



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



**STATE OF ARIZONA V. PABLO ISAAC HERNANDEZ
CR-19-0193-PR
246 Ariz. 543 (App. 2019)**

PARTIES:

Petitioner/Appellee: State of Arizona
Respondent/Appellant: Pablo Isaac Hernandez
Amici Curiae: Arizona Law Enforcement Legal Advisors Association
Arizona Association of Chiefs of Police

FACTS:

Pima County Sheriff's Deputy Michael Turner was driving at about 2:30 p.m. when a vehicle heading the opposite direction ran a stop sign and entered Turner's lane. While swerving to avoid a head-on collision, Turner testified that he locked eyes with the driver for about two seconds and gained a complete view of the driver's face. The car sped away, and Turner followed it to a parking lot. After parking the car, the driver and two passengers fled the scene on foot. Turner saw the driver's profile as he ran away.

Within a few minutes, federal marshals arrived at the parking lot to investigate a home invasion. The marshals showed Turner a photograph with Hernandez's name, and Turner identified Hernandez as the driver of the abandoned vehicle. Turner then searched Hernandez's name in his vehicle's computer, pulled up a photograph of Hernandez, and again identified him as the driver. The sheriff's department held the vehicle for a few weeks, but neither Turner nor the sheriff's department collected fingerprint or DNA evidence from the vehicle before returning it to the registered owner.

Hernandez was charged with unlawful flight from a law enforcement vehicle. At trial, Hernandez requested an instruction based on *State v. Willits*, 96 Ariz. 184, 191 (1964). "To be entitled to a *Willits* instruction, a defendant must prove that (1) the state failed to preserve material and reasonably accessible evidence that could have had a tendency to exonerate the accused, and (2) there was resulting prejudice." *State v. Glissendorf II*, 235 Ariz. 147 ¶ 16 (2014) (quoting *State v. Smith*, 158 Ariz. 222, 227 (1988)). Hernandez argued that the State failed to gather fingerprints and DNA evidence before returning the vehicle to its registered owner. Hernandez's defense at trial was that he was not the driver of the car and the State's only evidence was Turner identifying Hernandez as the driver. He argued that the State had a duty to preserve material evidence reasonably within its grasp and that it failed to do so. Hernandez argued that he suffered prejudice because a lack of his fingerprints and DNA, or the existence of another's fingerprints and DNA, would have bolstered his claim that he was

not the driver. The trial court denied the motion, holding that a *Willits* instruction was not warranted because Hernandez had not shown that the evidence would have been exculpatory. The jury found Hernandez guilty of unlawful flight from a law enforcement vehicle, and the trial court sentenced him to three years in prison.

On appeal, Hernandez argued that the trial court erred when it denied his request for a *Willits* instruction. A majority of the panel agreed with Hernandez. *State v. Hernandez*, 246 Ariz. 543, 548 ¶ 17 (2019). The majority determined that the State failed to preserve any fingerprints and DNA that may have been present in the car before returning it to the owner. *Id.* ¶ 18. Because the only issue in the case was the driver’s identity, and the validity of the identification was disputed, physical evidence from the inside of the car (particularly the driver’s side) was material. *Id.* The court then determined that the DNA evidence had the potential to exonerate Hernandez and rejected the State’s argument that the existence of DNA evidence was speculative. A photograph of the car showed visible fingerprints on the window and frame of the driver’s door. Although not necessarily dispositive, the lack of Hernandez’s fingerprints and DNA in the car—particularly on the steering wheel, gear shift and door handle-- would have had exculpatory value. *Id.* at 549 ¶ 19. Hernandez had met his burden of showing that the evidence, if preserved, would have been potentially helpful to him and he was entitled to a *Willits* instruction. The majority reversed the conviction and remanded the matter for a new trial. *Id.* ¶ 21.

Judge Brearcliffe dissented from the majority’s conclusion and remand on the *Willits* instruction issue. Judge Brearcliffe would have denied the requested instruction because Hernandez (1) did not prove that the evidence ever existed or was destroyed or lost; (2) did not present a defense theory supported by evidence that the lost evidence could have advanced; and (3) did not demonstrate prejudice. *Id.* at 550 ¶ 25.

ISSUE:

Did the court of appeals err in holding that law enforcement’s failure to *collect* potential fingerprint and DNA evidence from the vehicle Hernandez drove to flee from police warranted a *Willits* [96 Ariz. 184 (1964)] instruction, where only a failure to *preserve* “material and reasonably accessible evidence that could have had a tendency to exonerate the accused” justified the adverse-inference instruction?

DEFINITION:

In a *Willits* instruction, the jury is told that if it finds “that the state ... allowed material evidence to be destroyed,” or, in some circumstances failed to preserve evidence, it may “infer that the evidence would be against the interests of the state.” *State v. Hunter*, 136 Ariz. 45, 50 (1983).

This Summary was prepared by the Arizona Supreme Court Staff Attorneys’ Office solely for educational purposes. It should not be considered official commentary by the Court or any member thereof or part of any brief, memorandum, or other pleading filed in this case.