

# **Juvenile Prosecution: Trending Topics for the 21st Century**

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APAAC Training Room  
1951 W Camelback Rd., Unit 202,  
Phoenix, Arizona



## **How Do You Like Me Now? Social Media & Juvenile Court**

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Distributed by:

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# How Do You Like Me Now? Social Media & Juvenile Court

Erin Pedicone  
Deputy Maricopa County Attorney

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## Social Media Overview

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### Information Available on Social Media



- Messages, status updates, comments, blog posts, photos, maps, emojis, audio, video, links to other content, physical condition, geo-location, hashtags, payment history, friendships, associations, EXIF/metadata

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**New York gangs are using emojis as a secret language to plan crimes**

By Sara Khan August 2, 2018 8:24pm | Updated



**📱** = Gang  
**B** = Blood  
**👊** = Crip

Bloods and Crips are now doing battle online.

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### Traditional Social Media Platforms

- Many formats
  - Facebook: Social network
  - LinkedIn: Professional network
  - Twitter: Social networking, news
  - Instagram: Internet-based photo & video sharing
  - YouTube: Video production & posting
- Common features
  - Dynamic, internet-based, & interactive

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### Social Media Messaging Applications

- Becoming more popular than traditional platforms
- Two basic types
  - Short message service ("SMS") messages
    - Messages must go through third-party server en route to recipient
  - Over-the-top ("OTT") messaging applications
    - Common features
      - Messages go from device to device
      - High functionality, low cost
      - End to end encryption

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### Social Media Messaging Applications: "OTT"

- Third Party OTT Messaging Apps
  - Examples: WhatsApp, Snapchat, Facebook Messenger, Kik
  - Features:
    - Operate on multiple devices
    - Communicate across operating systems
- System Specific OTT Messaging Applications
  - Example: iMessage
  - Features:
    - Operate on multiple devices
    - Communication limited to particular operating system
      - iOS device > Android device

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### Anonymous Social Media Chat Applications

- Examples: Blind, Whisper, Truth
- Features:
  - Freedom!\*
  - Anonymity!\*
  - Popular with high school and college students

*\* According to user perception*

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### Ephemeral Social Media Messaging Applications

- Examples: Wickr, Confide, Facebook Messenger, Signal, iMessage
- Features:
  - Control message preservation & distribution
    - Send "self-destructing messages"
    - Disable screenshots
    - Encryption
    - Delete content from recipient device

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Wearable Technology & Social Media

- Examples: Nike, FitBit, Garmin, Apple Watch
  - Ability to transmit data to social media

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Social Media Evidence  
Preservation & Collection

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Preservation Letters

- Some ISPs retain records for a short amount of time; therefore, preservation letters should be sent as soon as records are identified
- Preserve
  - The contents of any communication or file stored by or for the account(s) and any information associated with the communications, like source and destination email addresses or IP addresses;
  - All records and other information relating to the account(s) and any associated accounts including email addresses, user names, telephone numbers, etc.

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### Resource: Search.org ISP List



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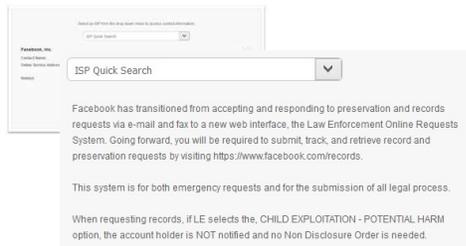
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### Resource: Search.org ISP List



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### Resource: Law Enforcement Guides



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### Subpoena or Search Warrant?

- Search warrant
- No more subpoenas for subscriber information per A.R.S. §13-3018
  - Subscriber information: User/account name(s), email address, phone number, internet service provider, I.P. address, billing/service address

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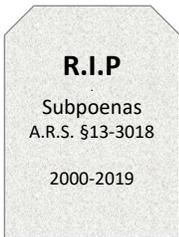
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### Search Warrants



Warrantless government collection of non-content (subscriber) information from an internet service provider constitutes a significant intrusion into a person's private affairs which the state constitutional provision governing the right to privacy unambiguously prohibits.

State v. Mixton, 247 Ariz. 212, 447 P.3d 829 (App. 2019), review granted (Nov. 19, 2019)

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### Search Warrants & Particularity

- Search warrants must:
  - Specify the crime(s) under investigation;
  - Particularly describe place to be searched and items to be seized;
  - Explain how items to be seized relate to criminal investigation;
  - Allow executing officers to distinguish between items that may and may not be seized
- Warrants for electronic searches are carefully scrutinized for particularity
- No good faith reliance on search warrants so lacking in particularity it was unreasonable for executing officers to rely on it

State v. Dean, 241 Ariz. 387 (2017)

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### Search Warrants & Nexus

Items to be seized must have evidentiary value and demonstrate a clear nexus to the criminal activity.

State v. Dean, 241 Ariz. 387 (2017)

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### Search Warrants & Staleness

- The question of staleness depends more on nature of the activity than on number of days that have elapsed since the factual information was gathered.
- Passage of time becomes less significant for activity of a continuous nature or a course of conduct

State v. Hale (1982) 131 Ariz. 444; State v. Smith (1979) 122 Ariz. 58

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### Search Warrants & Staleness

- Electronic searches generally do not get stale; however,
- An affidavit must be based on facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time.
- Generally speaking, the ability to obtain electronic evidence lasts much longer
  - Training & experience
  - Deleted files & file remnants
  - Correct misunderstandings of computer technology

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Social Media Evidence in Court

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Admitting Social Media Evidence

- Is it relevant?
- Is it authentic?
- Is it hearsay?
  - If so, is there an exemption/exception?

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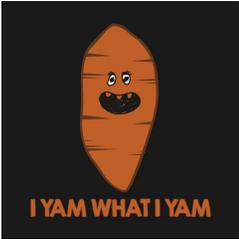
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Authentication



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Authentication: State v. Griffith

- State v. Griffith, 247 Ariz. 361, 449 P.3d 353 (App. 2019)
- First Arizona case to address how authentication and hearsay rules apply to communications obtained directly from online social media platforms.

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State v. Griffith

- 3 Apple iPads stolen when J.H. and S.H.'s home was burglarized.
- Police subpoenaed Apple and got information about Griffith
  - New Apple IDs created with Griffith's credentials
- When contacted, Griffith said he restored devices to their factory settings for other people, for money, even when he suspected they were stolen
- R.H., the burglary suspect, asked Griffith to reset three iPads via Facebook
- Police got a search warrant for Griffith's Facebook account
- Facebook returned a message containing a photograph sent from Griffith's account (among other things)

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State v. Griffith

- A Facebook user sent a message to Griffith's account complaining about the quality of their camera
- A reply from Griffith's account read, "Need a better one?" And included a photograph of an iPad
- The iPad in the photo had the same serial number as one of the iPads stolen from S.H.
- The State offered the Facebook message for the truth of the matter asserted therein; i.e., that Griffith had an iPad to sell

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State v. Griffith

- At trial, Griffith objected when the State tried to introduce the message as a business record
- According to Griffith, the records were inadmissible hearsay because the State failed to lay the foundation for the business records exception (Rule 803(6)) and the documents weren't certified (Rule 902(11))
- The State offered testimony of the detective who got the Facebook documents in lieu of certification
  - Rationale: The detective followed certain procedures to get the documents

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State v. Griffith

- Note, testimony only about how a record was obtained is not a substitute for testimony about how the record was kept in the regular course of business. Taegeer v. Catholic Family & Cmty. Servs., 196 Ariz. 285 (App. 1999).

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State v. Griffith

- The COA agreed that the State failed to lay the foundation for the business records exception
- The detective who got the documents did not and could not tell the jury whether they were made:
  - By or from info transmitted by someone with knowledge;
  - At or near the time of the event;
  - Whether Facebook kept the record in the course of a regularly conducted activity;
  - That it was Facebook's regular practice to make the records

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State v. Griffith

- What if the State had certified documents or had the custodian of records testify?
- Nothing would change
- Facebook documents aren't business records because they're not reliable
- "...no reason exists to question the trustworthiness and reliability of a statement relied on by a business because businesses normally require authentic, truthful statements to function."
  - Does Facebook rely on its users' statements? Of course not.

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State v. Griffith

- Moreover, the State offered the message to prove Griffith had trafficked the stolen iPad
- Thus, the State had to offer some evidence that the message was Griffith's; i.e., that he authored it
- "When the ultimate relevance of a document obtained from a social media platform turns on the fact of authorship, the foundation requirements of Rule 803(6)(D) are inadequate to authenticate it because, as is the case here, they simply do not show who authored the message"

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State v. Griffith

- Proponent need not establish authorship definitively
  - Question for the jury to decide.
- A social media communication may be admitted if reasonable extrinsic evidence tends to show the party made it
- Courts should use a flexible approach to decide whether evidence was properly authenticated

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State v. Griffith

- A jury could reasonably conclude that Griffith wrote the Facebook message because:
  - The account was in Griffith's name;
  - The records came from Facebook's law enforcement portal;
  - Message was consistent with Griffith's statements and Apple records

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State v. Griffith

- The COA ultimately found the message admissible as a party opponent statement (Rule 801(d)(2))

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Questions?

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