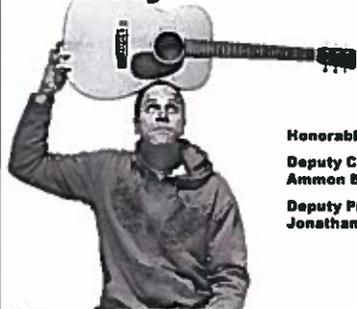
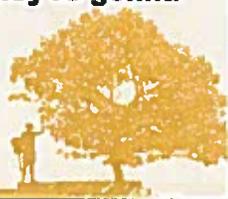


**Hearsay, Hearsongs:
Strumming Through the
Hearsay Rules & Exceptions**



Honorable Crane McClennen,
Deputy Coconino County Attorney
Ammon Barker,
Deputy Pima County Attorney
Jonathan Mosher

**Sit back and relax
Grab your coffee, grab your snacks
You're not gonna wanna sleep
through this one
Cuz we got JMo and Judge Crane
They're gonna talk, they're gonna
explain**



**All the hearsay rules and concepts
And we know how these things go
They're kind of bland,
they're kind of slow
So we got some songs for you.**



**And I know what you're thinking
Is Judge McClennen singing?
Probably not
But he's still gonna break this down
Not like a beat but more like a
fraction**

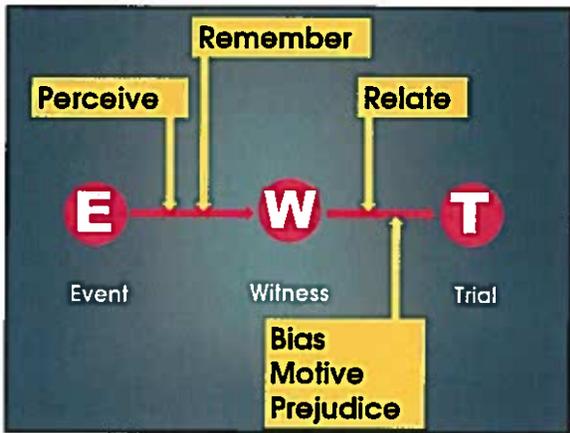


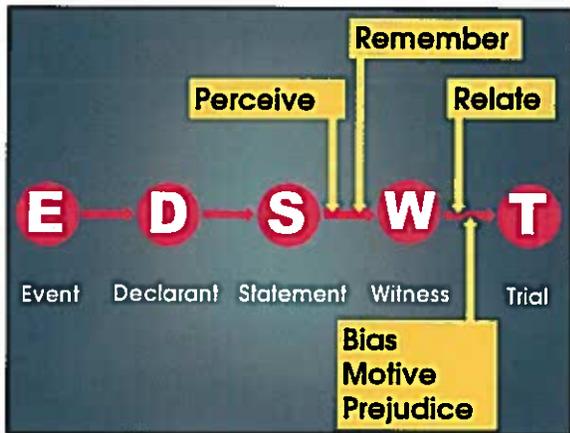
**And we're gonna be much,
much smarter
And JMo won't pick up a mic
He doesn't sing but he'll teach you
how to fight
And how to be ninjas in the
courtroom**



**And we know how these things go
They're kind of bland,
they're kind of slow
So we got some songs for you.**







**Rule 801(a)(b)&(c):
Hearsay Definition**

A statement that the declarant does not make while testifying and a party offers to prove the truth of the matter asserted

The illustration shows two children sitting on the floor, communicating via walkie-talkies, which serves as a metaphor for the concept of hearsay.

**What constitutes an
"assertion"?**

**Where is your backpack?
State v. Palmer,
229 Ariz. 64 (App. 2012)**

**"Hector don't do that now"
State v. Carrillo,
156 Ariz. 120 (App. 1987)**

Nonverbal conduct

**Was it intended to be an
assertion?**

**Descriptions of body language
State v. Ellison,
213 Ariz. 116 (2006)**



**I woke up this morning,
the sun shining bright
I walked into court and
I straightened my tie
The witness was awesome,
then out of the blue**



**The defense objected
citing Rule 802
I stood up and countered
with fire in my eyes
The judge listened closely
as I gave this reply:**

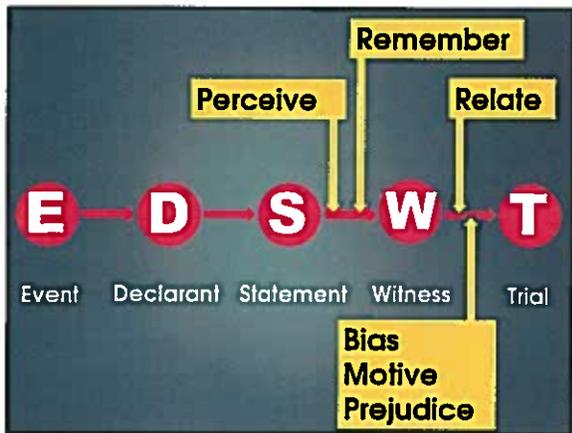


**This is not hearsay
it is not for the truth
It's merely the framework
to show the next move
Judge ruled in my favor, he said
"son, you're quite clear"
The defense sat down,
he was shaking
with fear.**



**Rule 801(d):
Statements that are not
hearsay**

- ✓ Prior inconsistent statements
- ✓ Prior consistent statement
(rebut recent fabrication,
rehabilitate)
- ✓ Statement identifying a person
- ✓ Opposing party statements



**Rule 801(d)(1)(A):
Prior inconsistent statements**

What constitutes inconsistency?
Feigned memory loss
State v. King,
180 Ariz. 268 (1994)

But see:
State v. Hausner,
230 Ariz. 60 (2012)
Pure failure of memory does
not suffice

**Rule 801(d)(1)(A):
Prior inconsistent statements**

What constitutes inconsistency?
"I'd rather not say"
State v. Joe,
234 Ariz. 26 (App. 2014)

**Rule 801(d)(1)(B)(i):
Prior consistent statement
to rebut claim of recent
fabrication**

The key question: when did the
motive to fabricate arise?

State v. Jones,
197 Ariz. 290 (2000)

**Rule 801(d)(1)(B)(ii):
Prior consistent statement to
rehabilitate declarant's
credibility as a witness when
attacked on another ground**

**Rule 801(d)(1)(C):
Statement identifying a person**

Officer witness can relate
statement from a show-up

State v. Rojo-Valenzuela,
235 Ariz. 617 (App. 2014)

**Rule 801(d)(2):
Opposing party statements**

801(d)(2)(A): "The statement is offered against an opposing party and...was made by the party in an individual or representative capacity."

**Rule 801(d)(2):
Opposing party statements**

The key is who is offering
State v. Carlson,
237 Ariz. 381 (2015)

State v. Wooten
193 Ariz. 357 (1998)

State v. Atwood,
171 Ariz. 576 (1992)

Practice tips: File Notice (or Motion) & assess questioner's statements for redaction

**Rule 801(d)(2)(E):
Co-conspirator statements**

The statement is offered against an opposing party and... was made by the party's coconspirator during and in furtherance of the conspiracy

Conspiracy need not be charged
State v. Skinner,
110 Ariz. 135 (1973)

**Rule 801(d)(2)(E):
Co-conspirator statements**

3 factors:

1. A conspiracy w/ defendant and declarant;
2. Statement made in course; &
3. Statement made in furtherance

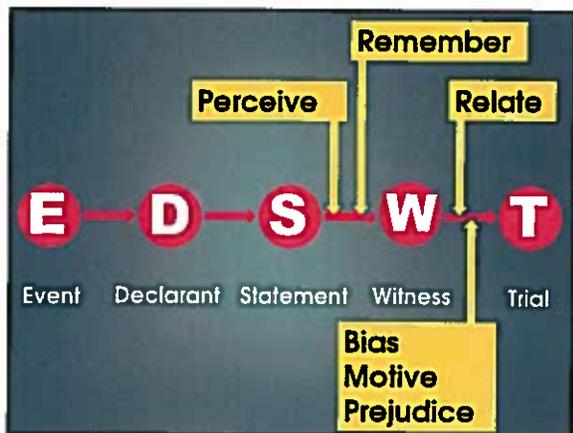
State vs Dunlap
187 Ariz. 441, 458 (Ct. App 1996)

Rule 802:

Hearsay is not admissible unless provided otherwise by constitutional provision or statute, these rules, or other rules prescribed by the Supreme Court

**Rule 803: Exceptions
(regardless of availability)**

- ✓ Present sense impressions
- ✓ Excited utterances
- ✓ State of mind
- ✓ Medical diagnosis or treatment
- ✓ Recorded recollection
- ✓ Record of regularly conducted activity (aka Business Records)
- ✓ Business Records
- ✓ Public records
- ✓ Statements in Learned Treatises, Periodicals, or Pamphlets
- ✓ Personal/Family History
- ✓ Reputation concerning character



**You called me crying
And your voice was shaking
You told me what had happened
And I thought about the things
that I could say . .**



**Not to you, but to a judge and jury
Cuz I knew that this was hearsay
But I thought it might come in
through 803**



**And it's all right
because you're in a panic
And it's all right
because it's near the moment
And it's all right
because it's not all right
And I will testify for you**



**Rule 803(1):
Present sense impressions**
Immediacy
Undercover descriptions of
actions over radio
State v. Wright,
2016 WL 1158144 (App. 2016)

Doesn't matter **who** (e.g., officer), what
matters is **when** and **why**

**Rule 803(2)
Excited utterances**

- i. Startling event
- i. Words spoken soon afterwards
- ii. Relate to startling event

You don't have to be acting startled...

State v. Hausner,
230 Ariz. 60 (2012)

Rule 803(2)
Excited utterances - Defendant

Motive/bias/trustworthiness

Don't forget Rule 806!

Rule 803(3)
State of mind

("Then-existing mental, emotional,
physical condition")

State v. Fulminante,
193 Ariz. 485 (1999)

- i. Statement proves the state of mind
- ii. State of mind must be relevant to an essential element

But note: No more use of "fear" to prove identity

It don't matter if you're crazy
It don't matter if you're smart
It don't matter if you're goin'
It don't matter if you aren't
It don't matter if the things you say
Is really what you do
It just matters that the
things you do
One day may come true



**It's a state of mind,
a state of mind
You're gonna be just fine
in this state of mind
It's a simple expression of future
intention**



**You're gonna be just fine
in this state of mind
You're gonna be just fine
in this state of mind**



**Rule 803(4)
Medical diagnosis or treatment**
State v. Lopez,
217 Ariz. 433 (App. 2008)

- i. Motive consistent with receiving medical care &
- ii. Reasonable for physician to rely for diagnosis/treatment

Practice tip: SANE at motion hearing

**Rule 803(5)
Recorded recollection**

(1) the declarant

- a. once had knowledge of the event,
- b. now has insufficient recollection to testify fully and accurately, and
- c. made or adopted the statement when the matter was fresh in the declarant's memory; and

(2) the statement correctly reflects the declarant's knowledge.

**Rule 803(5)
Recorded recollection**

Can include a video -

State v. Martin,
225 Ariz. 162 (App. 2010)

Can include a police report
(despite 803(8))

Gay v. Jones,
205 Ariz. 421 (App. 2003)

But note: It doesn't go to jury!

**Rule 803(6)
Record of regularly
conducted activity
(aka Business Records)**

- At or near the time
- Information transmitted by someone with knowledge
- Kept in ordinary course
- Made as regular practice
- Testified by qualified witness

**Rule 803(6)
Business Records**

Credit card report and timesheets
State v. Parker,
231 Ariz. 391 (2013)

- "If documents prepared for litigation are mere reproductions of regularly kept database records, such documents may qualify as business records."
- The witness need not have "assembled the complete record" (credit card report) nor have knowledge of the specific day in question (timesheets)

**Rule 803(6)
Business Records**

Quality Assurance Records
Bohsancurt v. Eisenberg,
212 Ariz. 182 (App. 2006)

Don't forget the foundation witness!
State v. Moody,
208 Ariz. 424 (2004)

**Rule 803(8)
Public records**

A matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law enforcement personnel

Rule 803(8)
Public records
QA/QC Documents are both
business records and public
records
Bohsancurt v. Eisenberg,
212 Ariz. 182 (App. 2006)
1. Crawford doesn't apply
2. 803(8) exception for police
reports doesn't apply

Rule 803(18)
**Statements in Learned
Treatises, Periodicals, or
Pamphlets**
Mind your foundation!
State v. Hardwick,
183 Ariz. 649 (App. 1995)

Rule 803(19)
**Reputation Concerning
Personal/Family History**
Rule 804(b)(4)
Statement of Personal or Family History
Aranda v. Cardenas,
215 Ariz. 210, 36-37 (Ct. App. 2007)
(Rule 804(b)(4))
State v. May,
210 Ariz. 452, 11-23 (Ct. App. 2007)
(Rule 803(19) & Rule 804(b)(4))
State v. Thompson,
146 Ariz. 552, 558 (Ct. App. 1985)
(Rule 803(19) & Rule 804(b)(4))

**Rule 803(21)
Reputation concerning
character**

*Rule 405 (a) Methods of Proving
Character; By Reputation or Opinion*

*State v. Jessen,
130 Ariz. 1, 5-7 (1981) (wrong way)*

*State v. Jessen,
134 Ariz. 458, 462-464 (1981) (Right
way)*

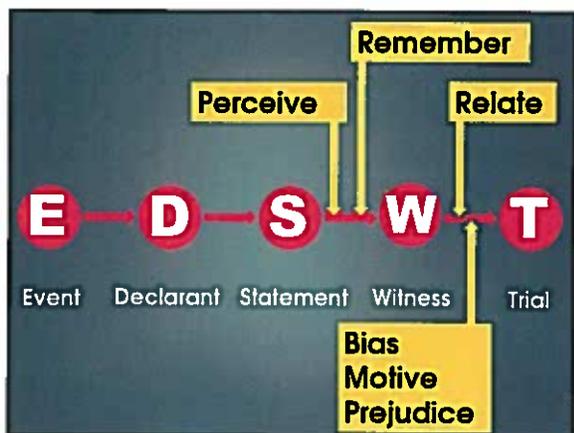
**Rule 803(22)
Prior conviction (facts
underlying the prior conviction
or guilty plea)**

*Rule 803(8) Public Records (fact of prior
conviction itself)*

*State vs Stone
122 Ariz. 304, 310 (Ct. App 1981) (no
contest plea)*

**Rule 804 Exceptions
(declarant unavailable)**

- ✓ Testimony in prior criminal case
- ✓ Belief of imminent death
- ✓ Statement against interest
- ✓ Personal/family history
- ✓ Forfeiture by wrongdoing



Rule 804(a)
Criteria for Being Unavailable

- (1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;
- (2) refuses to testify about the subject matter despite a court order to do so;
- (3) testifies to not remembering the subject matter;
- (4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

Rule 804(a)
Criteria for Being Unavailable

- (5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:
 - a. the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or
 - b. the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

**Rule 804(a)
Criteria for Being Unavailable**

But this subsection (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

**Rule 804(a)
Criteria for Being Unavailable**

Must be legitimate memory loss
State v. Just,
138 Ariz. 534 (App. 1983)

Good faith effort
State v. Edwards,
136 Ariz. 177 (1983)

Only "obvious and essential" leads
State vs Montano
204 Ariz. 413 (2003)

**Rule 804(b)(1)
Testimony in prior criminal case**

Key: declarant was subject to cross examination by same party at issue
State v. Shearer,
164 Ariz. 329 (1989)

**Rule 804(b)(2)
Belief of imminent death**

Requirements:

1. Statement offered in homicide case;
2. Declarant believed death imminent;
and
3. Statement concerned cause or
circumstances of impending death

**Rule 804(b)(2)
Belief of imminent death**

Clear showing (knowledge of death)

State v. Adamson,
136 Ariz. 250, 254 (1983)

vs.

Insufficient showing

State v. Valencia,
186 Ariz. 493, 500 (App. 1996)

State v. Ruelas,
174 Ariz. 37, 42 (App. 1992)

**Rule 804(b)(3)
Statement against interest
A statement that:**

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

Rule 804(b)(3)
Statement against interest
A statement that:

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

Rule 804(b)(3)
Statement against interest

A defendant seeking to use his accomplice's statements against interest as exculpatory evidence must also provide particularized guarantees of trustworthiness.

State v. Ellison,
213 Ariz. 116 (2006)

Rule 804(b)(4)
Personal/Family history

Aranda v. Cardenas,
215 Ariz. 210, (App. 2007)

State v. May,
210 Ariz. 452 (App. 2007)

State v. Thompson,
146 Ariz. 552 (App. 1985)

**Rule 804(b)(5)
Forfeiture by wrongdoing**

Wrongfully caused declarant's unavailability, and intended that result.

State vs Franklin,
232 Ariz. 556, (App. 2013)

No right to confrontation

Practice Tip: review jail calls early on

**Hearsay, hearsay,
you never have to fear say:
801, 802, 803 and 804
There are three more, but I could
not fit them here**



**We go to school to learn the rules,
they talk about the hearsay rule
It's pretty clear the problem here is
not about the hearsay rule
It's all those damn exceptions, but
now I have a question:**



**What if I wanna talk about a statement before
When I told the cops about a man who's robbing a store?
They said if you talk about the man's ID and no more
Then we don't consider that a part of hearsay no more**



**Hearsay, hearsay,
you never have to fear say:
801, 802, 803 and 804
There are three more, but I could not fit them here**



**We go to school to learn the rules,
they talk about the hearsay rule
It's pretty clear the problem here is not about the hearsay rule
It's all those damn exclusions, and now we've reached this song's conclusion.**



Rule 805: Double Hearsay

Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.



Rule 806: Impeachment and rehabilitation of the hearsay declarant

You can impeach defendant with his priors if he introduces his own statements in a 911 call (as excited utterances)

State v. Hernandez,
191 Ariz. 553 (App. 1998)

The felony does not need to relate to dishonesty

Rule 807: The residual exception

1. Equivalent guarantees of trustworthiness;
2. Offered as evidence of a material fact;
3. More probative than any other evidence;
4. Admitting will serve purpose of rules/justice;
5. Must give reasonable notice of intent, including declarant's name & address



Rule 807: The residual exception

Victim call to friend about Defendant
State v. Carrillo,
156 Ariz. 120 (App. 1987)



Thank You

Honorable Crane McClennen,
Deputy Coconino County Attorney
Ammon Barker,
Deputy Pima County Attorney
Jonathan Mosher

