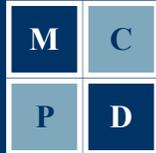


for The Defense

Training Newsletter of the Maricopa County Public Defender's Office
James J. Haas, Maricopa County Public Defender

Volume 22, Issue 3

August 2012 – October 2012



Delivering America's
Promise of Justice for All

for The Defense

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Contents

Twin Sons of Different Mothers: Distinguishing the Legal Ramifications of <i>Youngblood</i> and <i>Willits</i> , and a Cautionary Note about the Current <i>Willits</i> RAJI Instruction.....	1
Trial Tip #4: Trial Objections	11
Practice Pointer: Loss Prevention.....	13
Jury and Bench Trial Results.....	15

Twin Sons of Different Mothers: Distinguishing the Legal Ramifications of *Youngblood* and *Willits*, and a Cautionary Note about the Current *Willits* RAJI Instruction

By Anna Unterberger, Defender Attorney

Introduction

Since our team recently concluded a trial where the giving of a *Willits* instruction was at issue, I thought it might be helpful to compare and contrast the cases of *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988), *State v. Youngblood*, 173 Ariz. 502, 507, 844 P.2d 1152, 1157 (1993), and *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964). A *Youngblood* violation will garner a dismissal of your client's case. The failure to give a *Willits* instruction when one is warranted won't buy your client a dismissal, but it *will* result in a remand for a new trial. What follows is a summary of the saga of *Youngblood/Willits* and their progeny, as well as a "heads up" regarding the deficient Use Note and Comment in the current *Willits* RAJI instruction, and a sample modified instruction.

The Youngblood Dismissal Issue At The Federal And State Levels

An accused has a "constitutionally guaranteed access to evidence." *California v. Trombetta*, 467 U.S. 479, 485 (1984); U.S. Const., Amends. V (due process clause), VI & XIV; Ariz. Const., Art. 2, §§ 4 & 24. The purpose of this guarantee is to deliver "exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system." 467 U.S. at 485. The guarantee includes evidence that is material to the accused's guilt. *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963).

Under the federal constitution, it is only when the evidence at issue is not "material exculpatory evidence" that the good or bad faith of the State becomes relevant. *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988).

Thus, bad faith on the part of the police is required for a dismissal under the Due Process Clause, “when we deal with the failure of the State to preserve evidentiary material of which *no more can be said* than that *it could have been subjected to tests, the results of which might have exonerated the defendant.*” *Id.* (emphasis added). On the other hand, the police are obligated to preserve evidence in, “those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant.” 488 U.S. at 58.

The core of the corresponding doctrine under the Arizona Constitution’s Due Process Clause is whether “the state acts in bad faith **or** the defendant suffers prejudice-in-fact.” *State v. Youngblood*, 173 Ariz. 502, 507, 844 P.2d 1152, 1157 (1993) (emphasis added). If **either** situation occurs and evidence is destroyed, the defendant is deprived of due process. *Id.*, citing *State v. Day*, 148 Ariz. 490, 496, 715 P.2d 743, 749 (1986) and *State v. Soloman*, 125 Ariz. 18, 22-23, 607 P.2d 1, 5-6 (1980). Thus, it becomes “fundamentally unfair to allow the trial to proceed.” 173 Ariz. at 507, 844 P.2d at 1157.

Youngblood had been charged with molesting, sexually assaulting and kidnapping a boy from a carnival. Clothing from the boy containing the assailant’s semen was impounded, but it was not refrigerated and properly preserved. This resulted in a degraded sample for serological testing purposes, and useful information could not be obtained before the case went to trial in 1985. Youngblood’s case was not dismissed, but he did receive a *Willits* instruction at trial, which will be discussed further, *infra*. Despite the instruction, and based largely upon erroneous eyewitness testimony, he was convicted.

In 2000, DNA technology was used to obtain a profile from the clothing that had degraded semen on it. The obtained DNA profile was uploaded into the national CODIS database, and a man serving time in Texas for an unrelated crime was identified. Youngblood was exonerated, and the Texas inmate was convicted in 2002.

The Willits Instruction Remand Issue

In *State v. Youngblood*, *supra*, the Court did note that Youngblood asked for, and received, a *Willits* instruction at his trial. 173 Ariz. at 507, 844 P.2d at 1157. “For over a quarter century, [*Willits*] has required trial judges to instruct juries that if they find that the state has lost, destroyed or failed to preserve material evidence that **might** aid the defendant and they find the explanation for the loss inadequate, they may draw an inference that that evidence would have been unfavorable to the state. With respect to evidence which **might** be exculpatory, and where there is no bad faith conduct, the *Willits* rule more than adequately complies with the fundamental fairness component of Arizona due process.” 173 Ariz. at 506-07, 844 P.2d at 1156-57 (emphasis in the original). Thus, there was no due process violation because the defendant received a *Willits* instruction (although, as discussed above, he was still wrongfully convicted). *See also State v. Tucker*, 157 Ariz. 433, 442-43, 759 P.2d 579, 588-89 (1988) (holding that it was proper to give a *Willits* instruction where the State failed to preserve partial fingerprints that had been lifted from the murder weapon).

Willits, *supra*, which was handed down long before the Youngblood saga began, recognized that “[e]vidence ... may be innocently destroyed without fraudulent intent simply through carelessness or negligence or ... an unwillingness to make the necessary effort to preserve it. ... In any event, the State cannot be permitted the advantage of its own conduct in destroying evidence which might have substantiated the defendant’s claim regarding the missing evidence.” 96 Ariz. at 191, 393 P.2d at 279 (1964). Thus, the mere “unwillingness to preserve” evidence justifies a *Willits* instruction.

Willits had gone to the residence where his ex-wife and children were staying and attempted a reconciliation. He carried a homemade blasting device consisting of three sticks of dynamite and a detonator. While he was in the house, he and his wife had a physical altercation and the detonating

cap exploded. Although the detonator and wires attached to the terminals were preserved and introduced into evidence by the State, the dynamite with the attached wires was destroyed. 96 Ariz. at 186-87, 393 P.2d at 276.

Willits argued that the detonating cap accidentally discharged and the dynamite itself could not actually have exploded. The Court reversed because the court refused to instruct that “[i]f you find that the plaintiff, the State of Arizona, has destroyed, caused to be destroyed, or allowed to be destroyed any evidence whose contents or quality are in issue, you may infer that the true fact is against their interest.” 96 Ariz. at 187, 393 P.2d at 276. “Had the instruction been given, the jury would have been in the position of weighing the explanation and, if they believed it was not adequate, an inference unfavorable to the prosecution could have been drawn. *This in itself could create a reasonable doubt as to the defendant’s guilt.*” 96 Ariz. at 191, 393 P.2d at 279 (emphasis in the original). “[T]he rule permitting an inference is not based only on the notion that the destruction is motivated by a desire to conceal the truth. Evidence, of course, may be innocently destroyed without fraudulent intent simply through carelessness or negligence or, as the case might have appeared to the jury here, an unwillingness to make the necessary effort to preserve it.” *Id.* “In any event, the State cannot be permitted the advantage of its own conduct in destroying evidence which might have substantiated the defendant’s claim regarding the missing evidence. But the damage to the defendant is equally great because the evidence was no longer available at the trial by which the facts with certainty could be determined.” *Id.*

Furthermore, “[t]o be entitled to a *Willits* instruction . . . an accused need not prove that evidence destroyed by the state would have conclusively established a defense.” *State v. Hunter*, 136 Ariz. 45, 51, 664 P.2d 195, 201 (1983). In *Hunter*, a pair of scissors allegedly used as a weapon by the victim were not preserved in a manner that would allow the defendant to analyze them for fingerprints. 136 Ariz. at 50-51, 664 P.2d at 200-01. “We cannot say that the inference authorized by the improperly refused *Willits* instruction would not have made the difference between the jury believing and disbelieving appellants’ version of the stabbing.” 136 Ariz. at 51, 664 P.2d at 201.

In *State v. Lang*, 176 Ariz. 475, 862 P.2d 235 (App. 1993), the State’s evidence included a derogatory letter about the deceased that was sent to her employer by someone claiming to be the wife of a business associate. The deceased was the defendant’s estranged wife. The State analyzed the letter and its envelope and found the defendant’s fingerprints. 176 Ariz. at 477, 862 P.2d at 237. But the police processing methods made it impossible to test whether the defendant’s saliva was on the gummed portion of the envelope or the postage stamp. Thus, the court should have given a *Willits* instruction because the State destroyed potential biological evidence. 176 Ariz. at 485, 862 P.2d at 245. “The biological evidence *was accessible*. The biological evidence, like the fingerprints, *might* have had some bearing on who wrote the letter. The evidence *might have been exculpatory* because positive proof that someone other than the defendant sealed the envelope and affixed the stamp *suggests* that the defendant did not write the letter.” *Id.* (emphasis added). “If the state was allowed to prove that the defendant wrote the letter, the defendant had every right to prove that he did not.” *Id.*

In *State v. Leslie*, 147 Ariz. 38, 708 P.2d 719 (1985), the State failed to collect what appeared to be blood on a car that was stolen from the home of a murder victim. The defendant admitted that he stole the car and burglarized the home, but he denied killing, or even seeing, the victim. The trial court denied the defendant’s request for a *Willits* instruction, and the Arizona Supreme Court reversed and remanded. “When items are lost or destroyed a defendant is unable to determine whether they would have been helpful in his defense. Our court has used, as one method of overcoming this problem and ensuring a fair trial, the *Willits* instruction.” 147 Ariz. at 46-47, 708 P.2d at 727-28. “The state has a duty to act in a timely manner to preserve



evidence that is obviously material and reasonably within its grasp.” 147 Ariz. at 47, 708 P.2d at 728. “It is fundamentally unfair to allow the state to introduce conclusions as to the contents of certain evidence against a defendant without allowing him to inspect it in a manner that allows for meaningful rebuttal.” *Id.*

Although the court’s failure to give a *Willits* instruction has, at times, resulted in reversible error, you would not know that from reading the Use Note and Comment contained in the current *Willits* RAJI instruction.

Beware The RAJI Willits Instruction: An Incomplete Citation To Relevant Caselaw

The current *Willits* instruction in Revised Arizona Jury Instructions (Criminal) (“RAJI”), Standard 10, states: “If you find that the State has lost, destroyed, or failed to preserve evidence whose contents or quality are important to the issues in this case, then you should weigh the explanation, if any, given for the loss or unavailability of the evidence. If you find that any such explanation is inadequate, then you may draw an inference unfavorable to the State, which in itself may create a reasonable doubt as to the defendant’s guilt.” The Use Note and Comment below the instruction cites a number of cases where the failure to give a *Willits* instruction did not result in reversible error. There is no mention of cases where the failure to give the instruction *did* result in reversible error, like *Hunter, Lang* and *Leslie, supra*. Because of that, it may be in your client’s best interest to file a supplemental pleading and modified instruction that discuss those cases that *did* result in a reversal and remand because a *Willits* instruction was not given, including a review of the details of *Willits* itself. If the judge simply reads the cases cited below the RAJI instruction, he or she is not receiving a balanced review of the relevant caselaw. A sample *Willits* RAJI with a modified Comment section (modifications in boldface) follows this article.

Conclusion

In Arizona, due process is violated and a criminal case must be dismissed if “the state acts in bad faith **or** the defendant suffers prejudice-in-fact,” and where the State loses, destroys or fails to preserve evidence that might be exculpatory or provide your client with a defense. The requirement for obtaining a *Willits* instruction does not require a due process violation. Because the current RAJI Standard 10 does not contain a balanced review of the relevant caselaw in the Use Note and Comment sections, a supplemental pleading may be appropriate when requesting a *Willits* instruction, as well as a modified instruction.

Standard Criminal 10 – Lost, Destroyed, or Unpreserved Evidence (With Modified Comment)

If you find that the State has lost, destroyed, or failed to preserve evidence whose contents or quality are important to the issues in this case, then you should weigh the explanation, if any, given for the loss or unavailability of the evidence. If you find that any such explanation is inadequate, then you may draw an inference unfavorable to the State, which in itself may create a reasonable doubt as to the defendant’s guilt.

SOURCE: *State v. Willits*, 96 Ariz. 184, 187, 393 P.2d 274, 277-78 (1964); *State v. Eagle*, 196 Ariz. 27, 31, 992 P.2d 1122, 1126 (App. 1998) and *State v. Tucker*, 157 Ariz. 433, 443, 759 P.2d 579, 589 (1988).

USE NOTE: “A *Willits* instruction is appropriate when the State destroys or loses evidence potentially helpful to the defendant.” *State v. Murray*, 184 Ariz. 9, 33, 906 P.2d 542, 566 (1995) (quoting *State v. Lopez*, 163 Ariz. 108, 113, 786 P.2d 959, 964 (1990)). However, the destruction or nonretention of evidence does not automatically entitle a defendant to a *Willits* instruction. *Id.* A *Willits* instruction is not given merely because a more exhaustive investigation could have been made. To merit the instruction, a defendant must show “(1) that the State failed to preserve material and reasonably accessible evidence having a tendency to exonerate [the defendant], and (2) that this failure resulted in prejudice.” *Murray, id.* (citing *State v. Henry*, 176 Ariz. 569, 863 P.2d 861 (1993)). “Evidence must possess exculpatory value that is apparent before it is destroyed.” *State v. Davis*, 205 Ariz. 174, 180, 68 P.3d 127, 133 (App. 2002) (instruction not warranted where the police failed to preserve the carpet in which the victim was wrapped because the defendant admitted wrapping the victim in the carpet and burning her body with gasoline). Whether either showing has been made is a question for the trial court; its decision to forego a *Willits* instruction for failure to satisfy either or both of the above requirements will not be reversed absent an abuse of discretion. *State v. Reffitt*, 145 Ariz. 452, 461, 702 P.2d 681, 690 (1985).

COMMENT: The instruction restores the language of *Willits*, which stated that the jury “may infer” that the evidence was unfavorable to the State. The 1996 Revised Instruction changed that permissive inference to a mandatory one (jury “should assume”). In *Eagle, supra*, 196 Ariz. at 31, 992 P.2d at 1126, the Arizona Court of Appeals noted that the 1996 Revised Instruction’s language did not follow the permissive inference language of *Willits*.

The following cases are cited to assist the court and counsel in determining whether the instruction should be utilized. **Because these cases do not include citations where failure to give a *Willits* instruction has resulted in reversible error, those cases have been added in boldface to the end of the list included in the RAJI instruction:**

State v. Wooten, 193 Ariz. 357, 369, 972 P.2d 993, 1005 (App. 1998) (No *Willits* instruction given where the State introduced copies, not the originals, of tapes of telephone calls by defendant from the jail. The defendant claimed he could not show that the original tapes contained exculpatory evidence because the destruction of the tapes effectively prevented him from doing so. The supreme court disagreed noting the defendant was a party to each of the conversations. He was in a position to know whether or not any exculpatory information had been excluded from the copies but failed to indicate to the trial court that any material would have been preserved on the original tapes that did not also appear on the copies.)

State v. Tinajero, 188 Ariz. 350, 355, 935 P.2d 928, 933 (App. 1997) (No *Willits* instruction given where the police sold for salvage the truck involved in a fatal crash. The defendant admitted to police he was alone in the truck, but denied hitting anything. The defendant argued if the truck had been preserved he could have tested bloodstains in the truck to prove that he had been in the passenger seat and not driving. The police had no reason to preserve the truck in light of defendant’s admissions that he was the truck’s sole occupant. There was no reason to believe that the truck would have provided any exculpatory evidence. The duty of police to preserve potentially exculpatory evidence arises when the evidence is “obviously material.”)

State v. Boston, 170 Ariz. 315, 318, 823 P.2d 1323, 1326 (App. 1991) (No *Willits* instruction given at defendant’s trial for possession of a narcotic drug. Officers recovered packets of heroin from a motel room table, but an officer did not retrieve a syringe from a toilet bowl. Obtaining the syringe would have tended to prove the defendant guilty, rather than exonerate her.)

State v. Geotis, 187 Ariz. 521, 525, 930 P.2d 1324, 1328 (App. 1996) (No *Willits* instruction given where the police did not seize cash, pager, club, and water pistol as evidence, but instead left those items in the car the defendant was driving. The car, which did not belong to defendant,

was impounded. Property left in an impounded car may be retrieved by its owners. Even if the items were potentially exculpatory, there was no showing that they were rendered inaccessible to defendant for his later use.)

State v. Strong, 185 Ariz. 248, 251, 914 P.2d 1340, 1343 (App. 1995) (No *Willits* instruction given where the police destroyed some fingerprint lift cards after making a unilateral decision that they were not usable and did not attempt to obtain fingerprints at other locations where the robber was reported to have been.)

State v. Torres, 162 Ariz. 70, 75-76, 781 P.2d 47, 52-53 (App. 1989) (No *Willits* instruction given where the defendant argued the state failed to test a heroin packet for fingerprints and that the evidence could have eliminated him as a suspect. The absence of fingerprints on the packet of heroin would not have eliminated him as a suspect. The police simply chose not to collect fingerprints from the cellophane packaging. Police generally have no duty to seek out and obtain potentially exculpatory evidence.)

State v. Perez, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (The Supreme Court stated, “We realize that in some situations it may not be clear that a particular bit of evidence of which the state is aware is, or will prove to be, material. When the state fails to procure and/or assure the preservation of evidence that, though not obviously material, turns out to be material, it is up to the trial judge to determine if the state’s failure to recognize its materiality was reasonable or not and to give a *Willits* instruction only where it finds the failure to have been unreasonable.”)

***State v. Willits*, 96 Ariz. 184, 187, 393 P.2d 274, 277-78 (1964). (Found reversible error where the instruction was not given. “Evidence ... may be innocently destroyed without fraudulent intent simply through carelessness or negligence or ... an unwillingness to make the necessary effort to preserve it. ... In any event, the State cannot be permitted the advantage of its own conduct in destroying evidence which might have substantiated the defendant’s claim regarding the missing evidence.” 96 Ariz. at 191, 393 P.2d at 279 (1964). Thus, the mere “unwillingness to preserve” evidence justifies a *Willits* instruction.**

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Present

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Pre-Conference Sessions—AZ Death Penalty Case Study

Arrest through Trial Panel

Direct Appeal through Habeas Panel

December 5, 2012 Half Day

12:30pm—1:00pm Registration

1:00pm—5:00pm

.....
Death Penalty Conference 2012

Session Topics include:

Emerging Atkins Issues: Litigating IQ Scores

Brain Scanning: Types, Uses, and Strategy

Ethics and Professionalism for Capital Attorneys

Prosecutorial Misconduct and more...

.....
December 6, 2012 Full Day

8:30am—Check-in/Continental Breakfast

9:00am—5:00pm Sessions

December 7, 2012 Half Day

8:30am—Check-in/Continental Breakfast

9:00am—12:35pm Sessions

*This seminar is designed to meet the
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No Fee for Public Defense Offices. Please email registration form to cogleyc@mail.maricopa.gov
 \$25.00 Court-Appointed/Contract Counsel; City Public Defenders
 \$50.00 Other/Private

Conference December 6, 2012 — Full Day and December 7, 2012 — Morning Only

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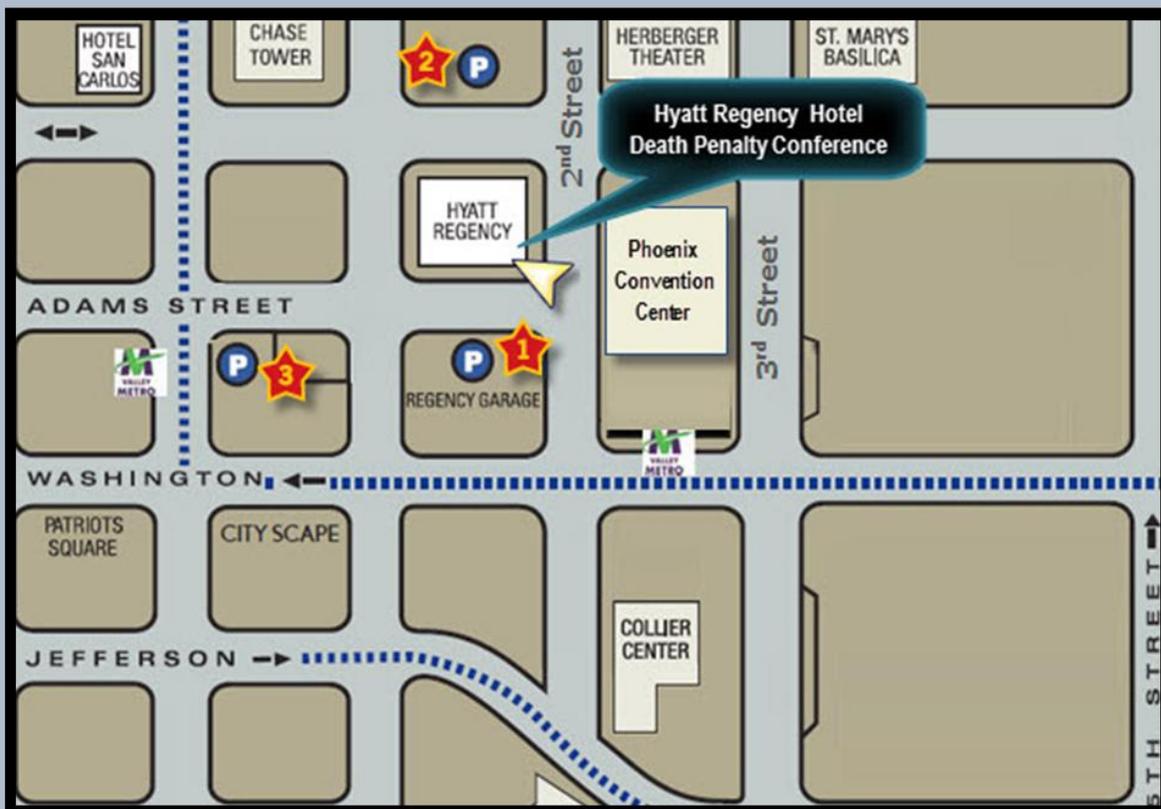
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3. 1st Street Surface Lot, 1st Street and Adams Street

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Celeste Cogley at 602-506-7711 X37569



Trial Tip #4: Trial Objections

By Terry Lovett Bublik, Defender Attorney

“I object, your honor. This trial is a travesty of a mockery of a sham of a travesty of two mockeries of a sham!” Woody Allen in *“Bananas”* (1971).

No matter how many motions you file or how well you prepare for trial, objectionable testimony will inevitably come up. So, it is imperative that you know how to properly object. If you are going to object, you should stand, say “Objection, your Honor,” and give the legal basis for your objection. Even though some prosecutors choose to sit when addressing the court or making an objection, you should always stand and clearly and confidently state your objection. Do not let your fear of being wrong prevent you from making a timely objection. If you are confident and articulate, you will look like you know what you are talking about regardless of the ruling. Finally, remember that you need to timely object in order to preserve the issue for appeal.

There is a saying: “The rookie lawyer knows the rules... the veteran knows the exceptions.” Your ability to effectively litigate in the courtroom requires you to know, be able to explain, and apply the Rules of Evidence and Criminal Procedure to issues in your case. The following list of key objections may assist you during trial:

TWENTY KEY OBJECTIONS

1. Argumentative

Authority: Rule 611, Mode and Order of Examining Witnesses and Presenting Evidence.

2. Asked and Answered

Authority: Rule 403, Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time or Other Reasons; Rule 611, Mode and Order of Examining Witnesses and Presenting Evidence.

3. Assumes Facts Not in Evidence / Lack of Foundation

Authority: Rule 403, Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time or Other Reasons; Rule 611, Mode and Order of Examining Witnesses and Presenting Evidence.

4. Best Evidence Rule

Authority: Rule 1001, Definitions; Rule 1002, Requirement of the Original; Rule 1003, Admissibility of Duplicates; Rule 1004, Admissibility of Other Evidence of Contents; Rule 1005, Copies of Public Records to Prove Contents; Rule 1006, Summaries to Prove Content; Rule 1007, Testimony or Statement of a Party to Prove Content; Rule 1008, Functions of the Court and Jury.

5. Beyond Scope of Prior Testimony

Authority: Rule 611.

6. Foundation (Lack of)

Authority: Rule 602, Personal Knowledge; Rule 402, General Admissibility of Relevant Evidence; Rule 403, Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons; Rule 901, Authentication.

7. Hearsay

Authority: 802, The Rule Against Hearsay

8. **Improper Impeachment**

Authority: Rule 608, A Witness's Character for Truthfulness or Untruthfulness; Rule 609, Impeachment by Evidence of a Criminal Conviction; Rule 610, Religious Beliefs or Opinion; Rule 613, Writing Used to Refresh a Witness's Memory.

9. **Improper Opinion**

Authority: Rule 701, Opinion Testimony by Lay Witnesses; Rule 702, Testimony by Expert Witnesses; Rule 703, Bases of an Expert's Opinion Testimony; Rule 704, Opinion on an Ultimate Issue; Rule 705, Disclosing the Facts or Data Underlying an Expert's Opinion.

10. **Leading (Improperly Suggest an Answer)**

Authority: Rule 611, Mode and Order of Examining Witnesses and Presenting Evidence.

11. **Misstatement of Prior Testimony**

Authority: Rule 403, Excluding Relevant Evidence for Prejudice, Confusion, or Waste of Time; Rule 611, Mode and Order of Examining Witnesses and Presenting Evidence.

12. **Multifarious (Compound)**

Authority: Rule 403, Excluding Relevant Evidence for Prejudice, Confusion, or Waste of Time; Rule 611, Mode and Order of Examining Witnesses and Presenting Evidence.

13. **Narrative (Cross-examination version of "Non-Responsive" Objection)**

Authority: Rule 403, Excluding Relevant Evidence for Prejudice, Confusion, or Waste of Time; Rule 611, Mode and Order of Examining Witnesses and Presenting Evidence.

14. **Non-Responsive (Typically Available Only on Direct Examination)**

Authority: Rule 401, Test for Relevant Evidence; Rule 402, General Admissibility of Relevant Evidence; Rule 403, Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time or Other Reasons; Rule 611, Mode and Order of Examining Witnesses and Presenting Evidence.

15. **Privilege**

Authority: Rule 501, Privilege in General; Rule 502, Attorney-Client Privilege and Work Product, Limitations on Waiver; A.R.S. § 32-749 (Accountant); §§13-4062, 12-2231 and 12-2232 (Anti-Marital Fact); §§13-4062 and 12-2234 (Attorney-Client); § 13-4062 and 12-2233 (Clergy); §§13-4430 and 12-2239 (Domestic Violence Victim Advocate); §12-2237 (Journalist); §§13-4062 and 12-2235 (Physician-Patient); §§13-4065 and 32-2085 (Psychologist); §13-4066 (Sex Offender Treatment); Ariz. Const. Art. 2, §10 (Self Incrimination); Ariz. Const. Art. 4, Part 2, §7 (Speech and Debate).

16. **Questioning by the Court**

Authority: Rule 614, Court's Calling or Examining Witnesses. (See, also, Ariz. Const. Art. 6: Arizona trial judge cannot comment on the evidence).

17. **Reading from Documents Not In Evidence**

Authority: Rule 403, Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time or Other Reasons; Rule 611, Mode and Order of Examining Witnesses and Presenting Evidence; Rule 901, Authenticating and Identifying Evidence.

18. **Relevance**

Authority: Rule 402, General Admissibility of Relevant Evidence; Rule 404, Character Evidence Not Admissible to Prove Conduct, Exceptions, Other Crimes; Rule 405, Methods of Proving Character; Rule 406, Habit: Routine Practice; Rule 407, Subsequent Remedial Measures; Rule 408, Compromise Offers and Negotiations; Rule 409, Offers to Pay Medical and Similar

Expenses; Rule 410, Pleas, Plea Discussions and Related Statements; Rule 411, Liability Insurance.

19. **Vouching**

Authority: *State v. Bible*, 175 Ariz. 549, 858 P.2d 1152 (1993); *State v. Blackman*, 201 Ariz. 527, 38 P.3d 1192 (2002).

20. **Speculation**

Authority: Rule 403, Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons; Rule 611, Mode and Order of Examining Witnesses and Presenting Evidence.

Effective Use of the Rules of Evidence Beyond Determining Admissibility

1. Conditional Relevance: Rule 104(b)
2. Limited Admissibility: Rule 105
3. Remainder of Writings: Rule 106
4. Judicial Notice: Rule 201
5. Order of Presentation of Evidence: Rule 611
6. Refresh Memory: 612
7. Exclusion of Witnesses: Rule 615
8. Court Appointed Expert Witnesses: Rule 706
9. Motion to Strike & Offers of Proof: Rule 103
10. Miscellaneous Evidentiary Considerations: Curative Instructions to Jury at Time of Questioning, Admonitions to Witness or Counsel.

Practice Pointer: Loss Prevention

By Diane Allen, Defender Attorney

Many department stores offer bonuses to their loss prevention officers for apprehending shoplifters. This bonus usually is in the form of a percentage of the value of the recovered goods. In fact, some loss prevention specialists have been known to nearly double their hourly wages through such incentives (see, e.g., <http://www.jobdescriptions.net/legal/loss-prevention/>). This may be fertile ground for cross-examination of loss prevention officers in many cases. It is highly unlikely, however, that the prosecution will provide it as part of their basic discovery (in fact, they may be unaware of it, as most retail establishments don't volunteer this information). Accordingly, a Motion for Specific Discovery regarding the monetary benefits received by the loss prevention officer should be filed in every case involving retail establishments that employ loss prevention officers.

Sponsored by Maricopa County Public Defender

Fall Trial College 2012

Presented by
Ira Mickenberg



Criminal Defense Attorney and Nationally Renowned Speaker

This two-day Fall Trial College will utilize a “bring your own case” format, using lecture and small-group practice sessions led by experienced attorneys to hone your trial skills. When the college is over, you will have an effective Story of Innocence, Persuasive Closing, and Voir Dire specifically related to your case.

We recommend attorneys who have been practicing Criminal Law since December 2011 attend the Fall Trial College.

November 29, 2012

- 8:15am—8:30am Check in
- 8:30am—5:15pm (Lunch on your own)
- * Telling your Client’s Story of Innocence
- * Practical Guide to Effective Closing Arguments

November 30, 2012

- 8:15am—8:30am Check in
- 8:30am—4:30pm (Lunch on your own)
- * Effective Voir Dire
- * Putting It All Together

Location:
Downtown Justice Center (DTJC)
620 W. Jackson,
5th Floor Training Room

Note: DTJC is a secured building and opens at 8:00am. Please allow time to go through security.

Free Parking:
Open Visitor Lot on Madison and 5th Ave., just north of DTJC.

May qualify for 12.25 CLE hours, no ethics.

For questions on training content, please contact Training Director, Stephanie Conlon via email conlons@mail.maricopa.gov

To register, please contact Celeste Cogley by telephone at 602-506-7711 x37569 or e-mail at cogleyc@mail.maricopa.gov by November 9, 2012.

Business causal attire is required for all Public Defender Training Sessions.

No fee for Public Defense Offices.

Private/Contract Counsel: Registration Fee is \$475.00

Jury and Bench Trial Results

June 2012 – August 2012

Public Defender's Office – Trial Division

Closed Date*	Attorney Investigator Paralegal Mitigation	Judge	CR Number and Charge(s)	Counts	Result
Group 1					
7/18/2012	Turner <i>Christiansen</i>	Bernstein	2012-103613-001 Aggravated Assault, F5 Resisting Arrest, F6	1 1	Jury Trial-Guilty As Charged
8/9/2012	Agnick <i>Sain</i> <i>Granillo</i>	Kreamer	2011-159401-001 Aggravated Assault, F5	1	Court Trial-Guilty Lesser/Fewer
8/9/2012	Hiatt <i>Rankin</i> <i>Christiansen</i>	Starr	2011-159606-001 Marijuana Violation, F6 Drug Paraphernalia Violation, F6	1 1	Court Trial-Guilty Lesser/Fewer
Group 2					
6/5/2012	Beam <i>Munoz</i>	Pineda	2011-154731-001 Disorderly Conduct, F6 Dschrng Firearm In City Limit, F6	1 1	Jury Trial-Guilty As Charged
7/27/2012	Jones <i>Menendez</i>	Flores	2011-008014-001 Burglary 3rd Degree, F4	1	Jury Trial-Guilty As Charged
8/10/2012	Cole <i>Munoz</i>	Svoboda	2012-111619-001 Marijuana Violation, F6 Drug Paraphernalia Violation, F6	1 1	Court Trial-Guilty Lesser/Fewer
8/21/2012	Vogel	Pineda	2012-103830-003 Marijuana Violation, F2	1	Jury Trial-Guilty As Charged
Group 3					
6/15/2012	Parker <i>Salvato</i>	Brodman	2011-160544-001 Burglary 2nd Degree, F3 Agg Aslt-Deadly Wpn/Dang Inst, F3 Criminal Damage-Deface, F6 Burglary Possess Tools, F6 Theft-Obt Service w/out Paying, M1	1 1 1 1 1	Jury Trial-Guilty Lesser/Fewer

*Defined as the date the defendant was sentenced or case was dismissed.

Jury and Bench Trial Results

June 2012 – August 2012

Public Defender's Office – Trial Division

Closed Date*	Attorney Investigator Paralegal Mitigation	Judge	CR Number and Charge(s)	Counts	Result
7/17/2012	Parker Salvato Farley	Warner	2011-008241-001 Aggravated Assault, F6	1	Jury Trial-Guilty As Charged
7/18/2012	Parker Salvato Farley	Kaiser	2011-151611-001 Armed Robbery, F2 Kidnap, F2 Burglary 1st Degree, F2 Aggravated Assault, F3	3 3 1 3	Jury Trial-Not Guilty
7/20/2012	Gronski	Brodman	2011-138444-001 Drug Paraphernalia Violation, F6 Marijuana Violation, F6 Dangerous Drug Violation, F4	1 1 1	Jury Trial-Guilty As Charged
Group 4					
6/18/2012	Becker Flannagan Kunz	Kaiser	2010-006459-001 Dangerous Drug Violation, F4 Narcotic Drug Violation, F4 Unlaw Flight From Law Enf Veh, F5	1 2 1	Jury Trial-Guilty Lesser/Fewer
6/18/2012	Kalman Flannagan Meginnis	Spencer	2011-162755-001 Aggravated Assault, F4 Assault-Intent/Reckless/Injur, M1 Aggravated Assault, F3	1 1 1	Jury Trial-Guilty Lesser/Fewer
7/9/2012	Tivorsak Meginnis Curtis Leyvas	Granville	2011-162576-001 Aggravated Assault, F3 Theft-Means of Transportation, F3 Aggravated Assault, F2 Unlaw Flight From Law Enf Veh, F5	2 1 1 1	Jury Trial-Guilty Lesser/Fewer
7/11/2012	Engle Meginnis	Potts	2011-142953-001 Burglary 2nd Degree, F3	1	Jury Trial-Not Guilty
7/27/2012	Finsterwalder Verdugo	Bergin	2011-135767-001 Disorderly Conduct, F6 Misconduct Involving Weapons, F4	1 1	Jury Trial-Guilty As Charged

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Jury and Bench Trial Results

June 2012 – August 2012

Public Defender's Office – Trial Division

Closed Date*	Attorney Investigator Paralegal Mitigation	Judge	CR Number and Charge(s)	Counts	Result
7/30/2012	Kalman <i>Munoz Browne</i>	Brotherton	2007-008760-001 Dangerous Drug-Poss/Use, F4	1	Jury Trial-Guilty As Charged
8/30/2012	Stanford <i>Verdugo Curtis</i>	Ditsworth	2011-154825-001 Burglary 2nd Degree, F3	1	Jury Trial-Guilty As Charged
Group 5					
6/8/2012	Ditsworth <i>Ralston Gebhart</i>	Stephens	2011-006437-001 Misconduct Involving Weapons, F4 Marijuana Violation, F6 Manslaughter, F2	1 1 1	Jury Trial-Guilty Lesser/Fewer
6/8/2012	Ditsworth <i>Gebhart</i>	Stephens	2011-103546-001 Unlaw Flight From Law Enf Veh, F5 Marijuana Violation, F6 Narcotic Drug Violation, F4	1 1 1	Jury Trial-Guilty As Charged
6/18/2012	Whitney <i>Romani Falle</i>	Stephens	2011-136382-001 Theft, F3	1	Jury Trial-Guilty As Charged
8/3/2012	Baker <i>Falle Chappell</i>	Warner	2010-165072-001 Armed Robbery, F3, Attempt to Commit	1	Jury Trial-Guilty As Charged
Group 6					
6/1/2012	Sheperd	Hoffman	2011-006024-001 Armed Robbery, F2	1	Jury Trial-Guilty As Charged
6/7/2012	Chiang	Garcia	2009-170995-001 Marijuana Violation, F6	1	Court Trial-Guilty As Charged
6/7/2012	McCarthy	Lynch	2011-136383-001 Resist Arrest-Physical Force, F6 Arson of Occupied Structure, F2	1 1	Jury Trial-Guilty Lesser/Fewer

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Jury and Bench Trial Results

June 2012 – August 2012

Public Defender's Office – Trial Division

Closed Date*	Attorney <i>Investigator</i> <i>Paralegal</i> <i>Mitigation</i>	Judge	CR Number and Charge(s)	Counts	Result
7/23/2012	Chiang	Garcia	2010-105395-001 Theft Crdt Crd Obt Fraud Means, F5	1	Jury Trial-Guilty As Charged
8/8/2012	Llewellyn <i>Souther</i> <i>Spears</i> <i>Johnson</i>	Passamonte	2011-007992-001 Fail Register As Sex Offender, F4	2	Jury Trial-Guilty Lesser/Fewer
8/24/2012	Llewellyn <i>Souther</i> <i>Johnson</i>	Miles	2012-103491-001 Misconduct Involving Weapons, F4 Dangerous Drug Violation, F4	3 1	Jury Trial-Guilty Lesser/Fewer
Appeals					
7/16/2012	Steinfeld	Warner	2011-152775-003 Misconduct Involving Weapons, M1 Narcotic Drug Violation, F4 Misconduct Involving Weapons, F4	1 1 1	Jury Trial-Guilty As Charged
Capital					
8/16/2012	Brown Blieden <i>Moore</i> <i>Southern</i> <i>Alling</i>	O'Connor	2001-092032-001 Murder 1st Degree, F1	1	Jury Trial-Guilty As Charged
RCC					
6/18/2012	Fischer <i>Menendez</i>	Contes	2011-155319-001 Burglary 2nd Degree, F3	1	Jury Trial-Guilty As Charged
6/18/2012	Jolley <i>Verdugo</i> <i>Kunz</i>	Svoboda	2011-120554-001 Armed Robbery, F2 Murder 1st Degree, F1, Attempt to Commit Aggravated Assault, F3 Misconduct Involving Weapons, F4 Kidnap, F2	1 1 1 1 1	Jury Trial-Guilty Lesser/Fewer

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Jury and Bench Trial Results

June 2012 – August 2012

Public Defender's Office – Trial Division

Closed Date*	Attorney <i>Investigator</i> <i>Paralegal</i> <i>Mitigation</i>	Judge	CR Number and Charge(s)	Counts	Result
7/20/2012	Primack Timmer	Macbeth	2011-065591-001 Threat-Intimidate, M1 Interfer w/Judicial Proceeding, M1	1 1	Court Trial-Guilty Lesser/Fewer
Specialty Court Group					
7/25/2012	Demarse Fridde Thompson Ralston	Cohen	2011-146172-001 Narcotic Drug Violation, F4	1	Jury Trial-Guilty As Charged
8/17/2012	Turley	Pineda	2011-030031-001 Agg Aslt-Officer, F4 Resisting Arrest, F6	1 1	Jury Trial-Guilty As Charged
Vehicular					
6/7/2012	Potter Baker	Miller	2011-148801-001 Agg DUI-Lic Susp/Rev for DUI, F4	2	Jury Trial-Guilty As Charged
8/14/2012	Foundas Moss Jarrell Baker	Bernstein	2010-155807-001 Agg DUI-Passenger Under 15, F6	2	Jury Trial-Guilty Lesser/Fewer
8/22/2012	Gosselin	Miller	2011-161764-001 Aggravated DUI-Third DUI, F4 Agg DUI-Lic Susp/Rev for DUI, F4	2 2	Jury Trial-Guilty As Charged
8/27/2012	Dehner	Richter	2011-160020-001 Agg DUI-Lic Susp/Rev for DUI, F4	2	Jury Trial-Guilty Lesser/Fewer



Jury and Bench Trial Results

June 2012 – August 2012

Legal Advocate's Office – Trial Division

Closed Date*	Attorney Investigator Paralegal Mitigation	Judge	CR Number and Charge(S)	Counts	Result
8/21/2012	Orozco	Mulleneaux	2011-154105-001 Marijuana Violation, F6 Drug Paraphernalia Violation, F6	1 1	Court Trial-Guilty As Charged
8/22/2012	Orozco	Gentry-Lewis	2011-141180-001 Marijuana Violation, F6	1	Jury Trial-Guilty As Charged

Legal Advocate's Office – Dependency

Last Day of Trial	Attorney CWS	Judge	Case Number and Type	Result	Bench Or Jury Trial
6/19/2012	Russell Bielke	Anderson	JD21450 Dependency	Dependency Found as to the Mother	Bench
7/6/2012	Konkol Nations	Sinclair	JD19420 Severance	Severance Granted	Bench
7/25/2012	Kenyon Indovino	Mendez	JD19922 Severance	Severance Granted	Bench
7/25/2012	Konkol Nations	Contes	JD21678 Dependency	Dependency Found	Bench
7/26/2012	Konkol Nations	Adelman	JD13418 Dependency	Dependency Denied	Bench
8/1/2012	Russell Bielke	Anderson	JD18970 Termination	Termination Granted	Bench
8/1/2012	Russell Bielke	Anderson	JD18969 Termination	Termination Granted	Bench
8/7/2012	Russell Bielke	Sinclair	JD19596 Termination	Termination Granted	Bench
8/27/2012	Konkol Nations	Steinle	JD18102 Severance	Severance Denied	Bench

*Defined as the date the defendant was sentenced or case was dismissed.

Jury and Bench Trial Results

June 2012 – August 2012

Legal Defender's Office – Trial Division

Closed Date*	Attorney Investigator Paralegal Mitigation	Judge	CR Number and Charge(S)	Counts	Result
7/6/2012	Phillips Lee Otero Handgis	Kreamer	2010-101760-002 Custodial Interference, F4, Conspiracy to Commit Forgery, F4	1 1	Jury Trial-Guilty As Charged
6/29/2012	Lawson Crocker Otero Handgis Bolinger	Stephens	2010-166615-001 Murder 1st Degree, F1 Aband/Conceal Dead Body/Parts, F5	1 1	Jury Trial-Guilty As Charged
6/13/2012	Tate	Hoffman	2011-131063-002 Dangerous Drug Violation, F4	1	Jury Trial-Guilty As Charged
6/14/2012	Abernethy De Santiago Williams	Martin	2009-177237-001 Kidnap, F2 Misconduct Involving Weapons, F4 Theft-Means of Transportation, F3 Burglary 2nd Degree, F3 Armed Robbery, F2	7 5 2 1 7	Jury Trial-Guilty Lesser/Fewer
6/15/2012	Collins	Brodman	2009-178890-002 Burglary 3rd Degree, F4	1	Jury Trial-Guilty As Charged
6/18/2012	Amiri Carson	Passamonte	2011-101582-001 Agg DUI-Lic Susp/Rev for DUI, F4	2	Jury Trial-Guilty As Charged
7/11/2012	Amiri	Bergin	2011-008284-001 Burglary 3rd Degree, F4 Burglary Tools Possession, F6	2 1	Jury Trial-Guilty Lesser/Fewer
7/20/2012	Shipman	Garcia	2010-166584-001 Dangerous Drug-Poss/Use, F4 Drug Paraphernalia-Possess/Use, F6	1 1	Jury Trial-Guilty As Charged
7/31/2012	Shipman	Bernstein	2011-134807-001 Agg DUI-Lic Susp/Rev for DUI, F4	2	Jury Trial-Guilty As Charged

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Jury and Bench Trial Results

June 2012 – August 2012

Legal Defender's Office – Dependency

Last Day of Trial	Attorney Case Manager	Judge	Case Number and Type	Result	Bench Or Jury Trial
6/12/2012	Fritz	Adleman	JD19189 Severance Trial	Severance Granted	Bench
6/12/2012	Ripa	Sinclair	JD9655 Severance Trial	Severance Granted	Bench
7/19/2012	Ripa	Steinle	JD21520 Dependency Trial	Dependency Found	Bench
7/26/2012	Ripa	Sinclair	JD21569 Dependency Trial	Dependency Dismissed	Bench
8/1/2012	Sandler	Adelman	JD19556 Severance Trial	Severance Granted	Bench
8/3/2012	Sandler	Harrison	JD19101 Dependency Trial	Dependency Found	Bench
8/14/2012	Fritz	Miles	JD18778 Dependency/Severance Trial	Dependency and Severance Granted: Client Failed to Appear	Bench
8/22/2012	Sandler	Harrison	JD21441 Dependency Trial	Dependency Found	Bench
8/24/2012	Fritz	Miles	JD21799 Dependency Trial	Dependency Dismissed	Bench



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for The Defense

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