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Capital Case 1.0 − Degree of Participation

During this part of the trial, you must determine the degree of the Defendant's individual participation in the crime.

You need to decide whether the State has proven beyond a reasonable doubt that the Defendant:

1. Killed [the victim]; or
2. Attempted to kill [the victim]; or
3. Intended that a killing take place; or
4. Was BOTH:
    a. a "major participant" in committing [list predicate felony or felonies] and
    b. "recklessly indifferent" regarding a person's life.

You should consider all of these factors. Each of you must decide if at least one factor has been proven. You do not need to agree on the same factor.

In determining whether the Defendant was a "major participant" in the [specify the felony], some factors to consider include:

- how much the Defendant participated in planning the [specify the felony];
- how much the Defendant participated in the [specify the felony];
- whether the Defendant had a weapon or provided a weapon(s) to any accomplice(s) during the [specify the felony]; and
- what the Defendant knew about the planned [specify the felony].

A Defendant is "recklessly indifferent" to human life if [he][she] knowingly commits a crime that any reasonable person would know seriously risks someone getting killed but disregards that risk. The risk must be so serious that disregarding it is far beyond what a reasonable person would do.

A Defendant is NOT recklessly indifferent to human life ONLY because [he][she] happened to be there when the killing happened, helped commit a crime that resulted in someone being killed, did not help the victim, or did not call for help.

A Defendant's individual responsibility depends on whether the Defendant intended, knew, or should have known that [his][her] criminal activities, or the criminal activities of any other participants, were likely to result in someone's death.

As I've previously told you, you do not need to be unanimous on any one factor. You must individually decide if at least one factor has been proven. After you have finished deliberating, the Jury Foreperson will fill out the jury verdict form to report your results to me.

SOURCE: This is the *Enmund/Tison* instruction. *See Enmund v. Florida*, 458 U.S. 782, 798 (1982) (Under the Eighth Amendment, the death penalty may not be imposed on a person "who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed."); *Tison v. Arizona*, 481 U.S. 137, 158 (1987) (holding that the *Enmund* culpability requirement is satisfied by "major participation" in the felony committed, combined with a "reckless indifference to human life"); A.R.S. § 13-752(P) (statutory language as of February 20, 2025) ("The trier of fact shall make all factual determinations required by this section or the Constitution of the United States or this state to impose a death sentence. . . . If the state bears the burden of proof, the issue shall be determined in the aggravation phase."); *State v. Tison*, 160 Ariz. 501, 502 (1989 (holding that the burden of proof for the *Enmund/Tison* finding is beyond a reasonable doubt); *see also State v. Allen*, 253 Ariz. 306, 346, ¶ 135 (2022) (jurors need not unanimously agree on whether the defendant's conduct satisfies either *Enmund* or *Tison* so long as each juror agrees that the defendant's conduct satisfies one of those standards); *State v. Garcia*, 224 Ariz. 1, 13-14, ¶¶ 47-52 (2010) (holding that juries should not be instructed to consider failure to report the crime in determining if the defendant was a major participant, but that factor may be relevant in determining if a defendant acted with reckless indifference, (citing *State v. Lacy*, 187 Ariz. 340, 351-52 (1996) (holding that "reckless indifference may be implicit when one 'knowingly engag[es] in criminal activities known to carry a grave risk of death'"; "[i]n almost every felony murder case . . . there is a failure by the defendant to stop and render aid or call for help [and] there must be something more if the concept of 'reckless indifference' is to provide any meaningful guidance for determining which defendant should suffer the ultimate penalty"; and the defendants' culpability ultimately rested on the fact that the defendants "subjectively appreciated that their acts were likely to result in the taking of innocent life" (quoting *Tison* 481 U.S. at 152, 157)).

The definition of "reckless indifference" is based on A.R.S. § 13-105. This is a subjective standard. *See State v. Miles*, 243 Ariz. 511, 514 ¶ 14 (2018); *State v. Forde*, 233 Ariz. 543, ¶¶ 94-96 (2014).

USE NOTE: This instruction should be given during the aggravation phase in a felony murder case where accomplices were involved in the killing. Because the State has the burden of proving the *Enmund/Tison* finding, and under A.R.S. § 13-752(P), the *Enmund/Tison* finding must be proved by the State at some point during the aggravation phase. However, § 13-752(P) does not indicate whether (1) the *Enmund/Tison* evidence/arguments should first be presented and a finding regarding that issue made before the aggravating circumstances evidence/arguments are presented; or (2) the evidence/arguments regarding *Enmund/Tison* and the aggravating circumstances should be presented and findings then made regarding both.

Capital Case Verdict Form: Degree of Participation in the Crime

ARIZONA SUPERIOR COURT
_____ COUNTY

THE STATE OF ARIZONA, PLAINTIFF, **vs.** **JOHN DOE, DEFENDANT.**	**Case No.** _____ **VERDICT**

Check only one of these options.

[ ] Every member of the Jury agrees that the State proved beyond a reasonable doubt at least one of the four factors listed below:

1. The Defendant killed [victim].
2. The Defendant attempted to kill [victim].
3. The Defendant intended for a killing to happen.
4. The Defendant was BOTH:
   a. a "major participant" in committing [list predicate felony or felonies] AND
   b. "recklessly indifferent" with a person's life.

You do not need to be unanimous on any one factor, but every juror must agree that the State proved at least one factor.

[ ] Every member of the Jury does NOT agree that the State proved beyond a reasonable doubt at least one of the four factors listed above.

_____
FOREPERSON

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AGGRAVATION PHASE

Capital Case 1.1 – Nature of the Hearing

The Defendant in this case has been convicted of the crime of first-degree murder. Arizona law requires that every person guilty of first-degree murder be sentenced to either death or life in prison. You as jurors will make this decision.

These instructions I am giving you now contain the law that applies to this part of the trial. I will give you some of the instructions now and more [after the evidence is presented] [before you deliberate].

You will first decide whether any aggravating circumstances exist. Aggravating circumstances are defined by law. If the State does not prove beyond a reasonable doubt that an aggravating circumstance exists, the trial will be over, and I will sentence the Defendant at a later hearing. If all of you decide beyond a reasonable doubt that at least one aggravating circumstance exists, then the trial will continue, and you will decide the Defendant's sentence.

Capital Case 1.2 – Duties of the Jury

In deciding whether the State has proven an aggravating circumstance, you must follow my instructions. Do not base your decision on sympathy, emotion, prejudice, or public opinion. Do not consider anyone's race, color, religion, nationality, gender, or sexual orientation when making your decision.

SOURCE: RAJI Preliminary Criminal Instruction 1 and Standard Criminal Instruction 1 (non- capital) (2005); *California v. Brown,* 479 U.S. 538, 542-45 (1987).

Capital Case 1.3 – Evidence

"Evidence" means the testimony and exhibits admitted during the trial. The lawyers may also stipulate that certain facts exist. You must treat a stipulated fact as you would any other evidence. You may accept it or reject it, in whole or in part, just like any other evidence.

I will rule on the admissibility of evidence. Do not be concerned with the reasons for my rulings. If I sustain an objection to a question, do not consider the question, and do not guess what the answer might have been. If I strike testimony from the record, do not consider the testimony. If I sustain an objection to an exhibit, do not consider the exhibit. If I admit evidence for a limited purpose, do not consider it for any other purpose.

Your decision must be based only on the evidence, [including the evidence you have already heard during the guilt phase]. You must apply these instructions to the evidence and decide whether the State has proven the alleged aggravating circumstance[s] beyond a reasonable doubt.

SOURCE: A.R.S. §§ 13-751(D), -752(I); RAJI Preliminary Criminal Instructions 3, 5, 6 and 7 and Standard Criminal Instructions 3 and 4 (non-capital) (2005).

Capital Case 1.4 – Burden of Proof

You must start with the presumption that the alleged aggravating circumstance is not proven. To overcome that presumption, the State must prove any alleged aggravating circumstance beyond a reasonable doubt.

The Defendant is not required to testify or present evidence of any kind. The decision whether to testify or present evidence is left to the Defendant, [acting with the advice of a lawyer]. The Defendant's decision not to testify or present evidence is not evidence of the existence of any aggravating circumstance.

SOURCE: A.R.S. § 13-751(B).

Capital Case 1.5 – Definition of Proof Beyond a Reasonable Doubt

The State must prove each element of an alleged aggravating circumstance beyond a reasonable doubt.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced that the alleged aggravating circumstance is proven. There are very few things in this world that we know with absolute certainty, and in criminal cases, the law does not require proof that overcomes every doubt. If, based on your consideration of the evidence, you are firmly convinced that any alleged aggravating circumstance is proven, then you must make that finding. If, on the other hand, you think there is a real possibility that the alleged aggravating circumstance is not proven, you must give the Defendant the benefit of the doubt and find the alleged aggravating circumstance is not proven.

SOURCE: *State v. Portillo*, 182 Ariz. 592, 596 (1995); Standard Criminal Instruction 5b(1).

USE NOTE: A reasonable doubt instruction must be given at the close of a case, even if it has been previously mentioned in the judge's preliminary instructions. *State v. Romanosky*, 176 Ariz. 118, 121 n.1 (1993); *State v. Marquez,* 135 Ariz. 316 (App. 1983). Courts should not deviate from the *Portillo* instruction.

Capital Case 1.5.1 – Order of Aggravation Phase

Each party may choose to make an opening statement. What is said in opening statements is not evidence.

The State will present its evidence first because it has the burden of proof. The Defense may, but is not required to, present evidence. The Defendant is not required to testify. If the Defense presents evidence, the State may present evidence in response. With each witness, there is direct examination, an opportunity for cross-examination, and an opportunity for redirect examination. After a witness has testified, you may submit questions in writing, but you are not required to do so.

Each party may give a closing argument. The State will argue first, then the Defense may present argument. If the Defense gives a closing argument, the State may respond.

During these arguments, the lawyers will tell you what they think the evidence shows and how they believe the law applies. What is said in closing arguments is not evidence, but it may help you understand the evidence and the law. If a lawyer says something about the law that differs from my instructions, you must rely on my instructions.

After closing arguments, you will decide whether the State has proven the aggravating circumstance[s]. You will then return to the courtroom, and the clerk will announce your decision.

Capital Case 1.6 – Aggravating Circumstances (for offenses occurring after August 27, 2019)

An "aggravating circumstance" is a fact that makes a Defendant eligible for the death penalty under Arizona law. The State must prove beyond a reasonable doubt that at least one aggravating circumstance is present in this case.

The State has alleged the following aggravating circumstance[s]:

[1. The Defendant has been convicted of another offense in the United States, and under Arizona law, a sentence of life imprisonment or death was imposed or could have been imposed for that conviction;]

[2. The Defendant was previously convicted of a serious offense. [The offense could be a(n) [attempt], [solicitation], [conspiracy], [facilitation] offense.] [A conviction for a serious offense committed on the same occasion as the murder, or not committed on the same occasion but joined for trial with the murder, is treated as a serious offense];]

[3. The Defendant

[a. arranged for the murder by paying, or promising to pay, something of financial value] or

[b. committed the murder for payment, or a promise of payment, of something of financial value];]

[4. The Defendant committed the murder in an

[a. especially cruel] or

[b. especially heinous or depraved] manner;]

[5. The Defendant committed the murder while

[a. in the custody of [the state department of corrections], [a law enforcement agency], [a county jail], or [a city jail] or

[b. on authorized or unauthorized release from [the state department of corrections], [a law enforcement agency], [a county jail], or [a city jail] or

[c. on felony probation];]

[6. The Defendant was convicted of one or more other [murder] [homicide] that occurred during the commission of the offense];]

[7. The murder victim was [under fifteen years of age], [seventy years of age or older], [an unborn child in the womb at any stage of its development];]

[8. The murder victim was an on-duty peace officer who was killed while performing the officer's official duties, and the Defendant knew, or should have known, that the victim was a peace officer;]

[9. The Defendant committed the murder with the intent to promote, further or assist the objectives of a [criminal street gang] or [criminal syndicate] or to join a [criminal street gang] or [criminal syndicate];]

[10. The Defendant committed the murder [to prevent someone's cooperation with an official law enforcement investigation], [to prevent someone's testimony in a court proceeding], [in retaliation for someone's cooperation with an official law enforcement investigation], or [in retaliation for someone's testimony in a court proceeding];]

As to each aggravating circumstance alleged,

(1) You may unanimously find beyond a reasonable doubt that the alleged aggravating circumstance is proven; or

(2) You may unanimously find that the alleged aggravating circumstance is not proven.

After you have finished deliberating, the Jury Foreperson will fill out the jury verdict form[s] to report the results to me. If you cannot unanimously agree whether an aggravating circumstance is proven or not proven, leave the verdict form blank for that circumstance and have your foreperson tell me.

SOURCE: A.R.S. §§ 13-751(F), -752(E); *Zant v. Stephens*, 462 U.S. 862, 877 (1983) (purpose of aggravating circumstances); *State v. Tucker*, 205 Ariz. 157, 169 (2003) (same).

USE NOTE: For the number 6 bracketed aggravating circumstance, "homicide" should be used to refer to a manslaughter or negligent homicide conviction. *See* A.R.S. § 13-1101. "Murder" may be used for first and second degree murder convictions.

Capital Case 1.6 – Aggravating Circumstances (for offenses occurring before August 27, 2019)

An "aggravating circumstance" is a fact that makes a Defendant eligible for the death penalty under Arizona law. The State must prove beyond a reasonable doubt that at least one aggravating circumstance is present in this case.

The State has alleged the following aggravating circumstance[s]:

[1. The Defendant has been convicted of another offense in the United States, and under Arizona law, a sentence of life imprisonment or death was imposed or could have been imposed for that conviction;]

[2. The Defendant was previously convicted of a serious offense. [The offense could be a(n) [attempt], [solicitation], [conspiracy], [facilitation] offense.] [A conviction for a serious offense committed on the same occasion as the murder, or not committed on the same occasion but joined for trial with the murder, is treated as a serious offense];]

[3. When committing the murder, the Defendant knowingly created a grave risk of death to another person or persons in addition to the person the Defendant murdered;]

[4. The Defendant either paid someone, or promised to pay someone, to commit the murder. Such payment can be made using anything of financial value;]

[5. The Defendant committed the murder in consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value;]

[6. The Defendant committed the murder in an

[a. especially cruel] or

[b. especially heinous or depraved] manner;]

[7. The Defendant committed the murder while

[a. in the custody of [the state department of corrections], [a law enforcement agency], [a county jail], or [a city jail] or

[b. on authorized or unauthorized release from [the state department of corrections], [a law enforcement agency], [a county jail], or [a city jail] or

[c. on felony probation];]

[8. The Defendant was convicted of one or more other [murders] [homicides] that occurred during the commission of the offense];]

[9. The murder victim was [under fifteen years of age], [seventy years of age or older], [an unborn child in the womb at any stage of its development];]

[10. The murder victim was an on-duty peace officer who was killed while performing the officer's official duties, and the Defendant knew, or should have known, that the victim was a peace officer;]

[11. The Defendant committed the murder with the intent to promote, further or assist the goals of a [criminal street gang] or [criminal syndicate] or to join a [criminal street gang] or [criminal syndicate];]

[12. The Defendant committed the murder [to prevent someone's cooperation with an official law enforcement investigation], [to prevent someone's testimony in a court proceeding], [in retaliation for someone's cooperation with an official law enforcement investigation], or [in retaliation for someone's testimony in a court proceeding];]

[13. The murder was committed in a cold, calculated manner without pretense of moral or legal justification;]

[14. The Defendant used a remote stun gun or an authorized remote stun gun while committing the murder. For the purposes of this aggravating circumstance:

"Remote stun gun" means an electronic device that emits an electrical charge and that is designed and primarily employed to incapacitate a person or animal either through contact with electrodes on the device itself or remotely through wired probes that are attached to the device or through a spark, plasma, ionization or other conductive means emitting from the device.]

"Authorized remote stun gun" means a remote stun gun that has all of the following:

(i) An electrical discharge that is less than one hundred thousand volts and less than nine joules of energy per pulse;

(ii) A serial or identification number on all projectiles that are discharged from the remote stun gun;

(iii) An identification and tracking system that, on deployment of remote electrodes, disperses coded material that is traceable to the purchaser through records that are kept by the manufacturer on all remote stun guns and all individual cartridges sold; and

(iv) A training program that is offered by the manufacturer.

As to each aggravating circumstance alleged,

(1) You may unanimously find beyond a reasonable doubt that the alleged aggravating circumstance is proven; or

(2) You may unanimously find that the alleged aggravating circumstance is not proven.

If you cannot unanimously agree whether an aggravating circumstance is proven or not proven, leave the verdict form blank for that circumstance and have your foreperson tell me.

After you have finished deliberating, the Jury Foreperson will fill out the jury verdict form[s] to report the results to me.

SOURCE: A.R.S. §§ 13-751(F), -752(E); *Zant v. Stephens*, 462 U.S. 862, 877 (1983) (purpose of aggravating circumstances); *State v. Tucker*, 205 Ariz. 157, 169 (2003) (same).

USE NOTES:

If the homicide was committed on or after May 26, 2003, the circumstance in numbered paragraph 2 [(F)(2) factor] may include the bracketed portion, and the (F)(7) factor (paragraph 7) may include the bracketed portion. The court should also review definitional Capital Case Instructions 1.6(a)-(e) and determine whether any of those instructions should be given regarding an alleged aggravating circumstance.

The circumstances listed in bracketed paragraphs numbered 11 through 14 [(F)(11) through (F)(14) and the "unborn child" portion of (F)(9)] apply only if the homicide was committed on or after August 12, 2005.

Capital Case 1.6(a) – Definition of Serious Offense

A "serious offense" means any of the following crimes, as either a(n) [attempt], [solicitation], [conspiracy], [facilitation] crime or a completed crime, if committed in this state [or any crime committed outside this state that if committed in this state would constitute one of the following crimes]:

[1. First-degree murder;]

[2. Second-degree murder;]

[3. Manslaughter;]

[4. Aggravated assault resulting in serious physical injury or committed by the use, threatened use or threatening exhibition of a deadly weapon or dangerous instrument;]

[5. Sexual assault;]

[6. Any dangerous crime against children;]

[7. Arson of an occupied structure;]

[8. Robbery;]

[9. Burglary in the first degree;]

[10. Kidnapping;]

[11. Sexual conduct with a minor under age fifteen;]

[12. Burglary in the second degree;]

[13. Terrorism;]

A conviction occurs when [a jury][the court] finds the Defendant guilty of a crime, or the Defendant pleads guilty to a crime.

A conviction for a serious offense committed on the same occasion as the murder, or not committed on the same occasion but joined for trial with the murder, is treated as a serious offense.

SOURCE: A.R.S. §§ 13-751(F)(2), (I) (statutory language as of August 12, 2005), -751.01(A), (C), (P) (statutory language as of August 1, 2002); *State v. Jones*, 197 Ariz. 290, 310-11 (2000).

USE NOTES:

This instruction should be given only if the State alleges the (F)(2) circumstance. The instruction should relate to the specific serious offense alleged.

Arizona's preparatory offenses, along with their corresponding statutory definitions and RAJIs, are:

- Attempt, A.R.S. § 13-1001(A) (Statutory Criminal Instruction 10.01);
- Solicitation, A.R.S. § 13-1002(A) (Statutory Criminal Instruction 10.02);
- Conspiracy, A.R.S. § 13-1003(A) (Statutory Criminal Instruction 10.031); *and*
- Facilitation, A.R.S. § 13-1004(A) (Statutory Criminal Instruction 10.04).

The options listed in 12 and 13 above are applicable for first-degree murders committed on or after August 12, 2005.

The bracketed language at the end of the instruction should be given if the homicide occurred on or after May 26, 2003.

If the prior conviction is from another jurisdiction, the court must first verify that the elements of the foreign prior conviction include every element that would be required to prove an enumerated Arizona offense, before the allegation may go to the jury. *State v. Crawford*, 214 Ariz. 129, 131, ¶ 7 (2007); *State v. Roque*, 213 Ariz. 193, 216-17 (2006) (refusing to "look beyond the language of the [foreign] statutes" to the complaint describing the defendant's conduct in determining whether prior California robbery conviction constituted a "serious offense" under A.R.S. § 13-751(F)(2)); *State v. Schaaf,* 169 Ariz. 323, 334 (1991) (reviewing Nevada attempted murder statute to determine if that crime involved violence and holding that sentencing courts "may consider only the statute that the defendant [was] charged with violating; it may not consider other evidence"). Whether the State is able to prove this beyond a reasonable doubt may be the subject of motions that the court will need to address under Rules 13.5(c) and Rules 16.1(b) and (c), 16.6(b) of the Arizona Rules of Criminal Procedure

(challenging the legal sufficiency of an alleged aggravating circumstance in a capital case), and/or Rule 20(a) and (b) (motion for judgment of acquittal before and/or after verdict). The court must verify that the fact finder in the prior case found beyond a reasonable doubt that the defendant committed every element that would be required to prove the Arizona offense. *State v. Ault*, 157 Ariz. 516, 521 (1988) (non-capital case involving California prior convictions that resulted from a jury trial).

If the court concludes that the foreign offense is a serious offense, but the title of the foreign conviction does not match the title of a defined Arizona serious offense, the title of the foreign offense should be included in the instruction.

COMMENT: For crimes committed prior to July 17, 1993, the statutory language for the (F)(2) factor was different. It stated that the (F)(2) factor applied to a prior "felony in the United States involving the use or threat of violence on another person." Under the prior interpretation of the factor, courts were to look at the statutory definition of the prior crime, and not its specific factual basis, and determine whether the prior conviction satisfied (F)(2). *State v. Richmond,* 180 Ariz. 573, 578, 886 P.2d 1329, 1334 (1994). "If, under the statutory definition, the defendant could have committed and been convicted of the crime without using or threatening violence, the prior conviction may not qualify as a statutory aggravating circumstance under § 13-703(F)(2)." *State v. Walden*, 183 Ariz. 595, 616-17 (1995); *State v. Romanosky,* 162 Ariz. 217, 228 (1989). "Violence" was defined as the exertion of any physical force with the intent to injure or abuse. *State v. Fierro,* 166 Ariz. 539, 549 (1990).

Capital Case 1.6(b) – Grave Risk of Death to Another (for offenses occurring before August 27, 2019)

The "grave risk of death to another" aggravating circumstance is established if the State proves beyond a reasonable doubt that, during the course of the murder, the Defendant:

1. knew another person was present, although the person could be a stranger to the Defendant; and
2. knowingly engaged in conduct that created a real and substantial likelihood that the person might die; and
3. did not intend to murder the other person.

The mere presence of another person is not sufficient to prove this aggravating circumstance.

SOURCE: A.R.S. § 13-751(F)(3) (statutory language as of October 1, 1978); *State v. Johnson*, 212 Ariz. 425, 431 (2006) (mere presence of a third person insufficient to prove aggravator; intent to kill third person precludes finding the aggravator); *State v. Carreon*, 210 Ariz. 54, 67 (2005) (using "specific third person" language); *State v. McMurtrey,* 151 Ariz. 105, 108 (1986) (holding that the (F)(3) circumstance does not apply when the person in the zone of danger is the intended victim of the murder).

USE NOTES:

Effective August 27, 2019, this aggravating circumstance was repealed and does not apply for offenses committed on or after that date.

This circumstance is not proven simply where bystanders are present or the defendant points a gun at another to facilitate escape. *See e.g.*, *State v. Wood*, 180 Ariz. 53, 69 (1994) (holding that, "the general rule is that mere presence of bystanders or pointing a gun at another to facilitate escape does not bring a murderous act within A.R.S. § 13-703(F)(3). . . . Our inquiry is whether, during the course of the killing, the defendant knowingly engaged in conduct that created a real and substantial likelihood that a specific third person might suffer fatal injury."); *compare State v. Doss*, 116 Ariz. 156, 158, 163 (1977) (finding (F)(3) circumstance where victim was shot and killed in a crowded college gymnasium and another student standing nearby was wounded; the relevant inquiry was knowledge of the victim's presence, not the victim's identity), with *State v. Smith*, 146 Ariz. 491, 502 (1985) (holding that defendant did not place convenience store manager or other store customers in danger when he shot directly and purposefully at cashier, even though the other persons could have sustained injury during the armed robbery, because shooting was not "random and indiscriminate").

This circumstance is not proven where people are present in another room, but they are not actually placed in danger. *See Carreon*, 210 Ariz. at 67 (reversing the (F)(3) circumstance finding where the shots fired during the murderous attack were aimed in the opposite direction from the bedroom of the children in the apartment; thus, "none of the bullets fired during that attack placed the boys in danger.").

Whether the (F)(3) circumstance should be presented to the jury may be the subject of motions that the court will need to address under the Arizona Rules of Criminal Procedure, Rules 13.5(c) and Rules 16.1(b) & (c), 16.6(b) (challenging the legal sufficiency of an alleged aggravating circumstance in a capital case), and/or Rule 20(a) and (b) (motion for judgment of acquittal before and/or after verdict).

"Knowingly" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0510(b)).

COMMENT: This instruction defines "zone of danger" by enumerating the four main ingredients identified by the Arizona Supreme Court that make up this very fact-intensive concept: (1) proximity (not mere presence); (2) time (during the course of the murder); (3) level of intent (knowingly create a risk, without intending to kill/actually murder the third person); and (4) conduct (creating a real and substantial likelihood of fatal injury).

In *State v. Johnson*, *supra*, the court approved an instruction that used the word "bystander." The court in *Johnson* used both "bystander" and "third person." The committee has included both "bystander" and "third person" to be used as appropriate.

Capital Case 1.6(c) – Definition of "Consideration for the Receipt, or in Expectation of the Receipt, of Anything of Pecuniary Value" (for offenses occurring before August 27, 2019)

The aggravating circumstance, "consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value," is established if the State proves beyond a reasonable doubt that the Defendant committed the murder intending to gain something of financial value. You may base this finding on direct or circumstantial evidence. Financial value may include money or property.

Financial gain does not need to be the only motivation for the murder. But there must be a connection between the financial motive and the killing. The mere fact that the Defendant obtained a financial gain does not by itself establish this aggravating circumstance. Just taking items of value before, during, or after the murder is not sufficient to establish this aggravating circumstance.

[While a conviction of robbery or burglary indicates a taking of property, the conviction does not itself prove that the Defendant killed intending to gain something of financial value.]

SOURCE: A.R.S. § 13-751(F)(5) (statutory language as of October 1, 1978); "[A] conviction for felony murder predicated on robbery or armed robbery does not automatically prove the (F)(5) aggravator." *State v. Anderson (II)*, 210 Ariz. 327, 341-42 (2005) (where the court also stated that, "the superior court properly instructed the jury on this aggravating factor" where the (F)(5) instruction included the language, "[a] finding of pecuniary gain may be based on tangible evidence or *strong* circumstantial evidence," and the court was reviewing whether a misstatement of the law regarding the (F)(5) circumstance by the prosecutor should cause a reversal (emphasis added)); *State v. Carreon*, 210 Ariz. 54, 67 (2005) (holding that, "[t]he finding of pecuniary gain may be based on tangible evidence or strong circumstantial evidence."); *State v. Moody,* 208 Ariz. 424, 471 (2004) (holding that the expectation of pecuniary gain must be a, "motive, cause or impetus for the murder, and not merely a result of the murder[,]" and that the State is required to, "establish the connection between the murder and the motive through direct or strong circumstantial evidence."); *State v. Armstrong*, 208 Ariz. 360, 363 n.2 (2004) (rejecting "but for" requirement, *i.e.*, receipt of item(s) of pecuniary value need not be the *only* cause of the murder); *State v. Sansing*, 200 Ariz. 347, 353, 356 (2001) (holding that to prove the (F)(5) circumstance, the State must prove, "a connection between a pecuniary motive and the killing itself; the expectation of pecuniary gain must be a motive for the murder[,]" "[w]e reserve the death penalty for murders committed during a robbery or burglary for those cases in which the facts clearly indicate a connection between a pecuniary motive and the killing itself[,]" and that, "[t]he murder, which occurred at least an hour after the victim's arrival, did not facilitate the defendant's ability to secure pecuniary gain, particularly in light of the fact that he bound the victim almost as soon as she entered his home."); *State v. Medina*, 193 Ariz. 504, 513 (1999) (holding that the State failed to prove the (F)(5) circumstance, even though Medina said prior to the murder that he intended to steal the victim's car and radio, and he then beat and kicked the victim and repeatedly drove over the victim with his (Medina's) car); *State v. Greene*, 192 Ariz. 431, 439 (1998) (regarding the (F)(5) circumstance, "[w]e have held that when one comes to rob, the accused expects pecuniary gain and this desire infects all other conduct.").

USE NOTES:

Effective August 26, 2019, this aggravating circumstance was repealed and does not apply for offenses committed on or after that date.

The court should define "value" on a case-by-case basis, in light of the evidence presented. For example, the "value" at issue in *Carreon* was money, while the "value" at issue in *Anderson (II)* was a truck.

Whether the (F)(5) circumstance should be presented to the jury may be the subject of motions that will need to be ruled on by the court under the Arizona Rules of Criminal Procedure, Rules 13.5(c) and Rules 16.1(b) and (c), 16.6(b) (challenging the legal sufficiency of an alleged aggravating circumstance in a capital case), and/or Rule 20(a) and (b) (motion for judgment of acquittal before and/or after verdict).

COMMENT: The Committee could not reach a consensus on whether the word "strong," when referring to "circumstantial evidence," should be included in the RAJI instruction, so the word "strong" appears in brackets. Some members of the Committee believe that the term "strong circumstantial evidence" is confusing, does not add anything to the fact that the circumstance must be proved beyond a reasonable doubt and does not consider the situation where there is tangible and circumstantial evidence to support the aggravating circumstance. Those members of the Committee suggest that the word "strong" contradicts the general instruction concerning "direct and circumstantial evidence."

Other members of the Committee believe that the term "strong circumstantial evidence" is not confusing, and it informs the jurors that if they rely, at least in part, on circumstantial evidence, that evidence must be "strong" circumstantial evidence. Furthermore, that distinction has been drawn by the Arizona Supreme Court regarding the (F)(5) circumstance, and its intent was to distinguish the (F)(5) circumstance from other situations where circumstantial evidence may be presented. Additionally, use of the word "strong" does not preclude the State from presenting both tangible and circumstantial evidence in the same trial.

As noted above in the source section, the word "strong" was used in the instruction discussed in *Anderson (II)*. That instruction read in full:

> The pecuniary gain aggravating circumstance only applies if you find beyond a reasonable doubt that the defendant committed the offense as consideration for the receipt or in expectation of the receipt of anything of pecuniary value.
>
> In order to prove this factor, the State must prove that the expectation of pecuniary gain was a motive, cause, or impetus for murder and not merely the result of it.
>
> A finding of pecuniary value may be based on tangible evidence or strong circumstantial evidence. While pecuniary gain need not be the exclusive cause of the murder, you may not find that the pecuniary gain aggravating circumstance exists merely because the person was killed and at the same time the defendant made a financial gain.

Anderson (II), 210 Ariz. at 341-42; *see also State v. Garza,* 216 Ariz. 56, 67, ¶ 52 (2007).

Capital Case 1.6(d) – Definition of "Especially Cruel, Heinous or Depraved"

All first-degree murders are to some extent cruel, heinous, or depraved. To establish the aggravating circumstance, "especially cruel, heinous or depraved" in this case, the State must prove beyond a reasonable doubt that the murder was "especially" cruel or "especially" heinous or depraved. "Especially" means unusually great or significant.

[The terms "especially cruel," or "especially heinous or depraved" are considered separately; therefore, the presence of either one is sufficient to establish this aggravating circumstance. However, to find that this aggravating circumstance is proven, you must unanimously find that especially cruel has been proven beyond a reasonable doubt, or especially heinous or depraved has been proven beyond a reasonable doubt.]

<u>Especially Cruel</u>

The term "especially cruel" focuses on the victim's pain and suffering. The murder was committed in an especially cruel manner if:

1. the victim consciously suffered significant [physical pain] [mental distress or anguish] prior to death, and
2. the Defendant knew or should have known that the victim would suffer.

Especially Heinous or Depraved

The term "especially heinous or depraved" focuses on the Defendant's state of mind at the time of the offense, as reflected by the Defendant's words and acts. A murder is especially heinous or depraved if it is shockingly evil. To prove this, the State must show beyond a reasonable doubt that [the Defendant]: [list only the options that apply]

1. Relished the murder; or
2. Inflicted gratuitous violence on the victim beyond that necessary to kill; or
3. Needlessly mutilated the victim's body; or
4. The murder victim was a child, and there was a parental or special [caregiver] relationship of trust between the victim and the Defendant.

Relished the Murder

The Defendant "relished the murder" if the Defendant, by words or actions, took pleasure in the murder at or near the time of the killing. Relishing is not established merely by statements or actions reflecting indifference, a calculated plan to kill, satisfaction over the apparent success of the plan, extreme callousness, lack of remorse, or bragging after the murder.

Inflicted Gratuitous Violence

The Defendant "inflicted gratuitous violence" if:

1. the Defendant intentionally inflicted violence clearly beyond what was necessary to kill the victim, and
2. the Defendant continued to inflict this violence after the Defendant knew or should have known that the [Defendant had inflicted a fatal injury] [victim was dead].

Needless Mutilation

1. The Defendant needlessly mutilated the victim if, after the victim's death and in an act separate from what led to the victim's death, the Defendant intentionally disfigured the victim's body [corpse].

Verdict Form [If the state State has alleged both "especially cruel" and "especially heinous or depraved"]

Even though this is a single aggravating circumstance, the verdict form I will give you directs you to make separate findings regarding both "especially cruel" and "especially heinous or depraved."

SOURCE: A.R.S. § 13-751(F)(6) (statutory language as of October 1, 1978); *State v. Bocharski*, 218 Ariz. 476, ¶ 87 (2008) (defining gratuitous violence to include that State must also show that the defendant continued to inflict violence after he knew or should have known that a fatal action had occurred); *State v. Wallace*, 219 Ariz. 1 (2008); *State v. Tucker*, 215 Ariz. 298 (2007); *State v. Andriano*, 215 Ariz. 497 (2007); *State v. Velazquez*, 216 Ariz. 300 (2007); *State v. Anderson*, 210 Ariz. 327, 352 n.19 (2005) (defining gratuitous violence and using "clearly beyond" language); *State v. Carlson*, 202 Ariz. 570, 581-83 (2002) (especial cruelty); *State v. Canez*, 202 Ariz. 133, 161 (2002) (holding that re especial cruelty, defendant knew or should have known that victim would consciously suffer); *State v. Medina*, 193 Ariz. 504, 513 (1999) (disjunctive); *State v. Doerr*, 193 Ariz. 56, 67-68 (1999) (relishing); *State v. Miles*, 186 Ariz. 10, 18-19 (1996) (holding that a finding of especially cruel, heinous or depraved, "is a single (F)(6) factor, and the trial judge erred when he characterized them as two separate (F)(6)

factors."); *State v. Murray*, 184 Ariz. 9, 37 (1995) (especial cruelty); *State v. Ross*, 180 Ariz. 598, 605-06 (1994) (witness elimination/extraordinary circumstances language); *State v. Richmond*, 180 Ariz. 573, 580 (1994) (mutilation); *State v. King*, 180, Ariz. 268, 284-85 (1994) (witness elimination alone insufficient); *State v. Milke*, 177 Ariz. 118, 124- 26 (1993) (holding that proof of parent/child relationship, along with victim being helpless and murder being senseless, satisfied especially heinous or depraved circumstance); *State v. Styers*, 177 Ariz. 104, 115 (1993) (holding the same where defendant was child's full-time caregiver for several months before the murder and therefore had a special relationship with the child); *State v. Amaya-Ruiz*, 166 Ariz. 152, 178 (1990) (gratuitous violence); *State v. Beaty*, 158 Ariz. 232, 242 (1988) (individual definitions of especially heinous or depraved).

USE NOTES:

Effective August 26, 2019, this aggravating circumstance was renumbered to A.R.S. § 13-751(F)(4). This instruction shall be given only if the State alleges the (F)(4) circumstance. The jury should only be instructed on the theory or theories that the State is pursuing.

"Especially" means unusually great or significant. *See* MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1997), 396 (defining "especially"). All first-degree murders are to some extent heinous, cruel or depraved; therefore, to be especially cruel, heinous or depraved, a murder must be more heinous, cruel or depraved than usual. *State v. Smith*, 146 Ariz. 491, 503 (1985). In other words, the murder must have been committed in such a way as to, "set [the] Defendant's' acts apart from the norm of first degree murder." *State v. Brookover*, 124 Ariz. 38, 41 (1979).

The language of "a murder is especially cruel when there has been the infliction of pain and suffering in an especially wanton and insensitive or vindictive manner" as used in defining "especially cruel" in the *Anderson II* instruction was deemed "not require[d]" in *State v. Tucker*, 215 Ariz. 298, ¶ 29-33 (2007). *See also State v. Andriano*, 215 Ariz. 497 (2007) and *State v. Velazquez*, 216 Ariz. 300 (2007), both of which approved instructions without the bracketed language.

Especially Cruel

The language of "a murder is especially cruel when there has been the infliction of pain and suffering in an especially wanton and insensitive or vindictive manner" as used in defining "especially cruel" in the *Anderson II* instruction was deemed "not require[d]" in *State v. Tucker*, 215 Ariz. 298, ¶¶ 29–33 (2007). *See also State v. Andriano*, 215 Ariz. 497 (2007) and *State v. Velazquez*, 216 Ariz. 300 (2007) in which instructions were approved without the bracketed language; *State v. Cropper*, 223 Ariz. 522, ¶ 13 (2010) (citing *Tucker* and *Anderson II*, the Court noted that its "cases make clear that an (F)(6) instruction is sufficient if it requires the state to establish that the victim consciously experienced physical or mental pain and the defendant knew or should have known that the victim would suffer"); *State v. Snelling*, 225 Ariz. 182, 190, ¶ 39 (2010) (F(6) aggravator was not proved where there was no evidence that the victim "consciously suffered mental anguish or physical pain").

Gratuitous Violence

After considering the case law, the committee could not agree what the Arizona Supreme Court meant by "a fatal action had occurred," whether the victim was dead when the additional violence was inflicted, or whether a fatal injury had been inflicted before the additional violence was inflicted. The bracketed language sets forth the two views of the majority of the committee. The minority view was to use the supreme court's language of "a fatal action had occurred" in the instruction and that "the victim was dead" option should not be included in the instruction. The trial court will need to select the appropriate language based on the facts of the case and the court's interpretation of the case law.

In *State v. Wallace*, 219 Ariz. 1, ¶ 24 (2008), the Arizona Supreme court held that "a 'less violent alternative' instruction is not appropriate in gratuitous violence cases."

Relished the Murder

The language in the instruction is taken from *State v. Johnson*, 212 Ariz. 425 (2006), where the Arizona Supreme Court "commended" this instruction to the trial courts.

The defendant's statements about the murder made after the killing may be admissible to show that the defendant savored the murder at the time of the killing. *See State v. Hampton,* 213 Ariz. 167 (2006).

Witness Elimination

The Committee has not included "witness elimination" as a possible factor supporting the "especially heinous" or "especially depraved" finding. *See e.g.*, *State v. Barreras*, 181 Ariz. 516, 522 (1995) (discussing the 3-optioned test for "witness elimination"). For murders committed on or after August 12, 2005, witness elimination is a "stand alone" aggravating circumstance under A.R.S. § 13-751(F)(12). Therefore, also using it as a factor for the (F)(6) circumstance finding would result in impermissible double counting.

For murders committed before August 12, 2005, witness elimination may considered as a factor supporting the "especially heinous" or "especially depraved" finding. An example of an instruction regarding witness elimination when used in that context follows:

[In addition, you may consider whether the following circumstances were proven:

1. The murder was senseless; *and*
2. The victim was helpless; *and*
3. A motive for the killing was to eliminate a potential witness to another crime.

That the victim has been murdered does not always mean that there has been witness elimination. In determining whether this circumstance applies, you must find that the facts show one of the following:

1. The murder victim was a witness to some other crime, and was killed to prevent the murder victim from testifying about the other crime; *or*
2. The defendant made a statement that witness elimination was a motive for the murder; *or*
3. The extraordinary circumstances of the crime show that witness elimination was a motive.]

Senselessness and Helplessness

The Arizona Supreme Court has held that "senselessness" and "helplessness" may be considered in determining "especially heinous or depraved," but those findings, individually or together, are not enough to prove this prong, unless the State also proves at least one of the four factors listed in the instruction listed under the heading "Especially Heinous or Depraved." All murders are "senseless" because of their brutality and finality. Yet not all are senseless as the term is used to distinguish those first-degree murders that warrant a death sentence from those that do not. Rather, a "senseless" murder is one that is unnecessary to achieve the defendant's objective. "Helplessness" means that the victim is unable to resist. *See, e.g., State v. Schackart*, 190 Ariz. 238, 250 (1997) (defining "senseless" and discussing that ordinarily this finding, even when coupled with "helplessness," is insufficient to satisfy "heinous or depraved"); *State v. Miles*, 186 Ariz. 10, 18-19 (1996) (defining "helplessness").

Child Victim and Parental or Special Relationship

"Full-time" and "caregiver" are bracketed in this factor. In *State v. Styers*, 177 Ariz. 104 (1993), the defendant was the full-time caregiver for the victim for four months. The committee believed that the opinion was subject to different interpretations as to whether this factor is limited to a full-time caregiver or whether it could be applied also to another person who has an established relationship of trust with the child, but is not the child's full-time caregiver.

COMMENT: In *State v. Hampton*, *supra*, the Arizona Supreme Court noted that it "expressly approved" the instruction in *Anderson II*. The instruction given in *Anderson II* is as follows:

The terms "heinous" and "depraved" focus on the defendant's mental state and attitude at the time of the offense as reflected by his words and actions. A murder is especially heinous if it is hatefully or shockingly evil. A murder is depraved if marked by debasement, corruption, perversion or deterioration.

In order to find heinousness or depravity, you must find beyond a reasonable doubt that the defendant exhibited such a mental state at the time of the offense by doing at least one of the following acts:

One, relishing the murder. In order to relish a murder the defendant must show by his words or actions that he savored the murder. These words or actions must show debasement or perversion, and not merely that the defendant has a vile state of mind or callous attitude.

Statements suggesting indifference, as well as those reflecting the calculated plan to kill, satisfaction over the apparent success of the plan, extreme callousness, lack of remorse, or bragging after the murder are not enough unless there is evidence that the defendant actually relished the act of murder at or near the time of the killing.

Two, inflicted gratuitous violence on the victim clearly beyond that necessary to kill.

Three, needlessly mutilated the victim's body. In order to find this factor, it must be proven beyond a reasonable doubt that the defendant had a separate purpose beyond murder to mutilate the corpse.

The term "cruel" focuses on the victim's state of mind. Cruelty refers to the pain and suffering the victim experiences before death. A murder is especially cruel when there has been the infliction of pain and suffering in an especially wanton and insensitive or vindictive manner. The defendant must know or should have known that the victim would suffer.

A finding of cruelty requires conclusive evidence that the victim was conscious during the infliction of the violence and experienced significant uncertainty as to his or her ultimate fate. The passage of time is not determinative.

The committee's proposed instruction incorporates extensive case law regarding F(6) to encompass fact situations beyond those in *Anderson II*.

The Arizona Supreme Court in *State v. Tucker, supra*, approved the following instruction regarding cruelty:

> Concerning this aggravating circumstance, all first-degree murders are to some extent heinous, cruel or depraved. However, this aggravating circumstance cannot be found to exist unless the murder is *especially* heinous, cruel or depraved, that is, where the circumstances of the murder raise it above the
>
> norm of other first-degree murders. "Especially" means beyond the norm, standing above or apart from others.

> The terms "cruel", ["]heinous", or "depraved" are to be considered separately, but proof of any one of these factors is sufficient to establish this aggravating circumstance.
>
> Cruelty involves the infliction of physical pain and/or mental anguish on a victim before death. A crime is committed in an especially cruel manner when a defendant either intended or knew that the manner in which the crime is committed would cause the victim to experience physical pain and/or mental anguish before death. The victim must be conscious for at least some portion of the time when the pain and/or anguish was inflicted.

Some cases defining especially cruel have included the phrase "mental anguish" and others have included the phrase "mental distress." *See e.g., State v. Carriger*, 143 Ariz. 142, 160 (1984) (using "mental distress"); *State v. Murdaugh*, 209 Ariz. 19, 30 (2004) (using "mental anguish"). The instruction uses "pain" in place of "distress" or "anguish" because "pain" is neutral and permits counsel to argue both "distress" and "anguish." *See State v. Anderson (II)*, 210 Ariz. 327, 354, 360 n. 18 (2005) and *Carlson*, *supra* (using "pain").

"Extreme" as an adjective describing mental anguish or physical pain is not included in the "especially cruel" definition because in *State v. Andriano*, *supra*, ¶ 67, the Arizona Supreme Court held that it is not required. *See also State v. Hampton, supra.* In *State v. Ellison*, 213 Ariz. 116, ¶ 98 (2006), the trial judge defined "especially cruel" as "the infliction of either extreme physical pain or extreme mental anguish" upon the victim. In footnotes 17 and 19, the court noted that "extreme pain" or "extreme mental anguish" must be proved. *See Ellison, footnotes 17 and 19*. In other cases, however, the word "extreme" has not been used.

Regarding expanding the definition of "heinous or depraved," the court has noted that, "to do so on a case-by-case basis would institute a regime of *ad hoc* sentencing, destroying the definitional consistency that preserves the constitutional validity of our sentencing process. If we could expand the meaning of the (F)(6) factor's broad language to encompass the facts of each case on the basis of our intuitive conclusion as to the proper penalty, we would indeed have abandoned the struggle to provide a consistent narrowing definition and conceded that the factor is unconstitutionally vague." *Barreras*, 181 Ariz. at 523, 892 P.2d at 859 (internal citations omitted). However, the *Gretzler* factors, "are not absolutely exclusive," (citing *Milke*). Nevertheless, "they provide a consistent and rationally reviewable standard for the otherwise vague (F)(6) 'especially heinous cruel or depraved' factor, thus ensuring the continuing constitutionality of our death penalty statute and facilitating our independent review." 181 Ariz. at 521. Caution should be exercised in expanding the factors. *See State v. Hampton*, *supra*, at ¶ 2 (2006).

Capital Case 1.6(e) – Definition of "During the Commission of the Offense"

To establish that the Defendant committed one or more [murders] [homicides] "during the commission of the offense," the State must prove beyond a reasonable doubt [that the other [murder] [homicide] was] [those other [murders] [homicides] were] related to the first-degree murder at issue in time, space, and motivation.

SOURCE: A.R.S. § 13-751(F)(6) (statutory language as of august 27, 2019); A.R.S. § 13- 751(F)(8) (if the offense was committed before August 27, 2019); *see, e.g.*, *State v. Dann*, 206 Ariz. 371, 373 (2003) (requiring all 3

subfactors of time, space and motivation); *State v. Rogovich*, 188 Ariz. 38, 45 (1997); *State v. Lavers*, 168 Ariz. 376, 393 (1991).

Capital Case 1.6(f) – Definition for "Cold, Calculated Manner Without Pretense of Moral or Legal Justification" (for offenses occurring before August 27, 2019)

To establish that the murder was committed in a "cold, calculated manner without pretense of moral or legal justification," the State must prove more than premeditation. The State must prove beyond a reasonable doubt that the Defendant exhibited a cold-blooded intent to kill that is more contemplative, more methodical, and more controlled than what is necessary to prove premeditated first-degree murder. In other words, it requires a heightened degree of premeditation.

"Cold" means the murder was the product of calm and cool reflection. "Calculated" means having a careful plan or prearranged design to commit murder. A "pretense of moral or legal justification" is any claim of excuse or justification that, though insufficient to reduce the degree of murder, nevertheless rebuts the otherwise cold, calculated nature of the murder.

This aggravating circumstance focuses on the Defendant's state of mind at the time of the offense, as reflected by the Defendant's words and acts. To determine whether a murder was committed in a cold, calculated manner without pretense of moral or legal justification, you must find that the State proved beyond a reasonable doubt that the Defendant:

1. had a careful plan or prearranged design to commit murder before the fatal incident; and
2. exhibited a cool and calm reflection for a substantial period of time before killing; and
3. had no pretense of moral or legal justification or excuse.

SOURCE: A.R.S. § 13-751(F)(13); based on State of Florida jury instruction 7.11 PENALTY PROCEEDINGS – CAPITAL CASES; *Jackson v. State*, 648 So.2d 85, 88-89 (Fla. 1994). The Arizona Supreme Court affirmed the use of the RAJI instruction for this circumstance in *State v. Hausner,* 230 Ariz. 60 (2012).

USE NOTE: Effective August 26, 2019, this aggravating circumstance was repealed and does not apply for offenses committed on or after that date. If the jury considering this aggravator was not the jury that determined guilt, the court should include the definition of "premeditation." *See* Statutory Instruction 11.05.

Capital Case Verdict Form: Aggravating Circumstances

ARIZONA SUPERIOR COURT

_____ COUNTY

THE STATE OF ARIZONA, **PLAINTIFF,** **vs.** **JOHN DOE,** **DEFENDANT.**	**Case No. _____**

Every member of the jury agrees that the following aggravating circumstance[s] [has][have] been proven beyond a reasonable doubt or not proven (check only one space for each alleged aggravating circumstance):

1. [name aggravating circumstance, e.g. The Defendant was previously convicted of a serious offense, either preparatory or completed.]

   __ Proven beyond a reasonable doubt

   __ Not proven

2. [name aggravating circumstance]

   ____ Proven beyond a reasonable doubt

   ____ Not proven

_____
FOREPERSON

SOURCE: A.R.S. §§ 13-751(F), -752(E).

USE NOTES:

The verdict form should include only the aggravating circumstances that the State has alleged.

If the State has alleged the (F)(6) aggravating circumstance and that the crime was *both* especially cruel *and* especially heinous or depraved, the following language should be used:

The Defendant committed the murder in an especially cruel, heinous or depraved manner

____ Proven beyond a reasonable doubt

____ Not proven

Number of jurors who find that the murder was especially cruel _____

Number of jurors who find that the murder was especially heinous or depraved _____

(All of you must agree that the murder was *either* especially cruel *or* especially heinous or depraved, but you do not have to all agree that the murder was both especially cruel and especially heinous or depraved).

Determining how many jurors found each prong is important because if a reviewing court determines that one of the prongs is not supported by the evidence, the aggravator will be struck unless the jurors are unanimous on the other prong.

Some Committee members believe that jurors must be unanimous on at least one of the (F)(6) prongs. They recommend that the instruction include the following language:

The Defendant committed the murder in an especially cruel manner

____ Proven beyond a reasonable doubt

____ Not proven

The Defendant committed the murder in an especially heinous or depraved manner

____ Proven beyond a reasonable doubt

____ Not proven

The especially cruel finding is separate from the especially heinous or depraved finding because cruelty has been defined, analyzed and reviewed separately from heinousness or depravity. *See, e.g.*, *State v. Medina*, 193 Ariz. 504, 513 (1999); *State v. Beaty*, 158 Ariz. 232, 242 (1988).

If aggravation findings apply to more than one victim, separate verdict forms should be used for each victim.

Regarding hung juries at the aggravation phase, the proper procedure is specified in A.R.S. § 13-703.01(J): "[I]f . . . the jury is unable to reach a verdict on any of the alleged aggravating circumstances and the jury has not found that at least one of the alleged aggravating circumstances has been proven, the court shall dismiss the jury and shall impanel a new jury. The new jury shall not retry the issue of the defendant's guilt or the issue regarding any of the aggravating circumstances that the first jury found not proved by unanimous verdict. If the new jury is unable to reach a unanimous verdict, the court shall impose a sentence of life or natural life on the defendant."

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PENALTY PHASE

Capital Case 2.1 – Nature of Hearing and Duties of Jury

You will now decide whether to sentence [the Defendant] [insert the Defendant's name] to life in prison or to death. Your decision is not a recommendation regarding the sentence. It is the final decision, and the Defendant will be sentenced as you decide.

As with other parts of trial, I may make evidentiary rulings. When I make rulings, I do not intend to express my personal views. If I have shown any personal views, you must ignore them.

I will now give you instructions that apply to this part of the trial. You must follow all of my instructions. Every instruction I give you is important.

SOURCE: A.R.S. § 13-752.

Capital Case 2.2 – Order of This Phase

This part of the trial will proceed as follows:

The Defense may make an opening statement. The State may then make an opening statement or may wait until the close of the Defense case. Again, what the Defense and the State say in opening statements is not evidence.

Family members of the victim [and/or a victim representative] may make a statement relating to the victim's personal characteristics and uniqueness and how the murder affected the victim's family.

The Defense may offer mitigation evidence.

[The State may offer mitigation evidence.]

The State may offer evidence to show that the Defendant should not be shown leniency, even if the Defendant does not present mitigation evidence. You may not consider this evidence as a new aggravating circumstance.

The Defense may offer evidence in response to the State's evidence.

The Defendant may make a statement, but [he][she] is not required to do so. If the Defendant does not make a statement, you cannot hold this against [him][her].

I will then give you the final instructions on the law.

The parties will present final arguments. The Defense may make an opening and a closing argument.

You will then deliberate on the sentence. Once you agree on a verdict, you will return to court where the verdict will be read with the parties present.

SOURCE: A.R.S. §§ 13-751(C), -752(G); Preliminary Criminal Instructions 3, 5, 6 and 7 and Standard Criminal Instructions 3 and 4 (non-capital) (2005).

USE NOTE: Before the instructions are given, the parties should indicate if they intend to follow this procedure. If they agree to a different procedure, the instructions should be modified accordingly.

Capital Case 2.3 – Evidence

Both the Defendant and the State can present evidence during this part of the trial. As the fact-finder, you must consider all the evidence, no matter which side presented it.

"Evidence" includes all witness testimony, unless I have told you not to consider it. It also includes all the exhibits that I have admitted as evidence. You may be able to take the exhibits into the jury room with you later. You must consider testimony and exhibits from all parts of the trial.

You, the Jury, decide how much of a witness's testimony you want to accept and the weight you want to give it. You may consider:

- How well the witness was able to observe the event,
- How well the witness remembers the event,
- How the witness acted while testifying,
- If the witness might have any interest, bias, or prejudice,
- How reasonable the testimony of the witness is compared to the other evidence, and
- Any other factors that help you decide whether you should believe the testimony.

The lawyers may object (make an objection) to evidence. I will decide whether to overrule it (reject the objection) or sustain it (grant the objection).

- If I overrule an objection, you may consider the testimony or exhibit.
- If I sustain an objection to testimony, do not consider the question or answer or guess what the answer might have been.
- If I sustain an objection to an exhibit, do not consider the exhibit.

I may also allow testimony or an exhibit for only a specific purpose. You must only use it for that purpose.

The lawyers may also stipulate that certain facts exist. This means both sides agree on those facts. You should treat stipulated facts like any other evidence:

- You can accept all of the stipulated facts; or
- You can accept some of the stipulated facts; or
- You can reject all of the stipulated facts.

With respect to exhibits, you may only consider those that I admit as evidence.

What the lawyers say to you about the facts is "argument." Argument can help you understand the evidence and apply the law. But the lawyers' arguments are not evidence.

SOURCE: A.R.S. §§ 13-751(C), -752(G); Preliminary Criminal Instructions 3, 5, 6 and 7 and Standard Criminal Instructions 3 and 4 (non-capital) (2005).

Capital Case 2.4 – Mitigation

A Defendant may not be sentenced to death unless you decide there are no reasons (mitigating circumstances) strong enough—either individually or collectively—to sentence he Defendant to life in prison instead of death.

"Mitigating circumstances" are circumstances that may make a life sentence a more appropriate punishment than the death penalty in this case, as long as the facts underlying the circumstance relate to:

- the Defendant's character,
- the Defendant's personal background,
- the Defendant's behavior or behavioral tendencies,
- the Defendant's history or record, or
- the details of the crime.

The mitigating circumstances are not being presented to you as excuses for the crime. They are factors that in fairness or mercy may reduce the Defendant's moral culpability/blameworthiness [. That is, they are possible reasons for you to decide that the appropriate punishment for the crime is life in prison rather than the death penalty.

Mitigating circumstances can be connected to the crime, but they do not need to be. You may consider how any connection or lack of connection to the crime affects the weight you give to the mitigating circumstances.

[A few examples of potential mitigating circumstances are:]

- [the history of the Defendant's life before the crime, OR]
- [significant impairments of any type, OR]
- [pressure from some other person to commit the crime ("duress"), OR]
- [a smaller role in the crime, OR]
- [not intending that the victim would die, OR]
- [the Defendant's age or maturity level, OR]
- [the Defendant's behavior after the crime.]

[Remember these are just examples.]

You can find mitigating circumstances from the evidence you will hear in this part of the trial and from any of the evidence you have heard so far.

[The Defendant has to show the existence of facts underlying a mitigating circumstance by a "preponderance of evidence." This is a much lower level of proof than "beyond a reasonable doubt." A preponderance of evidence means that it is more likely than not that the mitigating circumstance exists.] [The Defendant has to show that it is more likely than not that the facts in support of a mitigating circumstance exist.]

SOURCE: A.R.S. § 13-751(G); *State v. Pandeli*, 215 Ariz. 514, 526, ¶¶ 31-33 (2007) (the defendant need not prove that the mitigating circumstances were the direct cause of the offense); *Smith v. Texas,* 543 U.S. 37, 43-44 (2004); *Tennard v. Dretke,* 542 U.S. 274, 284-87 (2004); *McCleskey v. Kemp*, 481 U.S. 279, 305-06 (1987); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (holding that capital sentencers must be allowed to consider, "as a mitigating factor, any aspect of a defendant's character or record and circumstances of the

offense that the defendant proffers as a basis for a sentence less than death") (emphasis deleted); *Coker v. Georgia*, 433 U.S. 584, 590-91 (1977) (defining mitigating circumstances as circumstances that do not justify or *excuse* the offense, "but which, in fairness or mercy, may be considered as extenuating or reducing the degree of moral culpability").

Capital Case 2.5 – Mitigation Assessment and the Sentence Burden of Proof

You must each decide whether a particular mitigating circumstance was proven. This is an individual decision and is different than deliberations in previous parts of the trial. You do not need to unanimously agree on whether a particular mitigating circumstance was proven or on the value of the circumstance.

You are not limited to the mitigating circumstances offered by the Defendant. You must also consider any other information, including information presented by the State, that you find relevant in determining whether to impose a life sentence, as long as it relates to the Defendant's background, character, propensities, history or record, or the circumstances of the offense. The State may present evidence that demonstrates that the Defendant should not be shown leniency. The State may do so even if the Defendant does not present mitigation evidence.

You must individually determine if the totality of the mitigation is sufficiently substantial to call for leniency in light of the aggravating circumstance[s]. "Sufficiently substantial to call for leniency" means that the mitigating circumstance[s] are of such quality or value that [it is][they are] adequate, in the opinion of an individual juror, to vote for a sentence of life in prison.

Even if you believe that the aggravating and mitigating circumstances are of the same quality or value, you are not required to vote for a sentence of death. You may instead vote for a sentence of life in prison. You may find mitigation and vote for a life sentence even if the Defendant does not present any mitigation evidence.

You do not have to agree on mitigating circumstances. A mitigating circumstance that motivates one juror to vote for a sentence of life in prison may be evaluated by another juror as not having been proved or, if proved, as not significant to the determination of the appropriate penalty. In other words, each of you must individually determine whether the mitigation is of such quality or value that it warrants leniency in this case.

There is no presumption in favor of either a life or death sentence. The Defendant does not have the burden of proving that life is the appropriate sentence. The State does not have the burden of proving that death is the appropriate sentence. It is for you, as jurors, to decide what you individually believe is the appropriate sentence.

You must individually decide whether the mitigation is sufficiently substantial to call for leniency. This is not a mathematical process. You must individually evaluate the facts and circumstances of the case, the severity of the aggravating circumstances, and the quality or value of the mitigating circumstances you individually found.

[The State may rely upon a single fact to establish more than one aggravating circumstance. But if a single fact contributed to proving two or more aggravating circumstances beyond a reasonable doubt, you are to weigh that fact only once.]

If you unanimously agree there is mitigation sufficiently substantial to call for leniency, you must return a verdict of life. If you unanimously agree there is no mitigation, or the mitigation is not sufficiently substantial to call for leniency, you must return a verdict of death. Your foreperson must sign the verdict form indicating your decision. If you cannot unanimously agree on a life or a death sentence, have your foreperson tell me.

Your decision on a life or a death sentence is not a recommendation. Your decision is final.

USE NOTE: Bracketed portion to be used only if the State has alleged two aggravators based on one fact or event.

SOURCE: A.R.S. §§ 13-751(C), (E), -752(G); *see State ex rel. Thomas v. Granville (Baldwin)*, 211 Ariz. 468, 471-73, ¶¶ 12 & n.3, 18, 21 (2005) (holding that: (1) A.R.S. § 13-703(E) does not create a "presumption of death," and that, "a jury may return a verdict of life in prison even if the defendant decides to present no mitigation evidence at all"; (2) "Even if a juror believes that the aggravating and mitigating factors are equally balanced, A.R.S. § 13- 751(E) does not require the juror to impose the death penalty. Rather, each juror may vote for a sentence of death – or against it – as each sees fit in light of the aggravating factors found by the jury and the mitigating evidence found by each juror. The finding of an aggravating factor simply renders the defendant eligible for the death penalty; it does not require that he receive it."; (3) The phrase "sufficiently substantial to call for leniency" means that "the mitigation must be of such quality or value that it is adequate, in the opinion of an individual juror, to persuade that juror to vote for a sentence of life in prison"; (4) "[T]he determination whether mitigation is sufficiently substantial to warrant leniency . . . is a sentencing decision to be made by each juror based upon the juror's assessment of the quality and significance of the mitigating evidence that the juror has found to exist. [A] juror may not vote to impose the death penalty unless he or she finds, in the juror's individual opinion, that 'there are no mitigating circumstances sufficiently substantial to call for leniency.' A.R.S. § 13-751(E). In other words, each juror must determine whether, in that juror's individual assessment, the mitigation is of such quality or value that it warrants leniency."); *See also State v. Scott*, 177 Ariz. 131, 144 (1993) (holding that if one fact is used to establish two aggravating circumstances, that fact may not be considered twice when assessing aggravating and mitigating circumstances); *State* v. *Carlson*, 237 Ariz. 381, n. 6 (2015) (noting that use of the term "compared against" in might confuse or mislead jurors. "Terms such as 'balance,' 'outweigh,' and 'compare' should not be used."); *State* v. *Gomez*, 231 Ariz. 219, 227, ¶ 41 (2012) (noting that "We consider the quality and the strength, not simply the number, of aggravating and mitigating factors.").

Capital Case 2.6 – Victim Impact Information

Family members of the victim [and/or a victim representative] may make a statement or presentation relating to the victim's personal characteristics and uniqueness and how the murder affected the victim's family. What the victims present is not an aggravating circumstance. Do not consider this to be an additional aggravating circumstance.

SOURCE: *State v. Tucker*, 215 Ariz. 298, ¶ 92 (2007); *State v. Ellison*, 213 Ariz. 116, 140 (2006).

Capital Case 2.7 – Jury Not to Consider Financial Cost of Penalty

Do not consider the financial cost of any possible punishment when deciding whether to sentence the Defendant to life in prison or death.

SOURCE: *State v. Clabourne*, 194 Ariz. 379, 388, ¶ 40 (1999).

Capital Case 2.8 – Intellectual Disability

You cannot sentence a person who has an intellectual disability to death.

Under Arizona law, "Intellectual disability" means:

1. A full-scale IQ of 70 or below, accounting for the test's margin of error;
2. Significant impairment in adaptive behavior; and
3. Both conditions existed before age 18.

"Adaptive behavior" means the degree to which the Defendant meets the standards of personal independence and social responsibility expected of the Defendant's age and cultural group.

It is the Defendant's burden to prove by a preponderance of the evidence that [he][she] has an intellectual disability. The Defendant need not prove [his][her] intellectual disability beyond a reasonable doubt but must convince you that it is more probably true than not true that [he][she] has the condition. To prove this, the Defendant may rely on any evidence presented by either party at any part of the trial.

If all of you are convinced by the evidence that it is more probably true than not true that the Defendant has an intellectual disability under the law, then you must vote for a life sentence.

If each of you individually do not find the Defendant meets all the criteria under the law for an intellectual disability, you may still consider this evidence as mitigation.

SOURCE: A.R.S. § 13-753; *State v. Escalante-Orozco*, 241 Ariz. 254, 286-88, ¶¶ 128-39 (2017) (holding that the trial court did not err by instructing the jury that it must impose a life sentence if it found by a preponderance of the evidence that the defendant was intellectually disabled).

USE NOTES: The Supreme Court has held that "adjudications of intellectual disability should be 'informed by the views of medical experts'" and that "[t]hat instruction cannot sensibly be read to give courts leave to diminish the force of the medical community's consensus." *Moore v. Texas (Moore I)*, 581 U.S. 1, 5 (2017) (quoting *Hall v. Florida*, 572 U.S. 701, 710 (2014)). The American Association on Intellectual and Developmental Disabilities (AAIDD) currently defines intellectual disability as a condition "characterized by significant limitations both in intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills" that "originates before the age of 22." American Association on Intellectual and Developmental Disabilities, Intellectual Disability: Definition, Diagnosis, Classification, and Systems of Support (12th ed.) at 1.

The American Psychiatric Association defines adaptive functioning as "how well a person meets community standards of personal independence and social responsibility, in comparison to others of similar age and sociocultural background." Diagnostic and Statistical Manual-5-TR (DSM-5-TR) at 42. The APA focuses solely on weaknesses in adaptive functioning, explaining that deficits in such functioning exist "when at least one domain of adaptive functioning—conceptual, social, or practical—is sufficiently impaired that ongoing support is needed in order for the person to perform adequately across multiple environments, such as home, school, work, and community." *Id.*

The Arizona statute implicitly includes both weaknesses and strengths in making this assessment, defining adaptive behavior as "the effectiveness or degree to which the defendant meets the standards of personal independence and social responsibility expected of the defendant's age and cultural group." A.R.S. §13-753(K)(1). The Arizona Supreme Court has affirmed the use of the statutory/non-clinical definition of

adaptive behavior deficits requiring an "'overall assessment of the defendant's ability to meet society's expectations of him,'" including "holistically considering the strengths *and* weakness in each of the life-skill categories (conceptual, social, and practical)." *State ex rel. Montgomery v. Kemp*, 249 Ariz. 320, 323, 325 ¶¶ 9, 20 (2020) (emphasis in original); *see also State v. Escalante-Orozco*, 241 Ariz. 254, 267 ¶ 16 (2017) (state law definition "differs from a clinical definition").

Arizona also requires that a defendant prove that his or her adaptive deficits and significantly subaverage intellectual functioning onset "before the defendant reached the age of eighteen." A.R.S. §13-753(K)(3). The APA definition of intellectual disability, in contrast, has changed to now require that the disability onset "during the developmental period," DSM-5-TR at 38, identified as by age 22 by the AAIDD. American Association on Intellectual and Developmental Disabilities, Intellectual Disability: Definition, Diagnosis, Classification, and Systems of Support (12th ed.) at 1.

There is an open question whether changes in the medical community's definition of intellectual disability call into question the continued viability of A.R.S. §13-753. *See Moore*, 581 U.S. at 6 (noting that, where a state considers factors that are "[n]ot aligned with the medical community's information," there is "an unacceptable risk that persons with intellectual disability will be executed." *Id.* at 6 (quoting *Hall*, 572 U.S. at 704); *see also Moore*, 581 U.S. at 5 (the introduction of nonclinical factors when determining whether an individual is intellectually disabled "diminishes the force of the medical community's consensus" about who qualifies as intellectually disabled). Thus, there is an open question whether jurors should be instructed on clinical definitions of intellectual disability.

Capital Case 2.9 – Duty to Consult with One Another

You must discuss the case with each other and deliberate to try to reach a verdict. You must each decide the case for yourself, but only after you consider the evidence with your fellow jurors. During your deliberations, you must be willing to re-examine your own views and reconsider your opinions. But do not change your honest beliefs about the evidence just to return a verdict.

SOURCE: Washington Pattern Jury Instructions, 2nd ed. 31.04 (modified).

USE NOTE: In *State v. Andriano*, 215 Ariz. 497, ¶¶ 59-60 (2007), an instruction based on Rule 22.4, Arizona Rules of Criminal Procedure, that included a "duty to deliberate" was given as an impasse instruction. The Arizona Supreme Court approved using the instruction in that context.

ARIZONA SUPERIOR COURT
_____ COUNTY

THE STATE OF ARIZONA, **PLAINTIFF,** **vs.** **JOHN DOE,** **DEFENDANT.**	**Case No.** _____ **VERDICT**

Check off only one of these options.

[ ] Every member of the Jury agrees that the Defendant has intellectual disability.

[ ] The members of the Jury do not all agree that the Defendant has intellectual disability.

_____
FOREPERSON

OPTIONAL STATUTORY MITIGATION AND COMMONLY PROFFERED MITIGATING CIRCUMSTANCES INSTRUCTIONS

These instructions are presented to aid the court if counsel requests an instruction on a specific statutory mitigating circumstance or on other commonly proffered mitigating circumstances. *See* A.R.S. § 13-751(G)(1)–(5). If the court gives one or more of these instructions, the court should also instruct the jurors that these are not exclusive mitigating circumstances, and that each juror may consider any mitigating circumstance that the juror considers relevant in deciding the appropriate sentence.

Capital Case 3.1 – Mitigation Evidence

The evidence you must consider in determining mitigation includes any aspect of the Defendant's character, propensities, history or record, and any of the circumstances of the offense that might justify a penalty less severe than death. [Mitigating circumstances may include but are NOT limited to the following:]

[1. significant impairment]

[2. unusual and substantial duress]

[3. relatively minor participation]

[4. death not reasonably foreseeable]

[5. the Defendant's age or maturity level]

[6. the history of the Defendant's life before the crime]

[7. the Defendant's behavior after the crime.]

You may consider any mitigation evidence in deciding what sentence is appropriate. This includes any variation of the mitigating circumstances I specifically define in these instructions. You are not limited to considering these mitigating circumstances.

The Defendant must prove the facts underlying mitigating circumstances by a preponderance of evidence.

It is up to you to decide the value of any single mitigating circumstance. It is also up to you to decide whether a mitigating circumstance is sufficiently substantial, individually or together with other mitigating circumstances, to call for leniency.

SOURCE: A.R.S. § 13-751(G) (statutory language as of August 12, 2005).

Capital Case 3.2 – Significant Impairment

A Defendant is "significantly impaired" if:

- [he][she] suffered from [mental illness] [personality disorder] [character disorder] [substance abuse] [alcohol abuse] at or near the time of the crime, and
- that [mental illness] [personality disorder] [character disorder] [substance abuse] [alcohol abuse] substantially reduced the Defendant's ability to appreciate the wrongfulness of the conduct or conform [his][her] conduct to the requirements of the law.

Significant impairment does not have to be an impairment that is a defense to the murder.

SOURCE: A.R.S. § 13-751(G)(1) (statutory language as of August 1, 2002); *State v. Gallegos*, 178 Ariz. 1, 17-19 (1994) (substance/alcohol abuse); *State v. McMurtrey I*, 136 Ariz. 93, 101-02 (1983) (character/personality disorder).

Capital Case 3.3 – Duress

"Duress" is a mitigating circumstance. A Defendant acts under duress if someone pressured or threatened the Defendant, or some other person, to make the Defendant do something against [his][her] free will. Duress may be mitigating even if it is not a defense to the offense.

SOURCE: A.R.S. § 13-751(G)(2) (statutory language as of August 12, 2002).

Capital Case 3.4 – Relatively Minor Participation

A Defendant's "relatively minor" participation is a mitigating circumstance. You may consider that the Defendant's involvement was relatively minor, although not so minor as to constitute a defense to the murder.

SOURCE: A.R.S. § 13-751(G)(3) (statutory language as of August 1, 2002); A.R.S. § 13- 303(A) (statutory language as of April 23, 1980).

USE NOTES: Although similar to the felony murder/*Enmund*/*Tison* instruction, this instruction is to be given when the case involves accomplices to premeditated murder, or accomplices to the underlying offense for a felony murder charge.

Regarding the bracketed portions in the paragraph describing "relatively minor," use "homicide" if the defendant was an accomplice to premeditated murder. Use the name of the underlying felony offense if the defendant was charged with felony murder.

Use bracketed portions regarding legal accountability as appropriate. If the portion regarding "accomplice" applies, the instruction, defining "accomplice," must also be given.

For the definition of "intending," see A.R.S. § 13-105.

Capital Case 3.5 – Death Not Reasonably Foreseeable

It is a mitigating circumstance that the Defendant could not have reasonably known that [his][her] conduct at the time of the offense would either:

1. cause the death of the victim; or
2. create a serious risk of causing the death of the victim

SOURCE: A.R.S.)§ 13-751(G)(4) (statutory language as of August 1, 2002); State v. Bolton, 182 Ariz. 290, 214 (1995).

USE NOTE: For the definitions of "known," see A.R.S. § 13-105.

Capital Case 3.6 – Age or Immaturity

The Defendant's age may be a mitigating circumstance. Age is not limited to just how young or old the Defendant is. You may also consider the Defendant's level of intelligence, maturity, potential to be manipulated or coerced by others, or past experience.

SOURCE: A.R.S. § 13-751(G)(5) (statutory language as of August 1, 2002); *State v. Poyson*, 198 Ariz. 70, 81 ¶¶ 36-39 (2000) (age of nineteen and "low average" intelligence sufficient to prove mitigation); *State v. Trostle*, 191 Ariz. 4, 21 (1997) (age of 20 sufficient to prove mitigation where defendant was "immature and easily influenced" and was a "follower, easily manipulated and pushed to do what others with stronger willpower wanted him to do"); *State v. Jackson*, 186 Ariz. 20, 31 (1996) ("In addition to youth, we consider defendant's level of intelligence, maturity, involvement in the crime, and past experience."); *Roper v. Simmons*, 543 U.S. 551, 574 ("[T]he death penalty cannot be imposed upon juvenile offenders[.]").

COMMENT: The "age" mitigating circumstance is not limited to youthful/minor offenders. It may also be considered as mitigation for elderly defendants. *State v. Nash*, 143 Ariz. 392, 406 (1985).

Capital Case 3.7 – History of the Defendant's Life Before the Crime

[You may find it to be a mitigating circumstance that:

- [The Defendant grew up in a home with abuse, or neglect, or poverty, or]
- [The Defendant had a difficult childhood, such as losing parents or being in foster care, or]
- [The Defendant had no prior criminal record or no prior history of violence, or]
- [The Defendant behaved well during prior prison terms, or]
- [The Defendant showed signs of being a good person in other parts of [his][her] life, such as by helping others or by being a good family member.]

These are just examples. You may consider any facts about the Defendant's history as a mitigating circumstance, as long as they are relevant to why the death penalty may not be appropriate in this case.]

Capital Case 3.8 — Defendant's Behavior After the Crime

[You may find it to be a mitigating circumstance that:

- [The Defendant expressed remorse for the crime, or]
- [The Defendant assisted law enforcement in investigating the crime, or]
- [The Defendant cooperated in the prosecution of other people involved in the crime, or]
- [The Defendant has taken actions to make amends for the crime, or]
- [The Defendant has behaved well since being in custody for this crime.]

These are just examples. You may consider any facts about the Defendant's behavior after the crime as a mitigating circumstance, as long as they are relevant to why the death penalty may not be appropriate in this case.]

Capital Case Verdict Form 2

ARIZONA SUPERIOR COURT

_____ COUNTY

THE STATE OF ARIZONA, PLAINTIFF,	**Case No._____**
vs.	**VERDICT**
JOHN DOE, DEFENDANT.	

Every member of the Jury, having considered all the facts and circumstances of this case, sentence the Defendant to:

[ ] "LIFE" [imprisonment without the possibility of release] [imprisonment with or without the possibility of release]

[ ] "DEATH"

_____

FOREPERSON

SOURCE: Washington Pattern Jury Instructions-Criminal 2nd ed. (1994) 34.09.

USE NOTE: Regarding hung juries at the penalty phase, the proper procedure is specified in A.R.S. § 13-752(K): "[I]f . . . the jury is unable to reach a verdict, the court shall dismiss the jury and shall impanel a new jury. The new jury shall not retry the issue of the defendant's guilt or the issue regarding any of the aggravating circumstances that the first jury found by unanimous verdict to be proved or not proved. If the new jury is unable to reach a unanimous verdict, the court shall impose a sentence of life or natural life on the defendant."