



SUPREME COURT

STATE OF ARIZONA



GOVERNOR'S OFFICE OF
**HIGHWAY
SAFETY**

The Big, Wide World of Motions


The Big, Wide World of DUI Motions



Jeff Klotz – Tucson City Court

1

DUI Practice has its own unique culture.



2

- The uniqueness of DUI cases is in their similarities.
- Standardization of
 - Law enforcement practices
 - Motion practice
 - Trial practice



- Case patterns repeat
- Issues repeat
- Motions repeat

3

So....everyone can practice, learn, and get better at it over time. You set the tone and expectations.

Finally, the lawyers and officers get it. Then this happens...

4



5



6



7



8

WHAT IS A MOTION?



WHAT: A request for the court to do something.

WHY: Factual basis.

HOW: Authority for the requested relief.

What is a non-motion?

9

WHEN CAN A MOTION BE MADE?

- Pretrial
- During trial
- Post trial

10

**WHAT
FORM
CAN IT
TAKE?**



Written
***Read/Review**

Oral
***Listen/Comprehend**

(*tips for judges)

11


**WHAT DO
YOU DO
WITH THE
MOTION?**

- Nothing?
- Rule without a hearing?
- Set a hearing?
- Legal/Argument
- Evidentiary

12




A.I. Generated Motions

- They are here
- They are prone to error
- They are getting better
- Lawyers are responsible for content

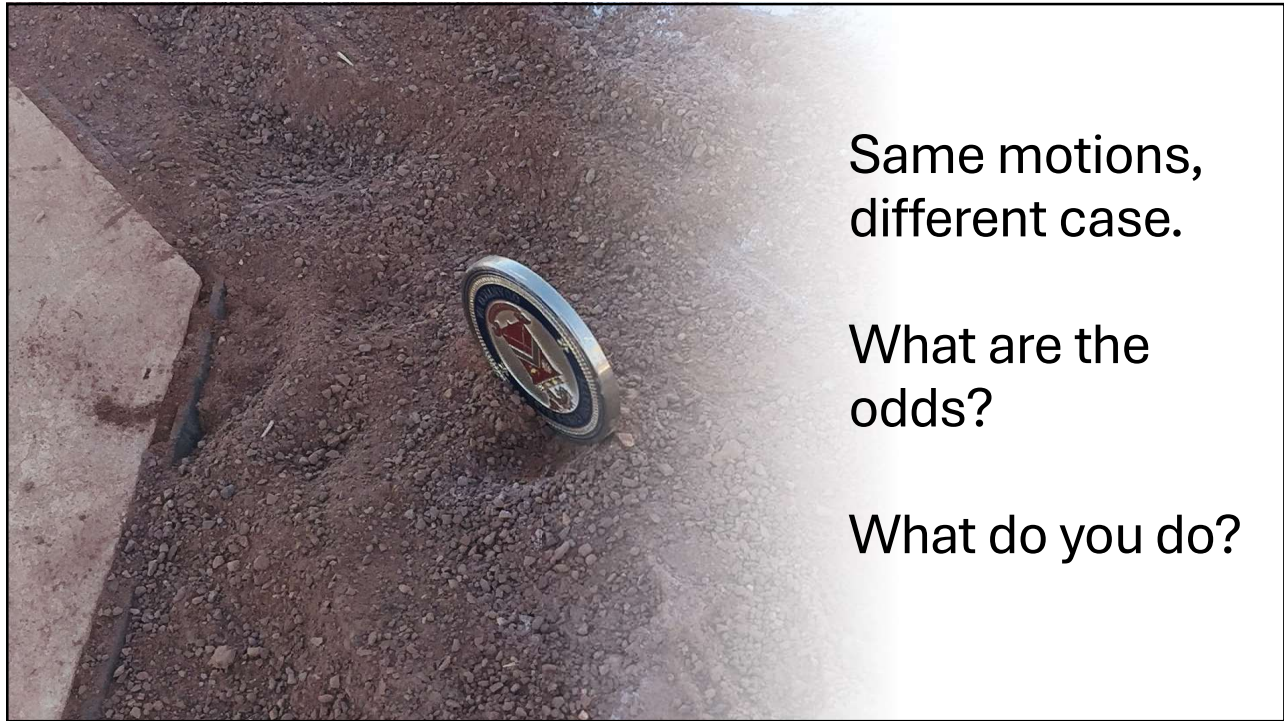


13

TYPES OF HEARINGS

<u>Legal/Argument</u>	<u>Evidentiary</u>
 No facts in dispute	 Facts in dispute
	 Fact-finding required to rule on the motion

14

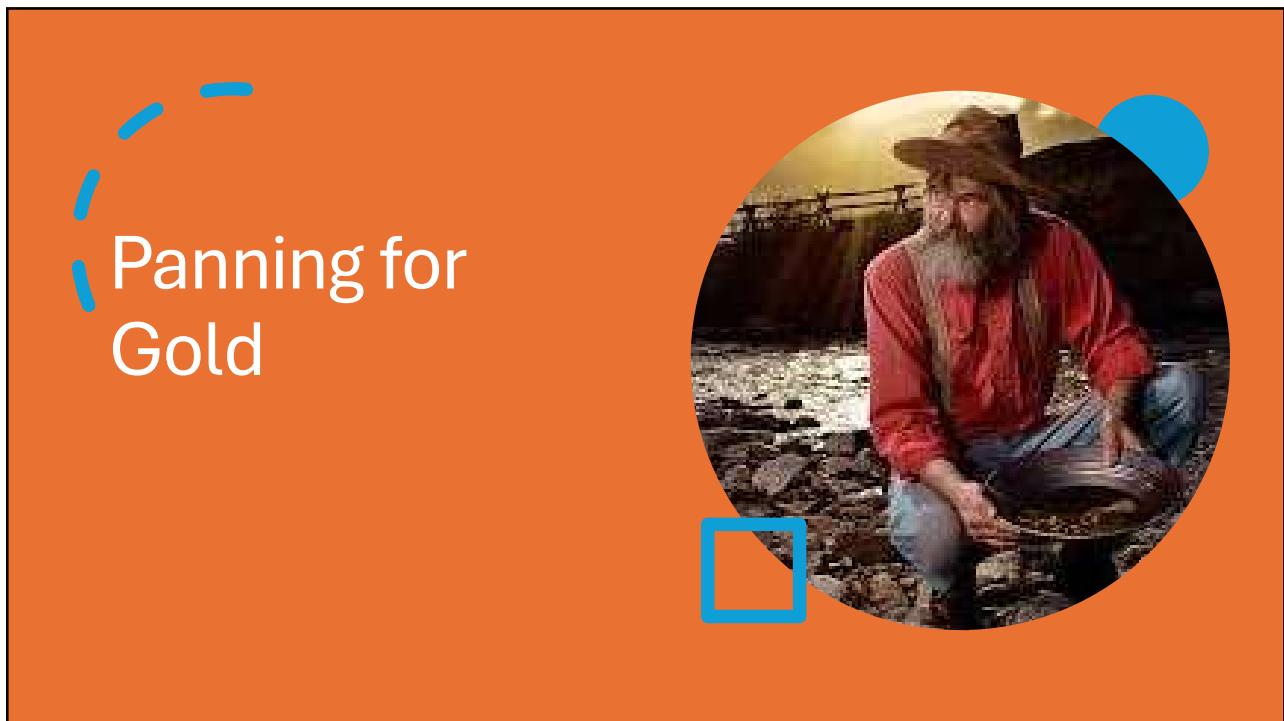


Same motions,
different case.

What are the
odds?

What do you do?

15



Panning for
Gold

16

Beware:

Motions are contagious.



17

Man eats underwear to beat breathalyzer

By D'ARCY RICKARD
of The Advocate

STETTLER — An 18-year-old Stettler man tried to eat his underwear in the hope that the cotton fabric would absorb alcohol before he took a breathalyzer test, provincial court heard this week.

David Zurfluh was subsequently acquitted of a charge of impaired driving because he blew .08, the legal limit.

But the testimony broke up people in Judge David MacNaughton's provincial court here Thursday afternoon.

Mr. Zurfluh was collared by RCMP Const. Bill Robinson after he ran from his vehicle, which had been seen weaving down the highway.

While sitting in the back of the patrol car, Mr. Zurfluh tried to eat his shorts, Const. Robinson told the court.

Mr. Zurfluh said he ripped the crotch out of his shorts, stuffed the fabric in his mouth and then spit it out.

A class of law students from William E. Hay Composite High, in court as observers,

was removed by the teacher when testimony enlivened the proceedings. The Grade 11 and 12 students had difficulty maintaining composure.

"People were leaving the courtroom with tears in their eyes, trying not to laugh," said RCMP Const. Peter McFarlane.



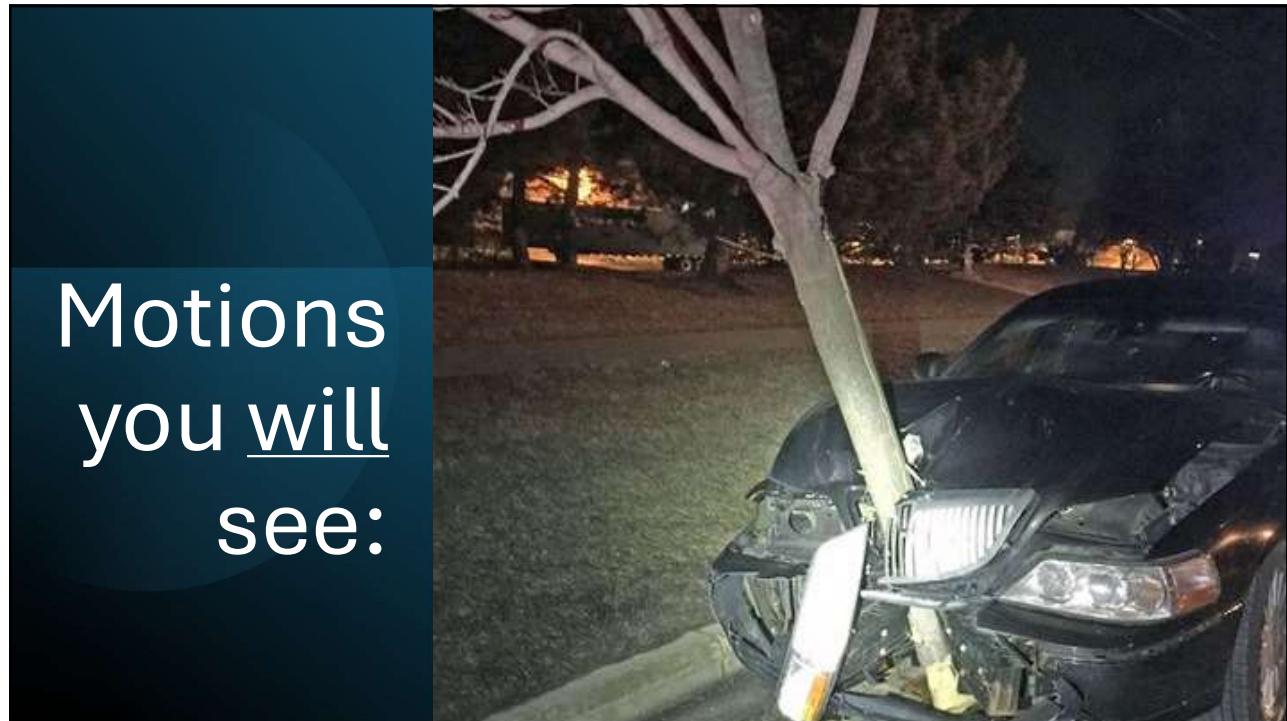
18



19

What Motions are
Trending in Your
Court?

20



21

Procedural Motions

- Continuances
 - Disclosure
 - Investigation
 - Scheduling conflicts


- Requests for Disclosure
 - Police reports
 - Lab reports

Hmmm.....?

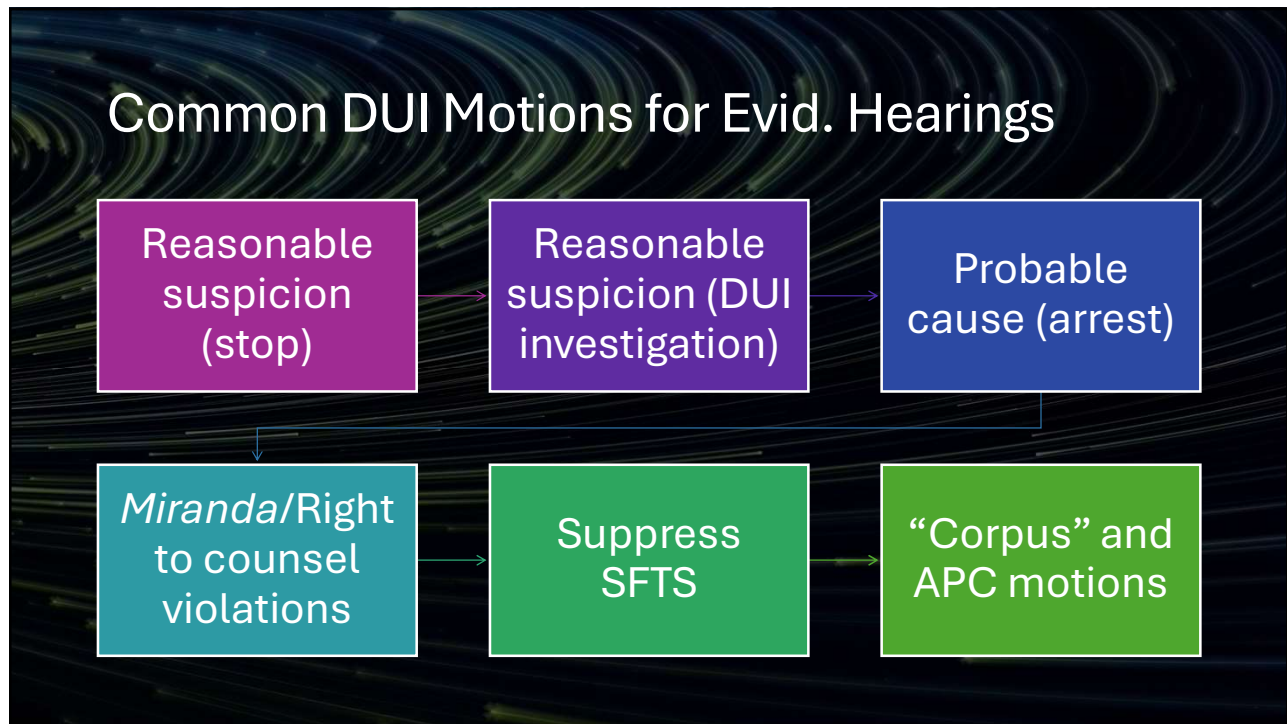
Rule 8: include or exclude time?

DUI Time standards

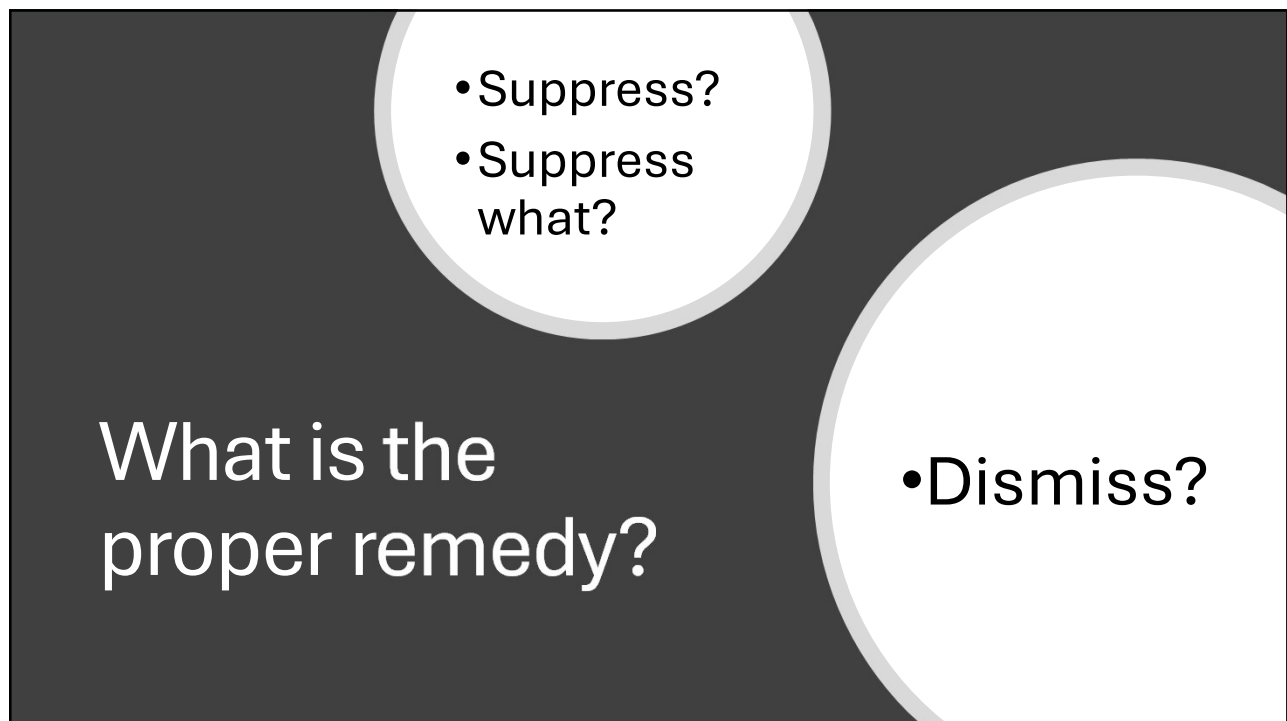
- A consideration when ruling on a motion?



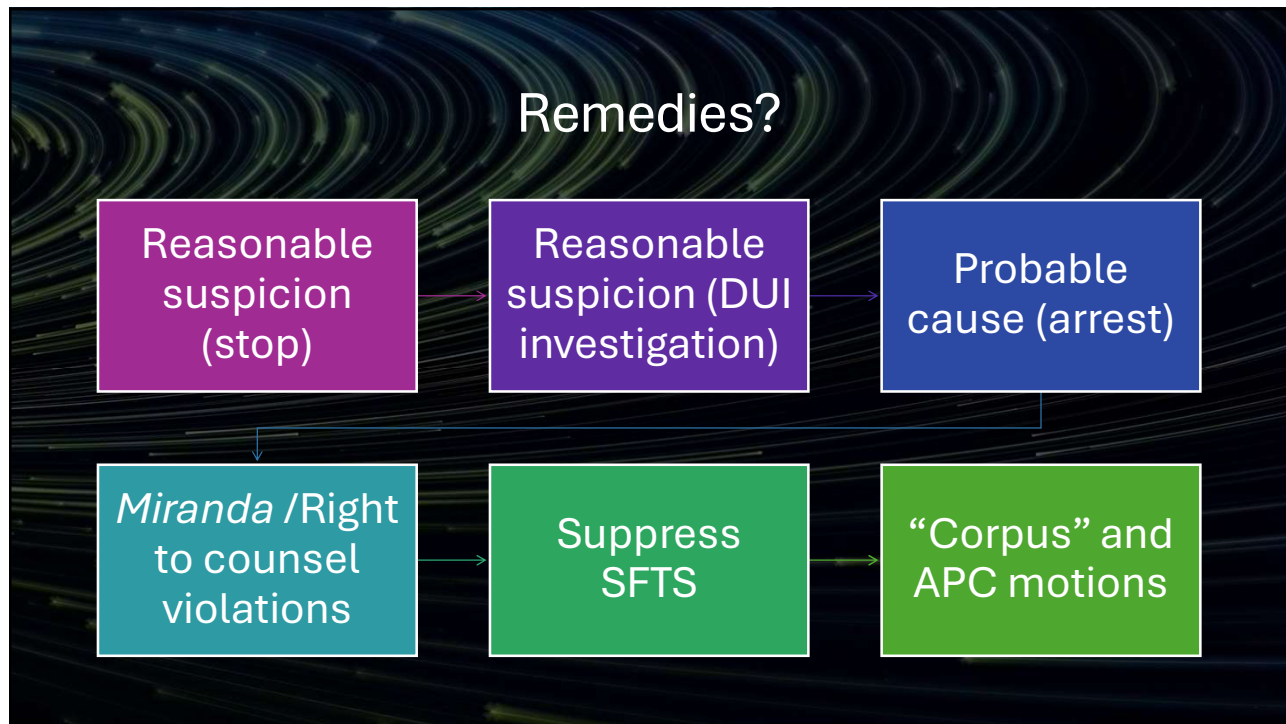
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23



24



25

Rule 16.4 Dismissals

Rule 16.4. Dismissal of Prosecution

- (a) **On the State's Motion.** On the State's motion and for good cause, the court may order a prosecution dismissed without prejudice if it finds that the dismissal is not to avoid Rule 8 time limits.
- (b) **On a Defendant's Motion.** On a defendant's motion, the court must order a prosecution's dismissal if it finds that the indictment, information, or complaint is insufficient as a matter of law.
- (c) **Record.** If the court grants a motion to dismiss a prosecution, it must state on the record its reasons for ordering dismissal.
- (d) **Effect of Dismissal.** Dismissal of a prosecution is without prejudice to commencing another prosecution, unless the court finds that the interests of justice require that the dismissal to be with prejudice.
- (e) **Release of Defendant; Exoneration of Bond.** If a court dismisses a prosecution, the court must order the release of the defendant from custody, unless the defendant also is being held on another charge. It also must exonerate any appearance bond.
- **(v) Victims' Rights.** On the victim's request, the victim must have an opportunity to confer with the prosecutor before the prosecutor moves to dismiss under (a).

26

Rule 16.4 Dismissals

State v. Rickard-Hughes, 182 Ariz. 273 (Div. 1, 1995)

“Rule [16.4] is not the proper procedural means for dismissal when the trial judge believes the evidence against the defendant is insufficient to go to the jury.” Weighing the evidence before trial is not appropriate. The proper motion is under Rule 20 at the appropriate time.

27

After a
hearing,
do you...

Rule
from
the
bench?

Rule from
chambers?

Issue a
written ruling?



28



29

Common DUI Motions *in Limine*



- Some are based on well established case law
- Some are based on rules of procedure or evidence
- Some do not apply to your case
- What is the experience level of your attorneys and witness(es)?

30

Kitchen Sink Motions *in Limine*



- Some motions may have no application to *this* case.
- Make the attorneys determine which motions are in dispute.
- Do you need to rule on every motion before trial?

31

Common Motions *In Limine*

("You can't say that!")



- HGN (testimony limitations), logs
- Pretrial HGN
- Ultimate Issue
- BAC in Opening
- Prior Convictions
- Limiting FSTS (weight vs admissibility)
 - Daubert
 - Application errors
 - Drug cases
 - Correlate to BAC
 - Pass/fail

32

Yes, there's more...

- PBT admissibility
- Breath testing / partition ratios (Cooperman)
- Independent test advisory
- Open containers
- "What is your DUI arrest rate?"



33

Remember....

ARE 103(d): "To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means."



34



35



36

Motions During Trial

- Offers of proof
- Publishing exhibits
- Endorsing witness as expert
- Rule 20
- Mistrial



37

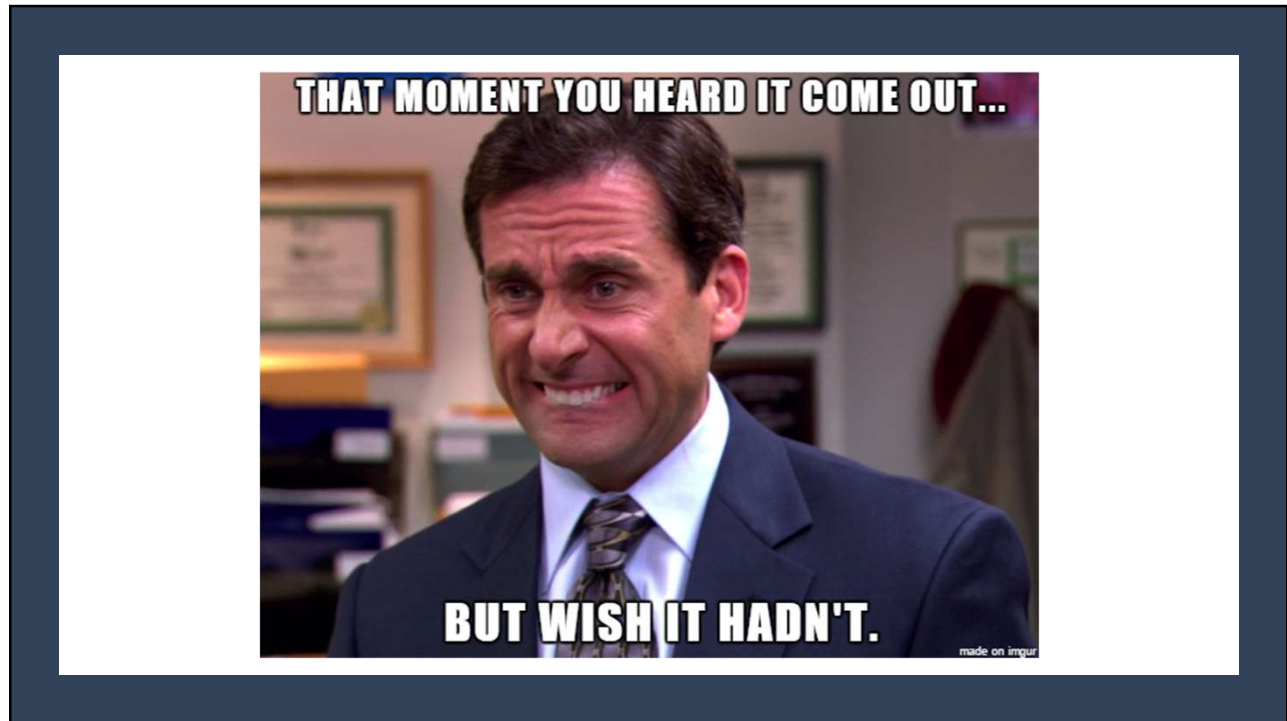
May we approach?

- Speaking objections (sidebar)
- Rule 20 Motions
- Juror strikes
- Mistrial motions
- Avoid suggesting inadmissible evidence to the jury. ARE 103d, 104c

- Whispering into the black box.



38



39

What do you do if inadmissible evidence is introduced?

A photograph of a judge in a black robe, pointing his right index finger directly at the camera. He is holding a wooden gavel in his left hand, which is resting on a wooden surface. The background is a plain, light-colored wall.

40

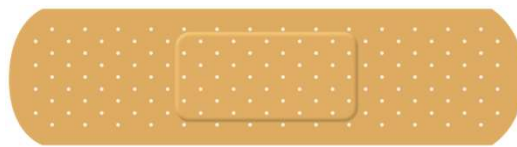


Weigh prejudice in context of the evidence and fashion the appropriate remedy.

41

Curative Instructions

- Know when and how to use a curative instruction as an alternative to mistrial.
- Will a “strike and disregard” instruction cure any prejudice caused?
- Draw attention to the inadmissible?
 - Counsel *may* opt to waive a curative instruction.



42

Or....



43



44

- "A declaration of a mistrial is the most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted." *State v. Adamson*, 136 Ariz. 250, 262, 665 P.2d 972, 984 (1983). If a witness makes an inadmissible statement, a trial court "must evaluate the situation and decide if some remedy short of mistrial will cure the error." *Id.*



45

- *State v. Doty*, 232 Ariz. 502 (Div 1., 2013)
 - "In deciding whether to grant a motion for mistrial after inadmissible testimony is unexpectedly interjected, the trial court should consider "(1) whether the remarks called to the attention of the jurors matters that they would not be justified in considering in determining their verdict, and (2) the probability that the jurors, under the circumstances of the particular case, were influenced by the remarks."

46

Sua sponte Mistrials (tread carefully!)

- *Sua sponte* mistrials ok if “manifest necessity” or ... “the ends of public justice will otherwise be defeated.”
- Jeopardy may attach if mistrial for prosecutorial misconduct, or “judicial overreaching”
- Read: *State v. Aguilar*, 217 Ariz. 235, (Ariz. App., 2007); *State v. Burr*, 229 Ariz. 467 (Ariz. App., 2012)



47

BREAKING NEWS

**MISTRIAL
GRANTED**

- If mistrial is granted, new trial must commence within **60 days**
- [Crim.R. 8.2(c)]

48



Questions?
Anyone? Bueller?

49



50

APPENDIX

(or, stuff you wish I would have covered today)

51

“Ultimate Issue” Testimony (1)

- May a witness testify in opinion form on matters that embrace an “ultimate issue?”

Rule 704. Opinion on an Ultimate Issue

- **(a) In General--Not Automatically Objectionable.** An opinion is not objectionable just because it embraces an ultimate issue.
- **(b) Exception.** In a criminal case, an **expert witness** must not state an opinion about whether the defendant did or did not have a mental state **or condition** that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

52

Ultimate Issue (2)

- *Fuenning v. Superior Court*, 139 Ariz. 590 (1983)
- *Fuenning* cautioned against allowing officer's opinions on Defendant's intoxication
- Such opinions, if parroting the language of the statute, equate to an opinion on Defendant's guilt
- Ruling is predicated on 403 balancing test
- OK to say whether Defendant displayed symptoms of intoxication
- Witness "might be allowed to testify that defendant's conduct seemed influenced by alcohol."

53

Ultimate Issue (3)

- *State v. Bojorquez*, 145 Ariz. 501 (Div.1 1985)
- *Fuenning* did NOT create a *per se* rule that an officer's opinion regarding intoxication is never admissible or will always constitute reversible error.
- The trial court must weigh whether the probative value outweighs its prejudicial effect
- No re-trial required

54

Ultimate Issue (4)

- *State v. Askren*, 147 Ariz. 436 (Div 1, 1985)
- Officer testified that the FSTs are used to determine whether defendant was intoxicated
- This was not an expression of the officer's opinion

55

Ultimate Issue (5)

- *State v. White*, 155 Ariz. 452 (Div.1 1987)
- Officer 1 testified that on the FSTS, defendant's symptoms of intoxication as a "6 or 7" on a 1-10 scale.
- Officer 2 testified in opinion form that defendant was under the influence. Statement deemed impermissible.
- Denial of mistrial upheld. Sustaining objection was sufficient and in the trial court's discretion.
- "The officers were not testifying as experts but were giving opinions as to what they personally observed, which any witness may do."

56

Ultimate Issue (6)

- *State v. Lummus*, 190 Ariz. 569 (Div. 1, 1997)
- Officer testified that on a 1-10 intoxication scale, defendant rated a “10 plus” for intoxication (allowed by trial court)
- Held to be an opinion on the ultimate issue (the same as saying defendant was extremely intoxicated)
- Despite violation of *Fuening*, no reversal required.
- The state presented “considerable evidence” of defendant’s impairment, so prejudice from statement did not require reversal
- “*Fuening* seems to be a source of confusion” but the admonition is not dicta

57

Ultimate issue (7)

- Common subject of *motion in limine*
- Instruct attorneys/ witnesses before trial
- Make attorneys responsible for witness statements
- What if there is a violation? DON’T PANIC!!
 - Mistrial?
 - Curative instruction sufficient?
 - Strike testimony?
 - Weigh prejudice in context of the evidence and fashion the appropriate remedy.

58

HGN (1)



- Essential cases to read and keep handy:
 - *State v. Superior Court (Blake)*, 149 Ariz (1986)
 - *State ex rel. Hamilton v. City Court of City of Mesa*, 165 Ariz. 514 (1990)
 - *State v. Cannon*, 192 Ariz. 236 (Div. 1, 1998)

59

HGN (2)

- *State v. Superior Court (Blake)*, 149 Ariz (1986)
 - Thorough discussion of HGN and admissibility under *Frye* standard
 - Admissible to corroborate or attack the accuracy of the chemical test results.
 - Admissible as evidence that the driver was “under the influence”
 - “NOT admissible in any criminal case as direct, independent evidence to quantify blood alcohol content.”
 - Administered by properly trained and certified officer?

60

HGN (3)

State ex rel. Hamilton v. City Court of City of Mesa, 165 Ariz. 514 (1990)

- Opinion clarifies *Blake*
- Proper officer training and certification foundational
- Splits the ruling in two:
 - No chemical test
 - Chemical test

61

HGN (4) (*Hamilton*)- NO BAC

HGN results are “inadmissible to estimate BAC in any manner, including estimates of BAC over .10%, *in the absence of a chemical analysis* of blood, breath, or urine. In the absence of a chemical analysis, the use of HGN test results, as with observations from other field sobriety tests, is to be limited to showing a symptom or clue of impairment. . .The officer may not testify regarding accuracy in estimating BAC from the test, nor may the officer estimate whether BAC was above or below .10%. *The officer's testimony is limited to describing the results of the test and explaining that, based on the officer's experience, the results indicated a neurological impairment, one cause of which could be alcohol intoxication.*”

62

HGN (5) (*Hamilton*) NO BAC

Language from Hamilton's Conclusion:

- “In a case involving only a § 28-692(A) charge, where *no chemical test...has occurred*, . . . HGN test results may be admitted only for the purpose of permitting the officer to testify that, based on his training and experience, *the results indicated possible neurological dysfunction, one cause of which could be alcohol ingestion.*”

63

HGN (6) (*Hamilton*) BAC

Footnote 2

“Where a chemical analysis has been conducted, the parties may introduce HGN test results in the form of estimates of BAC over .10%, to challenge or corroborate that chemical analysis. When no chemical analysis has been conducted, the use of HGN test results is limited as set forth in this opinion.”

64

HGN (7)

State v. Cannon, 192 Ariz. 236 (Div. 1, 1998)

- Officer testified 4 or more cues = .10+
- Def. had 6/6 cues two minute after the traffic stop
- Therefore: “Defendant’s BAC *at the time of the test* was .10.”
- This testimony violated *Blake* since it was admitted as direct, independent evidence to quantify Defendant’s BAC level

65

SFSTs (WAT and OLS)

State v. Campoy, 214 Ariz. 132 (Div 2, 2007)

- Reaffirms that FSTs are relevant evidence of *impairment*
- FSTs *cannot* be used to quantify BAC
- Testimony is permissible:
 - FSTs are administered to determine whether Def. intoxicated
 - Use of the terms “sobriety,” “test,” “field sobriety test,” “impairment,” “pass/fail,” “marginal”

But....trial courts can put “appropriate boundaries” on such testimony at trial

66

FSTS (2)

FSTS cannot be used to quantify or correlate BAC

- *State v. Superior Court (Blake)*, 149 Ariz (1986)
- *State ex rel. Hamilton v. City Court of City of Mesa*, 165 Ariz. 514 (1990)
- *State ex re. McDougall v. Albrecht*, 168 Ariz. 128 (Div 1, 1991)
 - Blatant violation of this rule
- *State v. Herrera*, (203 Ariz. 131, 51 P.3d 353 (Div. 2, 2002)
 - Officer correlated FTS with BAC, but did not state the actual percentage.
 - Denial of mistrial affirmed (no actual percentage given; would have been cumulative with other BAC evidence; curative instruction offered).

State v. Campoy, 214 Ariz. 132 (Div 2, 2007)

67

“Pretrial HGN” (1)

- Requested by state per Crim. Rule 15.2(a)(8)
 - **a. Physical Evidence.** At any time after the filing of an indictment, information or complaint, upon written request of the prosecutor, the defendant shall, in connection with the particular crime with which the defendant is charged:
 - . . .
 - (8) Submit to a reasonable physical or medical inspection of his or her body, provided such inspection does not include psychiatric or psychological examination.
 - The defendant shall be entitled to the presence of counsel at the taking of such evidence. This rule shall supplement and not limit any other procedures established by law.

68

Pretrial HGN(2)

- Question 1: Does Rule 15.8(a)(8) mandate that Defendant submit to a pretrial HGN?
- Question 2: If the exam is administered, are the results admissible?
 - Are they relevant?
 - Are they probative of Defendant's condition months before?
 - Are the conditions of the exam comparable?
 - What if the results show the presence of HGN?

69

Experts (1)

State v. Salazar-Mercado, 234 Ariz. 590 (2014)

“Cold” expert testimony OK (general principles to assist jury in understanding the issues)

State v. Bernstein (Herman) 237 Ariz. 226 (2015)

- GC blood testing is a reliable methodology
- Errors in its application do not require exclusion unless “they are so serious as to render the results themselves unreliable.”
- The jury can weigh the evidence

70

Experts (2)

Bullcoming v. New Mexico, 131 S.Ct. 2705 2710, (2011)

- Expert cannot be a conduit for another (BAC lab results precluded)

State v. Karp, 236 Ariz. 120 (Div. 1., 2014)

- An expert witness may testify as to her own independent opinion when she relies on facts and data (forensic reports) prepared by a non-testifying expert, if the testifying expert reasonably relied on these facts and data to reach her conclusions.
- Distinguishes opinion evidence from underlying data
- No confrontation clause violation because the witness whose opinion is being rendered is available for cross-examination.
- The lab reports, prepared by another person, not admitted.

71

Experts (3)

- Defense criminalist exhaustively testifies as to her training and experience in the area of forensic alcohol testing
- In front of the jury, defense counsel asked the court to submit the witness as an expert. OK?
- No!

72

Experts (4)

- *State v. McKinney*, 185 Ariz. 567 (1996)
- “ We do not recommend... the process of submitting a witness as an expert. The trial judge does not decide whether the witness is actually an expert but only whether the witness is "qualified as an expert by knowledge, skill, experience, training, or education ... [to] testify ... in the form of an opinion or otherwise.” By submitting the witness as an expert in the presence of the jury, counsel may make it appear that he or she is seeking the judge's endorsement that the witness is to be considered an expert. The trial judge, of course, does not endorse the witness's status but only determines whether a sufficient foundation has been laid in terms of qualification for the witness to give opinion or technical testimony.
- "Such an offer and finding [of expert status] by the Court might influence the jury in its evaluation of the expert and the better procedure is to avoid an acknowledgement of the witnesses' expertise by the Court."

73

DUI Drugs (Essential Cases)

- *State v. Bayardi*, 230 Ariz. 195, (Div. 1, 2012)
 - 28-1381(D) is an affirmative defense, requiring defendant to prove by a preponderance of the evidence that he used prescription drugs as prescribed by a licensed medical practitioner.
- *State v. Harris*, 234 Ariz. 343 (2014)
 - The “metabolite” reference in section 28-1381(A)(3) is limited to metabolites that are capable of causing impairment; drivers cannot be convicted of violating section 28-1381(A)(3) based merely on the presence of a non-impairing metabolite, such as Carboxy-THC.
- *Dobson v. McClellan*, 726 Ariz. Adv. Rep. 27 (11/20/15)
 - AMMA does not immunize cardholder from (A)(3) prosecution
 - Affirmative defense if cardholder shows mj/metab. was in a concentration insufficient to cause impairment.

74

DUI Marijuana (Essential Cases)

- *State v. Clark (App. Div.2 2020) 249 Ariz. 528, review denied.*

A person may be convicted of DUI if the person has marijuana or its impairing metabolite in his body.

- *Ishak v. McClennen (App. Div.1 2016) 241 Ariz. 364, review denied.*

The statute prohibiting DUI if the person has marijuana or its metabolite in his or her body makes it a crime for a person to drive with a metabolite that is capable of causing impairment.

75

Rule 20 Motions (1)

- **Rule 20. Judgment of Acquittal**
- **a. Before Verdict.** On motion of a defendant or on its own initiative, the court shall enter a judgment of acquittal of one or more offenses charged in an indictment, information or complaint after the evidence on either side is closed, if there is no substantial evidence to warrant a conviction. . . The court's decision on a defendant's motion shall not be reserved, but shall be made with all possible speed.
- **b. After Verdict.** A motion for judgment of acquittal made before verdict may be renewed by a defendant within 10 days after the verdict was returned.

76

Rule 20 Motions (2)

- Motion made in front of the jury?
- Court rule in front of the jury?
- .085 BAC. Give defendant the benefit of the doubt, taking into account the 10% / .01 margin of error? Rule 20 granted?
- Nope. *State ex rel. McDougall v. Superior Court In and For County of Maricopa*, 178 Ariz. 544 (Div. 1, 1994)
 - “...the effect of the inherent margin of error of a breath testing device is a question of fact for the fact finder.”

77

Key Trial Rules

- Understand what “invoking the rule” means. **R.9.3 and ARE 615**
- **ARE 103**: “To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.”
- **ARE 105**: Limiting instructions required
- **ARE 611**: Time limits permitted (best rule ever!!)



78