Mock Student Work Assignment

BSAs have a major impact on the HLS community through advising and coaching students regarding their legal writing skills. To this end, BSAs hold Outline Conferences for the major 1L writing assignments: the Closed Memo, the Open Memo, and the First-Year Ames Brief. BSAs also teach the Bluebook curriculum to first-year students and provide Bluebooking feedback in response to student questions and on student writing throughout the year. Because the above responsibilities are such an integral part of the BSA role, a substantial portion of our evaluation of your candidacy will be based on this mock assignment and the accompanying mock student conferences that will occur during interviews.

The Mock Student Work Assignment is comprised of two parts: Part I contains a mock Closed Memo assignment and two mock student outlines, and Part II contains a mock student email with Bluebook questions similar to the type that BSAs often receive from their advisees. Specific instructions on how to approach each assignment are included below. Please note that Part I is much lengthier and more substantive than Part II, and will be weighted accordingly. **Electronic copies of both Part I and Part II of the Mock Student Work Assignment will be due to your interviewer at the time of your interview; you should not turn in this assignment before your interview.**

**Interview Logistics**

Students who have completed applications will be contacted to schedule two BSA interviews to take place between March 30 and April 1, 2022. Each will include a mock student conference focused on either Student A or Student B’s mock outline, followed by a traditional interview component. At your interviews, you will turn in: (1) a hard copy of your feedback on the relevant mock student outline (either Student A or Student B) from Part I and (2) a hard copy of your response to the Bluebook email from Part II. We recommend that you bring **two** hard copies of your mock student outline feedback in order to facilitate the mock conference. Finally, you should dress casually for the interview—your interviewer will be wearing whatever they wore to class that day, and you should feel free to do the same.

**Interview Evaluation and Preparation**

You will be evaluated across the following categories: ability to teach substantive legal writing concepts, mentorship and interpersonal skills, willingness to advise students on HLS-related matters, and potential contribution to the Board. When drafting your comments on the Mock Student Work Assignment and preparing for your mock conferences, reflect on the feedback that your BSA has provided to you. The best way to prepare for the mock conference is to act as though you are working with a real 1L student advisee: tailor your feedback by empathizing with the mock student, focusing on the most important areas for improvement, and providing guidance on how he or she should move forward.

Part I: Closed Memo Outline

**Scenario and Instructions**

It is September and your students have just submitted Closed Memo Outlines. You are preparing for two Closed Memo Outline Conferences. To aid you in preparing, the BSA has provided:

(1) Closed Memo Assigning Memorandum

(2) Closed Memo Case Packet

(3) Teaching Memo Excerpt

(4) Appendix A

In addition to your preparation materials, attached you will find two mock student outlines.

(5) Mock Student Outline A

(6) Mock Student Outline B

Your task is to evaluate and comment on these outlines in light of the preparation materials with which you have been provided. Comments may be handwritten or typed in comment bubbles and then printed. Please comment on issues of analysis and organization in the outline (e.g., substantive errors like misstating the law, attention to CRuPAC, insufficient discussion of an issue, attention to facts and case details, etc.). Do not focus on Bluebooking. Please do not conduct outside research.

To: Young Prosecutor

From: Middlesex District Attorney’s Office

Re: Prosecution of Henry Hansel for Identity Theft

You have probably heard by now that Henry Hansel, best known for his portrayal of Marc Klein on a popular soap opera, has been indicted for identity theft and is facing trial. Our office is handling the prosecution, and I’m going to need your help with an evidence-related legal issue that has come up.

In 2007, after graduating from Boston Arts Academy, Hansel left his hometown to pursue his dream of being an actor in Los Angeles. He worked odd jobs until he landed a recurring role on *Uncivil Procedure,* a popular soap opera set at a highly ranked law school. With his good looks and charm, he quickly gained popularity among the show’s devoted fans (mostly partners at large law firms eager to relive the halcyon days of their youth), more than a thousand of whom “liked” his official fan page on Facebook.[[1]](#footnote-1) However, unlike most soap opera stars, Hansel avoided media coverage and even refused to create social media accounts while he was on the show. He also purportedly had a serious gambling problem and frequently requested small loans from his friends and coworkers.

After six years on *Uncivil Procedure*, Marc Klein was unceremoniously killed off when the top shelf of his locker dramatically buckled and his Federal Courts book bashed his head just moments before what would have been a breathtaking and tense three-hour exam.

Dejected and broke, Hansel returned to Boston in secret. Soon thereafter, he contacted his biggest fan, Noor Ahmed, through a newly-created Facebook page. The page was registered under the name “Henry Hansel,” listed a hometown of “Boston, MA,” and indicated that he had attended the Boston Arts Academy. While some of the pictures of Hansel on the page could be found online through a Google image search, others were not easily available from other Internet sources. On March 13, 2014, for example, a “#ThrowbackThursday” photo of Hansel and his brothers as children was posted on “Henry Hansel’s” Facebook page.

Ahmed, the managing partner of renowned Boston firm Ladders & Black, has told police that she began receiving Facebook messages from “Henry Hansel” in March 2014. Although she was skeptical at first because she knew Hansel had eschewed social media in the past, after looking through his page, she was convinced that it was legitimate. None of his “friends” were fans from his official page; instead, they had the same names as members of his family and his agent in Los Angeles.

In June 2014, Hansel told Ahmed that she could have a small role in a special hour-long episode of *Uncivil Procedure* in which Marc Klein would return, revealing that he had merely suffered from amnesia after his run-in with John Manning’s heavy textbook. Hansel said the episode would be shot within a few months. Ahmed enthusiastically accepted. Hansel warned her that security on the show was going to be incredibly strict to prevent leaks, so he would need her social security number to begin the background check process. Ahmed complied and began to plan her trip to California. However, over the following months, during which Hansel claimed filming had been delayed three times, Ahmed became suspicious. Ahmed soon discovered that three credit cards had been taken out in her name between June 30, 2014 and October 31, 2014, and that the balance on the cards was more than $50,000.

Hansel was arrested and charged with violating Massachusetts’ identity theft statute, Mass Gen. Laws Ann. ch. 266, § 37E,[[2]](#footnote-2) on January 2, 2015. In the coming trial, we would like to introduce the evidence in Appendix A, and excerpts from Hansel’s and Ahmed’s Facebook messages. I’d like to know whether the message transcript can be authenticated under Massachusetts Evidence Rule 901. Hansel is unlikely to testify, and I’m not sure that our office has the budget or the time to bring in a computer expert to track his profile and figure out where the messages came from.

Courts—both here in Massachusetts and in other states with similar evidence rules about authentication—have considered whether these kinds of Internet communications are admissible; I’ve attached those cases here. Please write a memo assessing whether we will be able to authenticate the Facebook messages under Rule 901.

**Sources**

**Statutes**

Mass. R. Evid. 901.

**Cases**

*Commonwealth v. Williams*, 926 N.E.2d 1162 (Mass. 2010).

*Commonwealth v. Siny Van Tran*, 953 N.E.2d 139 (Mass. 2011).

*Commonwealth v. Amaral*, 941 N.E.2d 1143 (Mass. App. Ct. 2011).

*Griffin v. State*,19 A.3d 415 (Md. 2011).

*In re F.P.*, 878 A.2d 91 (Pa. Super. Ct. 2005).

Massachusetts Rules of Evidence

Section **901**. Requirement of Authentication or Identification

**(a) General Provision.** The requirement of authentication or identification as a condition precedent to admissibility is satisfied by **evidence** sufficient to support a finding that the matter in question is what its proponent claims.

**(b) Illustrations.** By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this section:

**(1) Testimony of Witness with Knowledge.** Testimony that a matter is what it is claimed to be.

**(2) Nonexpert Opinion on Handwriting.** Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of litigation.

**(3) Comparison by Trier or Expert Witness.** Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

**(4) Distinctive Characteristics and the Like.** Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

**(5) Voice Identification.** Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

**(6) Telephone Conversations.** A telephone conversation, by **evidence** that a call was made to the number assigned at the time by the telephone company to a particular person or business, if,

**(A)** in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or

**(B)** in the case of a business, the conversation related to business reasonably transacted over the telephone.

**(7) Public Records or Reports.**

**(A) Originals.** **Evidence** that an original book, paper, document, or record authorized by law to be recorded or filed and in fact recorded or filed in a public place, or a purported public record, report, statement, or data compilation, in any form, is from a public office where items of this nature are kept is admissible.

**(B) Copies.** A copy of any of the items described in subsection (A), if authenticated by the attestation of the officer who has charge of the item, shall be admissible on the same terms as the original.

**(8) Ancient Documents.** **Evidence** that a document

**(A)** is in such condition as to create no suspicion concerning its authenticity;

**(B)** was in place where it, if authentic, would likely be; and

**(C)** has been in existence thirty years or more at the time it was offered.

**(9) Process or System.** **Evidence** describing a process or system used to produce a result and showing that the process or system produces an accurate result.

**(10) Methods Provided by Statute or Rule.** Any method of authentication or identification provided by a **rule** of the Supreme Judicial Court of this Commonwealth, by statute, or as provided in the Constitution of the Commonwealth.

**(11) Electronic or Digital Communication.** Electronic or digital communication, by confirming circumstances that would allow a reasonable fact finder to conclude that this **evidence** is what its proponent claims it to be. Neither expert testimony nor exclusive access is necessary to authenticate the source.

456 Mass. 857

Supreme Judicial Court of Massachusetts,

Middlesex.

COMMONWEALTH

v.

Dwight WILLIAMS

SJC–10308. | Argued Feb. 12, 2010. | Decided May 21, 2010.

**Synopsis**

**Background:** Defendant was convicted in the Superior Court Department, Middlesex County, [Paul A. Chernoff](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0164466301&originatingDoc=Ie8fc4cb2643411dfaad3d35f6227d4a8&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), [Herman J. Smith, Jr.](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0225290301&originatingDoc=Ie8fc4cb2643411dfaad3d35f6227d4a8&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), JJ., of murder in the first degree on a theory of deliberate premeditation, assault with intent to commit murder, assault with a dangerous weapon, and unlawful possession of a firearm. Defendant appealed.

**Holdings:** The Supreme Judicial Court, [Cowin](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0304330001&originatingDoc=Ie8fc4cb2643411dfaad3d35f6227d4a8&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), J., held that:

[[1]](#bookmark=id.qbtyoq) defendant waived his [*Miranda*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131580&originatingDoc=Ie8fc4cb2643411dfaad3d35f6227d4a8&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) rights;

[[2]](#bookmark=id.3abhhcj) computer messages on social networking Internet site were not authenticated;

[[3]](#bookmark=id.1pgrrkc) admission of messages did not create a substantial likelihood of a miscarriage of justice;

[[4]](#bookmark=id.49gfa85) firearm was admissible; and

[[5]](#bookmark=id.2olpkfy) trial court was not partial to Commonwealth.

Affirmed in part, vacated in part, and remanded for resentencing.

\* \* \*

**Attorneys and Law Firms**

**\*\*1165** [David H. Mirsky](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0297968701&originatingDoc=Ie8fc4cb2643411dfaad3d35f6227d4a8&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) for the defendant.

Casey E. Silvia, Assistant District Attorney (Elizabeth Keeley, Assistant District Attorney, with him) for the Commonwealth.

Present: [MARSHALL](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0136194301&originatingDoc=Ie8fc4cb2643411dfaad3d35f6227d4a8&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), C.J., SPINA, COWIN, BOTSFORD, & [GANTS](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0331352501&originatingDoc=Ie8fc4cb2643411dfaad3d35f6227d4a8&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), JJ.

**Opinion**

[COWIN](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0304330001&originatingDoc=Ie8fc4cb2643411dfaad3d35f6227d4a8&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), J.

**\*858** The defendant was convicted by a jury in the Superior Court of murder in the first degree on a theory of deliberate premeditation. The victim was twenty-two year old Izaah Tucker. The defendant was convicted also of assaulting Michael Gemma with intent to commit murder; assaulting Gemma by means of a dangerous weapon; and unlawful possession of a firearm. The defendant appeals from the judgments. He contends that the motion judge (who was not the trial judge) improperly denied his motion to suppress his statements to the police because the Commonwealth failed to prove that the defendant properly waived his Miranda rights and because the Commonwealth did not prove that the subsequent statements were voluntary.

As to the trial, he claims two evidentiary errors: the admission of the contents of a “MySpace” computer message and the admission of a firearm described as the murder weapon. He asserts further that he was denied his right to confrontation; that **\*859** the judge was biased against him; and that his counsel was ineffective. Finally, he maintains that the sentences for assault with intent to murder and assault with a dangerous weapon exceed the statutory maximums. We agree that those sentences exceed the statutory maximums and must be vacated, and we therefore remand the case for resentencing. We reject the defendant’s other claims, and affirm his convictions. After review of the entire record pursuant to our responsibility under [G.L. c. 278, § 33E](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST278S33E&originatingDoc=Ie8fc4cb2643411dfaad3d35f6227d4a8&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), we decline to exercise our power to grant extraordinary relief.

1. *Facts.* We summarize briefly the facts the jury could have found, leaving most of the evidence for discussion in connection with the specific issues raised. In the early morning of October 1, 2005, the victim was shot to death in the Riverside Projects housing development in Medford. The Commonwealth’s case rested primarily on the testimony of two witnesses present at the shooting, Gemma and Larry Baker Powell. Powell testified after entering into a cooperation agreement with the Middlesex district attorney’s office. Corroboration testimony came from two women who were with the defendant and Powell that night.

Powell spent the night of the murder at the apartment where he and his fifteen year old girl friend, Ashlei Noyes, lived with her mother and younger sister. At one point during the evening, the defendant and his “date” appeared at the apartment. The defendant talked on a “direct **\*\*1166** connect” Nextel cellular telephone[1](#bookmark=id.13qzunr) with the victim about selling him a gun. The defendant pulled out a revolver at one point and began playing with it, putting bullets in the weapon and taking them out. He passed the gun to Powell.

Later, Powell and the defendant left to meet the victim. En route, the defendant told Powell that he planned to “pop” the victim. The victim appeared at the meeting place with a friend, Gemma. Gemma and Powell hung back while the defendant and the victim walked ahead to consummate the sale. Instead of selling the gun to the victim, the defendant shot him. The defendant ran back, began shooting at Gemma, and yelled to Powell to **\*860** empty the victim’s pockets. Powell did as he was told, taking just under $300 from the victim. Gemma raced from the scene, escaping the shots.

\* \* \*

3. *“MySpace” computer message.* At trial, Noyes testified to the content of messages she received at her account at MySpace, a social networking Web site, from a person she testified was the defendant’s brother. After this testimony was admitted without objection, the defendant moved to strike it. The trial judge denied the motion and denied a motion for mistrial related to the same issue.[9](#bookmark=id.3nqndbk) On appeal, the defendant maintains that the judge should have struck the testimony because the messages were not properly authenticated and were hearsay. He claims also that the judge’s failure to strike Noyes’s testimony on the subject constitutes reversible error. He states further that the messages should have been provided to him in discovery and that, because their delayed disclosure until the trial had begun prejudiced him, the judge erred by denying his motion for mistrial on this ground as well. He argues also that his attorney’s failure to object to the messages on hearsay grounds constitutes ineffective assistance of counsel. The Commonwealth **\*\*1172** asserts that the messages were **\*868** adequately authenticated and that they were being offered only to explain why Noyes appeared reluctant to testify and why she may have feigned a lack of memory.

As stated, Noyes was the girl friend of Powell, and the defendant spent the evening of the murder socializing with Noyes and Powell. Noyes testified to some of the defendant’s “direct connect” cellular telephone conversations with the victim. She stated also that the defendant pulled out a gun and displayed it to Powell, that he left the apartment with Powell and returned shortly thereafter, and that he took “a lot of money” from his pocket.

On the fourth day of the trial, Noyes testified that the defendant’s brother had contacted her four times on her MySpace account between February 9, 2007, and February 12, 2007, urging her not to testify against the defendant or to claim a lack of memory about the events at her apartment the night of the murder. Noyes printed the messages from her MySpace account at the court house on the morning of her testimony. The prosecutor provided them to defense counsel immediately after she received them from Noyes.

[**[10]**](#bookmark=id.3abhhcj) [**[11]**](#bookmark=id.22vxnjd) [**[12]**](#bookmark=id.i17xr6) a. *Authentication.* The defendant’s authentication argument is based on his claim that the Commonwealth did not “prove ... that the source of the alleged [MySpace] messages was Jesse Williams [the defendant’s brother].” An item offered in evidence must be “what its proponent represents it to be.” [*Commonwealth v. Nardi,* 452 Mass. 379, 396, 893 N.E.2d 1221 (2008)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2017125545&pubNum=578&originatingDoc=Ie8fc4cb2643411dfaad3d35f6227d4a8&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), quoting [*Commonwealth v. LaCorte,* 373 Mass. 700, 704, 369 N.E.2d 1006 (1977)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977130467&pubNum=578&originatingDoc=Ie8fc4cb2643411dfaad3d35f6227d4a8&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). Authenticity is usually proved by testimony of a witness either “(1) that the thing is what its proponent represents it to be, or (2) that circumstances exist which imply that the thing is what its proponent represents it to be.” [*Id.*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2017125545&originatingDoc=Ie8fc4cb2643411dfaad3d35f6227d4a8&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation))

Noyes testified that Williams was the defendant’s brother, that he had a picture of himself on his Myspace account, and that his MySpace name was “doit4it.” She testified that she had received the messages at issue from Williams, and the document (which had been marked for identification) indicated that those messages were in fact sent by the user with the screen name “doit4it” and bore a picture of Williams. Noyes testified that she responded to three of the messages, and that he sent **\*869** communications back to her; she did not respond to the fourth message. The contents of the messages demonstrate that the sender was familiar with Noyes and the pending criminal cases against the defendant and desired to keep her from testifying.

There was insufficient evidence to authenticate the messages and they should not have been admitted. Although it appears that the sender of the messages was using Williams’s MySpace Web “page,” there is no testimony (from Noyes or another) regarding how secure such a Web page is, who can access a Myspace Web page, whether codes are needed for such access, etc. Analogizing a Myspace Web page to a telephone call, a witness’s testimony that he or she has received an incoming call from a person claiming to be “A,” without more, is insufficient evidence to admit the call as a conversation with “A.” [*Commonwealth v. Hartford,* 346 Mass. 482, 488, 194 N.E.2d 401 (1963)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1963118341&pubNum=578&originatingDoc=Ie8fc4cb2643411dfaad3d35f6227d4a8&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). See also [*Commonwealth v. Howard,* 42 Mass.App.Ct. 322, 324, 677 N.E.2d 233 (1997)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997072932&pubNum=578&originatingDoc=Ie8fc4cb2643411dfaad3d35f6227d4a8&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). Here, while the foundational testimony established that the messages were **\*\*1173** sent by someone with access to Williams’s MySpace Web page, it did not identify the person who actually sent the communication. Nor was there expert testimony that no one other than Williams could communicate from that Web page. Testimony regarding the contents of the messages should not have been admitted.

[**[13]**](#bookmark=id.320vgez) An additional reason for excluding these messages is that they could have been viewed by the jury as evidence of consciousness of guilt. There was no basis for the jury to conclude that the statements were generated, adopted, or ratified by the defendant or, indeed, that they had any connection to him. Thus, the messages are irrelevant to consciousness of guilt and their admission was prejudicial to the defendant. [*Commonwealth v. Cobb,* 374 Mass. 514, 521, 373 N.E.2d 1145 (1978)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1978106764&pubNum=578&originatingDoc=Ie8fc4cb2643411dfaad3d35f6227d4a8&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)).

[**[14]**](#bookmark=id.1pgrrkc) We consider whether the error permitting the jury’s consideration of the improperly admitted messages created a substantial likelihood of a miscarriage of justice. [*Commonwealth v. Raymond,* 424 Mass. 382, 388, 676 N.E.2d 824 (1997)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997065275&pubNum=578&originatingDoc=Ie8fc4cb2643411dfaad3d35f6227d4a8&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). The content of the messages (suggesting that Noyes not testify or forget what happened) was, in our view, rendered insignificant by the testimony of two witnesses to the murder who identified the defendant as the shooter, and the corroborative testimony of those who were **\*870** with the defendant and Powell at Noyes’s apartment. This evidence was strengthened by the defendant’s inconsistent accounts of his whereabouts on the night of the murder and his activities thereafter. Given this testimony, the admission of the improperly authenticated contents of the MySpace messages did not create a substantial likelihood of a miscarriage of justice. See [*Commonwealth v. Johnson,* 429 Mass. 745, 749–750, 711 N.E.2d 578 (1999)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999146702&pubNum=578&originatingDoc=Ie8fc4cb2643411dfaad3d35f6227d4a8&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)).

The defendant claims that his counsel was ineffective for failing to object to the MySpace messages on hearsay grounds. Because we have already determined that admission of the messages did not create a substantial likelihood of a miscarriage of justice, the defendant’s claim of ineffective assistance of counsel likewise fails. See [*Commonwealth v. Wright,* 411 Mass. 678, 682, 584 N.E.2d 621 (1992)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992026092&pubNum=578&originatingDoc=Ie8fc4cb2643411dfaad3d35f6227d4a8&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)).

\* \* \*

9. *Conclusion.* The defendant’s convictions are affirmed. The sentences on the charges of assault with intent to murder and assault with a dangerous weapon are vacated, and those cases are remanded for resentencing.

*So ordered.*

**Parallel Citations**

926 N.E.2d 1162

|  |
| --- |
| Footnotes |
| [1](#bookmark=id.1t3h5sf) | A “direct connect” Nextel cellular telephone was described as one that works like a “walkie-talkie” by pressing a button and talking directly to a person. |
| [2](#bookmark=id.1h65qms) | [General Laws c. 276, § 33A](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST276S33A&originatingDoc=Ie8fc4cb2643411dfaad3d35f6227d4a8&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), provides: “The police official in charge of the station or other place of detention having a telephone wherein a person is held in custody, shall permit the use of the telephone, at the expense of the arrested person, for the purpose of allowing the arrested person to communicate with his family or friends, or to arrange for release on bail, or to engage the services of an attorney. Any such person shall be informed forthwith upon his arrival at such station or place of detention, of his right to so use the telephone, and such use shall be permitted within one hour thereafter.” |
| [3](#bookmark=id.415t9al) | The defendant claims also that the police should have informed him that failure to sign the forms did not mean that his statements would not be used against him. This argument was not raised below; thus, the motion judge made no finding directly on the point. However, it follows from the judge’s findings that such an explanation was not necessary. The judge concluded that the defendant was not unfamiliar with the criminal justice system and knew he did not have to speak with the police, and that the police informed him several times that anything he said could be used against him. |
| [4](#bookmark=id.2gb3jie) | Although the defendant asserts that his statement that he “probably didn’t have much to say” was “met with” Manning’s response that he “needed to” read and sign the forms, the order in which these statements were made is not clear from the record. |
| [5](#bookmark=id.vgdtq7) | The defendant claims that Manning “displayed his firearm” during the interview at the Boston police department. The only evidence on the subject is that the trooper was carrying his service firearm on his side, unremarkable for an officer on duty interviewing an individual arrested for murder in the first degree. The defendant also maintains that at this interview he was informed that he was under arrest for a murder in Medford and he was handcuffed by a leg iron or shackle to a bar or stand. If the defendant is suggesting that the situation was one in which his will was overborne, the motion judge found otherwise and his finding is supported by the evidence. |
| [6](#bookmark=id.3fg1ce0) | The defendant further contends that the original warnings given to him when he was arrested did not include the “basic Miranda right to have counsel present before any questioning took place.” The motion judge found that the Miranda warnings were “properly administered at all relevant times: when the defendant was arrested, twice at the Boston ‘courtesy’ booking....” His findings are supported by the evidence. In any event, even if the Miranda warnings were not properly administered when the defendant was arrested, no questioning occurred at that time, and the judge found that the Miranda warnings were again provided to the defendant at the Boston police station before any questioning occurred. |
| [7](#bookmark=id.1ulbmlt) | There is no suggestion in the record that the defendant was not informed of the right to make a telephone call within the statutory time. |
| [8](#bookmark=id.4ekz59m) | The defendant contends that his statements made at the Medford police station later in the morning were “tainted by the illegality” of the prior statements he had made and therefore should have been suppressed. He notes correctly that “a statement made following the violation of a suspect’s Miranda rights is tainted,” and the prosecution must “show more than the belated administration of Miranda warnings in order to dispel the taint.” [*Commonwealth v. Osachuk,* 418 Mass. 229, 237, 635 N.E.2d 1192 (1994)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1994149723&pubNum=578&originatingDoc=Ie8fc4cb2643411dfaad3d35f6227d4a8&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), quoting [*Commonwealth v. Smith,* 412 Mass. 823, 836, 593 N.E.2d 1288 (1992)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992106624&pubNum=578&originatingDoc=Ie8fc4cb2643411dfaad3d35f6227d4a8&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). The problem with the defendant’s argument here is that there was no prior illegality, and consequently no taint. |
| [9](#bookmark=id.2s8eyo1) | The trial judge did refuse to admit a printout of the messages. |
| [10](#bookmark=id.2tq9fhf) | Noyes did inform the Commonwealth prior to trial that the defendant’s brother had “contacted” her, and the prosecutor informed defense counsel that the defendant’s relatives had been communicating with witnesses in the case. The record does not indicate why the prosecutor did not then press Noyes for specifics regarding the communications. |
| [11](#bookmark=id.18vjpp8) | Evidence that the defendant had the means of committing the crime is admissible even in the absence of proof that the particular instrument was the one used to commit the crime. [*Commonwealth v. Ashman,* 430 Mass. 736, 744, 723 N.E.2d 510 (2000)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000050355&pubNum=578&originatingDoc=Ie8fc4cb2643411dfaad3d35f6227d4a8&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). |
| [12](#bookmark=id.3sv78d1) | The defendant’s claim here concerns two separate Suffolk County drug cases. |

|  |  |
| --- | --- |
| **End of Document** | © 2015 Thomson Reuters. No claim to original U.S. Government Works. |

78 Mass.App.Ct. 671

Appeals Court of Massachusetts,

Plymouth.

COMMONWEALTH

v.

Jeremy M. AMARAL.

09–P–2284. | Argued Nov. 4, 2010. | Decided Jan. 26, 2011.

**Synopsis**

**Background:** Defendant was convicted in the District Court Department, Plymouth County, [Julie J. Bernard](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0258149601&originatingDoc=I85d95379289711e0852cd4369a8093f1&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Keycite)), J., of attempted rape of a child and solicitation of a prostitute. Defendant appealed.

**Holdings:** The Appeals Court, [Kantrowitz](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0108881201&originatingDoc=I85d95379289711e0852cd4369a8093f1&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Keycite)), J., held that:

[[1]](#bookmark=id.280hiku) document provided to link defendant to e-mail address was admissible under business records exception to hearsay rule;

[[2]](#bookmark=id.n5rssn) e-mail communications between defendant and officer posing as fifteen-year-old prostitute were properly authenticated; and

[[3]](#bookmark=id.375fbgg) best evidence rule did not require that servers on which company providing web-based e-mail services stored its data be admitted into evidence to prove the content of e-mail communications.

Affirmed.

**Attorneys and Law Firms**

**\*\*1144** [Thomas D. Frothingham](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0485125901&originatingDoc=I85d95379289711e0852cd4369a8093f1&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Keycite)) for the defendant.

Christine M. Kiggen, Assistant District Attorney, for the Commonwealth.

Present: DUFFLY, KANTROWITZ, & [MILKEY](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0260865101&originatingDoc=I85d95379289711e0852cd4369a8093f1&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Keycite)), JJ.

**Opinion**

[KANTROWITZ](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0108881201&originatingDoc=I85d95379289711e0852cd4369a8093f1&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Keycite)), J.

**\*671** In this case, we examine the efforts of the law to keep abreast of technological advances. More specifically, the issue is whether the Commonwealth’s documentary evidence was sufficient to tie the defendant to an undercover officer posing as a fifteen year old prostitute. The primary documentary evidence against the defendant **\*\*1145** consisted of (1) a printed copy of an electronic document provided by Yahoo! Inc. (Yahoo), an Internet service provider, linking him to a Yahoo account; and **\*672** (2) electronic mail (e-mail) correspondence allegedly between him and the officer. Fatal to the defendant were the actions he took in conformity with the information contained in those e-mails.

The defendant, Jeremy M. Amaral, was convicted of (1) attempted rape of a child, [G.L. c. 274, § 6](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST274S6&originatingDoc=I85d95379289711e0852cd4369a8093f1&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Keycite)), and [G.L. c. 265, § 23](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST265S23&originatingDoc=I85d95379289711e0852cd4369a8093f1&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Keycite)); and (2) solicitation of a prostitute, [G.L. c. 272, § 8](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST272S8&originatingDoc=I85d95379289711e0852cd4369a8093f1&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Keycite)).[1](#bookmark=id.1maplo9) The defendant appeals, arguing that the above evidence was wrongfully admitted.[2](#bookmark=id.46ad4c2) We affirm.

*Facts.* During the summer of 2007, State police Trooper Peter A. Cooke[3](#bookmark=id.2lfnejv) began an undercover operation pretending to be a fifteen year old prostitute on Craigslist, an online bulletin board. Trooper Cooke used the screen name “ashley01\_10\_1992@yahoo.com” (Ashley) and posted a message—“young teen looking for a friend ... email me if u wanna talk”—in the “erotic services” section of Craigslist.

On August 30, 2007, rdwmercury2006@yahoo.com (Jeremy) contacted Ashley and stated, “My name is Jeremy, I’m 27 5′7″ 152 lbs.... [W]anna meet up?” The two thereafter engaged in numerous brief e-mail communications, amounting to thirty-seven pages of text. In one, Ashley told Jeremy, “I am a 15 year old female,” to which Jeremy responded, “Hey, I’m ok with it, but can I ask you why you wouldn’t mind being friends with a 27 year old?” Over the course of the communications, Ashley held herself out as a fifteen year old prostitute, and Jeremy sent a picture of himself.

On the morning of September 17, 2007, Jeremy sent an e-mail stating that he was interested in meeting with Ashley later that day and sent her his telephone number. In anticipation of the meeting, Trooper Cooke engaged the assistance of a female **\*673** trooper, Anna Brookes, to pretend to be Ashley and call the telephone number Jeremy had provided to arrange a meeting at a local strip mall, near a convenience store, at 5:00 P.M. Trooper Brookes called the telephone number and addressed the other party as Jeremy, who stated that he wanted oral sex for fifty dollars. The arrangements were made.

Prior to the meeting, Trooper Cooke learned that the telephone number he received from Jeremy was registered to a Jeremy Amaral. He also checked the records of the Registry of Motor Vehicles, which provided photographs of five or six individuals with the name Jeremy Amaral. Trooper Cooke compared the photograph sent from Jeremy to those received from the Registry: “at that point I ... still wasn’t 100 percent that I ... kn[e]w exactly who, but I had narrowed it down to a possible two.”

At approximately 5:00 P.M. on September 17, 2007, after setting up surveillance, Trooper Cooke observed the defendant arrive in a car and park where Ashley had **\*\*1146** earlier directed him. The defendant then exited his car and walked in front of the stores in the strip mall, going into a few establishments. Trooper Cooke then asked Trooper Brookes to again call the defendant. When she did, Trooper Cooke observed the defendant answer his telephone. At that point, the defendant was arrested.

[**[1]**](#bookmark=id.280hiku) *Discussion.* 1. *Exhibit A.* At trial, to demonstrate that rdwmercury2006 @yahoo.com was the defendant, the Commonwealth introduced, among other exhibits, exhibit A, which was a one-page document provided by Yahoo, labeled an account management tool, that indicated that the login name of rdwmercury2006 was registered to “Mr. Jeremy Amaral.” An affidavit from the custodian of records for Yahoo, John P. Hernandez, accompanied the document.[4](#bookmark=id.10kxoro) The defendant claims that the document is not a business record insofar as Yahoo “has no interest in the truth of the information it stores but simply records whatever the user enters.”

**\*674** Little need be said about business records other than that they are a well known exception to the hearsay rule. See [G.L. c. 233, §§ 78](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST233S78&originatingDoc=I85d95379289711e0852cd4369a8093f1&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Keycite)), and [79J](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST233S79J&originatingDoc=I85d95379289711e0852cd4369a8093f1&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Keycite)); [Mass. G. Evid. § 803(6)(A)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1093473&cite=MAREVIDS803&originatingDoc=I85d95379289711e0852cd4369a8093f1&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Keycite)) (2010). The foundational requirements of [§ 78](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST233S78&originatingDoc=I85d95379289711e0852cd4369a8093f1&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Keycite)) were met here,[5](#bookmark=id.3kkl7fh) and the document was properly admitted. Further, “[a] business record is admissible even when its preparer has relied on the statements of others because the personal knowledge of the entrant or maker affects only the weight of the record, not its admissibility.” Note to [Mass. G. Evid. § 803](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1093473&cite=MAREVIDS803&originatingDoc=I85d95379289711e0852cd4369a8093f1&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Keycite)), at 271. See [*Wingate v. Emery Air Freight Corp.,* 385 Mass. 402, 406, 432 N.E.2d 474 (1982)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1982110298&pubNum=0000578&originatingDoc=I85d95379289711e0852cd4369a8093f1&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Keycite)).

Although exhibit A was properly admitted, the next step is the evaluation of its weight. In this case, standing alone, the weight of exhibit A was relatively weak. “Mere identity of name is not sufficient to indicate an identity of person.” [*Commonwealth v. Koney,* 421 Mass. 295, 302, 657 N.E.2d 210 (1995)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995226035&pubNum=0000578&originatingDoc=I85d95379289711e0852cd4369a8093f1&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Keycite)). However, it gained strength when considered in conjunction with the other evidence.

[**[2]**](#bookmark=id.n5rssn) 2. *Exhibit G.* Exhibit G consisted of the thirty-seven pages of e-mail communications between Jeremy and Ashley printed from Trooper Cooke’s computer, in chronological order, starting from August 30, 2007. The defendant argues that they were not properly authenticated and did not conform to the best evidence rule.

[**[3]**](#bookmark=id.1zpvhna) a. *Authentication.* “An item offered in evidence must be what its proponent represents it to be. Authenticity is usually proved by testimony of a witness either (1) that the thing is what its proponent represents it to be, or (2) that circumstances exist which imply that the thing is what its proponent represents it to be.” [*Commonwealth v. Williams,* 456 Mass. 857, 868, 926 N.E.2d 1162 (2010)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2022085991&pubNum=0000578&originatingDoc=I85d95379289711e0852cd4369a8093f1&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Keycite)) (quotations and citations omitted). See [Mass. G. Evid. § 901(a)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1093473&cite=MAREVIDS901&originatingDoc=I85d95379289711e0852cd4369a8093f1&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Keycite)).

**\*\*1147** The actions of the defendant himself served to authenticate the e-mails. One e-mail indicated that Jeremy would be at a certain place at a certain time, and the defendant appeared at that place and time. In other e-mails, Jeremy provided his **\*675** telephone number and photograph. When the trooper called that number, the defendant immediately answered his telephone, and the photograph was a picture of the defendant. These actions served to confirm that the author of the e-mails and the defendant were one and the same. See [Mass. G. Evid. § 901(b)(6)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1093473&cite=MAREVIDS901&originatingDoc=I85d95379289711e0852cd4369a8093f1&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Keycite)).[6](#bookmark=id.4jpj0b3)

*Commonwealth v. Williams, supra,* involving a MySpace social networking Web site account, is not to the contrary. “Analogizing a MySpace Web page to a telephone call, a witness’s testimony that he or she has received an incoming call from a person claiming to be ‘A,’ *without more,* is insufficient evidence to admit the call as a conversation with ‘A’ ” (emphasis added). [*Id.* at 869, 926 N.E.2d 1162](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2022085991&pubNum=0000578&originatingDoc=I85d95379289711e0852cd4369a8093f1&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Keycite)). Here, as explained above, there was more.

[**[4]**](#bookmark=id.375fbgg) b. *Best evidence.* The best evidence rule provides that “[t]o prove the content of a writing or recording, but not a photograph, the original writing or recording is required, except as otherwise provided in these sections, or by common law or statute.” [Mass. G. Evid. § 1002](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1093473&cite=MAREVIDS1002&originatingDoc=I85d95379289711e0852cd4369a8093f1&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Keycite)).

To the extent that a best evidence objection was even made below, we find the argument unavailing. First, it appears, as before, that the defendant is primarily questioning the authenticity of the e-mails. Second, it is questionable whether the best evidence rule is even applicable here. Trooper Cooke printed copies of communications he received. That somehow the best evidence is found in the Yahoo servers is doubtful, as is the need to bring in the computer drive itself.[7](#bookmark=id.2yutaiw) Third, “[t]he significance of the best evidence rule has declined appreciably in recent decades. The rule predates the invention of photocopy machines and computers, and also the modern discovery rules.” Brodin & Avery, Massachusetts Evidence § 10.2, at 603 (8th ed.2007). Fourth, [G.L. c. 233, § 79K](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST233S79K&originatingDoc=I85d95379289711e0852cd4369a8093f1&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Keycite)), inserted by St.1994, c. 168, § 1, permits the admission of a duplicate “computer **\*676** data file or program file.” See [*Commonwealth v. Weichell,* 390 Mass. 62, 77, 453 N.E.2d 1038 (1983)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1983142529&pubNum=0000578&originatingDoc=I85d95379289711e0852cd4369a8093f1&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Keycite)) (“best evidence rule does not apply to photographs”); [*Commonwealth v. Leneski,* 66 Mass.App.Ct. 291, 294, 846 N.E.2d 1195 (2006)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2009149525&pubNum=0000578&originatingDoc=I85d95379289711e0852cd4369a8093f1&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Keycite)) (best evidence rule inapplicable to “digital images placed and stored in a computer hard drive and transferred to a compact disc”).

*Conclusion.* It appears patently clear that in the computer age, one may set up a totally fictitious e-mail account, falsely using the names and photographs of others. One could have set up an account improperly using the name and photograph of the defendant. Here, the Commonwealth painstakingly presented its case, introducing a number of documentary exhibits, many of which used the name of the defendant. It was not, however, in this case at least, until the defendant appeared as planned in the e-mail communications, expecting to meet and have sex with a fifteen year old prostitute, that his guilt was established. **\*\*1148** [8](#bookmark=id.1e03kqp)

*Judgments affirmed.*

**Parallel Citations**

941 N.E.2d 1143

|  |
| --- |
| Footnotes |
| [1](#bookmark=id.2bn6wsx) | The defendant was found not guilty of a third charge, enticing a child under the age of sixteen to engage in prostitution, [G.L. c. 265, § 26C(*b* )](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST265S26C&originatingDoc=I85d95379289711e0852cd4369a8093f1&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Keycite)). |
| [2](#bookmark=id.qsh70q) | The defendant also claims error in the jury instructions. Read in their entirety, see [*Commonwealth v. Glacken,* 451 Mass. 163, 168–169, 883 N.E.2d 1228 (2008)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2015773950&pubNum=0000578&originatingDoc=I85d95379289711e0852cd4369a8093f1&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Keycite)), the instructions adequately conveyed to the jury the need to find that the fictitious female was under the age of sixteen. Additionally, her age was never an issue at trial. See [*Commonwealth v. Gagnon,* 430 Mass. 348, 350, 718 N.E.2d 1254 (1999)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999247918&pubNum=0000578&originatingDoc=I85d95379289711e0852cd4369a8093f1&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Keycite)). |
| [3](#bookmark=id.3as4poj) | Trooper Cooke has conducted over 100 undercover investigations wherein he posed as a thirteen, fourteen, or fifteen year old girl to apprehend adults who approach and solicit underage children online. |
| [4](#bookmark=id.147n2zr) | The affidavit, among other things, stated that “Yahoo! servers record this data automatically at the time, or reasonably soon after, it is entered or transmitted, and this data is kept in the course of this regularly conducted activity and was made by regularly conducted activity as a regular practice. Yahoo! provides most of its services to its subscribers free of charge. As such, Yahoo! does not collect billing information or verified personal information from the majority of our users.” |
| [5](#bookmark=id.23ckvvd) | The requirements for a business record are that (i) it was made in good faith, (ii) “it was made in the regular course of business,” (iii) it was made before the criminal proceeding in which it was offered, and (iv) “it was the regular course of such business to make such ... record at the time of such act, transaction, occurrence, or event, or within a reasonable time thereafter.” [Mass. G. Evid. § 803(6)(A)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1093473&cite=MAREVIDS803&originatingDoc=I85d95379289711e0852cd4369a8093f1&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Keycite)). |
| [6](#bookmark=id.2grqrue) | [Section 901 of Mass. G. Evid](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1093473&cite=MAREVIDS901&originatingDoc=I85d95379289711e0852cd4369a8093f1&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Keycite)). provides as follows: “(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this section: ... (6) Telephone conversations. A telephone conversation, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if, (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called....” |
| [7](#bookmark=id.3fwokq0) | It is possible that in some instances there might be such a need. |
| [8](#bookmark=id.2u6wntf) | We do not intimate that a meeting is necessary in every such case. Each case rises and falls on its own unique set of facts. |

|  |  |
| --- | --- |
| **End of Document** | © 2015 Thomson Reuters. No claim to original U.S. Government Works. |

460 Mass. 535

Supreme Judicial Court of Massachusetts,

Suffolk.

COMMONWEALTH

v.

SINY VAN TRAN (and thirteen companion cases[1](#bookmark=id.3xzr3ei)).

SJC–10425. | Argued Feb. 11, 2011. | Decided Sept. 14, 2011.

**Synopsis**

**Background:** Defendant in first-degree murder prosecution moved to suppress a statement made to police. The Superior Court Department, Suffolk County, [Patrick F. Brady](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0217933801&originatingDoc=Ie65cce49ddd111e08b448cf533780ea2&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)), J., denied motion. Thereafter, that defendant and another defendant were convicted at joint jury trial in the Superior Court Department, Stephen E. Neel, J., of five counts of first-degree murder, and each defendant received five consecutive terms of life imprisonment. Defendants appealed.

**Holdings:** The Supreme Judicial Court, [Cordy](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0165879401&originatingDoc=Ie65cce49ddd111e08b448cf533780ea2&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)), J., held that:

[[1]](#bookmark=id.2d51dmb) defendants did not have mutually antagonistic and irreconcilable defenses, in context of motions for severance;

[[2]](#bookmark=id.sabnu4) passenger manifest and ticket inquiry containing names corresponding to those of defendants and a third, unapprehended suspect were sufficiently authenticated with respect to a flight to Hong Kong less than three weeks after charged murders;

[[3]](#bookmark=id.3c9z6hx) statements to airline agent by purchasers of airline tickets, giving names corresponding to those of two defendants and a third, unapprehended suspects, were not “hearsay” as admitted in present case;

[[4]](#bookmark=id.1rf9gpq) passenger manifest and ticket inquiry were not “testimonial” under Confrontation Clause;

[[5]](#bookmark=id.4bewzdj) temporal nexus between murders and defendants’ alleged flight to Hong Kong less than three weeks later supported instruction on consciousness of guilt;

[[6]](#bookmark=id.2qk79lc) prosecutor’s opening statement and closing argument did not violate defendant’s due process right to a fair trial;

[[7]](#bookmark=id.15phjt5) one defendant’s incriminating statement to police was voluntary; and

[[8]](#bookmark=id.3pp52gy) exceptional circumstances applied to one defendant so as to toll six-hour period under *Rosario* rule that automatically excludes inculpatory statements made over six hours after arrest and prior to arraignment.

Affirmed.

**Attorneys and Law Firms**

**\*\*145** [Robert F. Shaw, Jr.](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0261457801&originatingDoc=Ie65cce49ddd111e08b448cf533780ea2&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)), Brighton, for Nam The Tham.

[Janet H. Pumphrey](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0418756201&originatingDoc=Ie65cce49ddd111e08b448cf533780ea2&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)), Boston, for Siny Van Tran.

David D. McGowan, Assistant District Attorney, for the Commonwealth.

Present: SPINA, CORDY, BOTSFORD, GANTS, & [DUFFLY](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0108959301&originatingDoc=Ie65cce49ddd111e08b448cf533780ea2&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)), JJ.

**Opinion**

[CORDY](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0165879401&originatingDoc=Ie65cce49ddd111e08b448cf533780ea2&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)), J.

**\*536** In the early morning hours of January 12, 1991, six men were shot execution-style in the basement of an illegal gambling parlor in the Chinatown section of Boston. Five of those men—Man Cheung, Van Tran,[2](#bookmark=id.24ufcor) Chung Wah Son, David Quang Lam, and Cuong Khand Luu—died from gunshot wounds to the head. A sixth man, Pak Wing Lee, survived and testified at the trial.

After the shootings, arrest warrants were issued for the defendants, Siny Van Tran (Tran) and Nam The Tham (Tham), but by that time they had already left the United States. In 1999, Tran was arrested in China. Tham was arrested the following year, also in China. A grand jury **\*\*146** indicted both defendants in 1999, **\*537** and in December, 2001, they were extradited from Hong Kong. At a joint trial, the defendants were convicted on five charges of murder in the first degree on theories of deliberate premeditation and extreme atrocity or cruelty. Each defendant was sentenced to five consecutive terms of life imprisonment.[3](#bookmark=id.jzpmwk) A third man alleged to have participated in the murders, Hung Tien Pham, has not been apprehended.

On appeal, the defendants assert several claims of error. Tran argues that the judge erred in denying their motions for severance where they presented mutually antagonistic defenses. Both defendants further contend that airline records that listed both of their names, and that of Hung Tien Pham, as ticketed passengers on a flight to Hong Kong departing three weeks after the murders, were improperly authenticated, constituted inadmissible hearsay, and provided an insufficient basis to justify the judge’s consciousness of guilt instruction to the jury. They also argue that the prosecutor impermissibly vouched for the credibility of witnesses, argued facts that were not in evidence, and appealed to sympathy and emotion in his opening statement and closing summation. In addition, Tran argues that an inculpatory statement he made to Boston police detectives more than six hours after his arrest should have been suppressed because (1) he did not voluntarily and intelligently waive the constitutional rights afforded by [*Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131580&pubNum=0000708&originatingDoc=Ie65cce49ddd111e08b448cf533780ea2&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)); (2) his statement was not a free and voluntary act; and (3) he received a defective warning, through an interpreter, of his right to a prompt arraignment under [*Commonwealth v. Rosario,* 422 Mass. 48, 661 N.E.2d 71 (1996)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1996051270&pubNum=0000578&originatingDoc=Ie65cce49ddd111e08b448cf533780ea2&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)).

For these reasons, the defendants request that we reverse their convictions and grant them new trials. We affirm the convictions, and decline to grant relief under [G.L. c. 278, § 33E](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST278S33E&originatingDoc=Ie65cce49ddd111e08b448cf533780ea2&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)).

1. *The facts.* The jury could have found the following facts **\*538** based on the testimony of the survivor, Pak Wing Lee (Lee); the testimony of the proprietor of the gambling house, Yu Man Young (Young); and on other evidence adduced at trial. We recite certain facts as they become relevant to the issues raised.

In the basement of the building at 85 Tyler Street in Chinatown, Young ran what witnesses interchangeably called a “gambling house” or a “social club.” There were card tables set out for men to play Mahjong, and Young provided tea and cigarettes. The gambling house was not open to the public, and an ornamental grate at the street level was kept locked at all times. There was a doorbell at the street level, and when it was rung, Young would view a closed-circuit video monitor trained on the front grate. If he recognized the person seeking entry, he or a doorman would allow him or her inside.[4](#bookmark=id.33zd5kd)

At approximately midnight on January 12, 1991, Young arrived at the gambling house.[5](#bookmark=id.1j4nfs6) One of the victims, Chung Wah **\*\*147** Son, was working as the doorman that evening. Three other victims, Cuong Khand Luu, Man Cheung, and Van Tran, were playing cards with two men, known only as “Ah B” and “Tong Dung.”

At approximately 2 A.M., Lee arrived. He brought cash that he owed to Young’s father for a gambling debt, and he stayed to gamble on a card game called “Cho Dai Dee,” or “Chase the Deuce.”[6](#bookmark=id.434ayfz) Approximately thirty minutes later, Tran entered the gambling house with the fifth victim, David Quang Lam. They had been drinking together at The Naked I nightclub. Soon after, Tran left by himself, returned to the gambling house again, and then left a second time.

Tran returned once more, this time with Tham and Hung Tien Pham. All three had guns. Tham carried a silver .38 caliber revolver, and Hung Tien Pham, a black .380 caliber semiautomatic **\*539** handgun.[7](#bookmark=id.2i9l8ns) Either Tran or Tham told everyone not to move and to kneel down.[8](#bookmark=id.xevivl) Lee dropped to his knees, placed his hands behind his head and bowed his head toward the ground. Cuong Khand Luu and Man Cheung knelt on the floor with their hands behind their heads. Van Tran remained seated and, laid his head on the Mahjong table. Ah B hid under the table. David Quang Lam remained standing.

Young saw Tham shoot Chung Wah Son as soon as he opened the door. Lee saw Tham shoot Man Cheung, and then “did not dare to look” anymore. Hung Tien Pham shot Cuong Khand Luu multiple times in the head. Neither Lee nor Young saw who shot Van Tran or David Quang Lam, but when the sound of gunshots ceased, both lay dead.

At this point, Lee heard Young say, “Hung [Tien Pham], no, no. Doesn’t matter how much money you want, I’ll give it to you. If you want money, you want all, I give you all.” Hung Tien Pham said, “I can spare your life.”[9](#bookmark=id.3hej1je) Ah B was kneeling on the ground next to Lee also pleading for his life. Then, Lee felt Hung Tien Pham place a gun to the back of his head. Lee pleaded with him not to fire, but Lee heard a bang, and then nothing.

After Lee was shot, Tran, Tham, and Hung Tien Pham, along with Young and Ah B, left through the front entrance, and Young locked the front grate behind them. They all ran in different directions.

At approximately 4 A.M., Lee regained consciousness. He crawled out the back **\*\*148** door of the gambling house, and outside to a second locked grate, where he shouted for help. Harold “Bud” Farnsworth, a security guard at New England Medical Center, was on a break outside when a young couple told him a **\*540** man was lying on the ground across the street. Farnsworth ran across to the rear of the gambling house. Lee was leaning on the locked grate, moaning and bleeding from his head. Farnsworth flagged down a police vehicle and two police officers approached Lee, who could not speak but made a shooting gesture with his index finger and thumb. Farnsworth and the police officers pried open the locked rear grate with a tire iron, entered the gambling house and saw “dead people all over the place.” The victims all had been shot in the head.[10](#bookmark=id.1wjtbr7)

Money and playing cards had been left on the tables and were strewn about the floor. Some card tables were overturned. A cellular telephone was on the floor. A silver .38 caliber revolver was on one table. A black .380 caliber semiautomatic handgun was on the floor, underneath a table and behind a chair. Shell casings, projectiles, and live rounds of ammunition were all over the floor. A forensics expert with the Boston police department concluded that the .38 caliber revolver had been fired five times, while the .380 caliber semiautomatic handgun had been fired four times, and three live rounds had been manually ejected. However, some of the shell casings and projectiles collected in evidence did not match either the .38 caliber revolver or the .380 caliber semiautomatic handgun, meaning that a third unrecovered firearm had been used. Some of the bullet fragments taken from the bodies of the victims were fired from this third unrecovered firearm.

On December 21, 2001, the defendants were flown to San Francisco and transferred to the custody of Joseph Tamuleviz, a special agent with the United States Drug Enforcement Agency; Kevin Constantine, an agent with the Federal Bureau of Investigation (FBI); another FBI agent; and a United States marshal. **\*541** The agents then transported the defendants to Boston with a layover in Washington, D.C. En route, Tamuleviz said that he told Tham: “[I]f he acted like a gentleman, I would treat him like a gentleman” Tamuleviz stated that Tham replied, in English: “I was there, they gave me a gun, but I didn’t kill anybody.”[11](#bookmark=id.4gjguf0)

The next day, after arriving at Logan Airport and spending the night in a holding cell at a police station, Tran made a statement to Boston police detectives in which he explained, inter alia, that he arrived at the gambling house with David Quang Lam and left between 3 A.M. and 4 A.M. to look for cocaine. He said he had returned to the gambling house when **\*\*149** Hung Tien Pham and another man came in and began shooting. He said he escaped by running outside and then took a bus to Atlantic City “to gamble and to have fun.” Thereafter, he traveled to Philadelphia and from there flew to Hong Kong on a passport issued in the name of Wah Tran. Before his arrest, he was living in the Quangxi province of China.

\*\*\*

**\*\*151** 3. *Admission of airline records.* At trial, two airline documents **\*544** were admitted in evidence to reflect that ticketed passengers flying under the names Wah Tran (the name on the passport belonging to Siny Van Tran), Nam The Tham, and Hung Tien Pham boarded a flight from John F. Kennedy Airport in New York City to Norita, Japan, and continuing to Hong Kong on February 1, 1991—less than three weeks after the murders. The Commonwealth offered the documents under the business records statute, [G.L. c. 233, § 78](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST233S78&originatingDoc=Ie65cce49ddd111e08b448cf533780ea2&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)), as circumstantial evidence of the defendants’ consciousness of guilt.

One of these documents was a photocopy of a one-page portion of a United Airlines passenger manifest for flight 801 departing from New York City to Norita. A passenger manifest is a report that lists all passengers on a given flight and their corresponding seat numbers. It is created for the pilot and flight crew just prior to takeoff. The manifest lists “Tran/Wah Mr.” in seat 53F and “Tham/Nam The Mr.” in seat 46J, with both passengers ticketed for connecting flight 831 to Hong Kong. An identical “group code” appears next to both of their names, denominating that they purchased tickets together and were traveling in the same party. A passenger under the name “Pham/Hung Tien Mr.” appears on the manifest assigned to seat 45H, also connecting to flight 831 bound for Hong Kong.

The second admitted document was a so-called “ticket inquiry,” which lists a variety of information associated with any ticket purchased for a United Airlines flight. The ticket inquiry identified three tickets under the names “Tham/Nam The Mr.,” “Tran/Wah Mr.,” and “Pham/Hung Tien Mr.,” all sold on January 30, 1991, with consecutive ticket identification numbers, meaning that the airline issued them one after the other.[14](#bookmark=id.2vor4mt) The defendants contend that neither document should have been **\*545** admitted because they were not properly authenticated and contained inadmissible “totem pole” hearsay. They also contend that the admission of the documents violated their constitutional right of confrontation.

[**[11]**](#bookmark=id.sabnu4) a. *Authentication.*[15](#bookmark=id.1au1eum) An employee at United Airlines provided the passenger manifest and ticket inquiry to Boston police detectives on February 21, 1991. The documents were admitted through the testimony of David Contarino, the business manager of United Airlines in Boston. Contarino was “[s]econd in charge” of the airline’s financial operations at Logan Airport at the time of trial. He had worked at United Airlines since 1999, when he started as a “gate agent,” processing tickets for passengers boarding outbound flights.

He testified that based on his experience, he knew that the passenger manifests for all flights were created by computer software called “Apollo,” which is managed by a third-party vendor but designed exclusively for United Airlines. **\*\*152** The appearance of the manifest, other than slight variations in font type, and the data it contained were identical to the passenger manifests produced by the “Apollo” software used by United Airlines throughout his employment there. Specifically, he recognized the passenger manifest to be authentic based on certain coding data, such as the unique “016” designator number used to signify United Airlines as the carrier of flight 801; the designation “M” next to some passenger names, which United Airlines still internally used to identify passengers booking tickets under a “frequent flyer” number; and meal code abbreviations, such as “KSML” indicating that a passenger requested a kosher meal. He testified that flight 801 was still the designation for United Airline’s international route from John F. Kennedy airport to Norita, Japan.

Contarino also testified that based on his experience, he knew ticket inquiries to be stored in an electronic database in an “old **\*546** fashioned mainframe computer” in Elk Grove Village, Illinois. The ticket inquiries corresponding to the names Tran, Tham, and Hung Tien Pham for flight 801 contained some of the same unique codes as the passenger manifest and were nearly identical in appearance to ticket inquiries used by United Airlines at the time of trial. Contarino testified that he had examined hundreds of passenger manifests and ticket inquiries.

The defendants argue that Contarino did not lay an adequate foundation to authenticate the photocopied airline documents, and thus, it was error for the judge to admit them. They note that Contarino started working at United Airlines more than eight years after the passenger manifest and ticket inquiries were produced, and they contend that the law does not permit authentication of documentary evidence where the foundation offered is that, in form alone, the document is similar in appearance to records with which the witness expressed familiarity. See [*Commonwealth v. LaCorte,* 373 Mass. 700, 704, 369 N.E.2d 1006 (1977)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977130467&pubNum=0000578&originatingDoc=Ie65cce49ddd111e08b448cf533780ea2&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)). The documents were not originals, not produced by the witness laying their foundation, and of unknown origin. In the case of the passenger manifest, only a partial reproduction of the complete document, which would have been approximately ten pages long, was provided.

[**[12]**](#bookmark=id.3utoxif) The requirement of authentication as a condition precedent to admissibility of real evidence is satisfied by a foundation sufficient to support a finding that the item in question is what its proponent claims it to be. [Mass. G. Evid. § 901(a)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1093473&cite=MAREVIDS901&originatingDoc=Ie65cce49ddd111e08b448cf533780ea2&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) (2011). See *Commonwealth v. LaCorte, supra;* M.S. Brodin & M. Avery, Massachusetts Evidence § 9.2, at 580 (8th ed. 2007). See also Fed.R.Evid. § 901(a) (2010) (same). Evidence may be authenticated by circumstantial evidence alone, including its “[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics” Mass. G. Evid., [*supra* at § 901(b)(1), (4)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1093473&cite=MAREVIDS901&originatingDoc=Ie65cce49ddd111e08b448cf533780ea2&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)). Fed.R.Evid. § 901(b)(1), (4) (2010). A proponent adequately lays the foundation for admission when a preponderance of the evidence demonstrates that the item is authentic. See *Commonwealth v. LaCorte, supra;* [*United States v. Safavian,* 435 F.Supp.2d 36, 38 (D.D.C.2006)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2009214669&pubNum=0004637&originatingDoc=Ie65cce49ddd111e08b448cf533780ea2&refType=RP&fi=co_pp_sp_4637_38&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)#co_pp_sp_4637_38).

Here, the jury could rationally have concluded, applying a preponderance of the evidence standard, that the documents **\*547** were authentic. See *id.* Both the passenger manifest and the ticket inquiry displayed several distinctive internal codes used only by United Airlines. Contarino recognized both airline documents as nearly identical in appearance to those used by United Airlines at the time of trial. Moreover, Tran told police that he flew to Hong **\*\*153** Kong in 1991 (after traveling to Atlantic City and Philadelphia) on a passport issued to Wah Tran, providing further circumstantial evidence of the authenticity of the documents. There was no error in the trial judge’s ruling that the Commonwealth laid a proper foundation for their admission. See *id.;* Mass. G. Evid., [*supra* at § 901(b)(1), (4)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1093473&cite=MAREVIDS901&originatingDoc=Ie65cce49ddd111e08b448cf533780ea2&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)).

\*\*\*

*Judgments affirmed.*

**Parallel Citations**

953 N.E.2d 139

|  |
| --- |
| Footnotes |
| [1](#bookmark=id.19c6y18) | Six against Siny Van Tran and seven against Nam The Tham (Tham). |
| [2](#bookmark=id.111kx3o) | This victim will be referred to as Van Tran to avoid confusion with the defendant, Siny Van Tran (Tran). |
| [3](#bookmark=id.4k668n3) | Each defendant was also convicted on one indictment charging armed assault with intent to murder, [G.L. c. 265, § 18](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST265S18&originatingDoc=Ie65cce49ddd111e08b448cf533780ea2&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)), and one indictment charging unlawful carrying of a firearm without a license, [G.L. c. 269, § 10 (*a* )](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST269S10&originatingDoc=Ie65cce49ddd111e08b448cf533780ea2&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)). Both were sentenced to from nineteen and one-half to twenty years on the armed assault with intent to murder convictions, to be served on and after the fifth life sentence. They were also sentenced to from four and one-half to five years on the unlawful carrying of a firearm without a license convictions, to be served on and after the sentences imposed for armed assault with intent to murder. |
| [4](#bookmark=id.1egqt2p) | The surveillance system did not record. |
| [5](#bookmark=id.3ygebqi) | Yu Man Young (Young) was visited by Boston police investigators the day following the murders, and he falsely stated that he was not present in the gambling house the previous night. Shortly thereafter, he left Massachusetts and spent three months in Puerto Rico so police could not interview him. Subsequently, he failed to identify Tham in a photographic array. Counsel for Tran and Tham vigorously cross-examined Young concerning these and other issues pertaining to his credibility. |
| [6](#bookmark=id.sqyw64) | Defense counsel suggested at trial that Pak Wing Lee (Lee) was a debt collector for Young’s gambling outfit. Lee denied this, but admitted that two days prior to the shooting he had gone to Chen Kwong Market to collect a debt. |
| [7](#bookmark=id.1rvwp1q) | At trial, Lee testified that Tham was carrying the revolver, but in a pretrial statement to agents from the Federal Bureau of Investigation (FBI), he said that Tran carried the revolver. |
| [8](#bookmark=id.4bvk7pj) | In personal notes that he made to assist his recollection, Lee wrote that Tran entered the gambling house first and ordered everyone to the floor. On direct examination, he stated that Tham entered first and made the order. On cross-examination, he said Tran entered first, and explained the Cantonese translator made an error. Lee told the grand jury that the three shooters said nothing as they entered. Young testified that Tran said, “Robbery,” as they entered. |
| [9](#bookmark=id.2r0uhxc) | Young denied negotiating for his life and explained that he was not shot because the shooters ran out of bullets. |
| [10](#bookmark=id.25b2l0r) | Autopsies revealed that Man Cheung had been shot twice in the head, once at very close range. Van Tran was shot at “near contact” in the left side of his head. Chung Wah Son was shot twice in the head and once in his left hand. David Quang Lam was shot twice in the head and once in the chest. An examination of one of the head wounds indicated that the shooter held the gun barrel tightly to the side of his head. Cuong Khond Luu was shot twice in the head.A criminalist, qualified as an expert in the field of gunshot residue analysis, examined the particle density of lead and copper deposits on the collars of jackets worn by Lee and Man Cheung in relation to the holes torn by the bullets. Her analysis showed that both men were shot at very close range. |
| [11](#bookmark=id.34g0dwd) | On cross-examination, Joseph Tamuleviz admitted that although he filed a written report following the flight to Boston, he did not include any information about this inculpatory statement. Constantine testified that he did not hear the statement. |
| [12](#bookmark=id.29yz7q8) | Before trial, Tham also filed a motion to sever, arguing that severance was required under the constitutional principles espoused in [*Bruton v. United States,* 391 U.S. 123, 135–136, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1968131192&pubNum=0000708&originatingDoc=Ie65cce49ddd111e08b448cf533780ea2&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) (*Bruton* ) (defendant deprived of right of confrontation where facially incriminating confession of nontestifying codefendant introduced at joint trial). Tham argued that a portion of Tran’s statement to the Boston police to the effect that it “seem[ed]” to him like Tham was one of the shooters, along with Hung Tien Pham, was directly inculpatory of Tham, and justified severance under *Bruton.* The judge agreed, and ordered redaction of Tran’s statement to omit all references to Tham’s presence at the gambling house. [*Gray v. Maryland,* 523 U.S. 185, 192, 118 S.Ct. 1151, 140 L.Ed.2d 294 (1998)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1998065032&pubNum=0000708&originatingDoc=Ie65cce49ddd111e08b448cf533780ea2&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) (“Unless the prosecutor wishes to hold separate trials ... he must redact the confession to reduce significantly or to eliminate the special prejudice that the *Bruton* Court found”). Although not raised by Tham, we note, as did the motion judge, that the statement still contained references to the “gunmen,” meaning Hung Tien Pham and another unidentified shooter. These stray references created, if at all, inculpatory inferences of such a remote nature that they did not fall within the scope of *Bruton.* Cf. [*Commonwealth v. Blake,* 428 Mass. 57, 62 & n. 7, 696 N.E.2d 929 (1998)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1998153490&pubNum=0000578&originatingDoc=Ie65cce49ddd111e08b448cf533780ea2&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)). |
| [13](#bookmark=id.p49hy1) | Even if the defendants had presented mutually antagonistic defenses, which they did not, “no compelling prejudice” arose where the jury could rationally find each of the defendants guilty “on the basis of ... eyewitness testimony [and other evidence].” [*Commonwealth v. Stewart,* 450 Mass. 25, 31, 875 N.E.2d 846 (2007)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2013928366&pubNum=0000578&originatingDoc=Ie65cce49ddd111e08b448cf533780ea2&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)), quoting [*Commonwealth v. Cordeiro,* 401 Mass. 843, 853, 519 N.E.2d 1328 (1998)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988035478&pubNum=0000578&originatingDoc=Ie65cce49ddd111e08b448cf533780ea2&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)). Given the testimony of Lee and Young that both defendants entered the gambling house with guns drawn, and the ballistics evidence showing that three guns were fired, the jury could easily rely on evidence other than the inculpatory suggestions of one defendant against the other. See *Commonwealth v. Stewart, supra.* |
| [14](#bookmark=id.xvir7l) | The tickets issued to Tham and Tran were for flight 801 on January 31, 1991, continuing to Hong Kong, with an “open” return ticket, meaning the date was not set. The ticket inquiry further showed that these tickets had not been used on January 31, but rather on flight 801 on the following evening, February 1, 1991. The ticket issued to Hung Tien Pham was also for flight 801 connecting to Hong Kong on February 1, 1991. It too was booked with an “open” return. The ticket was collected at the gate. |
| [15](#bookmark=id.4h042r0) | Authentication is an issue separate from the question whether the documents qualify as admissible business records under [G.L. c. 233, § 78](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST233S78&originatingDoc=Ie65cce49ddd111e08b448cf533780ea2&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)). We discuss the business record issue in part 3(b), *infra.* |
| [16](#bookmark=id.393x0lu) | Contarino testified that in early 1991, very much unlike today, it was not routine for gate agents or airport security officers to verify the identities of ticketed passengers. |
| [17](#bookmark=id.1o97atn) | The single justice ruled that “[e]vidence may be admitted under the [business records] exception even if the information contained in the record originated with an outsider so long as the creator of the entry would normally have recorded such information as a matter of business duty or business routine.” |
| [18](#bookmark=id.488uthg) | In a criminal trial, the judge preliminarily must decide that these four factual conditions of admissibility have been satisfied, and then the questions of fact must be submitted to the jury. [G.L. c. 233, § 78](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST233S78&originatingDoc=Ie65cce49ddd111e08b448cf533780ea2&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)). They were properly submitted to the jury in this case. |
| [19](#bookmark=id.2ne53p9) | Contarino testified that, as a matter of course, United Airlines employees create a passenger manifest for every flight immediately prior to departure, and input the ticket inquiry information contemporaneous with purchase. In each instance the information is obtained by the employee directly from the passenger, who provides the information himself either at the boarding gate or at the time the ticket is purchased. As to the passenger manifest, gate agents are required to produce the document for the pilot and flight crew to facilitate response to emergencies and passenger requests. As to the ticket inquiry, employees retrieve inquiries from the database for billing purposes and to comport with Federal Aviation Administration regulations. |
| [20](#bookmark=id.12jfdx2) | Other courts have concluded that information provided by passengers and recorded in the business records of airlines similar to those at issue here is sufficiently trustworthy for admission, even before the rigors of identification checks that followed the attacks of September 11, 2001. See, e.g., [*United States v. Fujii,* 301 F.3d 535, 539 (7th Cir.2002)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2002527549&pubNum=0000506&originatingDoc=Ie65cce49ddd111e08b448cf533780ea2&refType=RP&fi=co_pp_sp_506_539&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)#co_pp_sp_506_539), quoting [Fed.R.Evid. 803(6)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000607&cite=USFRER803&originatingDoc=Ie65cce49ddd111e08b448cf533780ea2&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)#co_pp_1e9a0000fd6a3) (“check-in and reservation records were compiled and maintained in Korean Airlines’ ordinary course of business” admissible because “the source of information or the method or circumstances of preparation indicate ... trustworthiness”); [*United States v. Elder,* 90 F.3d 1110, 1121 (6th Cir.)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1996167322&pubNum=0000506&originatingDoc=Ie65cce49ddd111e08b448cf533780ea2&refType=RP&fi=co_pp_sp_506_1121&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)#co_pp_sp_506_1121), cert. denied sub nom. [*Andrews v. United States,* 519 U.S. 1016, 117 S.Ct. 529, 136 L.Ed.2d 415 (1996)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1996238395&pubNum=0000708&originatingDoc=Ie65cce49ddd111e08b448cf533780ea2&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)), and cert. denied sub nom. [*Elder v. United States,* 519 U.S. 1131, 117 S.Ct. 993, 136 L.Ed.2d 873 (1997)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997023818&pubNum=0000708&originatingDoc=Ie65cce49ddd111e08b448cf533780ea2&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) (Delta Airlines business records admissible demonstrating thirty-three round trips by defendant between Florida and Knoxville, Tennessee); [*United States v. Marin*, U.S. Ct. App., No. 95–1106, 1995 WL 595066 (2d Cir. Sept. 11, 1995)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995202620&pubNum=0000999&originatingDoc=Ie65cce49ddd111e08b448cf533780ea2&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) (“flight reservation record and a passenger manifest for the Viasa airlines flight” admitted through “employee of a firm that provides services to Viasa Airlines” admissible because documents bore “sufficient indicia of trustworthiness to be considered reliable”). |
| [21](#bookmark=id.3mj2wkv) | Such evidence could have included the defendants’ mutual flight from the scene, their absence from the community for the years prior to trial as noted by witnesses, Tham’s transport to Boston by Federal agents, and Tran’s statement that Hung Tien Pham was still at large in Asia. With respect to Tran, the jury could also consider his admission to the police that he had flown to Hong Kong shortly after the murders on a passport in the name of Wah Tran. |
| [22](#bookmark=id.21od6so) | The confrontation clause of the Sixth Amendment to the United States Constitution provides: “In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him....” |
| [23](#bookmark=id.gtnh0h) | The judge’s instruction conformed with the model formulation articulated in [*Commonwealth v. Toney,* 385 Mass. 575, 585–586 & n. 6, 433 N.E.2d 425 (1982)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1982114094&pubNum=0000578&originatingDoc=Ie65cce49ddd111e08b448cf533780ea2&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)). |
| [24](#bookmark=id.30tazoa) | Tham complains of two other statements in the prosecutor’s opening: “It is a story that has continued for some fifteen years in two continents.... That final chapter will be written by you, the fair and impartial members of this jury”; and “[Lee] cried for help praying that somebody would hear him. Those prayers were answered by Bud Farnsworth....” These statements, too, are properly classified as “excusable hyperbole” or flourishes of justifiable rhetoric. [*Commonwealth v. Silva,* 455 Mass. 503, 515, 918 N.E.2d 65 (2009)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2020769377&pubNum=0000578&originatingDoc=Ie65cce49ddd111e08b448cf533780ea2&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)).Tran also argues that the statement in the prosecutor’s closing, “[f]ive men were executed like animals,” was similarly inflammatory. Again, this lands on the “excusable” rhetoric side of the line. See *id.* |
| [25](#bookmark=id.1fyl9w3) | An interrogation of Tham earlier in the morning (which was not admitted in evidence at the trial) was beset by even more confusion due to many translation errors. Ultimately, the motion judge suppressed statements Tham made to police because the police did not scrupulously honor his unambiguous request for an attorney in violation of [*Edwards v. Arizona,* 451 U.S. 477, 487, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1981121563&pubNum=0000708&originatingDoc=Ie65cce49ddd111e08b448cf533780ea2&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)). |
| [26](#bookmark=id.3zy8sjw) | Chin’s Cantonese translations to Tran, and Tran’s actual responses in Cantonese, were translated into English by a language specialist working for the FBI. The jury were given a transcript with these certified translations, and also heard an audio recording. Where Chin’s translation departed from the certified translation on the transcript, the judge instructed the jury to follow the certified translation. |
| [27](#bookmark=id.2f3j2rp) | The motion judge reasoned: “Given that the defendant already expressed his willingness to waive his Miranda rights, what else, from his perspective, was he being asked to waive? ... [W]here the defendant could not have been brought before court until Monday at the earliest, the only rights the defendant was really being asked to waive were his Miranda rights.” |
| [28](#bookmark=id.u8tczi) | Our exclusionary rule for confessions made six hours after arrest, but before arraignment, is a minority position. See [*Commonwealth v. Perez,* 577 Pa. 360, 367–368, 845 A.2d 779 (2004)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2004251685&pubNum=0000162&originatingDoc=Ie65cce49ddd111e08b448cf533780ea2&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)). Most other jurisdictions have held that arraignment delay is a factor to be considered among others in determining the admissibility of a confession. See Annot., [Admissibility of Confession or Other Statement Made by Defendant as Affected by Delay in Arraignment,28 A.L.R.4th 1121 (1984 & Supp. 2011)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984027041&pubNum=0000849&originatingDoc=Ie65cce49ddd111e08b448cf533780ea2&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)). See, e.g., *Commonwealth v. Perez, supra.* See also [*People v. Thompson,* 27 Cal.3d 303, 329, 165 Cal.Rptr. 289, 611 P.2d 883 (1980)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1980114953&pubNum=0000661&originatingDoc=Ie65cce49ddd111e08b448cf533780ea2&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) (delay treated as only one factor to be considered in determining voluntariness); [*People v. Cipriano,* 431 Mich. 315, 334, 429 N.W.2d 781 (1988)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988125506&pubNum=0000595&originatingDoc=Ie65cce49ddd111e08b448cf533780ea2&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) (test is “whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made”); [*People v. Hopkins,* 58 N.Y.2d 1079, 1081, 462 N.Y.S.2d 639, 449 N.E.2d 419 (1983)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1983125708&pubNum=0000578&originatingDoc=Ie65cce49ddd111e08b448cf533780ea2&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) (delay in arraignment “but a factor” to consider on underlying voluntariness). |
| [29](#bookmark=id.3e8gvnb) | By ruling as we do, we in no way indorse a practice of tolling the six-hour window established in [*Commonwealth v. Rosario,* 422 Mass. 48, 661 N.E.2d 71 (1996)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1996051270&pubNum=0000578&originatingDoc=Ie65cce49ddd111e08b448cf533780ea2&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)), when individuals are arrested, in the ordinary course, late at night, and court is not in session the following day. It is the fair and inescapable inference that the *Rosario* court was well aware that its rule would necessitate late-hour interrogations where an individual is formally arrested in the evening or early morning. See [*Commonwealth v. Martinez,* 458 Mass. 684, 694–696, 940 N.E.2d 422 (2011)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2024395475&pubNum=0000578&originatingDoc=Ie65cce49ddd111e08b448cf533780ea2&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)). |

|  |  |
| --- | --- |
| **End of Document** | © 2015 Thomson Reuters. No claim to original U.S. Government Works. |

419 Md. 343

Court of Appeals of Maryland.

Antoine Levar GRIFFIN

v.

STATE of Maryland.

No. 74, Sept. Term, 2010. | April 28, 2011.

**Synopsis**

**Background:** Defendant was convicted in the Circuit Court, Cecil County, [Richard E. Jackson](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0277645601&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)), J., of second-degree murder, first-degree assault, and use of a handgun in the commission of a felony or crime of violence. The assault conviction merged into the murder conviction. Defendant appealed. The Court of Special Appeals affirmed, [192 Md.App. 518, 995 A.2d 791.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2022159240&pubNum=162&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)) Defendant petitioned for a writ of certiorari, and the stated filed a conditional cross petition. Both petitions were granted.

**Holdings:** The Court of Appeals, [Battaglia](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0166434701&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)), J., held that:

[[1]](#bookmark=id.1tdr5v4) the state did not sufficiently authenticate pages that allegedly were printed from defendant’s girlfriend’s profile on a social-networking website, and

[[2]](#bookmark=id.4ddeoix) error in trial court’s admission of the pages was reversible error.

Reversed and remanded within instructions.

[Harrell](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0172887401&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)), J., dissented and filed opinion in which [Murphy](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0249212401&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)), J., joined.

**Attorneys and Law Firms**

**\*\*416** Katherine P. Rasin, Asst. Public Defender ([Paul B. DeWolfe](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0276421001&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)), Public Defender, Baltimore, MD), on brief, for petitioner/cross-respondent.

[Robert Taylor, Jr.](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0255622801&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)), Asst. Atty. Gen. ([Douglas F. Gansler](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0317716501&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)), Atty. Gen. of Maryland, Baltimore, MD), on brief, for respondent/cross-petitioner.

Argued by [BELL](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0154320301&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)), C.J., [HARRELL](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0172887401&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)), [BATTAGLIA](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0166434701&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)), [GREENE](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0121256301&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)), [MURPHY](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0249212401&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)), [ADKINS](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153286701&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)) and [BARBERA](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0331192801&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)), JJ.

**Opinion**

[BATTAGLIA](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0166434701&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)), J.

**\*346** In this case, we are tasked with determining the appropriate way to authenticate, for evidential purposes, electronically stored information printed from a social **\*\*417** networking website,[1](#bookmark=id.2sioyqq) in particular, MySpace.[2](#bookmark=id.17nz8yj)

[**[1]**](#bookmark=id.3rnmrmc) Antoine Levar Griffin, Petitioner, seeks reversal of his convictions in the Circuit Court for Cecil County, contending that the trial judge abused his discretion in admitting, without proper authentication, what the State alleged were several pages printed from Griffin’s girlfriend’s MySpace profile.[3](#bookmark=id.26sx1u5) The Court of Special Appeals determined that the trial judge did not abuse his discretion, [*Griffin v. State,* 192 Md.App. 518, 995 A.2d 791 (2010)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2022159240&pubNum=162&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)), and we granted Griffin’s Petition for Writ of Certiorari, [415 Md. 607, 4 A.3d 512 (2010)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2023265570&pubNum=7691&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)), to consider the two questions, which we have rephrased:

1. Did the trial court err in admitting a page printed from a MySpace profile alleged to be that of Petitioner’s girlfriend? [[4](#bookmark=id.ly7c1y)]

**\*347** 2. Did the trial court err in allowing the prosecutor to define reasonable doubt incorrectly over defense objection, including saying “it means this, do you have a good reason to believe that somebody other than Mr. Griffin was the person that shot Darvell Guest ... I’m not asking you whether you can speculate and create some construct of hypothetical possibilities that would have somebody else be the shooter.... I’m asking you the question, do you have right now any reason, any rational reason to believe that somebody other than he was the shooter or gunman?” [[5](#bookmark=id.35xuupr)]

The State presented a conditional cross-petition, which we also granted, in which one question was posed:

1. Is Griffin’s challenge to the probative value of the evidence preserved for appellate review? [[6](#bookmark=id.1l354xk)]

**\*\*418** We shall hold that the pages allegedly printed from Griffin’s girlfriend’s MySpace profile were not properly authenticated pursuant to [Maryland Rule 5–901](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1006359&cite=MDRREVR5-901&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)),[7](#bookmark=id.452snld) and shall, therefore, reverse **\*348** the judgment of the Court of Special Appeals and remand the case for a new trial.

Griffin was charged in numerous counts with the shooting death, on April 24, 2005, of Darvell Guest at Ferrari’s Bar in Perryville, in Cecil County. During his trial, the State sought to introduce Griffin’s girlfriend’s, Jessica Barber’s, MySpace profile to demonstrate that, prior to trial, Ms. Barber had allegedly threatened another witness called by the State. The printed pages contained a MySpace profile in the name of “Sistasouljah,” describing a 23 year-old female from Port Deposit, listing her birthday as “10/02/1983” and containing a photograph of an embracing couple. The printed pages also contained the following blurb:

FREE BOOZY!!!! JUST REMEMBER SNITCHES GET STITCHES!! U KNOW WHO YOU ARE!!

When Ms. Barber had taken the stand after being called by the State, she was not questioned about the pages allegedly printed from her MySpace profile.

Instead, the State attempted to authenticate the pages, as belonging to Ms. Barber, through the testimony of Sergeant John Cook, the lead investigator in the case. Defense counsel objected to the admission of the pages allegedly printed from Ms. Barber’s MySpace profile, because the State could not sufficiently establish a “connection” between the profile and posting and Ms. Barber, and substantively, the State could not say with any certainty that the purported “threat” had any **\*349** impact on the witness’s testimony; the latter argument is not before us.

Defense counsel was permitted to voir dire Sergeant Cook, outside of the presence of the jury, as follows:

[Defense Counsel]: How do you know that this is her [MySpace] page?....

[Sergeant Cook]: Through the photograph of her and Boozy on the front, through the reference to Boozy, [ ] the reference [to] the children, and [ ] her birth date indicated on the form.

[Defense Counsel]: How do you know she sent it?

[Sergeant Cook]: I can’t say that.

[The Court]: I failed—I am sorry. I misrepresented. I failed to realize there is a photograph there. It’s in the block **\*\*419** that says “Sistasouljah,” and then there’s a photograph of a person that looks like Jessica Barber to me.

[Defense Counsel]: When was it sent?

[Sergeant Cook]: That is a MySpace page. That wasn’t particularly sent. That is on the web, and it’s accessible to whoever views MySpace. It is open to the public.

[Defense Counsel]: I understand that. When did it get posted?

[Sergeant Cook]: The print date on the form, printed on 12/05/06.

[The Court]: You can tell by looking at it because that’s when he went to it.

[Defense Counsel]: So that would have been after the first trial. So how could that possibly affect [the witness]? He said it was before the first trial.

[The Court]: On its face, there is no way that you can conclude that on its face this establishes anything in regard to [the witness]. What it’s being offered for, as I understand it, is corroboration, consistency that she’s making a statement in a public forum, “snitches get stitches.” And I guess the argument is going to be made that that’s consistent with what [the witness] said, that she threatened him.

**\*350** [Assistant State’s Attorney]: That’s correct.

[The Court]: It’s weak. I mean, there is no question it’s weak, but that’s what it is offered for.

The trial judge, thereafter, indicated that he would permit Sergeant Cook to testify in support of authentication of the redacted portion of the pages printed from MySpace, containing the photograph “of a person that looks like Jessica Barber” and the Petitioner, allegedly known as “Boozy,” adjacent to a description of the woman as a 23 year-old from Port Deposit, and the blurb, stating “FREE BOOZY!!!! JUST REMEMBER SNITCHES GET STITCHES!! U KNOW WHO YOU ARE!!”

In lieu of Sergeant Cook’s testimony, while maintaining his objection to the admissibility of the redacted MySpace page, defense counsel agreed to the following stipulation:

If asked, Sergeant Cook would testify that he went onto the Internet to the website known as MySpace.... [F]rom that site he downloaded some information of a posting that someone had put there.

That posting contains a photograph which the witness would say he recognizes as a photograph of Jessica ... Barber, who testified, ... that she is the defendant’s live-in fiance; and that it also contains a date of birth, to wit October 2nd, 1983, which the witness would testify is the date of birth that Jessica Barber gave as her date of birth.

When the exhibit, the download, comes to you, you are going to see that it has a great—that most of its content has been redacted; that is, blacked out. That’s because some of it, in my judgment, might tend to be inflammatory without proving anything one way or the other. There is one portion of it that will not be redacted when it comes to you, and this is the only portion of it which you should consider. And you certainly should not speculate as to what any of the redacted portions may be.

The portion that will not be redacted says, just remember snitches get stitches. You will see that. The phrase is, just remember snitches get stitches.... And ... the witness **\*351** would testify that the date it was retrieved was ... December 5, 2006.

Whether the MySpace printout represents that which it purports to be, not only a MySpace profile created by Ms. Barber, **\*\*420** but also upon which she had posted, “FREE BOOZY!!!! JUST REMEMBER SNITCHES GET STITCHES!! U KNOW WHO YOU ARE!!,” is the issue before us.

With respect to social networking websites in general, we have already had occasion, in [*Independent Newspapers, Inc. v. Brodie,* 407 Md. 415, 424 n. 3, 966 A.2d 432, 438 n. 3 (2009)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2018234652&pubNum=162&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&fi=co_pp_sp_162_438&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)#co_pp_sp_162_438), to describe those sites as “sophisticated tools of communication where the user voluntarily provides information that the user wants to share with others.”[8](#bookmark=id.2k82xt6) A number of social networking websites, such as MySpace, enable members “to create online ‘profiles,’ which are individual web pages on which members [can] post photographs, videos, and information about their lives and interests.” [*Doe v. MySpace, Inc.,* 474 F.Supp.2d 843, 845 (W.D.Tex.2007)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2011464764&pubNum=4637&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&fi=co_pp_sp_4637_845&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)#co_pp_sp_4637_845).

Anyone can create a MySpace profile at no cost, as long as that person has an email address and claims to be over the age of fourteen:

MySpace users create profiles by filling out questionnaire-like web forms. Users are then able to connect their profiles to those of other users and thereby form communities. MySpace profiles contain several informational sections, known as “blurbs.” These include two standard blurbs: “About Me” and “Who I’d Like to Meet.” Users may supplement those blurbs with additional sections about their interests, general additional details, and other personal information. MySpace profiles also incorporate several **\*352** multimedia features. For instance, users may post photos, music, videos, and web logs to their pages.

Richard M. Guo, [*Stranger Danger and the Online Social Network,* 23 Berkeley Tech. L.J. 617, 621 (2008)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0340524295&pubNum=111090&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=LR&fi=co_pp_sp_111090_621&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)#co_pp_sp_111090_621) (footnotes omitted). After a profile is established, the user may invite others to access her profile, as a “friend,” who if the user accepts the befriending, can access her profile pages without further ado:

Users establish virtual communities by linking their profiles in a process known as “friending” or “connecting.” One user requests to add another as a friend, and the recipient may either accept or reject the invitation. If the recipient accepts, the profiles are linked and the connected members are generally able to view one another’s online content without restriction. The network created by the linking process allows a user to chat with friends, display support for particular causes, “join interest groups dedicated to virtually any topic,” and otherwise “hang out.”

Nathan Petrashek, Comment, *The* [*Fourth Amendment and the Brave New World of Online Social Networking,* 93 Marq. L.Rev. 1495, 1499–1500 (2009–2010)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0356048451&pubNum=1186&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=LR&fi=co_pp_sp_1186_1499&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)#co_pp_sp_1186_1499) (footnotes omitted). Although a social networking site generally requires a unique username and password for the user to both establish a profile and access it, posting on the site by those that befriend the user does not. *See* Samantha L. Miller, Note, *The* [*Facebook Frontier: Responding to the Changing Face of Privacy on the Internet,* 97 Ky. L.J. 541, 544 (2008–2009)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0344291491&pubNum=1178&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=LR&fi=co_pp_sp_1178_544&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)#co_pp_sp_1178_544); Eric Danowitz, [*MySpace Invasion: Privacy Rights, Libel, and Liability,* 28 J. Juv. L. 30, 37 (2007)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0335578301&pubNum=101504&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=LR&fi=co_pp_sp_101504_37&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)#co_pp_sp_101504_37).

**\*\*421** The identity of who generated the profile may be confounding, because “a person observing the online profile of a user with whom the observer is unacquainted has no idea whether the profile is legitimate.” Petrashek, [93 Marq. L.Rev. at 1499 n. 16](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0356048451&pubNum=1186&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=LR&fi=co_pp_sp_1186_1499&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)#co_pp_sp_1186_1499). The concern arises because anyone can create a fictitious account and masquerade under another person’s name or can gain access to another’s account by obtaining the user’s username and password:

**\*353** Although it may seem that, as creators of our own online social networking profiles, we are able to construct our own online persona, this is not always the case. There is no law that prevents someone from establishing a fake account under another person’s name, so long as the purpose for doing so is not to deceive others and gain some advantage. Moreover, fragments of information, either crafted under our authority or fabricated by others, are available by performing a Google search ... forever. Thus, online social networking poses two threats: that information may be (1) available because of one’s own role as the creator of the content, or (2) generated by a third party, whether or not it is accurate.

David Hector Montes, *Living Our Lives Online: The Privacy Implications of Online Social Networking,* Journal of Law and Policy for the Information Society, Spring 2009, at 507, 508. For instance, in one circumstance, Sophos, a Boston-based Internet security company, created a profile for a toy frog named “Freddi Staur,” and nearly 200 Facebook[9](#bookmark=id.zdd80z) users **\*354** chose to add the frog as a “friend.” Miller, [97 Ky. L.J. at 542](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0344291491&pubNum=1178&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=LR&fi=co_pp_sp_1178_542&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)#co_pp_sp_1178_542).[10](#bookmark=id.3jd0qos)

The possibility for user abuse also exists on MySpace, as illustrated by [*United States v. Drew,* 259 F.R.D. 449 (D.C.D.Cal.2009)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2019772601&pubNum=344&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)), in which Lori Drew, a mother, was prosecuted under the Computer Fraud and **\*\*422** Abuse Act, [18 U.S.C. § 1030](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS1030&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)), for creating a MySpace profile for a fictitious 16 year-old male named “Josh Evans.” Drew had contacted a former friend of her daughter’s, Megan Meier, through the MySpace network, using the Josh Evans screen name or pseudonym, and began to “flirt with her over a number of days.” [*Id.* at 452.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2019772601&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)) Drew then had “Josh” inform Megan that he no longer “liked her” and that “the world would be a better place without her in it,” after which Megan killed herself. [*Id.*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2019772601&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)) Thus, the relative ease with which anyone can create fictional personas or gain unauthorized access to another user’s profile, with deleterious consequences, is the [*Drew*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2019772601&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)) lesson.

The potential for fabricating or tampering with electronically stored information on a social networking site, thus poses significant challenges from the standpoint of authentication of printouts of the site, as in the present case. Authentication, nevertheless, is generally governed by [Maryland Rule 5–901](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1006359&cite=MDRREVR5-901&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)), which provides:

(a) **General provision.** The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

**\*355** Potential methods of authentication are illustrated in [Rule 5–901(b)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1006359&cite=MDRREVR5-901&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)). The most germane to the present inquiry are [Rules 5–901(b)(1)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1006359&cite=MDRREVR5-901&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)) and [5–901(b)(4)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1006359&cite=MDRREVR5-901&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)), which state:

(b) **Illustrations.** By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this Rule:

(1) Testimony of witness with knowledge. Testimony of a witness with knowledge that the offered evidence is what it is claimed to be.[[11](#bookmark=id.1yib0wl)]

(4) Circumstantial evidence. Circumstantial evidence, such as appearance, contents, substance, internal patterns, location, or other distinctive characteristics, that the offered evidence is what it is claimed to be.

We and our colleagues on the Court of Special Appeals have had the opportunity to apply the tenets of [Rule 5–901(b)(4)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1006359&cite=MDRREVR5-901&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)) to a toxicology report, [*State v. Bryant,* 361 Md. 420, 761 A.2d 925 (2000)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000606505&pubNum=162&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)), to recordings from 911 emergency calls, [*Clark v. State,* 188 Md.App. 110, 981 A.2d 666 (2009)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2019945373&pubNum=162&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)), and to text messages received on the victim’s cellular phone, [*Dickens v. State,* 175 Md.App. 231, 927 A.2d 32 (2007)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2012600003&pubNum=162&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)), but neither we nor our appellate brethren heretofore has considered the Rule’s application to authenticate pages printed from a social networking site.

Rather, we turn for assistance to the discussion in [*Lorraine v. Markel American Insurance Co.,* 241 F.R.D. 534 (D.Md.2007)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2012167862&pubNum=344&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)), wherein Maryland’s own Magistrate Judge Paul W. **\*356** Grimm, a recognized authority on evidentiary issues concerning electronic evidence, outlined issues regarding authentication of electronically stored information, in e-mail, websites, digital photographs, computer-generated documents, **\*\*423** and internet postings, etc. with respect to [Rule 901 of the Federal Rules of Evidence](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1004365&cite=USFRER901&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)):

(a) **GENERAL PROVISION.** The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) **ILLUSTRATIONS.** By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) *Testimony of Witness With Knowledge.* Testimony that a matter is what it is claimed to be.

\* \* \*

(4) *Distinctive Characteristics and the Like.* Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

Regarding [Rule 901(a)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1004365&cite=USFRER901&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)), Judge Grimm iterated in [*Lorraine*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2012167862&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)) that the “requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims,” to insure trustworthiness. [*Id.* at 541–42.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2012167862&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)) Judge Grimm recognized that authenticating electronically stored information presents a myriad of concerns because “technology changes so rapidly” and is “often new to many judges.” [*Id.* at 544.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2012167862&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)) Moreover, the “complexity” or “novelty” of electronically stored information, with its potential for manipulation, requires greater scrutiny of “the foundational requirements” than letters or other paper records, to bolster reliability. [*Id.* at 543–44,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2012167862&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)) quoting Jack B. Weinstein & Margaret A. Berger, *Weinstein’s Federal Evidence* § 900.06[3] (Joseph M. McLaughlin ed., Matthew Bender 2d ed.1997).

[**[2]**](#bookmark=id.1tdr5v4) In the present case, Griffin argues that the State did not appropriately, for evidentiary purposes, authenticate the **\*357** pages allegedly printed from Jessica Barber’s MySpace profile, because the State failed to offer any extrinsic evidence describing MySpace, as well as indicating how Sergeant Cook obtained the pages in question and adequately linking both the profile and the “snitches get stitches” posting to Ms. Barber. The State counters that the photograph, personal information, and references to freeing “Boozy” were sufficient to enable the finder of fact to believe that the pages printed from MySpace were indeed Ms. Barber’s.

We agree with Griffin and disagree with the State regarding whether the trial judge abused his discretion in admitting the MySpace profile as appropriately authenticated, with Jessica Barber as its creator and user, as well as the author of the “snitches get stitches” posting, based upon the inadequate foundation laid. We differ from our colleagues on the Court of Special Appeals, who gave short shrift to the concern that “someone other than the alleged author may have accessed the account and posted the message in question.” [*Griffin,* 192 Md.App. at 542, 995 A.2d at 805.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2022159240&pubNum=162&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&fi=co_pp_sp_162_805&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)#co_pp_sp_162_805) While the intermediate appellate court determined that the pages allegedly printed from Ms. Barber’s MySpace profile contained sufficient indicia of reliability, because the printout “featured a photograph of Ms. Barber and [Petitioner] in an embrace,” and also contained the “user’s birth date and identified her boyfriend as ‘Boozy,’ ” the court failed to acknowledge the possibility or likelihood that another user could have created the profile in issue or authored the “snitches get stitches” posting. [*Id.* at 543, 995 A.2d at 806](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2022159240&pubNum=162&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&fi=co_pp_sp_162_806&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)#co_pp_sp_162_806).

We agree with Griffin that the trial judge abused his discretion in admitting **\*\*424** the MySpace evidence pursuant to [Rule 5–901(b)(4)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1006359&cite=MDRREVR5-901&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)), because the picture of Ms. Barber, coupled with her birth date and location, were not sufficient “distinctive characteristics” on a MySpace profile to authenticate its printout, given the prospect that someone other than Ms. Barber could have not only created the site, but also posted the “snitches get stitches” comment. The potential for abuse and manipulation of a social networking site by someone other than its purported creator and/or user leads to our conclusion **\*358** that a printout of an image from such a site requires a greater degree of authentication than merely identifying the date of birth of the creator and her visage in a photograph on the site in order to reflect that Ms. Barber was its creator and the author of the “snitches get stitches” language.[12](#bookmark=id.4ihyjke)

In so holding, we recognize that other courts, called upon to consider authentication of electronically stored information on social networking sites, have suggested greater scrutiny because of the heightened possibility for manipulation by other than the true user or poster. In [*Commonwealth v. Williams,* 456 Mass. 857, 926 N.E.2d 1162 (2010)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2022085991&pubNum=578&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)), the Supreme Judicial Court of Massachusetts considered the admission, over the defendant’s objection, of instant messages a witness had received “at her account at MySpace.” [*Id.* at 1171.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2022085991&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)) In the case, the defendant was convicted of the shooting death of Izaah Tucker, as well as other offenses. The witness, Ashlei Noyes, **\*359** testified that she had spent the evening of the murder socializing with the defendant and that he had been carrying a handgun. She further testified that the defendant’s brother had contacted her “four times on her MySpace account between February 9, 2007, and February 12, 2007,” urging her “not to testify or to claim a lack of memory regarding the events of the night of the murder.” [*Id.* at 1172.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2022085991&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)) At trial, Noyes testified that the defendant’s brother, Jesse Williams, had a picture of himself on his MySpace account and that his MySpace screen name or pseudonym was “doit4it.” She testified that she had received the messages from Williams, and the document printed from her MySpace account indicated that the messages were in fact sent by a user with the screen name **\*\*425** “doit4it,” depicting a picture of Williams. [*Id.*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2022085991&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search))

The Supreme Judicial Court of Massachusetts determined that there was an inadequate foundation laid to authenticate the MySpace messages, because the State failed to offer any evidence regarding who had access to the MySpace page and whether another author, other than Williams, could have virtually-penned the messages:

Although it appears that the sender of the messages was using Williams’s MySpace Web “page,” there is no testimony (from Noyes or another) regarding how secure such a Web page is, who can access a MySpace Web page, whether codes are needed for such access, etc. Analogizing a MySpace [message] to a telephone call, a witness’s testimony that he or she has received an incoming call from a person claiming to be “A,” without more, is insufficient evidence to admit the call as a conversation with “A.” Here, while the foundational testimony established that the messages were sent by someone with access to Williams’s MySpace Web page, it did not identify the person who actually sent the communication. Nor was there expert testimony that no one other than Williams could communicate from that Web page. Testimony regarding the contents of the messages should not have been admitted.

[*Id.* at 1172–73](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2022085991&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)) (citations omitted). The court emphasized that the State failed to demonstrate a sufficient connection between **\*360** the messages printed from Williams’s alleged MySpace account and Williams himself, with reference, for example, to Williams’s use of an exclusive username and password to which only he had access. The court determined that the error in admitting the improperly authenticated MySpace messages “did not create a substantial likelihood of a miscarriage of justice,” however, and, therefore, did not reverse Williams’s conviction, because Noyes’s testimony was significantly overshadowed “by the testimony of two witnesses to the murder who identified Williams as the shooter.” [*Id.* at 1173.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2022085991&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search))

Similarly, in [*People v. Lenihan,* 30 Misc.3d 289, 911 N.Y.S.2d 588 (N.Y.Sup.Ct.2010)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2023807960&pubNum=602&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)), Lenihan challenged his second degree murder conviction because he was not permitted to cross-examine two witnesses called by the State on the basis of photographs his mother had printed from MySpace, allegedly depicting the witnesses and the victim making hand gestures and wearing clothing that suggested an affiliation with the “Crips” gang. The trial judge precluded Lenihan from confronting the witnesses with the MySpace photographs, reasoning that “[i]n light of the ability to ‘photo shop,’ edit photographs on the computer,” Lenihan could not adequately authenticate the photographs. [*Id.* at 592.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2023807960&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search))

In [*United States v. Jackson,* 208 F.3d 633 (7th Cir.2000)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000090731&pubNum=506&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)), Jackson was charged with mail and wire fraud and obstruction of justice after making false claims of racial harassment against the United Parcel Service in connection with an elaborate scheme in which she sent packages containing racial epithets to herself and to several prominent African–Americans purportedly from “racist elements” within UPS. [*Id.* at 635.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000090731&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)) At trial, Jackson sought to introduce website postings from “the Euro–American Student Union and Storm Front,” in which the white supremacist groups gloated about Jackson’s case and took credit for the UPS mailings. [*Id.* at 637.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000090731&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)) The court determined that the trial judge was justified in excluding the evidence because it lacked an appropriate foundation, namely that Jackson had failed to show that the web postings by the white **\*\*426** supremacist groups who took responsibility for **\*361** the racist mailings “actually were posted by the groups, as opposed to being slipped onto the groups’ websites by Jackson herself, who was a skilled computer user.” [*Id.* at 638.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000090731&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search))

The State refers us, however, to [*In the Interest of F.P.,* 878 A.2d 91 (Pa.Super.Ct.2005)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006801800&pubNum=162&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)), in which the Pennsylvania intermediate appellate court considered whether instant messages were properly authenticated pursuant to [Pennsylvania Rule of Evidence 901(b)(4)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000262&cite=PASTREVR901&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)), providing that a document may be authenticated by distinctive characteristics or circumstantial evidence. In the case, involving an assault, the victim, Z.G., testified that the defendant had attacked him because he believed that Z.G. had stolen a DVD from him. The hearing judge, over defendant’s objection, admitted instant messages from a user with the screen name “Icp4Life30” to and between “WHITEBOY Z 404.” [*Id.* at 94.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006801800&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)) Z.G. testified that his screen name was “WHITEBOY Z 404” and that he had printed the instant messages from his computer. In the transcript of the instant messages, moreover, Z.G. asked “who is this,” and the defendant replied, using his first name. Throughout the transcripts, the defendant threatened Z.G. with physical violence because Z.G. “stole off [him].” [*Id.*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006801800&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)) On appeal, the court determined that the instant messages were properly authenticated through the testimony of Z.G. and also because “Icp4Life30” had referred to himself by first name, repeatedly accused Z.G. of stealing from him, and referenced the fact that Z.G. had told high school administrators about the threats, such that the instant messages contained distinctive characteristics and content linking them to the defendant. [*In the Interest of F.P.*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006801800&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)) is unpersuasive in the context of a social networking site, because the authentication of instant messages by the recipient who identifies his own “distinctive characteristics” and his having received the messages, is distinguishable from the authentication of a profile and posting printed from MySpace, by one who is neither a creator nor user of the specific profile.[13](#bookmark=id.2xn8ts7)

**\*362** Similarly, the State relies upon an unreported opinion, [*State v. Bell,* 2009 WL 1395857, 2009 Ohio App. LEXIS 2112 (Ohio Ct.App.2009)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2018865768&pubNum=0000999&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)), in which the defendant, convicted of multiple counts of child molestation, asserted that the trial judge **\*\*427** improperly admitted “online conversations and email messages” on MySpace, purportedly involving Bell and one of his victims. The defendant argued that the messages were not properly authenticated, because his laptop “was turned on after it was seized,” which he asserted altered hundreds of files on the hard drive. [*Id.* at \*4, 2009 Ohio App. LEXIS 2112 at \*10.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2018865768&pubNum=176344&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)) The appellate court rejected that argument because defense counsel had expressly approved the admission of the MySpace emails and messages. Griffin, in the present case, however, explicitly objected to the authenticity of the MySpace printout.

[**[3]**](#bookmark=id.4ddeoix) In the case sub judice, the MySpace printout was used to show that Ms. Barber had threatened a key witness, who the State had characterized as “probably the most important witness in this case;” the State highlighted the importance of **\*363** the “snitches get stitches” posting during closing argument, as follows:

Sergeant Cook told you that he went online and went to a website called MySpace and found a posting that had been placed there by the defendant’s girlfriend, Jessica Barber, recognized her picture, able to match up the date of birth on the posting with her date of birth, and the posting included these words, “Free Boozy. Just remember, snitches get stitches. You know who you are.”

In addition, during rebuttal argument, the State again referenced the pages printed from MySpace, asserting that Ms. Barber had employed MySpace as a tool of intimidation against a witness for the State. It is clear, then, that the MySpace printout was a key component of the State’s case; the error in the admission of its printout requires reversal.

In so doing, we should not be heard to suggest that printouts from social networking sites should never be admitted. Possible avenues to explore to properly authenticate a profile or posting printed from a social networking site, will, in all probability, continue to develop as the efforts to evidentially utilize information from the sites increases. *See, e.g.,* Katherine Minotti, Comment, *The* [*Advent of Digital Diaries: Implications of Social Networking Web Sites for the Legal Profession,* 60 S.C.L.Rev. 1057 (2009)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0347815613&pubNum=1227&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=LR&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)). A number of authentication opportunities come to mind, however.

[**[4]**](#bookmark=id.1csj400) [**[5]**](#bookmark=id.3ws6mnt) The first, and perhaps most obvious method would be to ask the purported creator if she indeed created the profile and also if she added the posting in question, i.e. “[t]estimony of a witness with knowledge that the offered evidence is what it is claimed to be.” [Rule 5–901(b)(1)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1006359&cite=MDRREVR5-901&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)). The second option may be to search the computer of the person who allegedly created the profile and posting and examine the computer’s internet history and hard drive to determine whether that computer was used to originate the social networking profile and posting in question. One commentator, who serves as Managing Director and Deputy General Counsel **\*364** of Stroz Friedberg,[14](#bookmark=id.2bxgwvm) a computer forensics firm, notes that, “[s]ince a user unwittingly leaves an evidentiary trail on her computer simply by using it, her computer will provide evidence of her web usage.” Seth P. Berman, et al., *Web 2. 0:* **\*\*428** *What’s Evidence Between “Friends”?,* Boston Bar J., Jan.-Feb.2009, at 5, 7.

[**[6]**](#bookmark=id.r2r73f) A third method may be to obtain information directly from the social networking website that links the establishment of the profile to the person who allegedly created it and also links the posting sought to be introduced to the person who initiated it. This method was apparently successfully employed to authenticate a MySpace site in [*People v. Clevenstine,* 68 A.D.3d 1448, 891 N.Y.S.2d 511 (2009)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2020832107&pubNum=602&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)). In the case, Richard Clevenstine was convicted of raping two teenage girls and challenged his convictions by asserting that the computer disk admitted into evidence, containing instant messages between him and the victims, sent via MySpace, was not properly authenticated. Specifically, Clevenstine argued that “someone else accessed his MySpace account and sent messages under his username.” [*Id.* at 514.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2020832107&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)) The Supreme Court of New York, Appellate Division, agreed with the trial judge that the MySpace messages were properly authenticated, because both victims testified that they had engaged in instant messaging conversations about sexual activities with Clevenstine through MySpace. In addition, an investigator from the computer crime unit of the State Police testified that “he had retrieved such conversations from the hard drive of the computer used by the victims.” [*Id.*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2020832107&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)) Finally, the prosecution was able to attribute the messages to Clevenstine, because a legal compliance officer for MySpace explained at trial that “the messages on the computer disk had been exchanged by users of accounts created by [Clevenstine] and the victims.” [*Id.*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2020832107&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)) The **\*365** court concluded that such testimony provided ample authentication linking the MySpace messages in question to Clevenstine himself.[15](#bookmark=id.3b2epr8)

**JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED. CASE REMANDED TO THAT COURT WITH INSTRUCTIONS TO REVERSE THE JUDGMENT OF THE CIRCUIT COURT FOR CECIL COUNTY AND REMAND THE CASE TO THE CIRCUIT COURT FOR A NEW TRIAL. COSTS IN THIS COURT AND IN THE COURT OF SPECIAL APPEALS TO BE PAID BY CECIL COUNTY.**

[HARRELL](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0172887401&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)) and [MURPHY](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0249212401&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)), JJ., dissent.

[HARRELL](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0172887401&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)), J., dissenting in which [MURPHY](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0249212401&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)), J., joins.

I dissent from the Majority Opinion’s holding that “the picture of Ms. Barber, coupled with her birth date and location, were not sufficient ‘distinctive characteristics’ on a MySpace profile to authenticate its [redacted] printout....” 419 Md. 343, 357, 19 A.3d 415, 424 (2011).

[Maryland Rule 5–901](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1006359&cite=MDRREVR5-901&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)) (“Requirement of authentication or identification”) derives from and is similar materially to [Federal Rule of Evidence 901](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1004365&cite=USFRER901&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)).[1](#bookmark=id.1q7ozz1) *See*  **\*366** [*Washington v.*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2017647511&pubNum=162&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&fi=co_pp_sp_162_1115&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)#co_pp_sp_162_1115) **[\*\*429](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2017647511&pubNum=162&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&fi=co_pp_sp_162_1115&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)" \l "co_pp_sp_162_1115)** [*State,* 406 Md. 642, 651, 961 A.2d 1110, 1115 (2008)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2017647511&pubNum=162&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&fi=co_pp_sp_162_1115&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)#co_pp_sp_162_1115). Thus, federal cases construing the federal rule are almost direct authority impacting on our construction of a Maryland analog rule. *See* [*Higgins v. Barnes,* 310 Md. 532, 543, 530 A.2d 724, 729 (1987)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1987114597&pubNum=162&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&fi=co_pp_sp_162_729&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)#co_pp_sp_162_729) ( “Maryland courts have traditionally relied on the federal courts’ interpretations of analogous rules as persuasive authority....”). In construing and applying Federal [Rule 901](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1004365&cite=USFRER901&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)), federal courts have held almost unanimously that “a document is properly authenticated if a *reasonable juror could find in favor of authenticity.*” [*United States v. Gagliardi,* 506 F.3d 140, 151 (2d Cir.2007)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2013788198&pubNum=506&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&fi=co_pp_sp_506_151&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)#co_pp_sp_506_151) (emphasis added); *see* [*United States v. Twitty,* 72 F.3d 228, 232 (1st Cir.1995)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995249945&pubNum=506&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&fi=co_pp_sp_506_232&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)#co_pp_sp_506_232); [*United States v. Rawlins,* 606 F.3d 73, 82 (3d Cir.2010)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2022149294&pubNum=506&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&fi=co_pp_sp_506_82&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)#co_pp_sp_506_82); [*United States v. Branch,* 970 F.2d 1368, 1370 (4th Cir. 1992)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992135406&pubNum=350&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&fi=co_pp_sp_350_1370&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)#co_pp_sp_350_1370); [*United States v. Logan,* 949 F.2d 1370, 1377 n. 12 (5th Cir. 1991)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991206049&pubNum=350&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&fi=co_pp_sp_350_1377&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)#co_pp_sp_350_1377); [*United States v. Jones,* 107 F.3d 1147, 1150 n. 1 (6th Cir. 1997)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997062016&pubNum=506&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&fi=co_pp_sp_506_1150&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)#co_pp_sp_506_1150); [*United States v. Dombrowski,* 877 F.2d 520, 525 (7th Cir.1989)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989090294&pubNum=350&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&fi=co_pp_sp_350_525&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)#co_pp_sp_350_525); [*United States v. Tank,* 200 F.3d 627, 630 (9th Cir.2000)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000024966&pubNum=506&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&fi=co_pp_sp_506_630&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)#co_pp_sp_506_630); [*United States v. Blackwell,* 694 F.2d 1325, 1331 (D.C.Cir.1982)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1982153533&pubNum=350&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&fi=co_pp_sp_350_1331&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)#co_pp_sp_350_1331). Although, to date, we have not enunciated such a standard, because I think that the “reasonable juror” standard is consistent with [Maryland Rule 5–901](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1006359&cite=MDRREVR5-901&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search))—requiring only “ evidence *sufficient to support a finding* that the matter in question is what its proponent claims” (emphasis added)—I would adopt it.[2](#bookmark=id.4a7cimu) *See*  **\*367** [*Dickens v. State,* 175 Md.App. 231, 239, 927 A.2d 32, 37 (2007)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2012600003&pubNum=162&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&fi=co_pp_sp_162_37&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)#co_pp_sp_162_37) (citing [*United States v. Safavian,* 435 F.Supp.2d 36, 38 (D.D.C.2006)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2009214669&pubNum=4637&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&fi=co_pp_sp_4637_38&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)#co_pp_sp_4637_38)) (stating that “the burden of proof for authentication is slight”).

Applying that standard to the present case, a reasonable juror could conclude, based on the presence on the MySpace profile of (1) a picture of a person appearing to Sergeant Cook to be Ms. Barber posing with the defendant, her boyfriend; (2) a birth date matching Ms. Barber’s; (3) a description of the purported creator of the MySpace profile as being a twenty-three year old from Port Deposit; and (4) references to freeing “Boozy” (a nickname for the defendant), that the redacted printed pages of the MySpace profile contained information posted by Ms. Barber.

I am not unmindful of the Majority Opinion’s analysis relating to the concern that someone other than Ms. Barber could access or create the account and post the **\*\*430** threatening message. The record, however, suggests no motive to do so. The technological heebie jeebies[3](#bookmark=id.2pcmsun) discussed in the Majority Opinion go, in my opinion, however, not to the admissibility of the print-outs under [Rule 5–901](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1006359&cite=MDRREVR5-901&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)), but rather to the weight to be given the evidence by the trier of fact. *See* [*Hays v. State,* 40 Md. 633, 648 (1874)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1874007988&pubNum=536&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&fi=co_pp_sp_536_648&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)#co_pp_sp_536_648) (holding that where there was evidence that a paper was what it purported to be, it was not error for **\*368** the trial court to instruct the jury that “if they were not satisfied of the identity of the paper ..., then they should not consider it all”); LYNN MCLAIN, MARYLAND EVIDENCE—STATE AND FEDERAL § 901:1 (2001) (stating that “authentication of an item is only the first step”).

It has been said that the “purpose of authentication is to ... filter untrustworthy evidence.” [*Phillip M. Adams & Assocs., L.L.C. v. Dell, Inc.,* 621 F.Supp.2d 1173, 1184 (D.Utah 2009)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2018546046&pubNum=4637&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&fi=co_pp_sp_4637_1184&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)#co_pp_sp_4637_1184). Like many filters that are unable to remove completely all impurities, [Rule 5–901](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1006359&cite=MDRREVR5-901&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)) does not act to disallow any and all evidence that may have “impurities” (i.e., in this case, evidence that could have come, conceivably, from a source other than the purported source). As long as a reasonable juror could conclude that the proffered evidence is what its proponent purports it to be, the evidence should be admitted. *See* [*Gerald v. State,* 137 Md.App. 295, 304, 768 A.2d 140, 145 (2001)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001193837&pubNum=162&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&fi=co_pp_sp_162_145&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)#co_pp_sp_162_145) (stating that, after a trial court admits a document as being authenticated properly, “the ultimate question of authenticity is left to the jury”). The potentialities that are of concern to the Majority Opinion are fit subjects for cross-examination or rebuttal testimony and go properly to the weight the fact-finder may give the print-outs. Accordingly, I dissent.

Judge [MURPHY](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0249212401&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)) authorizes me to state that he joins in the views expressed in this dissent.

**Parallel Citations**

19 A.3d 415

|  |
| --- |
| Footnotes |
| [1](#bookmark=id.3mzq4wv) | The term “website” refers to “a collection of documents and related files that are owned or organized by a particular individual or organization.” Jonathan Wilson, *What’s In a Web Site?,* Ga. B.J., Apr. 1999, at 14, 14. |
| [2](#bookmark=id.2250f4o) | “MySpace is a ‘social networking’ website where members can create ‘profiles’ and interact with other members. Anyone with Internet access can go onto the MySpace website and view content which is open to the general public such as a music area, video section, and members’ profiles which are not set as ‘private.’ However, to create a profile, upload and display photographs, communicate with persons on the site, write ‘blogs,’ and/or utilize other services or applications on the MySpace website, one must be a ‘member.’ Anyone can become a member of MySpace at no charge so long as they meet a minimum age requirement and register.” [*United States v. Drew,* 259 F.R.D. 449, 453 (D.C.D.Cal.2009)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2019772601&pubNum=344&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&fi=co_pp_sp_344_453&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)#co_pp_sp_344_453). |
| [3](#bookmark=id.319y80a) | To establish a “profile,” a user needs only a valid email account. Patricia Sanchez Abril, [*A (My)Space of One’s Own: On Privacy and Online Social Networks,* 6 Nw. J. Tech. & Intell. Prop. 73, 74 (2007)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0335938600&pubNum=186041&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=LR&fi=co_pp_sp_186041_74&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)#co_pp_sp_186041_74). Generally, a user creates a profile by “filling out a series of virtual forms eliciting a broad range of personal data,” culminating in a multimedia collage that serves as “one’s digital ‘face’ in cyberspace.” Nathan Petrashek, Comment, *The* [*Fourth Amendment and the Brave New World of Online Social Networking,* 93 Marq. L.Rev. 1495, 1499 (Summer 2010)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0356048451&pubNum=1186&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=LR&fi=co_pp_sp_1186_1499&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)#co_pp_sp_1186_1499). |
| [4](#bookmark=id.1gf8i83) | In his Petition for Writ of Certiorari, Griffin presented three questions pertaining to the MySpace evidence, namely:1. What evidence is required to authenticate a printout from a social networking website?2. Did the court err in admitting what the State claimed was a printout from petitioner’s girlfriend’s MySpace profile containing highly prejudicial content without properly authenticating the material as having been posted by petitioner’s girlfriend?3. Did the Court of Special Appeals err in finding that the prejudice to petitioner from the admission of the MySpace page did not outweigh its probative value? |
| [5](#bookmark=id.2fk6b3p) | Because of our disposition of the first issue, we need not and will not address the second question presented. |
| [6](#bookmark=id.upglbi) | To the extent that the question presented in the State’s cross-petition concerns the preservation of Griffin’s challenge to the authenticity of the MySpace evidence, the authenticity issue was clearly preserved for appellate review by Griffin’s explicit objection to the admission of the printed pages. Insofar as the State contends that Griffin failed to preserve his challenge to the probity of the MySpace evidence, we need not and will not address that issue, because evidence that has not been properly authenticated is inadmissible, regardless of its probity or potentially prejudicial effect. |
| [7](#bookmark=id.1tuee74) | [Rule 5–901](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1006359&cite=MDRREVR5-901&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)), describing the requirement of authentication or identification, provides, in pertinent part:(a) **General provision.** The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.(b) **Illustrations.** By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this Rule:(1) Testimony of witness with knowledge. Testimony of a witness with knowledge that the offered evidence is what it is claimed to be.\* \* \*(4) Circumstantial evidence. Circumstantial evidence, such as appearance, contents, substance, internal patterns, location, or other distinctive characteristics, that the offered evidence is what it is claimed to be. |
| [8](#bookmark=id.36ei31r) | Social networking websites, which offer a framework in which users interact and create content themselves, is an application of “Web 2.0,” a phrase that does not refer to any specific new technology, but refers instead to the “participatory nature of how a website’s content is created and delivered.” Seth P. Berman, Lam D. Nguyen & Julie S. Chrzan, *Web 2.0: What’s Evidence Between “Friends”?,* Boston Bar J., Jan.-Feb.2009, at 5, 5. |
| [9](#bookmark=id.zu0gcz) | Facebook, the behemoth of the social networking world, allows users to build a profile and interact with “friends” in much the same way as MySpace:Facebook prompts new users to supply their name, e-mail address, sex, and birth date. Perhaps as a vestige of Facebook’s restrictive roots, users are also asked to name any high schools, colleges, or universities attended. Users may build upon this foundation by supplying additional information in any of four sections that compose the profile: “Basic Information,” which includes the user’s current city, hometown, relationship status, and political and religious views; “Personal Information,” which includes interests, activities, and favorite music, movies, and books; “Contact Information,” which includes websites, addresses, phone numbers, and instant messaging screen names; and “Education and Work,” which is largely self descriptive. “Status” posts allow users to update their profiles with up-to-the-minute information, offering users a virtual soapbox to their online community.Facebook’s community element is perhaps more sophisticated than that of MySpace. The web site’s design makes it easy for users to “compile lists of their friends, post public comments on friends’ profiles, ... send private messages to other users[,] ... [and] create groups of people with similar interests....” Members may upload photographs, and both Facebook and MySpace allow users to “tag” their friends in the image. Tagging “creates a link [in] the individual’s profile from the photograph, making users easily identifiable, even when the viewer of the photograph is not ‘friends’ with the photograph’s subjects.”Petrashek, [93 Marq. L.Rev. at 1506–07](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0356048451&pubNum=1186&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=LR&fi=co_pp_sp_1186_1506&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)#co_pp_sp_1186_1506) (footnotes omitted). |
| [10](#bookmark=id.1yyy98l) | Sophos apparently conducted the study to demonstrate that it “was able to acquire highly personal information from [forty percent] of the nearly 200 Facebook users who chose to add ‘Freddie Staur’ as a friend in their Facebook accounts.” Mint.com, *HOWTO: Protect Your Privacy on Facebook, MySpace, and LinkedIn* (Sept. 6, 2007), http://www.blog.mint. com/blog/moneyhack/howto-protect-your-privacy-on-facebook-myspace-and-linkedin/. |
| [11](#bookmark=id.1d96cc0) | We add this section to highlight that a witness with knowledge, such as Ms. Barber, could be asked whether the MySpace profile was hers and whether its contents were authored by her; she, however, was not subject to such inquiry when she was called by the State. *See* [*United States v. Barlow,* 568 F.3d 215, 220 (5th Cir.2009)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2018766013&pubNum=506&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&fi=co_pp_sp_506_220&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)#co_pp_sp_506_220) (reasoning that testimony of witness who had posed as a minor female that the transcripts fairly and fully reproduced the online chats was sufficient to authenticate them for admission); [*United States v. Gagliardi,* 506 F.3d 140, 151 (2d Cir.2007)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2013788198&pubNum=506&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&fi=co_pp_sp_506_151&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)#co_pp_sp_506_151) (reasoning that chat room logs were properly authenticated as having been sent by the defendant through testimony from witnesses who had participated in the online conversations).\* \* \* |
| [12](#bookmark=id.2pta16n) | The dissent minimizes as “the technological heebie jeebies” the challenges inherent in authenticating, for evidentiary purposes, social networking websites. *None* of the authorities cited by the dissent in support of its conclusion, however, even addresses the authentication of social networking sites. Only one case, [*United States v. Gagliardi,* 506 F.3d 140, 151 (2d Cir.2007)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2013788198&pubNum=506&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&fi=co_pp_sp_506_151&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)#co_pp_sp_506_151), involves digital communications, namely Internet chat room conversations, which the Second Circuit recognized were appropriately authenticated by witnesses who had participated in the “chats,” clearly persons “with knowledge.” *See* Federal [Rule 901(b)(1)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1004365&cite=USFRER901&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)).In addition, the “reasonable juror” standard to which the dissent refers is apparently derived from the federal analogue to [Maryland Rule 5–104(b)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1006359&cite=MDRREVR5-104&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)), concerning “relevance conditioned on fact,” a protocol not addressed in this case, which we discuss in footnote 15, infra. *See* [*United States v. Logan,* 949 F.2d 1370, 1377 n. 12 (5th Cir.1991)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991206049&pubNum=350&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&fi=co_pp_sp_350_1377&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)#co_pp_sp_350_1377) (reasoning that in determining whether to admit evidence of disputed authenticity, the court should utilize the protocol established in Federal Rule 104(b), namely that “the judge [ ] make a preliminary determination [as to] whether a jury could reasonably conclude” that the evidence is what it purports to be).Finally, authentication of evidence must be addressed by the trial court whether or not motive to fabricate or manipulate is raised by anyone or is in issue. *See* Lynn McLain, 6A *Maryland Evidence—State and Federal* § 901:1 (2001) (“Under Maryland law, generally ... an object, writing, telephone conversation, or tape recording is not self-authenticating. Some evidence other than the item or reported conversation itself is required to establish that it is what its proponent says it is, or comes from the source which its proponent professes.”). |
| [13](#bookmark=id.1idq7dh) | We further note that authentication concerns attendant to e-mails, instant messaging correspondence, and text messages differ significantly from those involving a MySpace profile and posting printout, because such correspondences is sent directly from one party to an intended recipient or recipients, rather than published for all to see. *See* [*Independent Newspapers, Inc. v. Brodie,* 407 Md. 415, 423, 966 A.2d 432, 437 (2009)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2018234652&pubNum=162&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&fi=co_pp_sp_162_437&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)#co_pp_sp_162_437) (contrasting emails and instant messages with a “different category of Internet communications, in which users post statements to the world at large without specification,” such as on social networking sites). *See also* [*United States v. Safavian,* 435 F.Supp.2d 36, 41 (D.D.C.2006)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2009214669&pubNum=4637&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&fi=co_pp_sp_4637_41&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)#co_pp_sp_4637_41) (reasoning e-mails could be authenticated by comparison by the jury with those e-mails that had already been independently authenticated through the contents or in the email heading itself); [*Commonwealth v. Amaral,* 78 Mass.App.Ct. 671, 674, 941 N.E.2d 1143, 1147 (2011)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2024458261&pubNum=578&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&fi=co_pp_sp_578_1147&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)#co_pp_sp_578_1147) (reasoning that “[t]he actions of the defendant himself served to authenticate the e-mails,” because one e-mail indicated that defendant would be at a certain place at a certain time and the defendant appeared at that place and time, and in another email, defendant provided his telephone number and immediately answered when the investigator called that number); [*Dickens v. State,* 175 Md.App. 231, 238–40, 927 A.2d 32, 36–37 (2007)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2012600003&pubNum=162&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&fi=co_pp_sp_162_36&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)#co_pp_sp_162_36) (reasoning text messages received on victim’s cell phone were properly authenticated because the phone number on one message showed that it had come from defendant’s phone and other messages referenced the defendant’s right to see the couple’s minor child and their wedding vows). |
| [14](#bookmark=id.1a346fx) | According to the firm’s website, Stroz Friedberg is a technical services firm specializing in the areas of computer forensics, mobile phone forensics, electronic discovery, data breach, cybercrime response, and investigations. Stroz Friedberg LLC—Who We Are, http://www. strozfriedberg.com/methodology/xprGeneralContent1.aspx?xpST=Methodology (last visited Apr. 26, 2011). |
| [15](#bookmark=id.38czs75) | Federally, some of the uncertainty involving evidence printed from social networking sites has been addressed by embracing the notion of “conditional relevancy,” pursuant to Federal Rule 104(b), which provides “[w]hen the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.” In this way, the trier of fact could weigh the reliability of the MySpace evidence against the possibility that an imposter generated the material in question. *See* [*Lorraine v. Markel American Insurance,* 241 F.R.D. 534, 539–40 (2007)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2012167862&pubNum=344&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=RP&fi=co_pp_sp_344_539&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)#co_pp_sp_344_539). [Maryland Rule 5–104(b)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1006359&cite=MDRREVR5-104&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)) establishes a nearly identical protocol; we, however, have not been asked in this case to address the efficacy of the [Rule 5–104(b)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1006359&cite=MDRREVR5-104&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)) protocol. |
| [1](#bookmark=id.47hxl2r) | [Federal Rule of Evidence 901](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1004365&cite=USFRER901&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)) provides, in pertinent part:(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.\* \* \*(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances. |
| [2](#bookmark=id.3ls5o66) | Professor McLain explains:The item will be properly authenticated if its proponent has offered foundation evidence that the judge finds would be sufficient to support a finding by a reasonable trier of fact that the item is what it is purported to be. [Md. Rule 5–901(a)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1006359&cite=MDRREVR5-901&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)), consistent with prior Maryland case law, establishes that the standard of proof is the same as is found in [Md. Rule 5–104(b)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1006359&cite=MDRREVR5-104&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)) for facts on which the relevance of an item is conditioned. In a jury trial, the judge need not be personally satisfied, by even a preponderance of the evidence, that the proffered item is authentic; the judge must find the authentication requirement met, if a reasonable jury could find the evidence to be what its proponent claims it to be.LYNN MCLAIN, MARYLAND EVIDENCE—STATE AND FEDERAL § 901:1 (2001). |
| [3](#bookmark=id.302dr9l) | “Heebie jeebies” is an idiom used to describe anxiety, apprehension, or jitters; attributed to William Morgan (“Billy”) De Beck, a cartoonist, in the 26 October 1923 edition of the *New York American. See also* LOUIS ARMSTRONG & THE HOT FIVE, HEEBIE JEEBIES (Okeh Records 1926) (“Say, I’ve got the heebies, I mean the jeebies, talkin about the dance, the heebie jeebies.”). |

|  |  |
| --- | --- |
| **End of Document** | © 2015 Thomson Reuters. No claim to original U.S. Government Works. |

  878 A.2d 91

Superior Court of Pennsylvania.

In the Interest of: F.P., A Minor

Appeal of: F.P., A Minor, Appellant

Submitted Jan. 24, 2005. | Filed June 15, 2005.

**Synopsis**

**Background:** Juvenile was adjudicated delinquent in the Court of Common Pleas, Allegheny County, Juvenile Division, No. 2611–03, [Christine A. Ward](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0137972901&originatingDoc=I32082e32dde011d9bf60c1d57ebc853e&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.3c1e18d911a94943a66ecb9f3ef2f95c*oc.DocLink)), J., of aggravated assault. Juvenile appealed.

[**[Holding:]**](#bookmark=id.14hx32g) The Superior Court, No. 1126 W.D.A. 2004, [Ford Elliott](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0161777101&originatingDoc=I32082e32dde011d9bf60c1d57ebc853e&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.3c1e18d911a94943a66ecb9f3ef2f95c*oc.DocLink)), J. held that evidence was sufficient to authenticate internet instant messages as having originated from juvenile, and thus transcripts of these instant message conversations were admissible.

Affirmed.

**Attorneys and Law Firms**

**\*92** [Victoria H. Vidt](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0138131801&originatingDoc=I32082e32dde011d9bf60c1d57ebc853e&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.3c1e18d911a94943a66ecb9f3ef2f95c*oc.DocLink)), Pittsburgh, for appellant.

[Michael W. Streily](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0179406601&originatingDoc=I32082e32dde011d9bf60c1d57ebc853e&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.3c1e18d911a94943a66ecb9f3ef2f95c*oc.DocLink)), Deputy District Attorney, Pittsburgh, for Commonwealth, appellee.

Before: [FORD ELLIOTT](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0161777101&originatingDoc=I32082e32dde011d9bf60c1d57ebc853e&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.3c1e18d911a94943a66ecb9f3ef2f95c*oc.DocLink)), [TODD](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0122314401&originatingDoc=I32082e32dde011d9bf60c1d57ebc853e&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.3c1e18d911a94943a66ecb9f3ef2f95c*oc.DocLink)), and [OLSZEWSKI](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0240663401&originatingDoc=I32082e32dde011d9bf60c1d57ebc853e&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.3c1e18d911a94943a66ecb9f3ef2f95c*oc.DocLink)), JJ.

**Opinion**

OPINION BY [FORD ELLIOTT](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0161777101&originatingDoc=I32082e32dde011d9bf60c1d57ebc853e&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.3c1e18d911a94943a66ecb9f3ef2f95c*oc.DocLink)), J.:

¶ 1 F.P. appeals the disposition order of May 27, 2004, after he was adjudicated delinquent on one count of aggravated assault. **\*93** [1](#bookmark=id.3ohklq9) We affirm.

¶ 2 A hearing was held on May 27, 2004 before the Honorable Christine A. Ward. Z.G., the victim in this case, testified that on September 25, 2003, after getting off the school bus, appellant approached him from behind and struck him numerous times about the head and face. (Notes of testimony, 5/27/04 at 15–16.) Z.G. fell to the ground and appellant continued to assault him. (*Id.* at 16.) Subsequently, Z.G. was treated at Children’s Hospital in Pittsburgh and released. (*Id.* at 17.) At the time of the hearing, Z.G. continued to suffer from headaches and insomnia. (*Id.* at 19.) Several witnesses, including the victim, testified that appellant was angry because he believed Z.G. had stolen a DVD from him. (*Id.* at 8, 31–32, 36.) Transcripts of instant messages[2](#bookmark=id.23muvy2) between appellant and Z.G. which occurred prior to the assault were admitted into evidence. (*Id.* at 14; Commonwealth Exhibit 1.) In these messages, appellant accuses Z.G. of stealing from him and threatens to beat him up. (*Id.*)

¶ 3 Judge Ward adjudicated appellant delinquent and committed him to the Academy’s summer school and day and evening programs. On June 28, 2004, appellant filed a notice of appeal. Appellant was ordered to file a concise statement of matters complained of on appeal,[3](#bookmark=id.is565v) and complied on July 28, 2004. On August 17, 2004, the trial court filed an opinion addressing the issues raised in appellant’s 1925(b) statement.

¶ 4 On appeal to this court, appellant raises the following issue for our review: “Did the trial court err in permitting the introduction of a computerized instant message into evidence in that the instant message was inadmissible as not being properly authenticated?” (Appellant’s brief at 4 (capitalization omitted).)[4](#bookmark=id.32rsoto)

¶ 5 Appellant argues that the instant messages should not have been admitted because it was not proved that appellant was the author. He contends that given the inherent unreliability of e-mail or instant messages, it was incumbent upon the Commonwealth to authenticate the documents by introducing evidence of their source from the internet service provider or presenting the testimony of a computer forensics expert. We disagree, and conclude that the documents were admissible and properly authenticated through the use of circumstantial evidence.

[**[1]**](#bookmark=id.1hx2z1h) [**[2]**](#bookmark=id.41wqhpa) ¶ 6 Admission of evidence is within the sound discretion of the trial court and will be reversed only upon a showing that the trial court clearly abused its discretion. [*Commonwealth v. Lilliock,* 740 A.2d 237, 244 (Pa.Super.1999)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999216707&pubNum=162&originatingDoc=I32082e32dde011d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_162_244&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.3c1e18d911a94943a66ecb9f3ef2f95c*oc.DocLink)#co_pp_sp_162_244), *appeal denied,* [568 Pa. 657, 795 A.2d 972 (2000)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000077337&pubNum=162&originatingDoc=I32082e32dde011d9bf60c1d57ebc853e&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.3c1e18d911a94943a66ecb9f3ef2f95c*oc.DocLink)). The requirement of authentication or identification is codified at [Pennsylvania Rule of Evidence 901](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000262&cite=PASTREVR901&originatingDoc=I32082e32dde011d9bf60c1d57ebc853e&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.3c1e18d911a94943a66ecb9f3ef2f95c*oc.DocLink)), 42 Pa.C.S.A.: “(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” [Pa.R.E. 901(a)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000262&cite=PASTREVR901&originatingDoc=I32082e32dde011d9bf60c1d57ebc853e&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.3c1e18d911a94943a66ecb9f3ef2f95c*oc.DocLink)). Testimony **\*94** of a witness with personal knowledge that a matter is what it is claimed to be may be sufficient to authenticate or identify the evidence. [Pa.R.E. 901(b)(1)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000262&cite=PASTREVR901&originatingDoc=I32082e32dde011d9bf60c1d57ebc853e&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.3c1e18d911a94943a66ecb9f3ef2f95c*oc.DocLink)). *See also* Comment, citing [*Commonwealth v. Hudson,* 489 Pa. 620, 414 A.2d 1381 (1980)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1980112208&pubNum=162&originatingDoc=I32082e32dde011d9bf60c1d57ebc853e&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.3c1e18d911a94943a66ecb9f3ef2f95c*oc.DocLink)); [*Heller v. Equitable Gas Co.,* 333 Pa. 433, 3 A.2d 343 (1939)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1939114155&pubNum=162&originatingDoc=I32082e32dde011d9bf60c1d57ebc853e&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.3c1e18d911a94943a66ecb9f3ef2f95c*oc.DocLink)).

[**[3]**](#bookmark=id.2h20rx3) [**[4]**](#bookmark=id.w7b24w) ¶ 7 A document may be authenticated by direct proof and/or by circumstantial evidence. [*Commonwealth v. Brooks,* 352 Pa.Super. 394, 508 A.2d 316, 318 (1986)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986120781&pubNum=162&originatingDoc=I32082e32dde011d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_162_318&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.3c1e18d911a94943a66ecb9f3ef2f95c*oc.DocLink)#co_pp_sp_162_318) (citations omitted). “ ‘[P]roof of any circumstances which will support a finding that the writing is genuine will suffice to authenticate the writing.’ ” [*Id.* at 319,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986120781&originatingDoc=I32082e32dde011d9bf60c1d57ebc853e&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.3c1e18d911a94943a66ecb9f3ef2f95c*oc.DocLink)) quoting [McCormick, *Evidence* § 222 (E. Cleary 2d Ed.1972)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0280312605&pubNum=0134642&originatingDoc=I32082e32dde011d9bf60c1d57ebc853e&refType=TS&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.3c1e18d911a94943a66ecb9f3ef2f95c*oc.DocLink)). “The courts of this Commonwealth have demonstrated the wide variety of types of circumstantial evidence that will enable a proponent to authenticate a writing.” *Id.* (collecting cases).

¶ 8 In this case, the instant messages were from a user with the screen name “Icp4Life30” to and between “WHITEBOY Z 404.” (Commonwealth Exhibit 1.) Z.G. testified that his screen name is WHITEBOY Z. (Notes of testimony, 5/27/04 at 11.) Z.G. printed the instant messages off his computer. (*Id.* at 14.) He believed the other participant in the conversation to be appellant. (*Id.*)

¶ 9 Appellant believed Z.G. had stolen a DVD from him. (*Id.* at 7.) Appellant sent Z.G. text messages stating he wanted to fight him because Z.G. had allegedly stolen the DVD. (*Id.* at 8.) According to J.H., a friend of both appellant and Z.G., appellant was angry because the DVD was a rental; and after it went missing, appellant had to pay for it. (*Id.* at 21, 36.)

¶ 10 It appears that there are transcripts of several instant message “conversations” between Z.G. and appellant on at least two different dates. (Commonwealth Exhibit 1.) In the first conversation, apparently taking place July 30, 2003 and initiated by appellant, Z.G. asks “who is this,” and appellant replies, using his first name as it appears in the record. (*Id.*) Throughout the transcripts, appellant threatens Z.G. with physical violence and accuses Z.G. of stealing from him. (*Id.*) Z.G. states, “i got no reason to fight u and u got no reason to fight me”; appellant answers, “ya i do. u stole off me.”[5](#bookmark=id.3g6yksp) (*Id.*) Later, appellant taunts Z.G. and tells him to come over to his house; when Z.G. states, “well i won;t be there cuz i not fightin u”; appellant replies, “well i am fightin u so when i see u ur dead.” (*Id.*)

¶ 11 After receiving these threatening instant messages from appellant in the summer of 2003, Z.G. notified his school counselor and the school social worker. (Notes of testimony, 5/27/04 at 14–15.) Appellant and Z.G. met with them separately regarding the messages and the alleged theft of the DVD from appellant. (*Id.* at 15.) Mr. Joseph K. DeGregorio, the high school guidance counselor, testified they conducted a “mediation” between Z.G. and appellant. (*Id.* at 54–55.) Mr. DeGregorio was aware of threatening instant messages between Z.G. and appellant. (*Id.* at 56.) Appellant did not deny sending the instant messages. (*Id.* at 57) The mediation proceedings were closed several days prior to this incident; at the time, appellant stated he had no intention of fighting Z.G. (*Id.*)

¶ 12 In the final instant message conversation, which appears to have occurred in September 2003, just prior to the assault **\*95** on Z.G. and at approximately the same time as the school mediation proceedings, appellant states: “u gotta tell tha school shit and stuff like a lil bitch.” (Commonwealth Exhibit 1.) Appellant also threatens, “want my brother to beat ur ass on tha steel center bus” and “want [sic] till i see u outta school ima beat ur aSS.” (*Id.*) At the adjudication hearing, appellant’s brother J.P. testified that he witnessed appellant beating up Z.G. after disembarking the school bus. (Notes of testimony, 5/27/04 at 48–50.) Appellant and his brother ordinarily do not ride Z.G.’s bus. (*Id.* at 5–6, 49.)

[**[5]**](#bookmark=id.14hx32g) [**[6]**](#bookmark=id.1vc8v0i) ¶ 13 Clearly, there was sufficient evidence that appellant was “Icp4Life30” and sent the threatening messages to Z.G. He referred to himself by his first name. He repeatedly accused Z.G. of stealing from him, which mirrored testimony that appellant was angry about a stolen DVD. Appellant referenced the fact that Z.G. had approached high school authorities about the instant messages. At one point, Z.G. states, “we used to be firends [sic] til u thought i stole off u”; appellant replies rather inartfully, with yet more foul language. (Commonwealth’s Exhibit 1.) Repeatedly, appellant called Z.G. vile names and threatened to beat him up. All of this evidence, taken together, was clearly sufficient to authenticate the instant message transcripts as having originated from appellant. *See Brooks, supra* at 321 (“[T]he foundation may consist of circumstantial evidence and may include factors relating to the contents of the writing and the events before and after the execution of the writing.”). We find no abuse of discretion in their admission.[6](#bookmark=id.4fbwdob)[7](#bookmark=id.2uh6nw4)

¶ 14 Essentially, appellant would have us create a whole new body of law just to deal with e-mails or instant messages. The argument is that e-mails or text messages are inherently unreliable because of their relative anonymity and the fact that while an electronic message can be traced to a particular computer, it can rarely be connected to a specific author with any certainty. Unless the purported author is actually witnessed sending the e-mail, there is always the possibility it is not from whom it claims. As appellant correctly points out, anybody with the right password can gain access to another’s e-mail account and send a message ostensibly from that person. However, the same uncertainties exist with traditional written documents. A signature can be forged; a letter can be typed on another’s typewriter; distinct letterhead stationary can be copied or stolen. We believe that e-mail messages and similar forms of electronic communication can be properly authenticated within the existing framework of [Pa.R.E. 901](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000262&cite=PASTREVR901&originatingDoc=I32082e32dde011d9bf60c1d57ebc853e&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.3c1e18d911a94943a66ecb9f3ef2f95c*oc.DocLink)) and Pennsylvania case law. *See* Robert Berkley Harper, Pennsylvania Evidence **\*96** § 9.01[B][9] (2001) (“An e-mail message may be authenticated through various traditional common-law methods, as well as those discussed in the authentication rule ....”).[8](#bookmark=id.19mgy3x) We see no justification for constructing unique rules for admissibility of electronic communications such as instant messages; they are to be evaluated on a case-by-case basis as any other document to determine whether or not there has been an adequate foundational showing of their relevance and authenticity.

¶ 15 Order affirmed.

**Parallel Citations**

2005 PA Super 220

|  |
| --- |
| Footnotes |
| [1](#bookmark=id.2rrrqc1) | [18 Pa.C.S.A. § 2702(a)(1)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000262&cite=PA18S2702&originatingDoc=I32082e32dde011d9bf60c1d57ebc853e&refType=SP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.3c1e18d911a94943a66ecb9f3ef2f95c*oc.DocLink)#co_pp_7b9b000044381). |
| [2](#bookmark=id.16x20ju) | “Instant messaging differs from e-mail in that conversations happen in realtime.” http://en.wikipedia.org. “Generally, both parties in the conversation see each line of text right after it is typed (line-by-line), thus making it more like a telephone conversation than exchanging letters.” *Id.* |
| [3](#bookmark=id.3qwpj7n) | [Pa.R.A.P.1925(b)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000262&cite=PASTRAPR1925&originatingDoc=I32082e32dde011d9bf60c1d57ebc853e&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.3c1e18d911a94943a66ecb9f3ef2f95c*oc.DocLink)). |
| [4](#bookmark=id.261ztfg) | An additional issue raised in appellant’s 1925(b) statement and addressed by Judge Ward in her opinion, whether or not the evidence was sufficient to support appellant’s adjudication for aggravated assault, has been abandoned on appeal. |
| [5](#bookmark=id.ymfzma) | In the interest of accuracy, excerpts from the instant messages have been left unaltered and uncorrected for grammatical errors. |
| [6](#bookmark=id.2wwbldi) | Although appellant does not raise the issue of relevancy, we note the messages were clearly relevant as they related to an issue in the truth-determining process, *i.e.,* the guilt or innocence of appellant. The messages bear directly on this question and suggest a motive for the assault as well as appellant’s identity as the perpetrator. |
| [7](#bookmark=id.1c1lvlb) | In addition, we note that even if the instant messages had not been properly authenticated, their admission into evidence would have constituted harmless error. Several eyewitnesses, including appellant’s brother and two high school friends, testified to the fight. Appellant admitted to Mr. DeGregorio and Officer Katie Donahue that he had been in a physical altercation with Z.G. The testimony was consistent with appellant having initiated the fight and being the aggressor. The Commonwealth introduced photographs of Z.G.’s injuries. The trial court did not have to rely on the instant messages to find beyond a reasonable doubt that appellant intentionally, knowingly, or recklessly caused serious bodily injury to Z.G. (Trial court opinion, 8/17/04 at 7–8.) Appellant was not charged with harassment by communication or any other offense stemming from the instant messages. |
| [8](#bookmark=id.2b6jogx) | There is a paucity of reported cases involving authentication of e-mails or instant messages, and none in the Commonwealth of Pennsylvania. However, those there are, although not binding on this court, would not suggest a contrary result. *See* [*Massimo v. State of Texas,* 144 S.W.3d 210 (Tex.App.—Fort Worth 2004)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2004818697&pubNum=4644&originatingDoc=I32082e32dde011d9bf60c1d57ebc853e&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.3c1e18d911a94943a66ecb9f3ef2f95c*oc.DocLink)) (e-mails admissible where the victim recognized the appellant’s e-mail address; the e-mails discussed things only the victim, the appellant, and a few other people knew about; they were written in the way in which the appellant would communicate; and a third party had witnessed the appellant sending a similar threatening e-mail to the victim previously); [*Kearley v. State of Mississippi,* 843 So.2d 66 (Miss.App.2002)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2002666081&pubNum=735&originatingDoc=I32082e32dde011d9bf60c1d57ebc853e&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.3c1e18d911a94943a66ecb9f3ef2f95c*oc.DocLink)), *certiorari denied,* [842 So.2d 578 (Miss.2003)](http://www.westlaw.com/Link/Document/FullText?findType=Y&pubNum=735&cite=842SO2D578&originatingDoc=I32082e32dde011d9bf60c1d57ebc853e&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.3c1e18d911a94943a66ecb9f3ef2f95c*oc.DocLink)) (e-mails adequately authenticated where victim vouched for their accuracy, and a police officer testified that the appellant admitted sending the e-mails); [*Perfect 10, Inc. v. Cybernet Ventures, Inc.,* 213 F.Supp.2d 1146 (C.D.Cal.2002)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2002262441&pubNum=4637&originatingDoc=I32082e32dde011d9bf60c1d57ebc853e&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.3c1e18d911a94943a66ecb9f3ef2f95c*oc.DocLink)) (exhibits printed off the internet, including pictures and webpages, had sufficient circumstantial indicia of authenticity (such as dates and web addresses) to support a reasonable juror in the belief the documents are what the proponent says they are); [*United States v. Siddiqui,* 235 F.3d 1318 (11th Cir.(Ala.) 2000)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000648725&pubNum=506&originatingDoc=I32082e32dde011d9bf60c1d57ebc853e&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.3c1e18d911a94943a66ecb9f3ef2f95c*oc.DocLink)), *certiorari denied,* [533 U.S. 940, 121 S.Ct. 2573, 150 L.Ed.2d 737 (2001)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001454558&pubNum=708&originatingDoc=I32082e32dde011d9bf60c1d57ebc853e&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.3c1e18d911a94943a66ecb9f3ef2f95c*oc.DocLink)) (e-mails properly authenticated where they bore the appellant’s e-mail address; the reply function automatically dialed the appellant’s e-mail address as the sender; they contained factual details known to the appellant; they bore his nickname; and they were followed up by phone conversations involving the same subject matter); [*United States v. Tank,* 200 F.3d 627 (9th Cir.(Cal.) 2000)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000024966&pubNum=506&originatingDoc=I32082e32dde011d9bf60c1d57ebc853e&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.3c1e18d911a94943a66ecb9f3ef2f95c*oc.DocLink)) (chat room log printouts authenticated where the appellant admitted he used the screen name “Cessna” when he participated in one of the conversations recorded; several co-conspirators testified the appellant used that name; and when they arranged a meeting with the person who used the screen name “Cessna,” it was the appellant who showed up). In all of these cases, the court examined the electronic messages within the framework of existing jurisprudence/rules of evidence to determine whether or not they had been properly authenticated. Our research revealed two additional cases, one of which is cited extensively by appellant in the instant case: [*Kupper v. State of Texas,* 2004 WL 60768 (Tex.App.—Dallas 2004)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2004064582&pubNum=0000999&originatingDoc=I32082e32dde011d9bf60c1d57ebc853e&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.3c1e18d911a94943a66ecb9f3ef2f95c*oc.DocLink)); and [*People v. Von Gunten,* 2002 WL 501612 (Cal.App. 3 Dist.2002)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2002225998&pubNum=0000999&originatingDoc=I32082e32dde011d9bf60c1d57ebc853e&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.3c1e18d911a94943a66ecb9f3ef2f95c*oc.DocLink)). However, neither of these cases is published and therefore cannot be cited or relied upon as precedential authority. *See* Tex.R.App.P. 47; [Cal.Rules of Court, Rule 977(a)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000298&cite=CASTMR977&originatingDoc=I32082e32dde011d9bf60c1d57ebc853e&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.3c1e18d911a94943a66ecb9f3ef2f95c*oc.DocLink)); *compare* [Pa.Super.Ct.I.O.P. § 65.37](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000262&cite=PASTSUPERCTIOPS65.37&originatingDoc=I32082e32dde011d9bf60c1d57ebc853e&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.3c1e18d911a94943a66ecb9f3ef2f95c*oc.DocLink)). Our rules prohibit parties from relying on unpublished memorandum opinions of this court; in the same vein, we certainly will not consider unpublished opinions from foreign jurisdictions which have no binding effect in this Commonwealth at any rate. |

|  |  |
| --- | --- |
| **End of Document** | © 2015 Thomson Reuters. No claim to original U.S. Government Works. |

Teaching Memo Excerpt

[There is sufficient room in this problem for a student to argue either side, so students should not be discouraged from pursuing whichever line of argument that they feel they can best support. However, the argument that the evidence can be authenticated is probably slightly stronger because authenticity does not have to be conclusively proven for evidence to be deemed ‘authenticated’ for purposes of admissibility.]

1. Authenticity – Massachusetts Rule 901.
	1. To be admissible, there must be sufficient evidence to support a finding that the evidence to be authenticated “is what its proponent represents it to be.” *Commonwealth v. Williams*, 926 N.E.2d 1162, 1172 (Mass. 2010).
		1. This could be proven in a variety of ways: with direct testimony from Hansel admitting that he sent the messages, with evidence from a computer expert linking the messages to Hansel’s computer, or with circumstantial evidence.
			1. The first two are unlikely: the Assigning Memo says that Hansel will not testify, and the DA’s office does not have access to the appropriate computer experts.
			2. Thus, the question is whether the circumstances surrounding the messages are sufficient to support a finding that Hansel actually sent them.
		2. Rule: Authenticity does not need to be conclusively proven: if a reasonable jury could find that the profile was authentic, that is sufficient to allow it into evidence. *Commonwealth v. Siny Van Tran*, 953 N.E.2d 139, 152 (Mass. 2011).
			1. Students who argue that the evidence can be authenticated should emphasize that this is an easy standard.
				1. Students might point to the dissent in *Griffin* (keeping in mind that it is not a Massachusetts case). As long as a minimum standard of reasonableness is met, any indication that the evidence is inauthentic should go to its weight, not its admissibility. *Griffin v. State*, 19 A.3d 415, 429 (Md. 2011) (Harrell, J., dissenting).
				2. Students might pre-empt the argument that social media can be abused by saying that there is no more uncertainty about the authenticity of social media messages than there would be about a letter or other form of communication. Online communications should not face a particularly high bar for admissibility. *In re F.P.*, 878 A.2d 91, 95 (Pa. Super. Ct. 2005).
			2. Students who argue that the evidence cannot be authenticated might argue that online forms of communications might be more susceptible to abuse and deception than other forms of communication. *Griffin*, 19 A.3d at 424 (concluding that *Williams* supports the idea that courts should give “greater scrutiny” to authenticity of evidence from social media “because of the heightened possibility for manipulation by other than the true user or poster”). Thus, there must be evidence that the messages were not merely fabricated by a third party.
	2. There is significant circumstantial evidence supporting the inference that Hansel sent the messages.
		1. The profile was listed under Hansel’s name, had photos that were not publicly available, and displayed his personal information, including his “hometown” and school.
		2. There are also some security restrictions that would have made it difficult for someone to send messages from the profile unless it was entirely his or her own fake account.
			1. To send messages from the “Henry Hansel” profile would have required that the sender have the correct username and password. *See Griffin*, 19 A.3d at 420 (“[A] social networking site generally requires a unique username and password for the user to both establish a profile and access it.”).
	3. It can be difficult to prove that online messages were sent by a particular person merely with reference to the message’s own allegation that it is from that person.
		1. Merely indicating that the profile itself purported to belong to Hansel is not sufficient. *Williams*, 926 N.E.2d at 1172–73.
			1. The fact that the profile was registered under his name and had photos of him does not establish that he sent the messages.
			2. Like MySpace profiles, Facebook profiles can be created under false names. *Griffin*, 19 A.3d at 420.
		2. There is not a lot of evidence outside of the profile itself that indicates that it belonged to Hansel or that he sent the messages.
			1. There is no evidence in the record that Hansel took subsequent actions indicating that he was responsible for the messages (unlike in *Amaral* or *In re F.P.*).
			2. Unlike in *Commonwealth v. Amaral*, there is no evidence about how secure a Facebook page is or who can access it. 941 N.E.2d 1143, 1146 (Mass. App. Ct. 2010); *see also* *Williams*, 926 N.E.2d at 1172–73 (describing the effect of similar evidence).
			3. There is no evidence from Facebook verifying the sender of the messages. *Siny Van Tran*, 953 N.E.2d at 151.

Appendix A







Mock Student Outline A

**To:** Young Prosecutor

**From:** Middlesex District Attorney’s Office

**Date:** September 21, 2018

**Re:** Prosecution of Henry Hansel for identity theft

**Question Presented**

Henry Hansel has been charged with violating Massachusetts’ identity theft statute for soliciting personal information from Noor Ahmed and using such information fraudulently to take out and use credit cards in her name. Is a court likely to find a Facebook message transcript between Ahmed and someone purporting to be Henry Hansel authentic under Massachusetts Evidence Rule 901?

**Brief Answer**

Probably yes. A document may be authenticated by circumstantial evidence alone. Although the mere fact that a profile purports to be someone is not sufficient for authenticating messages from such person, in this case Hansel’s Facebook profile contained distinctive characteristics, such as privately available photos, and could only be accessed with a username and password.

**Discussion**

1. **Umbrella**
	1. Massachusetts evidence rule 901
		1. Authenticity is usually proved by testimony of a witness either “(1) that the thing is what its proponent represents it to be, or (2) that circumstances exist which imply that the thing is what its proponent represents it to be.” *Commonwealth v. Williams*, 456 Mass. 857 (2010).
	2. Standard of review is preponderance of the evidence. *Commonwealth v. Siny Van Tran*, 460 Mass. 535 (2011).
	3. Assuming our office lacks budget to bring in a computer expert, (1) is undisputed.
	4. Regarding (2), some circumstantial evidence exists that implies the authenticity of the Facebook messages
		1. The fb profile contains non-publicly available personal information and can only be accessed with a username and password.
	5. Counter
		1. Mere fact that messages or profile purport to be sent by or belong to Hansel is not enough
		2. Unlike in *Amaral*, we have no future corroborating actions. *Commonwealth v. Amaral*, 78 Mass. App. Ct. 671 (2011).
2. **A court would probably hold that there is enough circumstantial evidence to authenticate**
	1. Evidence may be authenticated by circumstantial evidence alone, including its “[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics” Mass. G. Evid., [*supra* at § 901(b)(1), (4)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1093473&cite=MAREVIDS901&originatingDoc=Ie65cce49ddd111e08b448cf533780ea2&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)). *Commonwealth v. Siny Van Tran*, 460 Mass. 535 (2011).
	2. Here, the profile includes Hansel’s name, photos that were not previously publicly available and other personal information
		1. See *In re. F.P.*, 878 A.2d 91 (Superior Court of PA 2005) for analogy:
			1. It is enough that messages referred to defendant by first name, included threats against the victim, and referenced the fact that victim told school about threats.
				1. Counter: the mere fact that the messages or a profile demonstrate familiarity with the recipient of the messages or with publicly available information is not sufficient (See *Williams*, finding that the mere fact that the sender was familiar with the potential witness or the case was not sufficient to authenticate)
		2. To send messages, need username and pw for the profile (*Cf.* *Commonwealth v. State*,419 Md. 343 (2011).
		3. There is no more uncertainty about the authenticity of these messages than there would be about a letter or other form of communication. *In re F.P.*, 878 A.2d 91, 95 (2005).
		4. Standard is merely preponderance of evidence, so evidence would likely be admitted.
	3. Future actions consistent with messages can provide circumstantial evidence. *Commonwealth v. Amaral*, 78 Mass. App. Ct. 671 (2011).
		1. In *Amaral*, an email indicating defendant would be at a certain place at a specific time and including his phone number provided circumstantial evidence support that defendant sent the email when he showed up at the specific place at the specific time and responded to a phone call on the number provided.
			1. The prompt does not specify whether Hansel took any actions consistent with the messages. But, if any evidence can be presented that is consistent with the messages (e.g., the producer’s testimony that Hansel sought to be reinstated in the fashion described in the messages), that would provide further circumstantial evidence.
3. **The mere fact that the profile purported to be Hansel is not sufficient**. *Williams*; *Amaral*
	1. As in *Williams*, the mere fact that the messages purport to be from the defendant or are registered in the defendant’s name are insufficient to authenticate.
		1. Anyone can create a fb account with any name.
			1. Distinguish based on personal info etc.
	2. As in *Amaral*, no evidence regarding how secure FB pages are / who has access to them.
4. **Although the list of three authentication methods in *Commonwealth v. State* is not exhaustive (or controlling), notably none of the three is met here**
	1. Hansel is not testifying
	2. Hansel’s computer is not likely to be searched
	3. We have no info from facebook.
5. **Conclusion**

Mock Student Outline B

Question Presented

Is the transcript between Noor Ahmed and Henry Hansel authentic?

Brief Answer

Maybe. On the one hand, Henry’s messages include personal information, but on the other hand case law suggests that messages claiming to be from someone are not enough to authenticate those messages as from that person.

1. Overall rule
	1. “An item offered in evidence must be what its proponent represents it to be. Authenticity is usually proved by testimony of a witness either (1) that the thing is what its proponent represents it to be, or (2) that circumstances exist which imply that the thing is what its proponent represents it to be.” [*Commonwealth v. Williams,* 456 Mass. 857, 868, 926 N.E.2d 1162 (2010)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2022085991&pubNum=0000578&originatingDoc=I85d95379289711e0852cd4369a8093f1&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Keycite)) (quotations and citations omitted). See [Mass. G. Evid. § 901(a)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1093473&cite=MAREVIDS901&originatingDoc=I85d95379289711e0852cd4369a8093f1&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Keycite)).
2. A court will not authenticate just because the messages purport to be from a certain person.
	1. “Here, while the foundational testimony established that the messages were **\*\*1173** sent by someone with access to Williams’s MySpace Web page, it did not identify the person who actually sent the communication. Nor was there expert testimony that no one other than Williams could communicate from that Web page. Testimony regarding the contents of the messages should not have been admitted.” **Williams.**
	2. “We agree with Griffin that the trial judge abused his discretion in admitting \*\*424 the MySpace evidence pursuant to [Rule 5–901(b)(4)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1006359&cite=MDRREVR5-901&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)), because the picture of Ms. Barber, coupled with her birth date and location, were not sufficient “distinctive characteristics” on a MySpace profile to authenticate its printout, given the prospect that someone other than Ms. Barber could have not only created the site, but also posted the “snitches get stitches” comment.” **Griffin**
	3. There are three other ways of authenticating a profile, but they probably will not work
		1. “The first, and perhaps most obvious method would be to ask the purported creator if she indeed created the profile and also if she added the posting in question, i.e. “[t]estimony of a witness with knowledge that the offered evidence is what it is claimed to be.” [Rule 5–901(b)(1)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1006359&cite=MDRREVR5-901&originatingDoc=Iaafe614a71b211e0a8a2938374af9660&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Folder*cid.8619e1053cfe4561bb7dffc99dfced9e*oc.Search)).”
		2. “The second option may be to search the computer of the person who allegedly created the profile and posting and examine the computer’s internet history and hard drive to determine whether that computer was used to originate the social networking profile and posting in question.”
		3. “A third method may be to obtain information directly from the social networking website that links the establishment of the profile to the person who allegedly created it and also links the posting sought to be introduced to the person who initiated it.” **Griffin.**
3. Some circumstantial evidence suggests that the profile was Hansel’s
	1. Similar to **In re. F.P.**, Hansel uniquely identified himself by revealing information only he could know and by including pictures that no one else could have had access to.
		1. “Clearly, there was sufficient evidence that appellant was “Icp4Life30” and sent the threatening messages to Z.G. He referred to himself by his first name. He repeatedly accused Z.G. of stealing from him, which mirrored testimony that appellant was angry about a stolen DVD. Appellant referenced the fact that Z.G. had approached high school authorities about the instant messages. At one point, Z.G. states, “we used to be firends [sic] til u thought i stole off u”; appellant replies rather inartfully, with yet more foul language. (Commonwealth’s Exhibit 1.) Repeatedly, appellant called Z.G. vile names and threatened to beat him up. All of this evidence, taken together, was clearly sufficient to authenticate the instant message transcripts as having originated from appellant.” **In re. F.P.**
	2. Subsequent actions are relevant to proving that internet messages were sent by the person claimed. **Amaral**
		1. “One e-mail indicated that Jeremy would be at a certain place at a certain time, and the defendant appeared at that place and time. In other e-mails, Jeremy provided his **\*675** telephone number and photograph. When the trooper called that number, the defendant immediately answered his telephone, and the photograph was a picture of the defendant. These actions served to confirm that the author of the e-mails and the defendant were one and the same.” See [Mass. G. Evid. § 901(b)(6)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1093473&cite=MAREVIDS901&originatingDoc=I85d95379289711e0852cd4369a8093f1&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Keycite)).[6](#bookmark=id.4jpj0b3)
		2. Similar to **Amaral**, by actually committing the fraud, Hansel engaged in an action consistent with the transcripts, which corroborates the transcripts as being authentic.

Part II: Bluebook Email

**Scenario**

It is October and you receive this email:

To: BSA

From: Dedicated Student

Hi!

Thanks again for meeting with me yesterday, it was super helpful to go over some of the counterarguments that I’m considering including in the Open Memo. I can’t believe the draft is due so soon!

I realized last night that I forgot to ask you a few questions that I had about the Bluebook. I’ve listed them below. No rush, but if you have thoughts I’d be really appreciative.

Thanks in advance! Have a great weekend

-d

1. I want to put two citations in the same sentence. One requires a citation clause set off by commas; does that mean the other citation should also be a clause? Can I put it after the period instead?
2. For Hagen v. Burmeister & Associates, Inc. should I abbreviate “Associates” as “Assocs”? I know that per T6 the abbreviation for “Associate” is “Assoc.” I also see that the Bluebook says add “s” for plural unless otherwise specified. Since the word ends in “s” I think I should drop the “.” Does “Assocs” work?
3. Statutes: is the “West” necessary? How do I determine the right year? Ex: 28 U.S.C. 1346 (year).
4. Under the Bluebook capitalization rules, does “District Court” count as the “full name” of a court, or is capitalization only proper when I refer to the “U.S. Court for the District of Nevada?”
5. If I am doing a long string citation of cases, should I include the page number of the holding? Or, is it best to omit the pincite? I apologize that I have asked this one before (I think!), and in that context you told me always include the pin cite, but since I’m talking about the holding of the case as it relates to the case as a whole, I wanted to confirm.

**Instructions**

Please draft a response to this email and bring a hard copy of your response to **each** interview. You will not discuss it during the mock conference, but it will be collected.

**Evaluation**

Applicants will be evaluated on the quality of information provided, as well as the quality of the communication with the student (including clarity and tone of the response).

1. Facebook is a social networking site. Users establish a “profile” with their name, and they can display photos, add personal information about themselves, and connect their profile with those of their “friends.” Users can also send private messages to other Facebook users through the messaging system. To do any of these things in connection with a particular profile, a person must have the login information (email and password) for that profile. [↑](#footnote-ref-1)
2. In relevant part, the Massachusetts law states:

(b) Whoever, with intent to defraud, poses as another person without the express authorization of that person and uses such person's personal identifying information to obtain or to attempt to obtain money, credit, goods, services, anything of value, any identification card or other evidence of such person's identity, or to harass another shall be guilty of identity fraud and shall be punished by a fine of not more than $5,000 or imprisonment in a house of correction for not more than two and one-half years, or by both such fine and imprisonment.

(c) Whoever, with intent to defraud, obtains personal identifying information about another person without the express authorization of such person, with the intent to pose as such person or who obtains personal identifying information about a person without the express authorization of such person in order to assist another to pose as such person in order to obtain money, credit, goods, services, anything of value, any identification card or other evidence of such person's identity, or to harass another shall be guilty of the crime of identity fraud and shall be punished by a fine of not more than $5,000 or imprisonment in a house of correction for not more than two and one-half years, or by both such fine and imprisonment.

 (d) A person found guilty of violating any provisions of this section shall, in addition to any other punishment, be ordered to make restitution for financial loss sustained by a victim as a result of such violation. Financial loss may include any costs incurred by such victim in correcting the credit history of such victim or any costs incurred in connection with any civil or administrative proceeding to satisfy any debt or other obligation of such victim, including lost wages and attorney's fees.

Mass. Gen. Laws Ann. 266 § 37E (West) [↑](#footnote-ref-2)