

# **PRETRIAL MOTIONS PRACTICE**

Presenters:

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# DRUG DELIVERY RESULTING IN DEATH

## PRETRIAL TIPS AND MOTIONS

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## Statistics

2017: 9 of 25 charged homicides were DDRD – 36%

2018: 3 of 23 charged homicides were DDRD – 13%  
(one of these individuals overdosed and died in the County Jail)

2019: 12 of 30 charged homicides were DDRD or Involuntary Manslaughter – 40%

(3 of the 12 were charged as Involuntary Manslaughter, 9 were DDRD) – This is significant because it is the first time some differentiation is being shown at the charging level and it seems that accused persons with addiction are starting to be viewed slightly differently.

There is no One Size Fits All for these cases

While there are some similarities, these cases are fact driven.

Some of those facts are about the crime itself, but many are about the accused as well.

We see differences in both charging as well as outcomes, typically based upon the accused's level of involvement in drug activity.

Persons with addiction tend to fair slightly better than non addicted dealers, but still not very well considering that these are people who have a disorder that requires treatment and not incarceration

## REMINDER - THE TERRIBLE STATUTE

§ 2506. Drug delivery resulting in death.

(a) **Offense defined.**--A person commits a felony of the first degree if the person intentionally administers, dispenses, delivers, gives, prescribes, sells or distributes any controlled substance or counterfeit controlled substance in violation of section 13(a)(14) or (30) of the act of April 14, 1972 (P.L.233, No.64), known as **The Controlled Substance, Drug, Device and Cosmetic Act**, and another person dies as a result of using the substance.

(b) **Penalty.**--

(1) A person convicted under subsection (a) shall be sentenced to a term of imprisonment which shall be fixed by the court at not more than 40 years.

(SPOILER: - “as a result of” matters.....kind of?)

## Why so bad?

- The only difference between DDRD and a drug delivery is someone died and now your client is looking at a possible 20-40 year sentence
- The client does not need to have any intent, plan or expectation that the individual will die
- Client does not have to be the direct deliverer (Example – Wilson)
- Your client may very well be a person with addiction issues.
- The presence of Fentanyl changes everything – your client may have no clue that they are delivering fentanyl instead of heroin and therefore no clue that the drug is anywhere near as dangerous as it is
- Nonetheless, if you intentionally deliver drugs and someone dies – you are facing a charge that carries the same penalty as third degree murder, except no malice is needed

- the prior statute, in effect until 2011 read differently – instead of “commits a felony of the first degree” it used to say “commits murder of the third degree”
- as such, prior to the amendment in 2011 – the necessary mental state was determined, through case law, to be malice
- that is NO longer true – now the state of mind is reckless

**Seems crazy right?**



**But it's true – look at the jury instructions:**



## Old jury instruction:

*[For offenses committed before September 7, 2011:]*

**1. The defendant has been charged with delivering drugs that resulted in the death of a person. To find the defendant guilty of this offense, you must find that the following elements have been proven beyond a reasonable doubt:**

***First*, that the defendant administered, dispensed, delivered, gave, prescribed, sold, or distributed a controlled substance or a counterfeit controlled substance to a person.**

***Second*, that the administration, dispense, delivery, prescription, sale, or distribution must have been in violation of the Controlled Substance, Drug, Device and Cosmetic Act.**

***Third*, that a person has died as a result of using the substance.**

***Fourth*, that the defendant did so with malice. Let me explain what malice means in this context (malice definition was then provided)**

## Current Jury Instruction

*[For offenses committed on or after September 7, 2011:]*

**1. The defendant has been charged with delivering drugs that resulted in the death of a person. To find the defendant guilty of this offense, you must find that the following elements have been proven beyond a reasonable doubt:**

***First*, that the defendant administered, dispensed, delivered, gave, prescribed, sold, or did so intentionally, that is, that it was his conscious object to administer, dispense, deliver, give, prescribe, sell, or distribute a controlled substance or a counterfeit controlled substance to a person.**

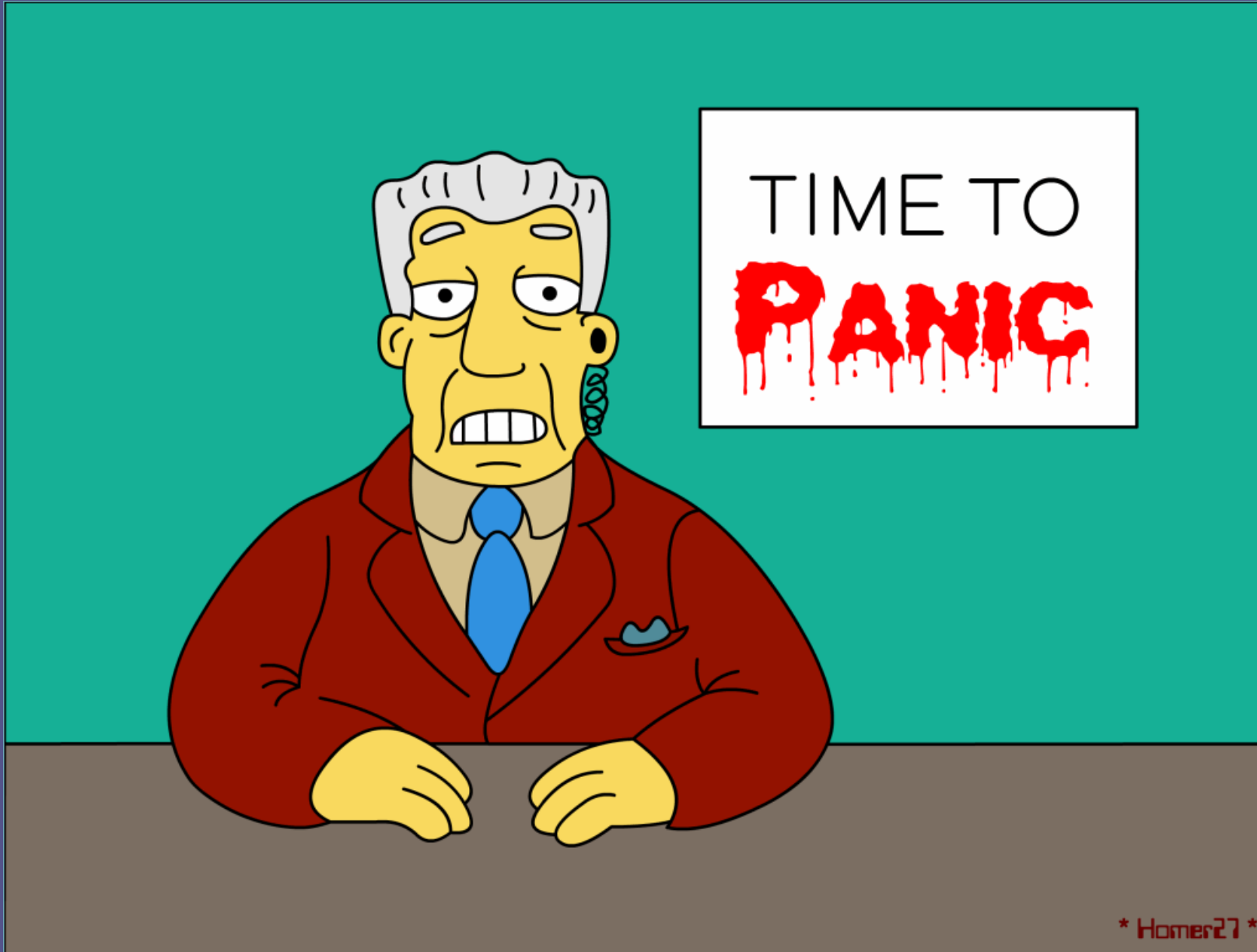
***Second*, that the defendant substance or a counterfeit controlled substance to a person.**

***Third*, that the administration, dispense, delivery, prescription, sale, or distribution was in violation of the Controlled Substance, Drug, Device and Cosmetic Act.**

***Fourth*, that a person has died as a result of using the substance.**

**2. If you find each of these elements beyond a reasonable doubt, you should find the defendant guilty. If you do not find each proven beyond a reasonable doubt, you must find the defendant not guilty.**

See....we told you it was bad



## CASE LAW:

***BURRAGE V. UNITED STATES*, 134 S. CT. 881 (US 2014)**

**-The Supreme Court interprets the language of the statute “results from” to mean “but for” – in other words, absent the drugs, the person would not have died**

**THIS “BUT FOR” TEST IS IMPORTANT – AND WILL FORM THE BASIS OF SOME OF YOUR STRATEGY AS WELL AS YOUR LIKELY NEED FOR EXPERTS**



- Remember – the PA Statute uses the phrase “results from”**
- and the US Supreme Court just said “results from” means “but for”**

PA Statute has been deemed constitutional (That doesn't mean we shouldn't keep fighting it)

***COMMONWEALTH V. KAKHANKHAM*, 132 A.3D 986, 990 (PA. SUPER. 2015)**

- holds that the statute is clear as to the level of causation – “but for”
- “the results of the defendant's actions cannot be so extraordinarily remote or attenuated that it would be unfair to hold the defendant criminally responsible”
- Therefore, not unconstitutionally vague (but isn't it? - if this same exact conduct from the client sometimes results in death and sometimes not what are we actually criminalizing – what actual actions of our clients make this any different than a drug delivery)



## **MORE BAD NEWS:**

There are some other not so great cases for us in Pennsylvania:



## ***COMMONWEALTH V. PROCTOR, 156 A.3D 261 (PA. SUPER. 2017)***

-A defendant's "conduct need not be the only cause of the victim's death in order to establish a causal connection" and that "**[c]riminal responsibility may be properly assessed against an individual whose conduct was a direct and substantial factor in producing the death even though other factors combined with that conduct to achieve the result.**"

Specifically, the Commonwealth offered expert testimony that, notwithstanding the other drugs in Lowe's system, the amount of heroin ingested by Lowe was a lethal dose.

### **MORAL:**

**COMBINED DRUG INTOXICATION DOESN'T HELP YOU IF THE DRUG YOU PROVIDED WAS ENOUGH**

***COMMONWEALTH V. STOREY, 167 A.3D 750 (PA. SUPER.  
2017)***

**-MORAL:**

**-EVEN IF SOMEONE YOU DIDN'T KNOW DIED... IT'S YOUR  
FAULT**

**AND:**

**-THE SALE OF HEROIN CONSTITUTES RECKLESS  
CONDUCT**

SO NOW WHAT?



NOW – WE FIGHT

## PRELIM

**-FIGHT HEARSAY – I KNOW, I KNOW, BUT... RICKER**



**REMEMBER – THE PENNSYLVANIA SUPREME COURT DID NOT  
APPROVE OF RICKER, THEY DISMISSED THE APPEAL AS  
IMPROVIDENTLY GRANTED (AND SEE JUSTICE WECHT'S DISSENT)**

# WHAT ABOUT VERBONITZ AND THE PA CONSTITUTION ITSELF?

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## **THE CONSTITUTION** OF THE **COMMONWEALTH OF PENNSYLVANIA,** AS AMENDED BY THE CONVENTION OF **1837--1838.**

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**WE**, the People of the Commonwealth of  
Pennsylvania, Ordain and establish this  
Constitution for its government.

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***COMMONWEALTH EX REL BUCHANAN V. VERBONITZ, 581, A.2D 172 (PA. 1990)***

"[f]undamental due process requires that no adjudication be based solely on hearsay evidence". If more than "rank hearsay" is required in an administrative context, the standard must be higher in a criminal proceeding where a person may be deprived of his liberty. The testimony of a witness as to what a third party told him about an alleged criminal act is clearly inadmissible hearsay, and thus, does not constitute legally competent evidence. In this case the Commonwealth has failed to establish prima facie that a crime has been committed and that Buchanan committed that crime. Additionally, a criminal defendant has a right to confront and cross-examine the witnesses against him: this right being secured by the United States Constitution and the Pennsylvania Constitution

## **Article I Section 9 – thanks PA Constitution!**

The Pennsylvania Constitution provides that "*in all criminal prosecutions*" the accused has a right to meet the witnesses against him -- "face to face". *Pa. Const. Art. 1 § 9*. This right necessarily includes the right to confront witnesses and explore fully their testimony through cross-examination. A preliminary hearing is an adversarial proceeding which is a critical stage in a criminal prosecution. It is not a sidebar conference at which offers of proof are made. Thus, the Pennsylvania Constitution mandates a criminal defendant's right to confrontation and cross-examination at the preliminary hearing.



## POST PRELIMINARY HEARING – WHAT MOTIONS ARE WE THINKING?

**-DISCOVERY**

**-EXPERTS**

**-VENUE**

**-CHAIN OF CUSTODY ISSUES?**

**-SUPPRESSION – STATEMENTS AND PHYSICAL EVIDENCE – CHECK YOUR WARRANTS**

**-CELL SERVICE LOCATION INFORMATION – IS THERE A WARRANT (BETTER BE PER THE US SUPREME COURT)**

**-TEXT MESSAGES – AUTHENTICATION AND HEARSAY ISSUES**

**-PRIOR BAD ACTS – HOW MANY DRUG DEALS ARE TOO MANY?**

**-VOIR DIRE QUESTIONS**

**-JURY INSTRUCTIONS**

DISCOVERY



**-MAKE SURE YOU ARE FILING DISCOVERY MOTIONS – AND GETTING ALL OF THE INFORMATION**

**-CHANCES ARE YOU ARE GOING TO GET LAB REPORTS DETAILING THE TOXICOLOGY REPORTS – YOU WANT MORE**

**-ASK FOR THE “CASE FILE” OR ”LITIGATION PACKAGE”**

**-THIS HAS THE ACTUAL DATA FROM THE TESTS AND YOU WANT YOUR EXPERT TO SEE THIS**

**-ALSO – BE WARY OF JUST THE BASIC REPORTS – (MONTCO/NMS ISSUE OF ONLY REPORTING HIGHER SCHEDULED NARCOTIC)**

**-ALSO ASK FOR INFORMATION ABOUT THE LAB’S CREDENTIALS AND THOSE OF THE PERSON WHO DID THE TESTING**

- IF YOUR CASE INVOLVES A CELL PHONE (OR SEVERAL)**
- IT IS LIKELY THE DOWNLOAD OF THE PHONE YOU RECEIVE IS NOT THE “COMPLETE” DATA (IT MAY NOT BE CAPTURING DELETED ITEMS)**
- LOGICAL VS. PHYSICAL EXTRACTION (CHECK THE NOTATION ON YOUR CELLPHONE DOWNLOADS – CHANCES ARE IT SAYS LOGICAL)**
- BUT YOU MAY BE ABLE TO GET MORE INFORMATION FROM THE PHONE - TRY SEEKING A COURT ORDER FOR THE PHONE ITSELF TO ALLOW YOUR OWN EXPERT TO DO AN EXTRACTION**

# SPEAKING OF EXPERTS...



## POTENTIAL EXPERTS:

- CELL PHONE EXTRACTION – AS NOTED BEFORE – THERE MAY BE MORE INFORMATION THAN YOU KNOW ON YOUR CLIENT’S PHONE OR ON THE DECEASED’S PHONE
- WHAT IF THE DECEASED HAD MULTIPLE SUPPLIERS BUT THOSE MESSAGES WERE DELETED – YOU MAY BE ABLE TO GET THEM BACK, BUT YOU’LL NEVER KNOW UNLESS YOU TRY
- CELL SERVICE LOCATION INFORMATION – YOU ARE LIKELY GOING TO GET THE CELL SERVICE LOCATION DATA IN DISCOVERY – YOU CAN USE EXPERTS TO MAP OUT THE LOCATIONS AND PATH OF THE PHONE AT CRITICAL STAGES
- ALSO CELL SERVICE LOCATION INFORMATION IS NOT AS “CERTAIN” AS THE COMMONWEALTH’S EXPERT WILL MAKE IT SEEM
- THERE CAN BE TIMES WHEN THE NON-CLOSEST TOWER IS USED BECAUSE OF HIGH TRAFFIC VOLUMES

**-TOXICOLOGISTS -REMEMBER – THE DRUGS  
DELIVERED BY YOUR CLIENT MUST HAVE RESULTED IN  
THE DEATH OF THE DECEASED**

**-“BUT FOR” YOUR CLIENT’S DELIVERY THE PERSON  
WOULD NOT HAVE DIED**

**-AS SUCH EXPERTS ON TOXICOLOGY ARE VERY  
IMPORTANT- PARTICULARLY WITH MIXED TOXICITY  
ISSUES**

**DON'T LET THE COMMONWEALTH KNOW WHAT YOU'RE DOING  
UNTIL YOU HAVE TO**



- SIMPLY PUT – IF YOU NEED TO SEEK COURT FUNDING FOR EXPERTS-  
MAKE THOSE REQUESTS EX PARTE AND UNDER SEAL**
- HOW? – RELY ON *AKE V. OKLAHOMA*, 470 US 68 (1985)**



# VENUE





***COMMONWEALTH V. GRAHAM*, 196 A.3D 661 (PA. SUPER. 2018)**

**-VENUE IS PROPER WHERE EITHER AN ELEMENT OF AN OFFENSE OR A REQUIRED RESULT OCCURS**

**-IN THIS CASE, THE TRIAL COURT HAD DETERMINED THAT THE ONLY PROPER PLACE FOR VENUE WAS WHERE THE DELIVERY OCURRED (DIFFERENT COUNTY THAN WHERE THE DEATH OCURRED)**

**-SUPERIOR COURT CONCLUDED THAT VENUE WAS PROPER IN EITHER LOCATION, SO THE TRIAL COURT SHOULD HAVE DONE A CONVENIENCE OF THE PARTIES ASSESSMENT**

**-AS SUCH – THINK ABOUT YOUR CASES, ARE THERE MULTIPLE COUNTIES, IS THERE A COUNTY THAT IS MORE CONVENIENT FOR YOUR CLIENT/ PROPER DISPOSITON OF THE MATTER)**

# CHAIN OF CUSTODY



**-THERE TENDS TO BE A FAIR AMOUNT OF PHYSICAL EVIDENCE IN THESE CASES – THE DRUGS THEMSELVES:**

**-HOW HAVE THEY BEEN HANDLED?**

**-WERE THEY ALL COLLECTED**

**(EXAMPLES FROM MONTCO – MCLAUGHLIN AND LEON)**

**-THE PHONES – WERE THEY IN AIRPLANE MODE WHEN DOWNLOADS WERE DONE?**

## SUPPRESSION

**-LIKE ANY OTHER CASE – DID YOUR CLIENT SAY ANYTHING, WHAT WERE THE CIRCUMSTANCES, WERE RIGHTS READ, WAS IT VOLUNTARY?**

**-WARRANTS/SEIZURES – IS THERE PROBABLE CAUSE?**

**-ARE THEY OVERBROAD?**

## CELL SERVICE LOCATION INFORMATION

***CARPENTER V. US, 138 S.CT 2206 (US 2018)***

**-MUST HAVE A WARRANT FOR CELL SERVICE LOCATION INFORMATION**

**-CHECK YOUR CASES – IF CSLI WAS OBTAINED PRIOR TO JUNE 2018, IT WAS PROBABLY OBTAINED THROUGH A COURT ORDER OR SUBPOENA TO THE PHONE COMPANY**

**-THESE COURT ORDERS WERE ISSUED UNDER THE WIRETAP ACT – ONLY REQUIRES REASONABLE SUSPICION**

**-THE US SUPREME COURT SAYS THAT A WARRANT IS REQUIRED**

**-THIS INFORMATION IS PRIVATE AND PERSONAL AND WARRANTS ARE NEEDED**

# MIRANDA

## ***IN THE INTEREST OF JNW*, 197 A.3D 274 (PA. SUPER. 2018)**

**Holdings:** The Superior Court, No. 1759 MDA 2017, Stabile, J., held that:

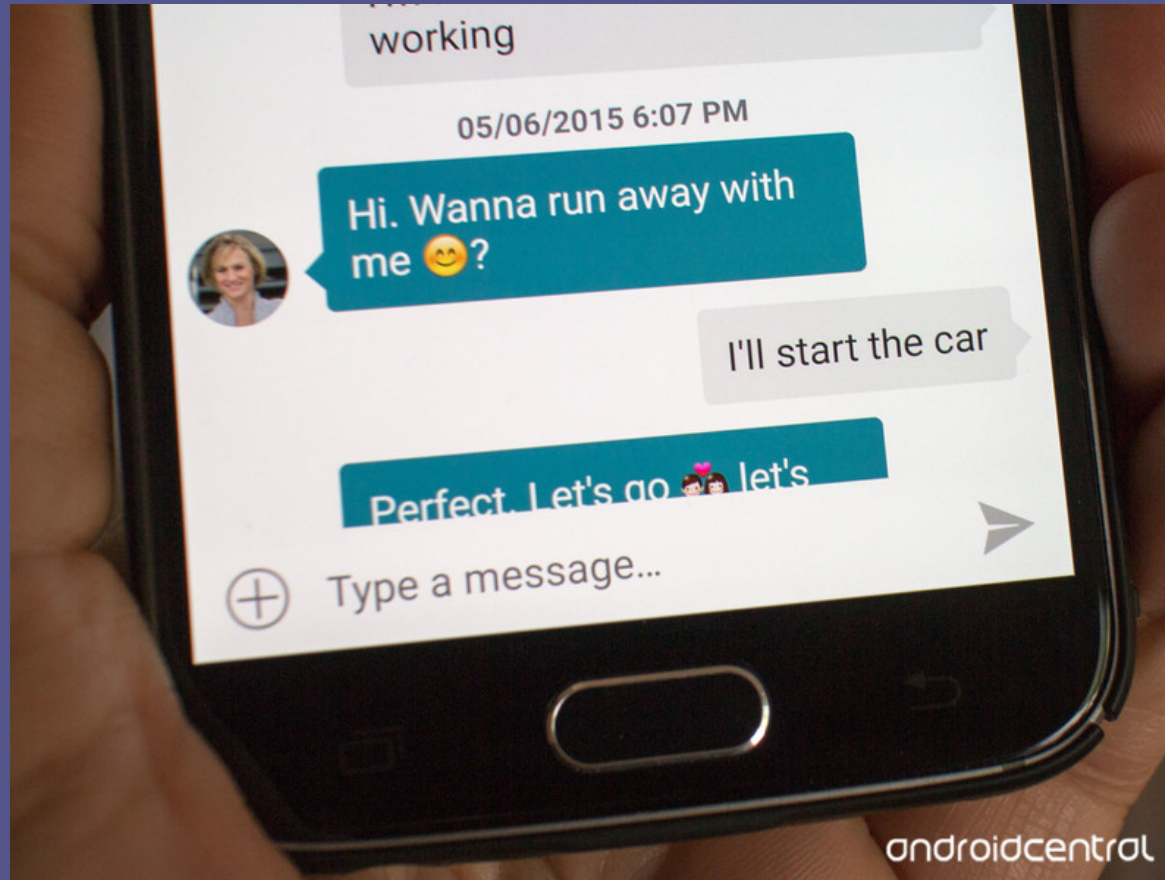
- 1 trial court did not err in determining that juvenile was subject to custodial interrogation at her apartment and that she did not voluntarily waive her *Miranda* rights;
- 2 deputy coroner's questioning of juvenile at hospital constituted custodial interrogation, and thus juvenile was entitled to *Miranda* warnings;
- 3 officers' interview of juvenile at her school constituted custodial interrogation for which juvenile did not waive *Miranda* rights; and
- 4 juvenile's statements during interview at police station did not constitute voluntary waiver of her *Miranda* rights.

**THIS IS A GREAT CASE, AND LIKE MANY, IT'S FACT SPECIFIC – BUT LOOK AT ALL OF THESE SITUATIONS THAT WERE DEEMED CUSTODIAL AND REQUIRED MIRANDA WARNINGS**

# TEXT MESSAGES...IF ONLY PEOPLE STILL USED PAGERS



# DARN TECHNOLOGY



**TEXTS - OFTEN THESE ARE GOING TO FORM A SUBSTANTIAL PART OF THE  
COMMONWEALTH'S CASE**

**-IT IS IMPORTANT TO CONTINUE TO CHALLENGE AUTHENTICITY AND HEARSAY  
CONCERNS.**



**COMMONWEALTH V. KOCH, 106 A.3D 705 (PA. 2014)**

**-IN *COMMONWEALTH V. KOCH*, AN EVENLY DIVIDED PENNSYLVANIA SUPREME COURT DETERMINED THAT TEXT MESSAGES WERE SUBJECT TO AUTHENTICATION PURSUANT TO RULE 901 OF THE PENNSYLVANIA RULES OF EVIDENCE.**

**-PENNSYLVANIA RULE OF EVIDENCE 901 STATES THAT, TO SATISFY THE REQUIREMENT OF AUTHENTICATION, THE PROPONENT MUST PRODUCE EVIDENCE SUFFICIENT TO SUPPORT A FINDING THAT THE ITEM IS WHAT THE PROPONENT CLAIMS IT IS. PA.R.E. 901(A).**

**-AUTHENTICATION CAN BE SHOWN BY THE TESTIMONY OF A WITNESS WITH KNOWLEDGE. HOWEVER, IN THE CONTEXT OF A COMMUNICATION, OTHER FACTORS MAY NEED TO BE LOOKED AT SUCH AS DISTINCTIVE CHARACTERISTICS. *COMMONWEALTH V. KOCH*, 106 A.3D 705, 712 (PA. 2014).**

-Distinctive characteristics may include information specifying an author-sender, references to other relevant events that precede or follow the communication, or any other aspects that the communication is what it claims to be. *Id.* At 712-713 (citing *Commonwealth v. Collins*, 957 A.2d 237, 265-66 (Pa.2008)).

-The *Koch* court agreed that authentication is a low standard, but also that communications technology presented novel questions with regard to both authentication and hearsay. *Id.* At 713.

***COMMONWEALTH V. MOSLEY*, 114 A.3D 1072, 1084 (PA. SUPER.  
2015)**

**The Superior Court was again confronted with the issue of authentication of text messages (again in a drug-related case) and determined that there was no corroborating witness testimony regarding the authenticity of the messages, that the messages were not properly authenticated and should not have been admitted.**

## HEARSAY IN THE TEXT MESSAGES

**-In both *Koch* and *Mosley*, the appellate courts determined that admission of testimony regarding the nature and content of the text messages was hearsay. In both cases, testimony was admitted through a detective or officer who interpreted the drug-related language and meaning of the texts, both cases involved allegations of drug-trafficking or delivery.**

## DRUG JARGON AND “EXPERTS”

The Commonwealth will likely try to introduce text messages and their “meaning” through a narcotics detective to explain what the texts mean – make appropriate objections or file motions in limine to try to exclude such testimony. The Pennsylvania rules of evidence state that expert testimony is proper where the specialized knowledge is beyond that possessed by the average person, the meaning of text messages is not something that requires specialized knowledge or skill, and it is something that involves a matter of common knowledge for the jury. Assuming the content of the text messages is admitted, the jury should be determining the meaning of those messages.

# EXAMPLES OF THE LANGUAGE THAT REQUIRES AN “EXPERT” IN DRUG JARGON/LANGUAGE

-OMW

-YOU AROUND

-WHAT U NEED

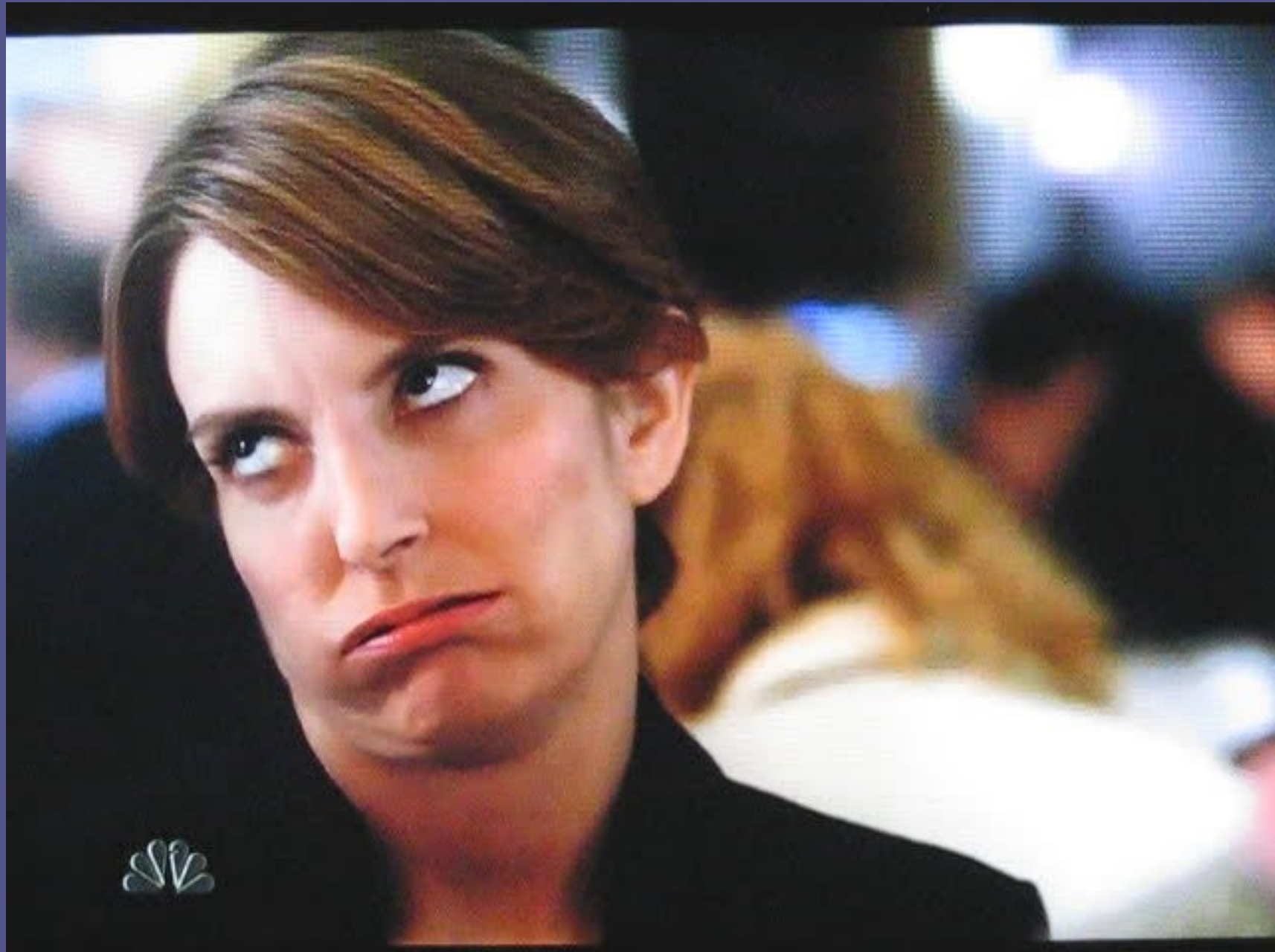
-MEET AT SAME PLACE

-IF 10, THEN 4

-I’LL GET YOU THAT AND A MILF BJ

-R U OK

-B CAREFUL ITS GOOD



## PRIOR BAD ACTS

**404B – Be careful of attempts to introduce other drug deliveries or controlled buys – this is improper as it is being used to establish propensity, not any of the appropriate factors under 404B**

**-How do the prior sales establish identity, motive, common scheme or plan? (It's not like drug dealing is done in some super unique way)**

**-Also, prejudicial impact far outweighs probative value as the jury now believes your client is a big time dealer – chances are your jurors are not dealing drugs, so more than once is way too many for a jury to consider and not be prejudiced**



## VOIR DIRE

- Need to get as much information as you can about jurors' views on drug addiction and drug sales
- The number of people who have been touched by addiction/overdoses is very high – these cases often hit a nerve with many potential jurors
- Does your county da have a social media presence – do they post about investigations/arrest? – Do your jurors follow those pages
- What other areas of voir dire are important to your case/your county?

## JURY INSTRUCTIONS

**-As you saw earlier – the current instruction actually does not mention the word reckless – consider seeking a jury instruction that does make it clear that there is in fact a mental state required – yes it's low, but it's still a specific mental state**



*"That's all Folks!"*