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Admissibility of Social Media & Digital Evidence

Presented by:

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Admissibility of Social Media & Digital Evidence

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TiPP
TRAUMA-INFORMED PROSECUTOR PROJECT

a program of zero abuse PROJECT

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Disclaimer

- The following is not intended to constitute legal advice.
- Terms and legal concepts include a broad range of national sources. Always consult your local prosecutor or attorney for guidance.
- Credit to Robert Peters and Victor Vieth for significant contributions.
- Recommended reading: "Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations," (2009) Office of Legal Education, Department of Justice.

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Agenda

- Social Media Trends
- Evidence Breakdown
  - Relevance
  - Authentication of Evidence
  - Hearsay Considerations
  - Best Evidence Rule
  - Jury Presentation
- Case Study

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Class Mantra

- Take away from this class:
  - What's out there
  - Why we want it
  - How we can get it
  - How we can get it in
- It's not rocket surgery
  - Change your way of thinking about digital evidence and criminal cases.

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Class Mantra

"The inability to get evidence admitted because of a failure to authenticate it almost always is a self-inflicted injury which can be avoided by thoughtful advance preparation."

Lorraine v. Markel Am.Ins.Co., 241 F.R.D. 534 (2007)

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Social Media Trends

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Social Media

- "Forms of electronic communications (as websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content…"

Merriam - Webster

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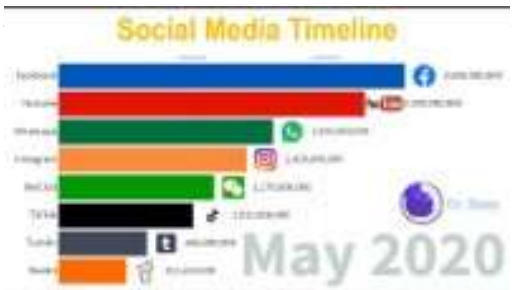

Social Media Sources

- Facebook and YouTube are the primary platforms for most adult Americans (18-65+)
  - Roughly seven-in-ten adults (69%) use Facebook
  - Roughly 81% report using YouTube
  - Roughly three-quarters of Facebook users (74%) visit the site daily; half visit several times
- YouTube and Reddit were the only two platforms measure that saw statistically significant growth since 2019.
  - Reddit use increased from 11% in 2019 to 18% in 2021

2021 Pew Research Center Survey of Adults

Social Media Sources

- Substantial age-related differences in platform use
- Instagram, Snapchat and TikTok have a strong following amongst young adults.
  - 71% report using Instagram
  - 65% report using Snapchat
  - 55% report using TikTok

2021 Pew Research Center Survey of Adults

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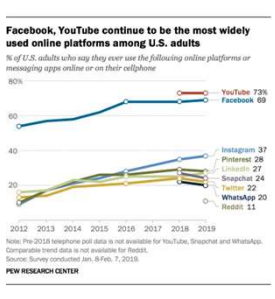

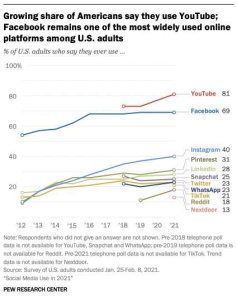

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Social Media Sources

- Kids and social media
  - "90% of teens age 13-17 have used social medial 75% have at lest one active social media profile, 51% report visiting a social media site at least daily. 2/3rds of teens have their own mobile device with internet capabilities.

Source: American Academy of Child and Adolescent Psychiatry, Facts for Families; Social Media and Teens, No. 100, updated March, 2018

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Video Games

- Discord
  - Becoming big for solicitation
- Chat sessions and videos
- "Talk, chat, hang out, and stay close with your friends and communities"

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Video Games

- "What started in 2015 as a haven for gamers has quickly morphed into a virtual meeting spot where sexual exploitation and abuse thrive. Now, exploiters go to Discord to groom children for sexual abuse or sex trafficking, and to trade pornography—including child sexual abuse materials, non-consensually recorded and/or shared pornography, and more."
- The Discord platform is a widely used text, video, and audio chat app that can be found on computers, browsers, and mobile phones. Originally designed for video game users to chat with each other while playing online games, the app has gained popularity even outside of the gamer community, with over 30% of users claiming they use Discord for activities other than gaming.

Source: Discord is a Haven For Gamers-And Sexual Exploiters. Summer Porter, National Center on Sexual Exploitation (2021).

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What's Out There?

- Variety of multimedia file types and combination of public posts and private messages accumulate rapidly into large volumes
- Social media services also generate their own records of and about user activity (beyond user created material), such as IP address logs, and other metadata

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Metadata – How Does it Work?

- Metadata is detailed information about a particular piece of digital data such as a picture of a document.
- Metadata provides an additional layer of encoded information within the main file.
- Examples: time stamps, geospacial info, copywrights.

Digital Evidence and the U.S. criminal Justice System, Goodison et. Al., 2015

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Examples of Metadata - Facebook

Metadata Field Description

Uri	Unified resource identifier of the subject item
fb_item_type	Identifies item as Wallitem, Newsitem, Photo, etc.
parent_itemnum	Parent item number sub item are tracked to parent
thread_id	Unique identifier of a message thread
recipients	All recipients of a message listed by name
recipients_id	All recipients of a message listed by user id
album_id	Unique id number of a photo or video item
post_id	Unique id number of a wall post
application	Application used to post to Facebook (i.e. from an iPhone or social media client)
user_img	URL where user profile image is located
user_id	Unique id of the poster/author of a Facebook item
account_id	Unique id of a user's account
user_name	Display name of poster/author of a Facebook item
created_time	When a post or message was created
updated_time	When a post or message was revised/updated
To	Name of user whom a wall post is directed to
to_id	Unique id of user whom a wall post is directed to
Link	URL of any included links.
comments_num	Number of comments to a post
picture_url	URL where picture is located

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- Key metadata fields for individual Facebook posts
- Can be key circumstantial data to authenticate social media posts, or constitute substantive evidence in and of itself, if properly preserved

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Evidence Breakdown

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Class Mantra

"The inability to get evidence admitted because of a failure to authenticate it almost always is a self-inflicted injury which can be avoided by thoughtful advance preparation."

Lorraine v. Markel Am.Ins.Co., 241 F.R.D. 534 (2007)

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Relevance

- "Evidence is relevant if:
  - (a) it has any tendency to make a fact probable than it would be without the evidence; and
  - (b) the fact is of consequence in determining the action."
    - Rule 401, Federal Rules of Evidence

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Relevance

- Prosecutorial analysis
  - Identify significant facts
  - Decide if the evidence is logically related to the consequential fact
  - Cast a wide net and think of all the ways to use evidence
    - Age (victim/suspect)
    - Details showing knowledge of age (ex., "I can't drive")
    - Grooming
    - Secrecy
    - Gifts and money
    - Offline meetups or arrangements

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Authentication of Evidence

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Acquisition Options

- Print-out (consider risks and limitations)
- Using the self-service export tools provided by the social media platform
- Specialized forensic collection software
- Obtaining evidence through legal process
- Maintain Stored Communications Act compliance in all scenarios

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Authenticating Evidence

- "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is."
  - Rule 901(a), Federal Rules of Evidence

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Authentication

- FRE 901(b)(1) – witness with knowledge can provide authenticating testimony.
  - testimony from the author or recipient of material
- FRE 901(b)(3) – comparison to authenticated specimen
- FRE 901(b)(4) – "distinctive characteristics" of a piece of evidence can be considered to establish its authenticity.
  - Specific details of the material that make it likely the material is authentic; appearance, contents, substance, circumstances
- Demonstrating reliability

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Authenticating Evidence

- "the question for the court under Rule 901 is whether the proponent of the evidence has 'offered a foundation from which the jury could reasonably find that the evidence is what the proponent says it is…' The Court need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the *jury* ultimately might do so."
  - *United States v. Safavian*, 435 F.Supp 2d 36 (Dist. Court of DC, 2006)

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Authenticating Evidence

- See also *In re the interest of F.P.*, 2005 PA Super 220, PA Superior Ct. 2005)
  - Authentication of emails from "Icp4Life30" account.
  - Whoop Whoop

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Case Law re: Social Media Print-Outs

- Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534 (2007)

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Two General Approaches

- **"The Maryland Approach"** – more skeptical of social media as evidence; higher standard for social media admissibility
  - *Griffin v. State of Maryland, 19 A.3d 415 (Md. 2011)*
- **"The Texas Approach"** – seen as more lenient in determining admissibility of social media and digital evidence
  - *Tienda v. State, 358 S.W.3d 633 (2012)*
- Texas rule more widely adopted, "but the careful practitioner will attempt to build as many connections as possible between the author and the exhibit."

Verga, 2017

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Texas Approach (*Tienda v. State*)

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Florida Rules of Evidence

- Closely aligns with Federal Rules of Evidence; centered around authenticity and relevancy
  - (F.S. §90.401, 402,901)
- Florida precedent establishes that parties may employ several methods of authentication
  - Personal knowledge
  - Distinctive characteristics
  - Self-authenticating documents (F.S. §90.902)
  - Expert witness testimony

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ANOTHER CRIMINAL CONVICTION OVERTURNED DUE TO FAILURE TO AUTHENTICATE SOCIAL MEDIA EVIDENCE

By John Patzakis July 21, 2020

The Supreme Court of Vermont overturned a felony conviction due to the prosecutions' failure to properly authenticate social media evidence, finding that the printed records subpoenaed directly from Facebook were insufficient. (*Vermont v. Allcock*, July 10, 2020) Defendant Christina Allcock appealed her convictions for aggravated assault on a police officer and other related lesser offences, asserting the trial court erred in admitting Facebook messages that lacked sufficient evidentiary foundation. The Vermont Supreme

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Self-Authenticating Evidence

- "The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted… (13) Certified Records Generated by an Electronic Process or System. A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12)."
  - Rule 902, Federal Rules of Evidence

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Self-Authenticating Evidence

- Rule 902(11)
  - Authenticated with an affidavit from the person who prepares like Facebook or Snapchat rep.
- *People v. Curry,* 2020 Il. App. (2d) 180148 (2020, appeal denied 1.27.2021)
- Cited by *Pinder v. 4716 Inc.,* 494 F. Supp. 3d 618 (US Dist. Ct. AZ 2020)
  - Circumstantial evidence can authenticate the content of a Facebook post where a document's contents, in conjunction with other circumstances, reflect distinctive characteristics.

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Self-Authenticating Evidence

- "The amendment sets forth a procedure by which parties can authenticate certain electronic evidence other than through the testimony of a foundation witness. ***. It is often the case that a party goes to the expense of producing an authentication witness, and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure under which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly."
  - Committee Notes to FRE 902(13)

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Self-Authenticating Evidence

- "A certification under this Rule can establish only that the proffered item has satisfied the admissibility requirements for authenticity. The opponent remains free to object to admissibility of the proffered item on other grounds—including hearsay, relevance, or in criminal cases the right to confrontation…"
  - Committee Notes to FRE 902(13)

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Self-Authenticating Evidence

- "Today, data copied from electronic devices, storage media, and electronic files are ordinarily authenticated by "hash value". A hash value is a number that is often represented as a sequence of characters and is produced by an algorithm based upon the digital contents of a drive, medium, or file. If the hash values for the original and copy are different, then the copy is not identical to the original. If the hash values for the original and copy are the same, it is highly improbable that the original and copy are not identical…"
  - Committee Notes to FRE 902(14)

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Self-Authenticating Evidence

- "…Thus, identical hash values for the original and copy reliably attest to the fact that they are exact duplicates. This amendment allows self-authentication by a certification of a qualified person that she checked the hash value of the proffered item and that it was identical to the original. The rule is flexible enough to allow certifications through processes other than comparison of hash value, including by other reliable means of identification provided by future technology."
  - Committee Notes to FRE 902(14)

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Challenges to Authenticity

- Alterations
  - "As with paper documents, the mere possibility of alteration is not sufficient to exclude electronic evidence. Absent specific evidence of alteration, such possibilities go only to the evidence's weight, not admissibility." (DOJ 2009)
- Authorship
  - United States v. Simpson, 152 F.3d 1241 (10th Cir. 1998)
- Authenticating Website Content
  - Website print-outs are not self-authenticating

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Challenges to Authenticity

- *United States v. Browne*, 834 F.3d 403, (US Ct. App. 3rd Dist. 2016)
  - Content of "chats among defendant's alias and witnesses were not business records under FRE 803(6) and could not be authenticated under FRE 902(11) but the Government presented sufficient extrinsic evidence to authenticate the chats under FRE 901(a) as there was abundant evidence linking defendant and the testifying victims to the chats conducted through the alias account and reflected in the logs procured from the social media site.

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Hearsay

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Hearsay

- "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FRE 801(c)
- A "statement" is:
  - Oral or written assertion, or
  - Nonverbal conduct of a person, if it is intended by the person as an assertion
    - FRE 801(a)

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Non-Hearsay Computer Records

- Created without human assertion
  - Cell site location information
  - Email headers
  - Electronic banking records
  - GPS data
  - Log-in records
- "Although human input triggers some of these processes—dialing a phone number or punching in a PIN—this conduct is a command to a system, not an assertion, and thus is not hearsay."
  - "Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations," Department of Justice

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Hearsay vs. Mixed Hearsay Records

- Hearsay records: personal letters, memos, business transaction records "inputted by persons"
- Mixed hearsay and non-hearsay records
  - Email containing both content and header information
  - File containing written text and file creation, last written, and last access dates
  - Chat room logs identifying participants and time/date of chat
  - Spreadsheets with figures typed by a person, but with columns calculated by computer programs
    - "Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations," Department of Justice

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Example: U.S. v. Hamilton, 413 F.3d 1138 (10th Cir. 2005)

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Other Exceptions

- Public records exception, FRE 803(8)
- Admissions or adopted admissions/context are not hearsay, FRE 801(d)(2)
  - United States v. Burt, 495 F.3d 733, 738-39 (7th Cir. 2007)
  - States v. Safavian, 435 F. Supp. 2d 36, 43-44 (D.D.C. 2006),
- Present sense impression exception
- State of mind exception
- Others?

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Hearsay

- Many courts have "categorically" found computer records admissible under the FRE 803(6) "records of regularly conducted activity" or "business records" exception
- These courts often fail to ask whether the records are even hearsay to begin with
- "Many computer records result from a process and are not statements of persons—they are thus not hearsay at all."
- Computer records can be a combination of both
  - "Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations," Department of Justice

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Hearsay

- Prepare for the challenge and how you can get around it.
- Testimony as to foundation and the way you frame your questions can overcome the objection.
- Truth of the matter asserted…

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Example: People v. Hamilton, 452 P.3d 184 (Co. Ct. App. 2019)

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Hearsay

- *United States v. Browne,* 834 F.3d 403, (US Ct. App. 3rd Dist. 2016)
  - Content of "chats…
  - A chat in which defendant did not participate was inadmissible hearsay under FRE 802 as it functioned at least in part to prove the truth of the matter asserted.

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Best Evidence Rule

- "An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise." FRE 1002
- "A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity, or the circumstances make it unfair to admit the duplicate." FRE 1003

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Jury Presentation

- Evidence list
- Take each piece of evidence and figure out what needs to be admitted and what needs to be published.
- Remember the record on appeal.
- Mark exhibits so it makes sense.

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Jury Presentation

38	photo / physical	Autopsy Report	Yes / No
39	photo / physical	Defendant Brian France's ZTE Samsung phone	Yes / No
40	photo / physical	Power Point of Forensic Download	Yes / No

No.	Type	Description	Admitted?
41	photo / physical	Thumbdrive containing Videos Extracted from Forensic Download Of Defendant Brian France's Phone	Yes / No
41A	photo / physical	Video #1 13:34:33	Yes / No
41B	photo / physical	Video #2 13:35:17	Yes / No
41C	photo / physical	Video #3 13:36:04	Yes / No
41D	photo / physical	Video #4 13:36:58	Yes / No
41E	photo / physical	Video #5 13:37:02	Yes / No
41F	photo / physical	Video #6 13:37:33	Yes / No
41G	photo / physical	Video #7 13:37:51	Yes / No
41H	photo / physical	Video #8 13:39:42	Yes / No
41I	photo / physical	Video #9 13:40:01	Yes / No
41J	photo / physical	Video #10 13:43:08	Yes / No
41K	photo / physical	Video #11 13:45:23	Yes / No
41L	photo / physical	Video #12 13:45:28	Yes / No
41M	photo / physical	Video #13 13:46:30	Yes / No
41N	photo / physical	Video #14 14:05:11	Yes / No
41O	photo / physical	Video #15 14:07:11	Yes / No
41P	photo / physical	Video #16 14:11:17	Yes / No
41Q	photo / physical	Video #17 14:11:28	Yes / No
42	photo / physical	Forensic Analysis of Defendant Brian France's Cellphone (on Thumbdrive)	Yes / No
42A	photo / physical	Image #1 13:34:48	Yes / No
42B	photo/physical	Image Group #2 13:37:28-13:37:50	
42C	Photo/physical	Image Group #3 13:44:35-13:44:38	
42D	Photo/physical	Image Group #4 13:44:52-13:45:07	
42E	Photo/physical	Image Group #5 13:45:36-13:45:38	
42F	Photo/physical	Image Group #6 13:45:44-13:46:27	
42G	Photo/physical	Image Group #7 13:50:20-13:50:38	
42H	Photo/physical	Image Group #8 13:51:16-13:51:44	
42I	Photo/physical	Image Group #9 13:54:26-13:54:38	
43	Photo/physical	Interview Image Penis hand	

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Case Study

- **Jeremy Embrich**
  - 15CF1685
- Investigation began with a 911 call from victim's mother.
- Victim FB messaged a friend to call mom to call police

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Case Study

- Officers respond to the residence
  - Victim is there
  - Suspect is gone
- What do we know based on the 911 officers need to do ASAP?

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Case Study

- Preservation letters sent
- Search Warrants done
- Screen shots from victims FB page

facebook

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Case Study

- Questions of admissibility of digital evidence need to be a team effort
- Coordinate police for seizure and prosecutors for legal questions.
- If you rely on inadmissible evidence for a confession, it may taint the entire process.
- Send your detectives in prepared.

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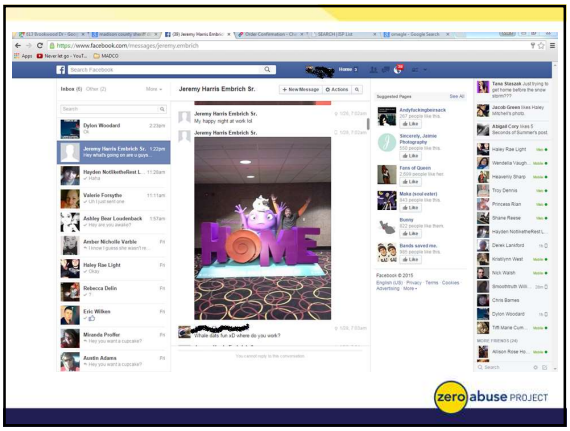

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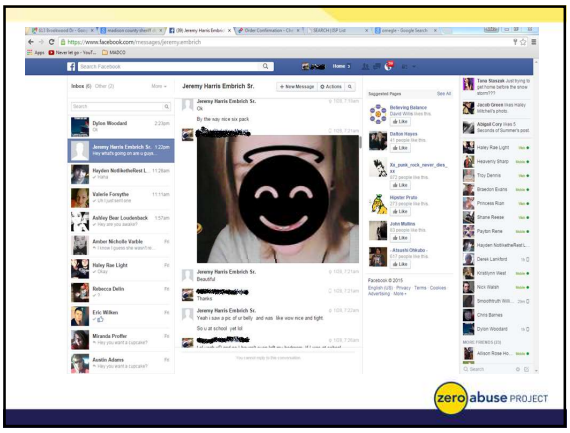

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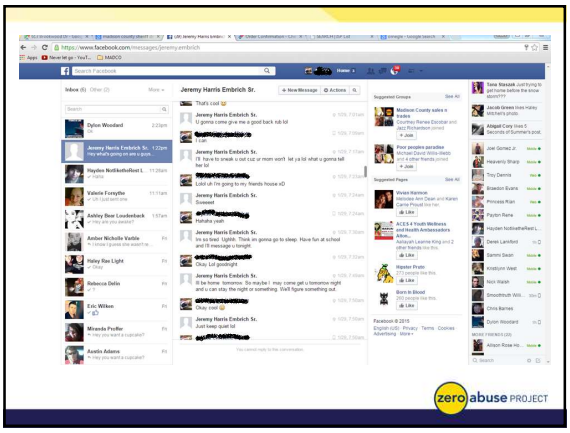

Case Study

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Case Study

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Case Study

- One piece of victim's statement we could not fully corroborate.
- "Justice for Justice"

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