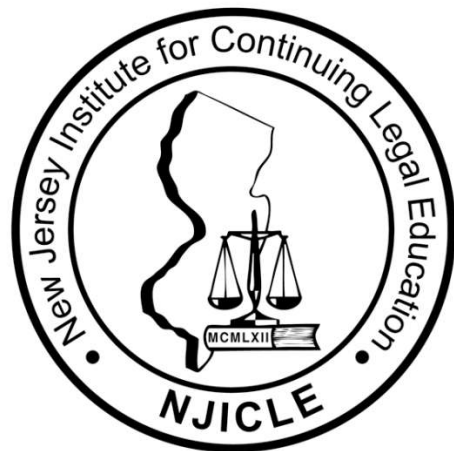# THE INAUGURAL NJSBA AI INSTITUTE – DAY 5

2025 Seminar Material

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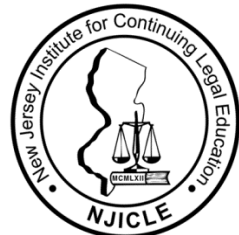
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THE INAUGURAL NJSBA AI INSTITUTE – DAY 5

Speakers

Stephanie D. Gironda, Esq.
Wilentz, Goldman & Spitzer, P.A.
(Woodbridge, Eatontown; New York City;
Philadelphia, PA)

Honorable Ronald J. Hedges, USMJ (Ret.)
Ronald J. Hedges LLC
(Hackensack)

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AI/GAI IN CRIMINAL INVESTIGATIONS AND PROCEEDINGS

THE INAUGURAL NJSBA AI INSTITUTE

SESSION #5

PRESENTER
RONALD J. HEDGES

- Principal, Ronald J. Hedges LLC
- United States Magistrate Judge, District of New Jersey, 1986-2007
- Co-Senior Editor, *Sedona Conference Cooperation Proclamation: Resources for the Judiciary Third Edition* (June 2020) and *Supplement* (April 2022)
- Lead Author, *Managing Discovery of Electronic Information, Third Edition* (Federal Judicial Center: 2017)
- Chair of Court Technology Committee of ABA Judicial Division
- Member, NJSBA Artificial Intelligence Committee
- r_hedges@live.com

PRESENTER
STEPHANIE D. GIRONDA, ESQ.

- Counsel, Wilentz Goldman & Spitzer, Woodbridge

- Represents primarily employees in employment law claims

- Panelist on multiple panels representing employee point of view/rights regarding use of AI, including "What Labor & Employment Lawyers Should Know about Generative AI" and "Artificial Intelligence Regulation."

- Use of AI in Criminal Cases is Instructive for Employment Lawyers and other civil law attorneys

DISCLAIMER

- The information in these slides and presentations is not legal advice and should not be considered legal advice.
- This presentation represents the personal views of the presenters.
- This presentation is offered for informational and educational uses only.

INTRODUCTION
UNITED STATES v. MALINDRETOS

- Charged with attempted use of fire to damage and destroy a building within the District of New Jersey
- Tracked by:
  - Surveillance video at building
  - License plate reading device ("LPR")
  - Video cameras in the area where suspect's car was parked

INTRODUCTION
I/M/O APP. FOR SEARCH WARRANT

- Multiple murders in Idaho, search warrant issued for suspect's residence in Washington State
- Supporting declaration included these sources of electronic information:
  - Video footage from bar
  - Livestreamed video from food truck
  - Downloads of records from victims' phones
  - Security camera at scene of crime
  - Video canvass of surveillance videos in neighborhood
  - Law enforcement body camera
  - License plate reader
  - Open-source internet search
  - Historical CSLI

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INTRODUCTION
I/M/O APP. FOR SEARCH WARRANT

- Warrant sought, among other things:
  - "images, whether digital or on paper "
  - "Trace evidence including DNA"
  - "Data compilations (whether digital/electronic or on paper or other format)"
  - "Electronic/digital devices or digital storage devices"
  - "Evidence of other accounts associated with this device"
  - "related data created, accessed, read *** between the above dates"
  - Evidence of use of the device to conduct internet searches"
  - Information that can be used to calculate the position of the device"
  - Evidence of the identity of the person in possession of the device"

INTRODUCTION
THE LAS VEGAS CYBERTRUCK

Prompts to ChatGPT:

- "'How much Tannerite is equivalent to 1 pound of TNT?' He follows up by asking how it might be ignited at 'point blank range.'"

See D. Cameron, "Before Las Vegas, Intel Analysts Warned that Bomb Makers were Turning to AI," *Wired* (Jan. 8, 2025)

INTRODUCTION
THE JUDGE AND THE VR HEADSET

See "Judge Wears VR Headset To View Defendant's Account Of Events And What Fresh Hell Is This?" *Above the Law* (Jan. 9, 2025)

- Who supports the tech?
- Who pays for it?
  - Court?
  - Defendant?
    - Retained counsel?
    - Public defender?
  - Prosecution?
  - Is the use of VR a case of "buying justice?"
- What is the appellate record?

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TOPICS TO BE ADDRESSED

- GAI-Related Crimes
- First Amendment
- Fourth Amendment
- Sixth Amendment and Ineffective Assistance of Counsel
- Discovery

CAUSES OF ACTION:
KNOWN OR FORESEEABLE

Criminal Causes of action arising out of GAI:

- Child pornography

  - *United States v. Morton,* 950 F.3d 257 (5th Cir. 2020)

- Data breach

- Cybersecurity

- Malicious use, such as deep fakes, hate speech and scamming

  - NY State Senate Bill No. SO1042A

THE FIRST AMENDMENT AND "TRUE THREATS"

- *Elonis v. United States,* 575 U.S. 723 (2015)
- *Counterman v. Colorado,* 600 U.S. 66 (2023)
- *K.B. v. D.O.,*23-P-291 (Mass. App. Ct. Feb. 15, 2024)
- *United States v. Ramos,* Case No. 5:24-cr-34 (MTT) (M.D. Ga. Sept. 27, 2024)

THE FOURTH AMENDMENT* AND GEOFENCING

Katz v. United States, 389 U.S. 347 (1967):

• Microphones on telephone booths

• Wires leading to wire recorders

• Search warrant for bookmaking records, etc.

How have times changed?

*But note that the State Constitution may offer greater protection to New Jersey residents than the Fourth Amendment. *State v. Earls,* 214 N.J. 564, 588 (2013).

THE FOURTH AMENDMENT AND GEOFENCING

United States v. Jones, 565 U.S. 400 (2012):

• Scalia (with Roberts, Kennedy and Thomas) = "trespass"

• Alito (with Ginsburg, Breyer and Kagan) = "The best that we can do *** is to apply existing Fourth Amendment doctrine and to ask whether the use of GPS tracking in a particular case involved a degree of intrusion that a reasonable person would not have been anticipated." 565 U.S. at 430.

• Sotomayor = Joins Scalia's opinion but notes that "it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties." 565 U.S. at 417.

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THE FOURTH AMENDMENT AND GEOFENCING

Riley v. California, 134 S. Ct. 2473 (2014):

- Unanimous decision by Roberts, C.J.

- "Although the data stored on a cell phone is distinguished from physical records by quantity alone, certain types of data are also qualitatively different."

- "Our answer to the question of what police must do before searching a cell phone incident to an arrest is accordingly simple – get a warrant."

- "Exigent circumstances" remain available.

THE FOURTH AMENDMENT AND GEOFENCING

Carpenter v. United States, 138 S. Ct. 2206 (2018):

• Roberts, C.J. (with Ginsburg, Breyer, Sotomayor and Kagan) = acquisition of CSLI was a "search"

• Kennedy (with Thomas and Alito) = "This case involves new technology, but the Court's stark departure from relevant Fourth Amendment precedents and principles is, in my submission, unnecessary and incorrect, requiring this respectful dissent."

THE FOURTH AMENDMENT AND GEOFENCING

What are reasonable expectations of privacy after *Carpenter*?

- *United States v. Bledsoe*, Criminal Action No. 21-204 (D.D.C. Aug. 22, 2022)
- *United States v. Martin,* Crim. No. 3:23-cr-150 (E.D. Va. Oct. 11, 2024)
- *United States v. Moore-Bush*, 36 F.4th 320 (1st Cir. 2022) (*en banc*)

THE FOURTH AMENDMENT

- *United States v. Chatrie,* No. 22-4489, 2024 U.S. App. LEXIS 16692 (4th Cir. July 9, 2024), vacated and *en banc* rehearing granted, No. 22-4489 (4th Cir. Nov. 1, 2024), see https://reason.com/volokh/2024/11/01/fourth-circuit-votes-to-rehear-its-geofence-warrant-case/

- *United States v. Davis,* No. 23-10184 (11th Cir. July 30, 2024)

- *United States v. Smith,* Case: 23-60321 (5th Cir. Aug. 9, 2024), petition for rehearing filed (5th Cir. Oct. 22, 2024),see https://reason.com/volokh/2024/10/24/doj-files-petition-for-rehearing-in-the-fifth-circuit-on-geofence-warrants/

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THE SIXTH AMENDMENT AND INEFFECTIVE ASSISTANCE OF COUNSEL

- *People v. Wakefield,* 175 A.D.3d 158, 107 N.Y.S.3d 487 (3d Dept. 2019), aff'd, 38 N.Y.3d 367, 195 N.E.3d 19, 174 N.Y.S.3d 312 (2022)
- *United States v. Michel,* Crim. No. 19-148-1 (CKK) (D.D.C. Aug. 30, 2024)

DISCOVERY

R. 3:13-3 Discovery and Inspection:

- (a) Pre-Indictment Discovery
- (b)(1) Post-Indictment Discovery
- (b)(2) Discovery by the State
- (b)(3) Discovery Provided through Electronic Means
- (c) Motions for Discovery
- (d) Documents Not Subject to Discovery

DISCOVERY

- Facial recognition technology used to identify suspect:
  - What might a defendant demand in discovery?
  - What objections might the State assert?
- Alleged deepfake used for child pornography:
  - What might a defendant demand in discovery?
  - What objections might the State assert?

DISCOVERY

What might be requested:

- Training set
- Source code or algorithm
- "Black box" algorithms
- Prompts
- Metadata – *see, e.g., Moore v. Garnard,* No. CV 19-00290 TUC RM (MAA) (D. Az. July 3, 2024)
- Etc.

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DISCOVERY

- *People v. Wakefield,* 175 A.D.3d 158, 107 N.Y.S.3d 487 (3d Dept. 2019), aff'd, 38 N.Y.3d 367, 195 N.E.3d 19, 174 N.Y.S.3d 312 (2022)

- *People v. Bay,* 2023 NY Slip Op 06407 (Ct. App. Dec. 14, 2023)

- *State v. Pickett*, 466 N.J. Super. 270 (App. Div. 2021), motions to expand record, for leave to appeal, and for stay denied, *State v. Pickett*, 246 N.J. 48 (2021)

RESOURCES

- S. Broderick, *et al., Criminal e-Discovery: A Pocket Guide for Judges* (FJC: Nov. 25, 2015), https://www.fjc.gov/content/309106/criminal-e-discovery-pocket-guide-judges

- R.J. Hedges, *Artificial Intelligence Discovery and Admissibility Case Law and Other Resources* (Jan. 2024) (in materials)

- R.J. Hedges, *Electronic Evidence in Criminal Investigations and Actions: Representative Court Decisions and Supplementary Materials*, https://www.mass.gov/service-details/understanding-electronic-information-in-criminal-investigations-and-actions

- R.J. Hedges, *Electronic Evidence in Criminal Investigations and Actions: Representative Court Decisions and Supplementary Materials* (Mar. 2024) (in materials)

FOLLOWING SESSIONS

- Session 6 – Admissibility of AI/GAI Under *Accutane* and *Olenowski* – Feb. 26
- Session 7 – The Ethics of AI/GAI Use by Attorneys – Mar. 12

QUESTIONS?
COMMENTS?
THANK YOU!

About the Panelists…

Stephanie D. Gironda is Counsel to the Employment Law Team of Wilentz, Goldman & Spitzer, P.A. with offices in Woodbridge and Eatontown, New Jersey; New York City; and Philadelphia, Pennsylvania. She concentrates her practice in employment matters, representing employees to help resolve some of the most difficult circumstances at work, including claims of harassment, discrimination and retaliation based on membership in a protected category such as gender, age, race, sexual orientation, religion, national origin and disability as well as whistleblower, wage and hour, and leave time claims. She advises employees on employment and severance agreements, accommodation requests, performance warnings and performance improvement plans, and in unemployment hearings.

Admitted to practice in New Jersey and before the United States District Court for the District of New Jersey, Ms. Gironda has been the Employee Co-Chair for the Insurance Subcommittee of the Employment Rights and Responsibilities Committee, Labor and Employment Law Section, American Bar Association. She has served as Co-Chair of the *Ad Hoc* Subcommittee of the Employment Law Section of the New Jersey State Bar Association and is a member of the Middlesex and Hudson County Bar Associations, and the New Jersey Employment Lawyers' Association. She is also a Trustee of the NJSBA LGBTQ Section.

Ms. Gironda is a Bencher in the Sidney Reitman Employment Law American Inn of Court. She is co-author and editor of "Recurring Insurance Defense Issues: A State-by-State Survey," ABA Section of Labor and Employment Law, 2016 Midwinter meeting of the Employment Rights & Responsibilities Committee, and edits a yearly book chapter on wage and hour law for Lexis Publications.

Ms. Gironda received her B.A. from the College of the Holy Cross, her M.A. from New York University and her J.D. from Rutgers Law School-Newark.

Honorable Ronald J. Hedges, USMJ (Ret.) is a Principal in Ronald J. Hedges LLC in Hackensack, New Jersey. Formerly Senior Counsel for Dentons in New York City and a member of the Litigation and Dispute Resolution Practice Group, he has extensive experience in e-discovery and the management of complex civil litigation matters, and has served as a special master, arbitrator and mediator. He also consults on the management and discovery of electronically stored information (ESI).

Admitted to practice in New Jersey, New York, Texas and the District of Columbia, and before several federal courts, Judge Hedges is a former United States Magistrate Judge in the United States District Court for the District of New Jersey (1986-2007), where he was the Compliance Judge for the Court Mediation Program, a member of the Lawyers Advisory Committee, and a member of and reporter for the *Civil Justice Reform Act* Advisory Committee. Chair of the Court Technology Committee of the Judicial Division of the American Bar Association, he has been a member of the American Law Institute, the American and Federal Bar Associations, and the Historical Society and the Lawyers Advisory Committee of the United States District Court for the District of New Jersey. He is a member of task forces established by the New Jersey and New York State Bar Associations to address artificial intelligence. Judge Hedges has served on the Sedona Conference Judicial Advisory Board; the Sedona Conference Working Group on Protective Orders, Confidentiality, and Public Access; and the Sedona Conference Working

Group on Best Practices for Electronic Document Retention & Protection. He has also been a member of the Advisory Board of the Advanced E-Discovery Institute of Georgetown University Law Center. He is a former Fellow at the Center for Information Technology of Princeton University and has been a member of the College of the State Bar of Texas.

Judge Hedges has been an adjunct professor at Rutgers School of Law-Newark and is a former adjunct professor at Georgetown University Law Center and Seton Hall University School of Law, where he has taught courses on electronic discovery and evidence and mediation skills. He is the author of "Rule 26(f): The Most Important E-Discovery Rule" (*New Jersey Law Journal*, 5/18/2009) and has authored, edited and co-edited a number of other publications on ESI topics including *Discovery of Electronically Stored Information: Surveying the Legal Landscape* (BNA, 2007). He is the co-senior editor of *The Sedona Conference Cooperation Proclamation, Resources for the Judiciary, Third Edition* (June 2020) and its 2022 supplement; and the principal author of the third edition of the Federal Judicial Center's *Pocket Guide for Judges on Discovery of Electronic Information*.

Judge Hedges received his B.A. from the University of Maryland and his J.D. from Georgetown University Law Center.