

Legal Issues with Obtaining Digital Evidence

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DISCLAIMER

- This project is supported by Grant #2019-MU-MU-K002 awarded by the Office of Juvenile Justice and Delinquency Prevention (OJJDP), Office of Justice Programs, U.S. Department of Justice.
- The opinions, findings, and conclusions or recommendations expressed in this publication/program/exhibition are those of the author(s) and do not necessarily reflect those of the Department of Justice.

PRIORITIES

Office of Juvenile Justice and Delinquency Prevention (OJJDP),
Office of Justice Programs, U.S. Department of Justice

- Treating Children as Children
- Serve Children at Home, with their Families, In their Communities
- Open up Opportunities for Young People Involved in the Justice System

Digital Evidence

- DIGITAL EVIDENCE FROM A DEVICE – ex. Forensic Download of cellular phone, computer, or any other digital device capable of storing data.
- DIGITAL EVIDENCE FROM A PROVIDER – ex. e-mails obtained from Google, messages or photos from Facebook/Instagram, content of iCloud, etc.
- LOCATION DATA CAN COME FROM PHONE OR FROM PROVIDER.
- CONTENT CAN OVERLAP BETWEEN THE TWO DATA SOURCES.

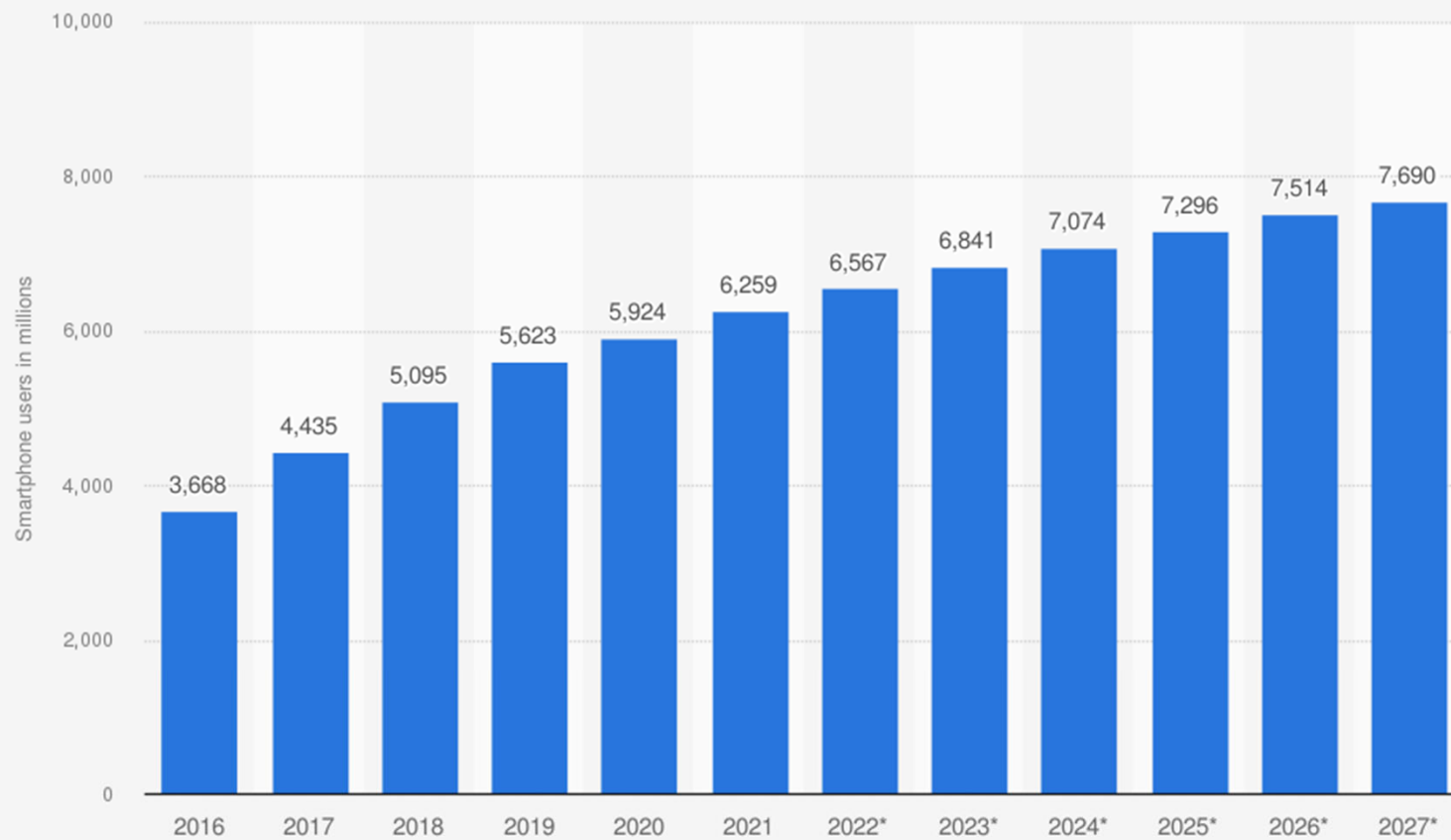
Digital Evidence

Obtaining Digital Evidence is controlled by Texas Code of Criminal Procedure.

TCCP 18.0215 – Physical Device

TCCP 18B – Data from Provider

Number of smartphone subscriptions worldwide from 2016 to 2027 (in millions)

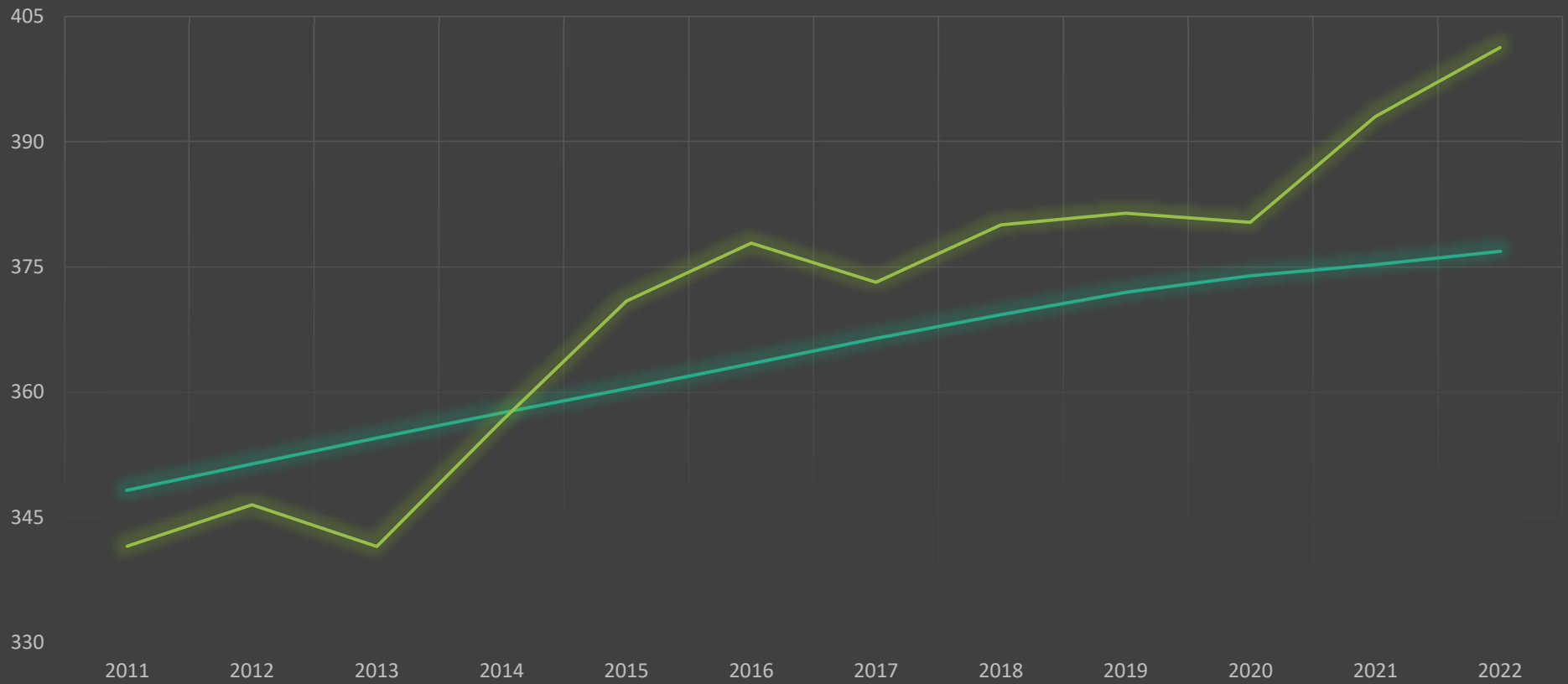


Source
Ericsson
© Statista 2022

Additional Information:
Worldwide; Ericsson; 2016 to 2021

Mobile Subscribers and Population (North America)

Population in Millions Mobile Subscribers in Millions

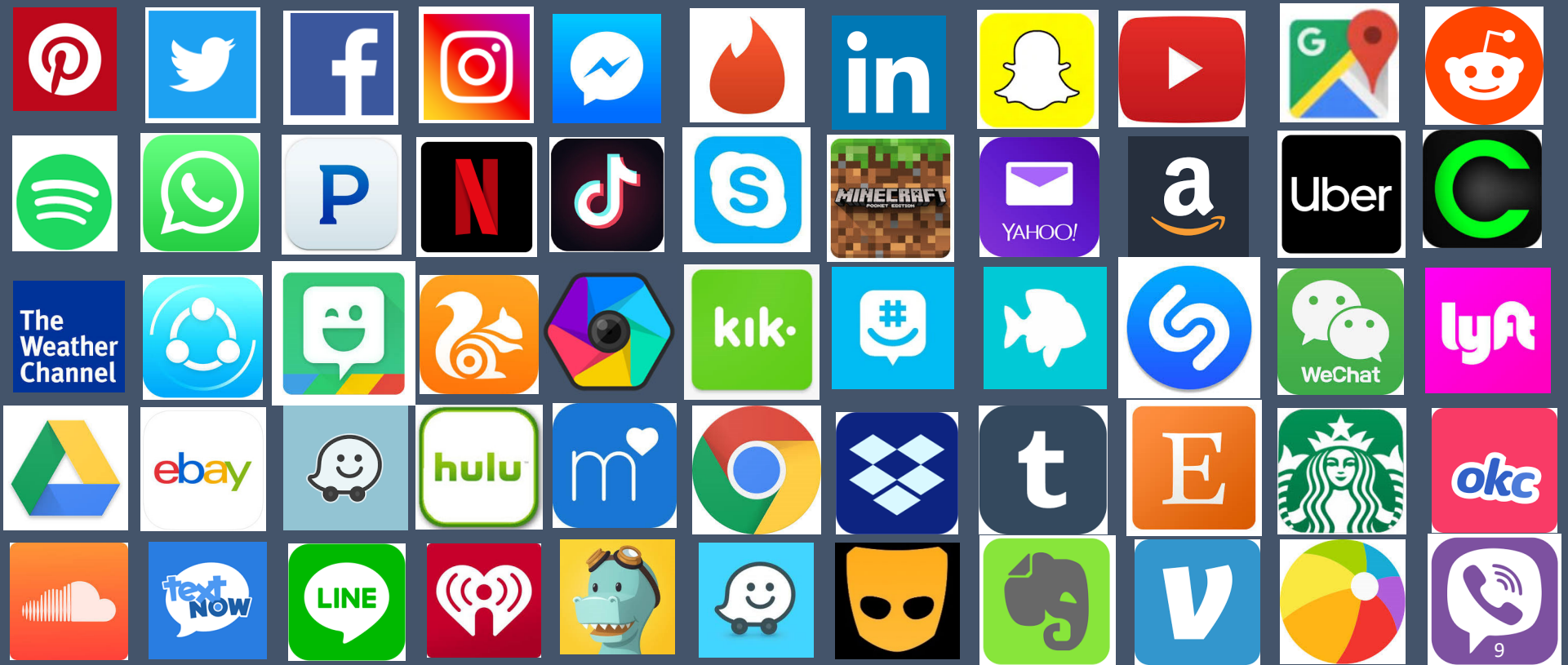


Mobile Phones

Mobile Applications “Apps”

Lots of them

Mobile Phones Apps



Mobile Phones Apps



Apple iTunes App Store

2.2 Million+
Q2 - 2022



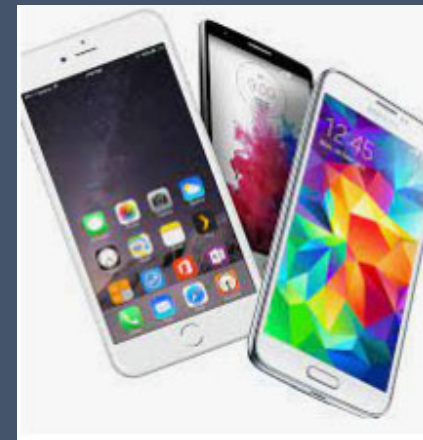
Google Play Store Apps

3.5 Million+
Q2 - 2022

That is a wealth of information and potential evidence

Cell Phone Device Content

- Electronic communication
 - Text messages
 - Social media
 - Instant messaging (WhatsApp, Google Hangout, Signal)
 - Apps that allow communication (Grindr, Pinterest)
 - Email
- Phone Calls (through phone and apps)
- Photos / Videos
 - YouTube / TikTok
- Location information
 - exif / metadata, GPS, Map searches
 - Uber / Lyft
- Internet Browsing History
- Notes / Reminders
- Banking, Health, App Store, Amazon
- Timeline



Cell Phone Device Warrant

CCP 18.0215

- Warrant must be signed by District Court Judge (no magistrate)
 - Judge of the jurisdiction of the officer's agency if the phone in police custody
 - Judge of the jurisdiction where the device is likely to be located
- Warrant and Affidavit must contain
 - Name, department, agency and address of applicant
 - Identify the device
 - State the name of the owner/possessor of the device to be searched
 - State the address at which the device is currently located
 - State facts and circumstances to establish *probable cause* that crime committed and evidence on phone

Cell Phone Device Content

- Software designed to interface with cell phones is constantly in a state of development in an attempt to keep pace with security features of cell phones.
- Despite privacy features employed by social media/communication platforms, messages can be retrieved from the device from which the messages were sent.
- Consent is always the preferred route if possible.

Digital Evidence

Recent and Relevant Texas Caselaw:

State v. Baldwin – Capital Murder Case out of Harris County
PD-0027-21

SCOTUS denied petition.

Police obtained search warrant for Defendant's cell phone

Affidavit contained “boilerplate language” regarding the use of cell phones amongst criminals

Court held that “boilerplate language” can be used but must be “coupled with other facts and reasonable inferences that establish a nexus between the DEVICE and the OFFENSE.”

Digital Evidence

Recent and Relevant Texas Caselaw:

State v. Stocker – Capital Murder Case out of Harris County
NO. 14-21-00412-CR.

Police obtained search warrant for Defendant's cell phone

- Court ruled that search of cell phone should have been suppressed, relying heavily on Baldwin.
- PDR was granted by CCA.

Digital Evidence

Grounds for Review in Stocker PDR:

Whether the court of appeals erred by interpreting Baldwin as requiring a heightened standard for probable cause, thereby departing from the flexible standard required by law?

Whether the court of appeals erred by applying inconsistent standards for probable cause as it analyzed the warrant affidavit for the search of cell phone data under Baldwin and the affidavit for the search of cell phone location information under Holder?

Digital Evidence

So where does that leave us?

What is the CCA going to rule in regard to Stocker?

Are they going to differentiate between the requisite nexus for searches of cell phones as opposed to cell site location data?

- At the very least, no more “boilerplate language” as the basis for search of cell phones.

Cell Phone Call Detail Records /Cell Tower, Cell Site, GPS HISTORICAL DATA

- *Carpenter v. US* (2018) → a warrant supported by PC is required to obtain cell-site location information ... people have a strong legitimate privacy interest in a person's physical location and movements
- Have to establish by PC standard how phone connected / used in the planning, commission, or afterwards to justify obtaining

DATA FROM PROVIDER

CCP 18B

- Call Detail Records
 - Contains HISTORICAL DATA: Incoming and Outgoing calls, Cell Tower, Cell Site/GPS
- **18B.354(b)** A search warrant may not be issued under this article unless the sworn affidavit required by Article 18.01(b) provides sufficient and substantial facts to establish probable cause that:
 - **(1)** a specific offense has been committed; and
 - **(2)** the electronic customer data sought:**(A)** constitutes evidence of that offense or evidence that a particular person committed that offense; and**(B)** is held in electronic storage by the service provider on which the warrant is served under Article 18B.355(c).

“Live” Orders NOT HISTORICAL BUT PROSPECTIVE

- Pen Register/Trap and Trace – requires application and order per TCCP 18B.
- Prospective Location – requires search warrant per TCCP 18B.

“Live” Orders

NOT HISTORICAL BUT PROSPECTDIVE

- Prospective Location requirements:
- **18B.323(b)** A warrant may not be issued under this article unless the sworn affidavit required by Article 18.01(b) provides sufficient and substantial facts to establish probable cause that:**(1)** the disclosure of the location information sought will:**(A)** produce evidence of an offense under investigation; or**(B)** result in the apprehension of a fugitive from justice; and**(2)** the location information sought is held in electronic storage in the possession, care, custody, or control of the service provider on which the warrant is served.

Emergency Live Orders

CCP 18b.151 & 18b.152

- Immediate Life Threatening situation ... hostage, barricade, or other emergency situation in which a person unlawfully and directly
 - Threatens **another** with death – OR –
 - Exposes **another** to a substantial risk of SBI
- Officer of a unit specially trained to respond to life threatening situations
→ list
- Officer SHALL
 - Promptly report to ADA (call / email)
 - w/in 48 hours have judge issue an order
 - If you don't do this ... lose evidence

“Live” Orders

NOT HISTORICAL BUT PROSPECTDIVE

- Prospective Location requirements:
- **18B.323(b)** A warrant may not be issued under this article unless the sworn affidavit required by Article 18.01(b) provides sufficient and substantial facts to establish probable cause that:**(1)** the disclosure of the location information sought will:
 - (A)** produce evidence of an offense under investigation; or
 - (B)** result in the apprehension of a fugitive from justice; and
- (2)** the location information sought is held in electronic storage in the possession, care, custody, or control of the service provider on which the warrant is served.

Live Orders

- This data, especially prospective location information, becomes particularly important in missing children/kidnappings situations.
- There is no “special exception” for access to data in order to find or recover a “missing” child.
- Reported kidnappings make up the bulk of requests our office gets for Emergency Declarations.

QUESTIONS?



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