EVIDENCE – Documentary and Physical Evidence – Authentication – Rule 901(b)(4) – Identification by Distinctive Characteristics, Etc. – Revised 3/2010

"Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances," are sufficient to establish the foundational requirements for admissibility of specific items of evidence. Rule 901(b)(4), Ariz. R. Evid. It is important to remember that "[f]oundation for evidence can be established **either** by chain of custody **or** identification testimony." *State v. Emery*, 141 Ariz. 549, 551, 688 P.2d 175, 177 (1984) [emphasis added]. Therefore, if the State can show that the evidence has "distinctive characteristics, which, taken in conjunction with circumstances, support a finding that it is what its proponent claims," the evidence is admissible even if the State cannot show an unbroken chain of custody. *Id.*

Marking of evidence items by police provides a good practical example in applying Rule 901(b)(4), Ariz. R. Evid. In *State v. McGonigle*, 103 Ariz. 267, 270, 440 P.2d 100, 103 (1968), a police officer testified that when he arrested the defendant, the officer removed certain coins from the defendant's pocket, put them in an envelope, sealed the envelope, and wrote his initials on the envelope. At trial, the officer testified that he had made the markings on the envelope, sealed it, and put the coins in it, and that the coins in the envelope were the coins he had taken from the defendant's pocket. On appeal, the defendant argued that the coins should not have been admitted because there was insufficient foundation to establish a chain of custody. The Arizona Supreme Court found the officer's testimony was sufficient to establish the requisite foundation for admission of the coins even though the officer had not initialed each coin, and even though the officer could not provide a definitive chain of custody for the items following

his placing of the items into the police evidence locker. *Id.,* citing *Witt Ice & Gas Co. v. Bedway*, 72 Ariz. 152, 231 P.2d 952 (1951), and *State v. Sherrick*, 98 Ariz. 46, 402 P.2d 1(1965)).

Similarly, in *Emery*, the defendant was charged with burglary and murder. At trial, the State introduced the victim's bed linens based on a police detective's testimony that the items produced in court were the same items he and another detective had confiscated at the scene of the crime. He recognized them "by their form (i.e. bedsheet, pillowcase, etc.)" and by looking at the other detective's identifying cards attached to the items. 141 Ariz. at 551, 688 P.2d at 177. The State also introduced a pair of shoes taken from the defendant when he was arrested, based on the testifying detective's recollection of the shoes' appearance when he arrested the defendant and on the identification card the other detective had attached to the shoes when the two detectives impounded the shoes. On appeal, the defendant argued that the trial court should not have admitted the items into evidence because the State did not establish a chain of custody for them and because the testifying detective had not seen the other detective write out the identifying cards. The Court rejected the "chain of custody" argument, stating, "Foundation for evidence can be established by either chain of custody or identification testimony." *Id*. The Court held that the identification cards were "distinctive characteristics" that provided sufficient evidence of identification to allow the items to be admitted. The fact that the testifying detective did not watch the other detective write out the tags went only to the weight of the evidence, not to its admissibility. *Id*.