Basic
Motion Practice

APAAC On Demand

Diana Hinz
Phoenix City Prosecutor's Office

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Introduction

- Important Rules
- Evidentiary Hearings
- Substantive areas – pre-trial motions
- Post-trial Motions

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Why is Motion Practice Important?

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You've Received a Motion – Now What?

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Was the motion timely filed?

Rule 16.1(b):

- 20 days prior to the actual trial date
- Such other time as the court may direct
- Scope: All motions

*But jurisdiction can be raised at any time

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Rule 16 applies to motions in limine

A motion *in limine* requesting suppression of evidence is nothing more than a motion to suppress and it must be timely filed within the limits of Rule 16.

State v. Zimmerman, 166 Ariz. 325 (App. 1990)

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Rule 16 applies to constitutional issues

- Preindictment delay (*Montano)*
- Voluntariness (*Alvarado*)
- Speedy Trial (*Lee*)

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What if the motion was untimely . . .

Rule 16.1(c) says an untimely motion "shall be precluded"

Your first response to an untimely motion should be to ask for preclusion

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Does this mean untimely motions are always precluded?

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No . . .

The court has discretion to hear late motions.

Invocation of Rule 16.1(c) rests in the discretion of the court – reviewed for abuse of discretion.

Zimmerman

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Untimely motions . . .

If request to preclude is denied, ask for time to respond.

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Exceptions to the 20-day rule: Rule 16.1(c)

- Basis unknown
- Could not have been known
- Raised promptly upon learning

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Time Limits – Rules 16.1 & 35.1(a)

- Response – 10 days
- Reply – 3 days

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Computation of Time

Do not count the day the motion was filed

If less than 7 days – don't count weekends or holidays

Add 5 days for mailing

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Rule 1.3
Computation of Time

Rule 1.3(a) – Mailing includes every type of service except hand delivery

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Length – Rule 35.1(b)

Motion and response – 10 pages

Reply – 5 pages

* Unless otherwise permitted by the Court

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Form – Rule 35.1(a)

- Typewritten
- Double Spaced
- 8.5 x 11 inch paper
- Short, concise statement of relief requested
- Memorandum with <u>specific factual grounds</u> and <u>precise legal points</u>

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Rule 35.4 Waiver

Formal requirements may be waived or defects in motions overlooked

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Rule 8/
Speedy Trial

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Rule 8.2
Time Limits

- Defendants in custody – 150 days from arraignment
- Defendants released from custody – 180 days from arraignment

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Rule 8.2
Time Limits

New trial:

- Mistrial or motion for new trial – 60 days from entry of order
- Reversal of judgment on appeal – 90 days from service of mandate by appellate court

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Rule 8.1(d)
Duty of Defense Counsel

Defense counsel has a duty to advise the court of impending expiration of time limits

Failure to do so may result in sanctions and should be considered in determining whether to dismiss an action with prejudice pursuant to Rule 8.6

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Rule 8.4
Excluded Periods

Delays occasioned by or on behalf of the defendant (absence, competency determination)

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Violation of Rule 8

Rule 8.6 – Dismissal may be with <u>or</u> without prejudice

Defendant needs to show actual prejudice for dismissal to be with prejudice

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Speedy Trial

Barker v. Wingo, 407 U.S. 514 (1972)

- Length of delay
- Reason for delay
- Whether defendant timely asserted his right to a speedy trial
- Any prejudice to the accused

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Responding to a Rule 8 / Speedy Trial Motion

- Has the Defendant merely alleged a Rule 8 violation without actually calculating Rule 8
- Show the court why there is no Rule 8 violation
- Then discuss the speedy trial factors

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Preparing Your Response -- Pointers

- Read the defense motion carefully
- Identify the issues/Frame the issues
- Anticipate arguments
- Be brief, concise

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Finalizing your written response

- Golden Rule – be professional
- Have someone else read your response – solicit input
- Always check cites

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Evidentiary Hearings

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Rule 16.2(b) – Procedure on pretrial motions to suppress evidence

Burden of proof
- State
- Preponderance of evidence

Burden of going forward
- Defendant
- Standard – *prima facie* showing that the evidence should be suppressed

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Rodriguez v. Arellano

- Defense may cite to argue State goes first
- Holding: Defendant satisfied his burden of going forward by showing no warrant existed for the search
- Key – entry into a home is the chief evil against which Fourth Amendment is directed
- Traffic stops are distinguishable

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Evidence Rule 104

Trial court is not bound by Rules of Evidence in determining preliminary questions of admissibility.

→ Hearsay comes in

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What about Crawford v. Washington?

Crawford does not apply to pretrial hearings.

- ✓ Gresham v. Edwards, 644 S.E.2d 122 (Ga. 2007)
- ✓ People v. Robinson, 802 N.Y.S.2d 868 (2005)

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Common Motions to Suppress – Substantive Issues

Search and seizure – Fourth Amendment

Voluntariness/Miranda

Probable cause to arrest

Corpus Delicti

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Fourth Amendment

- Fourth Amendment does not guarantee against all searches, just *unreasonable* searches

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Reasonable Grounds to Stop a Vehicle

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Reasonable Suspicion

1. Specific articulable facts
2. Rational Inferences
   - → Objective analysis
   - → Totality of the circumstances

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Violation of traffic law

- A.R.S. § 28-1594; State v. Acosta
- Officers may stop and detain a person to investigate an actual or suspected violation of Title 28
- The violation may be civil or criminal

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Stop of Vehicle

- Court may consider any observed traffic violation as basis for stop.
- Analysis is not limited to violations that were relied upon by officer who made the stop if **they are testified to in court**.

State v. Whitman, 232 Ariz. 60, 301 P.3d 226 (App. 2013)

Speeding

Driving any speed over the speed limit creates a presumption that the speed was not reasonable and prudent.

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Training and Experience

Officers can rely on their specialized training and experience.

→ NHTSA

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Collective Knowledge

- Other officers/agencies
- Radio broadcasts

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"Weaving"

- Blake – weaving within the lane
- Harrison – tire "bouncing"
- Winter – weaving within the lane

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State v. Livingston
75 P.3d 1103 (App. 2003)

Defendant was traveling a stretch of road that was "rural, curved, and dangerous."

Defendant's right side tires crossed the shoulder line once by less than twelve inches.

Trial court held no reasonable grounds to stop because Defendant did not violate A.R.S. § 28-729.1.

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State v. Livingston

The Court of Appeals affirmed the suppression:

The language "as nearly as practicable" demonstrates a legislative intent to avoid penalizing minor deviations.

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State v. Livingston

- The court stated, however:

  "[S]eemingly small factual distinctions can affect a court's conclusions as to the reasonableness of a stop." (Footnote 1)

Avoid *Livingston* situations – Provide ALL Reasons/Support for Stops

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Pretext stops

- Whren v. United States – Eliminated the pretext defense
- State v. Swanson – The officer's subjective intentions are irrelevant to the analysis

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Community Caretaking

- ***State v. Organ***, 225 Ariz. 43 (App. 2010). (Defendant stopped on side of road, then driving 20 mph)
- ***State v. Mendoza-Ruiz***, 225 Ariz. 473 (App. 2010). (Defendant arrested, officers saw gun in cab of truck and called locksmith to open truck)

Stop of Vehicle - Tail Light

State v. Becerra, 231 Ariz. 200, 291 P.3d 994 (App. 2013) (distinguishing *Fikes).*

- Officer who observed vehicle with only one taillight working did not have grounds to stop for taillight statute (A.R.S. § 28-925 requires one working taillight) but did have grounds to stop for safety concerns (A.R.S. § 28-982).
- Officer expressly testified he was concerned about safety.

Purpose of Exclusionary Rule

- Judicially created device
- Designed to safeguard against future Fourth Amendment violations
- Its application should be restricted to instances where its remedial objectives are most likely to be served
- Where it will not result in appreciable deterrence, its use is unwarranted

Arizona v. Evans, 514 U.S. 1 (1995).

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Exclusionary Rule

- Fact that Fourth Amendment violation occurred does not necessarily mean the rule applies
- Exclusion is a last resort
- The benefits of deterrence (of wrongful conduct) must outweigh the costs
- The abuses that gave rise to the rule featured intentional conduct that was clearly unconstitutional

Herring v. United States, 555 U.S. 135 (2009).

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Voluntariness of the Defendant's Statements

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All admissions are presumed involuntary

This means the State has the burden of going forward and the burden of proof

Standard: preponderance of the evidence

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Voluntariness

Statement must not be:

- Coerced
- By threats or promises
- Defendant must be conscious of the meaning of his or her answers

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Be aware . . .

Even if the judge determines that the statements are voluntary, the defendant may still offer evidence tending to contradict the voluntary nature of the statements

The jury may then disagree with the judge and reject the confession

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State v. Fimbres

Defendant wanted to suppress physical evidence and statements

Prosecutor unprepared

Court granted motions to suppress without evidentiary hearing

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Physical Evidence - suppression reversed

- The burden of production is on the defendant
- Argument of counsel is not evidence
- There was no evidence before the court to support the suppression

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Statements -- Suppression Affirmed

- Statements are presumed involuntary
- The burden was on the State to show that the statements were voluntary

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Miranda

When
- Custodial interrogation

Application
- Law enforcement

Intent
- Officer's subjective intent is irrelevant

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Factors indicative of custody

- Site of interrogation
- Whether investigation focused on accused
- Whether objective indicia of arrest present
- Length and form of interrogation

Brief roadside questioning is not custodial interrogation. *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138 (1984).

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Is an express waiver of Miranda needed?

No.

Answering of questions after a proper advisement constitutes a waiver by conduct.

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Exceptions to Miranda:

- Booking questions
- Spontaneous statements
- Non-custodial statements (roadside questioning)
- Asking the defendant to perform FSTs and take the breath test

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Probable Cause to Arrest

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Standard:

"The police have probable cause to arrest when reasonably trustworthy information and circumstances would lead a person of reasonable caution to believe an offense has been committed by the suspect."

State v. Moorman, 154 Ariz. 578 (1987)

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Probable Cause Analysis:

1. Totality of the circumstances
2. Objective analysis
3. Officer entitled to draw reasonable inferences from the facts in light of his/her own experience

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Corpus Delicti

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Corpus Delicti Rule

Before Defendant's incriminating statement comes in at trial, the State must show:

1) A **reasonable inference** that

2) A crime was committed by **some person**.

State v. Jones, 203 Ariz. 1, 23 (2002)

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PURPOSE FOR RULE

Concern Confession is Untrustworthy due to:

1. Mental Instability, or
2. Improper Police Procedures

State v. Superior Court (*Plummer*, RPI), 188 Ariz. 147 (App. 1996)

Point out there is no concern about either of the above

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The *Corpus* Rule addresses a preliminary question of admissibility

Are the defendant's incriminating statements admissible?

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Corpus Delicti

May be proved by circumstantial evidence alone.

State v. Rivera, 103 Ariz. 458, 445 P.2d 434 (1968).

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Order of proof

- Evidence used to establish the reasonable inference need not be before the statement.
- A variation in the order of proof does not constitute prejudice.

State v. Gerlaugh, 134 Ariz. 164 (1982)

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A.R.S. § 28-1388(G)

- Statutory exception to corpus requirement
- Allows for admission of the defendant's statement that he/she was driving a vehicle involved in an accident resulting in injury or death to any person

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DUI *Corpus* Case:

- ***State ex rel. McDougall v. Superior Court* (*Plummer*, Real Party in Interest),** 188 Ariz. 147, 933 P.2d 1215 (App. 1996).

(Officer observed impaired driving. Both potential drivers were drunk – sufficient evidence that some person committed the crime of DUI)

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Motions to Dismiss

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Motions to Dismiss

Common types:

- Right to counsel
- Destruction of evidence
- Jurisdiction
- Speedy trial/Rule 8
- Sufficiency of the complaint

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Burden of Going Forward

- Defendant

Burden of Proof

- Defendant

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Right to Counsel

Sixth Amendment Right

- Attaches when criminal proceedings are initiated

Fifth Amendment Right

- Applies when the defendant is in custody and being interrogated

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Right to Counsel

Defendant's invocation of right to counsel must be *unequivocal*

- *Davis v. U.S.*, 512 U.S. 452 (1994) ("Maybe I should talk to a lawyer" was not unequivocal)

Asking "who a good attorney would be" was not an unequivocal invocation.

- *State v. Linden,* 136 Ariz. 129 (App. 1983)

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Right to Counsel

Defendant has a right to a private conversation with an attorney, but he must specifically ask for privacy.

State v. Waldron, 157 Ariz. 90, 754 P.2d 1365 (App. 1988)

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Right to Counsel

The right to counsel belongs to the suspect, and the suspect must invoke that right.

- *Moran v. Burbine*, 475 U.S. 412 (1986) (suspect's sister tried to retain attorney; attorney contacted station, but was not given opportunity to be present during questioning)

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Right to Counsel

Moran v. Burbine holding adopted in Arizona

State v. Transon, 186 Ariz. 482 (App. 1996) (DUI suspect's wife had attorney contact police station and try to talk to defendant; attorney was not given opportunity to speak to defendant, defendant was not advised that attorney wanted to speak to him, and defendant never requested an attorney)

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Right to Counsel – Remedy for Violation

In a DUI case, dismissal is only appropriate where the State's actions hindered the defendant's ability to gather exculpatory evidence.

State v. Keyonnie, 181 Ariz. 485 (App. 1995)

State v. Rosengren, 199 Ariz. 112 (App. 2000)

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Directed Verdict/ Judgment of Acquittal

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Rule 20 – Judgment of Acquittal

- Oral
- Court or defendant may raise
- Standard: substantial evidence to warrant a conviction

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Rule 20

- Light most favorable to the State
- All reasonable inferences resolved against the D
- If reasonable minds could differ, evidence must be considered substantial
- Evidence may be either circumstantial or direct

* *West*, 226 Ariz. 559, 250 P.3d 1188 (2011)

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What if the Rule 20 motion is denied and the defendant decides to present evidence?

If the defendant goes forward and presents his case, he waives any error in the denial of the Rule 20 motion where deficiencies in the State's evidence are supplied by the defense

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Post-Trial Motions

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Rule 24.1 – Motion for New Trial

Must be filed within 10 days of the verdict (this is jurisdictional)

Grounds

- Verdict is contrary to law or evidence
- Prosecutorial misconduct
- Juror misconduct
- Court error in matter of law or jury instructions
- For any other reason defendant did not receive a fair trial

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Preparing for the Hearing: Practical Pointers

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What if your witnesses fail to appear?

If the witness is essential:

- See if the defense will stipulate to testimony
- Consider moving to continue the hearing to the time of trial
- Consider who has the burden of producing evidence
- Ask the court to bifurcate the hearing

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Exhibits

- Mark ahead of time
- Keep a list of exhibits marked and admitted
- Make copies of documents for the State's file
- Substitute copies for originals if necessary (17A A.R.S. *Rules of Evid.*, Rule 1003)

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State's Witnesses

- Have witness review report
- Explain purpose of hearing
- Ask about discrepancies/omissions

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State's Witnesses

- Have witness prepare time chronology chart or diagram
- Review general principles of testifying (testify chronologically, speak up, answer yes or no, TELL THE TRUTH)

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Defense Witnesses

- Interview prior to the hearing
- If not disclosed, move to preclude
- Always have another person (preferably a police officer) present during the interview

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Making a Record

- Identify yourself for the record
- Have witnesses spell their names
- Be record conscious
- Listen closely to the witnesses
- Ensure all arguments are on the record
- Do not speak over others
- Consider what information you will want on the record in the event of an appeal

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What if the defendant fails to present a prima facie case?

Ask the court to summarily deny the motion

Remember, the State's burden arises only after the defendant has presented a prima facie case for suppression – Rule 16.2(b)

If the court denies your request, it may give you an indication of what evidence it believes is lacking

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The Judge's Ruling

If the judge is making your point for you, it is wise to keep quiet

If the court rules against you, ask the court to state the basis on the record (this will narrow the issues on appeal)

Consider whether there is adequate evidence to go forward or whether to appeal

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Reconsideration

Rule 16.1(d) - Finality of Pretrial Determinations

"Except for good cause, or as otherwise provided by these rules, an issue previously determined shall not be reconsidered."

See State v. Kangas, 146 Ariz. 155 (App. 1985) (court criticized practice of seeking horizontal review by another judge at the same level)

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Use of suppressed evidence for impeachment

Illegally seized evidence that has been excluded from the State's case-in-chief may be used to impeach the defendant if he chooses to testify

United States v. Havens

Harris v. New York

State v. Menard

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Appeal by the State

A.R.S. § 13-4032

- Dismissal
- New trial
- Illegal Sentence
- Suppression

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Thank you

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