

**2019 Spring Public Defender
Attorney TRACK- Friday
May 8-10, 2019 – Wilmington, NC**

ELECTRONIC CONFERENCE MATERIALS*

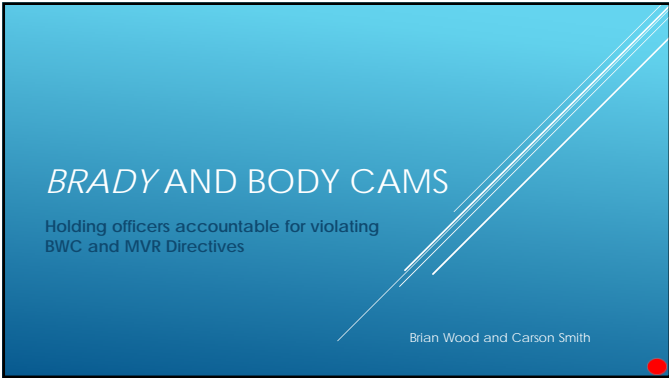
*This PDF file contains "bookmarks," which serve as a clickable table of contents that allows you to easily skip around and locate documents within the larger file. A bookmark panel should automatically appear on the left-hand side of this screen. If it does not, click the icon—located on the left-hand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

BRADY AND BODY CAMS

Holding officers accountable for violating
BWC and MVR Directives

Brian Wood and Carson Smith











OFFICER A GETS A CALL ABOUT AN AWDW

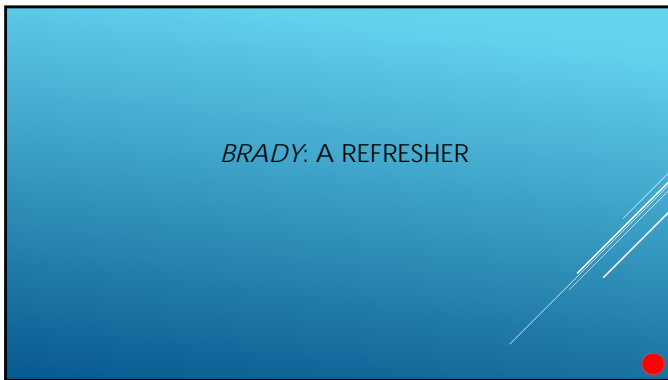


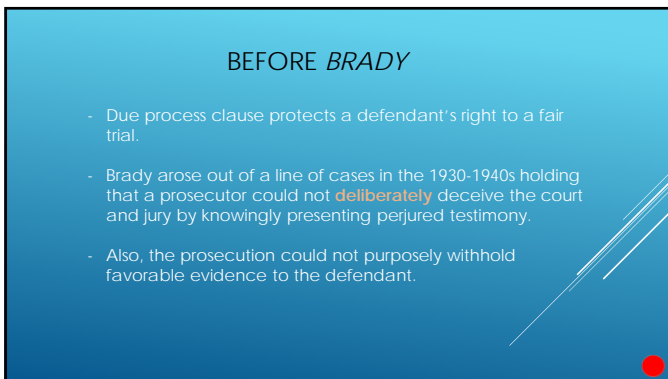
CALL COMES FROM THIS APARTMENT



TWO OFFICERS PARK THEIR CRUISERS HERE







BRADY V. MARYLAND, 373 U.S. 83 (1963)

- Facts: Defendant convicted of murder. After the trial, the prosecution is found to have withheld a statement made by co-defendant admitting to the killing.
- Holding: Suppression of evidence favorable to an accused violates due process where the evidence is material to guilt or to punishment, **irrespective of the good or bad faith of the prosecution.**

► "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."

BRADY ELEMENTS

Brady violation when the prosecution fails to turn over evidence:
(1) favorable to the accused
(2) material either to guilt or punishment

GIGLIO V. UNITED STATES, 405 U.S. 150 (1972); UNITED STATES V. BAGLEY, 473 U.S. 667 (1985)

- Facts: Promises/payments made to key witnesses not disclosed to defendant before trial.
- Holding (Giglio): Impeachment evidence, like exculpatory evidence, falls within the Brady rule.
- Holding (Bagley): Evidence is material if there is a reasonable probability that the result at trial would have been different had the evidence been turned over to the defendant.

- "A reasonable probability is a probability sufficient to undermine confidence in the outcome."

- "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."

BRADY ELEMENTS

Brady violation when the prosecution fails to turn over evidence:

- (1) **favorable** to the accused
- (2) **material** either to guilt or punishment

KYLES V. WHITLEY, 514 U.S. 419 (1995)

- Facts: Prosecution fails to turn over mountains of exculpatory and impeachment evidence to the defendant.
- Holding 1: In evaluating materiality, court must look at cumulative effect of all the withheld evidence, not just each piece of evidence individually.
- Holding 2: The prosecution has an affirmative duty to learn of any favorable evidence known to the police (or any entity acting on government's behalf in the case).

KYLES V. WHITLEY, 514 U.S. 419 (1995) SPECIFIC EXAMPLES OF BRADY MATERIAL

- Inconsistent descriptions by different witnesses of the criminal.
- Inconsistent descriptions by different witnesses of the crime.
- The fact that some of the witness's descriptions of the criminal matched the police informant
- That there were pending charges against the police informant
- That there was an ongoing investigation of the police informant concerning other crimes.
- That the police informant made inconsistent statements to the police about the crime and about his accusation of the defendant
- That the police had other leads and information that they failed to follow up on or investigate, that could have pointed the finger at someone other than the defendant.

KYLES V. WHITLEY, 514 U.S. 419 (1995)
SPECIFIC EXAMPLES OF BRADY MATERIAL

- That before accusing the defendant, one of the witnesses previously said that she had not actually seen the crime
- That a witness's description of the crime and/or the criminal became more "accurate" and more certain after the witness met with police and/or prosecutors, or after the witness testified at a first hearing or trial.
- That a witness's prior statements omit significant details or facts that the witness "remembered" at trial.
- That a witness's trial testimony omitted significant details or facts that the witness mentioned in prior statements.
- That a witness or informant made statements that incriminated himself in the crime charged against the defendant.

BRADY ELEMENTS AFTER KYLES

Brady violation when the prosecution fails to turn over evidence:
(1) favorable to the accused
(2) material either to guilt or punishment
(3) **within the actual or constructive possession of anyone acting on behalf of the state in the case.**

► "Any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials."

YOUNGBLOOD V. WEST VIRGINIA, 547
U.S. 867 (2006)

- ▶ In sexual assault case where consent was at issue, WV State Trooper refused to accept a mocking letter written by "victim" where she acknowledges encounter was consensual. Straight forward, but recent, application of *Kyles v. Whitley*.
- ▶ "Brady suppression occurs when the government fails to turn over even evidence that is 'known only to police investigators and not to the prosecutor.'" *Youngblood v. West Virginia*, 547 U.S. 867, 869-870 (2015) (citing *Kyles v. Whitley*, 514 U.S. at 438.)
- ▶ "[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Youngblood v. West Virginia*, 547 U.S. 867, 870 (2015) (citing *Kyles v. Whitley*, 514 U.S. at 437.)

WHAT DOES ANY OF THIS HAVE TO DO
WITH BODY WORN CAMERAS?

- Body camera footage is evidence in the hands of the State.
- Often times it can be favorable to our clients.
- Which means it could be *Brady* material.

HOW DO YOU ESTABLISH THAT A
RECORDING EXISTED?

III. DEFINITIONS

A. Body Worn Camera: An on the body video and audio recording system assigned to an officer as a means of documenting interactions between officers and the public.

B. Citizen Contact: An encounter with a citizen that has no criminal or investigative purpose. Ex: Stopping to say hello to someone or interacting with persons to obtain information that is non-criminal in nature.

C. Criminal Investigation: For the purposes of this directive, Criminal Investigation refers to the point at which a CFS or other defined recording situation changes from adversarial or fact finding contact to an investigation. For example, an officer has arrived on scene and the initial contact is over, the suspect has left, or the officer is now taking written statements, identifying witnesses, or processing the crime scene.

D. Audit: The supervisors review of BWC recordings to ensure compliance with departmental directives.

E. Pre-Event Buffering is the BWC continually recording video, but not committing it to memory (this means it is not recording audio). Once you activate the record on/off button, the previous 30 seconds of video is then committed to memory on the system.

F. Release: To provide a copy of a recording.

G. Disclose: To make a recording available for viewing or listening by the person requesting disclosure.

E. Pre-Event Buffering is the BWC continually recording video, but not committing it to memory (this means it is not recording audio). Once you activate the record on/off button, the previous 30 seconds of video is then committed to memory on the system.

- Once an officer starts his/her shift and equips their BWC, the BWC is continually recording video

- Automatically preserving the last 30 seconds of video

- If an officer "activates" the BWC, the officer preserves the video that has already been recorded, and continues to preserve video until "deactivating" the BWC

- If an officer does not "activate" the BWC, the previous 30 seconds that have already been recorded will be deleted

Not a duty to collect evidence, the BWC video has already been collected

WHAT TO DO IF THIS LANGUAGE ISN'T IN THE DIRECTIVES?

If your BWC footage includes the characteristic 30 seconds of soundless video, this will apply, but you must Establish that:

- the BWC footage contains 30 seconds of soundless video prior to the officer "activating" the BWC (pushes the button on the BWC).

- the BWC is always on and saving to short term memory (30 second retention window)

- When the Officer "activates" his BWC, the Officer is preserving that footage in long term memory and disabling the BWC's 30 second retention window)

WHAT TO DO IF THIS LANGUAGE ISN'T IN THE DIRECTIVES?

Source of information

- Officer will probably not know
- Speak with PD's IT specialist or procurement officer
- Speak with BWC service rep
- Obtain copies of BWC user manual / tech specs / training materials
- Seek stipulation or start subpoenaing bodies!

If all else fails, fall back on broader Due Process argument

CMPD BWC DIRECTIVES

Requires officers "record interactions that occur between the officers and the public."

CMPD BWC DIRECTIVES

That includes...

- prior to arrival to **any call for service or crime related interaction with citizens** while on duty.
- prior to or in anticipation of **traffic stops**
- when interacting with **suspicious vehicles or persons**
- during **voluntary investigative contact**
- **Arrests**
- **use of force**
- operating a vehicle in an emergency response or pursuit
- when **executing search warrants**
- when **asking for consent to search**
- when **performing a consent search**
- during **show ups**.

CMPD BWC DIRECTIVES

- Requires officers to save recordings for up to 20 years depending on the type of encounter.
- Any violation of the directives is a violation of CMPDs code of conduct and will be investigated.

NC POLICE DIRECTIVES

- Durham
- Raleigh
- Greensboro
- Asheville
- Charlotte
- Unable to find Winston-Salem or Wilmington via google search
- North Carolina State Highway Patrol

CMPD BWC DIRECTIVES

- CMPD officers violate these policies all the time...
 - Fail to wear BWCs
 - Fail to activate their BWCs.
 - Activate their BWCs late in the middle of an interaction.
 - Activate their BWCs and then deactivate them in the middle of an interaction.
 - Fail to save the footage properly.

WHAT ABOUT WHEN AN OFFICER TURNS
OFF HIS BWC IN VIOLATION OF THE
POLICY?

- The State has destroyed evidence or at least failed to preserve it.
- Does the State's failure to preserve video evidence trigger a due process violation?
- If yes, then what's the proper analysis, *Brady* or *Arizona v. Youngblood*, 488 U.S. 51, 56 (1988).

ARIZONA V. YOUNGBLOOD, 488 U.S.
51, 56 (1988).

- Facts: State failed to preserve semen samples from the victim's clothing in a child molestation and rape case.
- Holding: When the favorableness of the evidence is unknown, the State must have acted in bad faith in failing to preserve the evidence in order for a due process violation to arise.

- Sounds like we would need to show that the officer acted in bad faith in turning off his camera for the court to find a due process violation, right?

ARIZONA V. YOUNGBLOOD, 488 U.S.
51, 56 (1988).

AFTERMATH

- Exonerated in 2000, 12 years after SCOTUS decision, after advances in DNA technology allowed a profile to be created from the degraded DNA
- The profile matched that of Walter Cruise, an inmate in Texas, who was then convicted of the original sexual assault
- Fortunately...

**THE US CONSTITUTION SETS A FLOOR,
NOT A CEILING**

...But a lot of crap can survive on the floor
(paraphrasing Justice William Brennan)

**THE US CONSTITUTION SETS A FLOOR,
NOT A CEILING**

For Example: State v. Carter, 322 N.C. 709 (1988)

North Carolina Supreme Court has refused to find a "good faith" exception to the Exclusionary Rule

- ▶ Despite the Federal Rules finding a "good faith" exception
- ▶ Despite the NC legislature requesting the Court to find the exception

THE US CONSTITUTION SETS A FLOOR, NOT A CEILING

- ▶ “North Carolina, however, justifies its exclusionary rule not only on deterrence but upon the preservation of the integrity of the judicial branch of government and its tradition based upon fifty years’ experience in following the expressed public policy of the state. Under the judicial integrity theory, our constitution demands the exclusion of illegally seized evidence. The courts cannot condone or participate in the protection of those who violate the constitutional rights of others. Although the United States Supreme Court applied a cost-benefit analysis in *Krull*, the basis of our exclusionary rule is not suited to such simplistic resolution of the issue.” *Id* at 723.

NC BRADY CASE LAW – *STATE V. WILLIAMS*, 362 N.C. 628 (2008) <https://appellate.nccourts.org/opinions/?c=1&pdf=788>

- ▶ Inmate is badly beaten up and charged with Felony AOGO (Union County Jail). Defense Counsel sees a poster in DA’s office stating “Before he sued the D.A.’s Office,” and “After he sued the D.A.’s office,” with corresponding pictures of Williams from before and after he was beaten up. Defense Counsel repeatedly subpoenaed the poster and pictures. The state failed to provide the material, destroyed it, then said it could not be reproduced.
- ▶ Material and Favorable: Poster could be relevant to defense theory that AOGO charge was part of a conspiracy to retaliate against Williams for his suit against the DA’s office, or that the poster could support a self defense claim

NC BRADY CASE LAW – *STATE V. WILLIAMS*, 362 N.C. 628 (2008) <https://appellate.nccourts.org/opinions/?c=1&pdf=788>

- ▶ Irreparably Prejudiced by destruction and impossibility of recreating the poster
- ▶ “Accordingly, we conclude that when the State makes a pretrial admission to the existence and destruction of evidence requested by the accused which is favorable to him and material to his guilt or punishment, and when the State further discloses that it is impossible to produce the evidence at that time or, by implication, at trial, then in the interest of judicial economy, the trial judge does not need to await a trial and verdict before deciding that a due process violation exists.” (at 638)

NC BRADY CASE LAW – STATE V. ABSHER, (N.C. CT. APP. OCTOBER 5, 2010)(UNPUBLISHED)

<https://appellate.nccourts.org/opinions/?c=2&pdf=6470>

- ▶ Arrestee suffered life threatening injuries at Wilkes County Jail intake center and was charged with AOGO. Closed circuit video recorded the events, and defense counsel made several requests for the video from the Sheriff and DA's office. Counsel was informed that the video had been destroyed, and a "new video" was created and was in the Sheriff's possession. The "new video" deleted 24 minutes of the original video, but no sign of how deputies testified that Absher sustained his injuries
- ▶ Cites *Williams*

NC BRADY CASE LAW – STATE V. ABSHER, (N.C. CT. APP. OCTOBER 5, 2010)(UNPUBLISHED)

<https://appellate.nccourts.org/opinions/?c=2&pdf=6470>

- ▶ Irreparable Prejudice: Impossible to recreate complete video
- ▶ Material and Favorable (*Brady* Framework): "The video would have provided better images of defendant Absher's injuries and might have provided evidence demonstrating his impaired mental state. In addition, the video could have been used to impeach some of the State's witnesses. (*at* 20-21)
 - ▶ "The original video might have confirmed [officers'] testimony or impeached it" (*at* 18)
 - ▶ Court finds this was not merely "potentially useful" evidence, so the *Youngblood*/bad faith framework was inappropriate

NC BRADY CASE LAW – *RIISING OFF THE FLOOR*

- ▶ In both cases, the material was destroyed pretrial
- ▶ The motion for sanctions was made pretrial
 - ▶ Compare to Federal landmark *Brady* cases, where evidence discovered post-judgement

NC BRADY CASE LAW – RISING OFF THE FLOOR

- ▶ Suppression by “Destruction” or by other means
 - ▶ In *Williams* and *Absher*, Court rejected State’s argument that, because the evidence was suppressed through its destruction, the destroyed evidence’s value could not be known. Material and Favorable vs. Potentially Useful
 - ▶ The *Williams* and *Absher* courts held the *Brady* Material and Favorable standard applied and identified specific examples where the destroyed evidence complimented a theory of defense.
 - ▶ Furthermore, held that because the evidence was destroyed and incapable of reproduction by the defense, the defense was irreparably prejudiced under Rule N.C.G.S. § 15A-954(a)(4) and the case required dismissal
 - ▶ Couched in broader Due Process concerns.

NC BRADY CASE LAW – MISC. BWC CASES

- ▶ *State v. Mylett* (COA 2017) – No violation in AOGO when defense counsel reviewed but did not request copy of BWC in District Court, and requests copy BWC for first time on appeal to Superior Court, after retention time lapsed and BWC video was purged

NC BRADY CASE LAW – MISC. BWC CASES

- ▶ *State v. Hamilton* (COA 2018) – No Brady violation where State failed to turn over a blank audio recording. On Cross exam of lieutenant, lieutenant testified he had attempted to record a phone conversation between codefendants, but he was unfamiliar with the brand new recording device and failed to collect the conversation.
 - ▶ Blank audio recording would have been neither material, nor potentially useful (merely Defense Counsel’s highly speculative assertions that it could provide impeachment evidence: there was no audible information to impeach with). Furthermore, there was no bad faith in failing to preserve a blank recording – there was neither an obligation to record phone conversations, nor did lieutenant’s technical error when using a brand new recording device rise to the level of bad faith; failure to note the recording attempt and disclosure of the blank recording may have been a discovery violation, but did not rise to the level of requiring sanctions.

CLIMBING UP OFF THE FLOOR, PERSUASIVE AUTHORITIES

- ▶ *People v. Kladis*, 960 N.E.2d 1104 (Ill. 2011), MVR not preserved in DUI. Requested 5 days after arrest, destroyed after 30 day retention period. Suppressed Officer testimony of events that the MVR would have captured. "the use of video recordings as evidence at trial has become a common practice to allow a defendant the opportunity to present an effective defense and to further the truth seeking process." *Id* at 1110.
- ▶ *People v. Moravec*, 2015 IL App (1st) 133869. State's failure to preserve timely requested Traffic Cameras resulted in suppression of Officer's pre-arrest testimony.

CLIMBING UP OFF THE FLOOR, PERSUASIVE AUTHORITIES

- ▶ *United States v. Martinez-Martinez*, 369 F.3d 1076 (9th Cir. 2004). Extends *Youngblood* to create duty to collect evidence: State's "failure to collect... evidence that is potentially exculpatory may violate a defendant's due process rights if that failure was motivated by bad faith." *Id* at 1086.
- ▶ South Carolina, Act No. 71 (2015): "AN ACT...TO REQUIRE ALL STATE AND LOCAL LAW ENFORCEMENT OFFICERS TO IMPLEMENT THE USE OF BODY-WORN CAMERAS"
 - ▶ (Amendments pending to add sanctions for violations)

ARGUING FAVORABLENESS

- Tie to Williams/Absher
 - In both cases, the court did not have the evidence in hand BUT still found that it was favorable
 - Court focused more on the rationale behind Brady = fairness
- Hammer that it would be fundamentally unfair for the defendant to have to testify to establish some proof that the evidence would have been favorable

ARGUING FAVORABLENESS

- Talk about what the video could have shown
- Exculpatory evidence – the gun was not concealed
- Impeachment evidence – the defendant never gave consent to search the car

ARGUING MATERIALITY

- "A reasonable probability is a probability sufficient to undermine confidence in the outcome."
- Look to the directives themselves...

POLICE Charlotte-Mecklenburg Police Department		400-006
Interactive Directives Guide		Body Worn Camera (BWC)
Effective Date: 11/08/2018		1 of 20

I. PURPOSE

A Body Worn Camera (BWC) is utilized by officers to promote transparency in accordance with state law and accountability for officers and the community through objective evidence. This policy establishes guidelines regarding the use, management, storage, and retrieval of the audio and video recordings from BWCs.

II. POLICY

A. It is the policy of the CMPD that officers issued a BWC shall use it to record interactions that occur between officers and the public as described in this directive.

B. Any violation of this directive is considered a violation of Rule of Conduct (ROC) #42 (Use of Body Worn Cameras) and will be investigated.

C. Officers shall insert the BWC into a designated docking station at the end of their shift to facilitate automatic video/audio upload.

D. Officers and supervisors issued body worn cameras will complete and follow the

NO CONFIDENCE IN OUTCOME WITHOUT ACCOUNTABILITY

- The implementation of BWC and BWC policies is a direct response to a public outcry and an erosion of trust in our police departments
- 88% of the public want officers to use BWCs
- Studies have found that there is a significant decrease in use of force incidents and citizen complaints when officers use BWCs

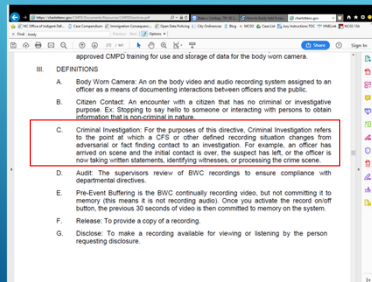
NO CONFIDENCE IN OUTCOME WITHOUT ACCOUNTABILITY

- Trust is only restored if policies are followed.
- What happens when officers don't follow their policies, turn off their cameras, and then ask the community (i.e. the jury) to believe their testimony?
- Prevents the court from fulfilling it's role of seeking the truth
- Essentially, asking the court to hold the officers accountable.

FACTORS THAT HELPED IN MY CASE

- The only evidence of criminality occurred after the officers turned off their cameras.
- The officers were on record testifying that they turned off their BWCs intentionally.
- The officers explicitly violated the directives by failing to record (1) asking for consent to search (2) my clients response to their request and (3) the search itself.

THE OFFICERS' RATIONALE FOR TURNING OFF THEIR CAMERAS



ISSUES TO OVERCOME

- (1) How do we know if the evidence was favorable?
- (2) The trial is still fair because now the defense can impeach the officers for turning off their cameras in violation of their directives

OTHER POSSIBLE REMEDIES

- Jury instruction
 - Modify "Credibility of the witness" jury instruction 101.15
 - "In deciding whether to believe a witness you should use the same tests of truthfulness that you use in your everyday lives. Among other things, these tests may include: **an officers failure to follow police department policies.**"
- Spoliation of Evidence. Because Officer destroyed video, no incontrovertible evidence exists. Assess officer's credibility

OTHER POSSIBLE REMEDIES

- ▶ *Napue* instruction
 - ▶ *Hamric v. Bailey*, 386 F.2d 390, 394 (4th Cir. 1967) (“[D]ue process is violated not only where the prosecution uses perjured testimony to support its case, but also where it uses evidence which it knows creates a false impression of a material fact.”)
 - ▶ E.g. This officer has a pattern of turning off his BWC when a material fact is “discovered.”

OTHER POSSIBLE REMEDIES

- Sanctions
 - Officer cannot testify to anything that happened after he turned off his BWC
 - Grant defense last argument (thanks Susan!)
 - Take away State's peremptory challenges (thanks Susan!)
- THE KEY IS FAIRNESS

WHAT RELIEF TO REQUEST PRIOR TO BRADY MOTION

- ▶ Utilize District Attorney's new "Brady/Giglio Committee"
- ▶ Motion to Compel
- ▶ In Camera Review. *State v. Hardy*, 293 N.C. 105 (1977)
 - ▶ Fishing Expedition? *State v. Soyars*, 332 N.C. 47 (1992)
- ▶ Request specifics, try to have examples ready to proffer
- ▶ *US v. Cowden* (4th Cir. 2017)
 - ▶ In deprivation of rights under color of law case, defendant LEO, argued US District Court erred in admitting evidence of two prior uses of force under 404(b). Fourth Circuit affirmed DC: Officer's prior "bad acts" are relevant and admissible under 404(b).
 - ▶ For Brady purposes: opens the door for In Camera Review of relevant evidence of motive, intent, absence of mistake, etc., in prosecuting officer's records (disciplinary records, patterns in BWC usage, etc.)
 - ▶ Even lower threshold for admission, just stands for proposition that internal documentation is relevant. Does not require 404(b) balancing test as if officer were a defendant.
 - ▶ It [just] takes two, baby!

WHAT RELIEF TO REQUEST PRIOR TO BRADY MOTION

► In Camera Review.

► *US. v. Abdullah, 911 F.3d 201 (4th Cir. 2018)*

► Lays out standard for seeking in camera review of "plausible" Brady material. **LOWER BURDEN**

"Meager" possibility requirement for in camera review" (Id at 218.)

► Clear error to deny defendant's request for production and In Camera review of "plausible" Brady material.

► Court denied request because of State's representation there would not be Brady material.

► In this case, the defendant believed officer's emails contained Brady material.

► Applies even where state claims confidentiality or privilege.

► "Because the defendant does not have access to the confidential material, the defendant 'cannot possibly know, but may only suspect, that particular information exists which meets [Brady's] requirements.' In such cases, 'a defendant need only make 'some plausible showing' that exculpatory material exists.'" (Id at 218.)

► QUESTIONS??

REPRESENTING NON-ENGLISH SPEAKING CLIENTS

Demographics:

Statistically speaking have you or will you be representing a Non-English Speaking Client?

According to UNC-Charlotte Urban Institute as of 2016, there are approximately 932,000 Hispanics living in North Carolina

Large numbers of Hispanics in Winston-Salem, Charlotte, Raleigh-Durham

But increasing growth by percentage in smaller towns and cities across North Carolina, Robbins, Siler City, Pink Hill, Magnolia, Wallace, Asheboro

According to 2010 census 6.09% in Wilmington

2020 Census???? Will we get meaningful numbers?

Challenges presented by NC Rules of Professional Conduct:

Rule 1.1 Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. What does effective assistance of competent counsel mean in light of Padilla v. Kentucky?

Felony vs Misdemeanor, is there a difference?

Rule 1.4 Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation

Do you speak English? Un poco.....

Which may lead to problems with Rule 1.6----confidentiality----- who is my interpreter??

What do I need to know about client's immigration status? Don't ask, don't tell?

Discussion of 2011 Formal Ethics Opinion 3

"...deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on concitizen defendants who plead guilty to specified crimes." Padilla v. Kentucky

Don't be afraid to educate your district attorneys, your probation officers and your community about what this really means

2011 FORMAL ETHICS OPINION 3

Search Adopted Opinions

ADVISING A CRIMINAL DEFENDANT WHO IS AN UNDOCUMENTED ALIEN

Adopted: April 22, 2011

*Opinion rules that a criminal defense lawyer may advise an undocumented alien that **deportation** may result in avoidance of a criminal conviction and may file a notice of appeal to superior court although there is a possibility that the client will be deported.*

Inquiry #1:

Client A is arrested for driving while impaired. The magistrate sets a secured bond of \$2000, schedules the trial for district court and notifies U.S. Immigration and Customs Enforcement (ICE) that Client A may be in the country illegally. Client A is taken to the county jail to wait for trial. At Client A's first appearance, the judge appoints Attorney A to defend him.

ICE determines that Client A is an undocumented alien and gives the jail notice that it should be advised when Client A is released. Once Client A's bond is paid, Client A will be held in the jail for an additional 48 hours to give ICE the opportunity to begin proceedings. If ICE does not serve Client A with a notice to appear within this time period, the jail will release him.

Client A tells Attorney A that he wants to be deported as soon as possible and does not want a conviction on his record. Attorney A discusses Client A's options with him. If Client A pays the bond, ICE will probably come to the jail, transport him to a federal holding facility and begin removal proceedings within 48 hours of paying the bond. Once Client A is deported, the State might dismiss Client A's DWI charge. Attorney A knows that, should Client A someday choose to re-enter the United States legally, a DWI conviction would be detrimental to an immigration application or an application for a work permit.

Attorney A is aware that the existence of an ICE detainer is only an indication that Client A might be removed before the resolution of the case. ICE may choose not to pick Client A up; it may serve him and then release him pending a removal hearing; it may offer him an immigration bond which can be posted so that he can secure his release during immigration proceedings; or he may be eligible for a remedy, such as cancellation of removal, which would allow him to receive permanent residency in the United States.

Did Attorney A violate the Rules of Professional Conduct by advising Client A of his legal option to pay the bond?

Opinion #1:

No. Although a lawyer may not assist a client in conduct that the lawyer knows is criminal or fraudulent, a lawyer "may discuss the legal consequences of any proposed course of conduct with a client". Rule 1.2(d).. Advising Client A of his legal option to pay the bond and face possible **deportation** is appropriate advice for a competent lawyer to give to a client under these circumstances.

Inquiry #2:

May Attorney A move for a continuance of the trial to give Client A more time to pay the bond?

Opinion #2:

Yes. *See* Opinion #1.

Inquiry #3:

Client A and Attorney A decide that Client A will plead guilty to DWI in district court because Client A has been unable to raise the money necessary to pay the bond. Client A is sentenced to time served. The jail immediately notifies ICE that it has 48 hours to pick up Client A before he is released. ICE takes custody of Client A and transports him to a federal holding facility. Attorney A knows that Client A has the right to appeal for a trial de novo in superior court. Attorney A also knows that the superior court may dismiss the case if Client A is deported.

May Attorney A enter a notice of appeal knowing that Client A's pending **deportation** may result in the dismissal of the superior court case?

Opinion #3:

Rule 3.1 prohibits a lawyer from advancing frivolous or meritless proceedings or arguments but permits a lawyer in a criminal proceeding that may result in incarceration the leeway to "so defend the proceeding as to require that every element of the case be established." Comment [1] to the rule observes that "[t]he advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure." Rule 3.2 requires a lawyer to make reasonable efforts to expedite litigation "consistent with the interests of the client". However, comment [1] to this rule adds, "[t]he question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay."

Filing a notice of appeal for Client A is not, in itself, frivolous or meritless because Client A has a constitutional right to a trial de novo in superior court before a jury. The question is whether the pleading is interposed for an improper purpose which would violate not only Rule 3.1 but also the prohibition on conduct prejudicial to the administration of justice set forth in Rule 8.4(d).

Rule 3.3(a)(1) prohibits a lawyer from knowingly making a false statement of material fact to a court. This prohibition applies to statements in pleadings as well as to statements in open court. Rule 3.3, cmt. [3]. Comment [3] to the rule adds that "[t]here are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation."

Although Attorney A believes that Client A may not be available for trial in superior court, a client's presence is not always necessary to resolve a case in superior court. If a trial is necessary, it can be done by written waiver if the court permits. Moreover, by the time the case is reached for trial, the client may, in fact, be available. Lastly, it is unlikely that the State will actually dismiss the charges simply because the defendant has been removed. Therefore, filing a notice of appeal for Client A does not violate the rules.

DEFENSE COUNSEL'S AFFIRMATIVE DUTY TO ADVISE OF IMMIGRATION CONSEQUENCES

Padilla v. Kentucky, 130 S.Ct. 1473 (2010) – Defense counsel has an affirmative duty to provide non-citizens with competent advice on immigration consequences resulting from a guilty plea. Defense counsel's failure to render competent advice on immigration consequences may constitute ineffective assistance of counsel pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984).

LAWFUL PERMANENT RESIDENT	ANY OTHER NONCITIZEN
<ul style="list-style-type: none"> • First and foremost, try to avoid a disposition that triggers deportability • Second, try to avoid a disposition that triggers inadmissibility if your client was arrested returning from a trip abroad or if your client may travel abroad in the future. • If you cannot avoid deportability or inadmissibility, but your client has resided in the United States for more than seven years (or, in some cases, will have seven years before being placed in removal proceedings), try at least to avoid conviction of an "aggravated felony." This may preserve possible eligibility for either the relief of cancellation of removal or the so-called 212(h) waiver of inadmissibility • If you cannot do that, but your client's life or freedom would be threatened if removed, try to avoid conviction of a "particularly serious crime" in order to preserve possible eligibility for the relief of withholding of removal. • If your client will be able to avoid removal, your client may also wish that you seek a disposition of the criminal case that will not bar the finding of good moral character necessary for citizenship 	<p>IF your client has some prospect of becoming a lawful permanent resident based on having a U.S. citizen or lawful permanent resident spouse, parent, or child, or having an employer sponsor; being in foster care status; or being a national of a certain designated country:</p> <ul style="list-style-type: none"> • First and foremost, try to avoid a disposition that triggers inadmissibility. • If you cannot do that, but your client may be able to show extreme hardship to a citizen or lawful resident spouse, parent, or child, try at least to avoid a controlled substance disposition to preserve possible eligibility for the so-called 212(h) waiver of inadmissibility. • If you cannot avoid inadmissibility but your client happens to be a national of Cambodia, Estonia, Hungary, Laos, Latvia, Lithuania, Poland, the former Soviet Union, or Vietnam and eligible for special relief for certain such nationals, try to avoid a disposition as an illicit trafficker in drugs in order to preserve possible eligibility for a special waiver of inadmissibility for such individuals.

CRIMES OF MORAL TURPITUDE

NC Crimes which are, or probably are:

- Voluntary Manslaughter
- Sexual Battery
- Crime Against Nature
- Indecent Liberties
- Violation of Sex Offender Registration Requirements
- Assault with Deadly Weapon 14-33(c)(1)
- Assault on Child under 12 (?)
- Stalking
- Assault by pointing a gun
- Common Law Robbery
- Injury to Real Property
- Possession of Stolen Property
- Concealment of Merchandise
- Forgery and Uttering
- Prostitution
- RDO
- Filing a False Police Report
- Felony Speeding to Elude
- Hit & Run, Personal Injury
- Sell, Manufacture or Deliver or PWISD Controlled Subst.
- Sell or Deliver Counterfeit Controlled Subst.
- Trafficking in Controlled Subst.
- Maintaining a Dwelling/MV for Controlled Subst.
- Child Abuse

NC Crimes which are not, or probably are not:

- Simple Assault
- Assault on a Female (even if DV)
- Involuntary Manslaughter
- Felony Death by Vehicle
- Misdemeanor Death by Vehicle
- Disorderly Conduct
- Simple Affray
- Domestic Criminal Trespass
- Harassing Phone Call
- Communicating Threats
- Assault Inflicting Serious Injury (compare to ADW) 14-33(c)(1)
- False Imprisonment
- Injury to Personal Property
- Misdemeanor B or E
- Unauthorized use of Motor Vehicle
- Worthless Check
- Carrying Concealed Weapon
- Possession of Firearm by a Felon
- Drunk & Disruptive
- DWLR
- DWI and Habitual DWI
- Reckless Driving
- Misdemeanor Speeding to Elude
- Hit & Run, Property Damage
- Simple Possession of Controlled Substance
- Possession of Drug Paraphernalia
- 1st and 2nd Degree Trespass



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 IMMIGRATION COUNSEL FOR ATTORNEYS AND INDIVIDUALS

INA 240(e)(2) defines removable as either:

- in the case of an alien not admitted to the United States, that the alien is inadmissible under section 212, or
- in the case of an alien admitted to the United States, that the alien is deportable under section 237

Whether an alien is inadmissible or deportable thus depends on whether s/he has been admitted or not.

INA 101(a)(13) defines "admission" and "admitted" as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer."

Aliens who entered without inspection ("EWIs") and were not admitted are not deportable, but are removable

Aliens who were admitted can be both deportable and inadmissible

GROUND FOR DEPORTABILITY

INA 101(a)(43), 8 USC 1101(a)(43) defines aggravated felonies including:

- Murder
- Rape
- Sexual Abuse of a Minor
- Drug Trafficking¹
- Firearms Trafficking
- Crime of Violence + 1 year sentence*
- Theft or Burglary + 1 year sentence*
- Fraud or tax evasion + loss to victim(s) > \$10,000
- Prostitution business offenses
- Commercial bribery, counterfeiting, or forgery +1 year sentence*
- Obstruction of justice or perjury + 1 year sentence*
- Various federal offenses and possibly state analogues (money laundering, various federal *firearms offenses*, alien smuggling, failure to register as sex offender, etc.)
- Attempt or conspiracy to commit any of the above

Consequences (in addition to deportability):

- Ineligibility for most waivers of removal
- Ineligibility for voluntary departure

Permanent inadmissibility after removal

¹NC Drug Trafficking may NOT be categorically an Agg Fel (in litigation)

*The 1-year requirement refers to an actual or suspended prison sentence of 1 year or more, not a possible sentence.

GROUND FOR INADMISSIBILITY

Conviction or admitted commission of a Controlled Substance Offense, or DHS has reason to believe individual is a drug trafficker

- No waiver possible (except for a single offense of simple possession of 30g or less of marijuana)

Conviction of 2 or more offenses of any type + aggregate (actual) prison sentence of 5 years

Prostitution and Commercialized Vice

Conviction or admitted commission of a Crime Involving Moral Turpitude (CMT)

Crimes in this category cover a broad range of crimes, including:

- Crimes with an intent to steal or defraud as an element (e.g., theft, forgery)
- Crimes in which bodily harm is caused or threatened by an intentional act, or serious bodily harm is caused or threatened by a reckless act (e.g., murder, rape, some manslaughter/assault crimes)
- Most sex offenses

Petty Offense Exception—for one CMT if the client has no other CMT + the offense is not punishable > 1 year + does not involve a prison sentence > 6 months. Covers all first North Carolina misdemeanors because of 150 day jail maximum.

Controlled Substance Conviction

EXCEPT a single offense of simple possession of 30g or less of marijuana

Crime Involving Moral Turpitude (CMT) Conviction

- For crimes included, see reverse
- One CMT committed within 5 years of admission into the US and for which a sentence of 1 year or longer may be imposed
- Two CMTs committed at any time "not arising out of a single scheme"

Domestic Violence Conviction or other domestic offenses, including:

- Crime of Domestic Violence (AOF *does not* qualify)
- Stalking
- Child abuse, neglect or abandonment
- Violation of order of protection (criminal or civil)

Firearm or Destructive Device Conviction

CONVICTION DEFINED

A formal judgment of guilt entered by a court or, if adjudication of guilt has been withheld, where: (i) a judge or jury has found the noncitizen guilty or the noncitizen has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, AND (ii) the judge has ordered some form of punishment, penalty, or restraint on the noncitizen's liberty to be imposed.

THUS:

- A court-ordered drug treatment or domestic violence counseling alternative to incarceration disposition IS a conviction for immigration purposes if a guilty plea is taken (even if the guilty plea is or might later be vacated)
- A deferred adjudication disposition is almost always a conviction
- A PJC is a conviction in most cases
- An expungement is still a conviction
- A Motion for Appropriate Relief is ineffective if the grounds are immigration-related.



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IMMIGRATION COUNSEL FOR ATTORNEYS AND INDIVIDUALS

Cybersecurity: Protecting Yourself, Your Organization, and Your Client Data




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AGENDA

- Cybersecurity – Why It Matters
- Social Engineering
- Types/Strategies of Attacks
 - Ransomware/Malware
 - Phishing
 - Business Email Compromise
- What to Look For: Protect Yourself & Your Clients
- Q&A

*If you get bored, go to <https://haveibeenpwned.com>

JIMMY Kimmel LIVE!



SOCIAL ENGINEERING
The clever manipulation
of the natural human
tendency to trust.

Webcam Blackmail/SEXTORTION - Click HERE

Your Secret Life

Hi [redacted]

Hello!

I'm a member of an international hacker group.

As you could probably have guessed, your account [redacted] was hacked, because I sent message you from it.

Now I have access to your account!

For example, your password for [redacted] is [redacted]

Within a period from July 1, 2018 to September 23, 2018, you were infected by the virus we've created, through an adult website you've visited. So far, we have access to your messages, social media accounts, and messengers. Moreover, we've gotten full dumps of these data.

We are aware of your little and big secrets...yeah you do have them. We saw and recorded your doings on porn websites. Your tastes are to weird, you know.

But the key thing is that sometimes we recorded you with your webcam, syncing the recordings with what you watched! I think you are not interested show this video to your friends, relatives, and your estimate one...

Transfer \$700 to our Bitcoin wallet: 15Gac54wZ3tpGhNqQVemMWk

If you don't know about Bitcoin please input in Google "buy BTC", it's really easy.

I guarantee that after that, we'll erase all your "data" :D

A timer will start once you read this message. You have 48 hours to pay the above-mentioned amount.

Your data will be erased once the money are transferred.

If they are not, all your messages and videos recorded will be automatically sent to all your contacts found on your devices at the moment of infection.

You should always think about your security. We hope this case will teach you to keep secrets.

Take care of yourself!



93% of all breaches or incidents involve...

"PHISHING"

You receive an email asking you to update your account details


You enter your username and password in the scam page

Attacker collects your information

Attacker acquires more account details and access to resources

Attacker steals your data

From: service@intl.paypal.com <bulkiapers@paypalimay.com>
Sent: 27 October 2016 23:56
To: paul-smith@hotmail.com
Subject: Your recent transactions has been declined



Your Transaction Has Been Declined

Dear Customer,

We wanted to let you know your PayPal account has been limited because recently noticed a pattern of activity in your account that is maybe high risk and noticed some unusual log in activity with your account. Please check that no one has logged in to your account without your permission. For more information, Please log in to PayPal and see the section limited.

Remove Your Limitation

After we receive and review your documentation, we'll email you regarding the status of your PayPal account. Thank you for your understanding and cooperation. If you need further assistance, please click Contact at the bottom of any PayPal page.

Sincerely,
PayPal

Copyright © 1999 – 2016 PayPal. All rights reserved.
Consumer advisory – PayPal Pte. Ltd. Users are advised to read the terms and conditions carefully.
PayPal Pte. Ltd. Singapore

Hacker 101: Build Trust

- Spear phishers personalize emails to try to gain your trust
 - Full name
 - Mailing address
 - Name of your employer
 - Personal Data (SSN, Banking Account Number, etc)

**Even if the email or text message appears to be from someone you know, use caution.*

Approach

The Double Barrel attack uses multiple emails to create a believable narrative.

Stage One: The Lure

1st Email builds trust

From: Lena.Dobbs@example.com
To: jack.doe@example.com
Subject: Re: Request

Hey Jack,
I'm about to jump on a flight. Just to let you know I'll be sending you a file when I land or get wifi.

-Lena

Stage Two: The Phish

The second email contains malicious attachments or links

From: Lena.Dobbs@example.com
To: jack.doe@example.com
Subject: Re: Request

Jack,

Thank you for your patience.
Attached is the file I need you to review.

Thanks for your help.
-Lena

How to Spot a Phish

Urgent subject line
Phishing emails try to create a sense of fear and urgency. Official emails typically do not.

Out of context sentences
This phrase does not make sense in the context of the email, particularly one with a sense of urgency.

Random capitalization
Official emails will never use all caps for the University's name.

Bad grammar and odd phrasing
This entire paragraph illustrates language mistakes common when emails come from outside the United States.

Bad links
Hover your mouse over a link to see the target destination. If you see a long, strange link that doesn't look familiar, it's probably phish.

From: service@intl.paypal.com <builkaopers@paypalimay.com>
Sent: 27 October 2016 23:56
To: paul-simon-smith@hotmail.com
Subject: Your recent transactions has been declined

Your Transaction Has Been Declined

Dear Customer,

We wanted to let you know your PayPal account has been limited because recently noticed a pattern of activity in your account that is maybe high risk and noticed some unusual log in activity with your account. Please check that no one has logged in to your account without your permission. For more information, Please log in to PayPal and see the section limited.

Remove Your Limitation

After we receive and review your documentation, we'll email you regarding the status of your PayPal account. Thank you for your understanding and cooperation. If you need further assistance, please click Contact at the bottom of any PayPal page.

Sincerely,
PayPal

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Consumer advisory - PayPal Pte. Ltd. Users are advised to read the terms and conditions carefully.
PayPal Pte. Ltd. 20160914-54616466021

From: service@intl.paypal.com <builkaopers@paypalimay.com>
Sent: 27 October 2016 23:56
To: paul-simon-smith@hotmail.com
Subject: Your recent transactions has been declined

Your Transaction Has Been Declined

Dear Customer,

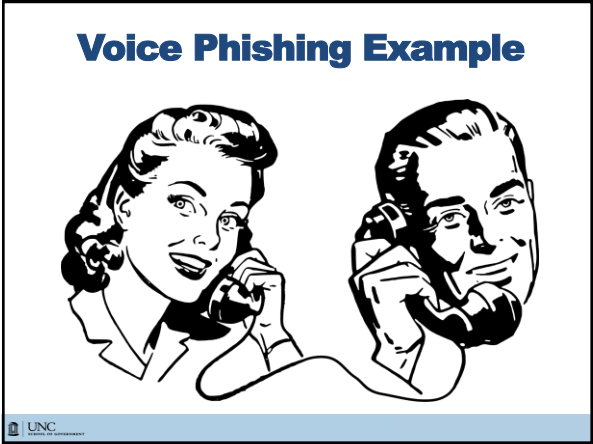
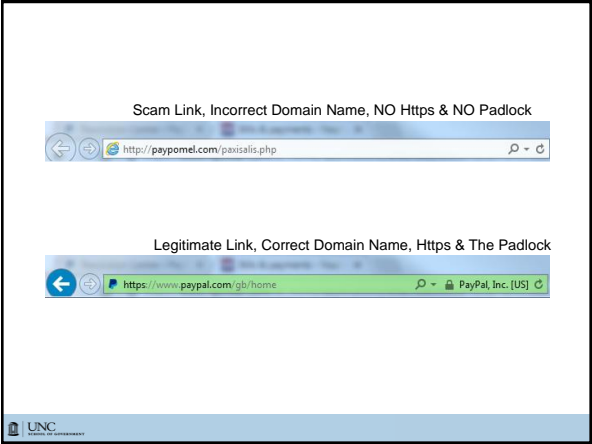
We wanted to let you know your PayPal account has been limited because recently noticed a pattern of activity in your account that is maybe high risk and noticed some unusual log in activity with your account. Please check that no one has logged in to your account without your permission. For more information, Please log in to PayPal and see the section limited.

Remove Your Limitation

After we receive and review your documentation, we'll email you regarding the status of your PayPal account. Thank you for your understanding and cooperation. If you need further assistance, please click Contact at the bottom of any PayPal page.

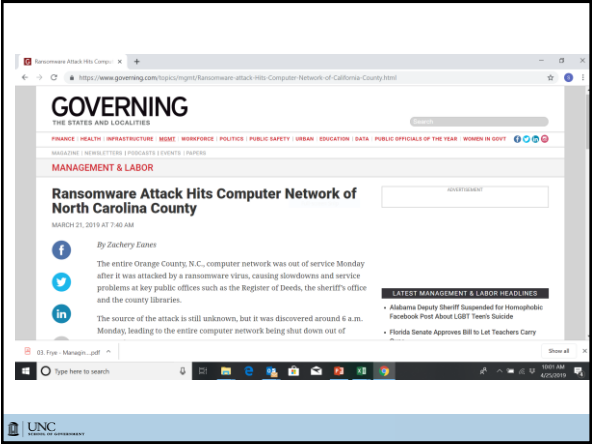
Sincerely,
PayPal

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Consumer advisory - PayPal Pte. Ltd. Users are advised to read the terms and conditions carefully.
PayPal Pte. Ltd. 20160914-54616466021



What Is It?

- Ransomware is a type of malware that attempts to extort money from a computer user by infecting or taking control of the victim's computer, or files, or documents stored on it.
- Ransomware will either lock or prevent normal usage, or encrypt the documents and files on it to prevent access to the saved data.



Your Backups Aren't Enough

Stage 1. Phishing attempt or brute force attack is successful & a dropper virus is released (Emotet, Trickbot, etc)

Stage 2. Credential harvesting tool deploys and gathers credentials across your network (including your backups potentially)

Stage 3. Ransomware is the big red flag alerting you that you have been hacked

Business Email Compromise Scams

Step 1:
Identify a Target

Organized crime groups target U.S. and European businesses, exploiting information available online to develop a profile on the company and its executives.

Step 2:
Grooming

Spear phishing e-mails and/or telephone calls target victim company officials (typically an individual identified in the finance department). Perpetrators use persuasion and pressure to manipulate and exploit human nature. Grooming may occur over a few days or weeks.

Step 3:
Exchange of Information

The victim is convinced he/she is conducting a legitimate business transaction. The winning email is then provided with instructions.

Step 4:
Wire Transfer

Upon transfer, the funds are converted into a bank account controlled by the organized crime group.

■ Business E-Mail Compromise Timeline
An outline of how the business e-mail compromise is executed by some organized crime groups.

What Does it Look Like?

Request - Message (HTML)

From: Rahyt Belars <rahyt.belars@shahne.com>
To: Samuel Hahn
Subject: Request

Sent: Wed 5/56/2015 12:08 PM

Hi,

Are you busy ? i need you to process a wire transfer for me today. Let me know when you are free so that i can send the beneficiary's details.

Thanks
Sent from my iPhone

Type #1: CEO Fraud

- Impersonates an executive
- Hacked or spoofed email address
- Exploits authority

Sample CEO Fraud

Date: Mon, 4 Feb 2019 22:18:08 GMT
From: Michael Smith [msmith1@gmail.com]
To: lpartin@sog.unc.edu
Subject: Please get back to me on this

Do you have a moment? I am tied up in a meeting and there is something i need you to take care of.

We have a pending invoice from our Vendor. I have asked them to email me a copy of the invoice and i will appreciate it if you can handle it before the close of banking transactions for today.

I cant take calls now so an email will be fine.

Sent from my iPhone

Type #2: Bogus Invoice Schemes

- Impersonate trusted vendor or supplier
- Use fake invoices
- Point you to new location for wire transfer

Bogus Invoices


From: [Brandon Wood](#)
To: [Brandon Wood](#)
Subject: APPROVAL DOCUMENT
Date: Monday, July 30, 2018 8:17:34 AM
Attachments: Invoice01.htm

Good Day,
Please kindly review the attached invoice for your perusal.

Best Regards,
Brandon Wood
Sales/Project Manager
Performance Cabling Technologies Inc.
Brandon@pct.cc


App State fleeced for almost \$2 million by scam; feds get most of the money back

- In 2016, Appalachian State hired Charlotte-based Rodgers Construction to build its new health science college facility. That October, the company filed a form with the school to establish wire transfers and direct deposits.
- Two months later, a staff member in the App State's controller's office received an email purported to be from Doug McDowell, the controller for Rodgers Construction.
- The email included a new direct deposit form along with instructions that the school should reroute company payments to a bank account at JPMorgan Chase. About a week later, some \$1.96 million was sent to the new location.
- On Dec. 20, the *real* Doug McDowell contacted App State to ask why the company had not received its money.



Avoiding BEC Scams

- Always check the sender and verify it is legitimate
- Check reply-to addresses as well
- Check links before clicking



Random Bait to Chew On

1

Top phishing disguises:

- Bills / Invoices (15.9%)
- Email delivery failures (15.3%)
- Legal / Law enforcement (13.2%)
- Scanned documents (11.5%)
- Package delivery (3.9%)

2

Top malicious attachments:

- Office files (38%)
- Archive files [.zip/etc.] (37%)
- PDF files (14%)

3


Top Phishing Lures:

- Dropbox Accounts
- Financial Institutions
- Generic Email
- Credential Harvesting

4

Highest Click Rates:

- DocuSign (7%)
- Dropbox (2%)
- IRS (1%)



27

**Any Questions**



Key Contacts and Resources In the Event Of A Breach

Immediately report your breach to the following entities:

- a. Your IT department
- b. Your local law enforcement agency
- c. The FBI via the Cybersecurity website complaint form: www.ic3.gov
- d. Email the FBI Cyber supervisors in addition to completing the above-mentioned form:
 - i. Western ½ of NC, contact: SSA Brian N. Cyprian at bnecyprian@fbi.gov
 - ii. Eastern ½ of NC, contact: SSA Jessica A. Nye at janeye@fbi.gov
- e. The North Carolina Fusion Center Cyber Manager, Tom McGrath:
Tom.McGrath@ncdps.gov or TMcGrath@ncsbi.gov; 919-740-1197 (cell)
- f. The North Carolina Information Sharing And Analysis Center (NC ISAAC):
ncisaac@ncsbi.gov, 919-716-1111
- g. State of NC Incident Reporting Form: <https://it.nc.gov/cybersecurity-situation-report>

Additional Resources:

- a. The State of North Carolina offers a multitude of resources, alerts, and contact information for key personnel that can assist with breach mitigation, training, statewide information sharing, etc.: <https://it.nc.gov/statewide-resources/cybersecurity-and-risk-management>
- b. UNC School of Government's Center for Public Technology:
 - i. Shannon Tufts (tufts@sog.unc.edu, 919-962-5438)