

First Amendment Issues

- *Miller v. California*, 413 U.S. 15 (1973)
- *New York v. Ferber*, 458 U.S. 747 (1982)
- *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002)
- Highest courts of six states have upheld nonconsensual pornography laws against First Amendment challenges

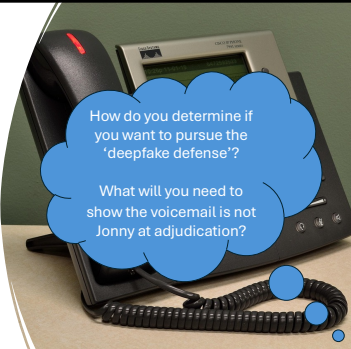


4

Scenario #2

Your client, Jonny, allegedly left an anonymous voicemail for the school principal where he said, "Revenge is going to be sweet. See you at the football game."

Through discovery, you receive a copy of the voicemail, which does sound like Jonny. Jonny denies it is him and believes someone created a deepfake of his voice.



How do you determine if you want to pursue the 'deepfake defense'?

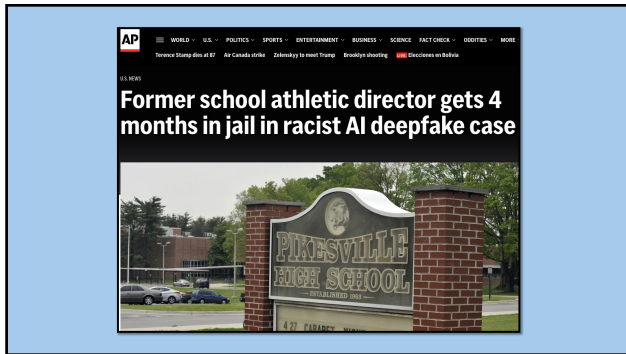
What will you need to show the voicemail is not Jonny at adjudication?

5

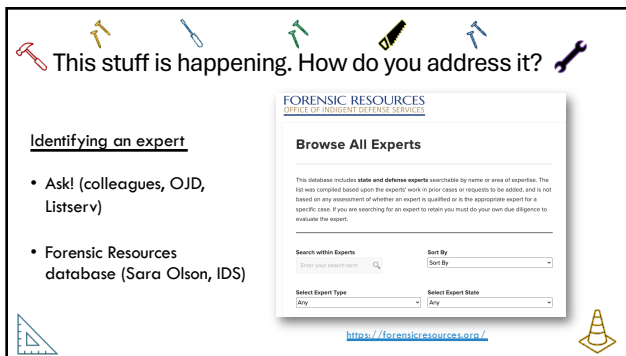
People are trying to claim real videos are deepfakes. The courts are not amused



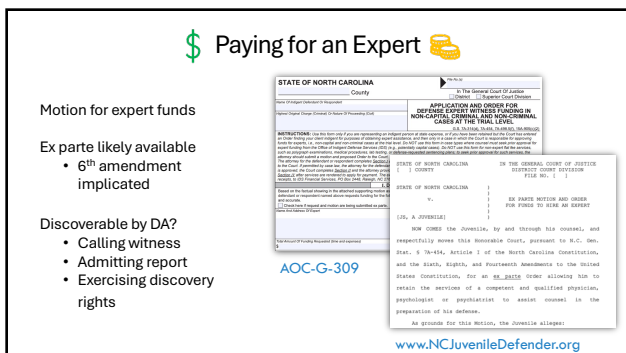
6



7



8



9



Forecasting Potential Changes to the Federal Rules of Evidence

- Many possible outcomes
- Proposed Rule 707 (reflects R. 702)
 - Gatekeeper function
 - Sufficient data
 - Reliable methods reliably applied
 - Helps trier of fact
- Considering R. 901 (authentication)
- May be model for N.C. changes

ADVISORY COMMITTEE
ON
EVIDENCE RULES

May 2, 2025

10

For now...what about Jonny?

- Get expert + funding
- Establish authenticity, foundation, and reliability
 - High level of scrutiny
 - Need competent witness
- Decide when to raise issues (e.g., in limine)

Consider in both directions

11

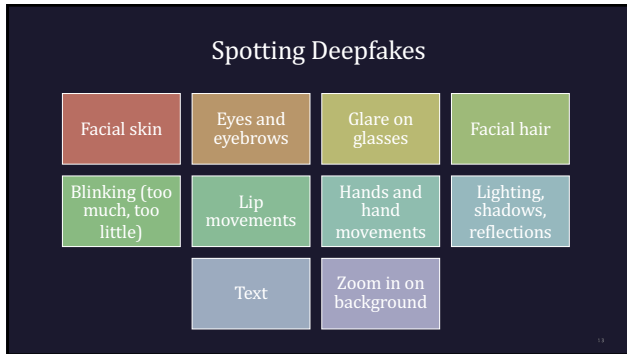
Scenario #3

Jonny is accused of defacing school property with graffiti. He says it was not him, but he took a picture of the kid who did it. You see the picture and suspect it has been created or altered using AI.

What do you do when you suspect your client is relying on a deepfake?

What are your ethical considerations?

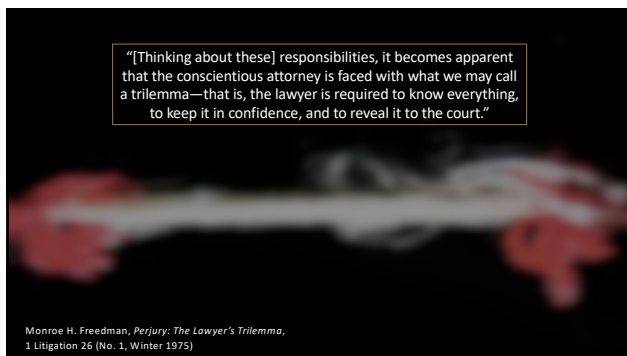
12



13



14



15

Before hearing

- Talk to your client (R. 1.4, Communication)
- Be prepared (R. 1.1, Competence)
- Don't wait, even when difficult (R. 1.3, Diligence)

At court

- Shall not offer evidence lawyer knows is false (R. 3.3(a)(3), Candor to Tribunal)
- May refuse to offer such evidence, other than criminal defendant's testimony lawyer reasonably believes is false (*id.*)

16

Scenario #4

The State wants to use AI to enhance audio/visual evidence to make the evidence clearer for the trier of fact to understand. The State is openly acknowledging its use of AI to enhance certain images and videos.

Is that allowed? How do you combat it?

Can the defense offer this type of evidence?

17

"AI-enhanced" evidence

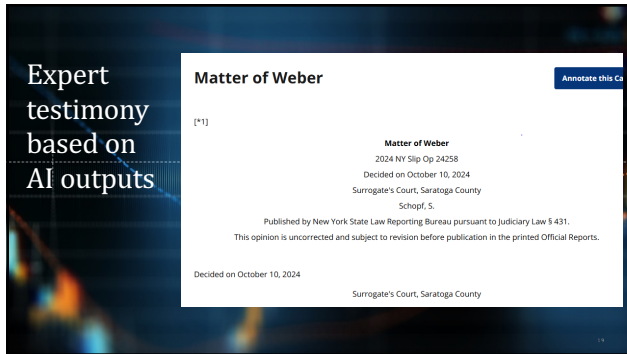
SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)
Plaintiff,) No. 21-1-04851-2 KNT

vs.)

JOSHUA PULOKA,)
Aka JOSHUA EVERYBODYTALKSABOUT,)
Defendant.) FINDINGS OF FACT AND
CONCLUSIONS OF LAW RE: FRYE
HEARING ON ADMISSIBILITY OF
VIDEOS ENHANCED BY
ARTIFICIAL INTELLIGENCE

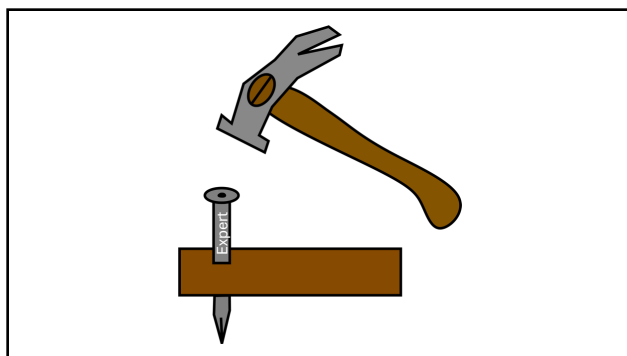
18



19

[illegible]

20

[illegible]

21

[illegible]