

# **Criminal Appeals and Digesting the record**

Professor John Pray  
Univ. of Wisconsin Law School  
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- What is Digesting? Organizing a huge amount of information into a form that is accessible to the person making the digest.
- What materials does an appellate attorney receive when appointed to represent a defendant on the appeal of his or her case? Three main categories: Court record, Transcripts, and Attorney File.

## **Court record**

- Criminal complaint
- Information
- Written motions (motions in limine, discovery, suppression, etc.)
- Judgment of Conviction
- Jury Instructions
- Verdict forms
- Written questions from jury during trial or deliberation
- Plea questionnaire/waiver of rights form
- Reports of exports

## **Transcripts**

- Court hearings
- Court hearings in co-defendants' cases in certain cases
- Transcriptions of audio or video statements (interviews, interrogations, 911 calls, etc.)

## **Attorney File**

- Duplicates of parts of court file
- Police Reports
- Video/audio tapes of interviews/interrogations, 911 calls

## Why Digest?

- If you just read the record, you haven't done your job. WHY?
  - Too much material in one case, let alone multiple cases.
  - Memory curves (appeals take a long time)
- Solution: Make a case digest
- There are Individual Differences, but there are features that should be included in everyone's digest
  
- What Should NOT be considered digesting?
  - It should *not* be sticking tabs on transcript
  - It should *not* be underlining of transcripts
  - It should *not* be by hand, but by computer to sort chronologically

## What makes a good digest?

- It combines Court Record, Attorney File, and Transcripts into one document that tells a story from beginning to end.
- It is chronological by date of occurrence, not the date you read the documents. Computer is needed.
- It is not too long, and not too short, but just right
- It allows you to flag issues

For Example, here is the first page of a combined digest:

- Revised 11/20/14

### **State v. Len D. Moore**

Spring County Case No. 2014 CF 351

Digest of Transcripts/Court Record/Attorney File

Digested by John Pray

- **July 25, 2013. SANE ER report**
- CK (age 11) came to ER with mother, Christy Kaan at 10:30 pm. V told her mom that def sexually assaulted her at school playground, kissed her on lips, touched inner thigh but did not go inside her panties, touched her on butt and breasts. Swabs taken of these areas and oral swabs and floss were taken. V has ADHD, and hard to keep her on task. Has drunk some water since the SA. No pelvic exam due to age. Evidence turned over to police. V says he "touched my butt in the middle." "I was scared" "He told me to lay down on the slide".....

- **July 28, 2013: Criminal Complaint 12 CF 4399**
- Count 1: Felony Bail Jumping. 946.49 Sept 5. Class H (6 year max).
- Count 2: Obstructing Officer. 946.41 Class A Misd. (9 month max).
- V said def is her ex-boyfriend. She was at 213 W. 25<sup>th</sup> St (her residence), def appeared at residence after midnight. She saw def's car parked in her driveway and heard def call her name. Didn't allow def into house. Heard glass break. Called 911 and hid upstairs. Def beat on the door, scared her. Cops arrived saw V lean out window and say he's upstairs and I'm locked in bedroom. Cops entered and V said he was hiding in basement. Found def hiding in closet. Attempted to take def he refused to go upstairs. Had to carry him out of house.
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- **July 27, 2013. INITIAL APPEARANCE**
  - Judge Fox, DA Fell, Atty Adams, Def.
  - DA: I want \$25,000 cash bail. Def has missed 3 court appearances. Serious offense. Flight risk
  - Adams: Has steady job, family in area, Made last 5 court appearances. Did have notice on his missed ones. Not a threat.
  - Ct: \$10,000 cash. Will consider lowering it later.
  - **Why no PC finding?**
- **Aug. 3, 2013: Demand for Discovery by Def.**
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- **Aug. 3, 2013: Demand for Speedy Trial by Def.**
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- **Nov. 4, 2013: STATUS HEARING.....**

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## Digesting the Court Record

- **Digest Criminal Complaint** (see above)
- **Information**—note any changes from complaint
- **PSI**
  - Read, but don't need to include much content.
  - Note Def's explanation of offense—did he admit, deny?
  - Note PSI sentence recommendation
- **Judgment of Conviction:** Note sentence on each count, whether CC or CS on multiple counts, Jail Credit, eligibility for CIP and SAP.
- Don't Need to Digest:
  - Jury Instructions—they will be in trial
  - Clerk's Notes (CCAP entries)

- Note Motions and Briefs filed by the parties. Usually you don't need to include much content as these can be found easily later.

## **Digesting the Attorney File**

- **Police reports.** Sample of digest of Police Report:

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**Nov. 8, 2013. Police report—statement of Michael Bell (brother of V) to Off. Graham.**

I was playing video games with friend Bruce. V and Def left to go to the store in def's truck. They were gone not even 20 minutes. They returned thru front door. V walked in and immediately went to mom's room. V look kind of scared and she hurried up and walked into mom's room. Len walked into mom's room and mom started yelling at Len. Len left mom's room and walked into kitchen, saying, "I can't believe she would say that." Len walked back into mom's room. Mom started yelling, "you touched my little girl, and "I am calling the cops." V was in room the whole time. Len then left and didn't say anything. Mom did call police. [**Why is this statement 3 months after it happened?**]

**Nov. 8, 2013. Police report. Off. Bell.** Canvassed neighborhood. No one saw or heard anything of note.

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- **Sample of Digest of Crime Lab Report:**

**Jan. 30, 2013. Report from Wis. Crime Lab.** Ken Long, analyst.

- Tested for DNA from vaginal swab of V. No male DNA found
- Tested for DNA from fingernail scrapings. Found mixture including male DNA. Cannot exclude def from mixture, but cannot give probability due to low amounts.

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- **Digesting of Recorded Interviews:**

-Note times from tape periodically. Sample Digest of interview:

- **October 31 2013 interview of Defendant.** 2:05 a.m. Off. Lopez.
- Cop (C): Do you know why you are here? No. You have warrant, and an investigation for SA. [Gives Miranda rights].

- D: I understand. I'll answer questions. I just want to know what the SA is. I'll talk to you. Born here. Lived here whole life. 24 years old. Gives brothers and sisters names and ages. Girlfriend. I have 2 kids. 7:00. Unemployed. 10<sup>th</sup> grade in school. I've been arrested for a lot of things. No alcohol today. No other drugs or meds 10:21. Saw psychologist a long time ago. When I was a kid. I feel OK now. 11:40.
- C: You are here for a SA.
- D: I didn't rape anyone. I lived at Main St. for about a year.
- C: Do you remember a few weeks ago meeting with a girl by Main St and 28th<sup>th</sup> Ave--a short white girl.
- D I didn't see no one on Main. I was walking, but not seen a white girl. If I was walking, I was just looking for some weed or something.
- C: This girl said you came up and talked, and something happened. Ring a bell?
- D. No.

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## **Digesting Transcripts of Court Hearings.**

### **Sample digest of Initial Appearance:**

#### **Aug. 3, 2010. INITIAL APPEARANCE**

Judge Doe, DA Lee, Atty Smith, Def.

Ct: Charge: 1<sup>st</sup> degree SA of child from July 25. Class B felony, 60 year max. On hold for outstanding fines. Not eligible for SPD.

DA: Serious charge. Need \$25,000 cash bond. Very lengthy criminal record. Been revoked 2x on probation.

Atty: Waive reading. He has own business and a very loving family. No income. Made all court appearances

Ct: \$25,000 cash. No contact with V or Christy Kaan.

**No PC determination made. Why?**

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### **Digest of Voir Dire of Jurors. Sample:**

- JURY PRESENT Given Oath.
- Ct Reads Info. 28 Dismisses some jurors after asking about experience with SA. 31. JI on SA. Lists potential witnesses. 39 One juror has a question, but Ct says I can't hear this question (Potter). 42. Case will take 1½ days. 44 Jurors have trips planned. 46
- Juror Fent: I have bad experience with law enforcement but I can be fair. [**peremptory**]
- Juror Baear—experience with SA in family. 50. I don't think I can be fair. Excused from jury.

- Juror Oller: I was SA'd, but I think I can probably can be fair. [**No move to strike, and ends up on jury**]
  - Juror Barton: I have problem with BOP of BRD. 55 Dismissed as juror.
  - DA: There will be testimony Def had affair outside marriage. **Why is that in here? Could it have been excluded as prejudice? What is probative value?** 57.
  - Juror Vance: I have a problem with that. But I'm fair. 58 **No motion to strike. Ends up on jury.**
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**Digest of Witness testimony. Sample:**

- **Matty Kaan**

49 I am 15. Lincoln School. 9<sup>th</sup> grade. Live with parents. I know def b/c he stayed with us sometimes. He usually slept in living room on couch. Came to live with us in April when he got out of jail. **Why no objection? Jury should not have heard about jail.** One day, parents were gone, and he came into my room. Don't know time. It was light outside. Spring. He sat on bed. Put arm on shoulders, pulled me to him, kissed me. I didn't know what was happening. 53 Put hand under my shirt. **Check police report to see if consistent.** Had bra. I didn't say anything. I told the truth to cop and SW. He then.....

**Cross:** 56 I got along OK with def. He never did anything like this before. Sometimes he got mad at me if I made fun of him too much. He took my phone away once so I couldn't use it. I was mad at him for a few days. None of his business, and he's not my dad. I wanted him out of the house. **Why not ask more about the contact—the more there was, the more likely DNA should be found—atty should want her to say there was a lot of touching.**

**Redirect:** 68 I would not make something like this up just to get him out of the house.

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**POINTERS:**

- Use first person ("I am 15," not "Kaan states he is 15")
- Put in page numbers throughout
- Note possible issues in bold
- Abbreviate: SW for social worker, D for defendant, V for victim, etc.

**Transcripts: Digesting Jury Instructions**

- No need to digest, but must read
- Pay close attention to any JI that is not a pattern JI, or there were alterations
- Might note the elements of the crime
- Note anything that seems questionable

## Transcripts: Digesting Closing arguments: Sample:

**DA:** No doubt def was in house he was not allowed. He knew he shouldn't be there—had copy of RO. 214. V heard him, called 911. Cried. Terrified. Cops came, found def in basement. Hiding in closet. Consciousness of guilt. Resisted—refused to walk. Kicked officer. BRD doesn't mean any doubt. 216. Cops are not on trial. Don't be distracted by def arguments. Doesn't matter that cop didn't ID self. 217. Find him guilty.

**Atty Lee:** 218 BOP is BRD. There is doubt. He had no contact with V. Had every reason to believe he could be there. He used to live there. 219 No contact w V...

## Digesting Transcripts: Plea Hearings. Sample:

### April 2, 2013 PLEA HEARING

Judge Burke, DA Lance, Atty Moe, def.

DA: Reached agreement. DA: Def will plead to count 1. Read in Counts 2-7

Ct: Class E felony, 15 year max, plus 2 for repeater.

Def. I went thru form with atty. No promises to give up rights. Voluntary, on atty's advice. Give up right to trial, BRD, 7. Unanimous, right to remain silent, cross examine W's, right to testify, trial. I had enough time to think about this. I know court is free to impose max. No questions. 8

Ct: Do all agree that complaint meets the elements of the crime?

Def: I didn't actually take the property though—the stolen property was brought to me by others.

- DA: It doesn't since its PTAC. **Def doesn't say yes, or atty. Is this adequate factual basis?**
- Atty: I believe he understands. 9 Freely, voluntarily, intelligent. I know ct doesn't have to follow PSI.
- Ct: Plea is free, voluntary. I convict you. Order PSI. Read ins for restitution and then dismissed. Sentencing for July 8. Bond continues.

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## Digesting Transcripts: Sentencing.

- Give summary of arguments of counsel
- Witnesses
- Allocution
- Court's reasoning
- Sentence length, confirm with JOC

## Listing Issues for Appeal/Postconviction Motion

- On separate document, or at end of Digest
  - Brainstorming mode—put in anything possible. It can be winnowed later.
  - Can be used to start PC motion or appeals brief
  - Can be used to write No –merit report
  - Can be used to explain to client what we considered, and why we came to our conclusions.
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- Sample sheet on Issues for Appeal:
    - Revised 11/20/14
    - Possible Issues for appeal—Joe Defendant
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    - Did court err in granting state’s other acts motion?
    - Was counsel IAC in failing to argue that the prejudicial value outweighed probative value?
    - Was counsel IAC at sentencing for not telling judge the fact that def’s co-defs got light sentences?

LATER: ADD RESEARCH. For example:

- Was counsel IAC at sentencing for not telling judge the fact that def’s co-defs got light sentences?
  - Phone to Atty Smith 11/10/14: I didn’t think of this. I agree it could have been helpful. No strategic reason for not doing this.
  - See *State v. Studler*, 61 Wis. 2d 537 Sentences of co def’s is not new factor.

FINALLY, COME TO A CONCLUSION:

- ~~• Was counsel IAC at sentencing for not telling judge the fact that def’s co-defs got lenient sentences?~~
  - ~~– Atty Smith 11/10/14: I didn’t think of this. I guess it couldn’t have hurt. No strategic reason for not doing this but I doubt the sentence would have been different.~~
  - ~~– See *State v. Studler*, 61 Wis. 2d 537 Sentences of co def’s is not new factor.~~
  - ~~– No merit b/c there seems to be valid reasons for giving def longer sentence. Can’t show prejudice.~~