2015 Joint NYSCALA/OCA Continuing Legal Education Program

Criminal Evidence Update
Electronic Evidence Overview

New York, New York

October 20, 2015

Judge Mark D. Cohen

Evidence

- Update Selected Recent Cases: 2013-2015
- Electronic Evidence Overview

Best Evidence

- Rule: When Terms of Writing at Issue, Proponent Must Either 1) Produce the Original; or 2) Both Excuse Non-Production of Original and Present Admissible Secondary Evidence
  - Applies Only to Documents, Not Physical Objects
  - Applies Only to Proof of Contents of Writing
  - Does Not Apply to “Collateral” Writings
  - Does Not Apply to Voluminous Writings
  - Does Not Apply to Public Documents
    - These May be Proved by Authenticated Copies

During the D’s GL and Money Laundering Trial, A Trust is the Victim and the Trust Agreement and Ownership of the Funds in the Agreement is at Issue. The Actual Trust Document is Not Produced at Trial But Testimony is Permitted by the Drafter of the Agreement.

Is This a Violation of the “Best Evidence” Rule?

People v. John Haggerty, 23 N.Y.3d 871 (2014)

- D Charged With GL1 and Money Laundering From Trust – Michael Bloomberg's - By Scheme in Which He Contracted to Provide Ballot Security Services in 2009 Re-Election Campaign But Never Rendered Them
- P's Proof From Bloomberg's Campaign Staff and Independence Party That $ Paid to D and Traced to Payment of Share of Queens Home by Bloomberg Revocable Trust On Phony Documentation + Testimony Late in Trial From Drafter of Trust Agreement That Mayor Bloomberg Was Actual Owner of Trust Funds
- Court of Appeals Affirmed Conviction 6-1 (Rivera, J.)
- By Time Issue Raised Already Un-objected To Testimony and Documentary Proof Re: Bloomberg's Ownership = Evidence Not So Prejudicial
- Any Error in Best Evidence Rule Here Harmless

Molineux

A Child Victim in a Course of Sexual Conduct Prosecution Testifies Her Father Sexually Abused Her on Several Occasions When She Was in the 3rd and 4th Grades.

Is It Error to Then Permit Two Prosecution Witnesses (The Victim's Half Brother and her Mother) to Testify That The Victim Reported The Attacks to Them 14 Months After the Last Incident With The Limiting Instruction That This Testimony Was Admitted For The Non-Hearsay Purpose (i.e., Not For The Truth), But For the Fact That "Upon Hearing it Something Was Done" – i.e., The Investigation Was Triggered - and Also Preclude XE of The Victim About a Prior Allegedly Inconstant Statement Made by the Victim to Her Aunt?

People v. Daniel A. Ludwig, 24 N.Y.3d 221 (2014)

- Per Court of Appeals 5-2 (Read, J.): Not Error – Affirmed
- Majority Rejected Claim Testimony of Half-Brother and Mother Was Bolstering Where It Was Offered For Non-Hearsay Purpose of Presenting The Circumstances "Attendant to the Disclosure That Triggered The Investigation" and Thus Complete The Narrative
  - Also Relevant to the Victim's Credibility
- Alleged Prior Inconsistent Statement by Victim to Aunt Properly Precluded as Collateral Where in Context it Related to Non-Case Issue – Whether Her Mother Was Pregnant

The D Is Charged With Bribing 3 Witnesses Who Identified His Brother in a Murder in Brooklyn.

Should The Court Permit the DA to Elicit Proof That 2 Days Before a 4th Witness Against The D Was Murdered As *Molineux* Proof or Proper Proof Otherwise?

People v. Dupree Harris, 117 A.D.3d 847 (2nd Dept. 2014)

- Yes, Per 2nd Dept. 3-1: Evidence Properly Permitted
- Not Actually *Molineux*, But Properly Presented With Limiting Instructions to:
  - Explain State of Mind of Three Witnesses
  - Interwoven With the Narrative of the Charged Crimes
  - Background For These Witnesses Participation in Witness Protection Program
- Leave to Appeal Granted: 2014 NY Lexis 2289 (7/8/14)

Is a 911 Call of “Armed Robbery” That Results in D’s Being Arrested and Tried Only For CPW and Resisting Arrest Admissible to “Explain The Narrative” Re: The Reason For The Police Action in Arresting the D?

Yes, With Limiting Instructions Per Majority of Court of Appeals: *People v. Chadon Morris, 21 N.Y.3d 588 (2013):* Necessary as “Background Information” on Issue [i.e., Reason For Arrest and Claimed “Aggressive” Action by Police in Reference Thereto], With Very Specific Limiting Instructions

The D is Charged With Predatory Sexual Assault Against a Child and EWOC, Based on the Victim's Testimony That Before Each Sexual Assault, the Defendant Would Show Her "Bad Movies."

Is Proof That His Computer Downloaded Child and Adult Pornography Images, Including Bestiality Images, Admissible?

People v. Garfield J. Sorrell, Jr., 108 A.D.3d 787 (3rd Dept. 2013)

- Yes, Per 3rd Dept. (Spain, J.)
- Trial Court's "Balanced and Carefully Circumscribed" Ruling Approved Evidence That During Period of Indictment:
  - The D's Computer Was Used to Either Download or View Children Engaged in Sexual Activity and Other "Pornographic Images" [Testimony, Not Actual Images]
  - A "Large Number of Internet Search Terms" For Pornography Used on D's Computer
- Bestiality Search/Download Evidence Excluded – Too Prejudicial
- Testimony Admitted on Condition D's Wife Testify (As She Did) That She Did Not Undertake This Activity
- Evidence Proper:
  - Confirmed V's Testimony
  - Inextricably Interwoven With Proof
  - Relevant on Issues of Intent, Motive and Lack of Mistake or Accident

The Defendant Is Charged With Robbing a Victim of a Diamond Engagement Ring by Spraying Mace in His Face.

Is an Uncharged Crime of a Theft of a Different Engagement Ring From Another Victim by the Defendant at or About the Time of Charged Crime Properly Admissible on the Issue of Intent Under *Molineux*?

People v. Gerald DeGerolamo, 118 A.D.3d 23 (1st Dept. 2014)

- No Per First Dept. 3-2 (Acosta, J.)
- Defendant Charged With Robbery of $30K Diamond Ring Listed on Craig's List by Macing CW in Face
- People Permitted to Introduce Evidence At or About Time of Robbery, Defendant Stole $90K Diamond Ring, Also Advertised on Craig's List by Switching it in Pouch
- Majority: Evidence of Uncharged Crime of Theft, Not Sufficiently Probative Under *Molineux*
  - "If Jury Believed" Complainant, Sufficient Proof Defendant Acted With Requisite Larcenous Intent
  - Error Not Harmless Where DA Highlighted it On Opening and Closing Statements

So, What About a Defendant's "Bad Thoughts?" Are They Properly Admissible Under *Molinuex*?

- (Maybe?) Per *People v. Paul Cortez, 22 N.Y.3d 1061 (2014)* Murder Conviction Affirmed by Memo Opinion: In Context, D's Journal Contained "Ruminations" Over Being Spurned by Victim, (Killed by Stabbing), Along With Rejections by Two Other Women With Whom He Had Relationships Several Years Prior:
  - "Revenge," "Need to Kill" and "Retribution" Outlined With Drawings of Knives
- Chief Judge Lippman, Concurring: Error to Admit But Harmless, <u>But May Be Proper if "More Temporally Related"</u>
- Judge Abdus-Salaam: Error to Admit – No Need to Expand *Molinuex* to "Thoughts" But Harmless

Sandoval

Can The People Be Permitted to Cross-Examine The Defendant If He Testifies in an Assault Case About The Underlying Facts of an Unrelated Rape Conviction That Was on Appeal Under *Sandoval?*

People v. Jean Cantave, 12 N.Y.3d 374 (2013)

- No Per Court of Appeals 7-0 (Lippman, C.J.)
- Privilege Against Self-Incrimination “Negatively Impacted”
- D Never Testified But “Practical Effect” of Lower Court Ruling Was to “Prevent Defendant’s Examination Entirely”
- Court Did Not Rule Whether Mere Fact of Conviction on Direct Appeal Could Be Used For Cross-Examination

Past Recollection Recorded

So, A Trial Witness Cannot Remember A Key Fact During the Defendant's Trial. During a Mid-Trial Hearing, The Witness Testifies He Had No Present Recollection and That He Was Not Sure His Grand Jury Testimony Was Based on His Recollection at the Time or Based on Interviews With DA Investigators.

Is The Grand Jury Testimony Properly Admissible as Past Recollection Recorded?

People v. Peter DiTommaso, 127 A.D.3d 11 (1st Dept. 2015)

- During D's Perjury Trial, DA's Witness (Woods), If D Referred Bernard Kerik Apartment Renovation Job to His Company
- Witness Waffled Repeatedly:
  - "As Far as I Can Remember…"
  - "We've (He and the DA), Have Gone Over This So Many Times…"
  - "I'm So Mixed Up…"
- DA Offered W's GJ Testimony as Past Recollection Recorded
- At Hearing W Testified Honestly Couldn't Recall Where Job Came From, That he Testified Truthfully and Accurately in GJ But (on XE) Could Not Tell is Based on Cumulative Effect of Interviews and Prior Testimony
- Trial Court Admitted GJ Testimony
- First Dep't (Andrias, J.). Reversed 5-0: Admission Violated CPL 60.35 and 670.10

Are the Results of a Field or Portable Sobriety Test, an “Alco-Sensor,” Ever Admissible in a Defendant’s DWI Case?

People v. Jamel Santiago, 47 Misc.3d 195 (Sup. Ct. Bx. Co. 2014)

- Bronx Supreme Court (Newbauer, J.) Denied DA's In Limine Motion to Admit Results of Intoximeter Alcosensor Field Sobriety Test in D's DWI Trial Following Foundational Hearing But In Dicta Held May Be Admissible in Appropriate Cases
  - Dicta Noted as Contrary to Court of Appeals Ruling in *P v. Thomas, 121 A.D.2d 73 (4th Dept. 1986), aff'ed 70 N.Y.2d 823 (1987*) But…
  - Consistent With Trend in Several Lower Courts to Identify Criteria For Admission of Such Evidence
- Alcosensor Instrument:
  - Properly Functioning
  - Certified by State and Federal Regulators
  - Deemed Reliable by Consensus Within Scientific Community and Technological Advances
  - More Than a "Crude 'Breath Test'"
- No F*rye* Hearing Required But..
- Evidence Inadmissible Here Since Police Failed to Wait for 15-20 Minute Period
- See also, *People v. Mark George, 2015 N.Y. Missc. Lexis 1870 Cr. Ct. Kings Co. 2015)*: Similar Ruling- Field Test Results Not Admitted Due to Failure to Document 20 Minute Period and "Distracting" Accident Scene

But Wait ….

People v. George Turner, 47 Misc.3d 100 (App. Term 1st Dep’t 2015)

- People’s Proof at D’s Manhattan DWI Trial Included Police Observations, .11 Intoxilizer 5000 Breath Test Result at Precinct and Results of Portable Field Breath Results
- Appellate Term Affirmed: Rejected Claims Field Test Results Erroneously Admitted in Evidence
  - Device on NYS DOH List of Approved Breath-Testing Instruments
  - Device Was in Proper Working Order
  - Test Properly Admitted
- In Any Event, Proof of Guilt Overwhelming = Any Error Harmless

So, What About Admitting PBT Results, Not For Truth But On Issue of D’s State of Mind in DWI Case?

Good or Bad?

People v. Palencia, 2015 N.Y. App. Div. Lexis 06231, (2nd Dept. 2015)

- Troopers Respond to Nassau Rear-End Collision
- After Observation of Signs of Intoxication, Police Administer Field Sobriety Tests (HGN, Walk and Turn, One-Legged Elevation), Portable Breath Test Administered = "Positive" Results, But Not Recorded
- At Barracks, D Only Exhaled "Short Breaths" in "Drager" Breath Instrument; After 5th Try, Deemed Refusal by Troopers
- P's In Limine Application to Admit Field Breath Test Result on D's State of Mind Re: His Subsequent Conduct Granted With Limiting Instructions at End of Trial
- Majority of Appellate Division Held 3-2 Reversible
  - PBT Device Reliability Not Accepted in Scientific Community
  - Undue Risk Jurors Considered PBT Result as Evidence of Intoxication, Especially Where Limiting Instruction Only Provided "Only at the End of the Trial."
- *P v. Kulk, 013 A.D.3d 1038, 1040 (3rd Dept. 2013*): Same Holding

The Prosecutor Cross-Examines a Defense Witness Over Objection That Permits The Jury to Infer That a Non-Testifying Person Made Statements That Implicate The Defendant and Then Uses The Inference on Summation.

Good, Reversible or Harmless Error?

People v. Derrick Lloyd, 115 A.D.3d 766 (2nd Dept. 2014)

- Reversed Per 2nd Dept.
- In Shooting at 1991 Brooklyn Party, Issue Was Who Was Shooter; D's Sister (Ramona Lloyd) Testified for Defense, Defendant Was With Her Throughout Night
- On Cross-Exam, Sister XE'ed by DA Over Objection Re:
  - Whether After The Shooting, a Detective Had Shown her a Picture of Her Brother, the Defendant
  - Whether She Asked The Detective What Another Person at the Party (Patricia Drake) Was Telling The Police
  - Whether When She Left The Police Station, She Spoke to Drake, and Whether They Had a "Heated Conversation"
- On Rebuttal DA Permitted to Call Rebuttal Witness Who Testified That Lloyd Told Him that After She Left Police Station, She Went Directly to Drake's Apartment
- DA Summed Up: When Police Showed Picture of D to His Sister, She Knew Someone Had Told Police About Brother's Presence at Party and Angry About This Because Drake Was in the Next Room
- Defendant's Confrontation Rights Violated Which Was Exacerbated By Summation Comments of DA + No Harmless Error

Experts

Can a Medical Examiner Provide Expert Testimony Regarding the Duration of a Chokehold Based, Not on Scientific Studies but On His "Experience" Alone?

People v. Anthony Oddone, 22 N.Y.3d 369 (2013)

- Yes Per Court of Appeals (Smith J.) 7-0 [In Dicta]
- An Expert May Base His/Her Opinion on Experience Alone
- If Expert Qualified and Bases On Which Opinion Based Derived Presented, No Limitation (?) in Experience-Based Testimony
  - "It May Not Be Possible to Draw a Neat Line Between *Frye* Scientific-Based Expert Opinions and Expert Opinions Based on Experience
- Court Declined to Rule on Efficacy of Admissibility of "Vierdodt's Law" [TJ Denied Admission of Defense Expert Identification Witness on Overestimation of Duration of Relatively Short Events]
- Case Reversed on Denial of Defense Effort to Refresh Recollection of Prosecution Witness Re: Length of Strangulation

The Defendant, A Self-Described "Los Angeles Talent Scout," Is Charged With Rape 2 and Facilitating a Sex Offense Based <u>Specifically on His Administering MDMA (Ecstasy)</u> to a High School Senior V, Thereby Rendering Her Helpless.

Is It Error To Permit Expert Testimony That The V's Symptoms (Unconsciousness), Were Not Normally Associated With Ecstasy But Were More Typical of "Date-Rape" Drug, GHB?

People v. Horacio Blackwood, 108 A.D.3d 163 (1st Dept. 2013)

- No – Per 1st Dept. (Saxe, J.)
- While Indictment Specifically Identified Ecstasy (MDMA) as Controlled Substance Used to Facilitate Crime, " It Did Not Name a Specific Substance As The Cause of the Incapacity"
- Thus, <u>People Not Limited to Assertion It Was Ecstasy Alone</u>
- Moreover, GBH Was Not "New, Legally Inadequate Theory" But Was at Worst, "Factually Unsupported"
  - Jurors "Given a Choice" Between Factually Supported and Factually Unsupported Theories

A Police Expert in "Decoding Telephone Conversations," Who Is Not an Investigator in a Narco-Turf Contract Killing Conspiracy, Testifies to the Meaning of Certain Recorded Coded Words Along With Explaining What is Happening in Various Transactions.

Aside From Explaining the Meaning of Coded Words, The Testimony Re: What is Happening in the Recordings is in Almost Complete Harmony With the People's Theory of the Case.

Impermissible Expert Testimony or OK?

People v. Jose Inoa, 25 N.Y.3d 466 (2015)

- It’s NG Per Court of Appeals 7-0 Lippman, C.J.
- While There is “No Categorical Prohibition on the Introduction of Police Expertise into the Calculus of a Criminal Trial,” Here, Expert (Who Was Not an Investigator in the Case) Became a “Summation Witness” When He Testified Beyond Mere Meaning of Coded Words and “Explained the Meaning of Virtually Everything”
- However, Error Harmless in Light of Overwhelming Proof

Declarations Against Penal Interest

A Female Co-Defendant in a Weapons Possession Case Involving Charges Against Her and Two Male Co-Defendants Testifies in Her Single Trial, She Never Possessed the Weapon. She is Acquitted. During Pre-Trial Proceedings, However, She Had Told a Lawyer for One Of Her Male Co-Defendants That She Alone Possessed The Gun Found in the Car. She is Unavailable at the Trial of Her Male Co-Defendants and the Co-Defendant's Lawyer Who Heard The Admission is Off The Case.

Is The Co-Defendant's Statement to The Attorney Proffered by The Defense Properly Admissible as a Declaration Against Penal Interest?

People v. Omar Shabazz & Donald Perrington, 22 N.Y.3d 896 (2013)

- Yes Per Court of Appeals (Memo; 4-2)
- Majority Held It Was Reversible to Refuse The Admission of Statement as Declaration Against Penal Interest, Notwithstanding Inconsistency Between Her Trial Testimony and Statement to Lawyer Since Statement Still Reliable Since Gun Found Directly Adjacent to Where Female Was Seated in Car and Circumstances in Which Statement Made Indicated It Was Against Penal Interest

Hearsay: *"An Out of Court Statement Offered For the Truth of the Matter Asserted"*

Sixth Amendment: *"In All Criminal Prosecutions, The Accused Shall Enjoy The Right to …Be Confronted With the Witnesses Against Him"*

Crawford & Progeny

- *Crawford v. Washington, 124 S.Ct. 1354 (2004)* Held Testimonial Hearsay Violates Confrontation Clause
- *Davis v. Washington/Hammon v. Indiana, 126 S.Ct. 2266 (2006)*
  - 911 Call – Not Testimonial (*Davis*)
  - Burglary Affidavit of Complainant - Testimonial (*Hammon*)
- *New York Court of Appeals:*
  - *People v. Garcia, 25 N.Y.3d 77 (2015);* **[Mere "Background Evidence" May Be Testimonial]**
  - *People v. Nieves-Andino, 9 N.Y.3d 12 (2007)* **[Pedigree Information and Identity of Shooter Provided to Police at Scene Not Testimonial]**
  - *People v. Bradley, 8 N.Y.2d 124 (2006)* [**Answer to Police "What Happened" by Assault Victim Not Testimonial**]
  - *People v. Pacer, 6 N.Y.3d 504 (2006)* [**VTL 214/DMV Affidavit Testimonial**]
  - *People v. Goldstein, 6 N.Y.3d 119 (2005)* [**Expert Forensic Testimony/ Non-Cross-Examined Hearsay – Testimonial**]
  - *People v. Douglas, 4 N.Y. 3d 777 (2005)* [**Co-Defendant's Redacted Plea Allocution – Testimonial & Not Admissible**]
  - *People v. Hardy, 4 N.Y.3d 192 (2004)* [**Co-Defendant's Plea Allocution-Testimonial & Not Admissible**]
  - *People v. Reynoso, 2 N.Y. 3d 820 (2004)* [**Co-Defendant's Statement to Detective Not Offered for Truth – Admissible**]

So What if a State Statute Authorizes the Admission of a Lab Report in a Narco Case.

Is That Testimonial Proof?

Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009)

- Narcotics + Three "Certificates of Analysis" Results of Forensic Tests of Bags Seized By Police Offered by DA
  - Weight
  - Bags ***"Have Been Examined With the Following Results: The Substance Was Found to Contain: Cocaine"***
  - Certificates Sworn to Before Notary Public at State Lab as Required by Massachusetts Law [Mass. Gen. Laws, Ch. 111, 113]
- Defendant Objected on *Crawford* Grounds
- Court Overruled and Admitted [Per Law] as "Prima Facie Evidence of the Composition, Quality and the Net Weight of the Narcotic Analyzed"
- Massachusetts Appeals Court Held Lab Reports As Admitted to Prove Seized Item Was Controlled Substance Did Not Violate Confrontation Clause

Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009)

- Supreme Court Reversed 5-4 (Scalia, J.)
- There is "Little Doubt" Documents at Issue "Fall Within The Core Class of Testimonial Statements"
- Since Prosecutor Established Element of Offense by "Affidavits" Instead of Live Testimony (or Showing Witness Was Unavailable or Defendant Had Prior Chance to XE), Confrontation Clause Violated
- *"The Sixth Amendment Does Not Permit the Prosecution to Prove Its Case By Ex Parte Out-of-Court Affidavits"*

Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009)

- The Confrontation Clause is Designed to “Weed Out” Not Only the Fraudulent Analyst but the Incompetent One as Well
- “The Sky Will Not Fall” As the Dissent Predicts
  - Many States Have *Crawford* Compliant Procedures
  - Several States Have “Notice and Demand” Statutes
    - DA Provides Notice of Intent to Present Report at Trial and Defendant Given Time to Object Without Live Testimony
      - The Right to Confrontation Can Be Waived By Failure to Object
  - Live Testimony Re: Chain of Custody, Authenticity of Sample and Accuracy of Testing Device Not Required [Fn #1]

People v. Michael Brown, 13 N.Y.3d 332 (2009)

- Nine Year Old Victim Sexually Attacked 1993
- Rape Kit Sent to Private Sub-Contractor Lab, Bode, by ME For Testing 2002
- Bode "Produced" DNA Report 2002 :
  - "Machine Generated Raw Data, Graphs and Charts of Male Specimen's DNA Characteristics"
  - DNA Characteristics Entered Into DNA Index System
- Meanwhile, D's DNA Entered into DNA Index System in 2000 By Maryland Police
- Cold Hit February 2003
  - ME Comparison Tests: "One in a Trillion"
- D Charged with Two Counts Sodomy and Kidnapping
- ME Forensic Biologist Testified Supervised ME DNA Testing and Testing Protocols of DNA Sub-Contracting Labs
- Bode Report Introduced into Evidence Over Claims it Violated *Crawford*
- 2nd Dept Affirmed

People v. Michael Brown, 13 N.Y.3d 332 (2009)

- Court of Appeals Affirmed 7-0 (Ciparick, J.)
- Report Was Not Testimonial = No 6A Violation
- *Melendez-Diaz* Distinguished:
  - Here Forensic Biologist Testified
  - Bode Report Was "Merely Machine Generated Graphs, Charts and Numerical Data" with "No Conclusions, Interpretations or Comparisons Apparent"
- Per *Melendez-Diaz*: Not Everyone Necessary to Establish Chain of Custody or Authenticity of Sample Must be Called
  - One Expert May Be Enough
  - Bode Technicians Were Not "Analysts"

So, Is a Statement by a Shooting Victim, In Response to a Police Officer, “What Happened” and “Who Shot You” Testimonial or Non-Testimonial?

Michigan v. Richard Perry Bryant
131 S.Ct. 1143 (2011)

- Police Responded to Shooting and Asked Victim, What Happened, Who Shot You, and Where Did Shooting Place?
- Victim Stated, "Rick" (D) Shot Him at Around 3 a.m., That He Recognized D's Voice During Back Door Conversation at D's Home, and When He Turned to Leave, He Was Shot Through Door
- Victim Died Hours Later
- Statement Admitted at Trial Prior to *Crawford (2004)*
- Michigan Supreme Court Reversed Conviction

Michigan v. Richard Perry Bryant, 131 S.Ct. 1143 (2011)

- Supreme Court Reversed 7-2 [Sotomayor, J.]
- Victim's Statement Was Non-Testimonial and *Crawford* Complaint Per *Davis and Hammon (2006)*
- Courts Should Consider These Factors:
  - 1) Type of Weapon; 2) Type of Crime; 3) Medical Condition of Decedent; 4) Did Crime Occur in Exposed or Public Area; 5) Was Encounter with Police "Disorganized;" 6) Was Declarant Capable of Forming a "Purpose;" 7 What Was the "Formality" of the Statement; 8) Did Statement Appear "Reliable;" and 9) What Was Purpose of Question: To "Enable Police Assistance," or Gather Evidence for Criminal Prosecution

And What About a Lab Report Re: BAC in DWI Case? Suppose It's Used by Testifying Witness to Present an Opinion that the Defendant Was Intoxicated?

If the Report is Admitted in Evidence is the Proof Testimonial or Non-Testimonial?

Donald Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011)

- State Presented Testimony of Supervising Lab Analyst Who Relied on Lab Report Prepared By Lab Tech on Leave – Report Admitted in Evidence as Business Record
- U.S.S.Ct. Held 5-4: Report Was Testimonial & Admission Violation of *Crawford* (2004) Per *Melendez-Diaz* (2009)
- Justice Sotomayor, Concurring: Case Did Not Involve Report For 1) Medical Treatment; 2) Witness Who Testified as a *"Supervisor With a Personal, Albeit Limited Role";* 3) Expert Who Provided Opinion About Testimonial Reports Not Admitted in Evidence; or 4) Machine-Generated Results

In Light of *Bullcoming*, What If a Prosecution Witness Provides an Opinion (A DNA Match) As an Expert Relying on a Lab Report Concerning a DNA Profile That The Witness Did Not Prepare?

- *Sandy Williams v. Illinois, 132 S.Ct. 2221 (2012)* - SCOTUS Plurality: OK – No Confrontation Violation – *Bullcoming* Distinguished
  - Report Not Admitted in Evidence
  - Expert Merely Relied on Information in Report To Present Her Opinion
- *People v. Brown (2009)* Has Continuing Vitality – But There Report Was Introduced in Evidence

So, Are Breathalyzer Calibration Records Admissible Under *Crawford*?

People v. Robert Pealer, 20 N.Y.3d 447 (2013)

- Yes, Per Court of Appeals 5-1 (Graffeo, J.)
- DWI Trial, DA Offered 3 Documents Through Officer Who Administered Test Re: Calibration and Maintenance of Breathlyzer Machine Used to Test D After Arrest
  - Two Certified Breathalyzer Calibrated by DCJS in 9/08 and 3/09
  - One Stated Sample of Simulator Solution Was Analyzed and Approved by State Police
- TJ Admitted Over Confrontation Objections

People v. Robert Pealer, 20 N.Y.3d 447 (2013)

- Per *P v. Brown (2009),* Criteria for Determination of Whether Document Violates Confrontation Clause:
  - *1) Is Agency That Produced Document Independent of LE?*
  - *2) Does it Reflect Objective Facts at the Time of the Reporting?*
  - *3) Is the Report "Biased" in Favor of LE?*
  - *4) Does it Accuse the D by Directly Linking Him to the Crime?*
- While Reports Bear "Some Resemblance to Traditional Testimonial Hearsay," Court Holds On Review of "Primary Purpose" of Document, and Review of Virtually Uniform National Consensus" – <u>Documents Re: "Routine Inspection, Maintenance and Calibration" Are Not Testimonial and Do Not Implicate the Confrontation Clause</u>
  - No Requirement to Produce Authors of Document to Testify and TJ Didn't Err in Declining D's Request to XE Them Before Ruling

Michael Duhs v. Capra, 2015 U.S. Dist. Lexis 12614 (E.D.N.Y. 2015)

- Update on *P v. Duhs (2011)*: Court of Appeals Held Testimony From ER Doctor Re: What Non-Testifying Three Year Old Child Told Her About Why He Didn't Get Out of Scalding Bath Water That Burned Him – Because He (the D) "Wouldn't Let Me Out" - Admissible Treatment and Diagnosis Non-Testimonial Hearsay
- E.D.N.Y. (Weinstein J.) Granted Federal Writ of HC: Confrontation Rights Violated
- State Court Rulings Unreasonable Application of Settled Federal Constitutional Law [*Michigan v. Bryant (2011)*]
  - "Primary Purpose" of Dr's Question as Mandated Reporter of Child Abuse Under Social Services Law 413 Was to Gather Evidence as Part of Criminal Investigation Because She In Essence, Was Part of Law Enforcement

But What About Statements Made by a Non-Testifying Child Victim to a Teacher?

Also Inadmissible?

Or Admissible?

Ohio v. Darius Clark, 135 S.Ct. 2173 (6/18/15)

- 3 Year Old Child – “L.P.” Observed by Pre-School Teacher in Lunchroom to Have Bloodshot; When Asked What Happened, LP Said He Fell
- When They Moved to Brighter Lights of Classroom, Teacher Observed “Red Marks, Like Whips of Some Sort” on LP’s Face
- When Asked Who Did This, LP Seemed “Kind of Bewildered” and Answered “Something Like Dee, Dee” and Indicated on Question Whether Dee Was Big of Little, That Dee is “Big”
  - Dee is D’s Nickname
  - D Denied Abuse When He Picked Up Child
- Teacher Called Child Abuse Hotline; LP Later Examined by Social Worker and Doctor
  - Black Eye, Belt Marks on Back and Stomach, and Bruises All Over Body on LP
- After Conviction, Ohio Appellate Courts Reversed = LP’s Statements Testimonial and Erroneously Admitted

Ohio v. Darius Clark, 135 S.Ct. 2173 (6/18/15)

- SCOTUS Per Alito, J., Reversed 9-0 With Several Concurring Opinions
- "Primary Purpose" of L.P. and Teacher Was Not to Assist in Prosecution = Statements Non-Testimonial Per *Hammon v. Indiana, 547 U.S. 813 (2006)* and *Michigan v. Bryant, 652 U.S, 344 (2011)*
- Where Statement Made to Civilian (Like Teacher), Existence of Emergency is Not Touchstone of Determination of Whether Statement Testimonial "Vel Non"
- Fact Teacher Mandatory Reporter, Relevant But Not Determinative
- *Duhs v. Capria* Ruling Now at Issue

Is it a Violation of a One-Eyewitness Murder Defendant's Confrontation Rights for the People to Elicit Testimony From a Police Detective That The Victim's Sister Told the Detective That Her Brother (The Victim) Was Having a Problem With Defendant Before the Murder?

Is This Evidence Properly Admitted as Background Information About as to How Why the Police Pursued the Defendant?

What About if the Detective is Asked Whether at a Certain Point in the Investigation, Before He Spoke to the Eyewitness, He Began to Look For the Defendant as a Suspect?

People v. Richard Garcia/Joshue DeJesus, 25 N.Y.3d 77 (2015)

- *Garcia*: Detective in One-Eyewitness Shooting Murder Testified That V's Sister Told Him That Her Brother (V) Was "Having a Problem" With the D
- *DeJesus*: Detective, Also in One-Eyewitness Shooting Murder Testified Began Specifically Looking for The D at 4 pm On Day of Murder Before He'd Talked to Eyewitness
- Both Statements Offered as Background Re: How and Why Police Focused on D
- Court of Appeals Reversed *Garcia* (6-1) [This Was Testimonial] and Violated Confrontation Rule and Affirmed *DeJesus* [Jury Merely Told Police Began to Look at D Before Speaking to Eyewitness]
  - Even Assuming Non-Testimonial Error Not Cured in Garcia By DA's Curative Argument on Summation" That Detective's Testimony Was Not Offered For Truth
- But Court Affirmed *DeJesus* 7-0: No Way to Characterize Det's Statement as Testimonial Since He Said He Began to Look For D Before Speaking to EW

How About a Fingerprint Evidence Report Prepared by an Unavailable Criminalist That's Used by an Fellow Criminalist Who is Called as a Witness and is Cross-Examined?

People v. John Doe, 38 Misc.3d 709 (Sup. Ct. Queens Co. 2012)

- Citing *Williams (SCOTUS 2012), P v. Brown (NYCA 2009*) and *P v. Encarnacion, 89 A.D.3d 81 (1st Dept 2011),* (Pre-*Pealer*) No *Crawford* Violation Since Report is Not Testimonial Where Expert Relying on Report Available For Cross-Examination

Electronic Evidence

Topics

- General Foundational Requirements for Electronic Evidence
- Best Evidence
- Fax’es
- Email
- Text Messages
- Social Media
  - Facebook
  - U-Tube
  - Twitter
- Judicial Notice of Electronic Evidence: Websites
- Audio Recordings
- Video/Surveillance Recordings
- Forensic Experts – Electronic Evidence
- Spoliation of Electronic Evidence
- Computer Animation – Demonstrative Evidence
- Tracking Devices and Information

Overarching Principle:

There Are No New or Even Novel Rules of Law That Are Properly Applied in Discovery or Evidentiary Determinations Involving Electronic Evidence.

Long-Standing Precedents in These Areas Are to be Applied.

Discovery in Cases Involving Electronic Evidence

- Court Rule 202.12 – Preliminary Conference: Establish Method and Scope of Any Electronic Discovery, Including But Not Limited To:
  - Identify Relevant Data & Computer Systems Used
  - Redact Privileged Communications
  - Anticipate and Allocate Cost of Data Recovery
  - Develop Retention of Electronic Data and Preservation Plan
  - Identify Persons Responsible for Data Preservation
- Court Rule 202.16(f): For Matrimonial Cases
- "Litigation Hold" Required to Put Opposing Party on Notice of Need to Preserve

Schreiber v. Schreiber, 29 Misc.3d 171 (Sup. Ct. Kings Co. 2010)

- Wife's Motion For Order Confiscating or Copying Hard Drive Disk of Husband's Office Computer on Claim of Concealed Income and Assets Denied as Overbroad Where it Sought General and Unrestricted Access to Entirety of Husband's Business
- Leave to Renew Granted With Proposed Discovery Protocol That Would Protect Privileged and Private Material, Provide Provisions For Discovery Referee, and Forensic Computer Expert, Outline Scope and Methodology of File Analysis, Contain Cost Sharing Plan and Provide for Retention of Clone

Discovery of Social Network Sites

- *Romano v. Steelcase, Inc., 30 Misc.3d 426 (Sup. Ct. Suffolk Co. 2010)*
  - Plaintiff Required to Provide Defendant With Access to Private Facebook and MySpace Network Accounts to Contradict Claims She Made in Personal Injury Action
- *Imanverdi v. Popovici, DPM, 109 A.D.3d 1179 (4th Dept. 2013)*
  - Trial Court Order Requiring Plaintiffs to Produce Contents of Facebook Account for In Camera Review Affirmed

Discovery of Social Network Sites [Cont'ed]

- *Gallo v. City of New York, 43 Misc.3d 1235(A) (Sup. Ct. N.Y. Co. 2014)*
  - Plaintiff Required to Provide Discovery of *LinkedIn* Account Re: Communications With Employment Recruiters in Case Involving Fall From Tree in Central Park
  - Court Applied Two-Pronged Test: Is Material Sought "Material and Necessary" + Would Production Result in Violation of Account Holder's Privacy Rights?
  - Defendant's Motion for Access to LinkedIn Communications With Colleagues Re: Self-Assessment of Post-Accident Condition and "All Social Media Sites" Denied
- *Kregg v. Maldonado, 98 A.D.3d 1289 (4th Dept. 2012)*
  - Order Requiring Production of All Social Media Maintained by Plaintiff Motorcyclist in MV Accident Reversed as Overbroad Without Prejudice to "More Narrowly Tailored Disclosure Request"
- See Also, *1 Modern New York Discovery 12:32.60 (2nd ed)* For Excellent Review of NY Cases on This Issue

Carlene Richards v. Hertz Corp., 100 A.D.3d 728 (2nd Dept. 2012)

- Defendant Sought Access to Plaintiff's "Status Reports, Emails, Photographs and Videos" Posted on Private Settings Portion of Plaintiff's Facebook Account in Personal Injury Action
  - Plaintiff Claimed She Could No Longer Play Sports and Suffered Pain in Cold Weather as Result of Accident
  - But Plaintiff Posted Post-Accident Pix Not Blocked By Privacy Settings Showing Her Skiing
- After Plaintiff Refused to Produce This Information, Defendant Moved to Preclude Plaintiff From Offering Proof on Damages and Plaintiff Then Cross-Moved For Protective Order for Facebook Information
  - Lower Court Denied Defendant's Preclusion Motion and Granted Plaintiff's Protective Order Application
- On Appeal: Case Remitted For In Camera Review and New Determination of Protective Order Issue by Trial Court
  - Defendant Made Sufficient Showing Relevant Evidence Reasonably Calculated to Lead to Discovery of Information Bearing on Plaintiff's Claim

General Foundations for Admission of Electronic Evidence

- *Per Lorraine v. Markel Amer. Ins. Co, 241 F.R.D. 534 (D. Md. 2007):*
  - Is it Relevant?
  - Is it Authentic? [F.R.Ev. 901]
  - Is it Hearsay and If So, Is There an Exception?
  - Is it The Best Evidence; If Not, Is There Admissible Secondary Evidence?
  - Does Probative Value Substantially Outweigh Unfair Prejudice [F.R.Ev. 403]

Statutes

- CPLR 4518(a): Admissibility of Business Records:
  - An "Electronic Record" of any Business, (Including a Profession, Occupation or Calling of Any Kind") as Defined in Technology Law 302(2) May be Admissible as Long as Business Record Criteria Established:
    - Made in Regular Course of Business
    - Regular Course of Business to Make
    - Made at or about Time or Reasonable Time Thereafter
- Court May Consider "Method or Manner by Which Electronic Record Was Stored or Maintained or Retrieved in Determining Whether the Exhibit is a True and Accurate Representation of Such Electronic Record"

C.P.L.R. 4539

Copies of Records Made in "Regular Course of Business, Institution or Member of a Professional Calling" Are Admissible If Original is in Existence and Available For Inspection Under Direction of Court

So, What About a Printouts of Electronic Spreadsheets Showing a Party’s On-Line Account Information in Action on Credit Card Debt?

Are They Admissible on Their Face?

Cach of Colorado, LLC v. Lazorovsky, 46 Misc.3d 1201(a) (Civ. Ct. Richmond Co. 2014)

- Redacted Printout of Electronic Printout of D's Citbank MasterCard Account Information Submitted by P in Opposition to Motion by D to Dismiss Complaint on Ground Plaintiff Never Existed as Corporate Entity
- Court Held This Evidence Inadmissible Under CPLR 4518 and 4539 and State Technology Law
- Complaint Dismissed

Also, Keep in Mind, F.R.Ev. 901(b)(4)

- Evidence (e.g., Electronic in Nature) May Be Authenticated By Reference to its “Appearance, Contents, Internal Patterns, or Other Distinctive Characteristics, When Taken in Conjunction With The Circumstances”

So, If These Electronic Records Records Are Admissible as Business Records, What About The Best Evidence Rule?

People v. Walter Rath, 41 Misc.3d 869 (Dist. Ct. Nassau Co. 2013)

- State Police Breathalyzer Calibration and Maintenance Records Introduced at Defendant's DWI Trial
- Defendant Convicted and Moved To Set Aside Verdict
- Court Denied Motion and Held: Records Properly Admitted Under C.P.L.R. 4518(a) and STL 302, 304, 305
  - "Electronic Record" Presented as Tangible Exhibit (i.e., Hard Copy) Was True and Accurate Representation
  - Proper Business Record Foundation Laid
- Court Rejected People's Additional Claim They Were Admissible Under C.P.L.R. 4539 Since They Were Never "Stored" or Existed as a "Paper Document" in State Police Records

And What About Fax'ed Documents?

People v. James R. Miller, 199 A.D.2d 692 (3rd Dept. 1993)

- Fax'ed D.C.J.S. Breathalyzer Operator Certification Certificate Introduced in Evidence at Defendant's DWI Trial
- 3rd Dept. Affirmed Conviction and Applied Traditional Best Evidence Rule re: Certificate
- Properly Admitted as Business Record Under C.P.L.R. 4518 Since a "Proper Excuse Was Offered For the Nonproduction of the Original Certificate"
- See Richardson, *Evidence*, Sec. 582 at 589 [Prince 10th ed] and Imwinkelreid, *Evidentiary Foundations*, Sec. 4.03(3), at 68-73

And is an “E-Notarized” Document Admissible?

- L. Prevost, *“E-Notaries Slow to Catch On,”* New York Times 5/25/15, Real Estate @ p. 7
- Short Answer is Admissible Per 2012 Statute in Only Virginia
- Signors Must Appear Before Notary by Live Two-Way Video Conference Which is Recorded – Electronic Signatures Affixed

So How Are E-Mails/Text Messages Authenticated?

- Testimony by “Persons With Knowledge”
  - Sender and/or Recipient
- “Distinctive Characteristics” [i.e., Headers]
  - *U.S. v. Safavian, 644 F. Supp. 2d 1 (D.D.C.2009))*
  - *U.S. v. Kwame Kilpatrick, 2012 WL 3236727 (E.D. Mich. 2012) [NOR]* [Text Messages]
- E-Mail Thread – Context
  - *U.S. v. Siddiqui, 235 F.3d 1318 (11th Cir. 2000)*
- Authentication by Comparison to E-Mails Previously Admitted
  - *U.S. v. Safavian, 435 F. Supp. 2d 36 (D. C.C. 2006)*
- Authentication by Discovery Production
- “Reply Letter” Doctrine
- Authentication by Content
  - *Smith v. Charles, 37 Misc.3d 1229(A) (Sup. Ct. Kings Co. 2012)* - Only Sender Would Have Had Specific Knowledge
- Authentication by Actions Consistent With Message
  - Circumstantial Confirmation

So, Can an Email With an Electronic Signature Be Used as a Supporting Deposition to Convert a Misdemeanor Complaint into a Misdemeanor Information?

People v. Sanchez, 2015 WL 463968 (Cr. Ct. Queens Co. 2015)

- After Arraignment on Criminal Complaint Charging Assault, EWC and Harassment, People Handed up CW's Electronic Signature, Emails Indicating Communications Between CW and ADA [One Indicated CW: "I Agree" With Statements in Accusatory Instrument] and ADA Supporting Deposition to Convert Accusatory Instrument to Misdemeanor Information
- Defendant Claimed No Authority to Accept Electronic Signature and Information Deficient Per C.P.L. 100.40 and *P v. Alejandro, 70 N.Y.2d 133 (1987)*
- Court Held Signature With Supporting Emails Satisfactorily Complied With Statute and Granted People's Motion to Convert The Misdemeanor Complaint to a Misdemeanor Information
- *"Not Only Was the Complainant Provided With the Language of the Complaint and Its Allegations, The District Attorney's Email Also Provided a Very Clear, Unambiguous Explanation of What the Legal Effect of Typing Her Name in a Response Email; Would Be"*
- Ruling Consistent With Clear Legislative Policy to Promote Use of Electronic Signatures to "Facilitate Business as Well as the Business of New York State."

United States v. David Safavian, 435 F.Supp.2d 36 (D.D.C. 2009)

- In False Statements and/or Concealment Trial, Trial Court Granted Government's Application to Admit @260 Emails Under F.R.Ev. 901(b)(4)
- Most Emails Properly Authenticated With "Distinctive Characteristics"
  - Email Addresses: "abramoff@gtlaw.com," DavidSafavian@mail.house.gov and MerrrittDC@aol.com (D's Business - Merrit Strategies, LLC
  - Signature Blocks Reflect "To" and "From"
- Court Declined Gov't Request to Admit as Self-Authenticating Under F.R. Ev. 902
- Hearsay and Co-Conspirator Exceptions Addressed

United States v. Mohamed Siddiqui, 235 F.3d 1318, 1322-1323 (11th Cir. 2000)

- In False Statements and Obstruction Prosecution Involving Fraudulent Federal Grant, D.Ct Admitted Inculpatory Emails Between D and Two Sponsors
  - Defendant Maintained Not Sufficiently Established as Authentic
- Held: Per F.R.Ev. 901(b)(4) - They Were Properly Admitted Due to Context and Circumstances:
  - The Emails Had Defendant’s Email Address at So. Alabama University
    - Both Sponsors Indicated They Replied to Defendant at This Address
    - Several Made References to Previous Interactions With Defendant
  - Defendant’s Emails Referred to Self As “Mo” – Identified by Sponsors as His Nickname
  - Both Sponsors Indicated They Received Telephone Calls From Defendant About Same Subject

General Methods of Proof

- Witness Recognize E-Mail/Text Message Address or Phone Number of Recipient
- Witness Composed E-Mail/Text Message and Pressed "Send" From Witness' E-Mail Address/Telephone Number to Recipient's Address/Telephone Number or Received E-Mail/Text Message From Known Address/Telephone Number
  - *People v. Richard Agudelo, 96 A.D.3d 611 (1st Dept. 2012):* Testimony From Grand Larceny Victim That She Sent and Received Text Messages From Defendant During Alleged Criminal Transaction and Then Compiled Them Into Single "Copy and Paste" Document Held Sufficient
    - Additionally, Detective Testified He Saw Them on Victim's Phone and No Dispute Defendant and Victim Interacted

General Methods of Proof (Cont'ed)

- Outline "Header" Information
  - Actual Receipt of E-Mail is Often Issue

Prove By Technical/Cryptography/Internet Service Provider Evidence

- o *People v. Hughes, 114 A.D.3d 1021, 1023 (3rd Dept. 2014)*
- o Imwinkelreid, *"Evidentiary Foundations,:"* 8th Ed., Sec. 4.03[4]b at pp.81-102

- Reply Letter Doctrine – Circumstantial Context
- Prove By Content
- Prove by Action Consistent With Message
- P. A. Crusco, *"Authenticating Digital Evidence,"* N.Y.L.J. 2/25/14 @ p. 5.

People v. Marcus Green, 107 A.D.3d 915 (2nd Dept. 2013)

- CW at D's Burglary, Rape and Unlawful Imprisonment Trial Testified Text Messages Purportedly Sent By D And Retained on Her Phone:
  - Were "Actual Photographs of the Screen of [Her] Telephone"
  - That She Saw Detective Taking The Photographs
- In Context, They "Made No Sense Unless … Sent By Defendant"
- Sufficient Evidentiary Foundation Per 2nd Dept.

People v. Emmanuel Pierre, 41 A.D.3d 289 (1st Dept. 2007)

- Trial Court Properly Allowed Testimony From Murder Defendant's Accomplice That Defendant Sent His Cousin an IM In Which He Stated He Did Not Want Victim's Baby
  - Admitted as Admission
  - Accomplice Testified to Defendant's Screen Name
  - Cousin Testified She Sent Defendant an IM to This Screen Name and Received a Reply, Which Made No Sense Unless Sent By Defendant
- IM Not Saved or Printed and No Service Provider or Other Technical Evidence Provided

People v. Al A. Givans, 45 A.D.3d 1460 (4th Dept. 2007)

- Trial Court Admission of a Text Message From Cell Phone in Narcotics Possession Case Held Error Where People Failed to Establish That The Text Was Ever Read By The Defendant or Even Retrieved by Him, Where Insufficient Proof of "Authenticity or Reliability" of Message, Held Error in Dictum
- Case Reversed Due to Jury Selection Error

People v. Jeremy J. Hardy, 42 Misc.3d 211 (Co. Ct. Clinton Co. 2013)

- During Grand Jury Presentment in Marijuana Possession Case, Police Officer Testified That an Unnamed Confidential Informant Told Him That The Defendant Sent Him Text Messages Relating to the Marijuana
- Officer Then Took Photos of The Text Messages That Were Admitted in Evidence
- Held Insufficient Proof of Authenticity of Text Messages to Sustain Indictment
- Application to Re-Submit Denied, 42 Misc.3d 444

Social Media

- No New or Distinctive Evidentiary Rules For This Electronic Evidence
  - Authenticity is Usual Issue
- Per *People v. McGee, 49 N.Y.2d 48 (1979)* – Need Proof Evidence is Genuine and No Tampering
- Per *Griffin v. State, 419 Md. 343, 364-365, 19 A.3d 415, 227-428 (2011)* Three Non-Exclusive Methods:
  - Did Purported Creator Create Profile and Post Content in Question?
  - Can Search of Person's Computer Determine Computer Used to Create Posting?
  - Can Profile and/or Postings Be Linked to Person Who Purportedly Created Posting?
- *Note, "Understanding and Authenticating Evidence From Social Networking Sites,"* 7 Wash. J.L. Tech. & Arts 209 (2012)

So Can an Action be Commenced by Service of a Summons Through a Facebook Account?

- Yes
- *Baidoo v. Blood-Dzraku, 2015 NY Misc. Lexis 977 (Sup. Ct. N.Y. Co. 2015):* Service, in Divorce Action, "While Novel," Permitted After Efforts At Regular Service Failed by Sending Summons Through Private Message Through Facebook Account Three Consecutive Weeks
- DRL 232 and CPLR 308(5) Permits Alternative Methods of Service
  - Proof Submitted: Wife Communicated With Husband Though Facebook Account, Husband Regularly Logs Into Account

What if There is Proof That the D’s Email Address Critical to the Transfer of an Alleged Fraudulent Document is Associated With a Foreign Facebook-Like Account He Maintains?

- Is That a Sufficient Foundation to Permit Proof From the Account in Evidence?

United States v. Aleksander Zhyltsou, 769 F.3d 125 (2nd Cir. 2014)

- D Charged in E.D.N.Y. on Single Charge of Transfer of a False ID Document
    - Forged Birth Certificate of Invented Infant Daughter as “Favor” to Enable Friend to Defer Army Service in Ukraine
        - Certificate Created While Two Sat in Internet Bklyn Internet Café
- Friend Did Get Deferment Based on Forged Certificate
- Gov’t Offered into Evidence Printed Copy of D’s Russian Social Networking Site, “VK”
    - Proof of Emails on Gmail Account D Sent Forged Certificate From New York to Friend
    - Spec Ag of U.S. DOS Diplomatic Security Service Testified:
        - “VK” Website Was “Equivalent to Facebook” and Discussed Profile Page, Which Witness Said Had D’s Name on it and Same Gmail Address
        - Had Only “Cursory Familiarity” With “VK” and Not Aware of What Identity Verification Was Required to Create Account
- D.Ct. However, Concluded That it Was Fair to Assume Information on Website Provided by the D

United States v. Aleksander Zhyltsou, 769 F.3d 125 (2nd Cir. 2014)

- 2nd Circuit Reversed D's Conviction
  - Insufficient Proof of Authentication and That Document Was Indeed Created by D as Required by F.R.Ev. 902
- Document Not Self-Authenticating Under F.R.Ev 901 and 902, Since There Was Insufficient Proof Document Was What Proponent Government Said it Was
- Court Does Not Reach Dicta in *Griffin v. State (Md. 2011)* [Evidence Derived From Internet Must Be Reviewed on Admissibility With "Heightened Scrutiny"
- See Also *Smith v. State, 136 So.3d 424 (Miss. 2014):* Similar Holding in FaceBook Account Posting Case

Ronnie Tienda v. State of Texas, 358 S.W.3d 633 (Tex. Crim. App. 2012)

- 3 MySpace Accounts Admitted in Evidence During Guilt and Penalty Phases in Texas Gang Capital Murder Case
  - Shooting Between Rival Gangs on Interstate in Dallas
- Profile Pages Contained D's Purported Boasts
  - "You anit BLASTIN You aint Lastin" & "I Live to Stay Fresh!! I Kill to Stay Rich!!"
  - Another Link: "I Still Kill"
  - IM's Exchanged Between Account Holder Included Specific References to Other Passengers Present During Shooting and Police Investigation
    - "WUT GOES AROUND COMES AROUND" & "U KNO HOW We DO, We DON"T CHASE EM We REPLACE EM"
- Per Subscriber Reports, 2 Profiles Created by "Mr. Ron T." and One by Smiley Face" (D's "Widely Known Nickname")
- Expert Gang Unit PO Testimony: Gangs Use Social Media to Communicate and Threaten

Ronnie Tienda v. State, 358 S.W.3d 633 (Tex. Crim. App. 2012)

- D's Conviction Affirmed: State Properly Presented Prima Facie Case to Authenticate MySpace Postings, Per *Griffin v. Maryland (2011)* With Sufficient Circumstantial Evidence That They Were Created by Defendant Based On:
  - Numerous Photos of D With Unique Arm, Body & Neck Tattoos
  - Particular References to V's Death and Music at His Funeral
  - References to D's Gang
  - Messages Regarding Shooting
  - References to D Wearing Ankle Bracelet Monitor
- See Also *Parker v. State, 85 A.3d 682 (Del. 2014):* Similar Holding – Post on Facebook Page Sufficiently Authenticated in Assault Case Based on Distinguishing Characteristics

Reliability of Purported Communication and Connecting Party in Question With Posting Is Generally The Pivotal Issue

Antoine Levar Griffin v. State, 419 Md. 343, 19 A.3d 415 (2011)

- Trial Court Admitted Screen Shots of Several Pages of Murder Defendant's (aka "Boozy") Girlfriend's MySpace Profile
- Permitted Evidence Through Testimony of Police Investigator Who Accessed Site to Demonstrate Prior to Trial Girlfriend Threatened Another Witness Called by State
  - Profile: "Sistasouljah," "23 Year Old Female," From "Port Deposit Maryland," With DOB: "10/02/1983"
  - "FREE BOOZY!!! JUST REMEMBER SNITCHES GET STITCHES!! U KNOW WHO YOU ARE!!
- Because Anyone Can Create MySpace Profile, Majority Held Identity of Creator Not Reliably Established or Authenticated to Meet Fabrication Concerns and Conviction Reversed
  - Emails. IM's and Text Messages Issues Differ "Significantly" Since Correspondence is Sent Directly From One Party to Another, Rather Than Published for All to See
  - Dissenters: "Technological Heebie-Jeebies" Aside, Sufficiently Authenticated
- See Also, *People v. Albert Sublet IV,, 2015 WL 1826582 (Md. 4/23/15)* [Extensive Review of Admissibility Requirements for Facebook, Twitter (Direct Messages and Public Tweets), and Facebook Messages]

People v. Richard Clevenstine, 68 A.D.3d 1448 (3rd Dept. 2009)

- Computer Disk Containing Electronic Communications Between Sex Crime Victims and Defendant Via IM’s Held Properly Authenticated and Admitted in Evidence
- Two Victims Testified The IM’ed Defendant About Sexual Relations on MySpace Account
- State Police Investigator Testified He Retrieved Such Conversations From Hard Drive of One of Victim's Computers
- MySpace Legal Compliance Officer Testified That Messages on Computer Disk Had Been Exchanged by Users of Accounts Created By Defendant
- Defendant’s Wife Testified She Viewed Sexually Explicit Communications on Defendant's MySpace Account

People v. Karon Lenihan, 30 Misc.3d 289 (Sup. Ct. N.Y. Co. 2010)

- Trial Court Precluded Murder Defendant From Confronting People's Witnesses About Gang Affiliation About Gang Affiliation Based on MySpace Photographs
- Court Held Ability to "Photoshop," Edit and Otherwise Manipulate Photographs Precluded Authentication of Postings
  - Defense Counsel's Good Faith Basis to XE Also Rejected
- Cited With Approval By *Griffin* Majority
- 120 Am Jur Proof of Facts 3rd 93, M.C.M. Leahy, *"Pretrial, Involving Skype, YouTube and Other Video Electronic Communications"*

And, Of Course, The Social Media Proof Must Be Probative.

- *People v. Jule Frazier, 2015 NY Slip Op 03561 (2nd Dept. 4/29/15)* [Photos Posted by D in Weapons Trial Properly Admitted Where They "Tended to Prove Material Issues," "Illustrate[d] or Elucidate[d] Other Relevant Evidence," and Probative Value Outweighed Prejudice]
- *United States v. Pierce, 2015 U.S. App. Lexis 7717 (2nd Cir. 5/11/15), N.Y.L.J. 5/12/15 @ p. 1* [Facebook Posts Containing Rap Video and Tattoos Properly Admitted in Drug and Gang Murder Prosecution; "Freedom of Expression" Claim Rejected; Probative Value Also Held Outweighed Prejudice]

Some Exceptions to Hearsay: Electronic Evidence

- Admission of Party-Opponent
  - *Sea-Land Serv., Inc v. Lozen Int'l, LLC, 285 F.3d 808 (9th Cir. 2002):* Email Forwarded by Party-Opponent:
- Business Records: CPLR 4518
  - Computer Printouts
  - Medical Records – Treatment and Diagnosis
- State of Mind:
  - Effect of Emails on Plaintiff's State of Mind in Libel Action: *Rombom v. Weberman, 2002 WL 1461890 (Sup Ct. Kings Co. 2002), aff'd, 309 A.D.2d 844 (2nd Dept. 2004)*
- NY Common Law Public Records Exception:
  - *Miriam Osborn Memorial Home Assoc. v. Assessor of City of Rye, 9 Misc.3d 1019 (Sup. Ct. Westch. Co. 2005)* – Printout of Webpage of Gov't Website Containing Real Property Sales Information Admissible
- CPLR 4539: As Discussed, Copies of Records Made in "Regular Course of Business, Institution or Member of a Professional Calling" Are Admissible If Original is in Existence and Available For Inspection Under Direction of Court

Palisades Collection LLC v. Barbara Kedik, 67 A.D.3d 1329 (4th Dept. 2009)

- Plaintiff, as Claimed Assignee of Defendant's Credit Card Debt Submitted Affidavit From Discover Bank With Attached Spreadsheet Listing Defendant's Discover Account as Debt Sold to Plaintiff in Support of Action to Recover Balance Owed on Card
- Court Affirmed Lower Court Order Dismissing Lawsuit on Plaintiff's Standing to Sue
  - Although Plaintiff's Purported Agent Averred Spreadsheet Was Kept in Regular Course of Business and Entries Therein Made in Regular Course of Business, <u>Agent Failed to Establish "When, How or By Whom The Electronic Spreadsheet Submitted in Paper Form Was Made" or That He Was Familiar With Discover's Business Practices or Procedures</u>

People v. Daniel Manges, 67 A.D.3d 1328 (4th Dept. 2009)

- Trial Court Erred in Admitting Printout of Electronic Data That Was Displayed on Computer Screen as Business Record as Proof Defendant Presented a Check Claimed to Be Forged
- No Proof Data Resulting in Printout Entered in Regular Course of Business of Bank
- Indeed, Bank Teller Testified, “Anyone [At The Bank] Can Sit Down at a Computer and Enter Information”

Judicial Notice of Electronic/Website Evidence

- Government Examples
  - Court of Record's Computerized Records
  - Official Government Websites [F.R.Ev. 902(5) – Self Authenticating]
    - Downloading Information – Hearsay Issues vs. Inherent Reliability
  - NYS DOS – "Entity Information"
  - N.Y.S. DOS – Professional Licensing Information
  - U.S. Naval Observatory – Time of Sunrise
  - Federal Reserve Board – Prime Interest Rate
  - National Personnel Records Center – Retired Military Personnel
- Private – Commercial Examples
  - *Mapquest* for Driving Distances
  - Hospital Websites for Medical Conditions and Causes *[Gallegos v. Elite Model Management Corp. 195 Misc.2d 223 (Sup. Ct. N.Y. Co. 2003), aff'ed as modified, 28 A.D.3d 50 (1st Dept. 2005)]*
  - Retirement Earnings Posted on Website [*O'Toole v. Northup Grumman Corp., 499 F.3d 1218 (10th Cir. 2007)*] – T.Ct. Erred in Not Taking Such Judicial Notice

N.Y.C. Medical and Neurodiagnostic, P.C. v. Republic Western Ins. Co., 3 Misc.3d 925 (Civ. Ct. Queens Co., N.Y. 2004)

- Trial Judge Made Independent Review of Website to Determine if Doing Business in NY
- On Motion to Renew, Court Held That Even Assuming It Took Judicial Notice of Facts - Information Posted on Corporate Party's Website Constitute Admissions and Are Encompassed by Admissions Exception to Hearsay
- But On Appeal [8 Misc.3d 33 (App. Term 2004)] – Reversed: No Showing Website Was of "Undisputed Reliability" & Opposing Party Had No Opportunity to Be Heard

Tape/Digital Recordings

- Witness Qualified to Operate Recording Instrument
- Witness Recorded a Certain Conversation
- Witness Used Certain Equipment to Record
- Equipment Was in Good Working Order
- Proper Procedures Were Used to Record
- Chain of Custody Maintained Over Tape/CD
- Witness Listened to Tape/CD Recording and It is Fair and Accurate Reproduction/Depiction of Conversation
- Witness Recognizes Tape/CD as the Same as One Used
- Transcript is Helpful but Only as Aid to Jury/Court

So, What About Tape-Recorded Conversations Between a Murder Victim and the Defendant That Were Purportedly Recorded by Victim at an Unknown Time and Placed in Storage Before Being Provided by Roommate to Police?

Have These Been Properly Authenticated?

People v. Karen T. Ely, 68 N.Y.2d 520 (1986)

- DA Sought Admission in Evidence of Tape Recorded Conversations Between D and V, Her Husband, in Murder by Strangulation Case
  - DA Claimed Motive For Murder Was to Prevent D From Exercising Overnight Parenting Time as Part of Pending Divorce Case in Albany
- Tapes Admitted on This Foundation:
  - Two Tapes: V's Roommate Testified: V Made Them at an Unknown Time and Place; She Stored It in Their Home and After Murder, Turned it Over to Police
  - Third Tape: V's Matrimonial Lawyer Testified V Gave it To Him After "About 3-4 Weeks," There Were Notations On It In V's Handwriting

People v. Karen T. Ely, 68 N.Y.2d 520 (1986)

- Court of Appeals Reversed 7-0
- Foundation For Admission of Tape Recordings is "Clear and Convincing Proof That the Tapes are Genuine and That They Have Not Been Altered"
- Court Outlined 4 Methods For Proper Foundation:
  - 1) Testimony of a Participant in the Conversation that it is a "Complete and Accurate Reproduction of the Conversation and Has Not Been Altered;
  - 2) Testimony of a Witness to the Conversation or its Recording (Such as the "Machine Operator" to the Same Effect;
  - 3) Testimony of a Participant in the Conversation Together with Proof by an Expert Witness after Analysis "Of the Tapes for Splices or Alterations"; or
  - 4) Demonstration of a "Chain of Custody" that Establishes, in Addition to Evidence Concerning the Making of the Tapes and Identification of the Speakers, That Within Reasonable Limits, Those Who Handled Tape from its Making to its Production in Court Identify it and Testify to its Custody and Unchanged Condition.
- Method # 4 Employed Here Insufficient

People v. Mathew P. Galunas, 107 A.D.3d 1034 (3rd Dept. 2013)

- People Offered Tape-Recorded Conversations Between D and CI in Narcotics Task Force Investigation
- Foundation Proper: Per *People v. Ely* on "Clear and Convincing" Proof:
  - Detectives Testified to "Events Surrounding Creation of Recordings, Indentified the Voices of the Informant and Defendant and Set Forth a Chain of Custody of the Recordings"
    - Detective-Operator of Recorder Immediately Reviewed Recording at Conclusion of Conversations, Secured Them In Police Custody, Immediately Prior to Trial Reviewed Recordings and Confirmed They Were "Fair and Accurate."
    - A Second Detective Testified That He Knew D for 35 Years and Identified One Voice on the Recording as the D's

People v. Randy Dicks, 100 A.D.3d 528 (1st Dept. 2012)

- At Narcotics Sale Trial Foundation for Admission of Tape-Recorded Conversations Established By:
  - Testifying Detectives (i) Described Creation of Recordings and (ii) Identified Voices of Informant and D on Recordings
- Defendant's Identity as Speaker on Recording Established by Testimony of Another Participant in Conversation, as Well as Surrounding Circumstances, Including Several Face-to-Face Meetings
- See Also, *People v. Jackson, 121 A.D.3d 1185 (3rd Dept. 2014)* [Same Holding in Controlled Buy Narco Case]

What About Surveillance Recordings?

People v. Darren Patterson, 93 N.Y.2d 80 (1999)

- Same Rules For Admission of Video Surveillance Recordings as For Audio Recordings
  - Need Proof of Authentication and Foundation, Including Chain of Custody to Demonstrate Integrity
- Court Reversed Conviction on Other Grounds But in Dictum Held Admission of Commercial Store Surveillance Recording of Robbery Error:
  - Proof "Too Tenuous and Amorphous"
  - 911 Call Apparently Recorded Background Noises of Unidentified Man Reporting Robbery Insufficient to Provide "Inferential Linkages"

People v. William Hill, 110 A.D.3d 410 (1st Dept. 2013)

- "Common Sense" Approach Adopted to Permit Admission into Evidence of Surveillance Video Based on Testimony of Moonlighting Detective Who Stated That While Working Second Job For Security Company, Hooked Up the Surveillance Cameras to the Video Recorder and Checked on a Daily Basis That The System Was Functioning Properly
- Detective Also Testified to Unaltered Condition of Tape = Trial Court Properly Concluded Video Accurately and Completely Depicted The Events at Issue

People v. Philip J. Messina, 43 Misc.3d 78 (App. Term 2nd Dept. 2014)

- Copy of DVD Surveillance Recording Introduced in Evidence Over Objection in D's Bench Contempt Trial
  - DVD Purportedly Captured Images of D Throwing Hammer at Home of D's Former BIL and SIL Who Were Protected by TOP
  - SIL Copied DVD and After Providing it to Investigator, Over-Written Within 48 Hours of Copying
    - Testified to Installation and Manner Surveillance Equipment Maintained
  - D's Estranged W Testified She Witnessed Entire Incident
- D's Request For Adverse Inference Instruction Re; Uncopied Portion Denied

People v. Philip J. Messina, 43 Misc.3d 78 (App. Term 2nd Dept. 2014)

- App. Term Affirmed
- Video Properly Authenticated by W's Who Knew Instrument and D
  - D Had Every Opportunity to Submit DVD to Expert to Challenge its Authenticity and Did Not
- D's Claim Tape "Faked" Rejected Even With Short Gaps in Recording
  - People Had No Control Until DVD Copy Provided to Investigator
- Adverse Inference Request Properly Denied (Again it Was a NJ Trial) & If Error Harmless Due to EW Evidence
- Also No *Brady* Error Either Since Per *P v. Hayes, 17 N.Y.3d 46 (2011),* No Affirmative Duty by Police to Collect Exculpatory Evidence

A Surveillance Tape of a Portion of Jailhouse Altercations Between an Inmate and Another Inmate and Sheriff is Inadvertently Taped Over and Lost After The Defense Requested It Be Produced.

Is The Defendant Entitled to an Adverse Inference Charge?

People v. Dayshawn P. Handy, 20 N.Y.3d 663 (2013)

- D Involved in Two Fights in County Jail - Two Months Apart
  - One on Inmate and One on Sheriff
- Surveillance Captured Portions of Area of Incidents
- D Timely Demanded Production of Videos But ….
- Both Were Destroyed Due to Routine Tape Over/Re-Using by Facility Per Jail Policy After 30 Days
- TJ Refused to Provide Adverse Inference Charge on All Charges Per DC Request
  - Issue Whether DC Had Requested Production of Both Incidents
- D Convicted of Only One Incident
  - Adverse Inference Charge Not Provided on This Count
- Court of Appeals Reversed 6-0 (Smith, J.): Holding as a Matter of New York Law of Evidence:
  - *"When a criminal defendant, acting with due diligence, demands evidence that is reasonably likely to be of material importance, and that evidence has been destroyed by the State, the defendant is entitled to a permissive adverse inference instruction charge"*
- Incentive to Avoid Destruction of Evidence and Raise "Consciousness" of State
- New CJI Instruction Per *Handy* Re" Destroyed Evidence

Expert Witness on Electronic Evidence Foundation

- Imwinkelreid, *“Evidentiary Foundations”* 4.03, Sec. 4.10 at pp. 169-204
- 40 A.L.R. 6th 355 “Admissibility of Computer Forensic Testimony”

How About Expert Testimony Re: Cell Site Location?

People v. Darryl Littlejohn, 112 A.D.3d 67 (2nd Dept. 2013)

- Expert Cellular Phone Tracking [Cell-Site] Evidence Held Properly Permitted Without *Frye* Hearing Where Basis of Testimony Rested on Generally Accepted Scientific Processes

Computer Animation?

- Demonstrative Evidence
- Proof: Fair and Accurate Representation + Consistent With Proponent Witness's (Lay or Expert) Testimony or Other Admitted Evidence
- Imwinkelreid, *"Evidentiary Foundations,"* 8th Ed., Sec. 4.09[4]b], at pp.155-173
- See *People v. Morency, 93 A.D.3d 736 (2nd Dept. 2012)* [Computer Animation Illustrating Expert's Testimony Re: Shooting of V Properly Admitted]

Mathew Kane v. TBTA, 8 A.D.3d 239 (2nd Dept. 2004)

- In MVA Case on Marine Parkway-Gil Hodges Bridge, T Ct. Properly Admitted Plaintiff's Video of Computer Generated Animation of Accident, Which Included Still Photos, to Re-Enact The Incident and Illustrate Plaintiff's Expert's Opinion Concerning Cause.
- In Affirming 2nd Dept Noted: Whether a Video Re-Creation Should Be Viewed by Jury Depends on "Facts and Circumstances" of Case in The Court's Sound Discretion
  - If There is Any Tendency to Exaggerate What is Sought to be Proved, Court May Reject The Evidence

People v. Gregory Morency, 93 A.D.3d 736 (2nd Dept. 2012)

- Where "Conditions Present in The Computer-Generated Animation Were Sufficiently Similar to the Conditions Present at The Time of The Shooting," in a Manslaughter Case, This Evidence Was Properly Admitted as Demonstrative Proof

Illegally Obtained Recordings

- C.P.L.R 4506: Contents of Illegally Obtained Intercepted Electronic Communications (and Any Derived Evidence) Inadmissible in Any Trial or Hearing
  - Applicable to Both Criminal and Civil

McLaughlin v. McLaughlin, 104 A.D.3d 1315 (4th Dept. 2013)

- Family Court Admitted Audio of Incident in Home Between H and W, Recorded With Either Party's Knowledge on Order of Protection Application
- 4th Dept. Affirmed: The Parties' Son Was Present and Thus Consented to Recording
  - CPLR 4506 and P.L. 250.02 Not Implicated

Gurevich v. Gurevich, 24 Misc.3d 808, (Sup. Ct. N.Y. Co. 2008)

- W Accessed Emails From H's Account Using His Password in Support of Child Support Claims
  - Claimed No Revocation of Permission
- H Claimed They Were "Stolen" and CPLR 4506 Required Suppression
- Court Rejected Claim This Was "Eavesdropping" or Unlawful Accessing of "Electronic Communication" Under P.L. 250.05
- Material Was Not "Intercepted" But "Stored"
  - *Moore v. Moore, N.Y.L.J. 8/14/08 @ p. 26 (Sup. Ct. N.Y. Co)*
  - *Boudakian v. Boudakian, N.Y.L.J. 12/26/08 @ p. 27 (Sup. Ct. Queens Co.)*

O’Brien v. O’Brien, 899 So. 1133 (Fla. App. 2005)

- Wife Secretly Installed Spyware Program (“Spector”) on Husband’s Computer in Matrimonial Action
- Captured Private On-Line Chats With Another Woman, Websites Visited and Secretly Took Photos of Screen
- Court Affirmed T.Ct’s Grant of Husband’s Motion to Preclude Introduction of Evidence (And Injunction) Under Florida Statute [Security Communications Act-FSA Sec. 943.03(1)] Similar to C.P.L.R. 4506
- These Were Illegally Intercepted “Electronic Communications” Under Statute

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Man Who Intercepted Wife's Emails Cleared by Jury

Mark Hamblett, New York Law Journal

March 17, 2015

A husband who set up his then-wife's email account so that her emails were forwarded to him, and continued collecting her emails after their divorce, has been cleared of liability under a federal privacy law.

A jury in White Plains on Friday found that Adel Abadir was not liable under the federal Wire Tap Act, 18 U.S.C. §2511, on accusations he secretly used auto-forwarding when he set up the email account for Annabelle Zaratzian in 2003 and never told her after the couple split.

Zaratzian, who discovered the breach in 2010, claimed that Abadir violated the act three ways: by intercepting her communications, by disclosing her communications and for using the contents of the communications—all in a dispute in Family Court over how much income Zaratzian earned in 2008.

Southern District Judge Vincent Briccetti had ruled in September that Abadir would have to

What About E-Z Pass Information?

- Generally Held Admissible:
  - *Gale v. Gale, 2009 WL 2612314 (N.J. Super. 2009)*
  - *S.S.S. v. M.A.G., 2010 WL 4007600 (N.J. Super. 2010)*

G.P.S. Evidence

- Law Enforcement Needs a Probable Cause Warrant/Order to Obtain G.P.S. Evidence
  - *People v. Weaver, 12 N.Y.3d 433 (2009)* [Per NYS Constitution]
  - *United States v. Antoine Jones, 132 S.Ct. 935 (2012)* [Per Fourth Amendment]
- State Attaching G.P.S. Device on Employee's Private Car "Unreasonable"
  - *Matter of Cunningham v. NYS Dept. of Labor, 21 N.Y.3d 515 (2013)*
- What About Private G.P.S./Tracking Devices?
  - Do They Fall Within C.P.L.R. 4506?
  - Or Are They Admissible Because The Evidence Isn't "Eavesdropping" and Are Obtained by Private Actors?

What About Tracking The Location of Cellular Telephones First By Gov't?

- *In re Application For Order For Prospective Cell Site Location Information, (S.D.N.Y. 2006)* When Cell Phone is in "On" Condition, Regardless of Whether It's Making or Receiving Voice or Data Call, It Periodically Transmits Unique ID # to Register Location Within Network
  - Signal Sent to Every Antenna Tower Within Range of Phone – Switching Capability of System Temporarily Assigns Phone as it is Moved to Nearest Tower
    - It Can Be Connected to Two or More Towers at Once, Depending on System & Location (Urban, Suburban or Rural)
  - Location of Tower Receiving Signal From Cell "Generally Fixed" in Real Time
    - Depending on System and Software Employed, By Mathematical Process of "Triangulation," [Two Towers With Cell, 3rd Point] Can Determine Location
    - Another Method is "Pinging" Which Discloses Cell Tower Range Where Cell Phone is Located [See P. Crusco *"Ringing, Pinging and the Fourth Amendment,"* N.Y.L.J. 6/25/13 @ p. 5
- FCC Regulation [47 CFR 20.18(h)(i)]: By 9/11/12, Cell Phone Carriers Required to Have Ability to:
  - Locate Phones Within 100 Meters For 67% of Calls and Within 300 Meters For 95% of Calls For Network-Based Calls
  - Locate Phones Within 50 Meters For 67% of Calls and Within 150 Meters For 95% of Calls For Hand-Set Based Service

The Answer Is…

- Still Undecided by SCOTUS – At Least For Government Action
- PC Not Required: *United States v. Davis, 754 F.3d 1205, opinion vacated and petition for re-hearing en banc granted, 573 Fed. Appx. 925 (11th Cir. 2014); In Re Application of The United States For Historical Cell Site Data, 724 F.3d 600 (5th Cir. 2013) and United States v. Skinner, 690 F.3d 772 (6th Cir. 2012)* [Need Only "Specific and Articulated Facts" Under Stored Communications Act-18 U.S.C. 2307]
- Other Courts to Contrary: *State v. Earls 70 A.3d 630, 2013 WL 3744221 (Sup. Ct. N.J. 2013)* [Need PC Warrant]
  - On Remand, Ct. Determined "Emergency Aid Exception" Inapplicable: 2014 N.J. Super Unpub..Lexis 238 (2014)
  - See Also, *United States v. Graham, 2015 U.S. App. Lexis 13653 (4th Cir. 2015)* [Warrantless Acquisition of Cell-Site Info Violated 4A; But Good Faith Exception Applied]
- *People v. Littlejohn, 113 A.D.3d 67 (1st Dept. 2013)* [Expert Cell-Site Evidence Properly Admitted in Murder Case Without *Frye* Hearing]
- SDT's to Phone Companies For Third Party Cell-Site Records?

Tape Recordings

- Witness Qualified to Operate Recording Instrument
- Witness Recorded a Certain Conversation
- Witness Used Certain Equipment to Record
- Equipment Was in Good Working Order
- Proper Procedures Were Used to Record
- Chain of Custody Maintained Over Tape/CD
- Witness Listened to Tape Recording and It is Fair and Accurate Reproduction/Depiction of Conversation
- Witness Recognizes Tape/CD as the Same as One Used
- Transcript is Helpful but Only as Aid to Jury

The End

Thanks to Jim Fagan for Assistance in the Preparation of this Presentation