

# **ADVANCED DUI SEMINAR**

December 12, 2016

Phoenix, Arizona



## **RIGHT TO COUNSEL**

Presented by:

**TOBIN SIDLES**

Oro Valley Town Prosecutor  
Oro Valley, Arizona

Distributed by:

**ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL**

1951 West Camelback Road, Suite 202

Phoenix, Arizona 85015

**ELIZABETH ORTIZ**  
**EXECUTIVE DIRECTOR**

# Right to Counsel

By: Tobin Sidles

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“I know I have the right to an attorney your honor,  
but I think I am in enough trouble already.”



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## Right to Counsel – CASE Evaluation AND MOTIONS PRACTICE

- Standard defense motion arrives – You interfered with my clients right to counsel.- First step - Start with which provision(s) actually apply?

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Motions-Right to Counsel

RIGHT TO AN ATTORNEY PROVISIONS

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Right to Counsel - MOTIONS

- 1) Federal- United States Constitution
  - Fifth Amendment –No person...shall be deprived of life, liberty, or property, without due process of law.
  - Sixth Amendment –In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense.

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Right to Counsel - MOTIONS

- 2) State - The Arizona Constitution
  - Article 2, Section 4- No person shall be deprived of life, liberty or property without due process of law.
  - Article 2, Section 24 –In criminal prosecutions, the accused shall have the right to appear and defend in person, and by counsel...

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Right to Counsel - MOTIONS

- Important motions tip- The Right to Counsel under Arizona Law is no broader than under the US Constitution.
- See *State v. Transon*, 186 Ariz. 482, 924 P.2d 486 (App. 1996)

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Right to Counsel - MOTIONS

- 3) Statutory - ARIZONA REVISED STATUTES (A.R.S.)
  - A.R.S. 13-114
    - In a criminal action defendant is entitled:
      2. To have Counsel.

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Right to Counsel - MOTIONS

- 4) Rules- Rules of Court
  - Rules of Criminal Procedure, Rule 6.1 (a)
 

A defendant shall be entitled to be represented by counsel in any criminal proceeding, **except in those petty offenses such as traffic violations where there is no prospect of imprisonment or confinement after a judgment of guilty.**

The right to be represented shall include **the right to consult in private** with an attorney, or the attorney's agent, as soon as feasible **after the defendant is taken into custody**, at reasonable times thereafter, and sufficiently in advance of a proceeding to allow adequate preparation therefore.

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RIGHT TO COUNSEL – MOTIONS

Right to Counsel for DUI's - AZ Case law.

*State v. Juarez* –Right to attorney for choosing chemical test

*McNutt v. Superior Court* –State cannot prevent access to attorney

*State v. Clary* (memo) – Right to private consultation (but see

*Municipal Court v. Waldron*- must request privacy

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Right to Counsel -MoTIONS

• Why? Generally, the right to assistance of counsel is essential because it is the means by which defendants assert all their other constitutional rights.

• Generally, *Alabama v. Shelton*, 535 U.S. 654, 122 S.Ct. 1764 (2002); *Kimmelman v. Morrison*, 477 U.S. 365, 377, 106 S.Ct. 2574 (1986); *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S.Ct. 792 (1963); *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938), etc.

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Right to Counsel-Evaluation

• NEXT STEP BEFORE WRITING A RESPONSE?

• Determining whether the defendant's right to counsel has attached .

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Evaluation AND MOTIONS-When Does 5<sup>TH</sup> AMENDMENT Right to Counsel Attach?

- A. Fifth Amendment/*Miranda* does not attach until both are met
  - Defendant must be:
    - 1) in custody
    - **AND**
    - 2) subject to interrogation.

See *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed. 2d 694 (1966)

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MOTIONS -When Does Right to Counsel Attach FOR THE SIXTH AMENDMENT?

- Sixth Amendment
  - Not attached until the commencement of criminal proceedings, often such as arraignment. (a critical stage.)
    - *US v. Goveia*, 467 U.S. 180, 81 L. Ed. 2d 146 (1984)
    - *Davis v. U.S.* 512 U.S. 452, 456-57 (1994)
    - *Chavez v. Martinez* 538 U.S. 760, 123 S.Ct. 1994 (2003)

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EVALUATION and Motions - When Does Right to Counsel attach?

- AZ Rule- Rule 6.1 Rules of Criminal Procedure
  - After arrest (or Grand Jury Proceedings).

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Right to Counsel - MOTIONS

- Most Common Federal Sixth Amendment Issues in DUI cases:
  - Is the Defendant entitled to a court appointed attorney?
  - Conflicts between the defense counsel and the defendant
  - Waiver of counsel issues
  - Ineffective assistance of counsel

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Right to Counsel - MOTIONS

- 5<sup>th</sup> Amendment claim next steps?
  - Determining if the defendant “clearly and unambiguously” invoked the right to counsel.
    - For review -What exactly did they say?

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Right To Counsel -Motions

- FEDERAL - The right to counsel must be clearly invoked.
  - [W]hether [the defendant]actually invoked his right to counsel...is an objective inquiry. (citation omitted) There must, at a minimum, be statement from the suspect that can ‘reasonably be construed’ to be an expression of a desire for the assistance of an attorney (citation omitted) Where a suspect makes reference to an attorney that is ambiguous or equivocal, the officers may continue with their questioning. ... *Sechrist v. Ignacio*, 549 F.3d 789, 807-808 (9<sup>th</sup> Cir. 2008)

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Right to Counsel - Motions

• Request Must Be Unambiguous (AZ Law)

- *State v. Thornton*, 172 Ariz. 449, 837 P.2d 1184 (App. 1992) (“talk to my lawyer,” in response to the officers questions was not an invocation.)
- *State v. Mada*, 168 Ariz. 289, 812 P.2d 1107 (App. 1991) (“I want to answer your questions, but my attorney told me not to talk to you guys,” was not an invocation.)

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Right to Counsel INVOCATION

- *State v. Eastlack*, 180 Ariz. 243, 883 P.2d 999 (1994) (“I think I’d better talk to a lawyer first” was not a clear request for counsel.
- *State v. Linden*, 136 Ariz. 129, 664 P.2d 673 (App. 1983). (Defendants inquiry- who he should get for an attorney, was not an invocation. The officer testified he took the question for advice on who a good attorney would be.)

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Right to Counsel - INVOCATION

- *State v. Nevarez*, 2014 WL 2566061 (App. 2014). Statement that suspect wanted an attorney to “read (him) the warrant” was not a clear invocation.

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Right to Counsel - Motions

- WHO MAY MAKE THE REQUEST?

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MOTIONS - THE Right to Counsel is personal

- The right to counsel is personal and can only be claimed by the defendant or his lawyer (unless the defendant is a minor.)

• *State v. Transon*, 186 Ariz. 482, 924 P.2d 486 (App. 1006); *Moran v. Burbine*, 475 U.S. 412, 106 S. Ct. 1135, 89 L.Ed. 2d 410 (1986)

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Motions RIGHT TO COUNSEL

- The privilege is personal to the client and can only be waived by him/her.

• *State v. Griswold*, 105 Ariz. 1, 457 P.2d 331 (1969)

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MOTIONS - RIGHT TO COUNSEL - INVOCATION

- A defendant may invoke for a limited purpose!
- State v. Urain ,157 Ariz. 21, 754 P.2d 350 (1988)

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MOTIONS - Right to Counsel -INVOKED

- **Determine what purpose they invoked for! Never assume the invocation is for everything!** Look at:
  - When did suspect invoke?
  - What was it in response to?
    - Admin per se?/*Miranda*?
  - What did the suspect say?
  - What did the officer do?
    - Allow a phone call?, not ask questions?, etc.

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Motions- Right to Counsel - WAIVER

- Once the right is invoked, waiver must be voluntary, knowing and intelligent.
  - *Edwards v. Arizona*, 451 U.S. at 481, 1010 S.Ct. at 1884
  - Fact specific question- includes background, experience and conduct of the accused.

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### Motions-Right to Counsel - WAIVER

- Absence of a written waiver does not constitute reversible error.
  - *State v. Harding*- 137 Ariz. 278, 670 P.2d 383 (1983)

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### THE Fifth Amendment



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### Right to Counsel -*Miranda*

- Fifth Amendment
  - Suspect must be affirmatively advised of the right to counsel, and other constitutional rights, prior to being subjected to "custodial interrogation."
  - *Berkemer v. McCarty*, 468 U.S. 420 (1984)

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ARGUING MOTIONS -What constitutes Custody?

- Restraint of freedom of movement “of a degree associated with a formal arrest”.
- Mere fact the investigation is focused on the suspect does not trigger need for Miranda.
  - *Minnesota v. Murphy*, 465 U.S. 420 (1984)

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ARGUING MOTIONS- RIGHT TO COUNSEL

- BEST PRACTICE - ARGUE THAT “CONTACT DOES NOT EQUAL CUSTODY”
- It does not matter if the defendant was free to leave. The officer did not create a situation analogous to a formal arrest.

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What constitutes Custody?

- Courts will look at:
    - Site of the interrogation (Police station, roadside, etc.)
    - Whether objective indicia of arrest are present (in handcuffs, gun drawn, etc.)
    - Form and length of the interrogation
      - (Subjective intent is removed)
- California v. Beheler*, 103 S.Ct. 3517 (1983); *State v. Cruz- Mata*, 138 Ariz. 370 (1983)

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MOTION ARGUMENT- Right to counsel

- Remember-Fifth Amendment needs 1) Custody AND 2) Interrogation.
- Best Practice- Questioning at the *roadside* after a routine traffic stop is not "custodial interrogation".
- Berkemer v. McCarty, 468 U.S. 420 (1984)

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Motions ARGUMENT - Right to Counsel

- Best Practice- 1) Officer may ask a "moderate number of questions" to determine identity and to try and confirm or dispel the officer's suspicions and:
  - 2) Ordinary traffic stops are not custodial.
- Berkemer v. McCarty, 104 S.Ct. 3138, 3150 (1984)

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Motions Argument- Right to Counsel

- Common Defense Ploy: "There were more than the one question!" - There is no "one free question" rule! A moderate number of questions allowed is the case law. See *Berkemer, Id.*

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Motions Argument- Right to Counsel

- Field Sobriety Tests are physical evidence, not testimonial. If not testimonial- no need for an attorney.
- *State v. Theriault*, 144 Ariz. 166, 696 P.2d 718 (App.1984)

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Motions Argument - Right to Counsel

- Miranda does not need to be read merely because the officer is administering FST's. This is true even if the suspect is already under arrest.
- *State v. Lee*, 184 Ariz. 230, 908 P.2d 44 (APP. 1995)

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Motions Argument- Right to Counsel

- Note the majority of the DRE protocol is NOT testimonial but physical evidence.
  - -So not subject to *Miranda* warnings!
- Even if the suspect invokes his right to counsel- the officer may proceed with the physical examination.
  - Best Practice- The officer should just skip the formal questions.

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### Motions Argument-Field Sobriety tests (and DRE protocols)

- Officers may comment on refusal to take them at trial.
- Fifth amendment does not apply as physical tests.
- Fourth Amendment does not prevent an officers comment.
- Trial tip- Ask for a jury instruction!
- *State v. Theriault*, 144 Ariz. 166 (App. 1984); *State v. Superior Court (Spears)*, 154 Ariz. 275 (App. 1987)

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### Motions Argument- Right to counsel

- Fifth Amendment
- Spontaneous outbursts are also admissible.
- *State v. Landrum*, 112 Ariz. 555 (1976); *Fisher v. U.S.*, 425 U.S. 391, 400, 96 S. Ct. 1569 (1976)

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### Motions Argument -5<sup>th</sup> Amendment

- Booking questions addressing biographical information are also not subject to *Miranda*.
- *State v. Jeny*, 163 Ariz. 293, 787 P.2d 1089
- *Pennsylvania v. Muniz*, 496 U.S. 582, 600-02 (1990)

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5<sup>th</sup> amendment -Reaction to Questioning

- It is not error to comment on the defendants reaction to questions asked by the officer when the suspect was not in custody and had not been *Mirandized*.
- This is true even by the prosecutor in trial. See *Salina v. Texas*, No. 120246 (6/17/13)(Plurality opinion).

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Motions Argument -Right to Counsel

- 6th Amendment practice

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Motions Argument - Right to Counsel

- ANY RIGHT TO A PARTICULAR LAWYER? – Probably Not
  - Only the right to a “competent” lawyer.
  - *State v. Schaaf*, 169 Ariz. 323, 819 P.2d 909 (1991)
  - *State v. Thorne*, 104 Ariz. 392, 453 P.2d 963 (1969)
- Compare- *State v. Rosengren*, 199 Ariz. 112, 14 P.3d 303 (App.2000).

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DUI Right to Counsel - Overall REVIEW

**REVIEW**

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REVIEW Right to counsel for DUI's

- Remember your suspect's have to 1) clearly invoke
- 2) You or your office needs to determine for what purpose they invoked.

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REVIEW -DUI- Right to counsel-blood/breath tests

- 3) A defendant is entitled to the assistance of an attorney in deciding whether to take a breath (blood or urine) test if requested.
- *State v. Juarez*, 161 Ariz. 76, 775 P.2d 1140 (1989)

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REVIEW- Right to Counsel for DUI's

- 4) The State may not, without justification, prevent access between a defendant and attorney, when such access would not unduly delay the DUI investigation. (statutory two hour window)
  - *McNutt v. Superior Court*, 133 Ariz. 7, 648 P.2d 122 (1982)
  - *State v. Sanders*, 194 Ariz. 156, 978 P.2d 133 (App. 1998)

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REVIEW -Right to counsel - breath test

- 5) Vice-versa - Defendant may not use the right to unreasonably interfere with an officer's investigation.
  - *State v. Juarez*, 161 Ariz. 76, 775 P.2d 1140 (1989)
- Note-The burden is on the State to prove an unreasonable interference. *State v. Juarez, Id.*

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REVIEW - Latest CASE Law -UNREASONABLE INTERFERENCE - Delay of the DUI investigation

- Held- Officer did not interfere with the defendants right to counsel by limiting the time for a phone call.
  - Stop at 5:15 a.m.
  - Invoked at 6:31 a.m.
  - Officer gave phone and phonebook. First test at 6:52, Second test 7:01 a.m.
  - Officer testified he was concerned about the two hour window .
  - *State v. Peraza*, 2 CA-CR 2015-0022 (App. 2016)

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REVIEW -Right to Counsel for DUI's

• 6) Police failure to provide callback number may constitute interference. Should provide some type of means to communicate with the defendant if defendants call them.

• *State v. Sanders*, 194 Ariz. 156, 978 P.2d 133 (App. 1999)

• But compare with *Martinez v. Superior Court (Garnett, RPI)*, 181 Ariz. 467, 891 P.2d 934 (App. 1994) (communication through an answering service for 45 minutes adequate.)

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REVIEW - Right to counsel for DUI's

• If they call an attorney Defendants have a right to a private consultation.

• 7) Consultation with counsel must be meaningful and, if requested, must be private.

• *State v. Holland*, 147 Ariz. 453, 711 P.2d 592 (1985).

• Memorandum - *State v. Clary*, 2016 WL 4524041 (2016)

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REVIEW - DUI Right to counsel

• RIGHT TO PRIVATE CONSULTATION

• Remember -The defendant must request privacy.

• *Municipal Court v. Waldron*, 157 Ariz. 90, 754 P.2d 1365 (App. 1988)

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REVIEW -DUI Right to Counsel

- 8) Do not confuse right to counsel issues with an interference with an independent chemical test. (Cada/Ganske cases) However, know that such interference may cause a case dismissal.

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Right to counsel - REMEDIES

- WHAT IF THERE WAS A RIGHT TO COUNSEL VIOLATION?
  - 1) Was it cured?
  - 2) If not, what is the remedy?

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Remedies- A violation may be cured

- A telephone call, consultation, opportunity, etc. may cure the violation.
  - State v. Juarez, 161 Ariz. 76, 775 P.2d 1140 (1989)

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DISMISSAL VS. SUPPRESSION Remedy for DUI Cases

- DISMISSAL
- If there is interference with ability to obtain exculpatory evidence (not a right to counsel)
- *McNutt v. Superior Court*, 133 Ariz. 7, 648 P.2d 122 (1982)
- But see *State v. Sanders*, 194 Ariz. 156 (App. 1999)
- SUPPRESSION
- If violation does not impinge on ability to collect exculpatory evidence
- *State v. Keyonne*, 181 Ariz. 485, 892 P.2d 205 (App. 1995);
- *State v. Juarez*, 161 Ariz. 76, 775 P.2d 1140 (1989)
- Memorandum Decision- *State v. Clary*, 2016 WL 4525041

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Remedies – RIGHT TO COUNSEL

Right to private consultation (remember if requested)

- Remedy for this violation?
- Dismissal –*Holland*, supra. See memorandum case *State v. Clary* discussion.

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Remedy for MOST 5<sup>th</sup> amendment violations

- SUPPRESSION OF THE STATEMENTS
  - *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)
- **Newest Case** - Suppression of the evidence is the proper sanction for violation of the right to counsel.
  - *State v. Santillan*, 2016 WL3030120. Good Motion in Limine!

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Motions IN LIMINE - Suppression is not always required

- Always argue a 5<sup>th</sup> amendment violation does not require the suppression of physical evidence.
- *State v. Lee*, 184 Ariz. 230, 908 P.2d 44 (App. 1995)
- A refusal to take a breath test is physical evidence. *Id*

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MOTIONS IN LIMINE - 5<sup>th</sup> Amendment

- Field Sobriety tests and DRE exams are physical, not testimonial, evidence.
- *State v. Theriault*, 144 Ariz. 166, 696 P.2d 718 (App. 1984)
- *State v. Lee*, 184 Ariz. 230, 908 P.2d 44 (App. 1995)

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MOTIONS IN LIMINE - Suppressed Evidence

- The defendant cannot use the constitution as both a shield and a sword.
- *Harris v. New York*, 401 U.S. 222, 91 S. Ct. 643 (1971)
- *U.S. v. Havens*, 446 U.S. 620, 100 S. Ct. 1912 (1980)
- *State v. Menard*, 135 Ariz. 385, 661 P.2d 649 (App. 1983)
- *State v. Fortier*, 149 Vt. 599, 547 A.2d 1327 (1988)
  - Suppressed evidence can still be used to impeach.

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“OK Then. You have the right to an attorney.  
Anything you say can be used against you in a  
court of law...”



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- THANK YOU!
- Materials provided by Beth Barnes, AZ GOHS Traffic Safety Resource Prosecutor
- Presented By: Tobin Sidles, Oro Valley Legal Services Director  
tsidles@orovalleyaz.gov

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