The offenses were more serious than mere possession of child pornography—the defendant was charged with two counts of soliciting people he believed to be minors to create child pornography, offenses the court categorized as "grave by any measure." *Tucker* Slip op. at 13. Consequently, it was unlikely that the defendant would have completed any sentence imposed as a result of the charges at this point in time—two of his charges carry 15-year minimum sentences in the event of conviction. The overall length of time of commitment was considerable, but the defendant forfeited or waived his challenge to much of that time by failing to object to earlier extensions, by seeking continuances, and by seeking multiple stays pending appeals. The court therefore authorized the involuntary medication order and extended the period of commitment once more to attempt restoration while cautioning the Government against further extensions. In the court's words:

Given the deferential standards of review, we conclude the district court committed no reversible error in deciding an involuntary medication order was warranted and finding it appropriate to grant one final four-month period of confinement to attempt to restore Tucker's competency. We emphasize, however, that '[a]t some point [the government] can't keep trying and failing and trying and failing, hoping to get it right,' and we trust no further extensions will be sought once the current appeal is finally resolved. *Id*. at 17-18.

Dismissal with Leave and Reinstatement

District Attorney holds exclusive discretionary power to reinstate criminal charges dismissed with leave; trial court does not have authority to compel district attorney to reinstate charges dismissed with leave

State v. Diaz-Tomas, ___ N.C. ___; 2022-NCSC-115 (Nov. 4, 2022). In this Wake County case, the Supreme Court affirmed the Court of Appeals decision denying defendant's petition for writ of certiorari and dismissed as improvidently allowed issues related to defendant's petition for discretionary review and the denial of his petition for writ of mandamus.

This matter has a complicated procedural history as detailed on pages 4-10 of the slip opinion. Defendant was originally charged with driving while impaired and driving without an operator's license in April of 2015. Defendant failed to appear at his February 2016 hearing date; an order for arrest was issued and the State dismissed defendant's charges with leave under G.S. § 15A-932(a)(2). This meant defendant could not apply for or receive a driver's license from the DMV. Defendant was arrested in July of 2018, and given a new hearing date in November of 2018, but he again failed to appear. In December of 2018, defendant was arrested a second time, and given another new hearing date that same month. However, at the December 2018 hearing, the assistant DA declined reinstate the 2015 charges, leading to defendant filing several motions and petitions to force the district attorney's office to reinstate his charges and bring them to a hearing. After defendant's motions were denied by the district court, and his writ for certiorari was denied by the superior court and the Court of Appeals, the matter reached the Supreme Court.

The court first established the broad discretion of district attorneys, as "[s]ettled principles of statutory construction constrain this Court to hold that the use of the word 'may' in N.C.G.S. § 15A-932(d) grants exclusive and discretionary power to the State's district attorneys to reinstate criminal charges once those charges have been dismissed with leave . . . ." Slip op. at 13. Due to this broad authority, the court held that district attorneys could not be compelled to reinstate charges. The court next turned to the authority of the trial court, explaining that "despite a trial court's wide and entrenched authority to govern proceedings before it as the trial court manages various and sundry matters," no precedent supported permitting the trial court to direct the district attorney in this discretionary area. *Id*. at 16. Because the district attorney held discretionary authority to reinstate the charges, and the trial court could not interfere with the constitutional and statutory authority of the district attorney, the court affirmed the denial of defendant's motions for reinstatement and petition for writ of certiorari. [Shea Denning blogged about this case here.]

Right to Counsel

Defendant did not "effectively waive" her right to counsel; forfeiture of counsel requires "egregious misconduct" by defendant

State v. Atwell, 2022-NCSC-135, ___ N.C. ___ (Dec. 16, 2022). In this Union County case, the Supreme Court reversed the Court of Appeals decision that the defendant effectively waived her right to counsel and remanded the case for a new trial.

The defendant was subject to a Domestic Violence Prevention Order (DVPO) entered against her in 2013; the terms of the order required her to surrender all firearms and ammunition in her position and forbid her from possessing a firearm in the future, with a possible Class H felony for violation. In 2017, the defendant attempted to buy a firearm in Tennessee while still subject to the DVPO and was indicted for this violation. Initially the defendant was represented by counsel, but over the course of 2018 and 2019, the defendant repeatedly filed pro se motions to remove counsel and motions to dismiss. The trial court appointed five different attorneys; three withdrew from the representation, and the defendant filed motions to remove counsel against the other two. The matter finally reached trial in September of 2019, where the defendant was not represented by counsel. Before trial, the court inquired whether she was going to hire private counsel. She explained that she could not afford an attorney and wished for appointed counsel. The trial court refused this request and determined that the defendant had waived her right to counsel. The matter went to trial and she was convicted, having been mostly absent from the trial proceedings.

Examining the Court of Appeals opinion, the Supreme Court noted that the panel was inconsistent when discussing the issue of waiver of counsel verses forfeiture of counsel, an issue that was also present in the trial court's decision. The court explained that "waiver of counsel is a voluntary decision by a defendant and that where a defendant seeks but is denied appointed counsel, a waiver analysis upon appeal is both unnecessary and inappropriate." Slip op. at 16. Here the trial court, despite saying defendant "waived" counsel, interpreted this as forfeiture of counsel, as the defendant clearly expressed a desire for counsel at the pre-trial hearing and did not sign a waiver of counsel form at that time (although she had signed several waivers prior to her request for a new attorney).

Having established that the proper analysis was forfeiture, not waiver, the court explained the "egregious misconduct" standard a trial court must find before imposing forfeiture of counsel from *State*

v. Harvin, 2022-NCSC-111, and *State v. Simpkins*, 373 N.C. 530 (2020). Slip op. at 18. The court did not find such egregious misconduct in this case, explaining that the defendant was not abusive or disruptive, and that the many delays and substitutions of counsel were not clearly attributable to her. Instead, the record showed legitimate disputes on defense strategy with one attorney and was silent as to the reasons for withdrawal for the others. Additionally, the State did not move to set the matter for hearing until many months after the indictment, meaning that defense counsel issues did not cause significant delay to the proceedings. [Brittany Williams blogged about this case, here.]

Chief Justice Newby, joined by Justices Berger and Barringer, dissented and would have found that the defendant forfeited her right to counsel by delaying the trial proceedings. *Id*. at 28.

Defense counsel's statements during closing argument represented admissions of guilt requiring consent from defendant

State v. Hester, 2022-NCCOA-906, ___ N.C. App. ___ (Dec. 29, 2022). In this Duplin County case, the Court of Appeals remanded the case to the trial court for an evidentiary hearing on whether the defendant consented to defense counsel's admissions of guilt.

The defendant was charged with breaking or entering, larceny, and possession of stolen goods after a series of break-ins in 2017 at a power plant that was not operational. At trial, defense counsel exhibited issues with hearing loss. The defendant also noted the issue of hearing loss before testifying in his own defense, although the trial court did not take any action on the information. During closing arguments, defense counsel said "Let me level with you. I agree it's not good to be caught in the act while being in somebody else's building without consent," and mentioned "caught" and "in the act" several times, referring to the defendant being on the power plant property. Slip op. at 5.

Reviewing the defendant's arguments on appeal, the court agreed that defense counsel's statements that the defendant possessed stolen keys from the plant and entered the plant's warehouse without permission amounted to admissions of guilt for lesser included misdemeanors of breaking or entering and possession of stolen goods. The court noted that under *State v. Harbison*, 315 N.C. 175 (1985), and subsequent precedent, a violation of the defendant's constitutional right to counsel occurs whenever defense counsel expressly or impliedly admits guilt without the defendant's consent, and this violation does not require a showing a prejudice to justify a new trial. *Id*. at 8-9. Here, defense counsel made admissions of guilt, but the record did not reflect any consent from the defendant. As a result, the Court of Appeals remanded to the trial court for an evidentiary hearing on whether the defendant consented in advance to these concessions of guilt.

Right to a Public Trial

Trial court failed to utilize *Waller* test or make sufficient findings of fact to support closure of courtroom; city ordinance was not properly pleaded where charging documents did not include the caption of the ordinance

State v. Miller, COA22-561, ___ N.C. App. ___ (Feb. 21, 2023). In this Union County case, the defendant appealed his convictions for attempted first degree murder, going armed to the terror of the people, possession of a handgun by a minor, and discharge of a firearm within city limits, arguing error by insufficient findings to justify closure of the courtroom and by denial of his motion to dismiss the

discharge of a firearm charge. The Court of Appeals agreed, remanding the case and vacating the discharge of a firearm conviction.

In August of 2018, the defendant was armed and riding in a car with other armed occupants near a neighborhood basketball court. Defendant was seated in the front passenger seat, and when the vehicle passed a group of pedestrians walking to the basketball court, defendant leaned out the window and began shooting. One bullet hit a pedestrian but did not kill him. During the trial, the prosecution moved to close the courtroom during the testimony of two witnesses, the victim and another witness who was present during the shooting, arguing this was necessary to prevent intimidation. The trial court granted this motion over defendant's objection, but allowed direct relatives of defendant and the lead investigator to be present during the testimony.

The Court of Appeals found that the trial court failed to utilize the four-part test from *Waller v. Georgia*, 467 U.S. 39 (1984), and failed to make findings sufficient for review to support closing the courtroom. The *Waller* test required the trial court to determine whether "'the party seeking closure has advanced an overriding interest that is likely to be prejudiced, order closure no broader than necessary to protect that interest, consider reasonable alternatives to closing the procedure, and make findings adequate to support the closure.'" Slip op. at 4, quoting *State v. Jenkins*, 115 N.C. App. 520, 525 (1994). In the current case, the trial court did not use this test and made no written findings of fact at all. As a result, the Court of Appeals remanded for a hearing on the propriety of the closure using the *Waller* test. [Shea Denning blogged out this issue in the case, here.]

Turning to defendant's motion to dismiss, the court found that the arrest warrant and indictment were both defective as they did not contain the caption of the relevant ordinance. Under G.S. 160A-79(a), "a city ordinance . . . must be pleaded by both section number and caption." *Id*. at 8. Here, the charging documents only reference the Monroe city ordinance by number, and failed to include the caption "Firearms and other weapons." The court found the State failed to prove the ordinance at trial, and vacated defendant's conviction for the discharge of a firearm within city limits charge.

Jury Selection

Trial court properly concluded that defendant did not prove purposeful discrimination under the third step of *Batson* inquiry

State v. Hobbs, 263PA18-2, ___ N.C. ___ (Apr. 6, 2023). In this Cumberland County case, the Supreme Court affirmed the trial court's determination that under the inquiry established by *Batson v. Kentucky*, 476 U.S. 79 (1986), no purposeful discrimination in jury selection occurred when the State used peremptory challenges to strike three black jurors.

This matter was originally considered in *State v. Hobbs (Hobbs I)*, 374 N.C. 345 (2020), where the Supreme Court remanded to the trial court with specific directions to conduct a hearing under the third step of the three-step *Batson* inquiry to determine whether defendant had proven purposeful discrimination. After the hearing, the trial court concluded defendant had not proven purposeful discrimination. In the current opinion, the Supreme Court considered whether the trial court's conclusions were "clearly erroneous."

The Supreme Court first noted that under both the U.S. and North Carolina constitutions the striking of potential jurors for race through peremptory challenges is forbidden, and that it has expressly adopted the *Batson* three-prong test for review of peremptory challenges. Here only the third prong was at issue, where the trial court "determines whether the defendant, who has the burden of proof, established that the prosecutor acted with purposeful discrimination." Slip op. at 4. The court then explained the basis of its review and detailed the instructions from *Hobbs I* for the trial court to consider when performing its analysis. Walking through the evidence for each stricken juror, the court found that the trial court considered the relevant factors and "conducted side-by-side juror comparisons of the three excused prospective jurors at issue with similarly situated prospective white jurors whom the State did not strike," creating an analysis for each juror. *Id*. at 9.

In addition to the evidence regarding specific jurors, the court pointed out that "the State's acceptance rate of black jurors was 50% after the State excused [the last juror under consideration] which did not support a finding of purposeful discrimination." *Id*. at 20. Reviewing additional evidence, the court noted that "the trial court found that the relevant history of the State's peremptory strikes in the jurisdiction was flawed and therefore misleading." *Id*. This referred to a study by Michigan State University regarding the use of peremptory strikes in North Carolina. The trial court found that all of the *Batson* challenges in cases referenced in the study were rejected by North Carolina appellate courts, and the study had three potential flaws:

> (1) the study identified juror characteristics without input from prosecutors, thus failing to reflect how prosecutors evaluate various characteristics; (2) recent law school graduates with little to no experience in jury selection evaluated the juror characteristics; and (3) the recent law school graduates conducted their study solely based on trial transcripts rather than assessing juror demeanor and credibility in person. *Id*. at 8-9.

Based on the court's review of the entire evidence, it affirmed the trial court's conclusion of no *Batson* violation.

Justice Earls, joined by Justice Morgan, dissented, and would have found a *Batson* violation. *Id*. at 22.

Lay and Expert Opinion

Testimony by an expert that sexual assault victim "did not appear to be coached" was admissible; evidence from school records was properly excluded under Rule 403; video showing equipment related to a polygraph examination was admissible

State v. Collins, COA22-488, ___ N.C. App. ___ (April 4, 2023). In this Rockingham County case, defendant appealed his convictions for statutory rape, indecent liberties with a child, and sex act by a substitute parent or guardian, arguing error in admitting expert testimony that the victim's testimony was not coached, in granting a motion *in limine* preventing defendant from cross-examining the victim about her elementary school records, and in admitting a video of defendant's interrogation showing equipment related to a polygraph examination. The Court of Appeals found no error.

In 2021, defendant was brought to trial for the statutory rape of his granddaughter in 2017, when she was 11 years old. At trial, a forensic interviewer testified, over defendant's objection, that he saw no indication that the victim was coached. The trial court also granted a motion *in limine* to prevent

defendant from cross-examining the victim regarding school records from when she was in kindergarten through second grade showing conduct allegedly reflecting her propensity for untruthfulness. The conduct was behavior such as cheating on a test and stealing a pen.

The Court of Appeals noted "[o]ur Supreme Court has held that 'an expert may not testify that a prosecuting child-witness in a sexual abuse trial is believable [or] is not lying about the alleged sexual assault.'" Slip Op. at 2, quoting *State v. Baymon*, 336 N.C. 748, 754 (1994). However, the court could not point to a published case regarding a statement about coaching like the one in question here. Because there was no controlling opinion on the matter, the court engaged in a predictive exercise and held, "[b]ased upon our Supreme Court's statement in *Baymon*, we conclude that it was not error for the trial court to allow expert testimony that [the victim] was not coached." *Id*. at 3.

The court also found no error with the trial court's conclusions regarding the admissibility of the victim's childhood records under Rule of Evidence 403. The court explained that the evidence showed behavior that was too remote in time and only marginally probative regarding truthfulness. Finally, the court found no error with the interrogation video, explaining that while it is well established that polygraph evidence is not admissible, the video in question did not show a polygraph examination. Instead, the video merely showed "miscellaneous items on the table and not the actual polygraph evidence," and all references to a polygraph examination were redacted before being shown to the jury. *Id*. at 5-6.

Expert fingerprint testimony was admitted without proper foundation but was not represent prejudicial error

State v. Graham, 2023-NCCOA-6, ___ N.C. App. ___ (Jan. 17, 2023). In this Mecklenburg County case, defendant appealed his convictions for breaking and entering, larceny, and attaining habitual breaking and entering offender status, arguing error in admission of expert fingerprint testimony without the necessary foundation, among other issues. The Court of Appeals found no prejudicial error.

The court noted that the defendant did not object at trial to the expert testimony, meaning the review was under plain error. The court examined the testimony of two experts under Rule of Evidence 702, finding that the fingerprint expert testimony "[did] not clearly indicate that [state's expert] used the comparison process he described in his earlier testimony when he compared [d]efendant's ink print card to the latent fingerprints recovered at the crime scene." *Id*. at 28. However, the court found no prejudicial error in admitting the testimony, as properly admitted DNA evidence also tied defendant to the crime.

Crimes

Disorderly Conduct

Disorderly conduct at school and disturbing schools laws failed to give fair notice of prohibited conduct and were unconstitutionally vague; South Carolina enjoined from further enforcement and ordered to expunge relevant records

Carolina Youth Action Project v. Wilson, 60 F.4th 770 (Feb. 22, 2023). Plaintiffs in the District of South Carolina obtained class certification to challenge two state criminal laws aimed at school misbehavior. The class consisted of all middle and high school-age children in the state, as well as any among that

group who had a record of referral to the Department of Juvenile Justice ("DJJ") for alleged violations of the laws. One law prohibited "disorderly" or "boisterous" conduct and "profane" or "obscene" language within hearing of a school. The other law prohibited the willful or unnecessary "interference with" or "disturbance of" teachers or students in any way or place, along with prohibiting "obnoxious" acts at schools. Between 2014 and 2020, more than 3,700 students aged between 8 and 18 were referred to DJJ for consideration of charges under the first law. Between 2010 and 2016, over 9,500 students aged between 7 and 18 were referred to DJJ for consideration of charges under the second law. While the State did not prosecute each referral, both DJJ and the local prosecutor kept a record of each referral, which could be used in the future for various purposes. The case was initially dismissed for lack of standing. The Fourth Circuit reversed. *Kenny v. Wilson*, 885 F.3d 280, 291 (4th Cir. 2018). On remand, the district court certified the class of plaintiffs and ultimately granted summary judgment to them. It found that the challenged laws were unconstitutionally vague and entered a permanent injunction prohibiting the State from enforcing them against members of the class. It also ordered that the records of the referrals to DJJ of class members be destroyed except as otherwise permitted under state expunction rules. The State appealed, and a divided Fourth Circuit affirmed.

A law is void for vagueness as a matter of the Due Process Clause if it fails to give an ordinary person sufficient notice of the prohibited conduct at issue, or if the law is so vague as to allow for arbitrary or discriminatory enforcement. *Manning v. Caldwell for* City of Roanoke, 930 F.3d 264, 272 (4th Cir. 2019) (en banc). Criminal laws are subject to a heightened standard of review for vagueness challenges. *Carolina Youth* Slip op. at 14 (citation omitted). The majority agreed that both laws failed to provide sufficient notice of prohibited conduct. As to the disorderly conduct at schools law, the court observed that a person of ordinary intelligence would not be able to determine whether certain "disorderly" or "boisterous" conduct in a school was merely a disciplinary matter versus a criminal one. In the court's words:

> Based solely on the dictionary definitions of the statutory terms—particularly disorderly and boisterous—it is hard to escape the conclusion that any person passing a schoolyard during recess is likely witnessing a large-scale crime scene. *Id*. at 18.

The record before the district court showed officers could not meaningfully articulate objective standards under which the law was enforced on the ground—using instead a "glorified smell test." *Id*. at 20. The evidence also showed a significant racial disparity in enforcement, with Black children being referred for violations of the law at around seven times the rate of referrals for White children. "The Constitution forbids this type of inequitable, freewheeling approach." *Id*. at 21.

The disturbing schools law was likewise unconstitutional. "It is hard to know where to begin with the vagueness problems with this statute." *Id*. at 24. The court found that the law lacked meaningful standards from which criminal "unnecessary disturbances" and "obnoxious acts" at a school could be distinguished from non-criminal acts. According to the court:

> The Supreme Court has struck down statutes that tied criminal culpability to whether the defendant's conduct was annoying or indecent—wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings. We do the same here. *Id*. at 26 (cleaned up).

The court agreed with the trial court as to the remedy, noting that the U.S Supreme Court and others have acknowledged the right to class-wide expungement at times. The district court was therefore affirmed in all respects. [Phil Dixon blogged about this case, here.]

Judge Neimeyer dissented. He would have found that no plaintiff had standing to seek expungement, and, on the merits, that the challenged laws were not unconstitutionally vague.

Drugs

Officer's testimony that "everyone" assumed substance was cocaine did not create a question regarding defendant's guilty knowledge that he possessed fentanyl, and did not justify providing a guilty knowledge instruction to the jury

State v. Hammond, COA22-715, ___ N.C. App. ___ (March 7, 2023). In this Henderson County case, defendant appealed his conviction for trafficking opium or heroin by possession, arguing error in the denial of his requested instruction that the jury must find he knew what he possessed was fentanyl. The Court of Appeals found no error.

In March of 2018 the Henderson County Sheriff's Office executed a warrant for defendant's arrest at a home in Fletcher. During the arrest, an officer smelled marijuana and heard a toilet running in the house, leading the police to obtain a search warrant for the entire home. During this search, officers found a plastic bag with white powder inside, as well as some white powder caked around the rim of a toilet. Officers performed a field test on the substance which came back positive for cocaine, but when lab tested, the substance turned out to be fentanyl. At trial, one of the officers testified that "everyone" at the scene believed the substance they found was cocaine on the day of the search. Defendant chose not to testify during the trial and had previously refused to give a statement when arrested.

Turning to defendant's arguments, the court found that no evidence in the record supported defendant's contention that he lacked guilty knowledge the substance was fentanyl. Defendant pointed to the officer's testimony that "everyone" believed the substance was cocaine, but "[r]ead in context, it is apparent that [the officer] was referring to the knowledge of the officers who initially arrested [defendant and another suspect] for possession of cocaine, as the excerpted testimony immediately follows a lengthy discussion of their rationale for doing so." Slip op. at 8. Because defendant did not testify and no other evidence supported his contention that he lacked knowledge, his circumstances differed from other cases where a defendant was entitled to a guilty knowledge instruction. The court explained that evidence of a crime lacking specific intent, like trafficking by possession, creates a presumption that defendant has the required guilty knowledge; unless other evidence in the record calls this presumption into question, a jury does not have to be instructed regarding guilty knowledge. *Id*. at 9. [Jeff Welty blogged about the knowledge element of drug offenses, here.]

Although defendant was in a separate car from the contraband, he was liable under the acting-in-concert theory for purposes of trafficking by possession and trafficking by transportation charges

State v. Christian, COA22-299, ___ N.C. App. ___ (March 7, 2023). In this Cleveland County case, defendant appealed his convictions for trafficking methamphetamine, arguing that his motion to dismiss should have been granted as he was not physically present when his travel companion was found in

possession of the contraband. The Court of Appeals affirmed the denial of defendant's motion to dismiss.

In February of 2020, an associate of defendant was arrested for possession of drugs and chose to assist police with their investigation of defendant in return for leniency. Defendant had asked the associate for assistance in bringing drugs from Georgia to North Carolina, and the police assisted the associate in developing a plan where they would drive together to pick up drugs for sale in North Carolina. The plan would conclude with the pair being pulled over as they re-entered the state. However, as the pair returned from Atlanta with the drugs, they became tired, and defendant called a female friend to assist them with driving from South Carolina to their destination in North Carolina. The female friend arrived with another woman, and the pair split up, leaving defendant's associate in the car with the contraband and one woman, and defendant in a different car with the other woman. They were both pulled over when they passed into North Carolina, traveling three to five miles apart. At trial, defense counsel moved to dismiss the charges at the close of State's evidence and again at the close of all evidence, but both motions were denied.

The Court of Appeals first explained that a person may be charged with a crime in North Carolina even if part of the crime occurred elsewhere, as long as at least one of the essential acts forming the crime occurred in North Carolina, and the person "has not been placed in jeopardy for the identical offense in another state." Slip op. at 5, quoting G.S. 15A-134. The court then moved to defendant's arguments that he did not possess or transport the drugs while in North Carolina so he could not be charged with trafficking by possession or trafficking by transportation.

Although defendant did not have actual possession of the drugs in North Carolina, the court noted that the "knowing possession" element of trafficking by possession could also be shown by proving that "the defendant acted in concert with another to commit the crime." Slip op. at 6, quoting *State v. Reid*, 151 N.C. App. 420, 428 (2002). Along with the evidence in the current case showing the defendant acted in concert with his associate, the trafficking charge required showing that defendant was present when the offense occurred. Here, after exploring the applicable case law, the court found that defendant was "constructively present" because, although "parties in the present case were a few miles away from each other, they were not so far away that defendant could not render aid or encouragement [to his associate]." *Id*. at 11.

Moving to the trafficking by transportation charge, the court noted that "[a]s with trafficking by possession, 'trafficking by transport can be proved by an acting in concert theory.'" *Id*. at 13, quoting *State v. Ambriz*, 880 S.E.2d 449, 459 (N.C. App. 2022). The court explained that "[f]or the same reasons we hold that defendant's motion to dismiss the trafficking by possession charge was properly denied, we also hold that the motion to dismiss the trafficking by transportation charge was properly denied." *Id*.

Failure to Register

Defendant's actions when reporting his change of address and homeless status to the sex offender registry did not show an intent to deceive, justifying dismissal of the charge

State v. Lamp, 2022-NCSC-141, ___ N.C. ___ (Dec. 16, 2022). In this Iredell County case, the Supreme Court reversed the Court of Appeals majority decision affirming defendant's conviction for failure to comply with the sex offender registry.

Defendant is a registered sex offender, and in June 2019 he registered as a homeless in Iredell County. Because of the county's requirements for homeless offenders, he had to appear every Monday, Wednesday, and Friday to sign a check-in log at the sheriff's office. On June 21, 2019, defendant moved into a friend's apartment, but the apartment was under eviction notice and defendant vacated this apartment sometime on the morning of June 26, 2019. Defendant reported all of this information at the sheriff's office and signed a form showing his change of address on June 21; however, due to the way the form was set up, there was no way to indicate defendant planned to vacate on June 26. Instead, defendant signed the homeless check-in log. A sheriff's deputy went through and attempted to verify this address, unaware that defendant had since vacated; compounding the confusion, the deputy went to the incorrect address, but did not attempt to contact defendant by phone. As a result, the deputy requested a warrant for defendant's arrest, defendant was indicted, and went to trial for failure to comply with the registry requirements. At trial defendant moved to dismiss the charge, arguing that there was no evidence of intent to deceive, but the trial court denied the motion.

Examining the appeal, the Supreme Court agreed with defendant that the record did not contain sufficient evidence of defendant's intent to deceive. The court examined each piece of evidence identified by the Court of Appeals majority, and explained that none of the evidence, even in the light most favorable to the State, supported denial of defendant's motion to dismiss. Instead, the court noted the record did not show any clear intent, and that the State's theory of why defendant would be attempting to deceive the sheriff's office (because he couldn't say he was homeless) made no sense, as defendant willfully provided his old address and signed the homeless check-in log at the sheriff's office. Slip op. at 16.

Justice Barringer, joined by Chief Justice Newby and Justice Berger, dissented and would have held that sufficient evidence in the record supported the denial of defendant's motion to dismiss. *Id*. at 18.

Fleeing to Elude

Specific description of lawful duty being performed by officer not necessary for charge of speeding to elude arrest

State v. McVay, 2022-NCCOA-907, ___ N.C. App. ___ (Dec. 29, 2022). In this Mecklenburg County case, the Court of Appeals found no error by the trial court when denying defendant's motion to dismiss for insufficient evidence.

In November of 2016, a Charlotte-Mecklenburg police officer received a call from dispatch to look out for a white sedan that had been involved in a shooting. Shortly thereafter, the officer observed defendant speed through a stop sign, and the officer followed. Defendant continued to run stop signs, and after the officer attempted to pull him over, defendant led officers on a high-speed pursuit through residential areas until he was cut off by a stopped train at a railroad crossing. Defendant was indicted and eventually convicted for felonious speeding to elude arrest.

On appeal, defendant argued that the trial court erred by failing to dismiss the charge, because the State did not admit sufficient evidence showing the officer was lawfully performing his duties when attempting to arrest defendant. The crux of defendant's argument relied on the language of the indictment, specifically that the officer was attempting to arrest defendant for discharging a firearm into an occupied vehicle. Although defendant argued that evidence had to show this was the actual duty being performed by the officer, the court explained that the description of the officer's duty in the indictment was surplusage. Although the State needed to prove (1) probable cause to arrest defendant, and (2) that the officer was in the lawful discharge of his duties, it did not need to specifically describe the duties as that was not an essential element of the crime, and here the court found ample evidence of (1) and (2) to sustain the conviction. Slip op. at 9-10. The court also found that defendant failed to preserve his jury instruction request on the officer's specific duty because the request was not submitted in writing.

Homicide

Failure to provide jury instruction on involuntary manslaughter represented error justifying new trial; jury finding defendant's offense as "especially heinous, atrocious, or cruel" did not conclusively represent a finding of malice for the offense

State v. Brichikov, 2022-NCSC-140, ___ N.C. ___ (Dec. 16, 2022). In this Wake County case, the Supreme Court affirmed the Court of Appeals decision granting defendant a new trial because the trial court declined to provide his requested jury instruction on involuntary manslaughter.

In 2018, defendant met his wife at a motel in Raleigh known for drug use and illegal activity; both defendant and his wife were known to be heavy drug users, and defendant's wife had just been released from the hospital after an overdose that resulted in an injury to the back of her head. After a night of apparent drug use, defendant fled the motel for Wilmington, and defendant's wife was found dead in the room they occupied. An autopsy found blunt force trauma to her face, head, neck, and extremities, missing and broken teeth, atherosclerosis of her heart, and cocaine metabolites and fentanyl in her system. Defendant conceded that he assaulted his wife during closing arguments. Defense counsel requested jury instructions on voluntary and involuntary manslaughter, including involuntary manslaughter under a theory of negligent omission, arguing that the victim may have died from defendant's failure to render or obtain aid for her after an overdose. The trial court did not provide instructions on either voluntary or involuntary manslaughter, over defense counsel's objections.

On appeal, the Supreme Court considered the issues raised by the Court of Appeals dissent, (1) whether the trial court committed error by failing to provide an instruction on involuntary manslaughter, and (2) did any error represent prejudice "in light of the jury's finding that defendant's offense was 'especially heinous, atrocious, or cruel.'" Slip op. at 15. The court found that (1) the trial court erred because a juror could conclude "defendant had acted with culpable negligence in assaulting his wife and leaving her behind while she suffered a drug overdose or heart attack that was at least partially exacerbated by his actions, but that it was done without malice." *Id*. at 21. Exploring (2), the court explained "where a jury convicts a criminal defendant of second-degree murder in the absence of an instruction on a lesser included offense, appellate courts are not permitted to infer that there is no reasonable possibility that the jury would have convicted the defendant of the lesser included offense on the basis of that conviction." *Id*. at 22, citing *State v. Thacker*, 281 N.C. 447 (1972). The court did not find the "especially heinous, atrocious, or cruel" aggravating factor dispositive, as it noted "finding that a criminal defendant

committed a homicide offense in an especially heinous, atrocious, or cruel way does not require a finding that he acted with malice in bringing about his victim's death." *Id*. at 24. Instead, the court found prejudicial error in the lack of involuntary manslaughter instruction.

Justice Berger, joined by Chief Justice Newby and Justice Barringer, dissented and would have upheld defendant's conviction for second-degree murder. *Id*. at 27.

Sentencing defendant as Class B1 felon was appropriate where the jury found all three types of malice supporting the second-degree murder conviction; presence of depraved-heart malice did not create ambiguity justifying Class B2 felony sentencing

State v. Borum, 505PA20, ___ N.C. ___ (Apr. 6, 2023). In this Mecklenburg County case, the Supreme Court reversed an unpublished Court of Appeals decision and affirmed the trial court's sentencing of defendant at the Class B1 felony level for second-degree murder.

In February of 2019, defendant went on trial for first-degree murder for shooting a man during a protest. During the jury charge conference, the trial court explained the three theories of malice applicable to the case: actual malice, condition of mind malice, and depraved-heart malice. The verdict form required the jury to identify which type of malice supported the verdict. When the jury returned a verdict of guilty for second-degree murder, all three types of malice were checked on the verdict form. At sentencing, defendant's attorney argued that he should receive a Class B2 sentence, as depraved-heart malice was one of the three types of malice identified by the jury. The trial court disagreed, and sentenced defendant as Class B1. The Court of Appeals reversed this holding, determining the verdict was ambiguous and construing the ambiguity in favor of the defendant.

Reviewing defendant's appeal, the Supreme Court found no ambiguity in the jury's verdict. Explaining the applicable law under G.S. 14-17(b), the court noted that depraved-heart malice justified sentencing as Class B2, while the other two types of malice justified Class B1. Defendant argued that he should not be sentenced as Class B1 if there were facts supporting a Class B2 sentence. The court clarified the appropriate interpretation of the statute, holding that where "the jury's verdict unambiguously supports a second-degree murder conviction based on actual malice or condition of mind malice, a Class B1 sentence is required, even when depraved-heart malice is also found." *Id*. at 7. The language of the statute supported this conclusion, as "the statute plainly expresses that a person convicted of second-degree murder is only sentenced as a Class B2 felon where the malice necessary to prove the murder conviction is depraved-heart malice . . . this means that a Class B2 sentence is only appropriate where a second-degree murder conviction hinges on the jury's finding of depraved-heart malice." *Id*. at 11. The court explained that "[h]ere . . . depraved-heart malice is not necessary—or essential—to prove [defendant's] conviction because the jury also found that [defendant] acted with the two other forms of malice." *Id*. at 11-12.

Impaired Driving

Exigent circumstances justified warrantless blood draw; evidence of impairing substances in defendant's blood represented sufficient evidence to dismiss motion

State v. Cannon, COA22-572, ___ N.C. App. ___ (May 2, 2023). In this Edgecombe County case, defendant appealed his convictions for second-degree murder and aggravated serious injury by vehicle,

arguing error in the denial of his motion to suppress a warrantless blood draw and motion to dismiss for insufficient evidence. The Court of Appeals found no error and affirmed.

In June of 2015, defendant crossed the centerline of a highway and hit another vehicle head on, causing the death of one passenger. Officers responding to the scene interviewed defendant, and noted his responses seemed impaired and the presence of beer cans in his vehicle. A blood draw was performed at the hospital, although the officer ordering the draw did not read defendant his Chapter 20 implied consent rights or obtain a search warrant before the draw. The results of defendant's blood draw showed a benzodiazepine, a cocaine metabolite, two anti-depressants, an aerosol propellant, and a blood-alcohol level of 0.02.

Reviewing defendant's argument that no exigent circumstances supported the warrantless draw of his blood, the Court of Appeals first noted that defense counsel failed to object to the admission of the drug analysis performed on defendant's blood, meaning his arguments regarding that exhibit were overruled. The court then turned to the exigent circumstances exception to justify the warrantless search, noting that the investigation of the scene took significant time and defendant was not taken to the hospital until an hour and forty-five minutes afterwards. Acknowledging Supreme Court precedent "that the natural dissipation of alcohol in the bloodstream cannot, standing alone, create an exigency in a case of alleged impaired driving sufficient to justify conducting a blood test without a warrant," the court looked for additional justification in the current case. Slip Op. at 11. Here the court found such justification in the shift change occurring that would prevent the officer from having assistance, and the delay in going to obtain a warrant from the magistrate's office that would add an additional hour to the process. These circumstances supported the trial court's finding of exigent circumstances.

The court then turned to defendant's argument that insufficient evidence was admitted to establish he was impaired at the time of the accident. The record contained evidence that defendant had beer cans in his truck along with an aerosol can of Ultra Duster, and several witnesses testified as to defendant's demeanor and speech after the accident. The record also contained a blood analysis showing defendant had five separate impairing substances in his system at the time of the accident, "alcohol, benzyl ethylene (a cocaine metabolite), Diazepam (a benzodiazepine such as Valium), Citalopram (an anti-depressant) and Sertraline (another anti-depressant called "Zoloft")." *Id*. at 16. The court found that based on this evidence there was sufficient support for denying defendant's motion.

Incest

Niece-in-law is not a niece for purposes of criminal incest under North Carolina law

State v. Palacio, COA22-231, ___ N.C. App. ___ (Feb. 21, 2023). In this Onslow County case, defendant appealed his convictions for statutory rape, incest, and indecent liberties with a child. Defendant argued error in denying his motion to dismiss the incest charge (among other issues on appeal). The Court of Appeals did not find justification for a new trial or error with denial of the motion to suppress, but did vacate defendant's incest conviction and remanded the case for correction of the clerical error on the judgment and resentencing.

In 2018, the 15-year-old victim of defendant's sexual advances moved in with defendant and his wife in Jacksonville. The victim is the daughter of defendant's wife's sister, making her defendant's niece by affinity, not consanguinity. During several encounters, defendant made sexual advances and eventually

engaged in sexual contact with the victim, and she reported this conduct to her father, who called the police. Prior to his trial, defendant moved to suppress statements made to after his arrest by the Onslow County Sherriff's Office, but the trial court denied the motion.

The court agreed with defendant that "the term 'niece' in [G.S.] 14-178 does not include a niece-in-law for the purposes of incest." *Id*. The opinion explored the history of the incest statute and common law in North Carolina in extensive detail, coming to the conclusion that a niece-in-law does not represent a niece for purposes of criminal incest. As an illustration of the "absurd results" under North Carolina law if a niece by affinity were included, "an individual could marry their niece-in-law . . . [but] that individual would be guilty of incest if the marriage were consummated." *Id*. at 20. As a result, the court vacated defendant's incest conviction.

Kidnapping

Indictment did not specifically identify facilitating flight following commission of felony as purpose of kidnapping; underlying felony of rape was completed before the actions of kidnapping occurred, justifying dismissal

State v. Elder, 2022-NCSC-142, ___ N.C. ___ (Dec. 16, 2022). In this Warren County case, the Supreme Court affirmed the Court of Appeals decision finding that the second of defendant's two kidnapping charges lacked support in the record and should have been dismissed because the rape supporting the kidnapping charge had already concluded before the events of the second kidnapping.

The two kidnapping charges against defendant arose from the rape of an 80-year-old woman in 2007. Defendant, posing as a salesman, forced his way into the victim's home, robbed her of her cash, forced her from the kitchen into a bedroom, raped her, then tied her up and put her in a closet located in a second bedroom. The basis for the kidnapping charge at issue on appeal was tying up the victim and moving her from the bedroom where the rape occurred to the second bedroom closet. Defendant moved at trial to dismiss the charges for insufficiency of the evidence, and argued that there was no evidence in the record showing the second kidnapping occurred to facilitate the rape.

The Supreme Court agreed with the Court of Appeal majority that the record did not support the second kidnapping conviction. The court explored G.S. 14-39 and the relevant precedent regarding kidnapping, explaining that kidnapping is a specific intent crime and the State must allege one of the ten purposes listed in the statute and prove at least one of them at trial to support the conviction. Here, the State alleged "that defendant had moved the victim to the closet in the second bedroom *for the purpose of facilitating the commission of rape*." Slip op. at 30. At trial, the evidence showed that defendant moved the victim to the second bedroom "after he had raped her, with nothing that defendant did during that process having made it any easier to have committed the actual rape." *Id*. Because the State only alleged that defendant moved the victim for purposes of facilitating the rape, the court found that the second conviction was not supported by the evidence in the record. The court also rejected the State's arguments that *State v. Hall*, 305 N.C. 77 (1982) supported interpreting the crime as ongoing, overruling the portions of that opinion that would support interpreting the crime as ongoing. Slip op. at 42.

Chief Justice Newby, joined by Justice Berger, dissented and would have allowed the second kidnapping conviction to stand. *Id*. at 45.

Maintaining a Vehicle or Dwelling

Conviction for maintaining a dwelling resorted to by persons using methamphetamine required evidence that someone other than defendant resorted to his home to use methamphetamine

State v. Massey, 2023-NCCOA-7, ___ N.C. App. ___ (Jan. 17, 2023). In this Johnston County case, defendant appealed his controlled substance related convictions arguing error in (1) the admission of prior bad act evidence, and (2) denying his motion to dismiss some of the controlled substances charges. The Court of Appeals vacated and arrested the judgment for maintaining a dwelling resorted to by persons using methamphetamine, but otherwise found no error.

In March of 2019, Johnston County Sheriff's Office executed a search warrant on defendant's home, discovering methamphetamine in small baggies, marijuana, and paraphernalia consistent with selling drugs. Defendant was also noncompliant during the search and arrest, struggling with officers and attempting to flee.

The court found error with one of defendant's convictions, maintaining a dwelling resorted to by persons using methamphetamine under G.S. 90-108(a)(7), as the State did not offer sufficient evidence to show any other person actually used defendant's residence for consuming methamphetamine. The court noted that "the State failed to establish that anyone outside of defendant, used defendant's home to consume controlled substances . . . [d]efendant cannot 'resort' to his own residence." *Id*. at 18. The court rejected defendant's arguments with respect to his other controlled substance convictions, and arrested judgment instead of remanding the matter as defendant's convictions were consolidated and he received the lowest possible sentence in the mitigated range.

Solicitation

Defendant's intent to meet with fifteen-year-old before her sixteenth birthday could be inferred from the content of messages and prior conduct, justifying denial of his motion to dismiss

State v. Wilkinson, COA22-563, ___ N.C. App. ___ (March 7, 2023). In this New Hanover County case, defendant appealed his conviction for soliciting a child by computer, arguing error in denying his motion to dismiss for insufficient evidence. The Court of Appeals found no error.

In 2019, defendant began communicating with a fifteen-year-old girl online. Defendant was aware of her age, but still messaged her regarding sexual activity, and on at least four occasions the girl went to defendant's house. During these visits, defendant groped and kissed the girl. The FBI received a tip regarding defendant's behavior and observed a conversation in August of 2019 where defendant messaged the girl on snapchat. Defendant was indicted on several charges related to his contact with the fifteen-year-old, but during the trial moved to dismiss only the charge of soliciting a child by computer. After being convicted of indecent liberties with a child and several over related offenses, defendant appealed the sufficiency of the evidence regarding the soliciting a child by computer charge alone.

Defendant argued that the evidence for soliciting a child by computer was insufficient because the snapchat messages from August of 2019 did not arrange a plan or show a request to meet in person before the fifteen-year-old's sixteenth birthday. Defendant argued that this evidence failed to prove he

intended to "commit an unlawful sex act" as required by G.S. 14-202.3(a). Slip op. at 4-5. The Court of Appeals disagreed, explaining that although there was no explicit plan to meet in the snapchat messages, defendant's intent could be inferred from the content of the messages and his previous conduct with the girl when she came to his house. Because defendant's intent could be inferred regarding the necessary sex act, the court found no error when dismissing defendant's motion.

Verbal altercation did not negate first-degree murder charge when sufficient evidence showed premeditation and deliberation; trial court's refusal of defendant's "stand your ground" instruction was appropriate

State v. Walker, ___ N.C. App. ___; 2022-NCCOA-745 (Nov. 15, 2022). In this Guilford County case, defendant appealed his convictions for first-degree murder and possession of a firearm by a felon, arguing the trial court erred by (1) denying his motions to dismiss, (2) giving an improper jury instruction on deliberation, and (3) failing to give defendant's requested "stand your ground" instruction. The Court of Appeals found no error.

In 2017, defendant was at a house drinking alcohol with two other men when an argument broke out between defendant and the eventual victim. The victim yelled in defendant's face and spit on him, threatening to kill defendant the next time he saw him. Notably, the victim's threat was to kill defendant at a later time, and the victim stated he would not do so in the house where they were drinking. After the victim yelled in defendant's face, defendant drew a pistol and shot the victim six times; defendant fled the scene and did not turn himself in until 18 days later.

Reviewing the trial court's denial of defendant's motions to dismiss, the court noted that "evidence of a verbal altercation does not serve to negate a charge of first-degree murder when 'there was other evidence sufficient to support the jury's finding of both deliberation and premeditation.'" Slip op. at 8, quoting *State v. Watson*, 338 N.C. 168, 178 (1994). The court found such evidence in the instant case, with defendant's prior history of quarrels with the victim, the number of gunshots, defendant's fleeing the scene and remaining on the run for 18 days, and with defendant's statements to his girlfriend regarding his intention to deny the charges.

The court then turned to the disputed jury instructions, first explaining that defendant's request for an additional explanation on deliberation beyond that contained in Pattern Jury Instruction 206.1 was based on a dissenting opinion in *State v. Patterson*, 288 N.C. 553 (1975) which carried no force of law, and the instruction given contained adequate explanation of the meaning of "deliberation" for first-degree murder. Slip op. at 11. The court next considered the "stand your ground" instruction, comparing the trial court's instruction on self-defense to the version offered by defendant. Looking to *State v. Benner*, 380 N.C. 621 (2022), the court found that "the use of deadly force cannot be excessive and must still be proportional even when the defendant has no duty to retreat and is entitled to stand his ground." Slip op. at 14. The court also noted that the "stand your ground" statute requires proportionality in defendant's situation, explaining "[d]efendant could use deadly force against the victim under [N.C.G.S. §] 14-51.3(a) only if it was necessary to prevent imminent death or great bodily harm, i.e., if it was proportional." *Id*. at 16-17. Finally, the court determined that even if the trial court erred in failing to give the instruction, it was not prejudicial, as overwhelming evidence in the record showed that defendant was not under threat of imminent harm, noting "[l]ethal force is not a proportional response to being spit on." *Id*. at 17.

Sentencing and Probation

No abuse of discretion by trial court when declining to adjust defendant's mandatory minimum sentence downward for defendant's substantial assistance to law enforcement

State v. Robinson, 2022-NCSC-138, ___ N.C. ___ (Dec. 16, 2022). In this Guilford County case, the Supreme Court affirmed the Court of Appeals majority that found no abuse of discretion by the trial court when declining to adjust defendant's sentence downward for defendant's substantial assistance to law enforcement.

Defendant was first arrested in 2016 after a search of his home, leading to charges of trafficking a controlled substance and possession of a firearm by a felon. In 2018, after defendant was released but before the charges reached trial, defendant was arrested and indicted with a second trafficking charge. Defendant ultimately pleaded guilty to two trafficking a controlled substance charges and a firearm possession charge. During sentencing, defense counsel argued that defendant had provided substantial assistance to law enforcement and deserved a downward deviation in the required minimum sentences. The trial court acknowledged that defendant had provided substantial assistance but declined to lower the sentences, instead choosing to consolidate the three offenses to one sentence of 90 to 120 months.

The Supreme Court agreed with the opinion of the Court of Appeals majority that the actions of the trial court did not represent abuse of discretion, explaining that G.S. 90-95(h)(5) granted complete discretion to the trial court. The court noted two decision points, (1) whether the defendant provided substantial assistance, and (2) whether this assistance justified a downward adjustment in the mandatory minimum sentencing. Further, the court noted that this assistance could come from any case, not just the case for which the defendant was being charged; this was the basis of the dissent in the Court of Appeals opinion, but the Supreme Court did not find any evidence that the trial court misinterpreted this discretion. Slip op. at 15. Instead, the court found that the trial court appropriately exercised the discretion granted by the statute, as well as G.S. 15A-1340.15(b), to consolidate defendant's offenses.

Justice Earls dissented and would have remanded for resentencing. *Id*. at 20.

Vacating judgment without remand was appropriate remedy for failure to find good cause when revoking defendant's probation after expiration

State v. Lytle, COA22-675, ___ N.C. App. ___ (Feb. 21, 2023). In this Buncombe County case, defendant appealed an order revoking his probation, arguing the trial court failed to make a finding of good cause to revoke his probation along with other errors. The Court of Appeals agreed with defendant and vacated the trial court's judgment without remand.

Defendant's probation was revoked at a hearing held 700 days after the expiration of his probation term. The court noted that "the trial court failed to find good cause to revoke probation after the expiration of the probation period as required by [G.S.] 15A-1344(f)(3)." Slip op. at 2. Subsection (f)(3) requires a finding of good cause to support the trial court's jurisdiction to revoke probation; here, the record did not show any findings supporting good cause. Considering the appropriate remedy, the court applied *State v. Sasek*, 271 N.C. App. 568 (2020), holding that where no evidence in the record supports a finding of "reasonable efforts" by the state to hold a revocation hearing sooner, the appropriate

remedy for failure to make findings of good cause under G.S. 15A-1344(f)(3) is vacating the judgment without remand. Slip op. at 4.

Defendant waived right to 30-day notice of intent to prove prior record level point for offense while on parole/probation/post-release supervision

State v. Scott, COA22-326, ___ N.C. App. ___ (Feb. 7, 2023). In this New Hanover County case, defendant appealed his conviction for possessing a firearm as a felon, arguing improper sentencing (among other issues).

During sentencing for defendant, his prior record level was calculated with nine points for prior crimes and one additional point for committing a crime while on probation/parole/post-release supervision, leading to a level IV offender sentence. The defendant complained on appeal that the State failed to give the statutorily required written notice of intent to use the extra sentencing point. Rejecting this argument, the court agreed that under G.S. 15A-1340.14(b)(7), the State was obligated to provide defendant with notice of its intent to add a prior record level point by proving his offense was committed while on probation, parole, or post-release supervision. While the record here did not contain evidence that defendant received the required notice 30 days before trial, the court found that the exchange between defense counsel and the trial court represented waiver for purposes of the requirement. While the trial court did not confirm the receipt of notice through the colloquy required by G.S. 15A-1022.1, defense counsel acknowledged on the record having notice of the State's intent to use the point and agreed that the prior record level worksheet submitted by the State4 was accurate. This exchange between the trial court and defense counsel amounted to waiver of the issue, falling into the exception outlined in *State v. Marlow*, 229 N.C. App 593 (2013). Under these circumstances, "the trial court was not required to follow the precise procedures . . . as defendant acknowledged his status and violation by arrest in open court." Slip op. at 18.

Defendant's appeal was timely filed within 14 days of order from trial court; probation revocation hearing evidence not subject to Fourth and Fourteenth Amendment analysis

State v. Boyette, 2022-NCCOA-904, ___ N.C. App. ___ (Dec. 29, 2022). In this Caldwell County case, the Court of Appeals denied the state's motion to dismiss defendant's appeal as untimely, but found no error with the trial court's decision to revoke defendant's probation for violations related to a search of his truck.

In May of 2020, defendant was pulled over after sheriff's deputies observed him cross the center line while driving 55 mph in a 35 mph zone. During the traffic stop, the deputies determined that defendant was on probation for manufacturing methamphetamine and possessing stolen goods, and was subject to warrantless searches. The deputies searched defendant and his truck, finding a shotgun, smoking pipes and a baggie containing methamphetamine. Defendant's probation officer filed violation reports with the trial court; the trial court subsequently revoked defendant's probation and activated his sentences, leading to defendant's appeal.

The Court of Appeals first reviewed the state's motion to dismiss defendant's appeal as untimely, applying *State v. Oates*, 366 N.C. 264 (2012), as controlling precedent for criminal appeals. Slip op. at 7-8. The court explained that Rule of Appellate Procedure 4 requires an appeal to be filed either (1) orally at the time of trial, or (2) in writing within 14 days of the entry of the judgment or order. In the present

case, the trial court announced its decision to revoke defendant's probation on April 30, 2021, but did not enter an order until May 24, 2021, a delayed entry similar to the circumstances in *Oates*. Defendant filed a written notice of appeal on May 25, 2021, easily satisfying the 14-day requirement.

Turning to the substance of defendant's appeal, the court noted that the Fourth and Fourteenth Amendment protections and formal rules of evidence do not apply in a probation revocation hearing. *Id*. at 9. As a result, defendant's arguments that the evidence obtained by searching his truck should have been suppressed were invalid, and the trial court did not err by using this evidence as the basis for revocation of his probation.

Judge Jackson concurred in part A, the denial of state's motion to dismiss, but concurred only in the result as to part B, the evidence found in defendant's truck. *Id*. at 10.

Order of restitution was not abuse of discretion where defendant presented no evidence of her inability to repay; G.S. 15A-1340.36(a) does not specify procedure for hearing from defendant regarding ability to pay restitution

State v. Black, COA22-426, ___ N.C. App. ___ (Feb. 21, 2023). In this Buncombe County case, defendant argued error by the trial court when ordering that she pay restitution of $11,000. The Court of Appeals found no error and affirmed the judgment.

The current opinion represents the second time this matter came before the Court of Appeals; previously defendant appealed her convictions of possession of a stolen motor vehicle and attempted identify theft after pleading guilty, arguing mistakes in calculating her prior record level and error in ordering a civil judgment for attorney's fees without permitting defendant to be heard. In *State v. Black*, 276 N.C. App. 15 (2021), the court found error by the trial court on both issues, and remanded for resentencing while vacating the attorney's fees. After the trial court's hearing on remand, defendant brought the current appeal, arguing that the trial court erred because it did not hear from her or consider her ability to pay before ordering the $11,000 restitution.

The Court of Appeals disagreed with defendant, noting that defendant did not present evidence of her inability to pay the restitution, and the burden of proof was on her to demonstrate an inability to pay. The applicable statute, G.S. 15A-1340.36(a), requires the trial court to consider the defendant's ability to pay restitution, but does not require any specific testimony or disclosures from defendant. Looking at the record, the court found no abuse of discretion by the trial court, explaining that defendant even conceded "she previously stipulated to the $11,000 restitution amount set out in the May 2019 Restitution Worksheet." Slip op. at 6.

Emerging Issues in Fourth Amendment Law

By Sterling Rozear and Michele Goldman
Assistant Appellate Defenders

1

Technical Points

- Statute - Motions to Suppress can be brought for:
  - Violations of NC or US constitutions
    - No good faith exception for violations of the NC constitution. *State v. Carter*, 322 N.C. 709 (1988).
    - Substantial violations of the provisions of Chapter 15A.
  - Good faith exception for statutory violations.

2

Technical Points

- Specific timing requirements:
- Before trial unless exceptions apply. See NCGS § 15A-975 – 976
- Content requirements:
- In writing.
- Motion and Affidavit:
  - Motion: Must state grounds (Law) Constitutions (both) and substantial violation of 15A.
  - Affidavit: Must state facts that support the motion.
  - If based on "information and belief," it must state the source of information and basis for belief.
- Failure to comply with technical requirements can waive merits review.

3

Technical Points

- Preserve your MTS:
  - Guilty Pleas require two steps:
    - 1. In the plea arrangements on the TOP, write: "Client reserves the right to appeal the denial of his motion to suppress."
    - 2. AFTER judgment is entered, you say, "Client gives notice of appeal."
      - DO NOT SAY, "from the denial of his motion to suppress."
  - Trial:
    - Object when the evidence is introduced or discussed with a witness in front of the jury.
    - Failure to do so every time with every witness will waive or limit appellate review.

4

The Fourth Amendment

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

5

You Create the Emerging Issues

- Looking back to move ahead:
  - Original motivation for the protection
  - Original motivations for exceptions
- Distinguishing the future from the past:
  - New technology needs a new understanding of 4th Amendment protection.

6

Was there a search?

- **Reasonable Expectation of Privacy:**

A search occurs when the government violates a reasonable expectation of privacy.

Katz v. United States (1967) (phone booth conversation)

AND

- **Trespass Theory:**

A search occurs where the government physically occupies a constitutionally protected area to obtain information.

United States v. Jones (GPS)

7

Technology and the Fourth Amendment

"When confronting new concerns wrought by digital technology, this Court has been careful not to uncritically extend existing precedents." *Carpenter*

8

Important Cases

- *Riley v. California*:
  - Refused to expand the search-incident-to-arrest exception to cell phones.
  - Rationale underlying the exception not present.
  - Digital information vastly different than the content of a wallet.
- *Carpenter v. United States*:
  - Refused to extend 3P doctrine (obtaining records held by 3P is not a search) to CSLI.
  - *Carpenter* used the "mosaic" theory to find a privacy interest.
  - Read Gorsuch's dissent in *Carpenter*.
- Both cases refused to dogmatically apply old rules to new technology.
- Both recognized the weighty privacy interest created by new technology:
  - Cell phones hold intimate details of our lives;
  - CSLI can reveal the most personal details of our lives.

9

Looking Ahead

- A lot of new technology is being used by law enforcement. Constitutional challenges are percolating through the courts.
  - Automatic License Plate Readers
  - Pole Cameras
  - Geofence warrants

10

License Plate Readers

- What are they?
  - "Hot list" feature
  - Data collection = search?
  - Accessing location info = search?

Remember:

- The 4A secures "the privacies of life against arbitrary power" and is meant "to place obstacles in the way of a too permeating police surveillance."
- Raises the concerns expressed in *Carpenter* and *Jones* of allowing police to achieve a level of surveillance not possible before.
- Commonwealth v. McCarthy, 142 N.E.3d 1090 (Mass. 2020)

11

Pole Cameras

- *Moore v. United States*: PWC pending at SCOTUS
- Eight months continuous, warrantless surveillance of front of home.
- D.C. granted MTS. 1st Circuit panel reversed. En banc split 3 to 3 on 4A issue:
  - Three said, under *Carpenter*, long-term pole camera surveillance of a home is a search, but GF exception applies.
  - Three said no 4A search.

12

Geofence Warrants

- Warrants that direct Google to turn over information about account holders in a given area at a given time.
- Is it a search? 3P records; location info; like CSLI?
- Google has required three–step warrants.
- Valid?
  - Probable Cause; Particularity; Neutral Magistrate
- Two recent cases finding warrants invalid, but GF applied:
  - *People v. Meza*, 2023 Cal. App. LEXIS 282 (4/13/2023)
  - *United States v. Chatrie*, 590 F. Supp. 3d 901, 925 (E.D. Va. 2022)

13

Take Aways

- Raise both trespass and REP theories when you can.
- Trespass Theory: Think creatively, e.g. Electronic trespass of electrons from GPS device through body.
  - Benefits: You don't need REP, so doctrines that undermine REP might not apply.
- REP Theory: Think creatively.
  - Use the mosaic theory when it helps, focus on other things when you don't have it (e.g. single ping is a search because it gives location information not previously accessible and, possibly, in a protected space).

14

State v. Rogers, 2022-NCCOA-828 (unpublished)

- Searches of historical data require probable cause.
  - *Carpenter v. United States*, 201 L. Ed. 2d 507 (2018)
  - **Carpenter expressly did not answer the question of what standard applies for "real-time" data.**
- **Takeaway:**
  - Pretty much all data involved in cell phone tracking in NC is "historical data"
  - *State v. Perry*, 243 N.C. App. 156 (2015)
  - Look at the search order, and look at the data itself

15

State v. Rogers

- **Historical Data:**
  - The order itself in *Rogers* included "historical" data (30 days prior)
  - But also included what may be considered "real time" or "prospective" data (30 days following)
  - This data was *still* considered historical, because it was provided to officers approximately every fifteen minutes on a delay.
  - Under *Perry*, this was sufficient to make even "prospective" data historical.
- **Probable cause:**
  - Searches of historical data require probable cause. *Carpenter v. United States*, 201 L. Ed. 2d 507 (2018)

16

State v. Rogers

- **Some ways to get "creative"**
  - Jurisdiction – how does it work?
  - Pen registers – what do they do?

17

State v. Rogers

- **How does a LEO get CSLI data?**
  - Stored Communications Act:
    - Orders for certain types of data, including CSLI, may be issued based upon "reasonable grounds" to believe the data will be "relevant and material" to an ongoing criminal investigation.
  - Under *Carpenter*, probable cause is required for historical CSLI.
  - Orders in NC will also cite the pen register statutes: N.C.G.S. §§ 15A-260-264.

18

State v. Rogers

- **How does a LEO get CSLI data?**
  - 18 U.S.C. § 2703(d) – an order "may be issued by any court that is a court of competent jurisdiction."
  - But - "[i]n the case of a State governmental authority, such a court order shall not issue if prohibited by the law of such State."
- **So what is allowed by the law of NC?**

19

State v. Rogers

- **NC Law on Search Warrants:**
  - Under North Carolina law, a search warrant issued by a superior court judge is valid only "***throughout the State***." N.C.G.S. § 15A-243(a)(3).
  - Likewise, Article 12 states that "a superior court judge may enter an ex parte order authorizing the installation and use of a pen register or a trap and trace device **within the State**[.]" N.C.G.S. § 15A-263(a).
- **So what?**

20

State v. Rogers

- **Territorial Jurisdiction:**
  - Where will the 'search' be effected?
  - Who has the data? Are they within NC?
  - Who will be flipping the switch, or clicking the button (or whatever it is), to begin forwarding location data to the NC LEO?
  - What authority will make them comply if they refuse?
  - Is there proof that the search is being effected within NC?
  - Why are the Nebraska State Police involved?
  - How does a superior court judge in NC have the authority to direct the FBI, the US Marshals, the Secret Service or the Nebraska State Police to do anything?


[redacted]

21

State v. Rogers

- **Other concerns:**
  - N.C.G.S. § 15A-248 requires that a warrant be executed within 48 hours of issuance.
    - What if the service provider doesn't return the data within 48 hours?
  - N.C.G.S. § 15A-249 requires an officer to announce his or her presence "before entering the premises [to be searched]."
    - How does this work when the LEO is sending the search order to some unknown person at an international corporation?

22

State v. Rogers

- **This issue was litigated in *Rogers*, and the Court 'resolved' it in two sentences by holding:**
  - North Carolina courts are "competent" within the meaning of § 2703, and therefore are authorized by federal law to issue orders. *State v. Rogers*, 2022-NCCOA-828, ¶ 27
  - In other words, they didn't really grapple with the issue or resolve it.
  - They did not bother to explain how federal law is able to change the authority of state actors
  - **And *Rogers* is unpublished.**
    - So this issue is still viable.

23

State v. Rogers

- The other basis for these orders is N.C.G.S. §§ 15A-260-264.

- **Pen Registers and Trap and Trace**
  - What are they and what information do they provide?

24

State v. Rogers

- **Pen Registers – N.C.G.S. § 15A-260(1)**
  - "means a device which records or decodes electronic or other impulses which identify numbers dialed or otherwise transmitted on the telephone line to which such device is attached"
- **Trap and Trace – N.C.G.S. § 15A-260(2)**
  - "means a device which captures the incoming electronic or other impulses which identify the originating number of an instrument or device from which a wire or electronic communication was transmitted."
- **What's missing here?**

25

State v. Rogers

- Pen Registers and Trap and Trace devices, by definition, cannot provide **LOCATION** data.
- So N.C.G.S. §§ 15A-260-264 **cannot** serve as a basis for searches resulting in location data.

26

State v. Rogers

- This is where you come in:
  - "Although Defendant's definitional argument is compelling, he did not advance it below and we may not entertain it for the first time here." *Rogers*, 2022-NCCOA-828, ¶ 26.

27

State v. Rogers

- Be aware – the General Assembly seems to have heard about *Rogers*.
- House Bill 719, currently working its way through the house changes the definition of pen registers:

(5) Pen register. – A device which records or decodes electronic or other impulses which identify numbers dialed or otherwise transmitted on a telecommunications device and location data of a telecommunications device.

28

State v. Rogers

- HB 719 also requires probable cause for *all* location data, whether historical or real time:

(2) The judge finds all of the following:
a. That there is probable cause to believe that a felony offense or a Class A1 or Class 1 misdemeanor offense has been committed.
b. That there is probable cause to suspect that the person named or described in the affidavit committed the offense, if that person is known and can be named or described.
c. That the results of procedures involving pen register or trap and trace devices will be of material aid in determining whether the person named in the affidavit committed the offense and the applicant is also requesting location data.

29

State v. Rogers

- HB 719 –
  - Traditional pen registers still only require "reasonable suspicion" and "reasonable grounds"
  - And there is an exception for emergencies

30

State v. Rogers

- *It is all historical data*
- Territorial jurisdiction
- Pen registers can't do this
- Don't forget the State constitution!
- Be prepared to relitigate the magistrate's finding of PC (if there is one).
- Make sure the suppression hearing judge applies the right standard.
- Hold the State to its burden and highlight their failure to establish jurisdiction, authority, justification, etc.
- And if you know there's information affirmatively showing that the State cannot meet their burden, make a record of that.

31

Is It Hemp or Is It Weed?

- Legalization of hemp raise 4A issues:
  - RAS, PC based only on sight or smell?
  - No clear decision on whether sight/odor alone is enough.
  - All NC cases challenging PC and RAS based on odor or sight have found additional factors.
  - Keep raising it—even if our courts ultimately reject the argument.
    - Remind courts that "odor plus" is just "totality of the circumstances" where circumstances have changed.
      - An odor previously distinct to an illegal substance no longer is.
- *State v. Walters*, 2022-NCCOA-796
  - D argued dog sniff that will alert on hemp is a search under *Illinois v. Caballes*.
  - Court said no. Dog found meth, and meth is still illegal. D had no privacy interest in meth.
  - Missed the issue: Once an alert can be for legal activity, it is more like *Kyllo* (thermal imaging) than *Caballes*.

32

Medical Records in DWI Cases

- *State v. Kitchen*, 283 N.C. App. 282 (2022) (unpublished)
  - Defendant was IVC'd after DWI arrest.
  - State got the medical records to obtain a BAC.
    - Common practice to use a statute with lower standard to get these records.
  - Trial attorney filed a MTS claiming a 4A violation.
  - COA dodged the issue, finding there was no prejudice because of other evidence of impairment.

33

UNC | SCHOOL OF GOVERNMENT

FRIDAY, MAY 12

8:30-9:30 a.m.	**Facilitating Difficult Conversations [60 min.]** Colleen Byers, JD, MBA Colleen Byers Mediation, LLC, Winston-Salem, NC
9:30-10:30 a.m.	**Too Many Cooks in the Kitchen: How Others Complicate Our Ethical Duties [60 min. – ETHICS CREDIT]** Timothy Heinle, Teaching Assistant Professor Amanda Zimmer, Assistant Appellate Defender
10:30-10:45 a.m.	*Break*
10:45-11:45 a.m.	**Substance Use, Harm Reduction, and Treatment [60 min. – MHSA CREDIT]** Dr. Michael Baca-Atlas, M.D. Assistant Professor of Psychiatry, UNC Chapel Hill Chapel Hill, NC
11:45 a.m.-12:45 p.m.	**Emerging Issues in Digital Surveillance [60 min. – TECH CREDIT]** Larry Daniel, Technical Director – Digital Forensics Practice Envista Forensics, Morrisville, NC
12:45 p.m.	*Adjourn*

CLE HOURS
General: Up to 9.75
Ethics: Up to 2.0
MHSA: 1.0
Technology: 1.0
Total CLE Hours: 13.75

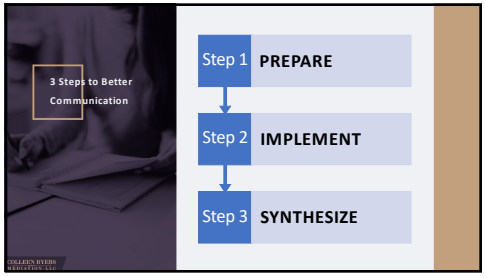
Final CLE hours are subject to change in accordance with NC State Bar Approval


Facilitating Difficult Conversations
Colleen L. Byers, JD, MBA
COLLEEN BYERS
MEDIATION, LLC

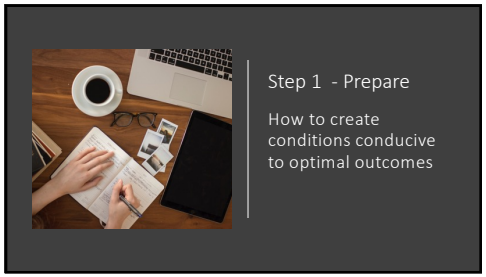
1


There comes a point where we need to stop pulling people out of the river. We need to go upstream and find out why they're falling in.
– Archbishop Desmond Tutu

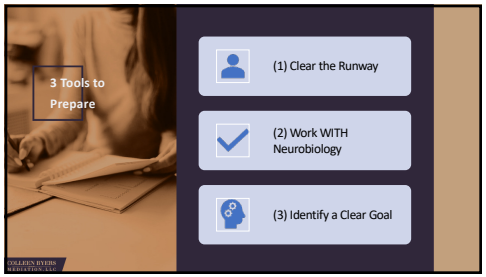
2


3 Steps to Better Communication
Step 1 PREPARE
Step 2 IMPLEMENT
Step 3 SYNTHESIZE

3


Step 1 - Prepare
How to create conditions conducive to optimal outcomes

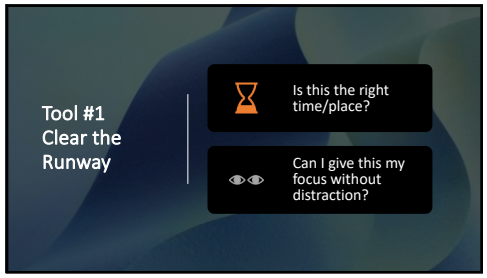
4


3 Tools to Prepare
(1) Clear the Runway
(2) Work WITH Neurobiology
(3) Identify a Clear Goal

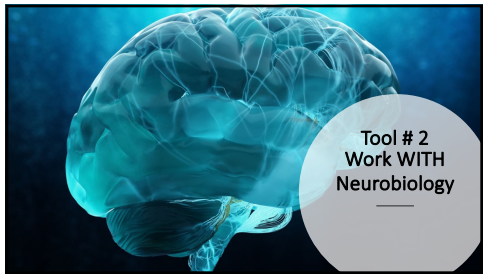
5


Tool # 1
Clear the Runway

6


Tool #1
Clear the
Runway
Is this the right time/place?
Can I give this my focus without distraction?

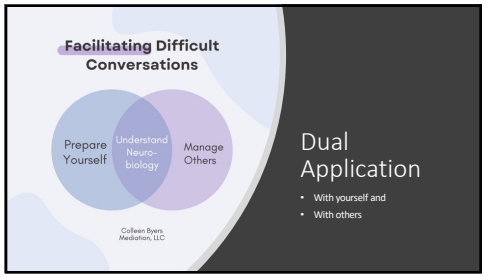
7


Tool # 2
Work WITH
Neurobiology

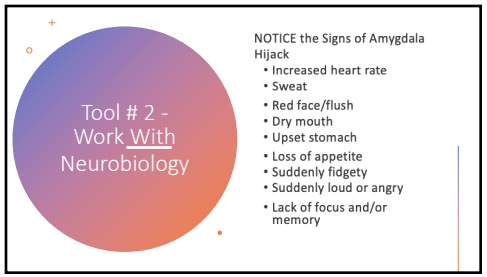
8


The Conflict Loop
Stimuli
Perceived Threat
Defend Behavior

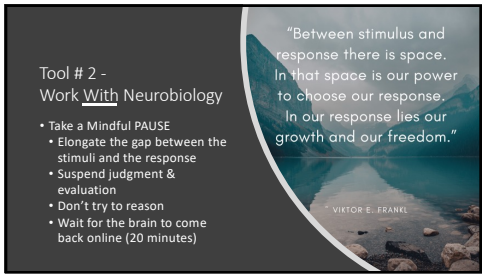
9


Facilitating Difficult Conversations
Prepare Yourself
Understand Neuro-biology
Manage Others
Colleen Byers Mediation, LLC
Dual Application
• With yourself and
• With others

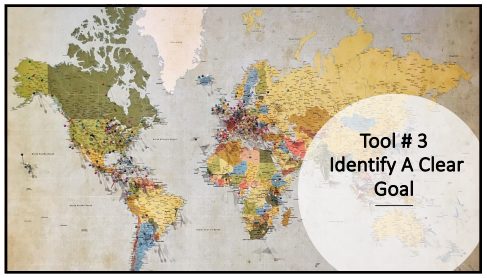
10


Tool # 2 - Work With Neurobiology
NOTICE the Signs of Amygdala Hijack
• Increased heart rate
• Sweat
• Red face/flush
• Dry mouth
• Upset stomach
• Loss of appetite
• Suddenly fidgety
• Suddenly loud or angry
• Lack of focus and/or memory

11


Tool # 2 - Work With Neurobiology
• Take a Mindful PAUSE
• Elongate the gap between the stimuli and the response
• Suspend judgment & evaluation
• Don't try to reason
• Wait for the brain to come back online (20 minutes)
"Between stimulus and response there is space. In that space is our power to choose our response. In our response lies our growth and our freedom."
VIKTOR E. FRANKL

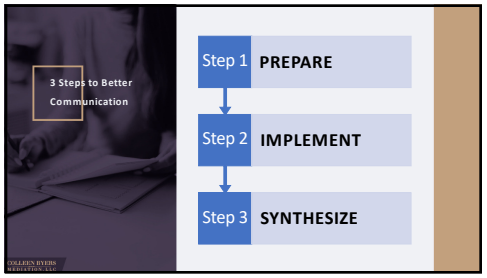
12


Tool # 3
Identify A Clear Goal

13


What do you hope will happen as a result of this conversation?
What is the specific desired outcome?

14


3 Steps to Better Communication
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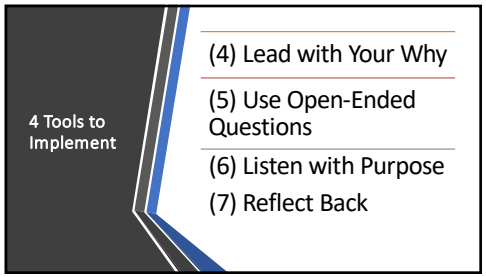
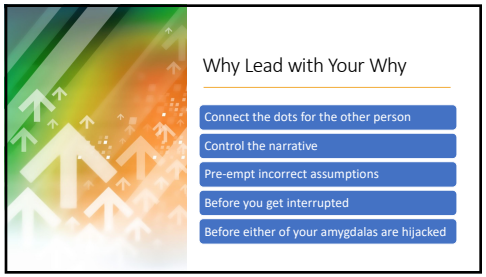
15


Step 2 - Implement
How to leverage practical techniques to improve influence and impact

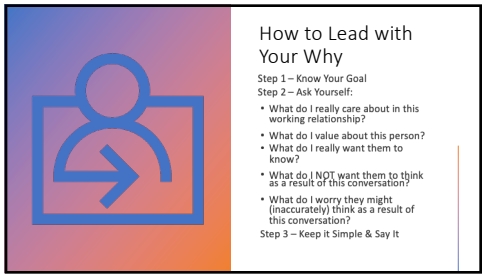
16


4 Tools to Implement
(4) Lead with Your Why
(5) Use Open-Ended Questions
(6) Listen with Purpose
(7) Reflect Back

17


Why Lead with Your Why
Connect the dots for the other person
Control the narrative
Pre-empt incorrect assumptions
Before you get interrupted
Before either of your amygdalas are hijacked

18



How to Lead with Your Why

Step 1 – Know Your Goal

Step 2 – Ask Yourself:

- What do I really care about in this working relationship?
- What do I value about this person?
- What do I really want them to know?
- What do I NOT want them to think as a result of this conversation?
- What do I worry they might (inaccurately) think as a result of this conversation?

Step 3 – Keep it Simple & Say It

19

Tool # 5
Use Open-Ended Questions

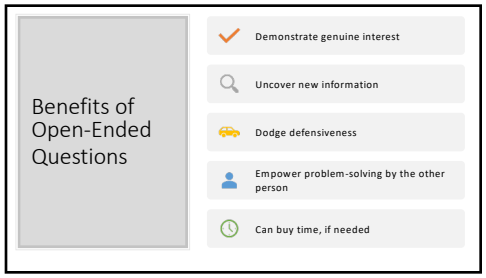
- What is an open-ended question?
- What is so great about an open-ended question?

20

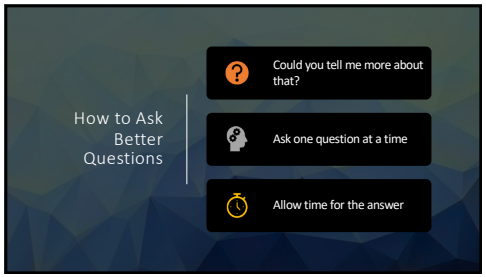
Open Ended Questions

DO NOT	DO
• Start with: ◦ Do or Did • Lead to a Yes or No response • Suggest the answer • Cut off or limit the conversation	• Start with: ◦ How or What • Lead to a fill in the blank response • Arise from curiosity • Expand the conversation

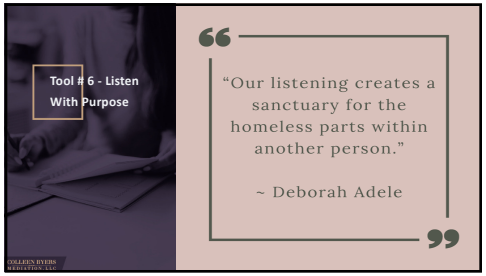
21


Benefits of Open-Ended Questions
Demonstrate genuine interest
Uncover new information
Dodge defensiveness
Empower problem-solving by the other person
Can buy time, if needed

22


How to Ask Better Questions
Could you tell me more about that?
Ask one question at a time
Allow time for the answer

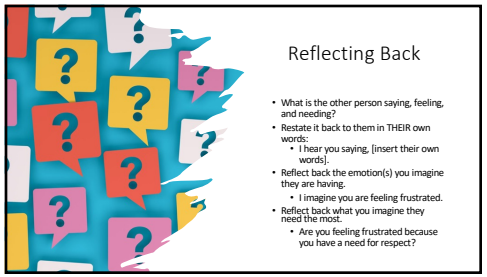
23


Tool # 6 - Listen With Purpose
"Our listening creates a sanctuary for the homeless parts within another person."
~ Deborah Adele

24


Listen with the Purpose of Understanding
WHAT ARE THEY FEELING?
WHAT ARE THEY NEEDING?
WHAT IS IMPORTANT TO THEM?
WHAT DO THEY VALUE?
WHERE IS THE COMMON GROUND?

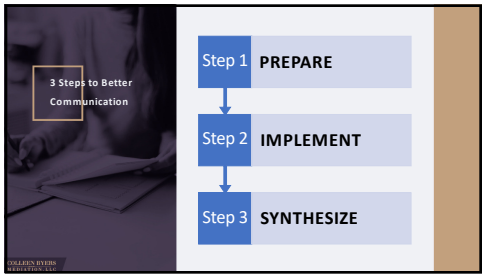
25


Reflecting Back
• What is the other person saying, feeling, and needing?
• Restate it back to them in THEIR own words:
  • I hear you saying, [insert their own words].
• Reflect back the emotion(s) you imagine they are having.
  • I imagine you are feeling frustrated.
• Reflect back what you imagine they need the most.
  • Are you feeling frustrated because you have a need for respect?

26


Behaviors
Feelings
Needs
Behaviors = strategies for an unmet need

27


3 Steps to Better Communication
Step 1 PREPARE
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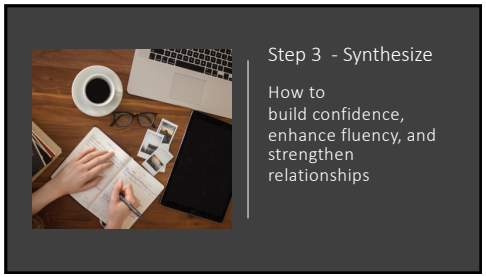
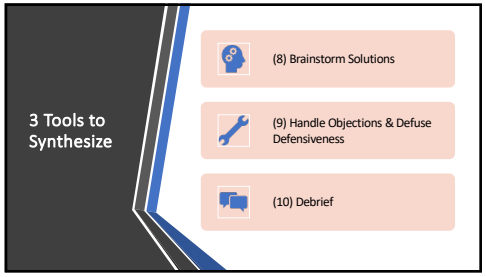
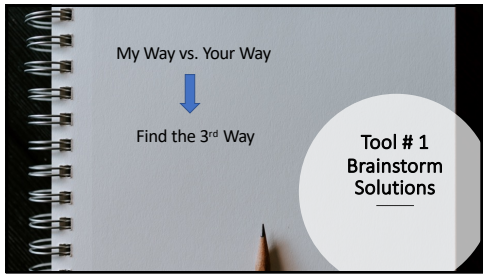
28


Step 3 - Synthesize
How to build confidence, enhance fluency, and strengthen relationships

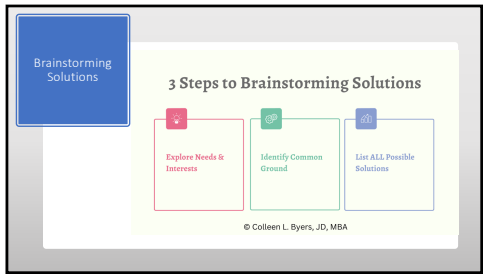
29


3 Tools to Synthesize
(8) Brainstorm Solutions
(9) Handle Objections & Defuse Defensiveness
(10) Debrief

30


My Way vs. Your Way
Find the 3rd Way
Tool # 1
Brainstorm
Solutions

31


Brainstorming Solutions
3 Steps to Brainstorming Solutions
Explore Needs & Interests
Identify Common Ground
List ALL Possible Solutions
© Colleen L. Byers, JD, MBA

32


Let's Workshop It

33

Tool # 9

Handling Objections
&
Defusing Defensiveness

34

Troubleshoot

DO NOT	DO

• Argue with their feelings
• Minimize their experience
  ◦ ie: "at least ..."
• Tell them what they should think or feel instead
	• Acknowledge
	  ◦ Thank you for sharing X with me
	• Reflect Back
	  ◦ It sounds like you are concerned about ... Did I get that right?
	• Ask if they are willing to discuss

35

Handling Objections

Why shouldn't they agree?

How might their point be valid?

What can I do about it?

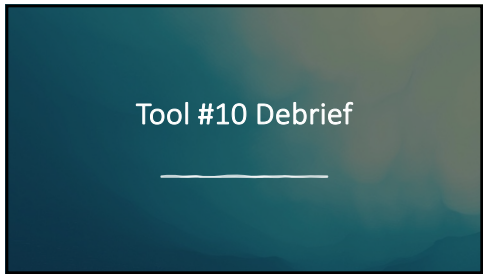
Acknowledge their concern – the feeling and the need

Ask if they would be willing to discuss it

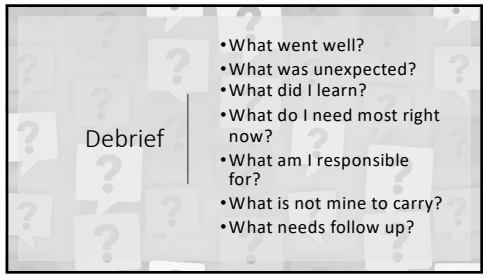
36


Defusing Defensiveness
Inquire - I wonder what is triggering them?
Acknowledge – focus on the underlying need
Pause – allow time for brain to come back online

37


Tool #10 Debrief

38


Debrief
•What went well?
•What was unexpected?
•What did I learn?
•What do I need most right now?
•What am I responsible for?
•What is not mine to carry?
•What needs follow up?

39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40

COLLEEN BYERS
MEDIATION, LLC

Facilitating Difficult Conversations

3 Steps & 10 Tools For Better Outcomes with Clients, Counsel, & Colleagues

Step 1 – Prepare

How to create conditions conducive to optimal outcomes

1. Clear the Runway
2. Work WITH Neurobiology
3. Identify a Clear Goal

Step 2 – Implement

How to leverage practical techniques to improve influence and impact

4. Lead with Your Why
5. Use Open Ended Questions
6. Listen with Curiosity
7. Reflect Back What Matters to the Other Person

Step 3 – Synthesize

How to build confidence, enhance fluency, and strengthen relationships

8. Brainstorm Solutions
9. Handle Objections & Defuse Defensiveness
10. Debrief

(336) 499-1977 colleen@byersmediation.com www.byersmediation.com

TOO MANY COOKS IN THE KITCHEN

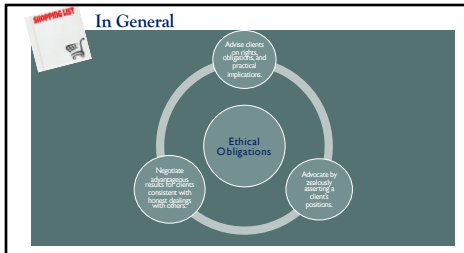
How Others Complicate Our Ethical Duties

Amanda Zimmer
Appellate Defender

Timothy Heinle
UNC School of Gov't

1

In General



RPC 0.1, Preamble

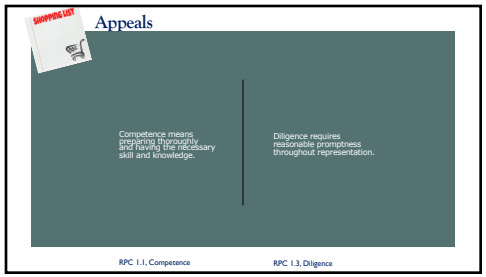
2

SO. MANY. COOKS.

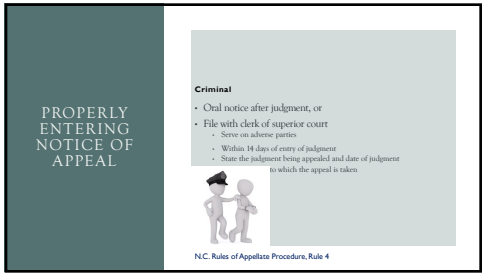
3


SHOPPING LIST
Our Own Clients
- Appeals
- Diminished capacity

4


Appeals
Competence means preparing thoroughly and having the necessary skill and knowledge.
Diligence requires reasonable promptness throughout representation.
RPC 1.1, Competence
RPC 1.3, Diligence

5


PROPERLY ENTERING NOTICE OF APPEAL
Criminal
• Oral notice after judgment, or
• File with clerk of superior court
• Serve on adverse parties
• Within 14 days of entry of judgment
• State the judgment being appealed and date of judgment to which the appeal is taken
N.C. Rules of Appellate Procedure, Rule 4

6

PROPERLY ENTERING NOTICE OF APPEAL

Sex Offender Registration, SBM, and Registry Removal Petitions

- Notice of Appeal must be in writing within 30 days
- The notice must:
  - Specify the party or parties taking the appeal
  - State the judgment being appealed and date of judgment
  - Be signed by counsel
  - Be served on all other parties

N.C. R.App. P. 3 *State v. Ricks*, 378 N.C. 737 (2021)

7

PROPERLY ENTERING NOTICE OF APPEAL

Remember! Appeal may be taken within 70 days of entry of adjudication order if no disposition is made within 60 days.

Juvenile Justice

- Orally (in court at time of disposition hearing)
- Written (within 10 days of entry of disposition order)
- Same rules apply to appeal of transfer order to superior court

N.C. Gen. Stat. §§ 7B-2602, -2603.

8

PROPERLY ENTERING NOTICE OF APPEAL

Motion to Suppress

Lost motion + Client plead guilty =

Must give prior notice of intent to appeal to DA and court

- ❑ Put it in the motion to suppress
- ❑ Put it in the plea transcript
- ❑ State it on the record
- ❑ Give notice of appeal of the judgment

9

Pop Quiz

JUDGE: "WHAT ERRORS ARE YOU APPEALING?"
HOW DO YOU RESPOND?

1 → 2 → 3

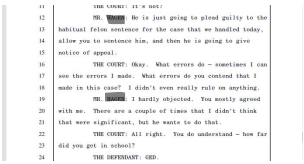
"Judge, I do not know of any errors."

"Your Honor, the appellate attorney will determine the issues."

"Judge, my client wants to appeal, and ethically I must follow their directions."

10

From an actual case:



THE COURT: It's not?

MR. [redacted]: He is just going to plead guilty to the habitual felon sentence for the case that we handled today, allow you to sentence him, and then he is going to give notice of appeal.

THE COURT: Okay. What errors do -- sometimes I can see the errors I made. What errors do you contend that I made in this case? I didn't even really rule on anything.

MR. [redacted]: I hardly objected. You mostly agreed with me. There are a couple of times that I didn't think that were significant, but he wants to do that.

THE COURT: All right. You do understand -- how far did you get in school?

THE DEFENDANT: GED.

11

12

Appeals

On one hand…

"The accused has the ultimate authority to make certain fundamental decisions regarding the case [including whether to] appeal."

Jones v. Barnes, 463 U.S. 745, 751 (1983)

It is "professionally unreasonable" to disregard a defendant's instruction to file a notice of appeal.

Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000)

13

Appeals

But on the other hand…

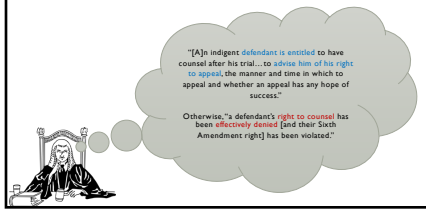
Lawyers cannot bring or defend a proceeding unless there is a legal or factual basis that makes doing so not frivolous.

RPC 3.1, Meritorious Claims and Contentions

14

NELSON V. PEYTON

415 F.2D 1154, 1157-58 (4TH CIR. 1969)



"[A]n indigent defendant is entitled to have counsel after his trial…to advise him of his right to appeal, the manner and time in which to appeal and whether an appeal has any hope of success."

Otherwise, "a defendant's right to counsel has been effectively denied [and their Sixth Amendment right] has been violated."

15

EXAMPLE FROM A TRIAL TRANSCRIPT

> I think -- I honestly think the appeal is groundless. I told him that. He can't undo what's done. It's set in stone. But he wanted to enter Notice of Appeal.

See 2008 Formal Ethics Opinion 17
(A trial lawyer who believes an appeal would be without merit may file a notice of appeal, relying upon appellate counsel to review the record to determine whether to pursue)

16

Diminished Capacity

Client's capacity concerning representation is diminished
+ Reasonable belief client is at risk of substantial physical or financial harm

Maintain as normal as possible attorney-client relationship
- Communication
- Decision making

Take reasonably protective action
- Consult w/ others who can take protective action
- Seek appointment of a guardian

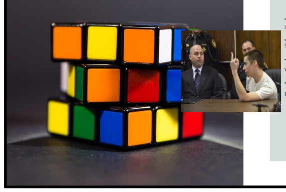
Impliedly authorized to reveal client information
- Only to the extent necessary to protect client's interests

RPC 1.14

17

"The lawyer's position in such cases is an unavoidably difficult one."

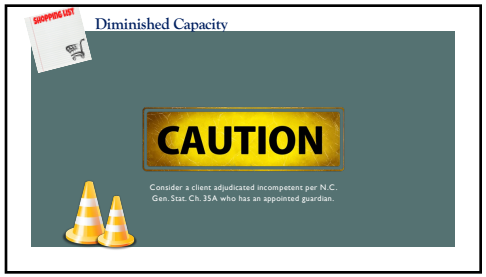
Rules of Prof'l Cond., R. 1.14, Cmt 8.



Reasonably protective actions may include raising incapacity without client's consent

- May raise over client's objection. *US v. Boigegrain*, 155 F.3d 1181 (10th Cir. 1998).
- Does not inherently require withdrawal. *State v. Robinson*, 330 N.C. 1 (1991).
- Relationship may deteriorate, warranting withdrawal. *See generally* Rules of Prof'l Cond., R. 1.16(b).
- May be entitled to new counsel if wishing to defend capacity. *Boigegrain*, Dissent.

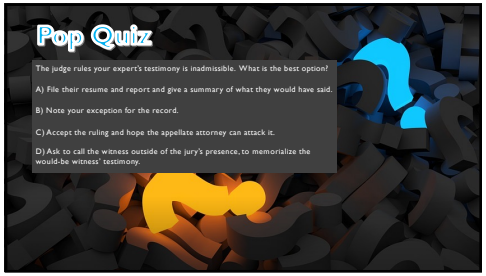
18


Diminished Capacity
CAUTION
Consider a client adjudicated incompetent per N.C. Gen. Stat. Ch. 35A who has an appointed guardian.

19


SHOPPING LIST
Our Own Clients
- Appeals
- Diminished capacity
Other Court Players
- Judges
- Prosecutors
- Clerks
- Concurrent and successor counsel

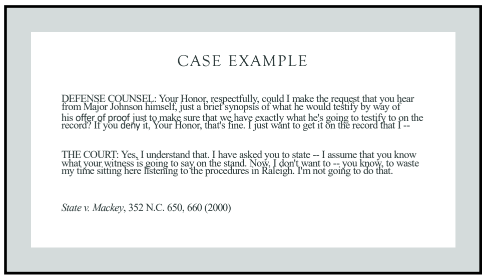
20


Pop Quiz
The judge rules your expert's testimony is inadmissible. What is the best option?
A) File their resume and report and give a summary of what they would have said.
B) Note your exception for the record.
C) Accept the ruling and hope the appellate attorney can attack it.
D) Ask to call the witness outside of the jury's presence, to memorialize the would-be witness' testimony.

21


WHEN JUDGES EXCLUDE EVIDENCE
"To preserve for appellate review …the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required."
"The words of the witness, and not the words counsel thinks the witness might have used, should go in the record…Excuse the jury and complete the record in open court."
STATE V. SIMPSON, 314 N.C. 359, 370 (1985)

22


CASE EXAMPLE
DEFENSE COUNSEL: Your Honor, respectfully, could I make the request that you hear from Major Johnson himself, just a brief synopsis of what he would testify by way of his offer of proof just to make sure that we have exactly what he's going to testify to on the record? If you deny it, Your Honor, that's fine. I just want to get it on the record that I --
THE COURT: Yes, I understand that. I have asked you to state -- I assume that you know what your witness is going to say on the stand. Now, I don't want to -- you know, to waste my time sitting here listening to the procedures in Raleigh. I'm not going to do that.
State v. Mackey, 352 N.C. 650, 660 (2000)

23


Pop Quiz
The judge rules your expert testimony is inadmissible and will not let you put their testimony on the record. What do you do?
A) Object and file their resume and report with the court, giving a summary of the would-be testimony.
B) Note your exception for the record and move on.
C) Accept the ruling and hope the appellate attorney can attack it.
D) Ask to call the witness, outside of the jury's presence, to have the witness' would-be testimony memorialized.

24

Other Court Officials

Judge
- Pressure you to answer or take steps
- Improper procedures

Prosecutor
- Inadvertent discovery
- Provocation

Clerk of Court
- Sealed ≠ impossible
- Trial and appellate attorneys blocked

25

SUCCESSOR COUNSEL

26

Successor Counsel

Credit and thanks goes to Tucker Charns, whose work we are borrowing heavily from in this section!

When declining or terminating representation, you must protect a client's interests by

- surrendering papers and property the client is entitled to,
- including records "relative to a client's matter that would be helpful to successor counsel."

Exception: no duty to turn over personal notes and unfinished work product.

RPC 1.16, Declining or Terminating Representation *See* 2013 FEO 15; *but see* Opinion #3

27

Successor Counsel

Credit and thanks goes to Tucker Charns, whose work we are borrowing heavily from in this section!

Can you discuss a former client's case with successor counsel?

- Continued confidentiality obligations.
- Cannot reveal information without client consent or implied authority.
- Applies to communications with successor counsel.

Tip #1: ask client at beginning of representation to sign a release for successor counsel, if any.

Tip #2: prepare and file a client-signed waiver with motion to withdraw.

RPC 1.6, Confidentiality; 1.9, Former Clients | IDS Performance Guidelines 9.3(e); 9.4 | CPR 300 (disclosure to successor counsel requires consent)

28

Successor Counsel

Credit and thanks goes to Tucker Charns, whose work we are borrowing heavily from in this section!

Defendants who claim ineffective assistance of counsel are "deemed to waive the attorney-client privilege with respect to both oral and written communications between such counsel and the defendant to the extent…prior counsel reasonably believes such communications are necessary to defend against the allegations."

The waiver is automatic, by statute.

N.C. Gen. Stat. § 15A-1415(e) *See also* 2011 FEO 16 (lawyer should narrowly tailor disclosures)

29

CONCURRENT COUNSEL

30

Concurrent Counsel

Professional misconduct includes intentionally prejudicing or damaging your client.

RPC 8.4, Misconduct

31

Concurrent Counsel

Suggestions

Share resources, info, and experts.

Find opportunities for overlap to benefit client.

Beware of conflicting court orders.

32

Concurrent Counsel

Won't I always know if my client has another case?

Obvious	Less obvious	Not obvious
Client charged with abusing their own child.	Client charged with abusing someone else's child.	Client charged with crimes not involving children.

Think: Dept. of Social Services and juvenile A/N/D.

33

SHOPPING LIST

Our Own Clients
- Appeals
- Diminished capacity

Other Court Players
- Judges
- Prosecutors
- Clerks
- Concurrent and successor counsel

Client's Family, Friends, and Significant Others

34

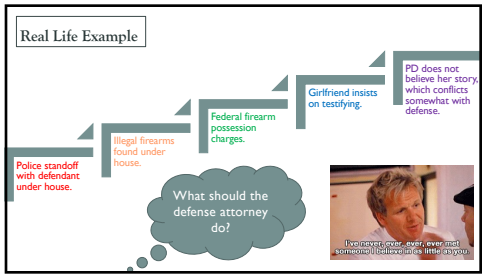
CLIENT'S FAMILY, FRIENDS, AND SIGNIFICANT OTHERS

35

Client's Family, Friends, and Significant Others

Client communications are confidential.	Disclosure to minor-client's parent requires consent.	Client's interests and decision-making authority are constants.
RPC 1.6; *but see* RPC 1.14 (diminished capacity)	*But see* 98 FEO 18 (OK if needed to make binding legal decision—therefore, not a plea)	*See* RPC 1.14, Cmt. 3 (remains true even if client invites others into discussions with lawyer)

36


Real Life Example
Police standoff with defendant under house.
Illegal firearms found under house.
Federal firearm possession charges.
Girlfriend insists on testifying.
PD does not believe her story, which conflicts somewhat with defense.
What should the defense attorney do?
I've never, ever, ever, met someone I believe in less little as you

37


SHOPPING LIST
Our Own Clients
- Appeals
- Diminished capacity
Other Court Players
- Judges
- Prosecutors
- Clerks
- Concurrent and successor counsel
Client's Family, Friends, and Significant Others

38


Questions?
Amanda Zimmer, Appellate Defender's Office
Timothy Heinle, UNC School of Gov't

39

2008 FORMAL ETHICS OPINION 17

FILING A NOTICE OF APPEAL IN A COURT-APPOINTED JUVENILE CASE

Adopted: January 23, 2009

Opinion rules that a lawyer appointed to represent a parent at the trial of a juvenile case may file a notice of appeal to preserve the client's right to appeal although the lawyer does not believe that the appeal has merit.

Inquiry:

Indigent parents who are parties in abuse, neglect, dependency, and termination of parent rights (TPR) juvenile proceedings are entitled to appointed counsel at both the trial court and the appellate levels. N.C. Gen .Stat. §§7B-602; 7B-1101; 7A-27; 7A-451.

Rule 3A of the North Carolina Rules of Appellate Procedure, N.C. R. App. P. 3A, applies to juvenile cases alleging abuse, neglect, or dependency or in which a TPR was sought. Rule 3A provides, in part,

> …If the appellant is represented by counsel, both the trial counsel and appellant must sign the notice of appeal,…

The remaining provisions of the rule protect the privacy interests of the juvenile and provide for expedited procedures and calendaring priority.

An indigent parent has the right to appeal the trial court's decision. However, an appointed trial lawyer will, on occasion, decline to sign the notice of appeal, as required by N.C. R. App. P. 3A and as requested by the client, because the lawyer is concerned that the appeal lacks merit and the lawyer may be in violation of Rule 11(a) of the North Carolina Rules of Civil Procedure and Rule 3.1 of the Rules of Professional Conduct. N.C. R. Civ. P. 11(a) provides in part,

> …The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation…

An appellate lawyer is appointed by the Office of the Appellate Defender to represent an indigent parent on the appeal. This lawyer reviews the record to determine whether there are

justiciable issues. On many occasions, the appellate lawyer finds justiciable issues that the trial lawyer did not identify. However, on some occasions, the appellate lawyer determines that there are no meritorious legal arguments to be made. In juvenile cases, the Supreme Court has ruled that an Anders-type brief may not be filed. In re Harrison, 136 N.C. App. 831, 526 S.E. 2d 502 (2000). Therefore, the appellate lawyer will advise the client that the appeal is without merit and ask the client to withdraw the appeal. If the client refuses to do so, the lawyer files a motion to withdraw from the representation.

In appeals of juvenile cases, when the client has indicated that he or she wants to appeal and is prepared to sign the notice of appeal as required by N.C. R. App. P. 3A, is it unethical for the appointed trial lawyer to sign the notice of appeal to preserve the client's right to appeal even if the trial lawyer has doubts as to the merit of the appeal?

Opinion:

No, it is not unethical for the trial lawyer to sign the notice of appeal to preserve an indigent client's right to appeal in a juvenile case. Whether signing the notice violates Rule 11 of the Rules of Civil Procedure is outside the purview of the Ethics Committee. Nevertheless, the committee can opine on whether the lawyer is in violation of the prohibition in Rule 3.1 of the Rules of Professional Conduct on bringing a proceeding or asserting an issue unless there is a basis in law and fact for doing so that is not frivolous. In TPR and other juvenile cases, the state's interest in ensuring due process for parents is demonstrated by the statutory requirement for court appointed-trial and appellate counsel for indigent parents. In light of this public policy, and when the notice of appeal serves to preserve the client's right to appeal but does not assert a particular legal argument, it is not unethical for the appointed trial lawyer for an indigent parent to sign a notice of appeal although the trial lawyer may not believe that the appeal has merit. Moreover, the trial lawyer may rely upon the court-appointed appellate lawyer's subsequent review of the record to determine whether to pursue the appeal.

2013 FORMAL ETHICS OPINION 15

RETURN OF ELECTRONIC RECORDS TO CLIENT UPON TERMINATION OF REPRESENTATION

Adopted: January 24, 2014

Opinion rules that records relative to a client's matter that would be helpful to subsequent legal counsel must be provided to the client upon the termination of the representation, and may be provided in an electronic format if readily accessible to the client without undue expense.

Inquiry #1: In the age of electronic records, what information must be given to a departing client when the client requests the file?

Opinion #1: Rule 1.16(d) of the Rules of Professional Conduct requires a lawyer, upon termination of representation, to "take steps to the extent reasonably practicable to protect a client's interests, such as...surrendering papers and property to which the client is entitled..."

Comment 10 to Rule 1.16 specifically provides that copies of "all correspondence received and generated by the withdrawing or discharged lawyer should be released; and anything in the file that would be helpful to successor counsel should be turned over."

Competent representation includes organized record-keeping practices that safeguard the documentation and information necessary to enable the lawyer to (1) readily retrieve information required for the representation; (2) remain abreast of the status of the case; and (3) be adequately prepared to handle the client's matter. 2002 FEO 5; Rule 1.1, cmt. [6]. The standards for record-keeping, including record retention, for electronic communications, documents, records, and other information ("records") are the same as the standards for paper records. As stated in 2002 FEO 5 on the retention of email in a client's file, "[a] lawyer must exercise his or her legal judgment when deciding what documents or information to retain in a client's file." Whether a lawyer should retain an electronic record that relates to a client's representation "depends upon the requirements of competent representation under the circumstances of the particular case." Id.

A lawyer must also exercise legal judgment, subject to the duty of competent representation, when deciding which format (electronic or paper) is the most appropriate for the retention of records generated during the representation of a client. 2002 FEO 5; see also RPC 234 (paper documents in client's file may be converted and saved in an electronic format if original documents with legal significance, such as wills, are stored in a safe place or returned to the client, and documents stored in electronic format can be reproduced in a paper format).

If an electronic record relative to a client's matter would be helpful to successor counsel, the electronic record is a part of the client's file. As explained in CPR 3, a client file does not include

"the lawyer's personal notes and incomplete work product," or "preliminary drafts of legal instruments or other preliminary things which, unexplained, could place a lawyer in a bad light without furthering the interest of his former client." Therefore, a lawyer may omit from the records that are considered a part of the client's file the following: (1) email containing the client's name if the email is immaterial, represents incomplete work product, or would not be helpful to successor counsel; (2) drafting notes saved in preliminary versions of a filed pleading since these are incomplete work product; (3) notations or categorizations on documents stored in a discovery database since these are incomplete work product; and (4) other items that are associated with a particular client such as backups, voicemail recordings, and text messages unless the items would be helpful to successor counsel.

If the lawyer determines that an electronic record is a part of a client's file, then the lawyer has a duty to provide a copy of the record to the client upon the termination of the representation. Conversely, if the lawyer, in the exercise of legal judgment, determines that the electronic record is not a part of the client's file, then the lawyer is not required, but may, provide a copy of the electronic record to the client.

Inquiry #2: Are lawyers required to organize or store electronic records relative to a specific client matter in any particular manner?

Opinion #2: An organized record-keeping system designed to safeguard client information must include electronic records. See Opinion #1. The electronic records must be organized in a manner that can be searched and compiled as necessary for the representation of the client and for the release of the file to the client upon the termination of the representation. A document management system to track records by client and matter is recommended.

Because of the potential for electronic records to accumulate, one important aspect of an organized record-keeping system is a procedure for regularly exercising legal judgment as to whether to retain an electronic record in the client's virtual file. Such a procedure would, for example, require the regular identification of emails that should be retained and made a part of the client's virtual file. Waiting until the representation has ended and the client has requested the file to identify electronic records that are a part of the client's file may increase the likelihood that an important electronic record will not be identified properly.

Inquiry #3: When the representation terminates and the client requests the file, is the lawyer or law firm required to provide the records in the format (electronic or paper) requested by the client?

Opinion #3: Many clients, or successor counsel, will have the technical expertise and financial ability to receive client records in an electronic format without experiencing any problem or undue expense in opening, using, or reproducing the records. These clients will

probably prefer to receive the records in an electronic format. However, there are clients, such as individuals or small businesses with limited financial means or technical expertise, that cannot afford to purchase expensive software or computer equipment simply to gain access to the records in their own legal files. There must be a weighing of the interests of the lawyer or law firm in producing the client's file in an efficient and cost-effective manner against the client's interest in receiving the records in a format that will be useful to the client or successor counsel.

Therefore, records that are stored on paper may be copied and produced to the client in paper format if that is the most convenient or least expensive method for reproducing these records for the client. If converting paper records to an electronic format would be a more convenient or less expensive way to provide the records to the client, this is permissible if the lawyer or law firm determines that the records will be readily accessible to the client in this format without undue expense. Similarly, electronic records may be copied and provided to the client in an electronic format (they do not have to be converted to paper) if the lawyer or law firm determines that the records will be readily accessible to the client in this format without undue expense. See 2002 FEO 5 ("in light of the widespread availability of computers," emails may be provided to a departing client in an electronic format even if the client requests paper copies).

A lawyer should in most instances bear the reasonable costs of retrieving and producing electronic records for a departing client. However, a lawyer or law firm may charge a client the expense of providing electronic records if the client asks the lawyer or law firm to do any of the following: (1) convert electronic records from a format that is already accessible using widely used or inexpensive business software applications; (2) convert electronic records to a format that is not readily accessible using widely used or inexpensive business software applications; or (3) provide electronic records in a manner that is unduly expensive or burdensome.

Nevertheless, if the usefulness of an electronic record in a client file would be undermined if the document is provided to the client or successor counsel in a paper format, the record must be provided to the client in an electronic format unless the client requests otherwise. For example, providing a spreadsheet without the underlying formulas or providing a complex discovery database printed in streams of text on reams of paper would destroy the usefulness of such data to both the client and successor counsel. Similarly, a video recording cannot be reduced to a paper format and therefore must be provided to the client in its original format.

Lawyers are encouraged to discuss with a client at the beginning of a representation the records that will be retained as a part of the client's file, and the format in which the records will be produced at the termination of the representation.

North Carolina Criminal Law

A UNC School of Government Blog

Incompetent Wards and the Sex Offender Registry

I received a challenging question recently when I taught about the intersection of criminal defense and Chapter 35A incompetency. Suppose a person is adjudicated incompetent in a Chapter 35A proceeding and a guardian is appointed. Suppose that same person had been convicted of a crime requiring registration as a sex offender and compliance with the other obligations of Chapter 14, Article 27A. The person is required to register changes to their address (including providing notice to law enforcement of an intention to move out-of-state), to their academic and employment status, and to notify the State of changes to their name or online identifiers, including e-mail addresses. G.S. 14-208.7; G.S. 14-208.9. What effect does declaration of incompetency have on these registration requirements? Who is responsible for ensuring that the incompetent adult complies with these registration obligations—the adult or their guardian?

Incompetency and the Guardian's Role

What being incompetent means. An incompetent adult "lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property." G.S. 35A-1101(7). A person who is at least seventeen-and-a-half-years-old and has been adjudicated incompetent is known as a ward. G.S. 35A-1101(17). Depending on the capacity, needs, assets, and liabilities of the ward, the court may appoint one of three types of guardians. When considering the potential obligations of a guardian in ensuring a ward's compliance with sex offender registration obligations, the focus is on a guardian of the person or general guardian, both of whom may make decisions regarding the ward's medical, educational, habitation, employment, and other needs. G.S. 35A-1202(10), G.S. 35A-1241. A guardian of the estate is unlikely to have any such responsibility. G.S. 35A-1202(9), G.S. 35A-1251.

A guardian's obligations in ensuring the ward's compliance. Wards have a right to a "qualified, responsible guardian" to assist in exercising their rights and managing their personal affairs. G.S. 35A-1201(a)(1), (2). A guardian's powers and duties can be broad and may affect many aspects of daily life. The statutes enumerating those powers and duties do not specifically refer to a guardian's role in ensuring compliance with sex offender registration requirements. A guardian's powers and duties, however, are not limited to those specifically identified in Chapter 35A, and additional obligations of the guardian include "any other duties imposed by law." G.S. 35A-1253; *See also* G.S. 35A-1201, G.S. 35A-1241(a), G.S. 35A-1251.

Regardless of the legal principles that apply, discussed below, the guardian has a role to play in assuring compliance. A guardian may assist the ward by scheduling an appointment with law enforcement, providing transportation, reviewing paperwork, and helping to ensure that the ward understands and complies with ongoing requirements.

Is a Ward Required to Comply with Registration Requirements?

The defendant's state of mind. North Carolina sex offender registration laws have been amended multiple times regarding the knowledge of a defendant who fails to register. Initially, a person had to act

"knowingly and with intent to violate" the registration requirements to be guilty of an offense. G.S. 14-208.11(a) (1995). Later, the legislature removed the specific intent requirement. G.S. 14-208.11(a) (1997). This would not be the final amendment, but it was at this time the courts weighed in.

In 2000, the North Carolina Court of Appeals considered the constitutionality of requiring a ward who is also a convicted sex offender to register when changing addresses. *State v. Young*, 140 N.C. App. 1 (2000). There the defendant, who had been convicted of an offense requiring registration, was also adjudicated incompetent, and his mother was appointed as his guardian. *Id*. at 2, 4. Based on conversations the defendant had with law enforcement, the defendant had "'actual knowledge' enough to satisfy due process requirements for any reasonable and prudent man"; however, as a ward he was "not a reasonable and prudent man," so actual notice on its own was insufficient. *Id*. at 9. Due process does not merely require providing notice to a person of the registration requirements. The court held that due process requires "that notice be synonymous with the ability to comply." *Id.* at 10. Without proof of his ability to comply, the defendant was denied due process and thus the registration requirements were unconstitutional "as applied to [him.]" *Id*. at 14. The Court took exception with the sheriff failing to contact the guardian, who the sheriff was aware of. "[I]t is impermissible (if not impossible) to solely give notice to the actual incompetent person himself, expecting then to enforce rights against him." *Id*. at 9-10. Law enforcement knew the defendant was incompetent and living with his guardian and "could easily have avoided the extreme time and cost of litigation" by informing the guardian that the ward had failed to register. *Id*. at 14.

In 2004, the Court of Appeals considered whether a trial court must instruct a jury that the State needs to prove a defendant's knowledge of the registration requirements. *State v. White*, 162 N.C. App. 183 (2004). The Court interpreted the legislature's removal of the specific intent element in 1997 to mean that failing to register was a strict liability offense. *Id.* at 189. The Court applied *Young*, holding that because the defendant's competency was not in doubt, the constructive notice of G.S. 14-208 and the actual notice he received when a sheriff told him of the registration requirements was sufficient "to satisfy due process requirements for any reasonable and prudent man." *Id*. at 189-90. Therefore, the trial court did not need to instruct the jury regarding the defendant's knowledge. *Id*. at 190.

In 2006, the legislature again amended G.S. 14-208.11. Session Law 2006-247 made a person who *willfully* fails to comply with the registration requirements guilty of a Class F felony. This version of the law remains in effect, and its implications are discussed next.

A ward's obligation to comply. Following *Young* and *White*, the legislature could have added a bright line rule that a ward is not required to comply with the registration requirements. It did not. A person convicted of an offense requiring sex offender registration is not necessarily exempt from these requirements simply because they were adjudicated incompetent.

Meaningfully, however, the legislature added language requiring that a person willfully fail to comply to be guilty. Determining the willfulness of the actions or inactions of a ward—who may not be a reasonable and prudent person—requires a case-by-case assessment. Such a determination involves consideration of the "acts and conduct of the defendant and the general circumstances existing at the time." *State v. Humphreys*, 853 S.E.2d 789 (N.C. Ct. App. 2020) (discussing factors involving mental

state). Willfulness requires a showing that "the defendant acted without justification or excuse, 'purposely and deliberately in violation of law.'" *Id.* at 796. Like anyone else, a ward is only guilty of failing to comply with the registration requirements under 14-208.11 if the failure is willful.

The ward's ability to understand and comply with registration requirements is relevant when determining a ward's willfulness and whether due process requirements have been satisfied. Determining a ward's capacity to do a specific act is an analysis employed in other areas. In some circumstances, wards have been found capable of marrying (*Geitner v. Townsend*, 67 N.C. App. 159 (1984)), making a will (*In re Will of Maynard*, 64 N.C. App. 211 (1983)), and entering into a contract (*In re Dunn*, 239 N.C. 378 (1954). Whether law enforcement assists a ward with complying with registration requirements—e.g., communicating with the guardian—may also be relevant. A guardian's efforts to ensure that the ward complies with registration requirements could also be of significance. For example, did the guardian review the requirements with the ward, provide transportation, or otherwise assist with the process? Such evidence may be a factor in determining willfulness, although it may not be conclusive.

Is a Guardian Liable for a Ward's Failure to Comply?

Criminal liability. G.S. 14-208 does not address whether a guardian is liable if a ward fails to comply with registration requirements. It seems unlikely in most situations. Guardians should be aware, however, of the duty we all have not to knowingly conceal a person required to register or help the person elude law enforcement. G.S. 14-208.11A(1)-(4). To violate G.S. 14-208.11A, a guardian would need to have knowledge of the ward's noncompliance and intend to help the ward elude arrest. For example, a guardian may operate a home daycare and may not want law enforcement to know that the person resides in the home. If the guardian helps the ward conceal where they live, the guardian may be committing a crime.

A guardian who actively participates in a ward's failure to comply, for example by defrauding law enforcement about a ward's whereabouts, could also be guilty of felonious obstruction of justice. *See, e.g., State v. Ditenhafer*, 373 N.C. 116, 128 (2019) (finding sufficient evidence to convict a defendant who interfered with a child welfare investigation on the basis that she (1) unlawfully and willfully (2) obstructed justice (3) with deceit and intent to defraud.")

Civil consequences. There could be consequences in the Chapter 35A proceeding for a guardian who does not ensure a ward's compliance with registration requirements. Clerks can enter orders ensuring "the better care and maintenance of wards." G.S. 35A-1290(a). The clerk must protect a ward's interests, which may include removal of the guardian, if the guardian "neglects to care for or maintain the ward…in a suitable manner," "has violated a fiduciary duty through default or misconduct," or is unsuitable for any reason. G.S. 35A-1290(b)(3), (b)(6), (b)(15).

These are complicated situations with a lot to consider. If you are navigating this situation, likely for the first time, please reach out to me at Heinle@sog.unc.edu.

KeyCite Yellow Flag - Negative Treatment
Not Followed as Dicta Rambaran v. Secretary, Dept. of Corrections, 11th Cir.(Fla.), May 9, 2016

103 S.Ct. 3308
Supreme Court of the United States

Everett W. JONES, Superintendent, Great Meadow Correctional Facility, et al., Petitioners,
v.
David BARNES.

No. 81–1794.
|
Argued Feb. 22, 1983.
|
Decided July 5, 1983.

Synopsis
Petitioner filed petition for habeas corpus based on claim of ineffective assistance by appellate counsel. The United States District Court for the Eastern District of New York, Eugene H. Nickerson, J., denied petition, and appeal was taken. The Court of Appeals for the Second Circuit, 665 F.2d 427, Oakes, Circuit Judge, reversed and remanded with directions, and certiorari was granted. The Supreme Court, Chief Justice Burger, held that defense counsel assigned to prosecute appeal from criminal conviction does not have constitutional duty to raise every nonfrivolous issue requested by defendant.

Reversed.

Justice Blackmun concurred in judgment and filed opinion.

Justice Brennan dissented and filed opinion in which Justice Marshall joined.

West Headnotes (3)

[1] **Criminal Law** Nature and scope of remedy in general

There is no constitutional right to appeal.

536 Cases that cite this headnote

[2] **Attorneys and Legal Services** Criminal Prosecutions

Accused has ultimate authority to make certain fundamental decisions regarding case, as to whether to plead guilty, waive jury, testify in his or her behalf, or take appeal.

1123 Cases that cite this headnote

[3] **Criminal Law** Raising issues on appeal; briefs

Defense counsel assigned to prosecute appeal from criminal conviction does not have constitutional duty to raise every nonfrivolous issue requested by defendant. U.S.C.A. Const.Amend. 6.

10127 Cases that cite this headnote

****3309** *Syllabus* *

***745** After respondent was convicted of robbery and assault in a jury trial in a New York state court, counsel was appointed to represent him on appeal. Respondent informed counsel of several claims that he felt should be raised, but counsel rejected most of the suggested claims, stating that they would not aid respondent in obtaining a new trial and that they could not be raised on appeal because they were not based on evidence in the record. Counsel then listed seven potential claims of error that he was considering including in his brief, and invited respondent's "reflections and suggestions" with regard to those claims. Counsel's brief to the Appellate Division of the New York Supreme Court concentrated on three of the claims, two of which had been originally suggested by respondent. In addition, respondent's own *pro se* briefs were filed. At oral argument, counsel argued the points presented in his own brief, but not the arguments raised in the *pro se* briefs. The Appellate Division affirmed the conviction. After respondent was unsuccessful in earlier collateral proceedings attacking his conviction, he filed this action in Federal District Court, seeking habeas corpus relief on the basis that his appellate counsel had provided ineffective assistance. The District Court denied relief, but the Court of Appeals reversed, concluding that under *Anders v. California,* 386 U.S. 738, 87 S.Ct. 1396,

18 L.Ed.2d 493—which held that an appointed attorney must advocate his client's cause vigorously and may not withdraw from a nonfrivolous appeal—appointed counsel must present on appeal all nonfrivolous arguments requested by his client. The Court of Appeals held that respondent's counsel had not met this standard in that he failed to present certain nonfrivolous claims.

Held: Defense counsel assigned to prosecute an appeal from a criminal conviction does not have a constitutional duty to raise every nonfrivolous issue requested by the defendant. The accused has the ultimate authority to make certain fundamental decisions regarding his case, including the decision whether to take an appeal; and, with some limitations, he may elect to act as his own advocate. However, an indigent defendant has no constitutional ****3310** right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points. By promulgating ***746** a *per se* rule that the client must be allowed to decide what issues are to be pressed, the Court of Appeals seriously undermined the ability of counsel to present the client's case in accord with counsel's professional evaluation. Experienced advocates have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues. Selecting the most promising issues for review has assumed a greater importance in an era when the time for oral argument is strictly limited in most courts and when page limits on briefs are widely imposed. The decision in *Anders,* far from giving support to the Court of Appeals' rule, is to the contrary; *Anders* recognized that the advocate's role "requires that he support his client's appeal to the best of his ability." 386 U.S., at 744, 87 S.Ct., at 1400. The appointed counsel in this case did just that. Pp. 3312–3314.

665 F.2d 427 (2nd Cir.1981) reversed.

Attorneys and Law Firms

Barbara D. Underwood argued the cause for petitioners. With her on the briefs was *Elizabeth Holtzman.*

Sheila Ginsberg Riesel argued the cause for respondent. With her on the brief was *Alan Mansfield.**

* *Solicitor General Lee, Assistant Attorney General Jensen, Deputy Solicitor General Frey, Edwin S. Kneedler,* and *Deborah Watson* filed a brief for the United States as *amicus curiae* urging reversal.

J. Vincent Aprile II filed a brief for the National Legal Aid and Defender Association as *amicus curiae* urging affirmance.

Opinion

Chief Justice BURGER delivered the opinion of the Court.

We granted certiorari to consider whether defense counsel assigned to prosecute an appeal from a criminal conviction has a constitutional duty to raise every nonfrivolous issue requested by the defendant.

I

In 1976, Richard Butts was robbed at knifepoint by four men in the lobby of an apartment building; he was badly ***747** beaten and his watch and money were taken. Butts informed a Housing Authority Detective that he recognized one of his assailants as a person known to him as "Froggy," and gave a physical description of the person to the detective. The following day the detective arrested respondent David Barnes, who is known as "Froggy."

Respondent was charged with first and second degree robbery, second degree assault, and third degree larceny. The prosecution rested primarily upon Butts' testimony and his identification of respondent. [1] During cross-examination, defense counsel asked Butts whether he had ever undergone psychiatric treatment; however, no offer of proof was made on the substance or relevance of the question after the trial judge *sua sponte* instructed Butts not to answer. At the close of trial, the trial judge declined to give an instruction on accessorial liability requested by the defense. The jury convicted respondent of first and second degree robbery and second degree assault.

The Appellate Division of the Supreme Court of New York, Second Department, assigned Michael Melinger to represent respondent on appeal. Respondent sent Melinger a letter listing several claims that he felt should be raised. [2] Included were claims that Butts' identification testimony should have been suppressed, that the trial judge improperly excluded psychiatric evidence, and that respondent's trial counsel was ineffective. Respondent also enclosed a copy of a *pro se* brief he had written.

In a return letter, Melinger accepted some but rejected most of the suggested ****3311** claims, stating that they would not aid ***748** respondent in obtaining a new trial and that they could not be raised on appeal because they were not based on evidence in the record. Melinger then listed seven potential claims of error that he was considering including in his brief, and invited respondent's "reflections and suggestions" with regard to those seven issues. The record does not reveal any response to this letter.

Melinger's brief to the Appellate Division concentrated on three of the seven points he had raised in his letter to respondent: improper exclusion of psychiatric evidence, failure to suppress Butts' identification testimony, and improper cross-examination of respondent by the trial judge. In addition, Melinger submitted respondent's own *pro se* brief. Thereafter, respondent filed two more *pro se* briefs, raising three more of the seven issues Melinger had identified.

At oral argument, Melinger argued the three points presented in his own brief, but not the arguments raised in the *pro se* briefs. On May 22, 1978, the Appellate Division affirmed by summary order, *New York v. Barnes,* 63 App.Div.2d 865, 405 N.Y.S.2d 621 (2d Dept.1978). The New York Court of Appeals denied leave to appeal, *New York v. Barnes,* 45 N.Y.2d 786, 409 N.Y.S.2d 1044, 381 N.E.2d 179 (1978).

On August 8, 1978, respondent filed a *pro se* petition for a writ of habeas corpus in the United States District Court for the Eastern District of New York. Respondent raised five claims of error, including ineffective assistance of trial counsel. The District Court held the claims to be without merit and dismissed the petition. *United States ex rel. Barnes v. Jones,* No. 78–C–1717 (EDNY, Nov. 27, 1978). The Court of Appeals for the Second Circuit affirmed, 607 F.2d 994, and we denied a petition for a writ of certiorari, 444 U.S. 853, 100 S.Ct. 109, 62 L.Ed.2d 71 (1979).

In 1980, respondent filed two more challenges in state court. On March 4, 1980, he filed a motion in the trial court for collateral review of his sentence. That motion was denied on April 28, and leave to appeal was denied on October 3. Meanwhile, on March 31, 1980, he filed a petition in the ***749** New York Court of Appeals for reconsideration of that court's denial of leave to appeal. In that petition, respondent for the first time claimed that his *appellate* counsel, Melinger, had provided ineffective assistance. The New York Court of Appeals denied the application on April 16, 1980, *New York v. Barnes,* 49 N.Y.2d 1001, 429 N.Y.S.2d 1029, 406 N.E.2d 1083 (1980).

Respondent then returned to United States District Court for the second time, with a petition for habeas corpus based on the claim of ineffective assistance by appellate counsel. The District Court concluded that respondent had exhausted his state remedies, but dismissed the petition, holding that the record gave no support to the claim of ineffective assistance of appellate counsel on "any ... standard which could reasonably be applied." No. 80–C–2447 (EDNY, Jan. 30, 1981), reprinted in App. to Pet. for Cert. 25a, 28a. The District Court concluded:

> "It is not required that an attorney argue every conceivable issue on appeal, especially when some may be without merit. Indeed, it is his professional duty to choose among potential issues, according to his judgment as to their merit and his tactical approach." *Id.,* at 28a–29a.

A divided panel of the Court of Appeals reversed, 665 F.2d 427 (CA2 1981).[3] Laying down a new standard, the majority held that when "the appellant requests that [his attorney] raise additional colorable points [on appeal], counsel *must argue the additional points to the full extent of his* ****3312** *professional ability.*" *Id.,* at 433 (emphasis added). In the view of the majority, this conclusion followed from *Anders v. California,* 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). In *Anders,* this Court held that an appointed attorney must advocate his client's cause vigorously and may not withdraw from a nonfrivolous appeal. ***750** The Court of Appeals majority held that, since *Anders* bars counsel from abandoning a nonfrivolous appeal, it also bars counsel from abandoning a nonfrivolous issue on appeal.

> "[A]ppointed counsel's unwillingness to present particular arguments at appellant's request functions not only to abridge defendant's right to counsel on appeal, but also to limit the defendant's constitutional right of equal access to the appellate process...." *Ibid.*
>
> The Court of Appeals went on to hold that, "[h]aving demonstrated that appointed counsel failed to argue colorable claims at his request, an appellant need not also demonstrate a likelihood of success on the merits of those claims." *Id.,* at 434.

The court concluded that Melinger had not met the above standard in that he had failed to press at least two nonfrivolous

claims: the trial judge's failure to instruct on accessory liability and ineffective assistance of trial counsel. The fact that these issues had been raised in respondent's own *pro se* briefs did not cure the error, since "[a] pro se brief is no substitute for the advocacy of experienced counsel." *Ibid.* The court reversed and remanded, with instructions to grant the writ of habeas corpus unless the State assigned new counsel and granted a new appeal.

Circuit Judge Meskill dissented, stating that the majority had overextended *Anders.* In his view, *Anders* concerned only whether an attorney must pursue nonfrivolous *appeals;* it did not imply that attorneys must advance all nonfrivolous *issues*.

We granted certiorari, —— U.S. ——, 102 S.Ct. 2902, 73 L.Ed.2d 1312 (1982), and we reverse.

II

[1] [2] [3] In announcing a new *per se* rule that appellate counsel must raise every nonfrivolous issue requested by the client,[4] ***751** the Court of Appeals relied primarily upon *Anders v. California, supra.* There is, of course, no constitutional right to an appeal, but in *Griffin v. Illinois,* 351 U.S. 12, 18, 76 S.Ct. 585, 590, 100 L.Ed. 891 (1955), and *Douglas v. California,* 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963), the Court held that if an appeal is open to those who can pay for it, an appeal must be provided for an indigent. It is also recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal, see *Wainwright v. Sykes,* 433 U.S. 72, 93 n. 1, 97 S.Ct. 2497, 2509 n. 1, 53 L.Ed.2d 594 (1977) (BURGER, C.J., concurring); ABA Standards for Criminal Justice 4–5.2, 21–2.2 (2d ed. 1980). In addition, we have held that, with some limitations, a defendant may elect to act as his or her own advocate, *Faretta v. California,* 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Neither *Anders* nor any other decision of this Court suggests, however, that the indigent defendant has a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points.

****3313** This Court, in holding that a State must provide counsel for an indigent appellant on his first appeal as of right, recognized the superior ability of trained counsel in the "examination into the record, research of the law, and marshalling of arguments on [the appellant's] behalf," *Douglas v. California,* 372 U.S., at 358, 83 S.Ct., at 817. Yet by promulgating a *per se* rule that the client, not the professional advocate, must be allowed to decide what issues are to be pressed, the Court of Appeals seriously undermines the ability of counsel to present the client's case in accord with counsel's professional evaluation.

Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, ***752** or at most on a few key issues. Justice Jackson, after observing appellate advocates for many years, stated:

> "One of the first tests of a discriminating advocate is to select the question, or questions, that he will present orally. Legal contentions, like the currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one.... [E]xperience on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one." Jackson, *Advocacy Before the Supreme Court,* 25 Temple L.Q. 115, 119 (1951).

Justice Jackson's observation echoes the advice of countless advocates before him and since. An authoritative work on appellate practice observes:

> "Most cases present only one, two, or three significant questions.... Usually, ... if you cannot win on a few major points, the others are not likely to help, and to attempt to deal with a great many in the limited number of pages allowed for briefs will mean that none may receive adequate attention. The effect of adding weak arguments will be to dilute the force of the stronger ones." R. Stern, Appellate Practice in the United States 266 (1981).[5]

There can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review. This ***753** has assumed a greater importance in an era when oral argument is strictly limited in most courts—often to as little

as 15 minutes—and when page limits on briefs are widely imposed. See, *e.g.,* Fed.Rules App.Proc. 28(g); McKinney's 1982 New York Rules of Court §§ 670.17(g)(2), 670.22. Even in a court that imposes no time or page limits, however, the new *per se* rule laid down by the Court of Appeals is contrary to all experience and logic. A brief that raises every colorable issue runs the risk of burying good arguments—those that, in the words of the great advocate John W. Davis, "go for the jugular," Davis, *The Argument of an Appeal,* 26 A.B.A.J. 895, 897 (1940)—in a verbal mound made up of strong and weak contentions. See generally, *e.g.,* Godbold, *Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal,* 30 SW.L.J. 801 (1976). [6]

****3314** This Court's decision in *Anders,* far from giving support to the new *per se* rule announced by the Court of Appeals, is to ***754** the contrary. *Anders* recognized that the role of the advocate "requires that he support his client's appeal to the best of his ability." 386 U.S., at 744, 87 S.Ct., at 1400. Here the appointed counsel did just that. For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every "colorable" claim suggested by a client would disserve the very goal of vigorous and effective advocacy that underlies *Anders.* Nothing in the Constitution or our interpretation of that document requires such a standard. [7] The judgment of the Court of Appeals is accordingly

Reversed.

Justice BLACKMUN, concurring in the judgment.

I do not join the Court's opinion, because I need not decide in this case, *ante,* at 3312, whether there is or is not a constitutional right to a first appeal of a criminal conviction, and because I agree with Justice BRENNAN, and the American Bar Association, ABA Standards for Criminal Justice, Criminal Appeals, Standard 21–3.2, Comment, p. 21–42 (2d ed., 1980), that, as an *ethical* matter, an attorney should argue on appeal all nonfrivolous claims upon which his client insists. Whether or not one agrees with the Court's view of legal strategy, it seems to me that the lawyer, after giving his client his best opinion as to the course most likely to succeed, should acquiesce in the client's choice of which nonfrivolous claims to pursue.

Certainly, *Anders v. California,* 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), and *Faretta v. California,* 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), indicate that the attorney's usurpation of certain fundamental decisions can ***755** violate the Constitution. I agree with the Court, however, that neither my view, nor the ABA's view, of the ideal allocation of decisionmaking authority between client and lawyer necessarily assumes constitutional status where counsel's performance is "within the range of competence demanded of attorneys in criminal cases," *McMann v. Richardson,* 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970), and "assure[s] the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process," *Ross v. Moffitt,* 417 U.S. 600, 616, 94 S.Ct. 2437, 2446, 41 L.Ed.2d 341 (1974). I agree that both these requirements were met here.

****3315** But the attorney, by refusing to carry out his client's express wishes, cannot forever foreclose review of nonfrivolous constitutional claims. As I noted in *Faretta v. California,* 422 U.S. 806, 848, 95 S.Ct. 2525, 2547, 45 L.Ed.2d 562 (1975) (dissenting opinion), "[f]or such overbearing conduct by counsel, there is a remedy," citing *Brookhart v. Janis,* 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966), and *Fay v. Noia,* 372 U.S. 391, 439, 83 S.Ct. 822, 849, 9 L.Ed.2d 837 (1963). The remedy, of course, is a writ of habeas corpus. Thus, while the Court does not reach the question, *ante,* at 3314, n. 7, I state my view that counsel's failure to raise on appeal nonfrivolous constitutional claims upon which his client has insisted must constitute "cause and prejudice" for any resulting procedural default under state law. See *Wainwright v. Sykes,* 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

Justice BRENNAN, with whom Justice MARSHALL joins, dissenting.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the *Assistance* of counsel for his defence" (emphasis added). I find myself in fundamental disagreement with the Court over what a right to "the assistance of counsel" means. The import of words like "assistance" and "counsel" seems inconsistent with a regime under which counsel appointed by the State to represent a criminal defendant can refuse to raise issues with arguable merit on appeal when his client, after hearing his assessment of the case and his advice, has directed ***756** him to raise them. I would remand for a determination whether

respondent did in fact insist that his lawyer brief the issues that the Court of Appeals found were not frivolous.

It is clear that respondent had a right to the assistance of counsel in connection with his appeal. "As we have held again and again, an indigent defendant is entitled to the appointment of counsel to assist him on his first appeal...." *Entsminger v. Iowa,* 386 U.S. 748, 751, 87 S.Ct. 1402, 1403, 18 L.Ed.2d 501 (1967) (citations omitted). [1] In **3316 recognizing the right to counsel on appeal, we *757 have expressly relied not only on the Fourteenth Amendment's Equal Protection Clause, which in this context prohibits disadvantaging indigent defendants in comparison to those who can afford to hire counsel themselves, but also on its Due Process Clause and its incorporation of Sixth Amendment standards. See *Anders v. California,* 386 U.S. 738, 744, 87 S.Ct. 1396, 1400, 18 L.Ed.2d 493 (1967); *Griffin v. Illinois,* 351 U.S. 12, 17, 76 S.Ct. 585, 589, 100 L.Ed. 891 (1956); cf. *Johnson v. United States,* 352 U.S. 565, 566, 77 S.Ct. 550, 551, 1 L.Ed.2d 593 (1957); *Johnson v. Zerbst,* 304 U.S. 458, 462–463, 58 S.Ct. 1019, 1022, 82 L.Ed. 1461 (1938). The two theories converge in this case also. Cf. *Bearden v. Georgia,* —— U.S. ——, ——, 103 S.Ct. 2064, ——, 75 L.Ed.2d —— (1983). A State may not incarcerate a person, whether he is indigent or not, if he has not had (or waived) the assistance of counsel at all stages of the criminal process at which his substantial rights may be affected. *Argersinger v. Hamlin,* 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972); *Mempa v. Rhay,* 389 U.S. 128, 134, 88 S.Ct. 254, 256, 19 L.Ed.2d 336 (1967). In my view, that right to counsel extends to one appeal, provided the defendant decides to take an appeal and the appeal is not frivolous. [2]

The Constitution does not on its face define the phrase "assistance of counsel," but surely those words are not empty of content. No one would doubt that counsel must be qualified to practice law in the courts of the State in question, [3] or that the representation afforded must meet minimum standards of effectiveness. See *758 *Powell v. Alabama,* 287 U.S. 45, 71, 53 S.Ct. 55, 65, 77 L.Ed. 158 (1932). To satisfy the Constitution, counsel must function as an advocate for the defendant, as opposed to a friend of the court. *Anders v. California,* 386 U.S., at 744, 87 S.Ct., at 1400; *Entsminger v. Iowa,* 386 U.S., at 751, 87 S.Ct., at 1403. Admittedly, the question in this case requires us to look beyond those clear guarantees. What is at issue here is the relationship between lawyer and client—who has ultimate authority to decide which nonfrivolous issues should be presented on appeal? I believe the right to "the assistance of counsel" carries with it a right, personal to the defendant, to make that decision, against the advice of counsel if he chooses.

If all the Sixth Amendment protected was the State's interest in substantial justice, it would not include such a right. However, in *Faretta v. California,* 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), we decisively rejected that view of the Constitution, ably advanced by Justice BLACKMUN in dissent. Holding that the Sixth Amendment requires that defendants be allowed to represent themselves, we observed:

> "It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts. But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him.... Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. **3317 And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.' *Illinois v. Allen,* 397 U.S. 337, 350–351, 90 S.Ct. 1057, 1064, 25 L.Ed.2d 353 (BRENNAN, J., concurring)."

422 U.S., at 834, 95 S.Ct., at 2540.

*759 *Faretta* establishes that the right to counsel is more than a right to have one's case presented competently and effectively. It is predicated on the view that the function of counsel under the Sixth Amendment is to protect the dignity and autonomy of a person on trial by *assisting* him in making choices that are his to make, not to make choices for him, although counsel may be better able to decide which tactics will be most effective for the defendant. *Anders v. California* also reflects that view. Even when appointed counsel believes an appeal has no merit, he must furnish his client a brief covering all arguable grounds for appeal so that the client may

"raise any points that he chooses." 386 U.S., at 744, 87 S.Ct., at 1400.

The right to counsel as *Faretta* and *Anders* conceive it is not an all-or-nothing right, under which a defendant must choose between forgoing the assistance of counsel altogether or relinquishing control over every aspect of his case beyond its most basic structure (*i.e.,* how to plead, whether to present a defense, whether to appeal). A defendant's interest in his case clearly extends to other matters. Absent exceptional circumstances, he is bound by the tactics used by his counsel at trial and on appeal. *Henry v. Mississippi,* 379 U.S. 443, 451, 85 S.Ct. 564, 569, 13 L.Ed.2d 408 (1963). He may want to press the argument that he is innocent, even if other stratagems are more likely to result in the dismissal of charges or in a reduction of punishment. He may want to insist on certain arguments for political reasons. He may want to protect third parties. This is just as true on appeal as at trial, and the proper role of counsel is to *assist* him in these efforts, insofar as that is possible consistent with the lawyer's conscience, the law, and his duties to the court.

I find further support for my position in the legal profession's own conception of its proper role. The American Bar Association has taken the position that

> "[W]hen, in the estimate of counsel, the decision of the client to take an appeal, *or the client's decision to press a particular contention on appeal,* is incorrect[, c]ounsel ***760** has the professional duty to give to the client fully and forcefully an opinion concerning the case and its probable outcome. *Counsel's role, however, is to advise. The decision is made by the client.*" ABA Standards for Criminal Justice, Criminal Appeals, Standard 21–3.2, Comment, at 21–42 (1980) (emphasis added). [4]

The Court disregards this clear statement of how the profession defines the "assistance of counsel" at the appellate stage of a criminal defense by referring to standards governing the allocation of authority between attorney and client at trial. See *ante,* at 3313, n. 6; ABA Standards for Criminal Justice, The Defense Function, Standard 4–5.2 (1980). [5] In the course of a trial, however, decisions must often be made in a matter of hours, if not minutes or seconds. From the standpoint of effective administration of justice, the need to confer decisive authority on the attorney is paramount with regard to the hundreds of decisions that must be made ****3318** quickly in the course of a trial. Decisions regarding which issues to press on appeal, in contrast, can and should be made more deliberately, in the course of deciding whether to appeal at all.

***761** The Court's opinion seems to rest entirely on two propositions. First, the Court observes that we have not yet decided this case. This is true in the sense that there is no square holding on point, but as I explain above, *supra,* at 3316–3317, *Anders* and *Faretta* describe the right to counsel in terms inconsistent with today's holding. Moreover, the mere fact that a constitutional question is open is no argument for deciding it one way or the other. Second, the Court argues that good appellate advocacy demands selectivity among arguments. That is certainly true—the Court's advice is good. It ought to be taken to heart by every lawyer called upon to argue an appeal in this or any other court, and by his client. It should take little or no persuasion to get a wise client to understand that, if staying out of prison is what he values most, he should encourage his lawyer to raise only his two or three best arguments on appeal, and he should defer to his lawyer's advice as to which are the best arguments. The Constitution, however, does not require clients to be wise, and other policies should be weighed in the balance as well.

It is no secret that indigent clients often mistrust the lawyers appointed to represent them. See generally Burt, Conflict and Trust Between Attorney and Client, 69 Geo.L.J. 1015 (1981); Skolnick, Social Control in the Adversary System, 11 J. Conflict Res. 52 (1967). There are many reasons for this, some perhaps unavoidable even under perfect conditions —differences in education, disposition, and socio-economic class—and some that should (but may not always) be zealously avoided. A lawyer and his client do not always have the same interests. Even with paying clients, a lawyer may have a strong interest in having judges and prosecutors think well of him, and, if he is working for a flat fee—a common arrangement for criminal defense attorneys—or if his fees for court appointments are lower than he would receive for other work, he has an obvious financial incentive to conclude cases on his criminal docket swiftly. Good lawyers ***762**

undoubtedly recognize these temptations and resist them, and they endeavor to convince their clients that they will. It would be naive, however, to suggest that they always succeed in either task. A constitutional rule that encourages lawyers to disregard their clients' wishes without compelling need can only exacerbate the clients' suspicion of their lawyers. As in *Faretta,* to force a lawyer's *decisions* on a defendant "can only lead him to believe that the law conspires against him." See 422 U.S., at 834, 95 S.Ct., at 2540. In the end, what the Court hopes to gain in effectiveness of appellate representation by the rule it imposes today may well be lost to decreased effectiveness in other areas of representation.

The Court's opinion also seems to overstate somewhat the lawyer's role in an appeal. While excellent presentation of issues, especially at the briefing stage, certainly serves the client's best interests, I do not share the Court's implicit pessimism about appellate judges' ability to recognize a meritorious argument, even if it is made less elegantly or in fewer pages than the lawyer would have liked, and even if less meritorious arguments accompany it. If the quality of justice in this country really depended on nice gradations in lawyers' rhetorical skills, we could no longer call it "justice." Especially at the appellate level, I believe that for the most part good claims will be vindicated and bad claims rejected, with truly skillful advocacy making a difference only in a handful of cases.[6] In most of such cases—in most cases generally—clients ultimately will do the wise thing and take their lawyers' advice. I am not ****3319** willing to risk deepening the mistrust ***763** between clients and lawyers in all cases to ensure optimal presentation for that fraction-of-a-handful in which presentation might really affect the result reached by the Court of Appeals.

Finally, today's ruling denigrates the values of individual autonomy and dignity central to many constitutional rights, especially those Fifth and Sixth Amendment rights that come into play in the criminal process. Certainly a person's life changes when he is charged with a crime and brought to trial. He must, if he harbors any hope of success, defend himself on terms—often technical and hard to understand—that are the State's, not his own. As a practical matter, the assistance of counsel is necessary to that defense. See *Johnson v. Zerbst,* 304 U.S., at 463, 58 S.Ct., at 1022. Yet, until his conviction becomes final and he has had an opportunity to appeal, any restrictions on individual autonomy and dignity should be limited to the minimum necessary to vindicate the State's interest in a speedy, effective prosecution. The role of the defense lawyer should be above all to function as the instrument and defender of the client's autonomy and dignity in all phases of the criminal process.

As Justice Black wrote in *Von Moltke v. Gillies,* 332 U.S. 708, 725–726, 68 S.Ct. 316, 324, 92 L.Ed. 309 (1948):

> "The right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client. *Glasser v. United States,* 315 U.S. 60, 70 [62 S.Ct. 457, 465, 86 L.Ed. 680].... Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes provision. And nowhere is this service deemed more honorable than in case of appointment to represent an accused too poor to hire a lawyer, even though the accused may be a member of an unpopular or hated group, or may be charged with an offense which is peculiarly abhorrent." (footnote omitted).

***764** The Court subtly but unmistakably adopts a different conception of the defense lawyer's role—he need do nothing beyond what the State, not his client, considers most important. In many ways, having a lawyer becomes one of the many indignities visited upon someone who has the ill fortune to run afoul of the criminal justice system.

I cannot accept the notion that lawyers are one of the punishments a person receives merely for being accused of a crime. Clients, if they wish, are capable of making informed judgments about which issues to appeal, and when they exercise that prerogative their choices should be respected unless they would require lawyers to violate their consciences, the law, or their duties to the court. On the other hand, I would not presume lightly that, in a particular case, a defendant has disregarded his lawyer's obviously sound advice. Cf. *Faretta v. California,* 422 U.S., at 835–836, 95 S.Ct., at 2541 (standards for waiver of right to counsel). The Court of Appeals, in reversing the District Court, did not address the factual question whether respondent, having been advised by his lawyer that it would not be wise to appeal on all the issues respondent had suggested, actually insisted in a timely fashion that his lawyer brief the nonfrivolous issues identified by the Court of Appeals. Cf. *ante,* at 3312, n. 4. If he did not, or if he was content with filing his *pro se* brief, then there would be no deprivation of the right to the assistance of counsel. I would remand for a hearing on this question.

All Citations

463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 This identification, which took place in a one-on-one meeting arranged by the police, was the subject of a pretrial hearing. The trial judge found it unnecessary to rule on the validity of that identification. He concluded that Butts' subsequent in-court identification was based upon an independent source, since Butts had known respondent for several years prior to the robbery.

2 Respondent's letter is not in the record. Its contents may be inferred from Melinger's letter in response.

3 By this time, at least 26 state and federal judges had considered respondent's claims that he was unjustly convicted for a crime committed five years earlier; and many of the judges had reviewed the case more than once. Until the latest foray, all courts had rejected his claims.

4 The record is not without ambiguity as to what respondent requested. We assume, for purposes of our review, that the Court of Appeals majority correctly concluded that respondent insisted that Melinger raise the issues identified, and did not simply accept Melinger's decision not to press those issues.

5 Similarly, a manual on practice before the Court of Appeals for the Second Circuit declares: "[A] brief which treats more than three or four matters runs serious risks of becoming too diffuse and giving the overall impression that no one claim of error can be serious." Committee on Federal Courts of the Association of the Bar of the City of New York, Appeals to the Second Circuit 38 (1980).

6 The ABA Model Rules of Professional Conduct provide:

> "A lawyer shall abide by a client's decisions concerning the objectives of representation ... and shall consult with the client as to the means by which they are to be pursued.... In a criminal case, the lawyer shall abide by the client's decision, ... *as to a plea to be entered, whether to waive jury trial and whether the client will testify.*" Model Rules of Professional Conduct, Proposed Rule 1.2(a) (Final Draft 1982) (emphasis added).

With the exception of these specified fundamental decisions, an attorney's duty is to take professional responsibility for the conduct of the case, after consulting with his client.

Respondent points to the ABA Standards for Criminal Appeals, which appear to indicate that counsel should accede to a client's insistence on pressing a particular contention on appeal, see ABA Standards for Criminal Justice 21–3.2, at 21–42 (2d ed. 1980). The ABA Defense Function Standards provide, however, that, with the exceptions specified above, strategic and tactical decisions are the exclusive province of the defense counsel, after consultation with the client. See ABA Standards for Criminal Justice 4–5.2 (2d ed. 1980). See

also ABA Project on Standards for Criminal Justice, The Prosecution Function and The Defense Function § 5.2 (Tent. Draft 1970). In any event, the fact that the ABA may have chosen to recognize a given practice as desirable or appropriate does not mean that that practice is required by the Constitution.

7 The only question presented by this case is whether a criminal defendant has a constitutional right to have appellate counsel raise every nonfrivolous issue that the defendant requests. The availability of federal habeas corpus to review claims that counsel declined to raise is not before us, and we have no occasion to decide whether counsel's refusal to raise requested claims would constitute "cause" for a petitioner's default within the meaning of *Wainwright v. Sykes,* 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). See also *Engle v. Isaac,* 456 U.S. 107, 128, 102 S.Ct. 1558, 1571, 71 L.Ed.2d 783 (1982).

1 The Court surprisingly announces that "[t]here is, of course, no constitutional right to appeal." *Ante,* at 3312. That statement, besides being unnecessary to its decision, is quite arguably wrong. In *Griffin v. Illinois,* 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1955), the fifth member of the majority, Justice Frankfurter, expressed doubt that there was a constitutional right to an appeal:

"[N]either the unfolding content of 'due process' nor the particularized safeguards of the Bill of Rights disregard procedural ways that reflect a national historic policy. It is significant that no appeals from convictions in the federal courts were afforded (with roundabout exceptions negligible for present purposes) for nearly a hundred years; and, despite the civilized standards of criminal justice in modern England, there was no appeal from convictions (again, with exceptions not now pertinent) until 1907. Thus, it is now settled that due process of law does not require a State to afford review of criminal judgments." 351 U.S., at 20–21, 76 S.Ct., at 591.

If the question were to come before us in a proper case, I have little doubt that the passage of nearly 30 years since *Griffin* and some 90 years since *McKane v. Durston,* 153 U.S. 684, 14 S.Ct. 913, 38 L.Ed. 867 (1894), upon which Justice Frankfurter relied, would lead us to reassess the significance of the factors upon which Justice Frankfurter based his conclusion. I also have little doubt that we would decide that a State must afford at least some opportunity for review of convictions, whether through the familiar mechanism of appeal or through some form of collateral proceeding. There are few, if any, situations in our system of justice in which a single judge is given unreviewable discretion over matters concerning a person's liberty or property, and the reversal rate of criminal convictions on mandatory appeals in the state courts, while not overwhelming, is certainly high enough to suggest that depriving defendants of their right to appeal would expose them to an unacceptable risk of erroneous conviction. See Kagan, Cartwright, Friedman & Wheeler, The Evolution of State Supreme Courts, 76 Mich.L.Rev. 961, 994 (1978); Project, 33 Stan.L.Rev. 951, 957, 962–964 (1981). Of course, a case presenting this question is unlikely to arise, for the very reason that a right of appeal is now universal for all significant criminal convictions.

2 Both indigents and those who can afford lawyers have this right. However, with regard to issues involving the allocation of authority between lawyer and client, courts may well take account of paying clients' ability to specify at the outset of their relationship with their attorneys what degree of control they wish to exercise, and to avoid attorneys unwilling to accept client direction.

3 Of course, a State may also allow properly supervised law students to represent indigent defendants. See *Argersinger v. Hamlin,* 407 U.S. 25, 40–41, 92 S.Ct. 2006, 2014, 32 L.Ed.2d 530 (1972) (BRENNAN, J., concurring).

4 Cf. ABA Code of Professional Responsibility (1980) EC7–7 ("the authority to make decisions is exclusively that of the client" except for decisions "not substantially affecting the merits of the cause or substantially

prejudicing the rights of a client"); id., EC7–8 ("the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client").

5 See also ABA Commission on Professional Standards, Model Rules of Professional Conduct, Rule 1.2(a) (Final Draft 1982). Rule 1.2(a) requires that "[a] lawyer shall abide by a client's decisions concerning the objectives of representation [if they are not illegal or unethical, or if, despite the fact that he considers them 'repugnant or imprudent,' the lawyer cannot withdraw without prejudicing the client], and shall consult with the client as to the means by which they are to be pursued." It is worth noting, however, that the commentary to Rule 1.2 discloses that its drafters' principal concern was the relationship between insurance company lawyers and insureds they represent, and that Rule 1.2 is intended to provide a basis for disciplinary action as well as general ethical guidance.

6 I do not mean to suggest that this "handful" of cases is not important—it may well include many cases that shape the law. Furthermore, the relative skill of lawyers certainly makes a difference at the trial and pre-trial stages, when a lawyer's strategy and ability to persuade may do his client a great deal of good in almost every case, and when his failure to investigate facts or to present them properly may result in their being excluded altogether from the legal system's official conception of what the "case" actually involves.

415 F.2d 1154
United States Court of Appeals Fourth Circuit.

Russell Judas NELSON, Appellee,
v.
C. C. PEYTON, Superintendent of the Virginia State Penitentiary, Appellant.

No. 13023.
|
Argued March 6, 1969.
|
Decided June 25, 1969.

Synopsis

Proceeding on petition of state prisoner for writ of habeas corpus. The United States District Court for the Eastern District of Virginia, at Richmond, Robert R. Merhige, Jr., J., entered judgment granting writ and the Commonwealth appealed. The Court of Appeals, Winter, Circuit Judge, held that where state defendant had been denied the effective assistance of counsel at a critical stage in the proceeding leading to his incarceration because he had never been informed of his right to appeal and the time and manner in which to take the same, he was entitled to release unless afforded a belated appeal or the Commonwealth elected to retry him.

Affirmed.

West Headnotes (8)

[1] **Habeas Corpus** Adequacy and Effectiveness

Record in federal habeas corpus hearing of state prisoner, who had progressed only to sixth grade and had an I.Q. of 73, disclosed that prisoner had been denied effective counsel at a critical stage of proceeding leading to his incarceration because at no time was he told by counsel or any one else that he had a right of appeal under state law irrespective of indigency or the manner and time in which to pursue that right. U.S.C.A.Const. Amends. 6, 14.

3 Cases that cite this headnote

[2] **Habeas Corpus** Post-Trial Proceedings; Sentencing, Appeal, Etc

Where state defendant had been denied the effective assistance of counsel at a critical stage in the proceeding leading to his incarceration because he had never been informed of his right to appeal and the time and manner in which to take the same, he was entitled to release unless afforded a belated appeal or the Commonwealth elected to retry him. U.S.C.A.Const. Amends. 6, 14.

19 Cases that cite this headnote

[3] **Criminal Law** Critical Stages

Criminal Law Adversary or Judicial Proceedings

Every criminal defendant has unqualified right, whether or not indigent, to be represented by counsel at all critical stages of any prosecution against him, and right begins when the accusatorial process begins as to him. U.S.C.A.Const. Amends. 6, 14.

1 Case that cites this headnote

[4] **Criminal Law** Indigence

Where states, which are not under obligation to provide for appellate review, do provide for appellate review, defendant's right to counsel continues through that stage of proceeding and he must be afforded full resort to that review and to same documents and tools of appellate review as if he were not indigent. U.S.C.A.Const. Amends. 6, 14.

1 Case that cites this headnote

[5] **Criminal Law** Indigence

Counsel is also required for indigent defendant in hiatus between termination of trial and beginning of an appeal in order that defendant knows that

he has a right to appeal, how to initiate an appeal and whether, in opinion of counsel, appeal is indicated. U.S.C.A.Const. Amends. 6, 14.

12 Cases that cite this headnote

[6] **Criminal Law** Indigence

Indigent defendant is entitled to have counsel after trial had been concluded for at least as long as necessary for counsel to advise him of right to appeal, manner and time in which to appeal and whether appeal has any hope of success, unless counsel had provided advice as to right to appeal and manner and time in which to appeal prior to conclusion of trial, or unless trial court has advised defendant in this respect. U.S.C.A.Const. Amends. 6, 14.

17 Cases that cite this headnote

[7] **Criminal Law** Waiver or Loss of Right

Where record provided no support for conclusion that indigent defendant knew that he had a right to appeal, waiver of that right by federal standards could not have occurred since, under those standards, one may not relinquish intentionally an unknown right. U.S.C.A.Const. Amends. 6, 14.

2 Cases that cite this headnote

[8] **Habeas Corpus** Post-Trial Proceedings; Sentencing, Appeal, Etc

Where it has been shown that a defendant was denied effective assistance of counsel because of failure to advise him of right to appeal, a showing that an appeal would have some chance of success was not a prerequisite to federal habeas corpus relief.

21 Cases that cite this headnote

Attorneys and Law Firms

***1155** Gerald L. Baliles, Asst. Atty. Gen., of Va. (Robert Y. Button, Atty. Gen. of Va., on the brief), for appellant.

Frank W. Hardy Richmond, Va. (Court-assigned counsel) (Daniel Rogers, II, Richmond, Va., Court-assigned counsel, on the brief), for appellee.

Before SOBELOFF, BRYAN and WINTER, Circuit Judges.

Opinion

WINTER, Circuit Judge:

Concluding that petitioner, a state prisoner incarcerated under a fifteen year term for robbery and faced with two ten year consecutive, prospective terms for attempted rape and recidivism, [1] had been denied his right to effective assistance of counsel because he had not been advised of his right to appeal his convictions for robbery and attempted rape and that he had not waived his right to appeal, the district judge granted the writ of habeas corpus. He afforded the Commonwealth a period of sixty days in which to grant petitioner a belated appeal, or to retry him, if it be so advised. The Commonwealth appeals and we affirm.

Petitioner who progressed only to the sixth grade of school and who has a mental age of eleven years and an IQ of 73, was tried with a codefendant, one Ernest Mines, on their pleas of not guilty to charges of robbery and attempted rape in the Hustings Court of the City of Richmond on November 27, 1962. Petitioner was represented by two court-appointed counsel who were acting informally as public defenders and who were also appointed to represent Mines and other defendants in other cases. Both defendants were convicted; no appeal on behalf of petitioner was noted or perfected; no transcript of the trial was made.

Shattered by the outcome of his trial, the sentences imposed on him for the substantive offenses and the prospect of an additional sentence as a recidivist, petitioner made no statement in court after he was pronounced guilty. He was led from the courtroom to the lockup. There was evidence that he requested the opportunity to speak to his counsel. It is undisputed that one of his attorneys ***1156** did not see him again after he left the courtroom. The other attorney did see petitioner in the lockup when that attorney went to talk to Mines, who was also in the lockup, about an appeal. That attorney had no recollection of speaking to petitioner; petitioner confirmed that they had no conversation. The only evidence in the record is that at no time during his pretrial interviews with his counsel, during the trial or thereafter, was petitioner told by his counsel or anyone else that he had a right

of appeal under Virginia law, irrespective of indigency, or the manner and time in which to pursue that right.

Petitioner testified that in approximately December, 1962, a fellow-inmate wrote to the trial judge in his behalf. Petitioner's understanding was that the letter was written because of petitioner's desire 'to know how could I get back to the Court,' but the actual contents of the letter were not known to petitioner. The official papers relating to petitioner's trial did not contain the letter, and the letter was not produced at the state post-conviction hearing.

From the facts of record we accept as correct the finding of the state habeas judge, concurred in by the district judge, that petitioner never made a request to appeal his case. [2]

I

The Commonwealth contends that the established rule in this circuit is that, in the absence of any indication by a defendant to anyone that he wished to appeal, defendant cannot claim that he was denied his right to appeal. The rule is claimed to be founded on our decisions in Allred v. Peyton, 385 F.2d 360 (4 Cir. 1967); Magee v. Peyton, 343 F.2d 433 (4 Cir. 1965); Boles v. Kershner, 320 F.2d 284 (4 Cir. 1963), and such memorandum decisions as Connors v. Peyton, Mem. Dec. No. 12,157, December 18, 1968; Morgan v. Peyton, Mem. Dec. No. 12,337, December 6, 1968; Sand v. Peyton, Mem. Dec. No. 12,647, October 2, 1968; and Smith v. Peyton, Mem. Dec. No. 12,265, November 15, 1968. Consequently, it is argued that, since the state habeas judge and the district judge found that petitioner never made a request to appeal, this finding is dispositive and the judgment of the district judge granting habeas corpus relief should be reversed.

[1] **[2]** It is true that on more than one occasion we have intimated that the failure on the part of one seeking habeas corpus relief to have requested that he be granted his right to appeal was fatal to a claim that he had unconstitutionally been denied his right of appeal, and it is true also that in such cases the language we have employed has suggested that the failure of such a request is fatal even in the absence of a showing that the petitioner knew of his right to appeal. However, on close examination these cases do not appear to have considered directly the issue of whether a defendant must be informed in the first instance of a right to appeal, nor does it appear with clarity whether in fact the petitioners in those cases had been aware of their right to appeal. In the instant case the determinative, basic question is whether petitioner knew that he had a right to appeal. We conclude that petitioner did not, and the absence of such knowledge is a clear indication that he was denied the effective assistance of counsel. This follows because he did have a right to appeal, and it was the duty of his counsel to advise him of the right and how and when to exercise it. Indeed, on this record we conclude that petitioner was denied counsel at a critical stage in the proceeding leading to his incarceration so that, in accordance ***1157** with current constitutional doctrine, he is entitled to release unless he is afforded a belated appeal or unless the Commonwealth elects to retry him. To the extent that language we have employed in the cases cited indicates to the contrary, we no longer consider it a correct statement of the law.

[3] **[4]** **[5]** At times cast in terms of a defendant's right to counsel under the Sixth Amendment, as made applicable to the states by the Fourteenth Amendment, in terms of due process clause of the Fourteenth Amendment, standing alone, in terms of the equal protection clause of the Fourteenth Amendment, or in terms of a combination of these, the recent trend of decisions makes clear that every defendant has the unqualified right, whether or not indigent, to be represented by counsel at all critical stages of any prosecution against him. The right begins when the accusatorial process begins as to him. And where the states, which are not under the obligation to provide for appellate review, do provide for appellate review, his right to counsel continues through that stage of the proceedings and he must be afforded full resort to that review and to the documents and tools of appellate review, the same as if he were not indigent. Where counsel is clearly required at trial and in certain instances even before the formalities leading to trial have begun and where counsel is clearly required on appeal when provisions for an appeal have been enacted, we think that counsel is also required in the hiatus between the termination of trial and the beginning of an appeal in order that a defendant know that he has the right to appeal, how to initiate an appeal and whether, in the opinion of counsel, an appeal is indicated. This interim is a critical, crucial one for a defendant because he must make decisions which may make the difference between freedom and incarceration.

Thus, Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), establishes the basic right to counsel. 'Appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected.' Mempa v. Rhay, 389 U.S. 128, 134, 88 S.Ct. 254, 257, 19 L.Ed.2d 336 (1967). Such cases as Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758,

12 L.Ed.2d 977 (1964), Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), and Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967), mark the beginning point when the right to counsel comes into being. Once the right has matured, the law is now certain that it continues through the conclusion of appellate review. Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); Swenson v. Bosler, 386 U.S. 258, 87 S.Ct. 996, 18 L.Ed.2d 33 (1967). And 'where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request.' Carnley v. Cochran, 369 U.S. 506, 513, 82 S.Ct. 884, 889, 8 L.Ed.2d 70 (1962); Puckett v. North Carolina, 343 F.2d 452 (4 Cir. 1965). Even if counsel appointed to conduct an appeal concludes that the appeal is frivolous and desires to withdraw, he must, nevertheless, brief anything in the record which might arguably support the appeal; and if the court finds any legal point arguable on its merits, it must, prior to decision, provide another attorney. Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

[6] When the breadth and scope of the right to counsel as established by these cases is considered, we think it follows that an indigent defendant is entitled to have counsel after his trial has been concluded for at least as long as it is necessary for counsel to advise him of his right to appeal, the manner and time in which to appeal and whether an appeal has any hope of success, unless counsel has provided advice as to the right to appeal and the manner and time in which to appeal prior to the conclusion ***1158** of trial, or unless the trial court has advised the defendant in the latter regard and shouldered the burden which is otherwise that of counsel. Where counsel, as in the instant case, treat their representation as terminated without having imparted such advice, a defendant's right to counsel has been effectively denied; or, where counsel have not treated their representation as terminated but fail to impart such advice, a defendant's right to effective assistance of counsel has been effectively denied. In either event, if the omissions of counsel have not been supplied by advice imparted by the trial court as to the right to appeal and the manner and time in which to appeal, a defendant's Sixth Amendment right, as made applicable to the states by the Fourteenth Amendment, has been violated. [3] While we do not now decide the issue, we note that the rules in right to counsel cases are generally applied retroactively. McConnell v. Rhay, 393 U.S. 2, 89 S.Ct. 32, 21 L.Ed.2d 2 (1968) (per curiam).

II

[7] The district judge further found that petitioner did not waive his right to appeal. We think the district judge was correct because the record provides no support for the conclusion that petitioner knew that he had a right to appeal. Waiver, by federal standards, thus could not have occurred. Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963). Under federal standards, one may not relinquish intentionally an unknown right.

We need not recite all of the evidence to support our conclusion. It is true that petitioner was never asked if he knew that he had a right to appeal in spite of the fact that the trial for the instant offenses was not his first court experience. But the record is undisputed that no one advised petitioner of his right to appeal the convictions we are considering and this, coupled with the lack of evidence that petitioner was ever a party to a previous appeal, petitioner's very limited intelligence and his uncontroverted testimony that he sought help from a fellow-inmate to 'get back to the Court' because he was unable to write his own letter can lead to no other finding.

III

In argument, the Commonwealth contended that petitioner was not entitled to habeas corpus relief unless he had established that he was prejudiced by the failure to have his convictions reviewed on appeal. Stated otherwise, the argument is that petitioner may qualify for relief only if he shows that an appeal by him would have been at least debatably meritorious so that he lost some right of potential value in the failure to obtain appellate review.

No transcript was made of petitioner's trial. His version of his defense was that he simply told his counsel the truth, i.e., that he had nothing to do with the girl and that he was in another city on the date of the alleged offenses. His counsel has no clear recollection of the course of the trial and no memory as to whether there were or were not, in their opinion, any specific grounds for appeal. One of his attorneys did recall that petitioner produced a bus ticket stub to corroborate his alibi, but he could not remember if

it had been offered in evidence. In short, if we adopt the Commonwealth's argument, petitioner failed, at the habeas corpus hearing, to show possible error in his trial and the possibility that his convictions would be set aside.

***1159 [8]** Victor v. Lane, 394 F.2d 268 (7 Cir. 1968), and McGarry v. Fogliani, 370 F.2d 42 (9 Cir. 1966), strongly suggest, if not hold, that in such cases a petitioner must demonstrate that his appeal would have had some chance of success before he is entitled to habeas corpus relief. We do not agree that where the basis for relief is denial of counsel or denial of effective assistance of counsel that such a showing is a prerequisite to habeas corpus relief.

The right to counsel and the effective assistance of counsel is too basic a right to condition entitlement thereto upon an uninformed, untrained, unintelligent, indigent petitioner's showing that his appeal would have at least debatable merit when the ability to make and preserve a record of what transpired was not even within his grasp. Cf., Miranda v. Arizona, supra, 384 U.S. at 472-473, 86 S.Ct. 1602. Where appellate review is provided it becomes an 'integral part of the * * * trial system for finally adjudicating the guilt or innocence of a defendant,' and denial of the right has been analogized to denying a fair trial. Griffin v. Illinois, 351 U.S. 12, 18, 76 S.Ct. 585, 590, 100 L.Ed. 891(1956). The right to counsel and the effective assistance of counsel goes to 'the very integrity of the fact-finding process.' Linkletter v. Walker, 381 U.S. 618, 639, 85 S.Ct. 1731, 1743, 14 L.Ed.2d 601 (1965). Once denied, it seems to us, the burden of proving it valueless in a given case must rest upon the Commonwealth which denied the right by the omissions of the counsel it supplied, if, indeed, the law will countenance such a defense.

We conclude, therefore, that the district court should be affirmed. We conclude, also, that the conditions of the district court's stay of the writ are proper. Petitioner may be retried, if the Commonwealth is so advised. Conceivably, from the notes of the trial judge and other sources- a matter as yet unexplored- a record on appeal may be constructed and Virginia may conclude to grant a belated appeal on such a record.[4] At least, the Commonwealth should be granted the opportunity to pursue this possible avenue of relief for petitioner.

Affirmed.

All Citations

415 F.2d 1154

Footnotes

1 Service of five years of the term under the Virginia Recidivist Statute was suspended on good behavior.

2 Before initiating proceedings in the district court, petitioner sought a writ of habeas corpus from the Hustings Court of the City of Richmond. Counsel was appointed for him and he was given a plenary hearing. From a denial of the writ, he unsuccessfully sought a writ of error from the Supreme Court of Appeals of Virginia. On the issues which concern us, petitioner had thus exhausted available state remedies before he sought relief from the district court.

3 The result we reach is in accord with that reached by other courts: Wynn v. Page, 369 F.2d 930 (10 Cir. 1966); Smotherman v. Beto, 276 F.Supp. 579 (N.D.Tex.1967); Fox v. State of North Carolina, 266 F.Supp. 19 (E.D.N.C.1967); United States ex rel. Thurmond v. Mancusi, 275 F.Supp. 508, 522-524 (E.D.N.Y.1967); United States ex rel. Maselli v. Reincke, 261 F.Supp. 457 (D.Conn.1966), aff'd, 383 F.2d 129 (2 Cir. 1967).

4 One of petitioner's counsel suggested that there may have been a recorded tape of the proceedings.

Defending People with SUDs:
Evidence-Based Harm Reduction & Treatment

Michael H. Baca-Atlas, MD, FASAM
Assistant Professor, Dept of Family Medicine/Psychiatry
Medical Director, UNC WakeBrook Primary Care – Raleigh, NC
President-Elect NC Society of Addiction Medicine
5/12/2023

UNC SCHOOL OF MEDICINE

1

Disclosures/Conflict of Interest

- I have no actual or potential conflicts of interest in relation to this program and no disclosures.

2

Objectives

- Review history of opioid use in the US and important policies.
- Discuss utilizing a chronic illness framework for SUD.
- Understand what settings patients can access MOUD.
- Discuss three FDA approved treatments for OUD.
- Review medications for treatment of opioid, methamphetamine, and alcohol use disorders.
- Discuss MOUD in the context of pregnancy/newborn care.

3

Special Populations

- Neonates
- Adolescents
- Pregnancy
- Geriatrics
- Criminal Justice Involved
- COVID-19+

https://www.nclap.org/

4

Past >>> Present

- Post Civil War
  - Addiction among Civil War soldiers
  - Isolation of morphine from Opium
  - Introduction of Hypodermic syringe
- Harrison Narcotics Tax Act of 1914
- NIDA created in 1970s
- DATA 2000 Waiver
- X-waiver eliminated 2023

5

OUD and Health Inequities

Overdose deaths in North Carolina increased by 40% in 2020 and continue to be on the rise. That's according to a new report from the state Department of Health and Human Services (DHHS) which shows, in 2020, an average of nine North Carolinians died from a drug overdose *every day*.

The startling figures mirror what's happening nationwide. In North Carolina, the number of drug overdose deaths - from illicit substances and/or medications - increased by nearly 1,000. What's more, both overdose deaths and the increases in substance use disproportionately affect historically marginalized populations.

Overdose Death Rates by Year and Race

	2019 rate	2020 rate	Increase
American Indian/Indigenous	43.3	83.6	93%
Black/African American	16.1	26.7	66%
White	27.4	36.1	32%

https://www.ncdhhs.gov/news/press-releases/2022/03/21/north-carolina-reports-40-increase-overdose-deaths-2020-compared-2019-ncdhhs-continues-fight-against

6

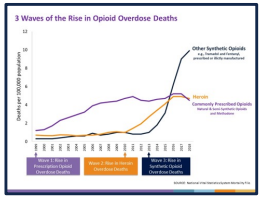
Definition

*Addiction is a primary, **chronic** and **relapsing brain disease** characterized by an individual pathologically pursuing reward and/or relief by substance use and other behaviors despite adverse consequences. (ASAM)*

"Use Despite Negative Consequences"

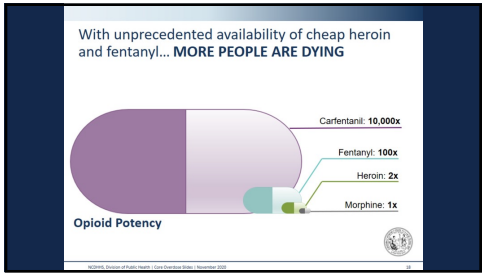
7

"Triple Wave"



Fourth Wave -> Methamphetamines

8



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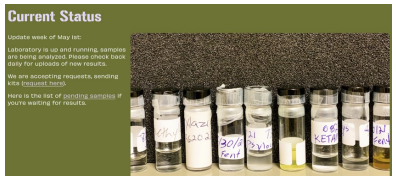
Street Drug Analysis in NC



https://www.streetsafe.supply/

10

NC Overdose Pyramid

For every opioid overdose death, there were over
1 hospitalizations and 3 ED visits due to opioid overdose

11

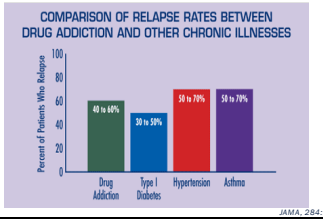
Treatment for OUD

Most Effective Treatment is….?

Medications for OUD (MOUD)

12

Why MOUD makes sense for Addiction?



JAMA, 284:1689-1695, 2000

13

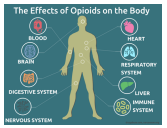
Comparison of Chronic Illnesses

	Diabetes Mellitus	Addiction
Relapse Rates	30-50%	40-60%
Medication Adherence	30-50%	40-60%
Screening/Monitoring	A1C	Urine Drug Screens
Access to Treatment	++++	+
Behavioral Interventions	Nutritionist/DM educator	Individual Counseling/Groups
Pharmacotherapy	Multiple formulations	Multiple Formulations
Refractory to Treatment	Endocrinology	Addiction Medicine/Psychiatry
HealthCare Stigma	+	++++

14

How Does MOUD Work?

- Provides **physiological** and **psychological** stabilization that can allow recovery to take place
  - **Reduce/prevent withdrawal**
  - **Diminish/eliminate cravings**
  - **Block the euphoric effect**
  - **Restore physiological function**



15

Evidence for MOUD

Decreases:

- Illicit use, death rate[1]
- HIV, Hep C infections[2-4]
- Crime[5]

Increases:

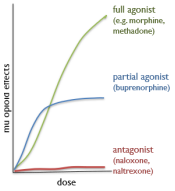
- Social functioning and retention in treatment[6,7]

1.Kreek J. SubstAbuse Treatment 2002
2.MacArthur, BMJ, 2012
3.Metzger, Public Health Reports 1998
4. H. Page, JAMA IM, 2014
5.Gerstein DR et al. CALDATA General Report, CA Dept of Alcohol and Drug Programs, 1994
6. Mattick RP et al. Cochrane Database of Systematic Reviews. 2009
7. Mattick RP et al. Cochrane Database of Systematic Reviews, 2014

16

FDA Approved MOUD

- **Methadone**
- **Buprenorphine**
- **Naltrexone (*PO, IM)**



17

Treatment Settings

- OTP vs. OBOT
- Residential detox
- Emergency Room
- Inpatient hospital

https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4527523/
https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4811188/

18

Opioid Treatment Programs (OTPs)

- Methadone can only be prescribed in a federally-regulated OTP when used for treatment of addiction
- Most common approach used worldwide
- Daily, directly observed therapy
  - Can obtain take home doses
- Not (yet) reported in PDMP
- Not referred to as "Methadone clinics"

Salsitz, Mt Sinai J of Medicine, 2000

19

MOUD Ambivalence/Stigma?

Myths and Realities of Opioid Use Disorder Treatment.

Myth	Reality
Buprenorphine treatment is more dangerous than other chronic disease management.	Buprenorphine treatment is simpler than many other routine treatments in primary care, such as titrating insulin or starting anticoagulation. But physicians receive little training in it.
Use of buprenorphine is simply a "replacement" addiction.	Addiction is defined as compulsively using a drug despite harm. Taking a prescribed medication to manage a chronic illness does not meet that definition.
Detoxification for opioid use disorder is effective.	There are no data showing that detoxification programs are effective at treating opioid use disorder. In fact, these interventions may increase the likelihood of overdose death by eliminating tolerance.
Prescribing buprenorphine is time consuming and burdensome.	Treating patients with buprenorphine can be uniquely rewarding. In-office inductions and intensive behavioral therapy are not required for effective treatment.
Reducing opioid prescribing alone will reduce overdose deaths.	Despite decreasing opioid prescribing, overdose mortality has increased. Patients with opioid use disorder may shift to the illicit drug market, where the risk of overdose is higher.

Wakeman SE, Barnett ML. Primary Care and the Opioid-Overdose Crisis - Buprenorphine Myths and Realities. *N Engl J Med*. 2018;379(1):1-4. doi:10.1056/NEJMp1802741

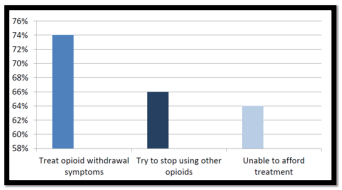
20

Q&A

What is the appropriate use for buprenorphine?

21

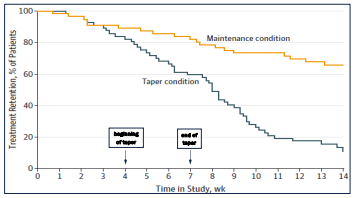
Reasons for Illicit Use of Buprenorphine



Bazazi, J Addict Med 2011

22

Buprenorphine: Maintenance vs Taper



Fiellin et al., 2014

23

Naloxone

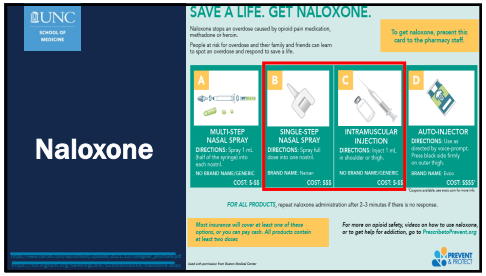
- No effect other than blocking opioids
- Naloxone ≠ MAT!!
- Increased shelf life for Narcan®! (Aug 2020)

FDA Approves First Over-the-Counter Naloxone Nasal Spray

Agency Continues to Take Critical Steps to Reduce Drug Overdose Deaths Being Driven Primarily by Illicit Opioids

For Immediate Release: March 29, 2023

24



25

Prescribing Scenarios

- Not interested in counseling
- Continues to intermittently use opioids
- Using methamphetamines, alcohol, or benzodiazepines

LOW BARRIER TREATMENT!!

26

Behavioral Health's Role in Treatment

- **Optional** psychosocial treatment should be offered in conjunction with pharmacotherapy.
- A decision to decline psychosocial treatment/absence of available treatment should **not** preclude or delay MOUD.
  - Think Depression treatment
- Declining psychosocial services should **not** generally be used as rationale for discontinuing current MOUD.

27

Harm Reduction Principles

Principle	Approaches
1.Humanism	Avoid making moral judgements and holding grudges against patients; Accept patients' choices.
2.Pragmatism	Do not assume abstinence is the goal; Providers may experience moral ambiguity since they may support individuals w/ behaviors that may cause negative health outcomes.
3.Individualism	Assess strengths and needs on an individual basis; Tailor messaging and interventions to specific needs of each patient while maximizing treatment options.
4.Autonomy	Highlights provider-patient partnership; Engage in patient centered care and shared decision making.
5.Incrementalism	Celebrate any positive gains; Appreciate all patients at times have negative courses or periods of stagnation.
6.Accountability without termination	Avoid penalizing backward movement and assist patients with understanding the effect of behaviors and choices on their health.

28

Harm Reduction Strategies

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- Targeted Naloxone Distribution
- MAT
- Academic Detailing
- Eliminating Prior-Authorization Requirements for MOUD
- Screening for Fentanyl in routine Clinical Toxicology testing
- 911 Good Samaritan Laws
- Naloxone Distribution in Treatment Centers and Criminal Justice Settings
- MAT in Criminal Justice Settings and Upon Release
- Initiating Buprenorphine-based MAT in Emergency Departments
- Syringe Services Programs

Acknowledgements: MAHEC

29

NC Opioid Epidemic & Criminal Justice Involvement

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- From 2000-2015, 1,329 people died of opioid overdose after release from NC State Prisons
- First 2 weeks post release from NC State Prisons Death Rate vs. general population:
  - Heroin Overdose -> 74x greater
  - Any Opioid Overdose -> 40x greater

Binswanger IA, Stern MF, Deyo RA, et al. Release from prison--a high risk of death for former inmates. N Engl J Med. 2007;356(2):157-165.

30

Q&A

Does MOUD provide treatment for stimulant (methamphetamine, cocaine) use disorder?

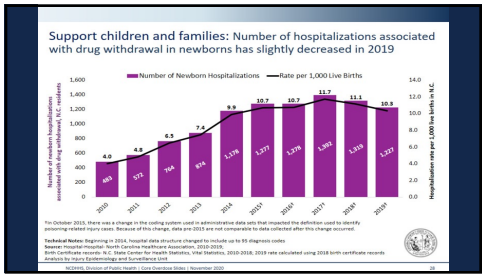
Are there SUDs that wouldn't be treated with medications?

31

Other FDA-Approved Treatment for Addiction?

- Opioids ☑
- Alcohol ☑
- Tobacco ☑
- Methamphetamines
- Cocaine
- Cannabis
- Benzodiazepines

32



33

Mom-Baby Dyad & OUD

- MOUD = GOLD STANDARD In pregnancy (methadone, BUP-NX)
- NAS (neonatal abstinence syndrome) = NOWS (neonatal opioid withdrawal syndrome)
- Increased 154% from 2010 to 2019
- Not only opioids, other substances including nicotine/alcohol

34

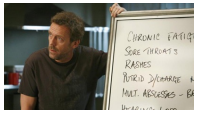
'Crack baby' development issues not side-effect of drug, but poverty

A 25-year study that followed babies born to crack cocaine addicted mothers found that the children were slow to develop. What surprised the researchers was that the determining factor wasn't crack cocaine. It was poverty.

35

What Else Is Going On?

- Sexual assault
- Intimate partner violence (IPV)
- Child Maltreatment
- Human trafficking
  - Sex
  - Labor
- Undiagnosed Mental Illness:
  - SMI/ADHD/MDD/GAD/PTSD
- Untreated Chronic Pain
- Untreated Medical Ailments
  - Neuropathy (DM), HA (HTN)
- Poverty, food insecurity, housing instability…



36

Words Matter!

- What we say and how we say it makes a difference to our patients with substance use disorder(s).

Stigmatizing Language	Non- Stigmatizing Language
Addict, drunk, junkie	
Drug habit Abuse Drug problem	
Clean	
Clean or dirty drug screen	

37

Conclusions

- Detox alone is seldom the treatment of choice for opioid addiction but is appropriate in some clinical situations.
- Medication for opioid use disorder (MOUD) has consistently demonstrated better long-term outcomes than no MAT.
- Buprenorphine and naltrexone have some significant advantages in terms of safety profile over methadone.
- Harm reduction strategies such as needle exchanges, naloxone distribution and low barrier access to treatment should be incorporated into treatment plans.

38

Resources

PCSS Providers Clinical Support System

Additional Resources

N.C. Department of Social Services
www.ncdhhs.gov/divisions/dss

N.C. Governor's Institute
www.governorsinstitute.org

N.C. Women's Health Branch
www.whb.ncpublichealth.com

N.C. Harm Reduction Coalition
www.nchrc.org

N.C. Department of Mental Health, Developmental Disabilities, and Substance Abuse Services
www.ncdhhs.gov/divisions/mhddsas

N.C. Recovery Courts
www.nccourts.gov/courts/recovery-courts

N.C Attorney General's Office
www.ncdoj.gov

N.C. Department of Public Instruction
www.ncpublicschools.org

N.C. Opioid Action Plan (OAP)
Information on the OAP can be found here

For additional substance use data visit:
www.injuryfreenc.ncdhhs.gov

39

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Thank you!

michael_baca-atlas@med.unc.edu

40

LARRY DANIEL
TECHNICAL DIRECTOR- DIGITAL FORENSICS

EMERGING ISSUES IN DIGITAL SURVEILLANCE

DIGITAL FORENSICS //

1

My Team

Lab Locations

- North Carolina
  - Lars Daniel – Practice Leader
  - Larry Daniel _ Technical Director
  - Jake Green – Technical Lead
  - Spencer McInvaille - Technical Lead
  - Luis Castrillon – Digital Forensic Analyst
  - Felipe Cruz – Digital Forensic Analyst
- South Carolina
  - Anthony Gentile – Digital Forensic Analyst
  - Eric Grabski – Sr. Digital Forensic Examiner
- Virginia
  - Kyle Richards – Digital Forensic Analyst
- Texas
  - Justin Ussery – Sr. Digital Forensic Examiner
  - Josh Lorencz – Digital Forensic Examiner

2

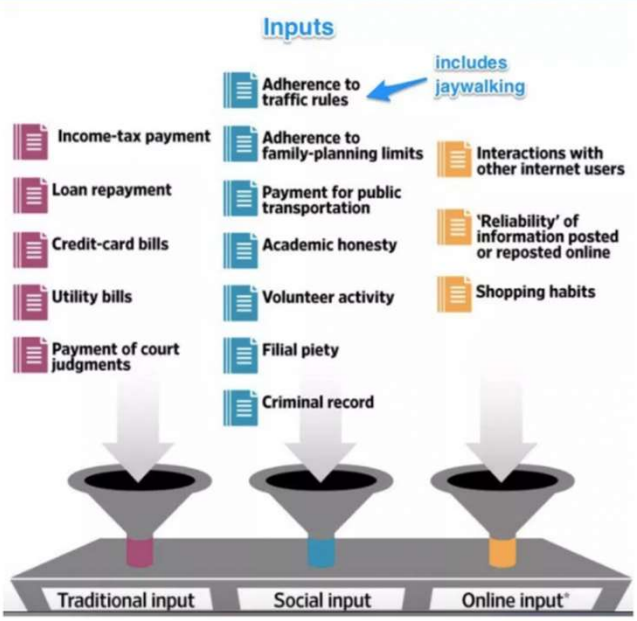
Chinese Social Credit System

https://www.zerohedge.com/news/2018-05-24/chinas-terrifying-social-credit-system-has-already-blocked-11-million-taking

3

Chinese Social Credit System

- Inputs
  - Traditional
  - Social
  - Online

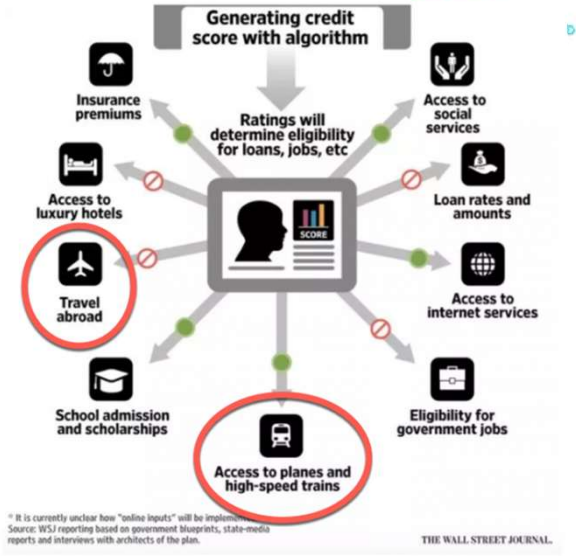


https://www.zerohedge.com/news/2018-05-24/chinas-terrifying-social-credit-system-has-already-blocked-11-million-taking

4

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

5

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

6

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.

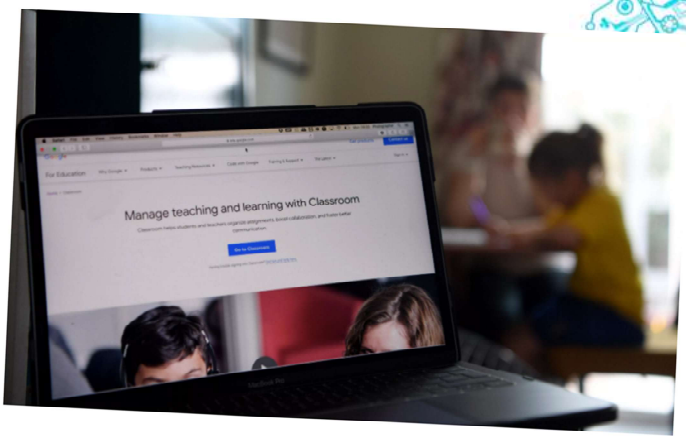
https://www.telegraph.co.uk/news/2018/05/17/chinese-school-uses-facial-recognition-monitor-student-attention/

7

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/

8

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/

11

Facebook: Smart Glasses

- Facial Recognition…?
  - Augmented Reality

https://www.allaboutvision.com/eyeglasses/smart-glasses/

12

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/

13

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/

14

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

15

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

16

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

17

Data Collection in the USA

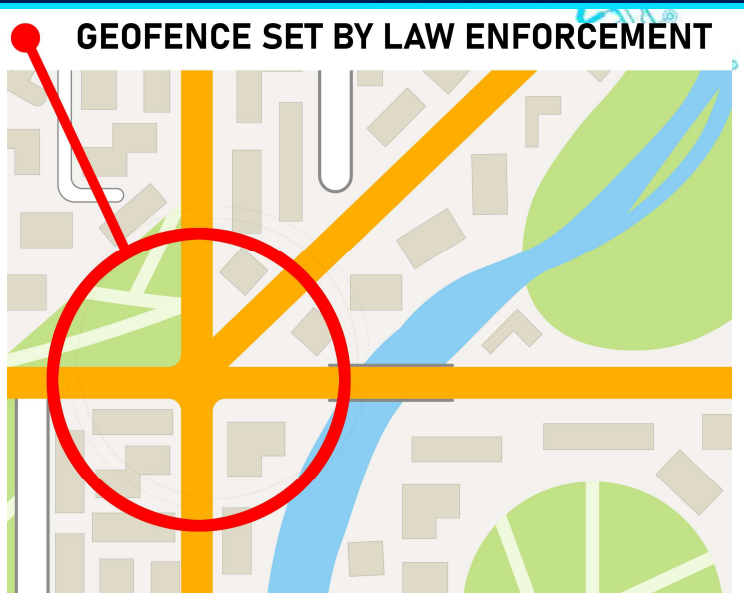
- Data Collection
  - License Plate Databases
    - License plate records and geo-tagged photos
  - Credit Reporting Agencies
    - Collect sensitive data and sell it to banks, creditors, insurers…
  - Smartphone Location Tracking
    - Extremely precise, allows for real time traffic, location busyness…
      - 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

18

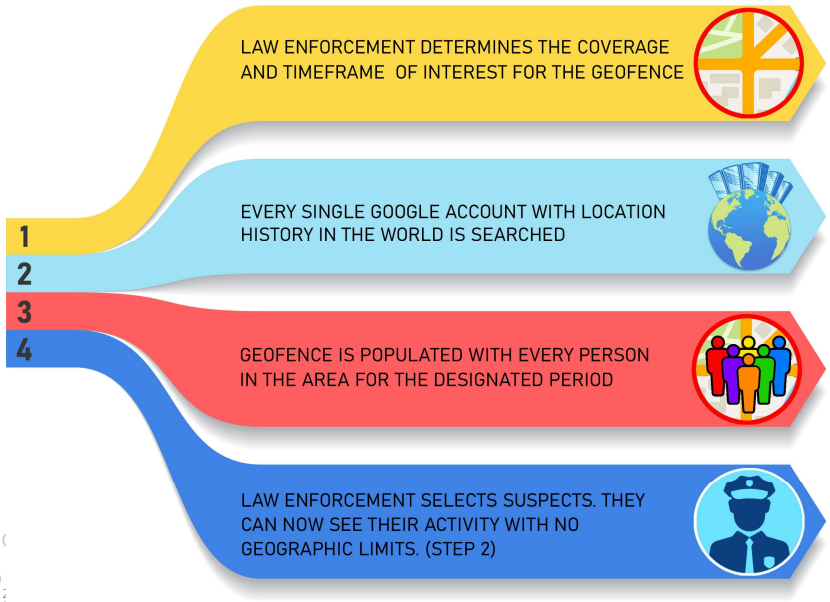
Location Data: Google GeoFence (GeoFence Warrant)

- GeoFence Warrant



19

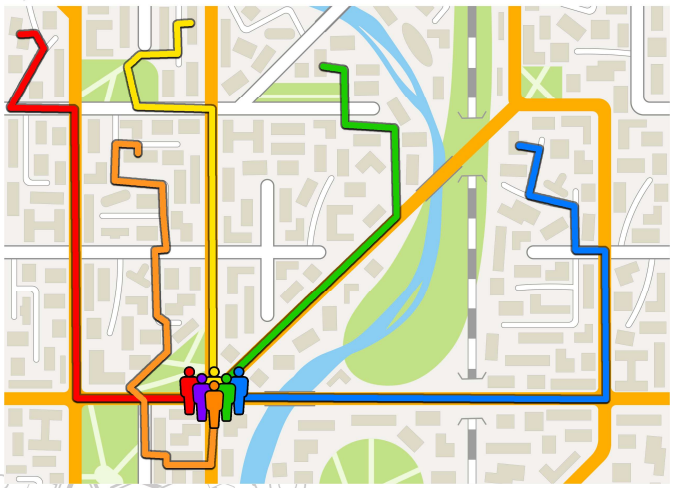
Location Data: Google GeoFence (GeoFence Warrant)



20

Location Data: Google GeoFence (GeoFence Warrant)

GEOFENCE IS REMOVED, ALL LOCATON ACTIVITY CAN NOW BE SEEN FOR THOSE PEOPLE LAW ENFORCEMENT HAS SELECTED



21

Location Data: Google GeoFence (GeoFence Warrant)

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

22

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)

Sesame Credit app

humancreativecontent.com/news-and-politics/2016/3/8/sypxe6b7dm2o8by6m4cwz1bh2kcszl

23

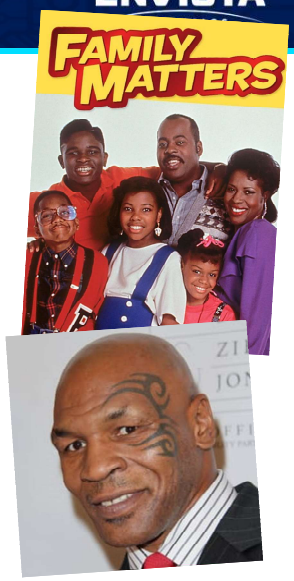
What determines the "truth" of content?

- Deepfake Videos – Nick Offerman

24

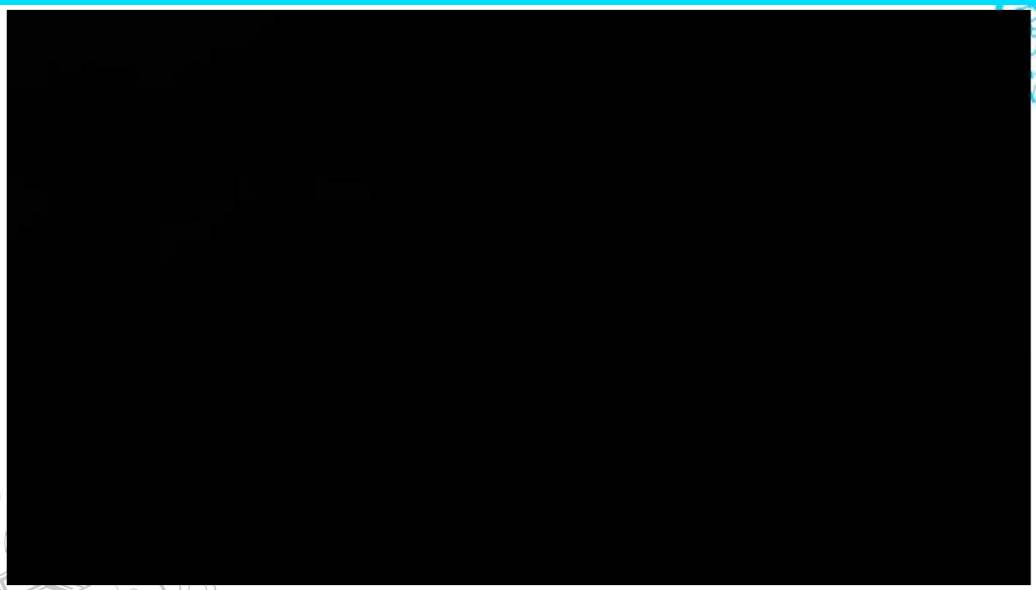
Will sharing this lower your score?

- Deepfake Videos – Mike Tyson



25

The Fake News Problem – what about this?



26

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REALITY CAPTURE

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27

Reality Capture

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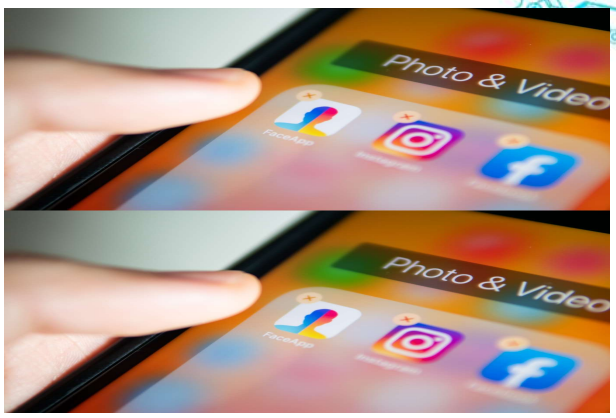
- New Territory
  - The ultimate social engineering
    - Virtual reality deepfakes



28

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WHAT IS THE IOT?

INTERNET OF THINGS

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29

Internet of Things (IoT)

ENVISTA FORENSICS

- 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

30

Internet of Things (IoT)

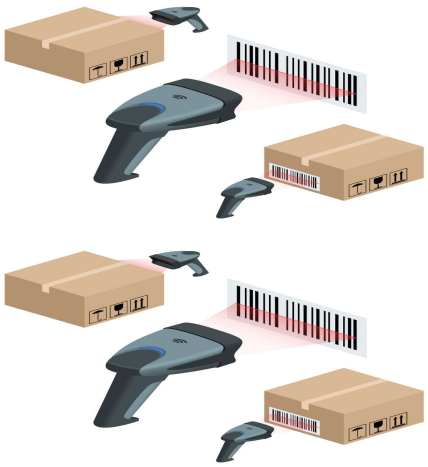
- What is the Internet of Things?
  - Any device with that is connected to the internet
  - Shared processing power
    - The **Internet of Things** (**IoT**) is the network of physical objects—devices, vehicles, buildings and other items embedded with electronics, software, sensors, and network connectivity—that enables these objects to collect and exchange data

Petchatz.com

31

Internet of Things (IoT)

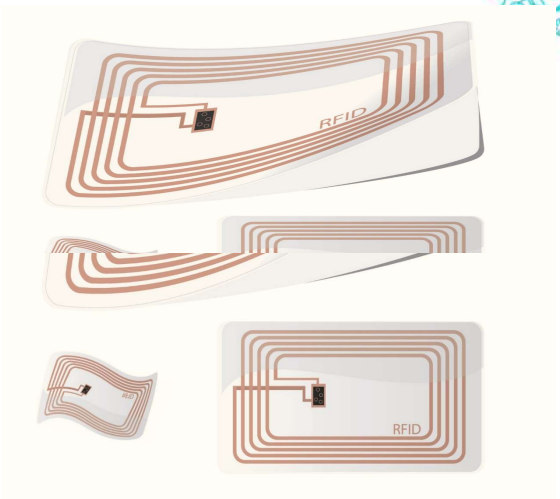
- Milestones
  - Barcode Reader
    - 1952
      - First ever built in a New York apartment by Norman Joseph and Bernard Silver
      - Ability to create and store data for retailers, shipping, inventory management…powerful when coupled with RFID



32

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



33

Internet of Things (IoT)

- Milestones
  - Sensors
    - Everything talks to everything
    - Stores and transmits data
    - Talks to RFID

34

Internet of Things (IoT)

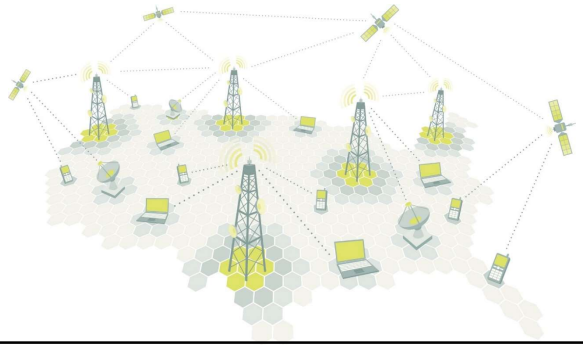
- Milestones
  - Big Data / Cloud
    - 2008-2009
      - According to Cisco Internet Business Solutions Group (IBSG), the Internet of Things was born in between 2008 and 2009 at simply the point in time when more "things or objects" were connected to the Internet than people.
    - 12.5 billion connected devices in 2010
  - Why is needed
    - Ability to store and transmit massive amounts of data generated by devices, sensors, websites, applications, etc.

35 of 89

35

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

36 of 89

36

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IOT DEVICES

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37

IoT Devices

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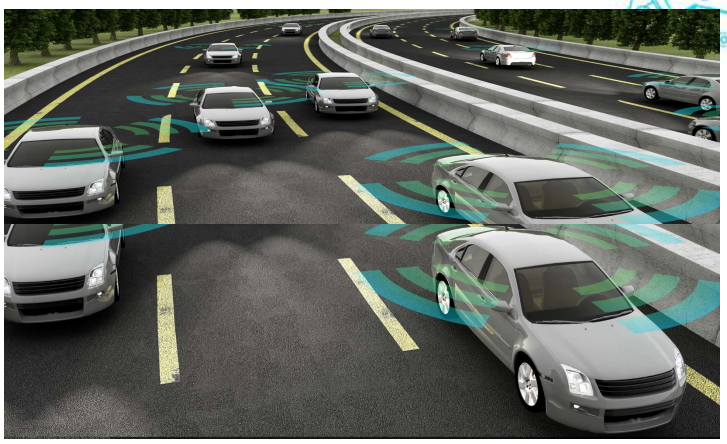
- Always on devices
  - Always listening…?
  - Data collection
  - Data stored on local devices
    - Cell phones, computers
  - Data stored in the cloud
    - Association accounts

38 of 89

38

IoT Devices

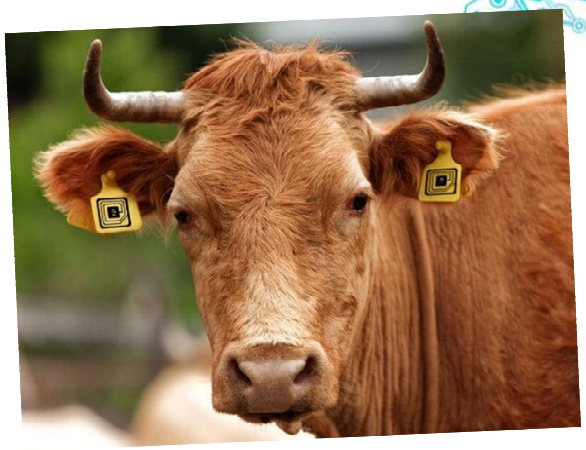
- Vehicles
  - Cellular connection
  - Autonomous
  - Semi-autonomous
  - Video



39

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



40

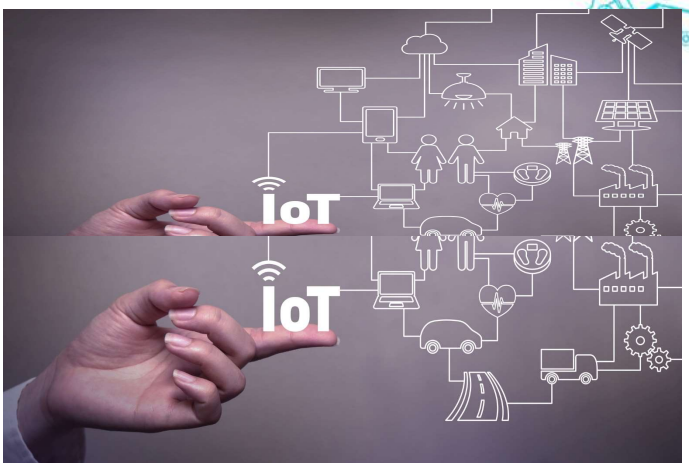
Digital Forensics – Murder Cases

- Case Example
  - SODDI Defense
    - (Some Other Dude Did It)
      - Computer Forensics
      - Cell Phone Forensics
      - Cellular Location
      - Xbox Forensics
      - Alarm System Logs

41

Internet of Things (IoT)

- What the Future Holds
  - Hyper-connection is the future, and it is coming fast.



42

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IOT CYBER SECURITY

TODAY'S HACKING = TOMORROW'S EVIDENCE

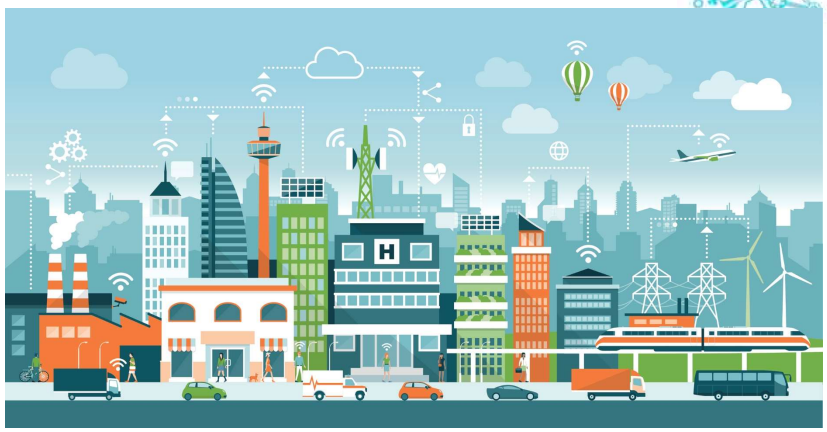
DIGITAL FORENSICS //

43

IoT Security Risks

ENVISTA FORENSICS

- Hacking
  - millions of insecure connected devices
  - Leaves critical systems and data around the world at risk



44

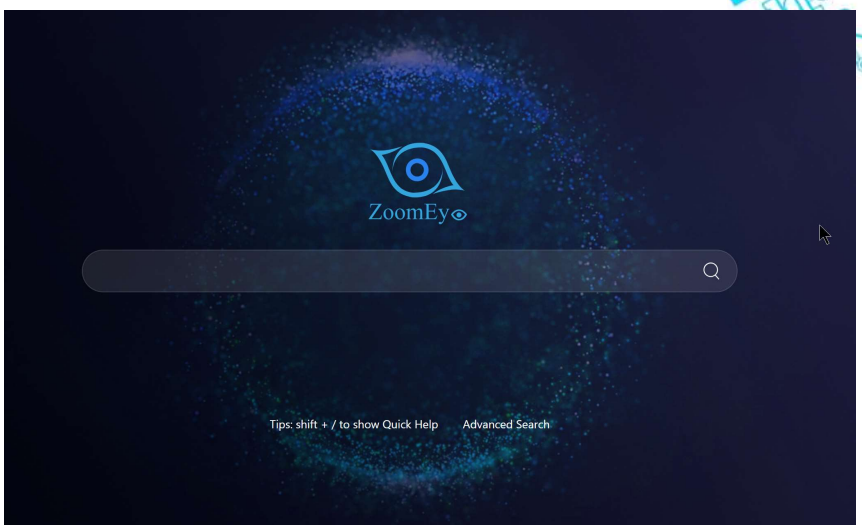
IoT Hacking Tools and Techniques

- Finding Attackable Hosts –
  - There are three difference search engines that scan for open ports and vulnerable services:
    - Censys.io
    - Zoomeye.org
    - Shodan.io

45

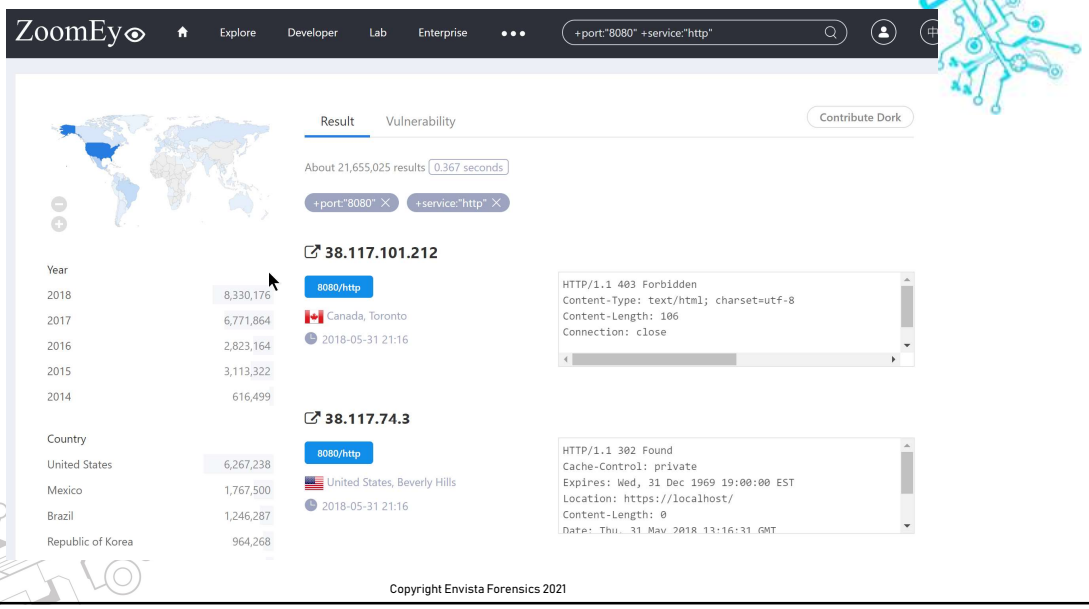
IoT Hacking Tools and Techniques

- Zoomeye.org



46

IoT Hacking Tools and Techniques



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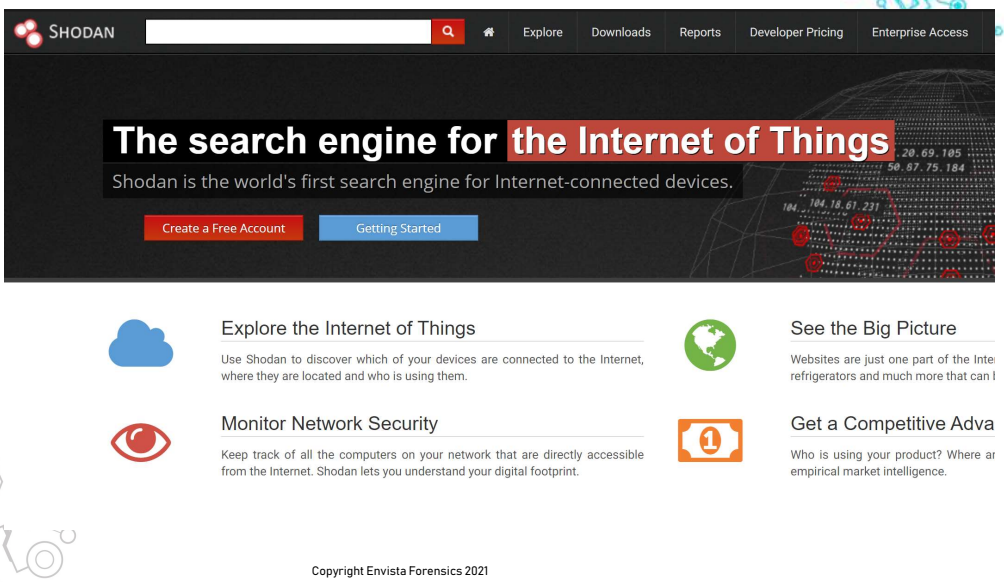
IoT Hacking Tools and Techniques

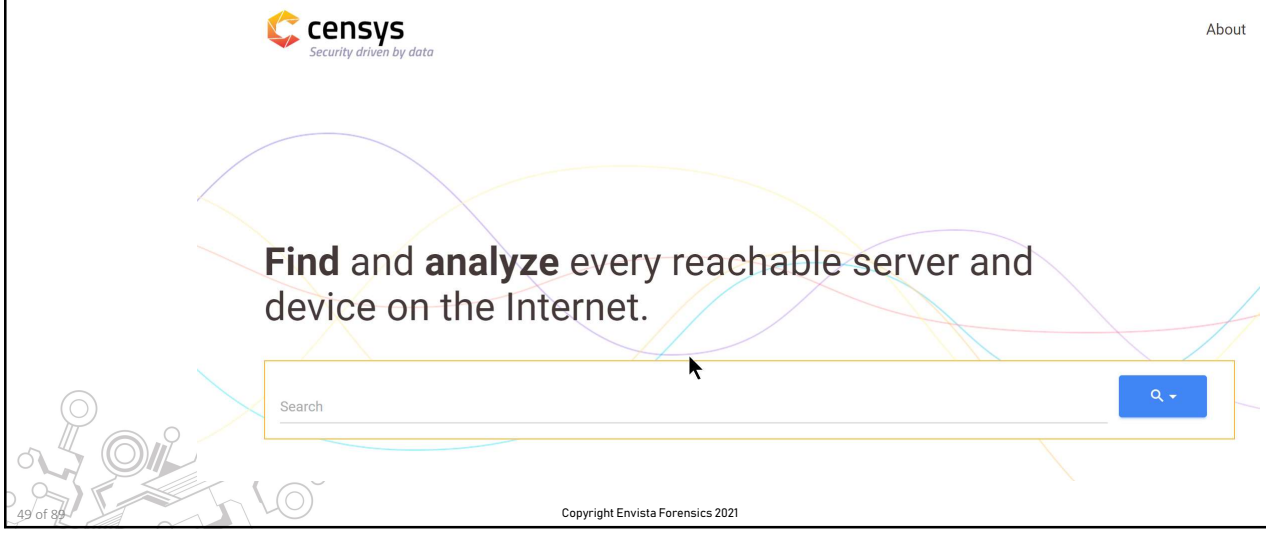
- Shodan.io



48

IoT Hacking Tools and Techniques

- Censys.io



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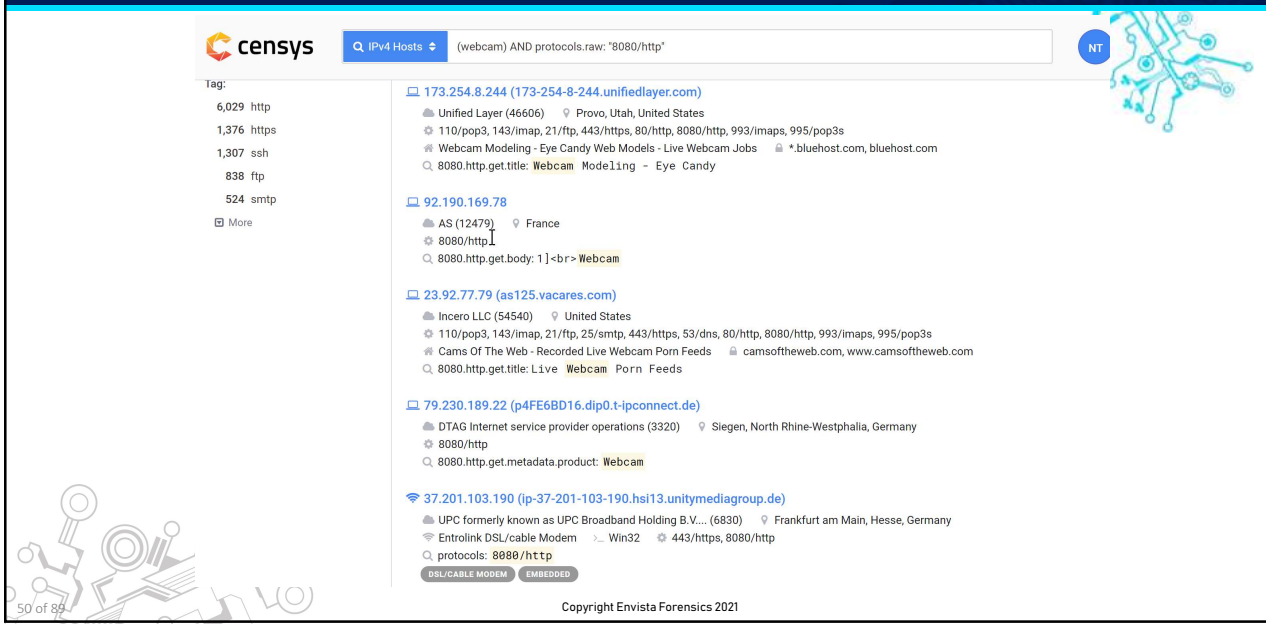
IoT Hacking Tools and Techniques



50

IoT Hacking Tools and Techniques

- Live Webcam

51

IoT Security Risks

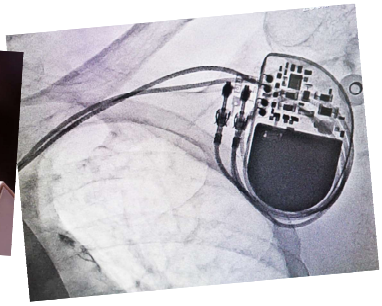
- Hacking
  - Cardiac devices
    - Early this year, CNN wrote, "The FDA confirmed that St. Jude Medical's implantable cardiac devices have vulnerabilities that could allow a hacker to access a device. Once in, they could deplete the battery or administer incorrect pacing or shocks, the FDA said.
    - "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/

52

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

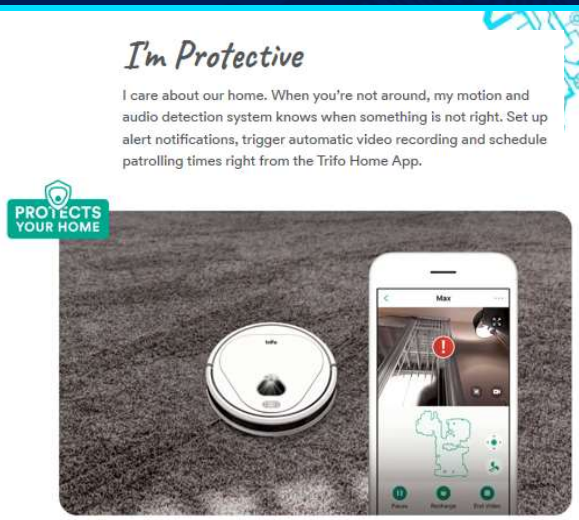
- Hacking
  - TRENDnet Webcam Hack
    - TRENDnet transmitted user login credentials in clear, readable text over the Internet, and its mobile apps for the cameras stored consumers' login information in clear, readable text on their mobile devices, the FTC said.
    - Allowed hackers to watch the video feed from the camera in real time.

https://www.iotforall.com/5-worst-iot-hacking-vulnerabilities/

55

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/

56

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/

57

IoT Security Risks

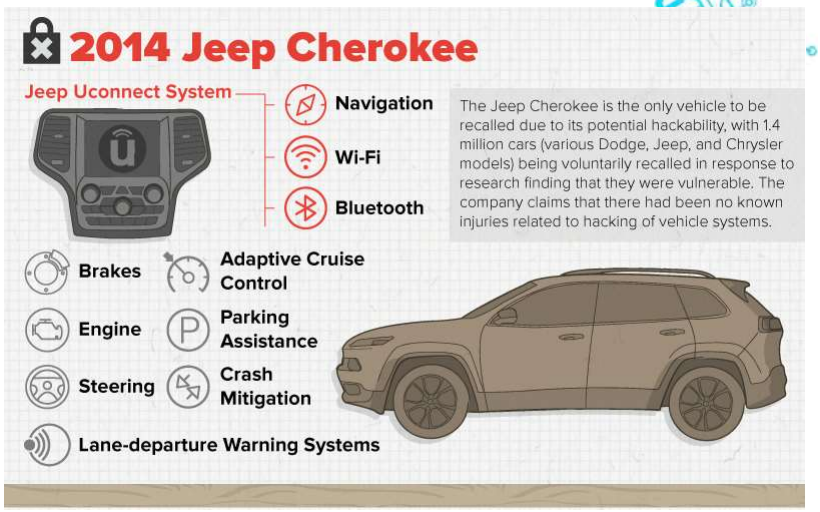
- Physical Ransomware..?
- DDOS Attacks
  - Hackers are actively searching the internet and hijacking smart door/building access control systems, which they are using to launch DDoS attacks, according to firewall company SonicWall…(due to the type of exploit) meaning it can be exploited remote, even 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/

58

IoT Security Risks

- Hacking
  - Connected vehicles

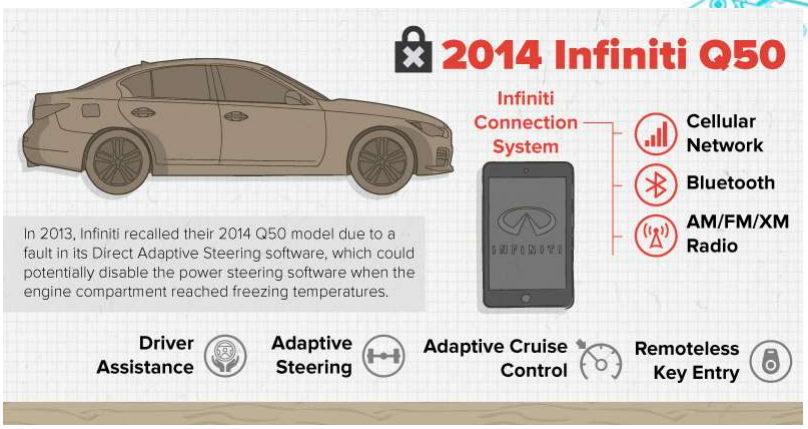


https://www.envistaforensics.com/news/the-most-hackable-cars-on-the-road-1

59

IoT Security Risks

- Hacking
  - Connected vehicles



https://www.envistaforensics.com/news/the-most-hackable-cars-on-the-road-1

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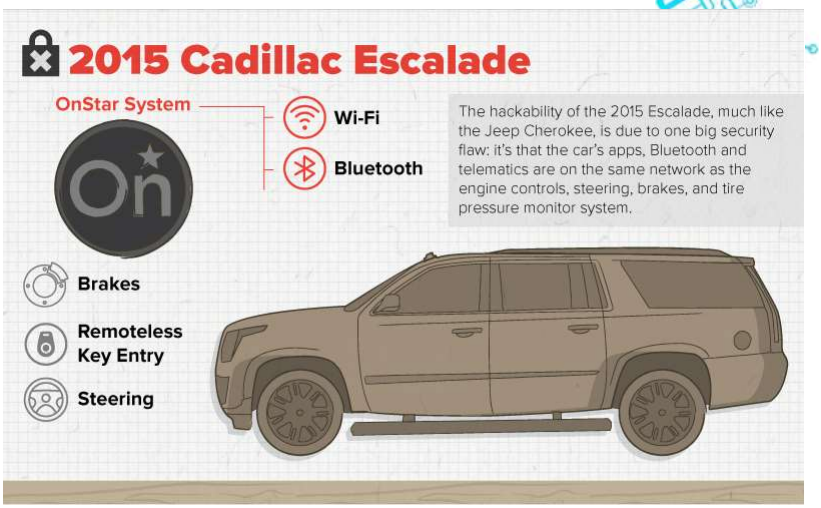
IoT Security Risks

- Hacking
  - Connected vehicles

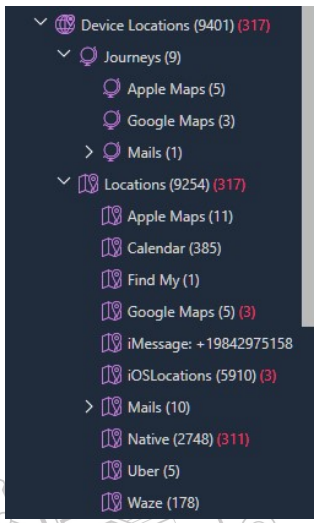


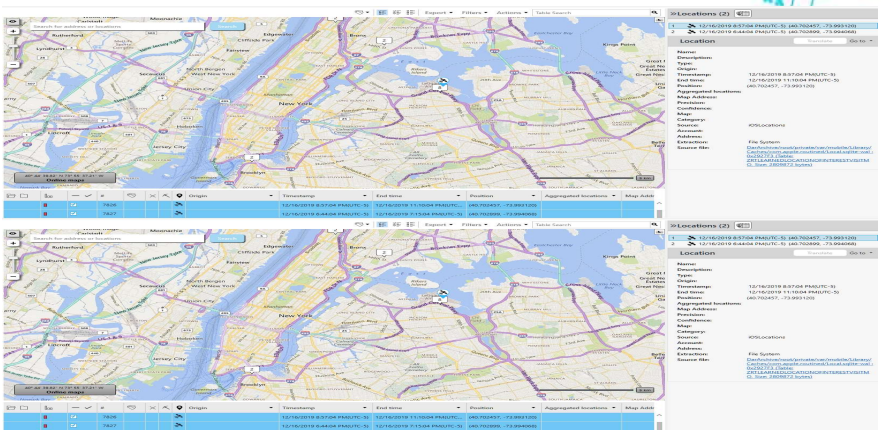
https://www.envistaforensics.com/news/the-most-hackable-cars-on-the-road-1

61

Location Data

- Location data from multiple sources within the cell phone





62

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.)

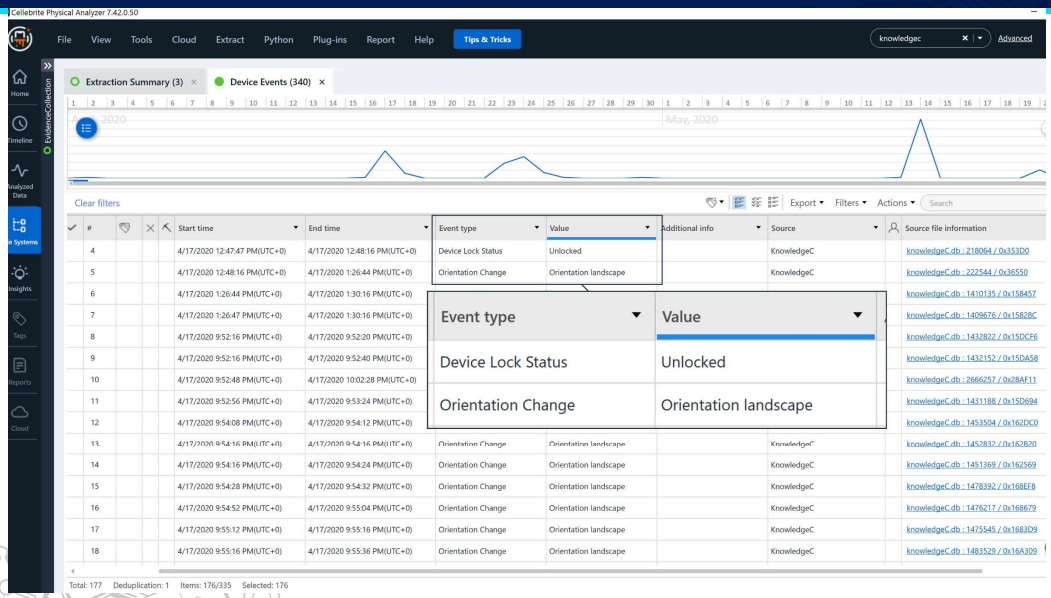
63

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

64

Device Events – User Interactions



65

Examination of Plaintiff's Phone

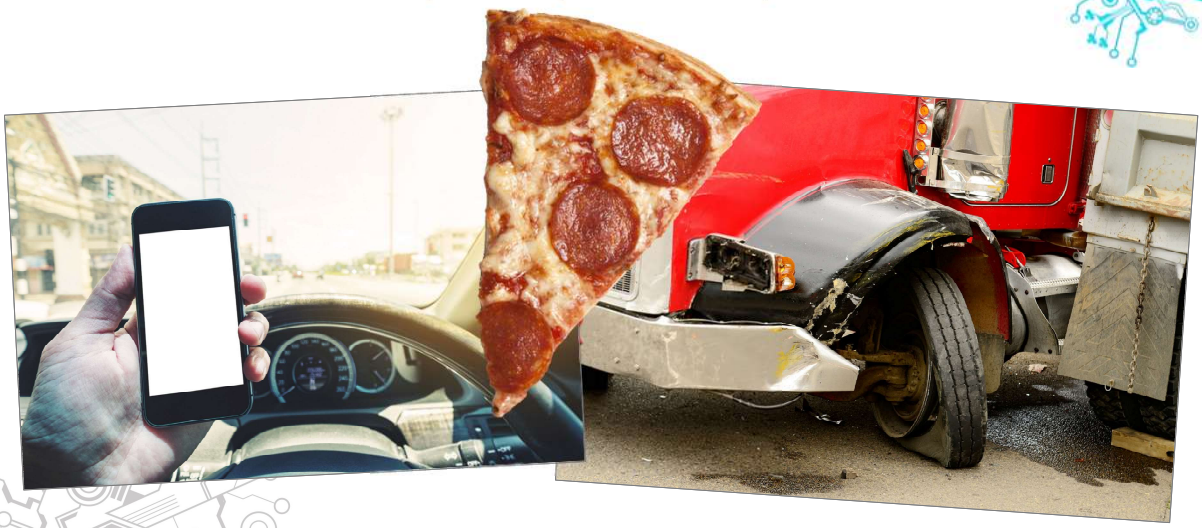
- Timelines

Time	Category	Item
[redacted] 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
[redacted] 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	Gmail (Cookies)
11:59:02 PM(UTC-6)	Text File	AnalyticsPlatformPrefsFile.xml
11:59:02 PM(UTC-6)	Text File	AnalyticsPlatformPrefsFile.DELETED.xml
11:59:26 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

66

Case Study: Distracted Driving

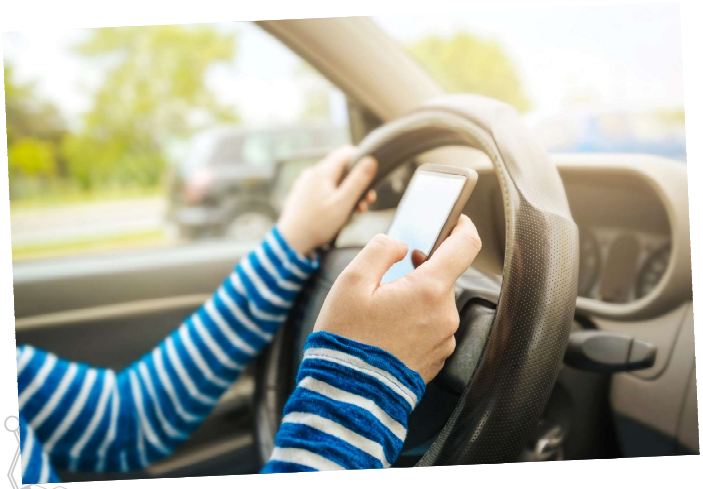
- Detailed timeline analysis at point of impact



67

Case Study: Distracted Driving

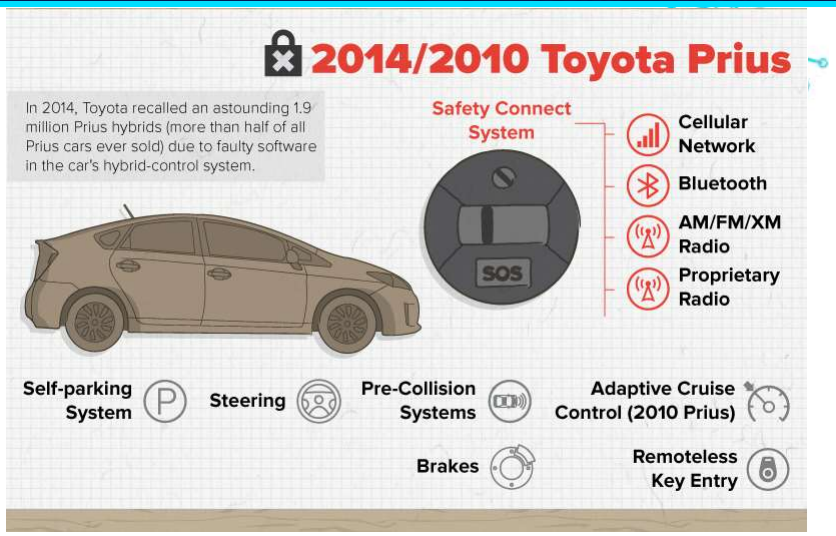
- Searching at time of impact



68

IoT Security Risks

- Hacking
  - Connected vehicles

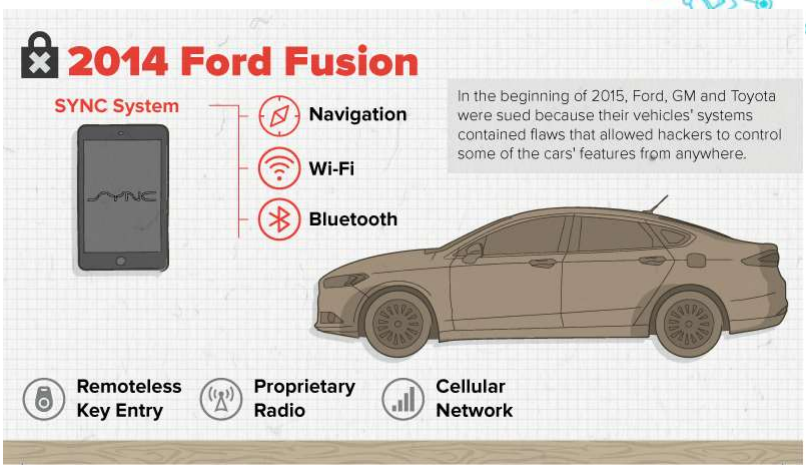


https://www.envistaforensics.com/news/the-most-hackable-cars-on-the-road-1

69

IoT Security Risks

- Hacking
  - Connected vehicles



https://www.envistaforensics.com/news/the-most-hackable-cars-on-the-road-1

70

ENVISTA FORENSICS

LARRY DANIEL
TECHNICAL DIRECTOR- DIGITAL FORENSICS

DATA SILOS

DIGITAL FORENSICS //

71

Data Silos

ENVISTA FORENSICS

- IoT Devices lack
  - Processing power
  - Storage capacity
  - Transmission capabilities
- Data silos are
  - Computers
  - Cell phones
  - Online accounts

72

ENVISTA FORENSICS

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TECHNICAL DIRECTOR- DIGITAL FORENSICS

WEARABLE DEVICES

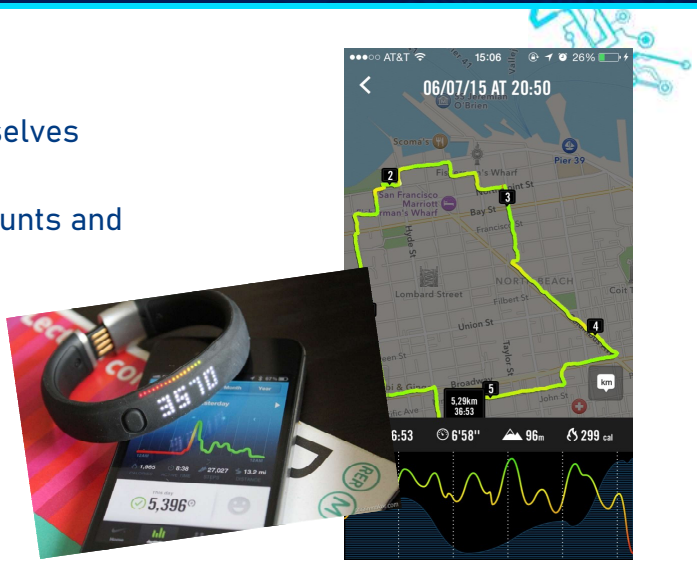
DIGITAL FORENSICS //

73

IoT Investigations

ENVISTA FORENSICS

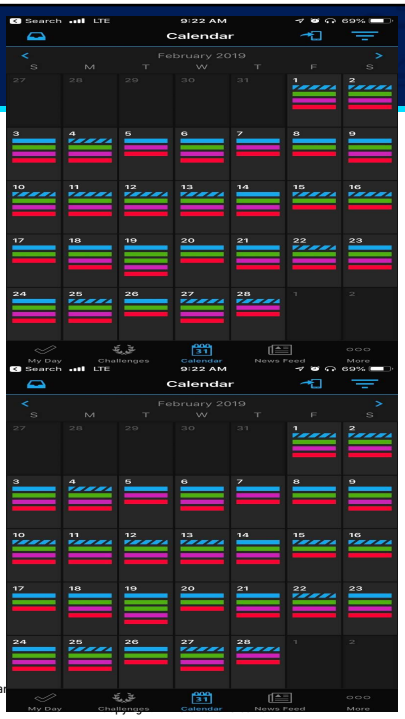
- Wearable Technology
  - Cell Phone Forensics
    - Data contained in apps themselves
  - Computer Forensics
    - Data contained in online accounts and local computer
  - Wearable Forensics
    - Data contained on actual wearable



74

IoT Devices

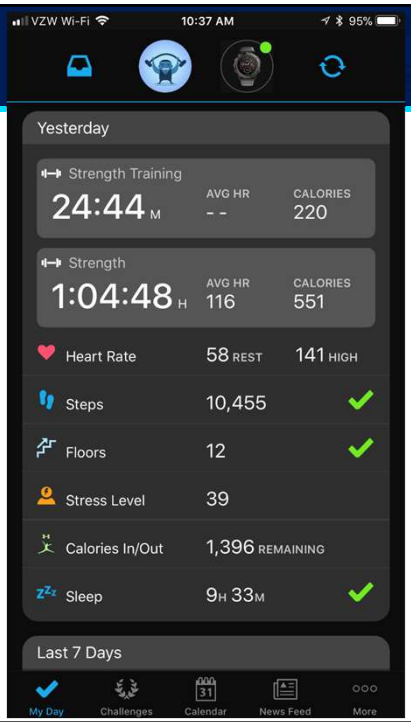
- Garmin Fenix 5X
  - Unlimited timeline of activity / currently 1.5 years.



75

IoT Devices

- Garmin Fenix 5X
  - Tracks almost everything about me



76

IoT Devices

- Garmin Fenix 5X
  - Tracks my performance metrics
    - Daily steps and when they were taken

77

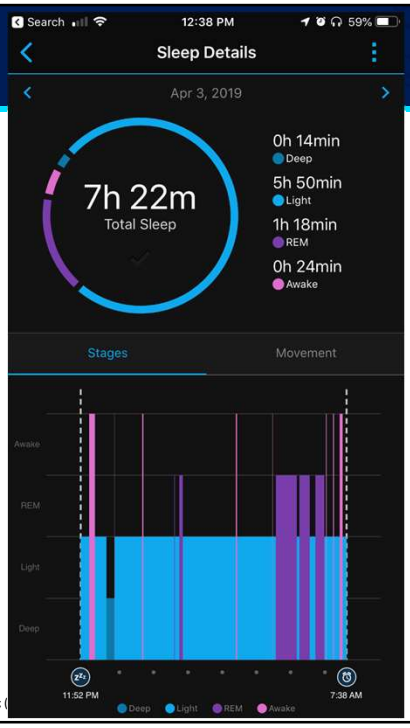
IoT Devices

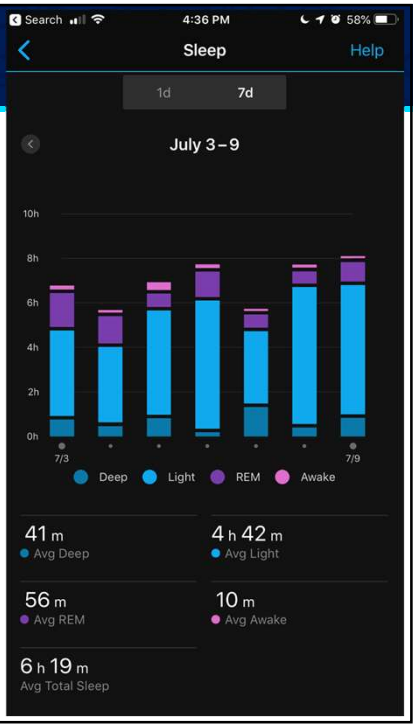
- Garmin Fenix 5X
  - Tracks almost everything about me
    - Down to the minute heartrate tracking

78

IoT Devices

- Garmin Fenix 5X
  - Tracks sleep down to the minute





79

IoT Devices

- Garmin Fenix 5X
  - Tracks almost everything about me
    - Stress analytics based upon heart rate and HRV (heart rate variability)

80

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

81

Fitness Wearables

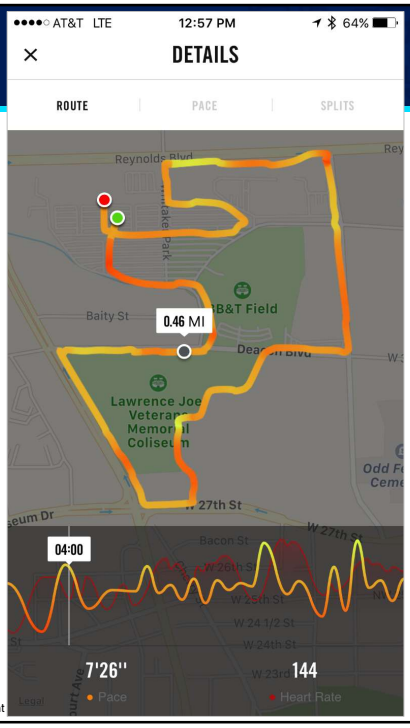
- Fitness wearable (FitBit)
  - Victims husband told police that he was at home fighting off an intruder when his wife returned from the gym no later than 9 am. According to the husband, the intruder then shot his wife, tied him up, and ran out of the house. The police searched the wife's fitness wearable. 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/.

82

Border Crossing

- Did defendant cross the border?
  - Data acquired from online account and the cell phone



83

Running at time of incident?

- Was suspect using treadmill?
  - Workout can be created after the fact – will be missing some data.

84

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

85

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.

86

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

87

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.

88

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)		

89

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		

90

Case Example – Insurance Fraud

- Outcome
  - Now armed with this information, SIU was able to confront the employee and his employer – claim was denied.

91

LARRY DANIEL
TECHNICAL DIRECTOR– DIGITAL FORENSICS

MEDICAL DEVICES

INGESTIBLES AND INSERTABLES

DIGITAL FORENSICS //

92

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/

93

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/

94

Medical Ingestibles

- Proteus Digital Health
  - Proteus Discover

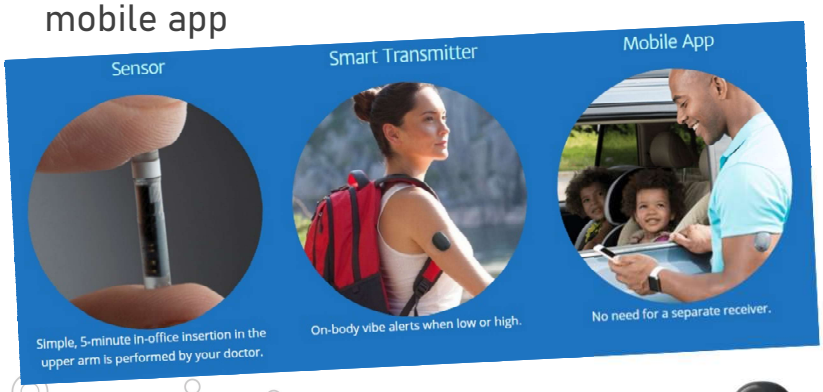
Proteus Discover consists of an ingestible sensor the size of a grain of sand, a small wearable sensor patch, an application on a mobile device and a provider portal. The patient activates Proteus Discover by taking medication with an ingestible sensor. Once the ingestible sensor reaches the stomach, 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/

95

Medical Implants

- Eversense CGM (Continuous Glucose Monitoring)
  - Remote monitoring by friends/family and providers via mobile app

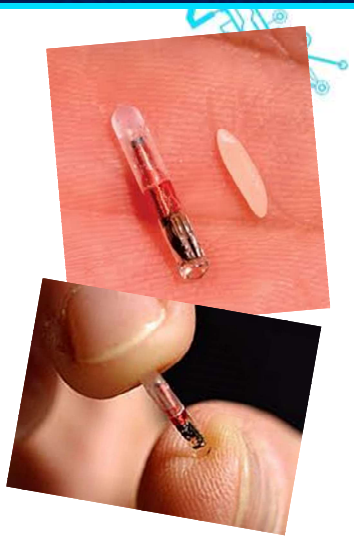


https://ous.eversensediabetes.com/products/

96

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

97

LARRY DANIEL
TECHNICAL DIRECTOR- DIGITAL FORENSICS

SMART VEHICLES

DIGITAL FORENSICS //

98

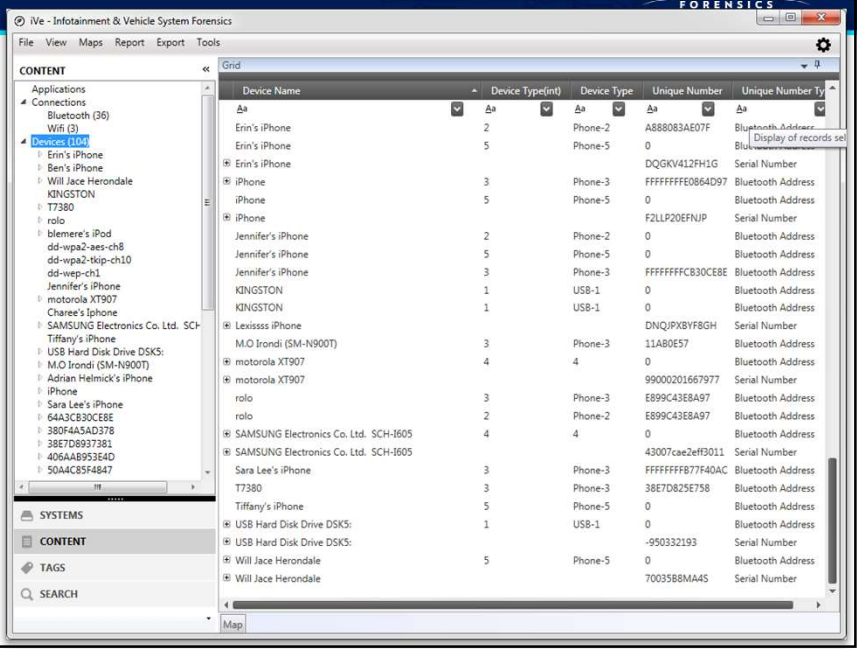
IoT Investigations

- 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

99

Forensic Artifacts

- Connected Devices
  - Rental Car



100

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	8CB61EBAEC23	Jim's Device	Apple
	3904567733		2018-10-26 16:12:00	Incoming	8CB61EBAEC23	Jim's Device	Apple
Jin Contreras	9029306440		2018-10-25 13:43:00	Incoming	8CB61EBAEC23	Jim's Device	Apple
Akeem Jensen	18612229018		2019-08-23 08:22:59	Incoming	8CB61EBAEC23	Jim's Device	Apple
	8927942810		2018-10-25 07:53:00	Incoming	8CB61EBAEC23	Jim's Device	Apple
Unknown	6876755339		2018-10-24 16:25:00	Incoming	8CB61EBAEC23	Jim's Device	Apple
Hadley Bell	9042066849		2018-10-24 15:20:00	Incoming	8CB61EBAEC23	Jim's Device	Apple
Akeem Jensen	18612229018		2018-10-24 15:18:00	Incoming	8CB61EBAEC23	Jim's Device	Apple
	3904567733		2018-10-24 15:18:00	Incoming	8CB61EBAEC23	Jim's Device	Apple
Rhonda Cote	14795835251		2018-10-24 08:17:00	Incoming	8CB61EBAEC23	Jim's Device	Apple
Jin Contreras	9029306440		2018-10-23 20:03:00	Incoming	8CB61EBAEC23	Jim's Device	Apple
	8927942810		2018-10-23 11:07:00	Incoming	8CB61EBAEC23	Jim's Device	Apple
Unknown	6876755339		2018-10-22 17:22:00	Incoming	8CB61EBAEC23	Jim's Device	Apple
Hadley Bell	9042066849		2018-10-22 15:05:00	Incoming	8CB61EBAEC23	Jim's Device	Apple
Akeem Jensen	18612229018		2018-10-22 11:43:00	Incoming	8CB61EBAEC23	Jim's Device	Apple
	3904567733		2018-10-22 08:03:00	Incoming	8CB61EBAEC23	Jim's Device	Apple
Rhonda Cote	14795835251		2018-10-21 20:42:00	Incoming	8CB61EBAEC23	Jim's Device	Apple
Jin Contreras	9029306440		2018-10-18 17:36:00	Incoming	8CB61EBAEC23	Jim's Device	Apple
	8927942810		2018-10-18 14:44:00	Incoming	8CB61EBAEC23	Jim's Device	Apple
Unknown	6876755339		2018-10-17 21:11:00	Incoming	8CB61EBAEC23	Jim's Device	Apple
Hadley Bell	9042066849		2018-10-17 17:31:00	Incoming	8CB61EBAEC23	Jim's Device	Apple
Akeem Jensen	18612229018		2018-10-17 16:50:00	Incoming	8CB61EBAEC23	Jim's Device	Apple
	3904567733		2018-10-17 16:43:00	Incoming	8CB61EBAEC23	Jim's Device	Apple
Akeem Jensen	18612229018		2018-10-29 13:37:00	Missed	8CB61EBAEC23	Jim's Device	Apple
	3904567733		2018-10-29 13:06:00	Missed	8CB61EBAEC23	Jim's Device	Apple
Rhonda Cote	14795835251		2018-10-29 09:25:00	Missed	8CB61EBAEC23	Jim's Device	Apple
Jin Contreras	9029306440		2018-10-28 11:45:00	Missed	8CB61EBAEC23	Jim's Device	Apple
	8927942810		2018-10-26 20:45:00	Missed	8CB61EBAEC23	Jim's Device	Apple

101 of 89

101

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@enim
Chancellor	Cash		(244) 941-9707, (480) 399-4784, 1 (873) 923-8314, 1...	Sed.eu.nibh@luctusvulputeni
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

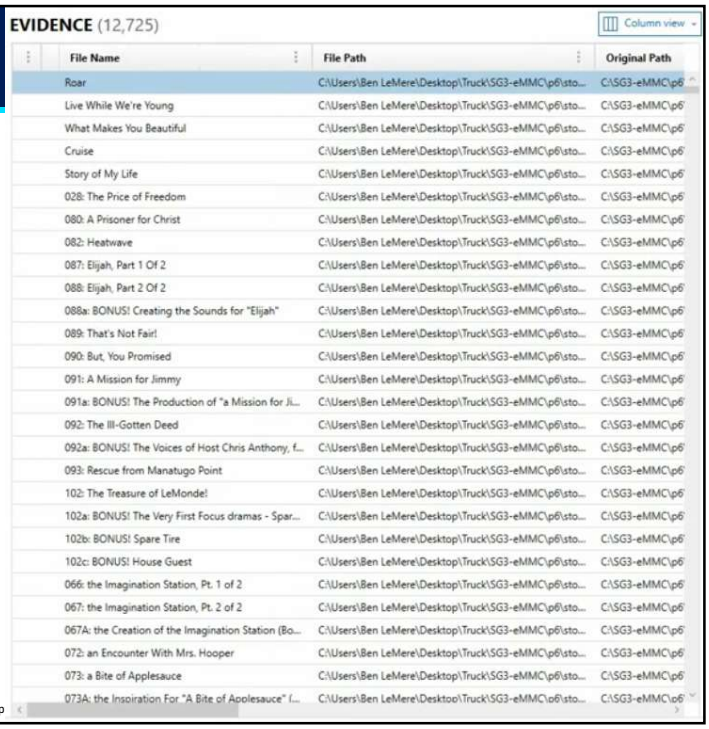
102 of 89

102

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



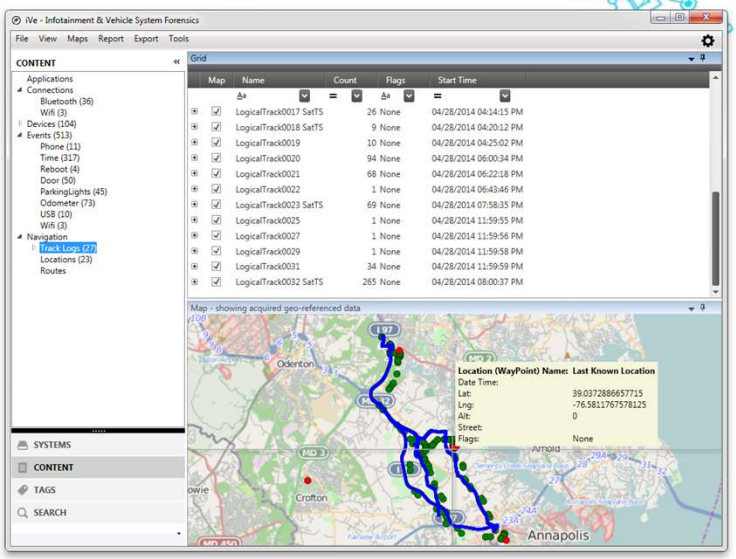
Cop

103

Track Logs

ENVISTA FORENSICS

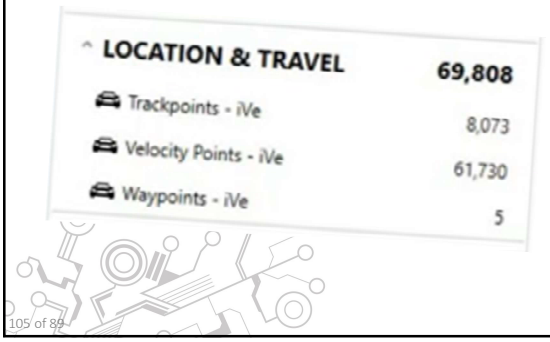
- Connected Devices
  - Rental Car

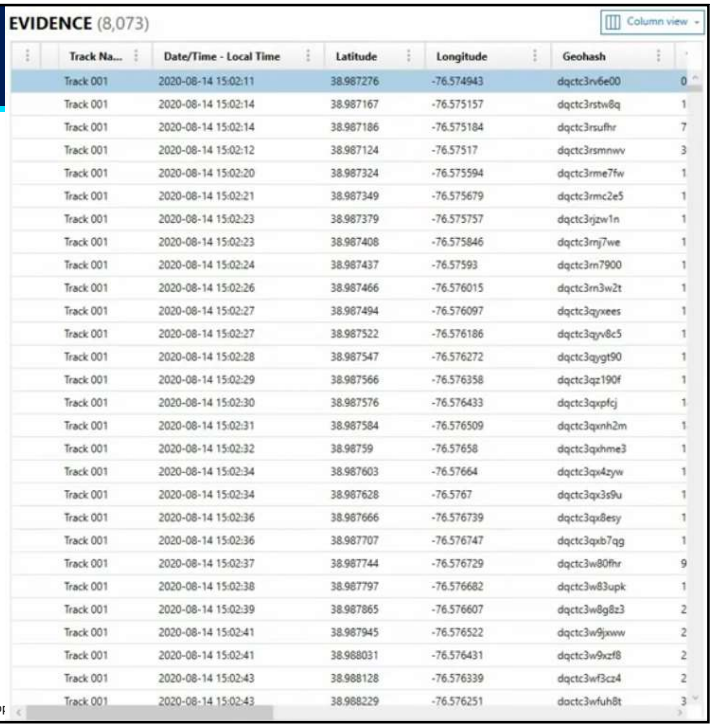


104

Forensic Artifacts

- Track Logs
  - Location history
  - Lifestyle analysis
  - Different that CDR (Crash Data Recorder)

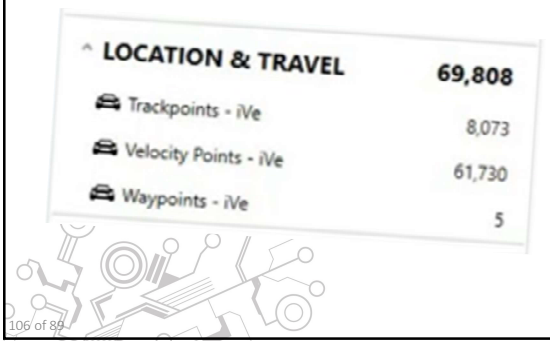


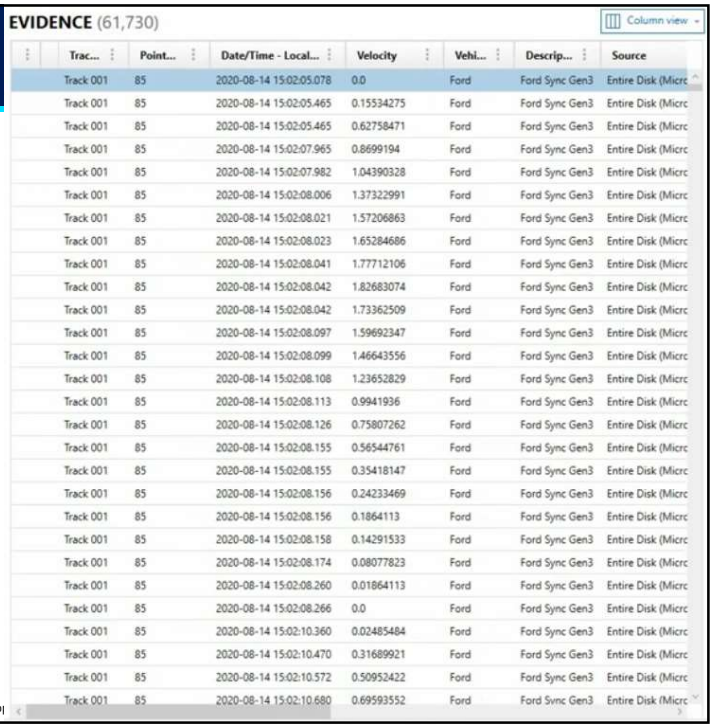


105

Forensic Artifacts

- Velocity Points
  - Driving patterns
  - Different that CDR (Crash Data Recorder)





106

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

107

Forensic Artifacts

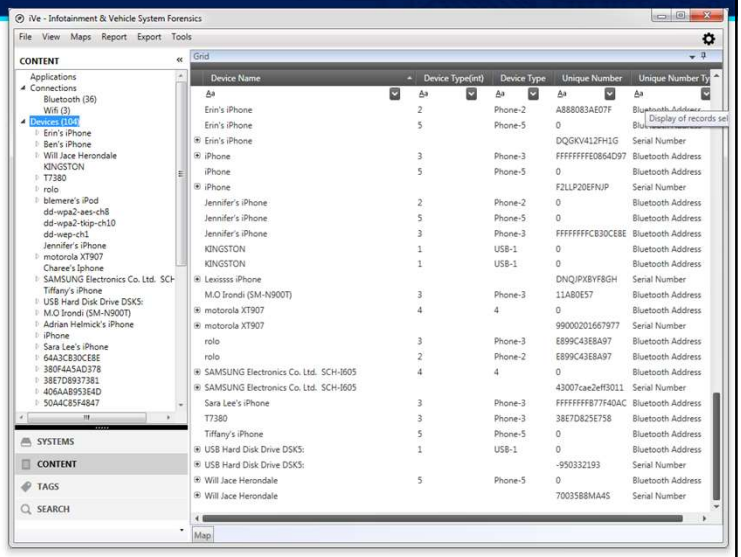
- Locally Accessed Files and Folders
  - Did they store files locally?
    - Data theft
    - Improper usage
    - Company policies

Path	Accessed Date/Time...
C:\Users\Accounting new\Desktop\Invoices\Picture [redacted]27.pdf	2019-06-14 14:55:00
C:\Users\Accounting new\Desktop\Invoices\Picture [redacted]27.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

108

IoT Investigations

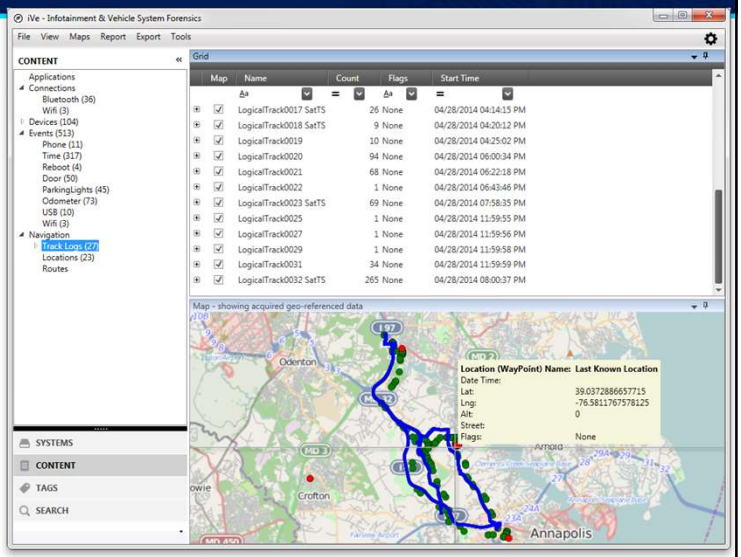
- Vehicle Forensics
  - In-vehicle infotainment
  - Vehicle telematics
- Connected devices



109

IoT Investigations

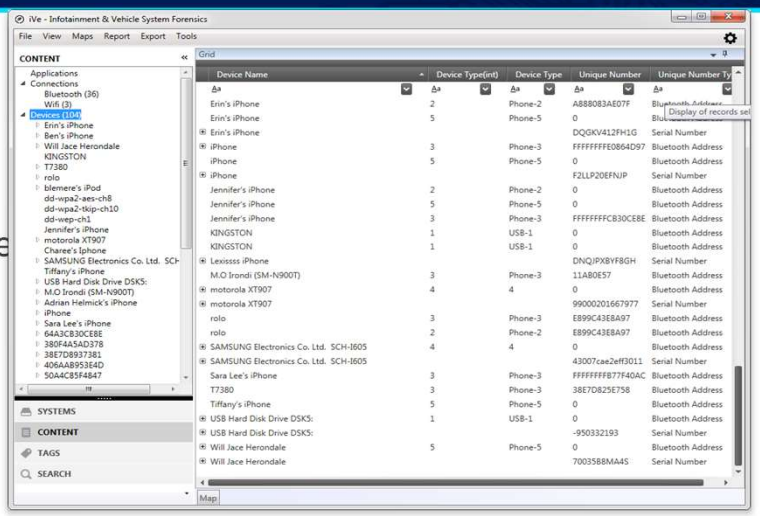
- Vehicle Forensics
  - In-vehicle infotainment
  - Vehicle telematics
- Track logs



110

IoT Investigations

- Vehicle Forensics
  - In-vehicle infotainment
  - Vehicle telematics
- Velocity Logs
  - Vehicle velocity and corre



111

Teleporting Car?

- Rental car location records
- Original data needed.

112

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SMART HOME

DIGITAL FORENSICS //

113

Alexa as a home assistant

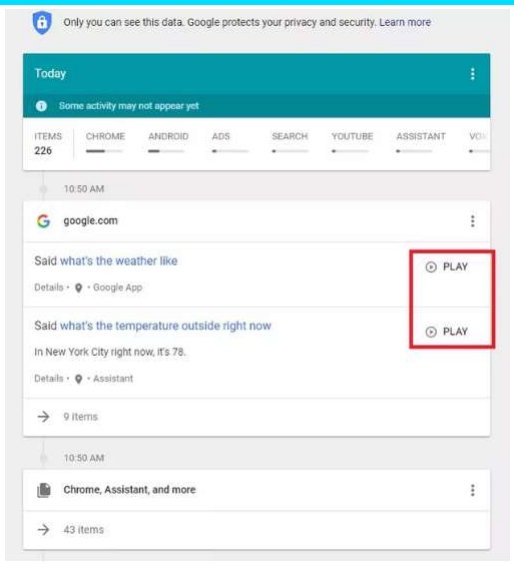
- Murder case – *Arkansas v. Bates*, No. CR-2016-370 (Cir. Ct. Benton County, Arkansas).
  - Police seized the defendant's smart speaker believing it might contain evidence of what happened the night of the murder at defendant's home.
    - Amazon moved to quash warrant, contenting 1st amendment rights 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/

114

Smart Home Assistants

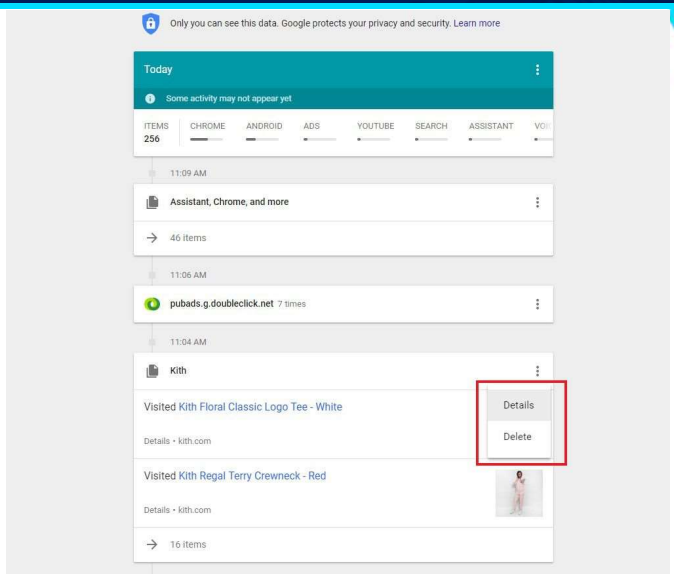
- Google Home
  - Google queries



115

Smart Home Assistants

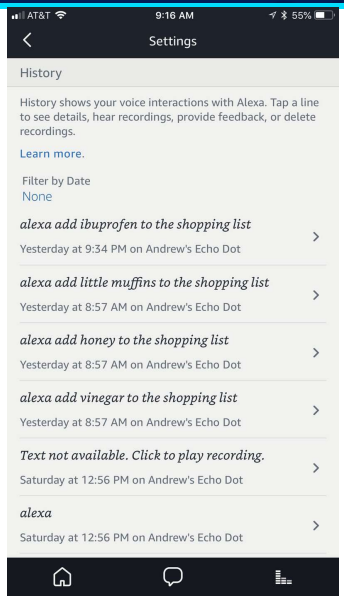
- Google Home
  - Shopping



116

Smart Home Assistants

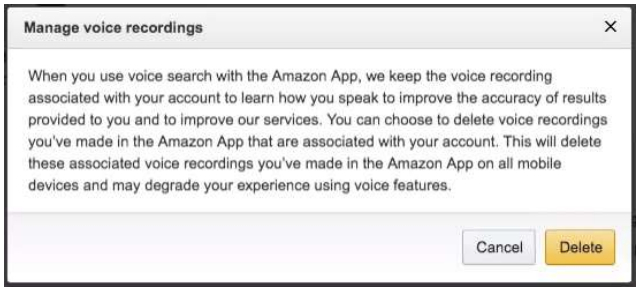
- Amazon Alexa
  - Search queries



117

Smart Home Assistants

- Amazon Alexa
  - Voice recordings



118

Smart Home Assistants

- Interrogate the device
  - Low tech works too…
    - Careful with the Christmas lists!

119

Smart Home Security

- Recording video
- Timeline data
- Account data

120

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

121

Smart Home Security

- Nest – Neighbors home

122

Smart Home Security

- Nest – Neighbors home

https://nest.com/video/clip/burglar-tries-to-steal-nest-cam/

123

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.

124

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TECHNICAL DIRECTOR- DIGITAL FORENSICS

CASE EXAMPLES

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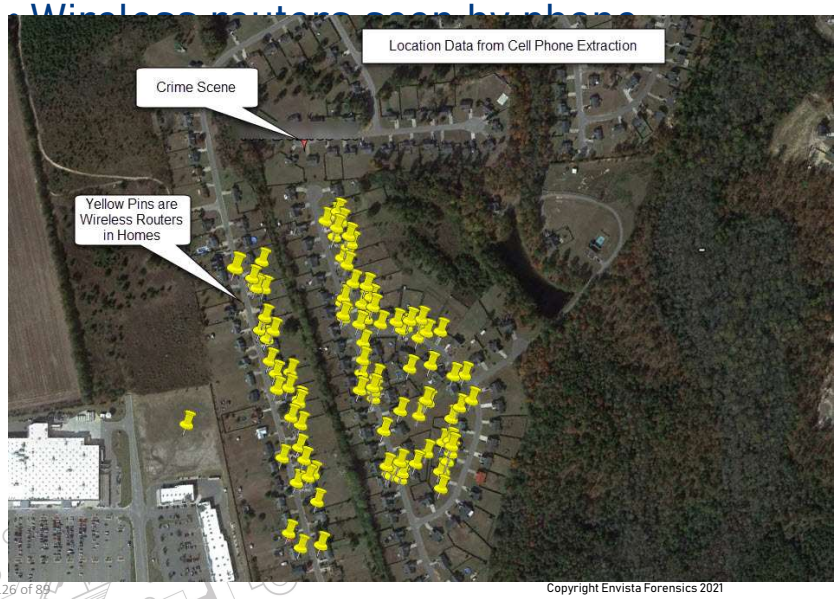
125

Case Example: WiFi Phone Location



126

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]

127

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 dat[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	Gmail (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 PM(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

128

Questions?

ENVISTA FORENSICS

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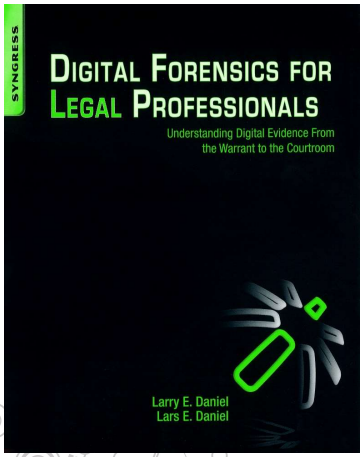

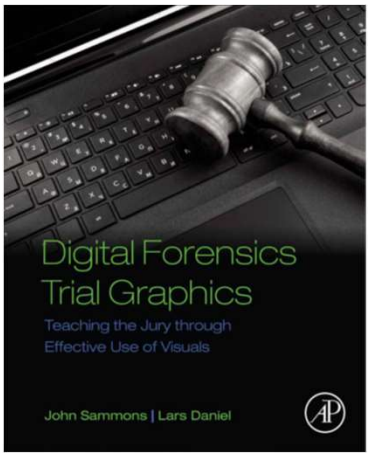

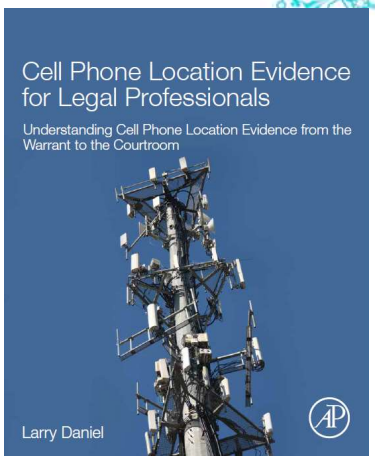

129

Questions?

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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

130

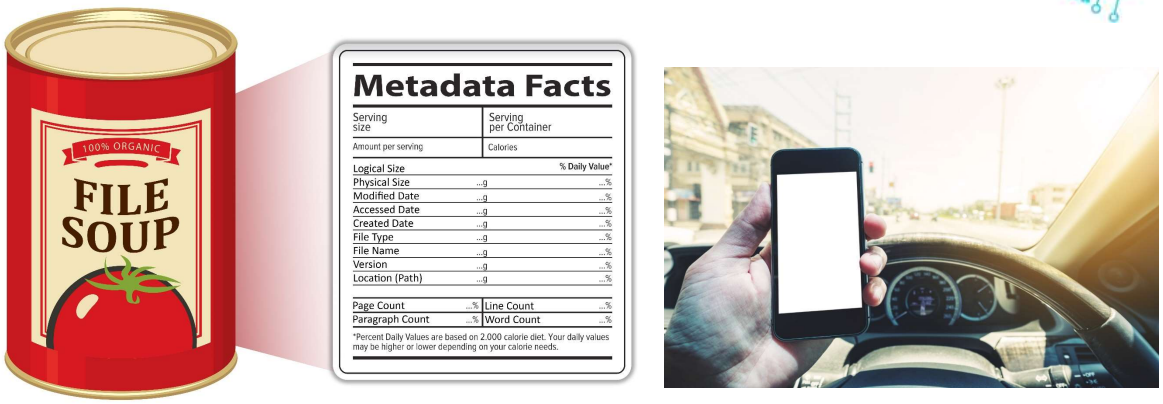
Case Study: Distracted Driving

- Detailed timeline analysis at point of impact
  - Cell phone, event data recorder, online accounts

131

Case Example: Cell Phone Picture

- Photo Editing and Metadata
  - Web based (cloud) photo editing application



132

Civil Case Becomes Criminal

- Data theft turns criminal
  - Assisting Federal Marshalls
    - Data thief becomes a fugitive
    - Syncing between IOT devices p

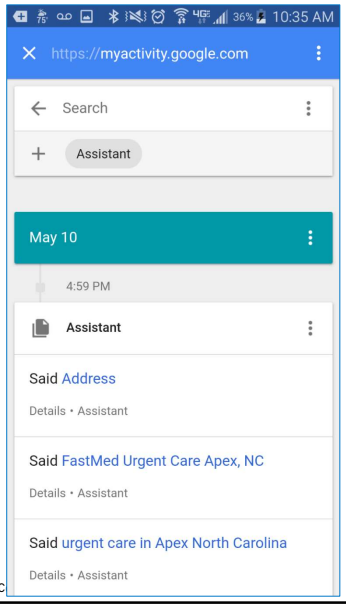
11. There is also a photograph stored on the Cell Phone that appears to be a picture of a New Mexico driver's license in the name of [redacted] with the date of birth of XX/XX/19XX. A copy of the photograph with the date of birth redacted is attached hereto as **Exhibit 4**.

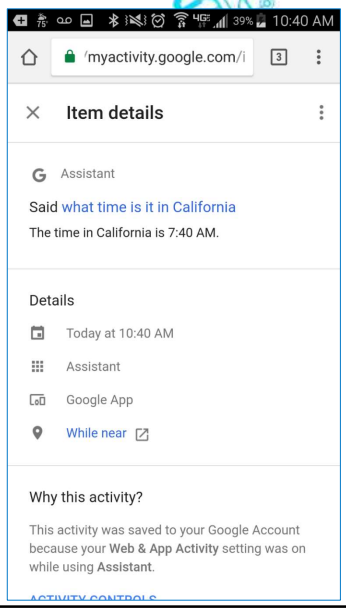
Cell Phone:	**Hey! Want to make some fast cash?**
[redacted] Number:	**Who is this**
Cell Phone:	**[redacted] You moved my lazy boy chairs about 2 months ago. I am putting in for a name change and one of the many things they want is an affidavit attesting to my morel [sic]character. They want 2 of them. 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.**

133

Capabilities: Examples

- Google is listening
  - Location activity
  - Full route





134

Capabilities: Examples

- Google is listening
  - Location activity
  - Full route