

for The Defense

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*Delivering America's
Promise of Justice for All*

for The Defense

Editor: Stephanie Conlon

Assistant Editors:
Jeremy Mussman
Susie Graham

Office:
620 West Jackson, Ste. 4015
Phoenix, AZ 85003
(602) 506-7711

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Can a Driver be his Passenger's Keeper?

When the 4th Amendment Prevents a Car Owner from Permitting a Search of a Passenger's Belongings

By Jeff Roth, Defender Attorney



Few things frustrate a defense attorney more than defending a case that never could have been filed if the client had not consented to the search. Equally troubling, though, is when that consent stems from a third party who has no

meaningful connection to the container being searched. This article analyzes third-party consent in the context of car searches where the person giving consent has sufficient control over the vehicle to permit its search but does not have any ownership interest in the containers inside. For example, imagine a case where Mr. Jones is stopped by a police officer while giving a ride to his friend Ms. Smith. A police officer contacts driver Jones and obtains consent to search the car. During the car search, the officer locates a closed container. He searches it and finds paperwork belonging to the passenger Ms. Smith along with a plastic baggie containing crack cocaine and a crack pipe. The question is whether Ms. Smith can successfully challenge the search of her container, notwithstanding the car owner's consent. The answer is a definitive "it depends."

For those of you looking for a little more guidance, you'll want to review a terrific case out of the Utah Supreme Court called *State v. Harding*, 282 P.3d 31 (Utah, 2011). This case carefully goes through pertinent caselaw

throughout the country and offers considerable assistance on how to evaluate the issue. The Court begins its analysis by indicating that there are three types of lawful consent: 1) consent from the person whose property is being searched, 2) consent from a third party with common authority, and 3) consent from a third party with apparent authority to consent to search the property. The first two categories pose no real 4th Amendment dilemma- a person who either owns or has common authority over a container can consent to its search.

Evaluating whether a third party has “apparent authority” to consent (i.e., category 3), begins with the test set forth in *Illinois v. Rodriguez*, 497 U.S. 177 (1990).

A warrantless search is valid “where the police reasonably, but mistakenly, believe that a third party consenting to a search has the authority to do so. The test is an objective one: a police officer’s belief is reasonable when ‘the facts available to the officer at the moment...warrant a man of reasonable caution in the belief that that consenting party had authority’ over the items to be searched....In some circumstances, the facts surrounding a driver’s consent to search could ‘be such that a reasonable person would doubt’ the driver’s authority ‘and not act upon it without further inquiry.’ But not every possible ‘doubt’ requires further inquiry....the ultimate question is...whether any doubt an officer may have is sufficient to undermine a reasonable belief that the driver had authority to consent to the search.

Harding, 282 P.3d at 34-35 quoting *Rodriguez*, 497 U.S. 177. One thing appears definitive: when the officer knows, in advance, that the driver has no authority over the items to be searched, it is unreasonable for him to rely upon the driver’s consent, even though the passenger’s belongings are in the driver’s car. See *Harding*, 282 P.3d at 35 ¶ 16.

The more difficult question is whether the search of the passenger’s belongings will be upheld when the officer does not know who owns the items. The *Harding* Court provides a list of several factors to aid in evaluating this issue:

1. The type of container being searched: The more personal the item being searched, the less reasonable it is for an officer to believe that the driver had common authority to consent to its search. Containers such as purses, backpacks, suitcases, and fanny packs are generally considered items of a more personal nature. In other words, people do not typically share these items, so it would be less reasonable for an officer to assume that the driver had common authority to authorize the search. Notably, a purse would also offer an additional obstacle if the driver was a male and the passenger was a female, as the officer would have a reason to believe that the purse did not belong to the driver.
2. The conduct of the passenger: The officer’s search is “more reasonable when the passenger remains silent when he could be expected to object to the search of his belongings.” *Harding*, at ¶ 29. One caveat, however, is that the passenger has to be aware that her belongings are about to be searched for this factor to affect the analysis. In other words, if the passenger did not hear the driver consent to the search, she would not be expected to object to the search of her belongings. There are some courts, however, who do not find this factor definitive. See e.g., *State v. Friedel*, 714 N.E.2d 1231, 1241 (Ind.Ct.App. 1999) (consent cannot reasonably be implied from passenger’s silence when officer never asked passenger for consent).
3. Whether there is anything on the exterior of the container indicating ownership: If the item contains identifying tags or anything else that would indicate that the driver does not own the container, the officer’s reliance on the driver’s consent would be less reasonable. The *Harding* Court did not seem to weigh this factor heavily because it is uncommon for people to label their belongings.

4. The number of occupants and containers in the vehicle: The more people and belongings that are in the car, the less reasonable it is for the officer to rely on the consent of the driver.
5. The location of the item in the car: If the location of the item within the car in some way suggests who it belongs to, the officer must weigh this information in his decision to rely on the consent. An officer's search of a passenger's belongings is less reasonable when the container is on or near the passenger when the officer initially sees it. Because items in the trunk more frequently belong to the driver, the search of those items are normally considered more reasonable. Nevertheless, some Courts have found an officer's conduct unreasonable where the container was in the trunk. See e.g., *State v. Frank*, 650 N.2.2d 213 (Minn.Ct.App.2001) (unreasonable for officer to search passenger's suitcase in trunk based on driver's consent).

Although the *Harding* court seemed to weigh most of the factors in favor of Ms. Harding, the Court remanded the case to the trial court for more fact-finding. The decision to remand raises an important point. The evaluation of the issue of 3rd-party apparent authority in the context of an automobile is extremely fact intensive. It is critical to lock down the facts as early as possible, preferably prior to the filing of any specific motion to suppress. Returning back to the Mr. Smith/ Mr. Jones hypothetical above, we need to find out: exactly what type of container the "bag" was; was it the type of item typically held by a man or a woman or was it gender neutral; did the bag contain any other identifying characteristics that would permit the officer to determine its owner (i.e., labels, tags, etc.); where exactly was the bag located- was it at the passenger's feet at the time of the stop or was it in the trunk of the car; did the passenger know that the driver was agreeing to a search of the items in the car and if so, did she say anything to try and stop the search; how many other people and items were in the car? One other factor was mentioned briefly in the analysis in *Harding* that may also prove relevant. In *Harding*, the Court placed some weight on the actual words used by the driver to consent; the driver merely told the officer he could "take a look in the vehicle." The Court found this significant because the statement in non way suggests that the driver had any ownership interest in the containers. Consequently, we should also ascertain exactly what the driver said in granting consent to search the car.

Although the Utah Supreme Court offers the best overview of this topic, there are some Arizona cases that address the issue of 3rd-party consent of a vehicle that you should review prior to filing your motion. See e.g., *State v. Bentlage*, 192 Ariz. 117 (App. 1998)(Court of Appeals found car owner's consent unreasonable as to zippered pouch under Bentlage's seat because officer never asked Bentlage's consent to open the case, even though he actually believed it belonged to Bentlage); see also *State v. Heberly*, 120 Ariz. 541 (App. 1978) (Court of Appeals found that it was unreasonable for the officer to rely on consent of a pilot to search suitcase belonging to a passenger. Court emphasized that the case involved a private aircraft and there was no evidence that the pilot had joint access or control of the suitcase. The Court rejected the argument that the individual assumed the risk that the pilot would authorize a search of the suitcase but noted that consent would have been approved if the case involved a commercial carrier). Other Arizona cases involving 3rd-party consent outside the car context may also be helpful. E.g., *State v. Schad*, 129 Ariz. 557 (1981)(where defendant assumed risk girlfriend would consent to search of his wallet after he gave it to her to hold). In the end, the lawfulness of the search is going to depend on the reasonableness of the officer's analysis, so any factor that undermines the officer's conduct will improve your chance for success.



When Permissive Inferences Aren't So Permissive

By Mike Steinfeld, Defender Attorney

Often in cases involving alleged theft, but increasingly in other types of cases as well, the state will request the court for a “permissive inference” jury instruction that advises the jury that they may interpret surrounding circumstances presented at trial in a manner supportive of guilt. These instructions improperly violate a Defendant’s rights to Due Process and a Fair Trial because the instructions relieve the State of its burden to prove every element of an offense beyond a reasonable doubt. Additionally, such instructions shift the burden of proof to the Defense to offer a “satisfactory explanation.”

“Permissive inference” instructions can make the state’s case for them, relieving the state of the burden of proving the most fundamental portions of serious offenses. The permissive inference instruction will often satisfy the element which is most difficult for the state to prove: mens rea. For example, a person who possesses recently stolen property, or who sells stolen property at a reduced value, is presumed to have been aware of the risk that it is stolen. RAJI 23.05. A person who is merely an occupant of a location where a utility access device has been placed, and receives a benefit from the device, is presumed to have obtained utility services by fraud. RAJI 37.24(B).

Multiple standard inference instructions include language that the jury may entertain the inference “unless satisfactorily explained.”¹ Additional instructions communicate the same message by articulating how an inference may be “satisfactorily explained.”² This article will focus on the first class of inference instructions, which “permit” jurors to apply an inference “unless satisfactorily explained.” This article will analyze the issue using only the Permissive Inferences Relating to Theft instruction, RAJI 23.05. This instruction reads:

The defendant has been accused of theft by controlling property of another knowing or having reason to know that the property was stolen.

Proof of possession of property recently stolen, unless satisfactorily explained, may give rise to an inference that the defendant was aware of the risk that such property had been stolen or in some way participated in its theft.

Proof of the purchase or sale of stolen property at a price substantially below its fair market value, unless satisfactorily explained, may give rise to an inference that the defendant was aware of the risk that it had been stolen.

Proof of the purchase or sale of stolen property by a dealer in property, out of the regular course of business or without the usual indication of ownership other than mere possession, unless satisfactorily explained, may give rise to an inference that the defendant was aware of the risk that it had been stolen.

You are free to accept or reject this inference as triers of fact. You must determine whether the facts and circumstances shown by the evidence in this case warrant any inference that the law permits you to make. Even with the inference, the State has the burden of proving each and every element of the offense of theft beyond a reasonable doubt before you can find the defendant guilty.

In considering whether possession of recently stolen property has been satisfactorily explained, you are reminded that in the exercise of constitutional rights, a defendant need not testify. Possession may be satisfactorily explained through other circumstances and other evidence, independent of any testimony by a defendant.

RAJI 23.05. The arguments presented herein would apply equally, however, to any inference instruction containing the “unless satisfactorily explained” language.

The State’s Burden of Proof is diminished

“[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073 (1970). The Due Process Clauses of the Fifth and Fourteenth Amendments and the Sixth Amendment’s Jury Trial Clause “require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.” *U.S. v. Gaudin*, 515 U.S. 506, 509-10, 115 S.Ct. 2310, 2313 (1995).

Mandatory presumptions “violate the Due Process Clause if they relieve the State of the burden of persuasion on any element of an offense.” *Francis v. Franklin*, 471 U.S. 307, 314, 105 S.Ct. 1965, 1971 (1985). “A permissive inference does not relieve the State of its burden of persuasion because it still requires the State to convince the jury that the suggested conclusion should be inferred based on the predicate facts proved.” *Id.* When analyzing whether a jury instruction violates the Due Process Clauses, the question is not what a court declares the meaning of an instruction to be, “but rather what a reasonable juror could have understood the charge as meaning.” *Id.* at 315-16, 1972. *Francis* dealt with an instruction in which the jury was, in effect, commanded to make a presumption in accord with the instruction. *Id.* at 316, 1972.

The Burden is Shifted to Defendant

The Arizona Court of Appeals analyzed a predecessor to RAJI 23.05 in *State v. Mohr*, 150 Ariz. 564, 567, 724 P.2d 1233, 1236 (App. 1986). In *Mohr*, the instruction provided:

You are instructed that proof that the Defendant was in possession of property recently stolen, unless satisfactorily explained, gives rise to the inference that the Defendant in possession of the property was aware of the risk that it had been stolen or in some way participated in its theft.

Id. (emphasis added). The Court relied upon *Francis v. Franklin* to determine that the underlined language in the instruction unconstitutionally shifted the burden of proof. *Id.* 567-68, 1236-37. The Court of Appeals emphasized that an instruction of this sort would only be constitutional if stated in a permissive manner. *Id.* at 569, 1238. The Court provided, as an example, language very similar to RAJI 23.05. *Id.*

The Appeals Court stopped short of analyzing the language that remained in the instruction, however. Specifically, the Court did not analyze the “unless satisfactorily explained” clause of the instruction. Even if the instruction is phrased in the permissive, there is still ground to argue that the “unless satisfactorily explained” clause impermissibly imposes a burden upon the Defendant.

This was the conclusion reached by the Washington Supreme Court in *State v. Deal*, 128 Wash.2d 693, 911 P.2d 996 (Wash. 1996). In *Deal* the challenged instruction was:

A person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property

therein unless such entering or remaining shall be explained by evidence satisfactory to the jury to have been made without such criminal intent. This inference is not binding upon you and it is for you to determine what weight, if any, such inference is to be given.

Id. at 697, 998 (emphasis original). The Court first determined that the portion of the instruction preceding “unless” created a permissive inference. *Id.* at 699, 999-1000. The Court had previously reviewed an instruction which was identical, except that it did not contain the emphasized language. *Id.* at fn.3 (citing *State v. Brunson*, 128 Wash.2d 98, 905 P.2d 346 (1995)). The Court had approved of the instruction without the emphasized clause. *Id.* at 699-700, 1000. Relying upon *Sandstrom v. Montanta*, 442 U.S. 510, 99 S.Ct. 2450 (1970), the Washington Supreme Court held:

The portion of the instruction we are focusing on in this part of the opinion has the vice identified in *Sandstrom*, in that it essentially requires the Defendant to either introduce evidence sufficient to rebut the inference that he remained on the premises with intent to commit a crime, or concede that element of the crime. In other words, a reasonable juror could have concluded that once Deal’s presence on the premises was shown, a finding that he intended to commit a crime was compelled, absent a satisfactory explanation by Deal as to why he was on the premises. This had the effect of relieving the State of its burden of proving beyond a reasonable doubt the element of intent to commit a crime and, therefore, violated Deals’ due process rights.

Id. at 701, 1000-01. The Court next addressed the language after the unconstitutional clause, that the inference was not binding, and held that the “additional language does not eliminate the possibility that a reasonable juror could have concluded that a finding of intent to commit a crime was required unless Deal proved otherwise.” *Id.* at 701-02, 1001. The Court also noted that the unconstitutional clause was unnecessary:

Harkening back to [*State v.*] *Johnson*], 100 Wash.2d 607, 674 P.2d 145 (Wash. 1983)], we observe again that it is unnecessary to include this sort of language in such a jury instruction. Without the language, the instruction permits but does not require jurors to infer criminal intent from unlawful presence. The jury needs no further instruction on that issue because if a defendant is able to credibly explain his unlawful presence on premises, the jurors, as the instruction permits them to do, may simply reject the inferred conclusion of criminal intent.

Id. at 702-03, 1001. The Washington Supreme Court, however, found the instruction harmless error because Deal had testified at trial and largely admitted to each of the elements of the charged offense. *Id.* at 703, 1001. Ten years later, in *State v. Cantu* the Washington Supreme Court affirmed *Deal* and found a similar error was not harmless. *State v. Cantu*, 156 Wash.2d 819, ¶¶ 16-17, 132 P.3d 725, ¶¶ 16-17 (Wash. 2006).

A Proposed Modification

RAJI 23.05 is similar to the instruction that was read in *Deal*. Both the instruction in *Deal* and RAJI 23.05 contain permissive language. However, the error of RAJI 23.05 is the “unless satisfactorily explained” clause. Like the instruction in *Deal*, RAJI 23.05 requires a Defendant to either introduce evidence to rebut the inference or to concede the element that the Defendant acted recklessly. A reasonable juror could conclude that once evidence of possession of stolen items was shown, a finding that a Defendant acted recklessly is compelled, absent a satisfactory explanation.

Like the instruction in *Deal*, RAJI 23.05 relieves the State of its burden of proving the element of recklessness beyond a reasonable doubt, and thus violates a Defendant's due process rights. From a pragmatic perspective, the "unless sufficiently explained" clause provides no benefit. If the clause were removed, the permissive nature of the resulting instruction would still empower the jury to reject the inference if a defendant elects to present evidence explaining the possession to the jury. Thus, the clause has no positive impact. The resulting instructions would read:

The defendant has been accused of theft by controlling property of another knowing or having reason to know that the property was stolen.

Proof of possession of property recently stolen may give rise to an inference that the defendant was aware of the risk that such property had been stolen or in some way participated in its theft.

Proof of the purchase or sale of stolen property at a price substantially below its fair market value may give rise to an inference that the defendant was aware of the risk that it had been stolen.

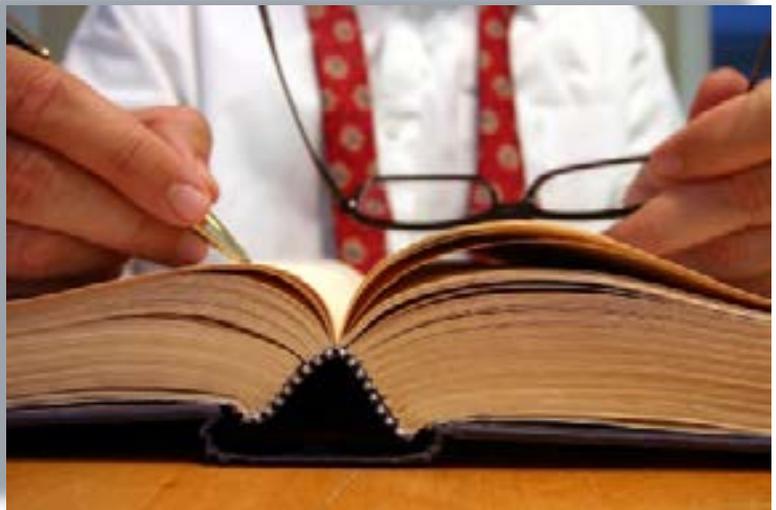
Proof of the purchase or sale of stolen property by a dealer in property, out of the regular course of business or without the usual indication of ownership other than mere possession, may give rise to an inference that the defendant was aware of the risk that it had been stolen.

You are free to accept or reject this inference as triers of fact. You must determine whether the facts and circumstances shown by the evidence in this case warrant any inference that the law permits you to make. Even with the inference, the State has the burden of proving each and every element of the offense of theft beyond a reasonable doubt before you can find the defendant guilty.

This instruction would more accurately inform the jury of the role of the inference and how the burden of proof interplays with the inference. Additionally, such an instruction would not impose any burden upon a Defendant. Counsel facing the possibility of a "permissive inference" instruction may wish to consider proffering this alternative framework for the instruction. If the alternative wording of the instruction is rejected by the court, ensure that it is made part of the record for appeal.

Other Concerns

Additionally, counsel may wish to research the instruction itself and argue that it is 1) a comment on the evidence and 2) not supported by the surrounding circumstances, and thus should not be given altogether. For example, in the recently stolen property instruction, the nature of the property and the proximation of time are both important factors in determining whether the instruction is appropriate to give at all.³



In an early case considering the propriety of giving the instruction, the court applied the concept of "recent" as varying depending on the nature of the property and the ease with which it could be passed from a culpable party to an innocent party. In the case of a car bumper, the court held that

four months was too remote a time to be considered “recent” and overturned the conviction. *State v. McMurtry*, 10 Ariz.App. 344, 346, 458 P.2d 964, 966 (App. 1969.)

Counsel may also consider an argument that the circumstances of their case do not fit the criteria laid out in *McMurtry*. If such an argument fails and the instruction is given over defendant’s objection, the triers of fact should also be reminded that they (not the court) are the determiners of whether the property was “recently” stolen.

Conclusion

There are multiple concerns surrounding permissive inference instructions. This note attempts to assist the attorney in effectively litigating those concerns through the example of the recently stolen property instructions. However, the application can reach to a variety of other instructions, from those listed here, to flight instructions, and even to self-defense instructions. The fundamental issues of burden shifting and commenting on the evidence remain the same, and an attorney would do well to prepare to do battle on one of the most important aspects of the trial. Remember, the jury does not take an eloquent closing argument or a scathing cross-examination back into deliberations. They do take the instructions.

(Endnotes)

1. 23.05 (Permissible Inferences Relating to Theft under A.R.S. §§ 13-1802(A)(5) and 13-1814(A)(5)); 23.08.01 (Terrorism); 23.16.01(B) (Permissible Inference related to Unlawful Possession of an Access Device); 37.09(C) (Rebuttable Inference of Intent related to Manufacture, Sale, or Distribution of Unauthorized Decoding Device); 37.19(C) (Rebuttable Inference Regarding A.R.S. § 13-3719); 37.24(B) (Rebuttable Inference related to Obtaining Utility Services by Fraud).
2. RAJI 18.02.04 (Inference Relating to Actions for Theft of Ferrous or Nonferrous Metal); 20.09 (Aggravated Taking of the Identity of a Person or Entity); 35.56 (Permissible Inference related to Prosecution for Sexual Exploitation of Children).
3. 89 A.L.R.3d 1202 gives a good overview of state case law applying the instruction to multiple types of property, from adding machines to wrenches, and dozens of items in between.



Maricopa County Offices of the Public Defender,
Legal Defender, Legal Advocate and Office of the
Federal Public Defender-Capital Habeas Unit
Present

The Fight for Life Death Penalty 2013

Sheraton Phoenix Downtown Hotel
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Pre-Conference Session

December 11, 2013 Half Day

Topics Include: Overview of the AZ DP Statutes

12:30pm—1:00pm Registration

1:00pm—5:00pm

Death Penalty Conference 2013

December 12, 2013 Full Day

Topics Include: Atkins after Grell, Capital Case Law Update,
Social Media in Capital Cases

8:30am—Check-in

9:00am—5:00pm Sessions

December 13, 2013 Half Day

Topics Include: Current Ethical Issues in DP Cases, DSM-V

8:30am—Check-in

9:00am—12:05pm Sessions

*This seminar is designed to meet the
Arizona Supreme Court C.L.E. requirements for criminal defense
attorneys engaged in death penalty litigation
under Arizona Rule of Criminal Procedure 6.8.*

Maricopa County Offices of the Public Defender, Legal Defender and
 Legal Advocate; and Office of the Federal Public Defender-Capital Habeas Unit
Present

The Fight for Life: Death Penalty 2013

Sheraton Phoenix Downtown Hotel, 340 North Third Street, Phoenix
 December 11-13, 2013

Registration Form

Please return forms and payment by 12/02/13
 (No Refunds after 12/06/13) For Defense Community Only

Please mark if you are attending the Pre-Conference and/or the Conference.

Pre-Conference December 11, 2013— Afternoon Only

No Fee for Public Defense Offices. Please email registration form to cowleye@mail.maricopa.gov
\$25.00 Court-Appointed/Contract Counsel; City Public Defenders
\$50.00 Other/Private

Conference December 12, 2013— Full Day and December 13, 2013 — Morning Only

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Death Penalty Pre-Conference and Conference

All sessions will be held at the Sheraton Phoenix Downtown Hotel, AZ 85004

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If you have questions or need ADA accommodations, please contact
Ebony Cowley via Email at cowley@mail.maricopa.gov

Writers' Corner

Editors' Note: Bryan A. Garner is a best selling legal author with more than a dozen titles to his credit, including *A Dictionary of Modern Legal Usage*, *The Winning Brief*, *A Dictionary of Modern American Usage*, and *Legal Writing in Plain English*. The following is an excerpt from Garner's "Usage Tip of the Day" e-mail service and is reprinted with his permission. You can sign up for Garner's free Usage Tip of the Day and read archived tips at www.us.oup.com/us/apps/totd/usage. Garner's *Modern American Usage* can be purchased at bookstores or by calling the Oxford University Press at: 800-451-7556.

Placement of only.

The word *only* is probably misplaced more often than any other modifier in legal and nonlegal writing. *Only* emphasizes the word or phrase that comes immediately after it. So the more words separating *only* from its correct position, the more awkward and ambiguous the sentence. When it comes too early in the sentence, it actually plays down what it should emphasize. Here are some examples:

Not this: The *Bennett* case involved a lawsuit that was *only* permissible after the repeal of a statute. But this: The *Bennett* case involved a lawsuit that was permissible *only* after the repeal of a statute.

But this: The *Bennett* case involved a lawsuit that was permissible *only* after the repeal of a statute.

Not this: Stewart is *only* entitled to a refund for overpayment in the five tax years if the order entered was invalid. But this: Stewart is entitled to a refund for overpayment in the five tax years *only* if the order entered was invalid.

But this: Stewart is entitled to a refund for overpayment in the five tax years *only* if the order entered was invalid.

Not this: In the brief, Collins argued that a statement is *only* admissible under the federal evidence rules if it was made within the scope of an agency or employment relationship. But this: In the brief, Collins argued that a statement is admissible under the federal evidence rules *only* if it was made within the scope of an agency or employment relationship.

But this: In the brief, Collins argued that a statement is admissible under the federal evidence rules *only* if it was made within the scope of an agency or employment relationship.

Not this: The Commission will *only* depart from this longstanding policy of nondisclosure when an institution has misrepresented the accrediting documents. But this: The Commission will depart from this longstanding policy of nondisclosure *only* when an institution has misrepresented the accrediting documents.

But this: The Commission will depart from this longstanding policy of nondisclosure *only* when an institution has misrepresented the accrediting documents.

As you can see, the strong tendency in American English is to place *only* right before the verb regardless of what it is modifying. But as the content grows between *only* and the word or phrase it modifies, so grows the ambiguity.

One caveat: the idiomatic use of *only* before the verb in spoken English works *only* because the speaker's inflection and tone usually make the meaning clear. But in written English -- especially in legal writing, where precision is crucial to meaning -- take care to place *only* in *only* its fastidiously correct position.

Sources: *Garner's Dictionary of Legal Usage* 635 (3d ed. 2011).

Garner's Modern American Usage 592-93 (3d ed. 2009).

The Redbook: A Manual on Legal Style § 10.42, at 209 (3d ed. 2013).

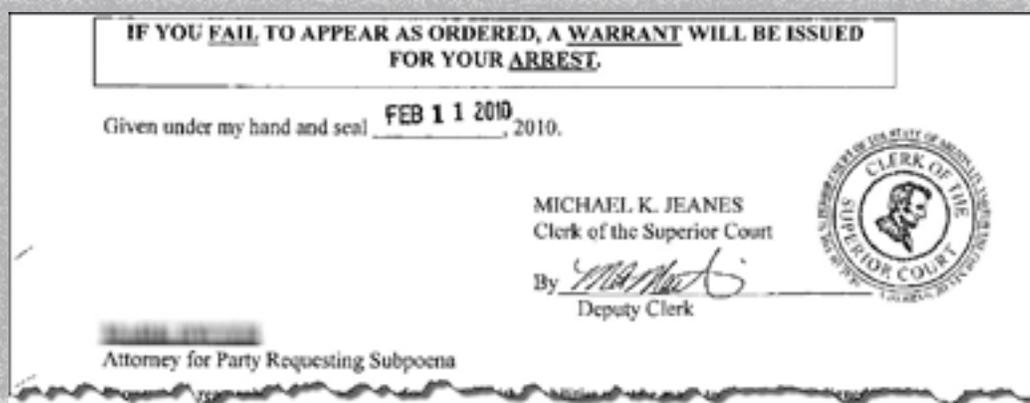
Thanks to David Gurnick and Todd C. Zubler for suggesting this topic.

Court Orders, Not Subpoena Duces Tecum

By Martin Becker, Defender Attorney

You arrive one day at the office and notice you have a new forgery case. You are working your case and your client tells you that there are bank records that will prove him innocent. You think, "Great, now I just need these bank records," but, how do you get them? You could ask the prosecutor to get them for you, but they will also see them then, and they might not be as helpful as your client suggests. You also think that maybe you should just get a subpoena duces tecum. You have heard other attorneys get them, and it seems straightforward. You tell your paralegal what you need, they draft the subpoena duces tecum, and the clerk stamps it - easy, right? Wrong - you just broke the law and probably committed an ethical violation. Subpoena power in Arizona is found in A.R.S. § 13-4071. It reads in full as follows:

- A. The process by which attendance of a witness before a court or magistrate is required is a subpoena.
- B. The subpoena may be signed and issued:
 1. By a magistrate before whom a complaint is laid for witnesses, either on behalf of the state or the defendant.
 2. By the county attorney, attorney general, municipal prosecutor or city prosecutor for witnesses to appear before the grand jury, or for witnesses on a complaint, indictment or information to appear before the court in which the complaint, indictment or information is to be heard or tried or by the county attorney, attorney general, municipal prosecutor or city prosecutor for witnesses requested by a grand jury.
 3. By the clerk of the court in which an indictment or information is to be tried, or by the clerk as authorized in subsection C.
- C. The clerk of the court or the clerk's designee, on request of the county attorney or attorney general, shall issue a subpoena for witnesses to appear before the grand jury, without prior authorization by a grand jury, if all of the following occur:
 1. A duly impaneled grand jury is sworn and is in existence at the time of the issuance of the subpoena.
 2. The county attorney or attorney general designates the subpoena with the standard identifying grand jury number.



3. The county attorney or attorney general reports to the foreman of the grand jury, or in the foreman's absence the acting foreman, the fact of the issuance of the subpoena within ten days following its issuance or, if the grand jury is in recess, at the first succeeding session of the grand jury after the expiration of the ten day period.
 4. The county attorney or attorney general reports to the presiding judge of the superior court the fact of the issuance of the subpoena within ten days following its issuance.
- D. The clerk, at any time, on application of the defendant, and without charge, shall issue as many blank subpoenas, subscribed by the clerk as clerk, for witnesses as the defendant requires. **Blank subpoenas shall not be used to procure discovery in a criminal case, including to access the records of a victim.** Records relating to recovered memories or disassociated memories may be subject to subpoena only if the state seeks to introduce evidence of the victim's recovered or disassociated memory, the records are not otherwise privileged and the court approves the subpoena after a hearing. The victim shall be given notice of and the right to be heard at any proceeding involving a subpoena for records of the victim from a third party.

Now you know that subpoenas are not to be used to procure discovery in criminal cases under A.R.S. § 13-4071(D). "But wait," you are saying, "judges have told me to subpoena discovery in cases". Well, sometimes judges mistakenly believe that subpoenas can be used for discovery in criminal cases, but unfortunately, they are incorrect. Not only is it illegal, it has also led the State Bar of Arizona to sanction at least one attorney for subpoenaing records of the victim without a court order.¹ So what do you do? You get a court order under Rule of Criminal Procedure 15.1 (g):

g. Disclosure by Order of the Court. Upon motion of the defendant showing that the defendant has substantial need in the preparation of the defendant's case for material or information not otherwise covered by Rule 15.1, and that the defendant is unable without undue hardship to obtain the substantial equivalent by other means, the court in its discretion may order any person to make it available to the defendant. The court may, upon the request of any person affected by the order, vacate or modify the order if compliance would be unreasonable or oppressive.

Now, the court, not you, will order a third party to turn over the evidence to you. The discovery will also come to you, not the prosecutor. If you do not want the State to know that you sought the discovery, you can always file an ex parte motion for court order.

(Endnote)

1. http://www.myazbar.org/AZAttorney/PDF_Articles/1009LawReg.pdf



Stand Up for Veterans

By Carlos Daniel Carrion, Attorney Manager, and David Jones, Client Services Manager



Stand Up Veterans was held at Glendale Community College on September 28, 2013. More than 50 service agencies were involved in addressing the needs of approximately 500 veterans, such as interviewing for jobs (19 were hired on the spot), drivers license issues, and legal issues (civil and criminal). The criminal cases were limited to the misdemeanor offenses in the municipal and justice courts in Maricopa County.

For court services, six judges were present: Glendale City Court Presiding Judge Elizabeth Finn, Tempe City Court Presiding Judge MaryAnne Majestic, Maricopa County Justice Court Judges Joe Getzwiller, Rachel Carillo, Gerald Williams and Craig Wismer. Judges Finn and Majestic represented 11 additional local City Courts and the Maricopa County Regional Homeless Court. The Justice Court Judges represented 25 Justice Courts.

Our Office assisted between 30 and 40 veterans. The majority received legal advice on their criminal matters.

Patrick DeMore from OET was valuable in maintaining our remote connectivity with the Office's database during the event. Another person who deserves special acknowledgment is Leticia Chavez who managed the volunteer list and worked behind the scenes.

Thank you to the following attorney and non-attorney volunteers who helped to handle the criminal matters:

Adam Adinolfi
Tim Bein
David Brown
Yolanda Carrier
Stephanie Colson
Ray Del Rio
Kristi Dumon

John Houston
Sheila Perry Johnson
Natalie Jones
Valeria Llewellyn
Dan Lowrance
Tennie Martin
Ashley Meyers

Belen Olmedo Guerra
Richard Randall
Barbara Rees
Cecelia Valentine
Cathy Whalen

Sponsored by Maricopa County Public Defender

Fall Trial College 2013

Presented by
Ira Mickenberg



Criminal Defense Attorney and Nationally Renowned Speaker

This two-day Fall Trial College will utilize a “bring your own case” format, using lecture and small-group practice sessions led by experienced attorneys to hone your trial skills. When the college is over, you will have an effective Story of Innocence, Persuasive Closing, and Voir Dire specifically related to your case.

We recommend attorneys who have been practicing Criminal Law for at least one year attend the Fall Trial College.

November 21, 2013

8:15am—8:30am Check in
8:30am—5:15pm (Lunch on your own)

- Telling your Client’s Story of Innocence
- Practical Guide to Effective Closing Arguments

November 22, 2013

8:15am—8:30am Check in
8:30am—4:30pm (Lunch on your own)

- Effective Voir Dire
- Putting It All Together

Location:
Downtown Justice Center (DTJC)
620 W. Jackson,
5th Floor Training Room

Note: DTJC is a secured building and opens at 8:00am. Please allow time to go through security.

Free Parking:
Open Visitor Lot on Madison and
5th Ave., just north of DTJC.

May qualify for 12.25 CLE hours, no ethics.

For questions or to register, please contact
Ebony Cowley, Training Facilitator, via email at
cowley@mail.maricopa.gov by November 12, 2013.
Business casual attire is required for all Public Defender Training Sessions.
No fee for Public Defense Offices.
Private/Contract Counsel: Registration Fee is \$475.00

Jury and Bench Trial Results

June 2013 - August 2013

Public Defender's Office – Trial Division

Closed Date*	Attorney Investigator Paralegal Mitigation	Judge	CR Number and Charge(s)	Counts	Result
Group 1					
6/4/2013	Hartley <i>Rankin</i>	Hegy	2012-007105-001 Aggravated Assault, F5, Attempt To Commit	1	Jury Trial-Guilty As Charged
6/5/2013	Beckman <i>Rankin</i> <i>Christiansen</i>	Pineda	2012-137112-001 Burglary 3rd Degree, F4	1	Jury Trial-Not Guilty
6/18/2013	Beckman <i>Rankin</i> <i>Sain</i> <i>Christiansen</i>	Hegy	2012-145002-001 Unlaw Flight From Law Enf Veh, F5	1	Jury Trial-Guilty As Charged
6/21/2013	Martin <i>Rankin</i>	O'connor	2012-100410-001 Narcotic Drug Violation, F4	1	Jury Trial-Guilty As Charged
8/6/2013	Adwell	Richter	2012-140303-001 Marijuana Violation, F6	1	Court Trial-Guilty Lesser/Fewer
8/30/2013	Walker Beckman <i>Christiansen</i>	Granville	2012-161106-001 Marijuana Violation, F6	1	Court Trial-Not Guilty
Group 2					
6/21/2013	Delatorre <i>Brazinskas</i> <i>Avalos</i>	Brodman	2012-112984-002 Burglary Tools Possession, F6 Burglary 2nd Degree, F3 Forgery, F4	1 1 1	Jury Trial-Guilty As Charged
6/24/2013	Gurion	O'connor	2012-160624-001 Theft-Means of Transportation, F3	1	Jury Trial-Not Guilty
8/9/2013	Cole <i>Brazinskas</i> <i>Avalos</i> <i>Menendez</i>	Reinstein	2013-108032-001 Disorderly Conduct, F6 Aggravated Assault, F3	1 1	Jury Trial-Guilty As Charged

*Defined as the date the defendant was sentenced or case was dismissed.

Jury and Bench Trial Results

June 2013 - August 2013

Public Defender's Office – Trial Division

Closed Date*	Attorney Investigator Paralegal Mitigation	Judge	CR Number and Charge(s)	Counts	Result
Group 3					
6/12/2013	Setzer <i>Granillo</i>	Svoboda	2011-008100-001 Traffick Stolen Prop 2nd Deg, F3	3	Jury Trial-Guilty As Charged
6/17/2013	Jones <i>Thompson</i>	Kaiser	2012-124044-001 Aggravated Assault, F5	1	Jury Trial-Guilty Lesser/Fewer
6/25/2013	Allen <i>Gilchrist</i> <i>Farley</i>	Mullins	2012-154538-001 Trafficking in Stolen Property, F3 Organized Retail Theft, F4	2 2	Jury Trial-Guilty As Charged
8/6/2013	Brady <i>Salvato</i>	Cohen	2012-030152-001 Drug Paraphernalia Violation, F6 Marijuana Violation, F6	1 1	Court Trial-Guilty Lesser/Fewer
Group 4					
6/7/2013	Wallace	Mahoney	2012-009268-001 Aggravated Assault, F5	1	Jury Trial-Guilty As Charged
7/10/2013	Tivorsak <i>Flannagan</i>	Brotherton	2012-157059-001 Dschg Firearm At a Structure, F2 Endangerment, F6 Disorderly Conduct, F6	1 1 1	Jury Trial-Guilty As Charged
8/1/2013	Finsterwalder <i>Verdugo</i> <i>Kunz</i>	Garcia	2012-007326-001 Forgery, F4 Marijuana Violation, F6	5 1	Jury Trial-Guilty Lesser/Fewer
8/2/2013	Peterson <i>Verdugo</i> <i>Kunz</i>	Mullins	2012-160155-001 Aggravated Robbery, F3 Aggravated Assault, F3 Misconduct Involving Weapons, F4 Armed Robbery, F2	1 2 1 1	Jury Trial-Guilty Lesser/Fewer
8/13/2013	Becker	Rueter	2012-007266-001 Endangerment, F6	1	Court Trial-Guilty Lesser/Fewer

*Defined as the date the defendant was sentenced or case was dismissed.

Jury and Bench Trial Results

June 2013 - August 2013

Public Defender's Office – Trial Division

Closed Date*	Attorney Investigator Paralegal Mitigation	Judge	CR Number and Charge(s)	Counts	Result
8/27/2013	Becker Flannagan Hayes	Gentry- Lewis	2012-143654-001 Theft-Means of Transportation, F3	1	Jury Trial-Guilty As Charged
Group 5					
7/23/2013	Lachemann Thompson Ralston	Vandenberg	2012-157169-001 Aslt-Cause Fear of Phys Inj, M2 Endangerment, M1 Assault-Touched to Injure, M3 Criminal Trespass 3rd Deg, M3 Threat-Intimidate, M1 Disorderly Conduct, M1 Endangerment, F6	2 2 1 1 1 1 3	Jury Trial-Guilty Lesser/Fewer
7/29/2013	Hintze Thompson	Gates	2013-105268-001 Marijuana Violation, F6	1	Court Trial-Guilty Lesser/Fewer
8/16/2013	Ditsworth Henry	Nothwehr	2012-162079-001 Burglary Tools Possession, F6 Burglary 2nd Degree, F4, Attempt to Commit Assault-Touched to Injure, M3 Aggravated Assault, F3	1 1 1 1	Jury Trial-Guilty Lesser/Fewer
Group 6					
6/21/2013	McCarthy Souther Verdugo Springer	Miles	2012-005669-001 Murder 1st Degree, F1	1	Jury Trial-Guilty As Charged
8/16/2013	Sheperd Souther	Nothwehr	2012-164686-001 Aggravated Assault, F3	1	Jury Trial-Guilty Lesser/Fewer
8/22/2013	Petroff-Tobler Godinez	Sanders	2012-153999-001 Robbery, F4 Receive Earnings of Prostitute, F5	1 1	Jury Trial-Guilty Lesser/Fewer

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Jury and Bench Trial Results

June 2013 - August 2013

Public Defender's Office - Trial Division

Closed Date*	Attorney Investigator Paralegal Mitigation	Judge	CR Number and Charge(s)	Counts	Result
Capital					
8/16/2013	Kalman <i>Flannagan</i> <i>Kunz</i> <i>Leyvas</i>	Brotherton	2012-121459-001 Murder 2nd Degree, F1	1	Jury Trial-Guilty As Charged
RCC					
8/6/2013	Houck <i>Hayes</i>	Ash	2012-127823-001 DUI-Watercraft-Alcohol Bac .08, M1 Extrm OUI-Wtrcft-Bac .15-.19, M1 Extrm OUI-Wtrcft-Bac > .20, M1 DUI-Watercraft, M1	1 1 1 1	Jury Trial-Guilty Lesser/Fewer
8/7/2013	Brown	Goodman	2012-115574-001 Fail to Comply-Court Order, M1	1	Court Trial-Not Guilty
8/22/2013	Brown	Goodman	2011-066021-001 Disorderly Conduct-Fighting, M1	1	Court Trial-Not Guilty
Training					
7/30/2013	Roth	Kiley	2012-008756-001 Narcotic Drug Violation, F4	1	Jury Trial-Not Guilty
Vehicular					
8/9/2013	Hann	Bernstein	2012-111170-002 Agg DUI -Lic Susp/Rev For DUI, F4	2	Jury Trial-Guilty Lesser/Fewer



Jury and Bench Trial Results

June 2013 - August 2013

Legal Defender's Office – Trial Division

Closed Date*	Attorney <i>Investigator</i> <i>Paralegal</i> <i>Mitigation</i>	Judge	CR Number and Charge(S)	Counts	Result
6/4/2013	Phillips <i>Otero</i> <i>Carrillo</i> <i>Woodrick</i>	Pineda	2010-005932-001 Murder 1st Degree, F1 Kidnap, F2	2 2	Jury Trial-Guilty As Charged
6/14/2013	Lane <i>Alkhoury</i>	Oconnor	2012-162490-002 Dangerous Drug Violation, F4 Narcotic Drug Violation, F4 Drug Paraphernalia Violation, F6	1 1 1	Jury Trial-Guilty As Charged
6/25/2013	Amiri	Chavez	2012-157543-001 Marijuana Violation, F6 Drug Paraphernalia Violation, F6	1 1	Jury Trial-Not Guilty
8/16/2013	Kinkead	Hegy	2012-154416-001 Dangerous Drug Violation, F4 Drug Paraphernalia Violation, F6	1 2	Jury Trial-Guilty As Charged
8/20/2013	Kinkead	Richter	2012-114614-001 Child/Vulnerable Adult Abuse, F4	1	Jury Trial-Not Guilty
8/29/2013	Rothschild	Reinstein	2012-009547-002 Burglary 1st Degree, F2 Kidnap, F2 Armed Robbery, F2 Aggravated Assault, F3	1 3 3 4	Jury Trial-Guilty Lesser/Fewer
8/30/2013	Shipman <i>Alkhoury</i>	Hegy	2013-000017-001 Armed Robbery, F2 Kidnap, F2 Aggravated Assault, F3 Theft-Means of Transportation, F3 Burglary 1st Degree, F2 Marijuana Violation, F6 Misconduct Involving Weapons, F4	1 1 1 1 1 1 1	Jury Trial-Guilty Lesser/Fewer

Jury and Bench Trial Results

June 2013 - August 2013

Legal Defender's Office – Dependency

Last Day of Trial	Attorney <i>Case Manager</i>	Judge	Case Number and Type	Result	Bench Or Jury Trial
6/6/2013	Sanders	Blakey	JD22723 Dependency Trial	Dependency Found; client FTA	Bench
6/20/2013	Sanders	Blakey	JD19000 Severance Trial	Severance granted; client FTA	Bench
7/18/2013	Ripa	Pineda	JD21823 Severance Trial	Severance granted; client FTA	Bench



Jury and Bench Trial Results

June 2013 - August 2013

Legal Advocate's Office - Dependency

Last Day of Trial	Attorney <i>CWS</i>	Judge	Case Number and Type	Result	Bench Or Jury Trial
6/11/13	Haywood <i>Sanchez</i>	Ishikawa	JD 510193 Severance	Severed	Bench
6/4/13	Lofland <i>Bielke</i>	Sinclair	JD21944 Severance	Severed	Bench
6/6/13	Lofland <i>Bielke</i>	Contes	JD23364 Dependency	Dependency Granted	Bench
6/24/13	Todd <i>Lieske</i>	Ishikawa	JD509917 Severance	Severed Parents	Bench
6/18/13	Timmes Gill	Ishikawa	JD510352 Severance	Severed	Bench
7/17/13	Timmes <i>Gill</i>	Anderson	JD507117 Dependency	Granted	Bench
7/19/13	Timmes <i>Gill</i>	Palmer	JD506858 Dependency	Granted	Bench
7/24/13	Timmes <i>Gill</i>	Anderson	JD510698 Dependency	Granted	Bench
7/29/13	Timmes <i>Gill</i>	Lopez	JS507367 Severance	Severed	Bench
7/3/13	Youngblood	Astrowsky	JD21873 Dependency	Dependency Found	Bench
7/30/13	Youngblood	Miles	JD22221 Severance	Severed	Bench



Jury and Bench Trial Results

June 2013 - August 2013

Legal Advocate's Office – Trial Division

Closed Date*	Attorney Investigator Paralegal Mitigation	Judge	CR Number and Charge(S)	Counts	Result
6/12/2013	Orozco	O'Connor	2013-417220-003 Smuggling Humans, F4, Conspiracy To Commit	1	Court Trial-Guilty Lesser/Fewer
6/12/2013	Orozco	O'Connor	2013-417220-003 Smuggling Humans, F4, Conspiracy To Commit Monitor Device Interference, F4	1 1	Court Trial-Guilty Lesser/Fewer
6/14/2013	Miller	Bassett	2012-142385-001 Misconduct Involving Weapons, F4	1	Court Trial-Guilty As Charged
6/21/2013	Rose	Granville	2012-159969-001 Arson of Occupied Structure, F3, Attempt To Commit Arson of Structure/Property, F4 Misconduct Involving Weapons, F4 Aggravated Assault, F5 Resisting Arrest, F6	1 1 1 1	Court Trial-Guilty Lesser/Fewer
8/22/2013	Whiteside	Mroz	2012-007952-002 Theft-Means of Transportation, F3	1	Jury Trial-Not Guilty

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Maricopa County
Public Defender's Office
620 West Jackson, Ste. 4015
Phoenix, AZ 85003
Tel: 602 506 7711
Fax: 602 372 8902
pdinfo@mail.maricopa.gov

for The Defense

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