CHAPTER 12

12.01 – Endangerment

The crime of endangerment requires proof of the following:

1. The defendant disregarded a substantial risk that [his/her] conduct would cause [imminent death/physical injury], *and*
2. The defendant's conduct did in fact create a substantial risk of [imminent death/physical injury].

SOURCE: A.R.S. § 13-1201 (statutory language as of October 1, 1978).

USE NOTE: The court shall instruct on the culpable mental state.

"Recklessly" and "Physical Injury" are defined in A.R.S. § 13-105.

If an issue is whether there was a substantial risk of imminent death, a special form of verdict should be used. *State v. Carpenter*, 141 Ariz. 29 (App. 1984).

The victim must be placed in actual substantial risk of imminent death in order for a defendant to be found guilty of endangerment involving the substantial risk of imminent death. *State v. Doss*, 192 Ariz. 408 (App. 1998).

12.02 – Threatening or Intimidating

The crime of threatening or intimidating requires proof that the defendant threatened or intimidated by word or conduct:

1. to cause physical injury to another person; *or*
2. to cause serious damage to the property of another person; *or*
3. to cause, or in reckless disregard to causing, serious public inconvenience including, but not limited to, evacuation of a building, place of assembly, or transportation facility; *or*
4. to cause physical injury to another person or damage to the property of another person in order to promote, further or assist, in the interests of or to cause, induce or solicit, another person to participate in a criminal street gang, a criminal syndicate, or a racketeering enterprise.

SOURCE: A.R.S. § 13-1202 (statutory language as of April 19, 1994).

USE NOTE: "Physical Injury" is defined in A.R.S. § 13-105.

A special verdict form should be used to determine which subsection applies.

The State must prove that a reasonable person would foresee that the words would be taken as a serious expression of intent to inflict bodily harm; the State does not have to show that the defendant had the ability to carry out the threat or that the defendant had the intent to carry out the threat. *In re Kyle M.*, 200 Ariz. 447 (App. 2001).

The State does not have to show that the victim was in fact in fear; the subjective fear of the victim is not necessary for the defendant to be guilty of threatening or intimidating. *In re Ryan A.*, 202 Ariz. 19 (App. 2002).

The felony offense of threatening and intimidating may also include the lesser misdemeanor offense of threatening and intimidating. *State v. Corona*, 188 Ariz. 85 (App. 1997).

12.03 – Assault

The crime of assault requires the proof that the defendant:

1. [Intentionally/knowingly/recklessly] caused a physical injury to another person; *or*
2. Intentionally put another person in reasonable apprehension of imminent physical injury; *or*
3. Knowingly touched another person with the intent to injure, insult, or provoke that person.

SOURCE: A.R.S. § 13-1203 (statutory language as of October 1, 1978).

USE NOTE: The court shall instruct on the culpable mental state.

"Intentionally," "knowingly," "recklessly," and "physical injury" are defined in A.R.S. § 13-105.

"Knowingly touching" does not require a direct, person-to-person physical contact. Instead, it is sufficient if the defendant sets in motion a force, process, or some substance that produces some sort of contact with the victim. *In re P.D.*, 216 Ariz. 336 (App. 2007), *State v. Matthews*, 130 Ariz. 46 (App. 1981).

A special verdict form should be used to determine which subsection applies.

12.04 – Aggravated Assault – General

The crime of aggravated assault requires proof of the following:

1. The defendant committed an assault, *and*
2. The assault was aggravated by at least one of the following factors:
   - The defendant caused serious physical injury to another person; *or*
   - The defendant used a deadly weapon or dangerous instrument; *or*
   - The defendant committed the assault after entering the private home of another with the intent to commit the assault; *or*
   - The defendant was eighteen years of age or older and the person assaulted was fifteen years of age or under; *or*
   - The defendant knew or had reason to know that the person assaulted was a peace officer; *or*

- The defendant knew or had reason to know that the person assaulted was someone summoned and directed by a peace officer; *or*
- The defendant knew or had reason to know that the person assaulted was a [code enforcement officer] [state park ranger] [municipal park ranger] [constable] [firefighter] [fire investigator] [fire inspector] [emergency medical technician] [paramedic] [prosecutor] [public defender] [judicial officer] [while engaged in the execution of any official duties] [if the assault results from the execution of his/her official duties]; *or*
- The defendant knew or had reason to know that the person assaulted was someone summoned and directed by a [code enforcement officer] [state park ranger] [municipal park ranger] [constable] [firefighter] [fire investigator] [fire inspector] [emergency medical technician] [paramedic] performing any official duties; *or*
- The defendant committed the assault while the person assaulted was bound or otherwise physically restrained; *or*
- The defendant committed the assault while the assaulted person's ability to resist was substantially impaired; *or*
- The defendant knew or had reason to know that the victim was a health care provider or a person summoned and directed by such person performing professional duties; *or*
- The assault was committed by any means of force that caused temporary but substantial disfigurement, temporary but substantial loss or impairment of any body organ or part, or a fracture of any body part; *or*
- The defendant was in violation of an order of protection issued against him or her pursuant to A.R.S. § 13-3602 or 13-3624.

SOURCE: A.R.S. § 13-1204 (statutory language as of August 9, 2017).

USE NOTE: The court shall instruct on the culpable mental state.

"Intentionally" is defined in A.R.S. § 13-105 (Statutory Definitional Instruction 1.0510(a)).

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

"Recklessly" is defined in A.R.S. § 13-105 (Statutory Definitional Instruction 1.0510(c)).

"Code enforcement officer" is defined in A.R.S. § 39-123.

"Dangerous instrument" is defined in A.R.S. §13-105 (Statutory Definitional Instruction 1.0512).

"Deadly weapon" is defined in A.R.S. § 13-105 (Statutory Definitional Instruction 1.0515).

"Physical injury" is defined in A.R.S. § 13-105 (Statutory Definitional Instruction 1.0533).

"Public defender" is not defined in A.R.S § 13-1204. In a separate context, A.R.S. § 13-2401 defines "public defender" as a federal public defender, county public defender, county legal defender or county contract indigent defense counsel and includes an assistant or deputy federal public defender, county public defender or county legal defender.

"Serious physical injury" is defined in A.R.S. §13-105 (Statutory Definitional Instruction 1.0539).

a. The court shall also instruct on assault (Statutory Criminal Instruction 12.03).

b. A special verdict form should be used to determine which subsection applies.

c. If assault is aggravated by a deadly weapon, dangerous instrument, or serious physical injury, a special verdict form should be used if the victim is under 15 years of age.

d. If assault is aggravated by a deadly weapon, dangerous instrument, serious physical injury, or if the means of force used caused a temporary but substantial disfigurement, temporary but substantial loss or impairment of any body organ of part, or a fracture of any body part, a special verdict form should be used if the victim is a peace officer.

e. If the person who commits the assault is seriously mentally ill, as defined in A.R.S. § 36-550, or is inflicted with Alzheimer's disease or related dementia, the specific provisions relating to aggravated assaults on licensed health care providers do not apply [13-1204(A)(10)].

f. When the offense is alleged to have arisen in violation of an order of protection, the assault must have occurred as defined by A.R.S. § 13-1203(A)(1) or (3).

A.R.S. §13-1204(D) provides that it is not a defense to a prosecution for assaulting a peace officer or a mitigating circumstance that the peace officer was not on duty or engaged in the execution of official duties.

12.04B – Aggravated Assault – Domestic Violence

The crime of aggravated assault requires proof that:

1. The defendant [intentionally, knowingly or recklessly caused any physical injury to another person] [intentionally placed another person in reasonable apprehension of imminent physical injury] [knowingly touched another person with the intent to injure the person]; *and*
2. The defendant [intentionally/knowingly] [impeded the normal breathing or circulation of blood of another person by applying pressure to the throat or neck] [obstructed the nose and mouth of another person either manually or through the use of an instrument]; *and*
3. [The defendant and the victim were married.] [The defendant and the victim are married.] [The defendant and the victim reside in the same household.] [The defendant and the victim resided in the same household.] [The defendant and the victim have a child in common.] [The defendant or the victim is pregnant by the other party.] [The victim is the defendant's or defendant's spouse's parent, grandparent, child, grandchild, brother or sister.] [The victim is the defendant or defendant's parent-in-law, grandparent-in-law, stepparent, step-grandparent, stepchild, step-grandchild, brother-in-law or sister-in-law.] [The victim is a child who

resides or has resided in the same household as the defendant and is related by blood to a former spouse of the defendant or to a person who resides or who has resided in the same household as the defendant.] [The victim is the defendant or defendant's adopted child.] [The relationship between the victim and the defendant was/had been a romantic or sexual relationship. The following factors may be considered in determining whether the relationship between the victim and the defendant was/had been a romantic or sexual relationship:

(a) The type of relationship.

(b) The length of the relationship.

(c) The frequency of the interaction between the victim and the defendant.

(d) If the relationship has terminated, the length of time since the termination.]

SOURCE: A.R.S. §§ 13-1204(B) and 13-3601(A) (statutory language as of July 29, 2010).

12.048 – Aggravated Assault Upon Teacher or School Employee

The crime of aggravated assault upon a teacher or school employee requires proof of the following:

1. The defendant committed an assault; *and*

2. The defendant knew or had reason to know that the person assaulted was a [teacher/school nurse/school employee]; *and*

3. The defendant committed the assault [on school grounds/on grounds next to a school/in a building or motor vehicle used for school purposes/while the teacher or school nurse was visiting a private home in the course of professional duties/on any teacher engaged in any authorized and organized classroom activity held off school grounds].

SOURCE: A.R.S. § 13-1204(A)(8) (statutory language as of January 1, 2009).

USE NOTE: Under most of the situations in A.R.S. § 13-1204(A)(6), an assault upon a teacher or an employee of a school is aggravated. However, the only employees of a school subject to aggravated assault in a private home are teachers and school nurses. For the sake of clarity, "nurse" is added here.

The court shall also instruct on assault (Statutory Criminal Instruction 12.03).

12.04.09A – Aggravated Assault – Control of Officer's Firearm

The crime of aggravated assault requires proof that:

1. The defendant committed an assault; *and*

2. The defendant knowingly [took control] [attempted to exercise control] over the firearm of [a peace officer] [a state department of corrections officer] [a department of juvenile corrections officer] [a law enforcement agency officer] [a city/county jail officer] [a city/county juvenile detention facility officer] [an officer of an entity that

had contracted with any state or federal agency responsible for sentenced or unsentenced prisoners]; *and*

3. The defendant knew or had reason to know that the person assaulted was [a peace officer] [state department of corrections officer] [a department of juvenile corrections officer] [a law enforcement agency officer] [a city/county jail officer] [a city/county juvenile detention facility officer] [an officer of an entity that had contracted with any state or federal agency responsible for sentenced or unsentenced prisoners].

SOURCE: A.R.S. § 13-1204(A)(9)(a) (statutory language as of August 9, 2017).

USE NOTE: The court shall also instruct on assault (Statutory Criminal Instruction 12.03).

The court shall instruct on the culpable mental state.

Use bracketed language as appropriate to the facts of the case.

See Statutory Criminal Instruction 1.0519 for the definition of "firearm."

A.R.S. §13-1204(D) provides that it is not a defense to a prosecution for assaulting a peace officer or a mitigating circumstance that the peace officer was not on duty or engaged in the execution of official duties.

12.04.09B – Aggravated Assault – Control of Officer's Weapon Other Than a Firearm

The crime of aggravated assault requires proof that:

1. The defendant committed an assault; and
2. The defendant knowingly [took control] [attempted to exercise control] over any weapon that was being used or attempting to be used by [a peace officer] [a state department of corrections officer] [a department of juvenile corrections officer] [a law enforcement agency officer] [a city/county jail officer] [a city / county juvenile detention facility officer] [an officer of an entity that had contracted with any state or federal agency responsible for sentenced or unsentenced prisoners]; *and*
3. The defendant knew or had reason to know that the person assaulted was [a peace officer] [a state department of corrections officer] [a department of juvenile corrections officer] [a law enforcement agency officer] [a city / county jail officer] [a city/county juvenile detention facility officer] [an officer of an entity that had contracted with any state or federal agency responsible for sentenced or unsentenced prisoners].

SOURCE: A.R.S. § 13-1204(A)(9)(b) (statutory language as of August 9, 2017).

USE NOTE: The court shall also instruct on assault (Statutory Criminal Instruction 12.03).

The court shall instruct on the culpable mental state.

Use bracketed language as appropriate to the facts of the case.

A.R.S. §13-1204(D) provides that it is not a defense to a prosecution for assaulting a peace officer or a mitigating circumstance that the peace officer was not on duty or engaged in the execution of official duties.

12.04.09C – Aggravated Assault – Control of Officer's Implement Other Than a Firearm

The crime of aggravated assault requires proof that:

1. The defendant committed an assault; *and*
2. The defendant knowingly [took control] [attempted to exercise control] over any implement that was being used or attempting to be used by [a peace officer] [a state department of corrections officer] [a department of juvenile corrections officer] [a law enforcement agency officer] [a city/county jail officer] [a city/county juvenile detention facility officer] [an officer of an entity that had contracted with any state or federal agency responsible for sentenced or unsentenced prisoners]; *and*
3. The defendant knew or had reason to know that the person assaulted was [a peace officer] [a state department of corrections officer] [a department of juvenile corrections officer] [a law enforcement agency officer] [a city/county jail officer] [a city/county juvenile detention facility officer] [an officer of an entity that had contracted with any state or federal agency responsible for sentenced or unsentenced prisoners].

"Implement" means an object that is designed for or that is capable of restraining or injuring an individual, but does not include handcuffs.

SOURCE: A.R.S. § 13-1204(A)(9)(c) (statutory language as of August 9, 2017).

USE NOTE: The court shall also instruct on assault (Statutory Criminal Instruction 12.03).

The court shall instruct on the culpable mental state.

Use bracketed language as appropriate to the facts of the case.

A.R.S. §13-1204(D) provides that it is not a defense to a prosecution for assaulting a peace officer or a mitigating circumstance that the peace officer was not on duty or engaged in the execution of official duties.

12.04.10 – Aggravated Assault – Defendant in Custody

The crime of aggravated assault requires proof that:

1. The defendant committed an assault; *and*
2. The assault was aggravated by at least one of the following factors:

   The defendant knew or had reason to know that the person assaulted was a [code enforcement officer] [state park ranger] [municipal park ranger] [constable] [firefighter] [fire investigator] [fire inspector] [emergency medical technician] [paramedic] [prosecutor] [public defender] [judicial officer] [while

engaged in the execution of any official duties] [if the assault results from the execution of his/her official duties].

SOURCE: A.R.S. § 13-1204(A)(10) (statutory language as of August 9, 2017).

USE NOTE: The court shall instruct on the culpable mental state.

Use bracketed language as appropriate to the facts of the case.

The definition of public defender includes court-appointed counsel. *State v. Wilson*, 250 Ariz. 197 (App. 2020).

12.05 – Unlawfully Administering Intoxicating Liquors, or Drug

The crime of unlawfully administering liquor or drug requires proof of the following:

1. The defendant knowingly introduced or caused to be introduced into the body of another person [intoxicating liquors/narcotic drug/dangerous drug]; *and*
2. The person did not consent; *and*
3. It was for a purpose other than lawful medical or therapeutic treatment.

SOURCE: A.R.S. § 13-1205 (statutory language as of October 1, 1978).

USE NOTE: The court shall instruct on the culpable mental state.

"Knowingly" is defined in A.R.S. § 13-105.

"Narcotic drug" and "dangerous drug" are defined in A.R.S. § 13-3401.

A special verdict form should be used if the victim is a minor.

12.06 – Dangerous or Deadly Assault by a Prisoner

The crime of dangerous or deadly assault by a prisoner requires proof that the defendant:

1. Was in the custody of [the department of corrections/a county jail/a city jail/a law enforcement agency]; *and*
2. Committed an assault [involving the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument]; *or* [by intentionally or knowingly inflicting serious physical injury upon another person].

SOURCE: A.R.S. § 13-1206 (statutory language as of September 2, 2002).

USE NOTE: Use the language in the brackets as appropriate to the facts.

The court shall instruct on the culpable mental state.

The court shall instruct on assault (Statutory Criminal Instruction 12.03).

"Intentionally," "knowingly," "deadly weapon," "dangerous instrument," and "serious physical injury" are defined in A.R.S. § 13-105.

Definition of "custody" in § 13-2501 defining the word as it relates to escape offenses does not apply to § 13-1206 proscribing dangerous or deadly assault by a prisoner; "custody" in latter statute must be read to mean the imposition of actual or constructive restraint pursuant to an on-site arrest or court order or pursuant to detention in a correctional facility, juvenile detention center, or state hospital. *See State v. Newman*, 141 Ariz. 554 (1984).

12.07 – Prisoners [Committing Assault with Intent to Incite to Riot/Participating in a Riot]

The crime of a prisoner [committing assault with intent to incite to riot/participating in a riot] requires proof that the defendant:

Was in the custody of [the state department of corrections/a county or city jail]; *and*

1. committed an assault upon another person with the intent to incite to riot; *or*
2. participated in a riot.

SOURCE: A.R.S. § 13-1207 (statutory language as of January 1, 1994).

USE NOTE: The court shall instruct on the culpable mental state.

"With the intent to" is defined in A.R.S. § 13-105.

The court shall also instruct on assault if subsection (a) applies (Statutory Criminal Instruction 12.03).

12.08 – Assault; Vicious Animals

The crime of assault by a vicious animal requires proof that:

1. The defendant owned a dog that the defendant knew or had reason to know had a propensity to attack, to cause injury or otherwise endanger the safety of human beings without provocation, or that had been found to be a vicious animal by a court of competent authority; and
2. The dog, while at large, bit, inflicted physical injury on, or attacked a human being.

SOURCE: A.R.S. § 13-1208 (statutory language as of September 21, 2006).

USE NOTE: The court shall instruct on the culpable mental state.

"Knowingly," and "physical injury" are defined in A.R.S. § 13-105.

12.09 – Drive-By Shooting

The crime of drive-by shooting requires proof that:

1. The defendant intentionally discharged a weapon from a motor vehicle; *and*
2. The discharge was at a person, another occupied motor vehicle, or an occupied structure.

SOURCE: A.R.S. § 13-1209 (statutory language as of October 1, 1997).

USE NOTE: The court shall instruct on the culpable mental state.

"Intentionally" is defined in A.R.S. § 13-105.

"Motor Vehicle" is defined in A.R.S. § 28-101.

"Occupied structure" is defined in A.R.S. § 13-3101.

12.11 – Discharging a Firearm at a Structure

The crime of discharging a firearm at a [residential] [nonresidential] structure requires proof that the defendant knowingly:

1. discharged a firearm; *and*
2. discharged at a [residential] [nonresidential] structure.

SOURCE: A.R.S. § 13-1211 (statutory language as of July 20, 1996).

USE NOTE: The court shall instruct on the culpable mental state.

"Knowingly" and "firearm" are defined in A.R.S. § 13-105.

"Residential structure," "nonresidential structure," and "structure" are defined in A.R.S. § 13-1211.

A special verdict form should be used to determine the type of structure.

A storage room that was under the same roof as the living quarters was found to be a residential structure. *See State v. Ekmanis*, 183 Ariz. 180 (App. 1995).

An almost completed home is not a residential structure because it has not been adapted for human residence. *See State v. Bass*, 184 Ariz. 543 (App. 1995).

12.12 – Prisoner Assault with Bodily Fluids

The crime of prisoner assault with bodily fluids requires proof that the defendant:

1. was a prisoner; *and*
2. threw or projected any saliva, blood, seminal fluid, urine or feces at or onto a person who is a correctional facility employee or private prison security officer; *and*
3. knew or reasonably should have known the person was a correctional facility employee or private prison security officer.

SOURCE: A.R.S. § 13-1212 (statutory language as of April 28, 1997).

USE NOTE: The court shall instruct on the culpable mental state.

"Knowingly" and "physical injury" are defined in A.R.S. § 13-105.

12.14 – Unlawful Mutilation

The crime of unlawful mutilation requires proof that the defendant:

[knowingly mutilated a female who was under eighteen years of age.]

[knowingly transported a female under eighteen years of age to another jurisdiction for the purpose of mutilation.]

[recklessly transported a female under eighteen years of age to another jurisdiction where mutilation was likely to occur.]

The consent of the minor on whom the mutilation is performed or the parents of the minor is not a defense to a prosecution for unlawful mutilation.

"Mutilate" or "mutilation" means the partial or total removal of the clitoris, prepuce, labia minora, with or without excision of the labia major, the narrowing of the vaginal opening through the creation of a covering seal formed by cutting and repositioning the inner or outer labia, with or without removal of the clitoris, or any harmful procedure to the genitalia, including pricking, piercing, incising, scraping or cauterizing.

[Mutilate and mutilation do not include procedures performed by a licensed physician that are proven to be medically necessary due to a medically recognized condition.]

SOURCE: A.R.S. § 13-1214 (statutory language as of July 24, 2014).

USE NOTE: Use statutory definition instruction 1.0510(b) defining "knowingly."

Pursuant to *Blakely v. Washington*, 542 U.S. 296 (2004), and its progeny, the trial judge must instruct the jury to determine the minor's age because a violation of this statute is a Class 2 felony, unless the minor is under fifteen years of age, in which case the offense is punishable as a dangerous crime against children pursuant to A.R.S. § 13-705. *See* statutory criminal 7.05 for the instruction and verdict form if it is necessary for the jury to determine whether the offense is a "dangerous crime against a child."

COMMENT: The committee notes that the statute fails to set forth the burden of proof for subsection f, or to whom that burden belongs.

CHAPTER 14

14.01.01 – Definition of "Oral Sexual Contact"

"Oral sexual contact" means oral contact with the penis, vulva or anus.

14.01.02 – Definition of "Position of Trust"

Position of trust" means a person who is or was any of the following:

(a) The minor's parent, stepparent, adoptive parent, legal guardian or foster parent.

(b) The minor's teacher.

(c) The minor's coach or instructor, whether the coach or instructor is an employee or volunteer.

(d) The minor's clergyman or priest.

(e) Engaged in a sexual or romantic relationship with the minor's parent, adoptive parent, legal guardian, foster parent or stepparent.

14.01.03 – Definition of "Sexual Contact"

"Sexual contact" means any direct or indirect touching, fondling or manipulating of any part of the genitals, anus or female breast by any part of the body or by any object or causing a person to engage in such contact. It does not include direct or indirect touching or manipulating during caretaking responsibilities, or interactions with a minor or vulnerable adult that an objective, reasonable person would recognize as normal and reasonable under the circumstances.

SOURCE: A.R.S. 13-1401(A)(3) (effective August 3, 2018)

14.01.04 – Definition of "Sexual Intercourse"

"Sexual intercourse" means penetration into the penis, vulva or anus by any part of the body or by any object or masturbatory contact with the penis or vulva.

14.01.05 – Definition of "Spouse"

"Spouse" means a person who is legally married and cohabiting.

14.01.06 – Definition of "Teacher"

"Teacher" means a certificated teacher or any person who provides instruction to pupils in any school district, charter school or accommodation school, the Arizona state schools for the deaf and the blind or a private school in this state.

14.01.07 – Definition of "Without Consent"

"Without consent" includes any of the following:

1. The victim is coerced by the immediate use or threatened use of force against a person or property.
2. The victim is incapable of consent by reason of mental disorder, mental defect, drugs, alcohol, sleep or any other similar impairment of cognition and such condition is known or should have reasonably been known to the defendant. "Mental defect" means the victim is unable to comprehend the distinctively sexual nature of the conduct or is incapable of understanding or exercising the right to refuse to engage in the conduct with another.
3. The victim is intentionally deceived as to the nature of the act.
4. The victim is intentionally deceived to erroneously believe that the person is the victim's spouse.

SOURCE: A.R.S. § 13-1401 (statutory language as of July 3, 2015).

COMMENT: Simulated sexual intercourse by defendant rubbing his penis back and forth between victim's legs involved "manual masturbatory contact with the penis" was "sexual intercourse" within meaning of prohibition against sexual conduct with minor. *State v. Crane,* 166 Ariz. 3, 8 (App. 1990), *review denied.*

In interpreting A.R.S. § 13-612, which defined the offense of rape, the court wrote that "the slightest penetration of vulva is sufficient" to constitute sexual intercourse. *State v. Kidwell,* 27 Ariz. App. 466, 467 (App. 1976).

Prescribed mental state for crime of sexual abuse is "intentionally or knowingly," and since no contrary legislative purpose plainly appears, "intentionally or knowingly" applies to all elements of sexual abuse statute, including "without consent." *State v. Witwer,* 175 Ariz. 305 (App. 1993).

In a case of lack of consent based on a mental disorder, the State must prove that the mental disorder was an impairment of such a degree that it precluded the victim from understanding the act of intercourse and its possible consequences. *State v. Johnson,* 155 Ariz. 23 (1987).

USE NOTE: "Certificated Teacher" is defined in A.R.S. § 15-501.

14.02 – Indecent Exposure

The crime of indecent exposure requires proof of the following:

1. The defendant exposed [his or her genitals or anus] [the areola or nipple of her breast or breasts]; *and*
2. Another person was present; *and*
3. The defendant was reckless about whether the other person, as a reasonable person, would be offended or alarmed by the exposure.

[Indecent exposure does not include breast-feeding by a mother.]

SOURCE: A.R.S. § 13-1402 (statutory language as of September 21, 2006).

USE NOTE: A verdict form must indicate the age of the victim in order to classify the offense as a misdemeanor or felony.

[Complete this section of the verdict form if you find the defendant "guilty" of the charged offense.]

We the jury, duly impaneled in the above-entitled action, find that the other person present was:

_____ Fifteen years of age or older

_____ Under the age of fifteen

14.03 – Public Sexual Indecency to a Minor

The crime of public sexual indecency to a minor requires proof of the following:

1. The defendant intentionally or knowingly engaged in an act of [sexual contact] [oral sexual contact] [sexual intercourse] [bestiality]; *and*
2. The defendant was reckless about whether a minor under the age of fifteen years was present.

SOURCE: A.R.S. § 13-1403 (statutory language as of September 21, 2006).

USE NOTE: The court shall instruct on the culpable mental state.

"Intentionally" is defined in A.R.S. § 13-105.

"Knowingly" is defined in A.R.S. § 13-105.

"Recklessly" is defined in A.R.S. § 13-105.

"Sexual contact" is defined in A.R.S. § 13-1401 (Statutory Definition Instruction 14.01.03).

"Oral sexual contact" is defined in A.R.S. § 13-1401 (Statutory Definition Instruction 14.01.01).

"Sexual intercourse" is defined in A.R.S. § 13-1401 (Statutory Definition Instruction 14.01.04).

"Bestiality" is defined in A.R.S. § 13-1411 (Statutory Definition Instruction 14.11.01).

14.03.A.1 – Public Sexual Indecency

The crime of public sexual indecency to a minor requires proof of the following:

1. The defendant intentionally or knowingly engaged in an act of [sexual contact] [oral sexual contact] [sexual intercourse] [bestiality]; *and*
2. Another person was present; *and*

3. The defendant was reckless about whether such other person, as a reasonable person, would be offended or alarmed by the act.

SOURCE: A.R.S. § 13-1403(A)(1) (statutory language as of September 21, 2006).

USE NOTE: Use language in brackets as appropriate to the facts.

The court shall instruct on the culpable mental state.

"Intentionally" is defined in A.R.S. § 13-105 (Statutory Definition Instructions 1.0510(a)(1) and 1.0510(a)(2)0.

"Knowingly" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0510(b)(1))).

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

"Sexual contact" is defined in A.R.S. § 13-1401 (Statutory Definition Instruction 14.01.03).

"Oral sexual contact" is defined in A.R.S. § 13-1401 (Statutory Definition Instruction 14.01.01).

"Sexual intercourse" is defined in A.R.S. § 13-1401 (Statutory Definition Instruction 14.01.04).

"Bestiality" is defined in A.R.S. § 13-1411 (Statutory Definition Instruction 14.11.01).

14.04 – Sexual Abuse

The crime of sexual abuse requires proof of the following:

1. The defendant intentionally or knowingly engaged in sexual contact with another person; *and*
2. [The defendant knew the sexual contact was without consent].

   or

2. [The other person was under fifteen years of age; *and*
3. The sexual contact involved only the female breast].

SOURCE: A.R.S. § 13-1404 (statutory language as of January 1, 1994).

USE NOTE: The court shall instruct on the culpable mental state.

"Intentionally" is defined in A.R.S. § 13-105.

"Knowingly" is defined in A.R.S. § 13-105.

"Sexual contact" is defined in A.R.S. § 13-1401 (Statutory Definition Instruction 14.01.03).

COMMENT: Sexual abuse is not a lesser included offense of the crime of child molestation. *State v. Patton,* 136 Ariz. 243 (App. 1983).

The State must prove that the defendant knew the victim had not consented. *State v. Witwer*, 175 Ariz. 305 (App. 1993).

If the defendant was in a position of trust, it is not a defense to a prosecution for a violation of this section that the other person consented if the other person was fifteen, sixteen or seventeen years of age. A.R.S. § 13-1404(B).

14.05.01 – Sexual Conduct with a Minor

The crime of sexual conduct with a minor requires proof that the defendant intentionally or knowingly engaged in [sexual intercourse] [oral sexual contact] with a person under eighteen years of age.

[If the minor was under the age of fifteen, the State is not required to prove that the defendant knew the minor's age.]

SOURCE: A.R.S. § 13-1405 (statutory language as of July 21, 1997); *State v. Falcone*, 228 Ariz. 168 (App. 2011).

USE NOTE: The court shall instruct on the culpable mental state.

"Intentionally" is defined in A.R.S. § 13-105.

"Knowingly" is defined in A.R.S. § 13-105.

"Sexual intercourse" is defined in A.R.S. § 13-1401 (Statutory Definition Instruction 14.01.03).

"Oral sexual contact" is defined in A.R.S. § 13-1401 (Statutory Definition Instruction 14.01.01).

If the defendant raises the affirmative defense of lack of knowledge of the age of the minor and the minor is 15, 16, or 17, refer to Statutory Criminal 14.07.02 or 14.07.05.

The jury will need to determine the age of the victim and the defendant for sentencing purposes. *See* A.R.S. §§ 13-1406(B) and 13-705. See 7.05 Verdict Form.

COMMENT: If the conduct was masturbatory contact, then the mandatory life sentence under A.R.S. § 13-604.01(A) does not apply, but a life sentence may be imposed under A.R.S. § 13-604.01(B). *See* A.R.S. § 13-1405.

Defendant's placing his finger in his minor daughter's vagina and placing his penis in vagina were separate acts of "intercourse" that could serve as basis for separate convictions and sentences. *State v. McCuin,* 167 Ariz. 447 (App. 1991), *review granted, affirmed in part, vacated in part,* 171 Ariz. 171 (1992).

Charge of single count of sexual misconduct with minor was duplicitous, creating real possibility of nonunanimous jury verdict and thereby constituting reversible error, where offense was alleged in indictment to have occurred "on or about" January 18, victim testified she had sex with defendant twice, once around middle of January and once on last weekend of January, doctor testified that physical examination of victim revealed signs consistent with sexual intercourse at end of January, defendant offered alibi offense regarding last weekend of January and also denied ever having sexual intercourse with victim, and jury was instructed that exact dates were not important. *State v. Davis,* 206 Ariz. 377 (2003), *cert. den.,* 541 U.S. 1037 (2004).

Evidence that defendant propositioned television reporter posing as 14-year-old boy in computer chat room, arranged a meeting, and came to the park as agreed, where he again offered to engage in sexual conduct with actor hired by reporter to play part of boy, that reporter and actor had both told defendant several times that boy was only 14 years old, and that defendant acknowledged that he was offering to do something that could have gotten him into trouble was sufficient to support conviction for attempted sexual conduct with a minor. *State v. Carlisle,* 198 Ariz. 203 (App. 2000).

14.05.02 – Sexual Conduct with a Minor – Special Relationship

The crime of sexual conduct with a minor requires proof of the following:

1. The defendant intentionally or knowingly engaged in [sexual intercourse] [oral sexual contact] with another person; *and*
2. The other person was fifteen, sixteen or seventeen years of age; *and*
3. The defendant was or had been in a position of trust.

["Teacher" means a teacher certified by the Arizona State Board of Education or any other person who directly provides academic instruction to pupils in any school district, charter school, accommodation school, the Arizona state schools for the deaf and the blind or a private school in this state.]

SOURCE: A.R.S. § 13-1405 (statutory language as of July 20, 2011).

USE NOTE: The court shall instruct on the culpable mental state.

Use the bracketed language as appropriate for the facts of the case.

"Intentionally" is defined in A.R.S. § 13-105 (Statutory Definitional Instruction 1.0510(a)).

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

"Sexual intercourse" is defined in A.R.S. § 13-1401 (Statutory Definition Instruction 14.01.03).

"Oral sexual contact" is defined in A.R.S. § 13-1401 (Statutory Definition Instruction 14.01.01).

"Position of trust" is defined in A.R.S. § 13-1401 (Statutory Criminal Instruction 14.01.02).

The following factors may be considered in determining whether a relationship is currently or was previously a sexual or romantic relationship:

1. The type of relationship,
2. The length of the relationship.
3. The frequency of the interaction between the two persons.
4. If the relationship has terminated, the length of time since the termination.

(A.R.S. § 13-1401(B)).

14.06.01 – Sexual Assault

The crime of sexual assault requires proof that the defendant:

1. intentionally or knowingly engaged in sexual intercourse or oral sexual contact with another person; *and*
2. engaged in the act without the consent of the other person.
3. The defendant knew the act was without the consent of the other person.

SOURCE: A.R.S. § 13-1406 (statutory language as of January 1, 2009); *State v. Kemper,* 227 Ariz. 452 ¶ 5 (App. 2011).

USE NOTE: The court may need to determine the age of the victim and the defendant for sentencing purposes. *See* A.R.S. §§ 13-1406(B) and 13-705. If that determination is needed, use of the following verdict form is suggested:

[Complete this portion of the verdict form only if you find the defendant guilty of the offense.]

We the jury, duly impaneled in above-entitled action, find that the other person was (check only one):

_____ 15 years of age or older.

_____ 13 or 14 years of age.

_____ 12 years of age.

_____ under 12 years of age.

[Complete this portion of the verdict form only if you find that the other person was 12 years of age or younger.]

We the jury, duly impaneled in above-entitled action, find that the defendant was (check only one):

_____ 18 years of age or older.

_____ under 18 years of age.

The court shall instruct on the culpable mental state.

"Intentionally" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0510(a)(1)).

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

"Sexual intercourse" is defined in A.R.S. § 13-1401 (Statutory Definition Instruction 14.01.03).

"Oral sexual contact" is defined in A.R.S. § 13-1401 (Statutory Definition Instruction 14.01.01).

"Without consent" is defined in A.R.S. § 13-1401 (Statutory Definition Instruction 14.01.05).

COMMENT: The court of appeals in *State v. Kemper,* 227 Ariz. 452 ¶ 5 (App. 2011) (holding that an instruction that omitted the *mens rea* element that the conduct was conducted without the consent of the victim was fundamental error).

14.06.02 – Sexual Assault – Aggravation Instruction if Use of Drugs Alleged

If you find the defendant guilty of sexual assault, you must then determine whether the defendant intentionally or knowingly administered flunitrazepam, gamma hydroxy butyrate or ketamine hydrochloride to other person without the other person's knowledge.

"Intentionally" and "knowingly" have the same meanings previously set forth in these instructions.

The State has the burden of proving this allegation beyond a reasonable doubt. Your decision must be set forth in a separate verdict form. Your decision regarding this allegation must be unanimous.

SOURCE: A.R.S. § 13-1406(B) (statutory language as of August 6, 1999).

USE NOTE: This instruction should be used in conjunction with the sexual assault instruction if the State has alleged the use of a drug listed in the statute.

When this allegation is made by the State, the following addition to the standard "guilty"/"not guilty" verdict form is suggested:

[Complete this portion of the verdict form only if you find the defendant guilty of sexual assault.]

> We the jury find on the allegation that the defendant intentionally or knowingly administered flunitrazepam, gamma hydroxy butyrate or ketamine hydrochloride to other person without the other person's knowledge as follows (check only one):
>
> _____ Was not proven.
>
> _____ Was proven beyond a reasonable doubt.

14.06.03 – Sexual Assault – Aggravation Instruction for the Allegation of Serious Physical Injury

If you find the defendant guilty of sexual assault, you must then determine whether the defendant intentionally or knowingly inflicted serious physical injury upon the person.

"Serious physical injury" means physical injury which created a reasonable risk of death, or which caused serious and permanent disfigurement, serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb.

"Intentionally" and "knowingly" have the same meanings previously set forth in these instructions.

The State has the burden of proving this allegation beyond a reasonable doubt. Your decision must be set forth in a separate verdict form. Your decision regarding this allegation must be unanimous.

SOURCE: A.R.S. §§ 13-1406(D) (statutory language as of August 6, 1999) and 13-105 (statutory language as of September 21, 2006).

USE NOTE: This instruction should be used in conjunction with the sexual assault instruction if the State has alleged that the defendant inflicted serious physical injury on the victim.

When this allegation is made by the State, the following addition to the standard "guilty"/"not guilty" verdict form is suggested:

[Complete this portion of the verdict form only if you find the defendant guilty of sexual assault.]

> We the jury find on the allegation that the defendant intentionally or knowingly inflicted serious physical injury upon the person as follows (check only one):
>
> _____ Was not proven.
>
> _____ Was proven beyond a reasonable doubt.

If the victim is twelve years of age or under and the defendant is eighteen years of age or older, a mandatory life sentence must be imposed. If this is an issue, the court should include the verdict form suggested in the sexual assault instruction use note.

14.07.01 – Defense to Sexual Abuse

It is a defense to sexual abuse with a minor if:

1. The act was done in furtherance of lawful medical practice; *or*
2. At the time of the act, the defendant was the spouse of the victim.

SOURCE: A.R.S. § 13-1407(A) and (D) (statutory language as of August 12, 2005).

USE NOTE: The "affirmative defense" instruction should be used. *See* Standard Criminal Instruction 2.025.

COMMENT: A.R.S. § 13-1407(B) provides an additional defense to sexual contact as follows:

> The victim's lack of consent is based on incapacity to consent because the victim was fifteen, sixteen, or seventeen years of age, if at the time the defendant engaged in the conduct constituting the offense the defendant did not know and could not reasonably have known the age of the victim.

The statutory definition of "without consent" does not include the lack of capacity to consent based on being the age of fifteen, sixteen or seventeen. Therefore, this defense has not been included in the instruction because the defense could be construed to mean that lack of consent can be based solely on the fact that the victim was fifteen, sixteen or seventeen years of age. This affirmative defense cannot be used to prove lack of consent under A.R.S. § 13-1404 based on age alone; the State must prove that the victim did not give consent. *See State v. Getz*, 189 Ariz. 561, 565-66 (1997) (the sixteen-year-old victim consented to the touching of her breasts and, therefore, the sexual abuse count should have been dismissed).

14.07.02 – Defense to Sexual Conduct with a Minor

It is a defense to sexual conduct with a minor if:

1. The act was done in furtherance of lawful medical practice; *or*
2. The victim was fifteen, sixteen, or seventeen years of age and, at the time the defendant engaged in the conduct constituting the offense, the defendant did not know and could not reasonably have known the age of the victim; *or*
3. At the time of the act, the defendant was the spouse of the victim.

SOURCE: A.R.S. § 13-1407(A), (B), and (D) (statutory language as of August 12, 2005).

USE NOTE: The "affirmative defense" instruction should be used. *See* Standard Criminal Instruction 2.025.

COMMENT: Paragraph 2 is based on A.R.S. § 13-1407(B) that provides a defense to sexual conduct with a minor. However, "consent" is not an element of the offense of sexual conduct with a minor. In an attempt to reconcile the defense to the elements of the offense, the consent language has been deleted from the instruction. Whether this defense is viable in view of *State v. Getz,* 189 Ariz. 561 (1997), the lack of consent as an element of the offense, and because § 13-1407(B) is premised on the lack of consent, this is an issue left for the trial judge to decide.

14.07.03 – Emergency Occurrence Defense to Indecent Exposure, Sexual Abuse, Sexual Conduct with a Minor, or Sexual Assault

It is a defense to [indecent exposure] [sexual abuse] [sexual conduct with a minor] [sexual assault] if:

1. The act was done by the defendant who [was a duly licensed physician] [was a registered nurse] [was acting under the direction of a physician or nurse] [rendered emergency care at the scene of an emergency occurrence]; *and*
2. The act consisted of administering a recognized and lawful form of treatment which was reasonably adapted to promoting the physical or mental health of the patient and the treatment was administered in an emergency; *and*
3. The defendant reasonably believed that no one competent to consent could be consulted and that a reasonable person, wishing to safeguard the welfare of the patient, would consent.

SOURCE: A.R.S. § 13-1407(C) (statutory language as of September 26, 2008).

USE NOTE: The "affirmative defense" instruction should be used. *See* Standard Criminal Instruction 2.025.

14.07.04 – Lack of Sexual Interest Defense to Sexual Abuse and Molestation of Child (To Be Used for Crimes Committed Prior to August 3, 2018)

It is a defense to [sexual abuse] [molestation of a child] if the defendant was not motivated by a sexual interest.

SOURCE: A.R.S. § 13-1407(E) (statutory language prior to August 3, 2018).

USE NOTE: The defense applies to sexual abuse of both a minor and an adult.

The "affirmative defense" instruction should be used. *See* Standard Criminal Instruction 2.025.

COMMENT: In *State v. Simpson*, 217 Ariz. 326 ¶ 19 (App. 2007), Division One of the Court of Appeals held (1) sexual motivation is not an element of the crime of child molestation under A.R.S. § 13-1410, and (2) the "lack of sexual interest" provision is an affirmative defense. But in *State v. Holle,* 238 Ariz. 218 ¶¶ 6-26 (App. 2015), Division Two reviewed statutory history and reached the conclusion that Simpson was wrongly decided. Under *Holle,* the defendant has the burden of proving beyond a reasonable doubt that the defendant had a sexual motivation. "To conclude otherwise would force defendants to negate a "'fact[s] of the crime which the State is to prove in order to convict.'" *Id.* ¶ 25 (quoting *State v. Farley*, 199 Ariz. 542 ¶ 11 (App. 2001), quoting in turn *Patterson v. New York*, 432 U.S. 197, 207 (1977)).

14.07.05 – Defense Based on Age to Sexual Conduct with a Minor or Aggravated Luring a Minor for Sexual Exploitation

It is a defense to [sexual conduct with a minor] [aggravated luring a minor for sexual exploitation if:

1. The minor was fifteen, sixteen or seventeen years of age; *and*
2. The defendant was under nineteen years of age or attending high school and was no more than twenty-four months older than the minor; *and*
3. The conduct was consensual.

SOURCE: A.R.S. § 13-1407(F) (statutory language as of September 26, 2008).

USE NOTE: The "affirmative defense" instruction should be used. *See* Standard Criminal Instruction 2.025.

14.09 – Unlawful Sexual Conduct by Probation Department Employees

The crime of Unlawful Sexual Conduct by Probation Department Employee requires proof of the following:

1. The defendant was [an adult probation department] [juvenile court] employee; and

2. The defendant knowingly coerced the victim to engage in [sexual contact], [oral sexual contact] or [sexual intercourse]; and
3. The coercion was accomplished by [threatening to negatively influence the victim's supervision or release status] [offering to positively influence the victim's supervision or release status].

"Adult probation department employee" or "juvenile court employee" means an employee of an adult probation department or the juvenile court who either:

(a) Through the course of employment, directly provides treatment, care, control or supervision to a victim; or

(b) Provides presentence or predisposition reports directly to a court regarding the victim.

"Victim" means a person who is either of the following:

(a) Subject to conditions of release or supervision by a court.

(b) A minor who has been referred to the juvenile court.

SOURCE: A.R.S. § 13-1409 (statutory language as of July 20, 2011).

USE NOTE: The court needs to determine the age of the victim for sentencing purposes. *See* §§ 13-1409(B). Therefore, use of the following verdict form is suggested:

[Complete this portion of the verdict form only if you find the defendant guilty of the offense.]

We the jury, duly impaneled in above-entitled action, find that the other person was (check only one):

___ 18 years of age or older.

___ At least 15 years of age, but under 18.

___ Under 15 years of age.

The court shall instruct on the culpable mental state.

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

"Sexual intercourse" is defined in A.R.S. § 13-1401 (Statutory Criminal Instruction 14.01.03).

"Oral sexual contact" is defined in A.R.S. § 13-1401 (Statutory Criminal Instruction 14.01.01).

"Sexual contact" is defined in A.R.S. § 13-1401 (Statutory Criminal Instruction 14.01.03).

14.10 – Molestation of Child

The crime of molestation of a child requires proof of the following:

1. The defendant intentionally or knowingly [engaged in] [caused a person to engage in] any direct or indirect touching, fondling or manipulation of any part of the genitals or anus by any part of the body or by any object or causing a person to engage in such contact with a child; *and*

2. The child was under 15 years of age.

SOURCE: A.R.S. § 13-1410 (statutory language as of January 1, 1994).

USE NOTE: The court shall instruct on the culpable mental state.

"Intentionally" is defined in A.R.S. § 13-105.

"Knowingly" is defined in A.R.S. § 13-105.

COMMENT: "Sexual contact" is defined in A.R.S. § 13-1401 (Statutory Definition Instruction 14.01.03). A.R.S. § 13-1410 excludes from the definition of "sexual contact" the female breast. In order to avoid the possibility of confusing the jurors with differing definitions of "sexual contact," the instruction is written to eliminate the words "sexual contact."

In a case addressing the predecessor statute to A.R.S. § 13-1410, the court held that a good faith belief that the victim was over the age of eighteen was not a defense to rape in the second degree. *State v. Superior Court of Pima County*, 104 Ariz. 440 (1969). Also, lack of knowledge of the child's age is not a defense listed in A.R.S. § 13-1407. Therefore, it is likely not a defense to molestation of a child that the defendant did not know the child was under the age of fifteen.

14.11.01 – Bestiality

The crime of bestiality requires proof of that the defendant knowingly engaged in oral sexual contact, sexual contact or sexual intercourse with an animal.

"Animal" means a nonhuman mammal, bird, reptile or amphibian, either dead or alive.

SOURCE: A.R.S. § 13-1411 (statutory language as of September 21, 2006).

USE NOTE: The court shall instruct on the culpable mental state.

"Knowingly" is defined in A.R.S. § 13-105.

"Sexual contact" is defined in A.R.S. §13-1401 (Statutory Definition Instruction 14.01.03).

"Oral sexual contact" is defined in A.R.S. § 13-1401 (Statutory Definition Instruction 14.01.01).

"Sexual intercourse" is defined in A.R.S. § 13-1401 (Statutory Definition Instruction 14.01.03).

COMMENT: There are three exceptions that apply to insemination of animals by the same species, veterinarian medical practices and animal husbandry. A.R.S. § 13-1411(C).

14.11.02 – Bestiality

The crime of bestiality requires proof of that the defendant knowingly caused another person to engage in oral sexual contact, sexual contact or sexual intercourse with an animal.

"Animal" means a nonhuman mammal, bird, reptile or amphibian, either dead or alive.

SOURCE: A.R.S. § 13-1411 (statutory language as of September 21, 2006).

USE NOTE: A verdict form must indicate the age of the victim to classify the offense:

[Complete this portion of the verdict form only if you find the defendant guilty of the offense.]

We the jury, duly impaneled in above-entitled action, find that the other person was:

_____ under 15 years of age.

_____ 15 years of age or older.

The court shall instruct on the culpable mental state.

"Knowingly" is defined in A.R.S. § 13-105.

"Sexual contact" is defined in A.R.S. § 13-1401 (Statutory Definition Instruction 14.01.03).

"Oral sexual contact" is defined in A.R.S. § 13-1401 (Statutory Definition Instruction 14.01.01).

"Sexual intercourse" is defined in A.R.S. § 13-1401 (Statutory Definition Instruction 14.01.04).

COMMENT: There are three exceptions that apply to insemination of animals by the same species, veterinarian medical practices and animal husbandry. A.R.S. § 13-1411(C).

14.17 – Continuous Sexual Abuse of a Child

The crime of continuous sexual abuse of a child requires proof of the following:

1. The defendant intentionally or knowingly, over a period of three months or more, engaged in three or more acts of sexual conduct, sexual assault or molestation of a child; *and*
2. The other person was under fourteen years of age.

The State must prove that three or more acts were committed by the defendant. However, you do not need to agree on the same act.

SOURCE: A.R.S. § 13-1417 (statutory language as of July 17, 1993).

"Sexual assault" is defined in A.R.S. § 13-1406 (Statutory Definition Instruction 14.06.01).

"Molestation of a child" is defined in A.R.S. § 13-1410 (Statutory Definition Instruction 14.10).

COMMENT: The trier of fact shall unanimously agree that the requisite number of acts occurred but does not need to agree on which acts constitute the requisite number. A.R.S. § 13-1417(C); *State v. Ramsey*, 211 Ariz. 529 (App. 2005).

A.R.S. § 13-1417(D) states that any other felony sexual offense involving the victim shall not be charged in the same proceeding with a charge under this section unless the other charged felony sexual offense occurred outside the time period charged under this section or the other felony sexual offense is charged in the alternative. A defendant may be charged with only one count under this section unless more than one victim is involved. If more than one victim is involved, a separate count may be charged for each victim.

14.18 – Sexual Misconduct by Licensed Behavioral Health Professional

The crime of sexual misconduct by a licensed behavioral health professional requires proof of the following:

1. The defendant was a licensed [behavioral health professional] [psychologist] [psychiatrist]; *and*
2. The defendant intentionally or knowingly engaged in sexual intercourse with another person; *and*
3. The other person was a client who was under the defendant's care or supervision at the time of the sexual intercourse.

SOURCE: A.R.S. § 13-1418 (statutory language as of July 1, 2004).

Use Note: The court shall instruct on the culpable mental state.

"Intentionally" is defined in A.R.S. § 13-105.

"Knowingly" is defined in A.R.S. § 13-105.

"Sexual intercourse" is defined in A.R.S. § 13-1401 (Statutory Definition Instruction 14.01.03).

This statute only applies to a defendant licensed pursuant to A.R.S. §§ 32-3251 *et seq*., 32-1401 *et seq*., 32-1800 *et seq*., or 32-2061 *et seq*.

14.19.1 – Unlawful Sexual Conduct by Correctional Employee

The crime of unlawful sexual conduct by a correctional employee requires proof of the following:

1. The defendant was employed by or contracted to provide services to [the state department of corrections] [the department of juvenile corrections] [a private prison facility] [a juvenile detention facility] [a city or county jail];

   or

1. The defendant was [an official visitor] [a volunteer] [an agency representative] of [the state department of corrections] [the department of juvenile corrections] [a private facility] [a juvenile detention facility] [a city or county jail];

   and

2. The defendant intentionally or knowingly engaged in any act of sexual nature with another person; *and*

3. The other person was in the custody of [the state department of corrections] [the department of juvenile corrections] [a private prison facility] [a juvenile detention facility] [a city or county jail] or an offender under the supervision of the state department of corrections, the department of juvenile corrections or a city or county.

"Any act of a sexual nature" means [any completed, attempted, threatened or requested touching of the genitalia, anus, groin, breast, inner thigh, pubic area or buttocks with the intent to arouse or gratify sexual desire] [any act of exposing the genitalia, anus, groin, breast, inner thigh, pubic area or buttocks with the intent to arouse or gratify sexual desire] [any act of photographing, videotaping, filming, digitally recording or otherwise viewing, with or without a device, a prisoner or offender with the intent to arouse or gratify sexual desire, either while the prisoner or offender is in a state of undress or partial dress or while the prisoner or offender is urinating or defecating].

SOURCE: A.R.S. § 13-1419 (statutory language as of July 20, 2011).

USE NOTE: The court shall instruct on the culpable mental state.

"Intentionally" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0510(a)(1)).

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

"Sexual intercourse" is defined in A.R.S. § 13-1401 (Statutory Criminal Instruction 14.01.04).

"Oral sexual contact" is defined in A.R.S. § 13-1405 (Statutory Criminal Instruction 14.01.01).

"Sexual contact" is defined in A.R.S. § 13-1401 (Statutory Criminal Instruction 14.01.03).

A verdict form must indicate the age of the victim in order to classify the offense. The following addition to the verdict form is suggested:

> [Complete this section of the verdict form if you find the defendant "guilty" of the charged offense.]
>
> We the jury, duly impaneled in the above-entitled action, find that the other person was:
>
> _____ At least 15 years of age, but not yet 18 years of age
>
> _____ Under the age of 15
>
> _____ 18 years of age or over
>
> _____ 18 years of age or over

14.23 – Violent Sexual Assault

The crime of violent sexual assault requires proof that the defendant:

1. committed [sexual abuse] [sexual conduct with a minor] [sexual assault] [molestation of a child]; *and*

2. discharged, used or committed the threatening exhibition of a deadly weapon or dangerous instrument or intentionally or knowingly inflicted serious physical injury to another; *and*
3. was previously convicted of a historical prior felony for a sexual offense, (name of offense).

[Include a definition of "historical prior felony" that is appropriate for each of the alleged prior felonies.]

SOURCE: A.R.S. § 13-1423 (statutory language as of August 12, 2005).

USE NOTE: The court will need to give an instruction on the underlying offense in addition to this instruction.

The court shall instruct on the culpable mental state.

"Intentionally" is defined in A.R.S. § 13-105.

"Knowingly" is defined in A.R.S. § 13-105.

"Sexual abuse" is defined in A.R.S. § 13-1404 (Statutory Definition Instruction 14.04).

"Sexual conduct with a minor" is defined in A.R.S. § 13-1405 (Statutory Definition Instruction 14.05.01 or 14.05.02).

"Sexual assault" is defined in A.R.S. § 13-1406 (Statutory Definition Instruction 14.06.01–03).

"Molestation of a child" is defined in A.R.S. § 13-1410 (Statutory Definition Instruction 14.01.01).

The court will need to include a definition of "historical prior felony" in the jury instruction. A.R.S. § 13-105provides:

> "Historical prior felony conviction" means:
>
> (a) Any prior felony conviction for which the offense of conviction:
>
> (i) Mandated a term of imprisonment except for a violation of chapter 34 of this title involving a drug below the threshold amount; or
>
> (ii) Involved the intentional or knowing infliction of serious physical injury; or
>
> (iii) Involved the use or exhibition of a deadly weapon or dangerous instrument; or
>
> (iv) Involved the illegal control of a criminal enterprise; or
>
> (v) Involved aggravated driving under the influence of intoxicating liquor or drugs, driving while under the influence of intoxicating liquor or drugs with a suspended, canceled, revoked or refused driver license or driving under the influence of intoxicating liquor or drugs with two or more driving under the influence of intoxicating liquor or drug convictions within a period of sixty months; or

(vi) Involved any dangerous crime against children as defined in section 13-705.

(b) Any class 2 or 3 felony, except the offenses listed in subdivision (a) of this paragraph, that was committed within the ten years immediately preceding the date of the present offense. Any time spent on absconder status while on probation or incarcerated is excluded in calculating if the offense was committed within the preceding ten years. If a court determines a person was not on absconder status while on probation that time is not excluded.

(c) Any class 4, 5 or 6 felony, except the offenses listed in subdivision (a) of this paragraph, that was committed within the five years immediately preceding the date of the present offense. Any time spent on absconder status while on probation or incarcerated is excluded in calculating if the offense was committed within the preceding five years. If a court determines a person was not on absconder status while on probation that time is not excluded.

(d) Any felony conviction that is a third or more prior felony conviction.

State ex rel. Thomas v. Talamante, 214 Ariz. 106 (App. 2006) held that A.R.S. § 13-1423 established the crime of violent sexual assault and that a historical prior felony conviction for a sexual offense is an element of that crime. Accordingly, the State is allowed to offer evidence of the defendant's prior conviction for a sexual offense.

COMMENT: If the prior conviction is from a foreign jurisdiction, the court must first conclude 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); *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").

14.24.01 – Voyeurism

The crime of voyeurism requires proof that the defendant knowingly invaded the privacy of another person without the knowledge of the other person for the purpose of sexual stimulation.

A person's privacy is invaded if both of the following apply:

1. The person had a reasonable expectation that the person would not be photographed, videotaped, filmed, digitally recorded or otherwise viewed or recorded.
2. The person was photographed, videotaped, filmed, digitally recorded or otherwise viewed, with or without a device, either:

(a) while the person was in a state of undress or partial dress.

(b) while the person was engaged in sexual intercourse or sexual contact.

(c) while the person was urinating or defecating.

(d) in a manner that directly or indirectly captured or allowed the viewing of the person's genitalia, buttock or female breast, whether clothed or unclothed, that was not otherwise visible to the public.

SOURCE: A.R.S. § 13-1424(A) (statutory language as of September 21, 2006).

USE NOTE: The court shall instruct on the culpable mental state.

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

COMMENT: The statute contains a number of exceptions. Those are set forth in A.R.S. § 13-1424(D)(1) through (4).

14.24.02 – Voyeurism

The crime of voyeurism requires proof that the defendant disclosed, displayed, distributed or published a photograph, videotape, film or digital recording that when taken knowingly invaded the privacy of another person without the consent or knowledge of the person depicted for the purpose of sexual stimulation.

A person's privacy is invaded if both of the following apply:

1. The person had a reasonable expectation that the person would not be photographed, videotaped, filmed, digitally recorded or otherwise viewed or recorded.
2. The person was photographed, videotaped, filmed, digitally recorded or otherwise viewed, with or without a device, either:
   (a) while the person was in a state of undress or partial dress.
   (b) while the person was engaged in sexual intercourse or sexual contact.
   (c) while the person was urinating or defecating.
   (d) in a manner that directly or indirectly captured or allowed the viewing of the person's genitalia, buttock or female breast, whether clothed or unclothed, that was not otherwise visible to the public.

SOURCE: A.R.S. § 13-1424(B) (statutory language as of September 21, 2006).

COMMENT: This portion of the statute does not expressly set forth a culpable mental state for the defendant. It will fall to the trial court to decide whether to include a mental state in the instruction. A.R.S. § 13-202(B) provides that if a statute omits a mental state, the offense is one of strict liability. However, the court in *State v. Slayton*, 214 Ariz. 511 (App. 2007) noted that strict liability offenses are not favored.

"Knowingly" was included in the instruction because subsection A requires that the recording "knowingly invade[d] the privacy of the person."

The statute contains a number of exceptions. Those are set forth in A.R.S. § 13-1424(D)(1) through (4).

14.25.01 – Unlawful Distribution of Recognizable Images

The crime of unlawful distribution of recognizable images requires proof that defendant intentionally disclosed an image of another person who is identifiable from the image itself or from information displayed in connection with the image if:

1. the person in the image is depicted in a state of nudity or engaged in specific sexual activities; and
2. that depicted person has a reasonable expectation of privacy; and
3. the image is disclosed with the intent to harm, harass, intimidate, threaten or coerce the depicted person.

Evidence that a person has sent an image to another person using an electronic device does not, on its own, remove the person's reasonable expectation of privacy for that image. Whether the depicted person has a reasonable expectation of privacy is a fact that you must determine in light of all of the other evidence.

SOURCE: A.R.S. § 13-1425) (statutory language as of March 11, 2016).

USE NOTE: Use statutory definition instruction defining 'intentionally" and "knowingly."

"Disclose" means display, distribute, publish, advertise or offer.

"Disclosed by electronic means" means delivery to an email address, mobile device, tablet or other electronic device and includes disclosure on a website.

"Harm" means physical injury, financial injury or serious emotional distress.

"Image" means a photograph, videotape, film or digital recording.

"Specific sexual activities" has the same meaning prescribed in A.R.S. § 11-811, subsection d, paragraph 18, subdivisions (a) and (b).

"State of nudity" has the same meaning prescribed in A.R.S. § 11-811, subsection d, paragraph 14, subdivision (a).

This section does not apply to any of the following:

1. The reporting of unlawful conduct.
2. Images involving voluntary exposure in a public or commercial setting.
3. An interactive computer service, as defined in 47 U.S.C. § 230(f)(2), or an information service, as defined in 47 U.S.C. § 153, with regard to content wholly provided by another party.
4. Any disclosure that is made with the consent of the person who is depicted in the image.

14.28 – Sexual Extortion

The crime of "sexual extortion" requires proof that defendant knowingly communicated a threat with the intent to coerce another person to [engage in sexual contact or sexual intercourse] [allow the other person's genitals, anus or female breast to be photographed, filmed, videotaped or digitally recorded] [exhibit the other person's genitals, anus or female breast].

"Communicating a threat" means a threat to [damage the property of the other person] [harm the reputation of the other person] [produce or distribute a photograph, film, videotape or digital recording that depicts the other person engaged in sexual contact or sexual intercourse or the exhibition of the other person's genitals, anus, or female breast.]

SOURCE: A.R.S. § 13-1428 (statutory language as of August 3, 2018).

USE NOTE: The court shall instruct on the culpable mental state.

"Knowingly" is defined in A.R.S. § 13-105.

"Sexual contact" is defined in A.R.S. § 13-1401. Statutory Criminal Instruction 14.01.02.

"Oral sexual contact" is defined in A.R.S. § 13-1401. Statutory Criminal Instruction 14.01.01.

"Sexual intercourse" is defined in A.R.S. § 13-1401. Statutory Criminal Instruction 14.01.03.

An aggravation phase verdict form must indicate the age of the victim in order to classify the offense. The following addition to the verdict form is suggested:

[Complete this section of the verdict form if you find the defendant "guilty" of the charged offense.]

We the jury, duly impaneled in the above-entitled action, find that the other person was:

_____ At least 15 years of age, but not yet 18 years of age

_____ Under the age of 15

_____ 18 years of age or over

CHAPTER 32

32.01 – Enticing a Person for Purpose of Prostitution

The crime of enticing a person for purpose of prostitution requires proof that the defendant knowingly enticed another person into a house of prostitution or elsewhere, for the purpose of prostitution with another person.

"Entice" means to "tempt or to lure." Enticement does not require that the other person engage in what the defendant intended.

"House of prostitution" means any building, structure or place used for the purpose of prostitution or lewdness or where acts of prostitution occur.

"Prostitution" means engaging in or agreeing or offering to engage in sexual conduct under a fee arrangement with any person for money or any other valuable consideration.

SOURCE: A.R.S. §§ 13-3201 (statutory language as of 1982) and 13-3211(5) (statutory language as of June 13, 2007).

USE NOTE: Use Statutory Criminal Instruction 1.0510(b) defining "knowingly."

The definition of "prostitution" was changed effective June 13, 2007. The new definition is:

> "Prostitution" means engaging in or agreeing or offering to engage in sexual conduct under a fee arrangement with any person for money or any other valuable consideration.

A.R.S. § 13-3211(5). For offenses committed before June 13, 2007, use the previous definition, which was:

> "Prostitution" means engaging in or agreeing or offering to engage in sexual conduct with another person under a fee arrangement with that person or any other person.

The definition of "house of prostitution" appears in A.R.S. § 13-3211(2). The word "entice" means to "tempt or to lure." *State v. Schwartz,* 188 Ariz. 313, 319 (App. 1996) (citing *State v. Cook*, 139 Ariz. 406 (App. 1984)). "Like solicitation, enticement does not require that the victim engage in what the enticer intends." *Schwartz,* 188 Ariz. at 319.

32.02 – Procurement by False Pretenses of Person for Purpose of Prostitution

Because of the changes that have been made in the statutes regarding what may be unlawful sexual acts, the Committee questions the continued viability of A.R.S. § 13-3202 for use in any criminal prosecution. Therefore, the Committee has not proposed an instruction based on A.R.S. § 13-3202.

32.03 – Placing a Person in Prostitution

The crime of procuring or placing a person in a house of prostitution, or elsewhere, for money or other valuable things requires, proof that the defendant knowingly:

1. received money or something else of value for, or on account of; *and*
2. procured or placed in a house of prostitution or elsewhere any person for the purpose of engaging in prostitution.

"House of prostitution" means any building, structure or place used for the purpose of prostitution or lewdness or where acts of prostitution occur.

"Prostitution" means engaging in or agreeing or offering to engage in sexual conduct under a fee arrangement with any person for money or any other valuable consideration.

"Sexual conduct" means sexual contact, sexual intercourse, oral sexual contact or sadomasochistic abuse.

"Sexual contact" means any direct or indirect fondling or manipulating of any part of the genitals, anus or female breast.

"Sexual intercourse" means penetration into the penis, vulva or anus by any part of the body or by any object.

"Sadomasochistic abuse" means flagellation or torture by or on a person who is nude or clad in undergarments or in revealing or bizarre costume or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

SOURCE: A.R.S. §§ 13-3203 (statutory language as of October 1, 1978) and 13-3211 (statutory language as of June 13, 2007).

USE NOTE: Use Statutory Criminal Instruction 1.0510(b) defining "knowingly."

The definition of "prostitution" was changed effective June 13, 2007. A.R.S. § 13-3211(5). The previous definition was:

> "Prostitution" means engaging in or agreeing or offering to engage in sexual conduct with another person under a fee arrangement with that person or any other person.

The definition of "house of prostitution" appears at A.R.S. § 13-3211(2). The meaning of "sexual conduct" appears at A.R.S. § 13-3211(8). "Oral sexual contact" is defined at A.R.S. § 13-3211(4). The meaning of "sexual contact" is at A.R.S. § 13-3211(9). "Sexual intercourse" is defined in A.R.S. § 13-3211(10). "Sadomasochistic abuse" is defined in A.R.S. § 13-3211(7).

32.04 – Receiving Earnings of Prostitute

The crime of receiving earnings of a prostitute requires proof that the defendant knowingly received money or some other valuable thing from the earnings of a person engaged in prostitution.

SOURCE: A.R.S. § 13-3204 (statutory language as of October 1, 1978).

USE NOTE: Use Statutory Criminal Instruction 1.0510(b) defining "knowingly."

The definition of "prostitution" was changed effective June 13, 2007. The new definition is:

> "Prostitution" means engaging in or agreeing or offering to engage in sexual conduct under a fee arrangement with any person for money or any other valuable consideration.

A.R.S. § 13-3211(5). For offenses committed before June 13, 2007, use the previous definition, which was:

> "Prostitution" means engaging in or agreeing or offering to engage in sexual conduct with another person under a fee arrangement with that person or any other person.

COMMENT: The Arizona Supreme Court upheld the constitutionality of the predecessor statute of this provision in *State v. Green*, 60 Ariz. 63 (1942) (upholding former A.R.S. § 13-584).

The preceding instruction was approved in *State v. Rodgers*, 134 Ariz. 296 (App. 1982). The court also noted that it is sufficient to prove guilt that a defendant receive a benefit, knowing that the proceeds come from the earnings of a prostitute, and it need not be shown that he maintained his lifestyle from the proceeds of a prostitute. *Id.* at 304.

32.05 – Causing Spouse to Become Prostitute

The crime of causing a spouse to become a prostitute requires proof that the defendant knowingly by force, fraud, intimidation or threats, caused [his][her] spouse to [live in a house of prostitution] [lead a life of prostitution].

"House of prostitution" means any building, structure or place used for the purpose of prostitution or lewdness or where acts of prostitution occur.

"Prostitution" means engaging in or agreeing or offering to engage in sexual conduct under a fee arrangement with any person for money or any other valuable consideration.

SOURCE: A.R.S. §§ 13-3205 (statutory language as of October 1, 1978) and 13-3211 (statutory language as of June 13, 2007).

USE NOTE: Use Statutory Criminal Instruction 1.0510(b) defining "knowingly."

The definition of "house of prostitution" appears at A.R.S. § 13-3211(2).

The definition of "prostitution" was changed effective June 13, 2007. The new definition is:

> "Prostitution" means engaging in or agreeing or offering to engage in sexual conduct under a fee arrangement with any person for money or any other valuable consideration.

A.R.S. § 13-3211(5). For offenses committed before June 13, 2007, use the previous definition, which was:

> "Prostitution" means engaging in or agreeing or offering to engage in sexual conduct with another person under a fee arrangement with that person or any other person.

32.06 – Taking a Child for Purpose of Prostitution

The crime of taking a minor from legal custody for the purpose of prostitution requires that the defendant:

1. took a minor from the minor's legal custodian; *and*
2. the purpose in taking the minor was for prostitution.

"Prostitution" means engaging in or agreeing or offering to engage in sexual conduct under a fee arrangement with any person for money or any other valuable consideration.

SOURCE: A.R.S. §§ 13-3206 (statutory language as of August 18, 1987) and 13-3211 (statutory language as of June 13, 2007).

USE NOTE: The definition of "prostitution" was changed effective June 13, 2007.

The new definition is:

> "Prostitution" means engaging in or agreeing or offering to engage in sexual conduct under a fee arrangement with any person for money or any other valuable consideration.

A.R.S. § 13-3211(5). For offenses committed before June 13, 2007, use the previous definition, which was:

> "Prostitution" means engaging in or agreeing or offering to engage in sexual conduct with another person under a fee arrangement with that person or any other person.

COMMENT: Unlike the other sections of this chapter, this particular statute omits a *mens rea* requirement. Research of the legislative history suggests that the legislature intended this to be a strict liability offense. Strict liability offenses are allowed under Arizona law. *See* A.R.S. § 13-202(B). However, the Committee suggests that the trial court have the parties brief the issue. If the court concludes that a *mens rea* requirement is needed, the Committee suggests that minimally the jury be instructed on the statutory definition for "knowingly." "Knowingly" is defined in Statutory Criminal Instruction 1.0510(b).

The Committee recommends using the term "legal custodian" in lieu of the statutory phrase "father, mother, guardian or other person having legal custody of the minor." A.R.S. § 13-1302 refers to "legal custody" in terms of entrusting a person by authority of law to the custody of another.

Under *Blakely v. Washington*, 542 U.S. 296 (2004), and its progeny, the trial judge must instruct the jury to determine the minor's age. This is because a violation of this statute in general is a class 4 felony, unless the minor is under fifteen years of age, in which case the offense of taking a child for prostitution is a class 2 felony punishable as a dangerous crime against children under A.R.S. § 13-705. *See* Statutory Criminal Instruction 7.05 and verdict

form for having the jury determine whether the offense is a "dangerous crime against a child."

32.07 – Detention of Persons in a House of Prostitution for Debt

The crime of detaining any person in a house of prostitution for debt requires proof that the defendant knowingly detained another person in a house of prostitution because of a debt such person contracted or was claimed to have been contracted.

"House of prostitution" means any building, structure or place used for the purpose of prostitution or lewdness or where acts of prostitution occur.

"Prostitution" means engaging in or agreeing or offering to engage in sexual conduct under a fee arrangement with any person for money or any other valuable consideration.

SOURCE: A.R.S. §§ 13-3207 (statutory language as of October 1, 1978) and 13-3211 (statutory language as of June 13, 2007).

USE NOTE: Use Statutory Criminal Instruction 1.0510(b) defining "knowingly."

The definition of "house of prostitution" appears at A.R.S. § 13-3211(2).

The definition of "prostitution" was changed effective June 13, 2007. The new definition is:

> "Prostitution" means engaging in or agreeing or offering to engage in sexual conduct under a fee arrangement with any person for money or any other valuable consideration.

A.R.S. § 13-3211(5). For offenses committed before June 13, 2007, use the previous definition, which was:

> "Prostitution" means engaging in or agreeing or offering to engage in sexual conduct with another person under a fee arrangement with that person or any other person.

COMMENT: The statutory term "detain" is not defined. A.R.S. § 13-3102(2) defines a similar term, "restrain" to mean bodily confinement or otherwise restricting liberty of movement.

The statute also does not require an "actual debt" as it provides for "a debt such person has contracted or is said to have contracted." A.R.S. § 13-3207.

32.08 – Maintaining or Operating House of Prostitution

The crime of maintaining or operating a house of prostitution requires proof that the defendant knowingly maintained or operated a house of prostitution or a prostitution enterprise.

"House of prostitution" means any building, structure or place used for the purpose of prostitution or lewdness or where acts of prostitution occur.

"Prostitution" means engaging in or agreeing or offering to engage in sexual conduct under a fee arrangement with any person for money or any other valuable consideration.

"Prostitution enterprise" means any corporation, partnership, association or other legal entity or any group of individuals associated in fact although not a legal entity engaged in providing prostitution services.

SOURCE: A.R.S. §§ 13-3208 (statutory language as of 1982) and 13-3211 (statutory language as of June 13, 2007).

USE NOTE: Use Statutory Criminal Instruction 1.0510(b) defining "knowingly."

"House of prostitution" is defined at A.R.S. § 13-3211(2). "Prostitution enterprise" is defined at A.R.S. § 13-3211(6).

The definition of "prostitution" was changed effective June 13, 2007. The new definition is:

> "Prostitution" means engaging in or agreeing or offering to engage in sexual conduct under a fee arrangement with any person for money or any other valuable consideration.

A.R.S. § 13-3211(5). For offenses committed before June 13, 2007, use the previous definition, which was:

> "Prostitution" means engaging in or agreeing or offering to engage in sexual conduct with another person under a fee arrangement with that person or any other person.

COMMENT: Although the legislature titled this provision, "Keeping or residing in house of prostitution," the Committee chose to entitle it, "Maintaining or operating house of prostitution" as conduct involving "working" or "residing" at a house of prostitution is a misdemeanor. The Committee recommends *State v. Rowan*, 174 Ariz. 285 (App. 1992) *review granted, aff'd in part, vac'd in part,* 176 Ariz. 114 (1993), and *State v. Schwartz*, 188 Ariz. 313 (App. 1996) for decisions addressing the sufficiency of the evidence of elements for "prostitution enterprise" or "house of prostitution."

32.09 – Pandering

The crime of pandering requires proof that the defendant knowingly [placed any person in the charge or custody of any other person for the purpose of prostitution] [placed any person in a house of prostitution with the intent that such person become a prostitute or engage in an act of prostitution] [compelled, induced or encouraged any person to reside with the defendant or another person for the purpose of prostitution] [compelled, induced or encouraged any person to become a prostitute or engage in an act of prostitution].

"House of prostitution" means any building, structure, or place used for the purpose of prostitution or lewdness or where acts of prostitution occur.

"Prostitution" means engaging in or agreeing or offering to engage in sexual conduct under a fee arrangement with any person for money or any other valuable consideration.

SOURCE: A.R.S. §§ 13-3209 (statutory language as of June 24, 2014) and 13-3211 (statutory language as of June 13, 2007).

USE NOTE: Use Statutory Criminal Instruction 1.0510(b) defining "knowingly."

The definition of "house of prostitution" appears at A.R.S. § 13-3211(2).

The definition of "prostitution" was changed effective June 13, 2007. The new definition is:

> "Prostitution" means engaging in or agreeing or offering to engage in sexual conduct under a fee arrangement with any person for money or any other valuable consideration.

A.R.S. § 13-3211(5). For offenses committed before June 13, 2007, use the previous definition, which was:

> "Prostitution" means engaging in or agreeing or offering to engage in sexual conduct with another person under a fee arrangement with that person or any other person.

COMMENT: This statute in general covers activity when a defendant knowingly places a person in a house of prostitution for career purposes. In *State v. Rodgers*, 134 Ariz. 296, 305 (App. 1982), the court held that in a pandering case the State need only establish that a defendant encouraged another person to lead a life of prostitution, and that there is no requirement that the defendant actually forced such person into prostitution.

32.10 – Transporting Persons for Purpose of Prostitution or Other Immoral Purpose

The crime of transporting another person for the purpose of prostitution [or other immoral purpose] requires proof that the defendant knowingly:

1. transported a person by any conveyance, through or across this state; *and*
2. did so for the purpose of [prostitution] [concubinage] [an immoral purpose].

"Prostitution" means engaging in or agreeing or offering to engage in sexual conduct under a fee arrangement with any person for money or any other valuable consideration.

SOURCE: A.R.S. §§ 13-3210 (statutory language as of October 1, 1978) and 13-3211 (statutory language as of June 13, 2007).

USE NOTE: Use Statutory Criminal Instruction 1.0510(b) defining "knowingly."

Use bracketed language as appropriate to the facts.

The definition of "prostitution" was changed effective June 13, 2007. The new definition is:

> "Prostitution" means engaging in or agreeing or offering to engage in sexual conduct under a fee arrangement with any person for money or any other valuable consideration.

A.R.S. § 13-3211(5). For offenses committed before June 13, 2007, use the previous definition, which was:

> "Prostitution" means engaging in or agreeing or offering to engage in sexual conduct with another person under a fee arrangement with that person or any other person.

COMMENT: The final statutory sentence was excluded as jurisdiction is not an issue for the jury's consideration.

The statute does not contain a definition for "concubinage" or "other immoral purpose."

The phrase "through or across this state" means something more than merely driving someone down the street. *See State v. Rowan*, 174 Ariz. 285, 288-89 (App. 1992), *affirmed in part, vacated in part*, 176 Ariz. 114 (1993) (court declined adoption of notion "that the distance traveled is immaterial" as to "transport through or across this state" means "to transfer or convey someone from one end or boundary line of this state to another, that is, from one side of Arizona to the other side.")

32.11 – Definitions

"House of prostitution" means any building, structure, or place used for the purpose of prostitution or lewdness or where acts of prostitution occur.

"Operate and maintain" means to organize, design, perpetuate or control. Operate and maintain includes providing financial support by paying utilities, rent, maintenance costs or advertising costs, supervising activities or work schedules, and directing or furthering the aims of the enterprise.

"Oral sexual contact" means oral contact with the penis, vulva or anus.

"Prostitution" means engaging in or agreeing or offering to engage in sexual conduct under a fee arrangement with any person for money or any other valuable consideration.

"Prostitution enterprise" means any corporation, partnership, association or other legal entity or any group of individuals associated in fact although not a legal entity engaged in providing prostitution services.

"Sadomasochistic abuse" means flagellation or torture by or on a person who is nude or clad in undergarments or in revealing or bizarre costume or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

"Sexual contact" means any direct or indirect fondling or manipulating of any part of the genitals, anus or female breast.

"Sexual conduct" means sexual contact, sexual intercourse, oral sexual contact or sadomasochistic abuse.

"Sexual intercourse" means penetration into the penis, vulva or anus by any part of the body or by any object.

SOURCE: A.R.S. § 13-3211 (statutory language as of June 13, 2007).

32.12A – Child Sex Trafficking

The crime of child sex trafficking requires proof that the defendant knowingly

[caused any minor to engage in prostitution.]

[used any minor for the purposes of prostitution.]

[permitted a minor who is under the defendant's custody or control to engage in prostitution.]

[received any benefit for or on account of procuring or placing a minor in any place or in the charge or custody of any person for the purpose of prostitution.]

[received any benefit pursuant to an agreement to participate in the proceeds of prostitution of a minor.]

[financed, managed, supervised, controlled, or owned, either alone or in association with others, prostitution activity involving a minor.]

[transported or financed the transportation of any minor with the intent that such minor engage in prostitution.]

[engaged in prostitution with a minor.]

[recruited] [enticed] [harbored] [transported] [provided] [obtained] by any means a minor [with the intent of causing the minor to engage in prostitution or sexually explicit performance] [knowing that the minor would engage in prostitution or sexually explicit performance].

"Prostitution" means engaging in or agreeing or offering to engage in sexual conduct under a fee arrangement with any person for money or any other valuable consideration.

"Sexually explicit performance" means a live or public act or show intended to arouse or satisfy the sexual desires or appeal to the prurient interest of patrons.

SOURCE: A.R.S. § 13-3212 (statutory language as of August 9, 2017).

USE NOTE: Use Statutory Criminal Instruction 1.0510(b) defining "knowingly." "Prostitution" is defined in A.R.S. § 13-3211(a). "Benefit" is defined at A.R.S. § 13-105(3).

COMMENT: The phrase "through or across this state" means something more than merely driving someone down the street. *See State v. Rowan,* 174 Ariz. 285, 288-89 (App. 1992), *review granted, aff'd in part, vac'd in part,* 176 Ariz. 11 (1993) (court rejected notion "that the distance traveled is immaterial" as to "transport. . . . through or across this state" means to "transfer or convey someone from one end or boundary line of this state to another, that is, from one side of Arizona to the other side.")

Pursuant to *Blakely v. Washington*, 542 U.S. 296 (2004), and its progeny, the trial judge must instruct the jury to determine the minor's age because a violation of this statute is a class 2 felony, unless the minor is under fifteen years of age, in which case taking a child for prostitution is punishable as a dangerous crime against children pursuant to A.R.S. § 13-705. See Statutory Criminal 7.05 for the instruction and verdict form for having the jury determine whether the offense is a "dangerous crime against a child."

A.R.S. § 13-3212(C) provides that it is not a defense to an offense charged under A.R.S. § 13-3212(A) and (B)(1) and (2) that "the other person is a peace officer posing as a minor or a person assisting a peace officer posing as a minor."

32.12B – Child Sex Trafficking

The crime of child sex trafficking requires proof that the defendant knowingly

[engaged in prostitution with a minor who was under fifteen years of age.

[engaged in prostitution with a minor who the defendant knew was fifteen, sixteen or seventeen years of age.]

[engaged in prostitution with a minor who is fifteen, sixteen or seventeen years of age.]

"Prostitution" means engaging in or agreeing or offering to engage in sexual conduct under a fee arrangement with any person for money or any other valuable consideration.

SOURCE: A.R.S. § 13-3212(B) (statutory language as of August 9, 2017).

USE NOTE: Use Statutory Criminal Instruction 1.056(b) defining "knowingly."

The definition of "prostitution" was changed effective June 13, 2007. The new definition is:

> "Prostitution" means engaging in or agreeing or offering to engage in sexual conduct under a fee arrangement with any person for money or any other valuable consideration.

A.R.S. §13-3211(5). For offenses committed before June 13, 2007, use the previous definition, which was:

> "Prostitution" means engaging in or agreeing or offering to engage in sexual conduct with another person under a fee arrangement with that person or any other person.

A.R.S. § 13-3212(C) provides that it is not a defense to an offense charged under A.R.S. § 13-3212(A) and (B)(1) and (2) that "the other person is a peace officer posing as a minor or a person assisting a peace officer posing as a minor."

32.14 – Prostitution

The crime of "prostitution" requires proof that the defendant:

1. knowingly engaged or agreed or offered to engage in sexual conduct with another person under a fee arrangement with any person for money or any other valuable consideration; *and*
2. had been convicted of prostitution at least three times before committing the present offense.

SOURCE: A.R.S. §§ 13-3211 (statutory language as of June 13, 2007) and 13-3214 (statutory language as of September 21, 2006).

USE NOTE: Use Statutory Criminal Instruction 1.0510(b) defining "knowingly."

"Sexual conduct" is defined in Statutory Definition Instruction 32.11.

The definition of "prostitution" used in element one was changed effective June 13, 2007. The new definition is:

> "Prostitution" means engaging in or agreeing or offering to engage in sexual conduct under a fee arrangement with any person for money or any other valuable consideration.

A.R.S. § 13-3211(5). For offenses committed before June 13, 2007, use the previous definition, which was:

> "Prostitution" means engaging in or agreeing or offering to engage in sexual conduct with another person under a fee arrangement with that person or any other person.

COMMENT: A prior misdemeanor conviction under A.R.S. § 13-3214 qualifies as a prior conviction. If the alleged prior conviction was a misdemeanor conviction under any city or town ordinance, the court must compare the elements of the city or town ordinance to those in § 13-3214; if they are the same or substantially similar, the misdemeanor conviction can be used as a prior conviction. A.R.S. § 13-3214(C).

32.14.A – Prostitution [NEW]

The crime of prostitution requires proof that the defendant knowingly engaged or agreed or offered to engage in sexual conduct with another person under a fee arrangement with any person for money or any other valuable consideration.

[It is an affirmative defense to a prosecution under this section that the defendant committed the acts constituting prostitution as a direct result of being a victim of sex trafficking.]

SOURCE: A.R.S. §§ 13-3211 (statutory language as of June 13, 2007) and 13-3214 (statutory language as of July 24, 2014).

USE NOTE: Use the language in brackets and parentheses as appropriate to the facts.

Use Statutory Definition Instruction 1.0510(b) defining "knowingly."

"Sexual conduct" is defined in Statutory Definition Instruction 32.11.

No Arizona appellate court has determined whether the misdemeanor offense of Prostitution is a jury eligible offense.

CHAPTER 36

36.01 – Definition of Domestic Violence Offense

The defendant commits a domestic violence offense if the defendant commits [list applicable act or offense charged in the charging document and listed in A.R.S. § 13-3601A] *and*:

[the defendant and the victim were married] [the defendant and the victim are married] [the defendant and the victim reside in the same household] [the defendant and the victim resided in the same household] [the defendant and the victim have a child in common] [the defendant or the victim is pregnant by the other party] [the victim is the defendant's or defendant's spouse's parent, grandparent, child, grandchild, brother or sister] [the victim is the defendant or defendant's parent-in-law, grandparent-in-law, stepparent, step-grandparent, stepchild, step-grandchild, brother-in-law or sister-in-law] [the victim is a child who resides or has resided in the same household as the defendant and is related by blood to a former spouse of the defendant or to a person who resides or who has resided in the same household as the defendant] [the victim is the defendant or defendant's adopted child] [the relationship between the victim and the defendant was/had been a romantic or sexual relationship. The following factors may be considered in determining whether the relationship between the victim and the defendant was/had been a romantic or sexual relationship:

(a) The type of relationship.

(b) The length of the relationship.

(c) The frequency of the interaction between the victim and the defendant.

(d) If the relationship has terminated, the length of time since the termination.].

SOURCE: A.R.S. § 13-3601(A) (statutory language as of July 29, 2010).

NOTE: For any domestic violence felony offense charge where the victim is alleged to be pregnant, the jury will have to make a separate finding that the victim was pregnant at the time of the offense and the defendant knew the victim was pregnant at that time. A.R.S. § 13-3601(L).

36.01.2 – Aggravated Domestic Violence

The crime of aggravated domestic violence requires proof that:

1 [the court must instruct the jury on the elements of each domestic violence offense that has been charged]; *and*

2. [the defendant and the victim were married] [the defendant and the victim are married] [the defendant and the victim reside in the same household] [the defendant and the victim resided in the same household] [the defendant and the victim have a child in common] [the defendant or the victim is pregnant by the other party] [the

defendant and the victim are or were related by blood, court order or marriage] [the victim is the defendant's parent, grandparent, child, grandchild, brother or sister, parent-in-law, grandparent-in-law, stepparent, step-grandparent, stepchild, step-grandchild, brother-in-law or sister-in-law] [the victim is the defendant's spouse's parent, grandparent, child, grandchild, brother or sister parent-in-law, grandparent-in-law, stepparent, step-grandparent, stepchild, step-grandchild, brother-in-law or sister-in-law] [the victim is a child who resides or has resided in the same household as the defendant and is related by blood to a former spouse of the defendant or to a person who resides or who has resided in the same household as the defendant] [the victim is the defendant's or defendant's spouse's adopted child] [the victim and the defendant are or were in a romantic or sexual relationship. Factors to consider in determining whether their past or present relationship was romantic or sexual include: (a) the type of relationship; (b) the length of the relationship; (c) the frequency of the interaction between the victim and the defendant; and (d) if the relationship is over, the amount of time that has passed since it ended]; *and*

3. the defendant has been convicted of two or more domestic violence offenses; *and*
4. two prior domestic violence offenses were committed within eighty-four months of the date of the current offense.

SOURCE: A.R.S. § 13-3601.02(A) (statutory language as of September 19, 2007).

USE NOTE: Regarding paragraph 1, if the court has already instructed the jury on the offense alleged to have been a domestic violence offense, then the court need only include the name of the charge.

Regarding paragraph 3, the court must make an initial determination as a matter of law whether any alleged prior domestic violence offense arising in another state, a court of the United States or a tribal court would, if committed in Arizona, have been a domestic violence offense under Arizona law.

Use the language in brackets as appropriate to the facts. For any domestic violence felony offense charge where the victim is alleged to be pregnant, the jury will have to make an additional separate finding that the victim was pregnant at the time of the offense and the defendant knew the victim was pregnant at that time. A.R.S. § 13-3601(L).

COMMENT: The State must prove a defendant has been convicted of two or more prior domestic violence offenses within the last five years, and not merely that he has committed such offenses. *State v. Gaynor-Fonte*, 211 Ariz. 516 (App. 2005). The defendant cannot preclude the State from presenting evidence of prior convictions. Evidence of two prior convictions for domestic violence were elements required to prove aggravated domestic violence, and thus, the defendant could not require the State to accept a stipulation to prior convictions or preclude the State from presenting the evidence to the jury. *State v. Newnom*, 208 Ariz. 507, 508 (App. 2004).

36.01.02 – Domestic Violence – Special Verdict Form

Complete this portion of the verdict form only if you find the defendant guilty of (insert name of applicable offense listed in A.R.S. § 13-3601).

We, the jury, find as follows (check only one):

1. [list the first alleged domestic violence prior conviction, including the date of the conviction and case number]

   _____ Proven beyond a reasonable doubt.

   _____ Not proven.

2. [list the next alleged domestic violence prior conviction, including the date of the conviction and case number]

   _____ Proven beyond a reasonable doubt.

   _____ Not proven.

3. [list the next alleged domestic violence prior conviction, including the date of the conviction and case number]

   _____ Proven beyond a reasonable doubt.

   _____ Not proven.

[We the jury find that the defendant knew the victim was pregnant. (Check only one.)

_____ Proven beyond a reasonable doubt.

_____ Not proven.

SOURCE: A.R.S. § 13-3601.02 (statutory language as of August 25, 2004).

USE NOTE: Use the language in brackets as appropriate to the facts.

The length of sentence varies based on the number of prior domestic violence convictions. Therefore, the Committee suggests that each alleged prior domestic violence conviction be listed separately on the verdict form to allow the jury to specifically decide the prior convictions.

For any domestic violence felony offense listed in A.R.S. § 13-3601.02(A) or a felony offense causing physical injury where the victim is alleged to be pregnant, the jury will have to make an additional separate finding that the victim was pregnant and the defendant knew the victim was pregnant at the time of the offense. This finding increases the sentence by two years. A.R.S. § 13-3601(L).

36.03.01 – Partial-Birth Abortion

The crime of partial-birth abortion requires proof that the defendant:

1. was a physician who knowingly performed a partial-birth abortion; *and*
2. thereby killed a human fetus.

"Partial-birth abortion" means an abortion in which the person performing the abortion does *both* of the following:

(a) Deliberately and intentionally vaginally delivers a living fetus until, in the case of a headfirst presentation, the entire fetal head is outside the body of the mother or, in the case of breech presentation, any part of the fetal trunk past the navel is outside

the body of the mother for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus.

(b) Performs the overt act, other than completion of delivery that kills the partially delivered living fetus.

"Physician" means a doctor of medicine or a doctor of osteopathy who is licensed under Arizona law or any other individual legally authorized by this state to perform abortions or any individual who is not a physician or who is not otherwise legally authorized by this state to perform abortions but who nevertheless directly performs a partial-birth abortion.

[It is a defense to the crime that the partial-birth abortion was necessary to save the life of a mother whose life was endangered by a physical disorder, physical illness or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.]

SOURCE: A.R.S. § 13-3603.01 (statutory language as of September 30, 2009).

USE NOTE: Use Statutory Criminal Instructions 1.0510(a)(1) and (b) to instruct on "intentionally" and "knowingly."

Use bracketed language as appropriate for the facts of the case.

36.06(A) – Bigamy

The crime of bigamy requires proof that the defendant:

1. knowingly married another person; *and*
2. had another living spouse when the marriage occurred.

SOURCE: A.R.S. § 13-3606(A) (statutory language as of October 1, 1978).

USE NOTE: Use Statutory Definition Instruction 1.0510(b) to instruct on "knowingly."

36.06(B) – Defenses to Bigamy

[It is a defense to bigamy if, prior to the alleged crime, a competent court has dissolved, annulled, or voided the former marriage.]

[It is a defense to bigamy if the defendant's spouse had been absent for five successive years without being known to the defendant within that time to be living.]

SOURCE: A.R.S. § 13-3606(B) (statutory language as of October 1, 1978).

USE NOTE: Although unclear, it would seem reasonable to put the burden of proof for this defense on the defendant.

Use bracketed language as appropriate for the facts of the case.

36.07 – Marrying the Spouse of Another

The crime of marrying the spouse of another requires proof of the following:

1. the defendant married the spouse of another; *and*
2. the defendant knew the person [he] [she] was marrying was the spouse of another; *and*
3. the spouse the defendant married would be guilty of bigamy.

SOURCE: A.R.S. § 13-3607 (statutory language as of October 1, 1978).

USE NOTE: The court shall instruct on the culpable mental state. "Knowingly" is defined in A.R.S. § 13-105 (Statutory Criminal Instruction 1.0510(b)).

Use Statutory Criminal Instructions 36.06(A) to define "bigamy" and 36.06(B) to define "defense to bigamy" (if appropriate) when using this instruction.

COMMENT: The opinion of the Committee was that the statute should be interpreted to require the defendant to know that the person being married was already married.

36.08 – Incest

The crime of incest requires proof that:

1. the defendant knowingly [married] [committed sexual intercourse with] [committed adultery with] another person; *and*
2. the defendant was eighteen or more years of age and the other person was eighteen or more years of age; *and*
3. the defendant and the other person were [parent and child] [grandparent and grandchild regardless of the degree] [brother and sister, including half-brother or half-sister] [uncle and niece] [aunt and nephew] [first cousins] at the time.

SOURCE: A.R.S. §§ 13-3608 and 25-101 (statutory language as of August 21, 1998).

USE NOTE: The court shall instruct on the culpable mental state. "Knowingly" is defined in A.R.S. § 13-105 Statutory Criminal Instruction 1.0510(b)).

Although the statute uses the term "fornication" in defining the crime of incest, for the sake of clarity use the definition of "sexual intercourse" found in A.R.S. § 13-1401(3).

For the definition of "adultery," see A.R.S. § 13-1408.

There is an exception/defense for first cousins contained in A.R.S. § 25-101(B).

36.09A – Child Bigamy

The crime of child bigamy requires proof that the defendant [was at least eighteen years of age, had a spouse and knowingly married a child] [was at least eighteen years of age and, either alone or in association with others, knowingly directed, caused or controlled, the

marriage of a child to a person who already had a spouse] [was at least eighteen years of age and, either alone or in association with others, knowingly directed, caused or controlled the marriage of a child if the child already had a spouse] [was at least eighteen years of age and knowingly married a child if the child already had a spouse] [knowingly transported or financed the transportation of a child to promote marriage between the child and a person who already had a spouse] [knowingly transported or financed the transportation of a child who already had a spouse to promote marriage between the child and another person].

"Spouses" means two persons living together as husband and wife, including the assumption of those marital rights, duties and obligations that are usually manifested by married people, including but not necessarily dependent on sexual relations.

["Marriage" means the state of joining together as husband and wife through an agreement, promise or ceremony regardless of whether or not a marriage license had been issued.]

["Marries" means to join together as husband and wife through an agreement, promise or ceremony regardless of whether or not a marriage license had been issued.]

SOURCE: A.R.S. § 13-3609 (statutory language as of August 25, 2004).

USE NOTE: The court shall instruct on the culpable mental state. "Knowingly" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0510(b)).

Use Instruction 36.09(B) "Defenses to Child Bigamy" (if appropriate) when using this instruction.

"Marriage," "marries" and "spouses" are all defined in A.R.S. § 13-3609(D)(1)–(3) and have been included in the text of the instruction because they apply only to this offense.

Use bracketed language as appropriate for the facts of the case.

36.09B – Defenses to Child Bigamy

[It is a defense to child bigamy if, prior to the alleged crime, a competent court had dissolved, annulled, or voided the former marriage.]

[It is a defense to child bigamy if the defendant's spouse had been absent for five successive years without being known to the defendant within that time to be living.]

SOURCE: A.R.S. § 13-3609(B)(1) and (2) (statutory language as of August 25, 2004).

USE NOTE: Although unclear, it would seem reasonable to put the burden of proof for this defense on the defendant.

Use the bracketed language as appropriate to the facts of the case.

36.13 – Contributing to the Delinquency of a Minor

The crime of contributing to the delinquency of a minor requires proof that the defendant caused, encouraged or contributed to the delinquency of a child.

"Delinquency" is defined as any act that tends to debase or injure the morals, health or welfare of a child.

SOURCE: A.R.S. §§ 13-3613 and 13-3612 (statutory language as of October 1, 1978).

36.19 – Child Neglect

The crime of child neglect requires proof of the following:

1. The defendant had custody of a minor under sixteen years of age; and
2. The defendant knowingly caused or permitted [the life of such minor to be endangered] [the minor's health to be injured] [the minor's moral welfare to be imperiled by neglect, abuse or immoral associations].

SOURCE: A.R.S. § 13-3619 (statutory language as of October 1, 1978).

USE NOTE: The court shall instruct on the culpable mental state.

Use Statutory Definition Instruction 1.0510(b)(1) defining "knowingly."

36.20 – Failure to Report

The crime of failure to report requires proof that the defendant:

1. was [list the occupation of the defendant at the time of the offense; see Use Note for the occupations to which this statute applies]; *and*
2. reasonably believed that a minor had been the victim of [a reportable offense] [physical injury] [abuse] [child abuse] [neglect that appears to have been inflicted on the minor by other than accidental means or that is not explained by the available medical history as being accidental in nature or who reasonably believes there has been a denial or deprivation of necessary medical treatment or surgical care or nourishment with the intent to cause or allow the death of an infant who is protected by law]; *and*
3. failed to immediately [report] [cause reports to be made of] the offense by phone or in person followed by a written report in seventy-two hours to [a peace officer or child protective services] [a peace officer]

SOURCE: A.R.S. § 13-3620 (statutory language as of September 18, 2003).

USE NOTE: The statute applies to the following persons:

1. any physician, physician's assistant, optometrist, dentist, osteopath, chiropractor, podiatrist, behavioral health professional, nurse, psychologist, counselor or social worker who develops the reasonable belief in the course of treating a patient.
2. any peace officer, member of the clergy, priest or Christian Science practitioner.

3. the parent, stepparent or guardian of the minor.
4. school personnel or domestic violence victim advocate who develop the reasonable belief in the course of their employment.
5. any other person who has responsibility for the care or treatment of the minor.

Note that for those in paragraph 1, the defendant must develop the reasonable belief in the course of treating the patient. For those in paragraph 4, the defendant must develop the reasonable belief in the course of their employment.

In element 2, put in the name of the reportable offense. "Reportable offenses" are listed in A.R.S. § 13-3620(P)(4)(a)–(d) as:

(a) Any offense listed in chapters 14 (sexual offenses) and 35.1(sexual exploitation of minors) or A.R.S. § 13-3506.01 (furnishing harmful items to minors; Internet activity).

(b) Surreptitious photographing, videotaping, filming or digitally recording of a minor pursuant to A.R.S. § 13-3019.

(c) Child prostitution pursuant to A.R.S. § 13-3212.

(d) Incest pursuant to A.R.S. § 13-3608.

The statute should be carefully reviewed because the exceptions are very narrow. A limited exception is made for clergy, Christian Science practitioner and priest receiving a communication or confession within the context of their religion. A.R.S. § 13-3620(A). Another exception exists for A.R.S. §§ 13-1404 and 13-1405 reportable offenses involving consensual conduct and minors fourteen to seventeen years of age. A.R.S. § 13-3620(B). Finally, there is a very narrow exception for a physician, psychologist or behavioral health professional providing sex offender treatment. A.R.S. § 13-3620(C).

If the report concerns a person who does not have care, custody or control of the minor then use the second bracketed part (peace officer only) part of instruction otherwise use first bracketed part (peace officer or child protective services).

A special verdict form should be used to determine whether the offense is a misdemeanor or a felony. Only the "reportable offenses" are felonies.

36.23A – Child Abuse or Vulnerable Adult Abuse

The crime of [child] [vulnerable adult] abuse requires proof that the defendant,

1. [under circumstances likely to produce death or serious physical injury],
2. [intentionally] [knowingly] [recklessly] [with criminal negligence],
3. [caused the (child) (vulnerable adult) to suffer physical injury].

   [caused or permitted the person or health of the (child) (vulnerable adult) to be injured, while having the care or custody of the (child) (vulnerable adult).]

   [caused or permitted the (child) (vulnerable adult) to be placed in a situation where the person or health of the (child) (vulnerable adult) was endangered, while having the care or custody of the (child) (vulnerable adult).]

SOURCE: A.R.S. § 13-3623 (statutory language as of September 21, 2006).

USE NOTE: "Abuse," "physical injury," "serious physical injury," "child" and "vulnerable adult" (see Statutory Criminal Instruction 36.23.01) are all defined in A.R.S. § 13-3623(F), and should be given in separate instructions.

Use bracketed language appropriate to the facts of the case.

The court must instruct on the culpable mental state. The culpable mental states are all defined in A.R.S. § 13-105 (Chapter 1). If the jury is instructed that it may consider more than one mental state, a separate jury finding may be necessary because the class of felony is determined by the culpable mental state. *See* A.R.S. § 13-3623 (A)(1)–(3).

There is a narrow exception for health care providers and another for vulnerable adults receiving spiritual treatment. A.R.S. § 13-3623(E)(1) and (2). There is also a narrow defense to child abuse, which allows a parent or agent of the parent to leave an unharmed child, 72 hours old or younger, at a "safe haven provider." A.R.S. § 13-3623.01.

COMMENT: The statute does not provide any definition for "care or custody." The Committee's opinion is that the phrase should be given its ordinary meaning.

36.23B – Child Abuse or Vulnerable Adult Abuse

The crime of [child] [vulnerable adult] abuse requires proof that the defendant,

1. [under circumstances other than those likely to produce death or serious injury,]
2. [intentionally] [knowingly] [recklessly] [with criminal negligence],
3. [caused the (child) (vulnerable adult) to suffer physical injury.]

   [caused the (child) (vulnerable adult) to suffer abuse.]

   [caused or permitted the person or health of the (child) (vulnerable adult) to be injured, while having the care or custody of the (child) (vulnerable adult).]

   [caused or permitted the (child) (vulnerable adult) to be placed in a situation where the person or health of the (child) (vulnerable adult) was endangered, while having the care or custody of the (child) (vulnerable adult).]

SOURCE: A.R.S. § 13-3623(B) (statutory language as of September 21, 2006).

USE NOTE: "Abuse"; "physical injury"; "serious physical injury"; "child" and "vulnerable adult" (*see* Statutory Criminal Instruction 36.23.01) are all defined in A.R.S. § 13-3623(F), and should be given in separate instructions.

Use bracketed language appropriate to the facts of the case.

The court must instruct on the culpable mental state. The culpable mental states are all defined in A.R.S. § 13-105 (Statutory Criminal Instructions, Chapter 1). If the jury is instructed that it may consider more than one mental state, a separate jury finding may be necessary because the class of felony is determined by the culpable mental state. *See* A.R.S. § 13-3623 (B)(1)–(3).

There is a narrow exception for health care providers and another for vulnerable adults receiving spiritual treatment. A.R.S § 13-3623(E)(1) and (2). There is also a narrow defense

to child abuse, which allows a parent or agent of the parent to leave an unharmed child, 72 hours old or younger, at a "safe haven provider." A.R.S. § 13-3623.01.

COMMENT: The statute does not provide any definition for "care or custody." The Committee's opinion is that the phrase should be given its ordinary meaning.

36.23D – Emotional Abuse of a Vulnerable Adult

Emotional abuse of a vulnerable adult requires proof that the defendant [intentionally] [knowingly]:

[engaged in emotional abuse of a vulnerable adult who was a patient or resident in any setting in which health care, health-related services or assistance with one or more of the activities of daily living was provided.]

[subjected the vulnerable adult to emotional abuse, while in the defendant's care or custody.]

[permitted the vulnerable adult to be subjected to emotional abuse, while in the defendant's care or custody.]

SOURCE: A.R.S. § 13-3623(D) (statutory language as of September 21, 2006).

USE NOTE: "Emotional Abuse" and "Vulnerable Adult" (*see* Statutory Criminal Instruction 36.23.01) are defined in A.R.S. § 13-3623(F)(3) and (F)(6) and should be given in separate instructions.

Use the bracketed language appropriate for the case.

The court must instruct on the culpable mental state as defined in A.R.S. § 13-105. Use Statutory Definition Instructions 1.0510(a)(1) for "intentionally" and 1.0510(b) for "knowingly."

There is a narrow exception for health care providers and another for vulnerable adults receiving spiritual treatment. A.R.S § 13-3623(E)(1) and (2).

COMMENT: The statute does not provide any definition for "care or custody." The Committee's opinion is that the phrase should be given its ordinary meaning.

36.23.01 – Definition of "Vulnerable Adult"

"Vulnerable adult" means an individual who is eighteen years of age or older and who is unable to protect [himself] [herself] from abuse, neglect or exploitation by others because of a mental or physical impairment.

SOURCE: A.R.S. § 13-3623(F) (statutory language as of December 14, 2000).

USE NOTE: Use the language in brackets as appropriate to the facts.

36.28.11a – Arizona Medical Marijuana Act – Registered Qualifying Patient

It is a defense to the crime of [CRIME] that the defendant was authorized to [use] [possess] marijuana under the terms of the Arizona Medical Marijuana Act. Arizona law authorizes persons with debilitating medical conditions to possess and use marijuana as medicine, so long as such persons are registered qualifying patients with the Arizona Department of Health Services.

To claim the protections of the Arizona Medical Marijuana Act, the defendant must prove, by a preponderance of the evidence, that [he] [she]

1. was a registered qualifying patient and possessed a valid registry identification card from the Arizona Department of Health Services permitting [him] [her] to use and possess marijuana for medical use at the time of [his] [her] arrest; and
2. possessed an amount of marijuana that does not exceed the allowable amount.

The presumption may be rebutted by evidence that conduct related to marijuana was not for the purpose of treating or alleviating the qualifying patient's debilitating medical condition or symptoms associated with the qualifying patient's debilitating medical condition.

[A defendant who possessed or smoked marijuana in a prohibited location may not assert the defense.]

If you find that the defendant's conduct was allowed under the Arizona Medical Marijuana Act, then you must find the defendant not guilty of the charged offense[s].

SOURCE: A.R.S. §§ 36-2801, 36-2802, 36-2811; *State v. Fields (Chase)*, 232 Ariz. 265 (App. 2013); *State v. Maestas*, 244 Ariz. 9 ¶ 15 (2018).

USE NOTE: "Possession" is defined pursuant to Standard Criminal 37.

"Medical use" is defined pursuant to Statutory Criminal 36.28.11f.

"Allowable amount" is defined pursuant to New Statutory Criminal 36.28.11g ("Allowable Amount").

Prohibited locations is defined pursuant to New Statutory Criminal 36.28.11h.

Registry Identification Card validity standards are set forth in A.R.S. § 36-2804.04.

COMMENT: In *State v. Fields (Chase)*, 232 Ariz. 265 (App. 2013), the court of appeals explained the immunities and presumptions available under the Arizona Medical Marijuana Act.

Cardholders who are on probation are entitled to assert the immunities. *Reed-Kaliher v. Hoggatt*, 235 Ariz. 361 (App. 2014), *aff'd*, 237 Ariz. 119 (2015); *Polk v. Hancock*, 236 Ariz. 301 (App. 2014), *vacated*, 237 Ariz. 125 (2015).

36.28.11b – Arizona Medical Marijuana Act – Designated Caregiver

It is a defense to the crime of [CRIME] if the defendant was authorized to possess marijuana under the terms of the Arizona Medical Marijuana Act. [A designated caregiver may also be a registered qualifying patient.] A designated caregiver may assist up to five other registered qualifying patients.

The defendant must prove, by a preponderance of the evidence, that [he] [she]:

1. was a designated caregiver; and
2. possessed a valid registry identification card from the Arizona Department of Health Services for each registered qualifying patient to whom the defendant was connected in the Arizona Department of Health Services system; and
3. possessed no more than the allowable amount of marijuana at the time of [his][her] arrest.

The presumption may be rebutted by evidence that conduct related to marijuana was not for the purpose of treating or alleviating the qualifying patient's debilitating medical condition or symptoms associated with the qualifying patient's debilitating medical condition pursuant to this chapter.

If you find that the defendant's conduct was allowed under the Arizona Medical Marijuana Act, then you must find the defendant not guilty of the charged offense[s].

SOURCE: A.R.S. §§ 36-2801, 36-2802, 36-2811; *State v. Fields (Chase)*, 232 Ariz. 265 (App. 2013); *State v. Liwski*, 238 Ariz. 184, 186 ¶¶ 8-9 (App. 2015).

USE NOTE: "Possession" is defined pursuant to Standard Criminal 37 ("Possession Defined").

"Allowable amount" is defined pursuant to Statutory Criminal 36.28.11g ("Allowable Amount").

"Designated caregiver" is defined in A.R.S. § 36-2801(5).

"Medical use" is defined pursuant to Statutory Criminal 36.28.11f ("Medical use").

Registry Identification Card validity standards are set forth in A.R.S. § 36-2804.04.

COMMENT: In *State v. Fields (Chase)*, 232 Ariz. 265 (App. 2013), the court of appeals explained the immunities and presumptions available under the Arizona Medical Marijuana Act.

Cardholders who are on probation are entitled to assert the immunities. *Reed-Kaliher v. Hoggatt*, 235 Ariz. 361 (App. 2014), *aff'd*, 237 Ariz. 119 (2015); *Polk v. Hancock*, 236 Ariz. 301 (App. 2014), *vacated*, 237 Ariz. 125 (2015).

36.28.11c – Arizona Medical Marijuana Act – Authority to Cultivate

It is a defense to the crime of [CRIME] that the defendant was authorized to [cultivate] marijuana under the terms of the Arizona Medical Marijuana Act. Arizona law authorizes persons with debilitating medical conditions to use marijuana as medicine, so long as such persons are registered qualifying patients with the Arizona Department of Health Services. The Arizona Department of Health Services allows [registered qualifying patients] [designated caregivers] to cultivate marijuana legally if the person's registration indicates that they are authorized to cultivate.

To assert the defense, the defendant must prove, by a preponderance of the evidence:

1. that [he][she] possessed a valid registry identification card from the Arizona Department of Health Services permitting [him] [her] to cultivate marijuana for medical use at the time of [his][her] arrest; and
2. possessed no more than the allowable amount of marijuana; and
3. the marijuana plants were kept in an enclosed, locked facility, except that the plants do not need to be in an enclosed, locked facility if the plants are being transported because the defendant was moving.

If you find that the defendant's conduct was allowed under the Arizona Medical Marijuana Act, then you must find the defendant not guilty of the charged offense[s].

SOURCE: A.R.S. §§ 36-2801, 36-2802, 36-2806(E), 36-2811; *State v. Fields (Chase)*, 232 Ariz. 265 (App. 2013).

USE NOTE: "Possession" may be defined pursuant to Standard Criminal 37 ("Possession Defined").

"Allowable amount" is defined pursuant to Statutory Criminal 36.28.11g ("Allowable Amount").

Prohibited locations is defined pursuant to Statutory Criminal 36.28.11h.

"Medical use" is defined pursuant to Statutory Criminal 36.28.11f.

This instruction should be given in conjunction with Statutory Criminal 36.28.11a ("Registered Qualifying Patient") or Statutory Criminal 36.28.11b ("Designated Caregiver").

Registry Identification Card validity standards are set forth in A.R.S. § 36-2804.04.

COMMENT: In *State v. Fields (Chase)*, 232 Ariz. 265 (App. 2013), the court of appeals explained the immunities and presumptions available under the Arizona Medical Marijuana Act.

36.28.11d – Arizona Medical Marijuana Act – DUI Affirmative Defense

It is a defense to the crime of [CRIME] that the defendant was authorized to use marijuana under the terms of the Arizona Medical Marijuana Act. Arizona law authorizes persons with debilitating medical conditions to use marijuana as medicine, so long as such persons are registered qualifying patients with the Arizona Department of Health Services.

The defendant may establish the affirmative defense by showing by a preponderance of the evidence that:

1. [he] [she] was a registered qualifying patient and possessed a valid registry identification card from the Arizona Department of Health Services permitting [him][her] to use marijuana for medical use at the time of [his][her] arrest, and
2. The concentration of the marijuana or its metabolites capable of causing impairment was insufficient to impair [him][her] at the time of driving.

SOURCE: A.R.S. §§ 36-2801, 36-2802, 36-2811; *State v. Fields (Chase)*, 232 Ariz. 265 (App. 2013); *State ex rel. Montgomery v. Harris*, 234 Ariz. 343, 347 (2014); *Dobson v. McClennen*, 238 Ariz. 389, 393 ¶ 20 (2015); *Ishak v. McClennen*, 241 Ariz. 364, 367 ¶ 14-15 (App. 2016).

USE NOTE: Defendants may plead the immunities in the Arizona Medical Marijuana Act in prosecutions under A.R.S. § 28-1381(A)(3), but not in prosecutions under A.R.S. § 28-1381(A)(1).

Registered Qualifying Patient standards are set forth in A.R.S. § 36-2804.04.

Registry Identification Card validity standards are set forth in A.R.S. § 36-2804.04.

"Qualifying Patient" is defined in A.R.S. § 36-2801(13).

COMMENT: In *State ex rel. Montgomery v. Harris*, 234 Ariz. 343, 347 (2014), the Arizona Supreme Court held that marijuana users do not violate A.R.S. § 28-1381(A)(3) "based merely on the presence of a non-impairing metabolite that may reflect the prior usage of marijuana."

In *Dobson v. McClennen*, 238 Ariz. 389, 393 ¶ 20 (2015), the Arizona Supreme Court held that it is an affirmative defense to A.R.S. § 28–1381(A)(3) if the marijuana or its metabolite was in a concentration insufficient to cause impairment.

In *Ishak v. McClennen*, 241 Ariz. 364, 367 ¶ 14-15 (App. 2016), the court of appeals held that a defendant is not required to introduce expert testimony to avail himself or herself of the affirmative defense as long as the defendant introduces evidence that he or she was not actually impaired.

36.28.11e – Arizona Medical Marijuana Act – Visiting Qualifying Patient

A defendant who does not possess a valid registry identification card from the Arizona Department of Health Services to use or possess marijuana qualifies may assert the protections of the Arizona Medical Marijuana Act if the defendant qualifies as a visiting patient.

To assert the immunities as a visiting qualifying patient, the defendant must prove by a preponderance of the evidence that [he] [she]:

1. is not an Arizona resident or has been in Arizona for less than thirty days; and
2. has been diagnosed with a qualifying debilitating medical condition by a person who is licensed with authority to prescribe drugs to humans in the state of the person's residence or, in the case of a person who has been a resident of Arizona less than thirty days, the state of the person's former residence; and
3. possesses a registry identification card or its equivalent issued under the laws of another state, district, territory, commonwealth or insular possession of the United States that allows the defendant to possess or use marijuana for medical purposes in the jurisdiction of issuance.

SOURCE: A.R.S. §§ 36-2801, 36-2802, 36-2804.03, 36-2811; *State v. Kemmish*, 244 Ariz. 314, ¶ 11 (App. 2018); *State v. Abdi*, 236 Ariz. 609, 611 ¶ 11 (App. 2015).

USE NOTE: Registry Identification Card validity standards are set forth in A.R.S. § 36-2804.04.

COMMENT: In *State v. Kemmish*, 244 Ariz. 314 ¶ 11 (App. 2018), the court of appeals held that A.R.S. § 36-2804.03(c) allows a visiting qualifying patient to possess or use medical marijuana in Arizona if the patient has documentation that would entitle him to do so under the medical marijuana laws of another state, regardless whether another state's medical marijuana law requires an identification card, a physician's letter, or some other documentation.

The "visiting patient" defense applies only to qualifying patients and not to caregivers. *See State v. Abdi*, 236 Ariz. 609, 611 ¶ 11 (App. 2015); A.R.S. § 36-2804.03(c).

36.28.11f – Arizona Medical Marijuana Act – Medical Use

"Medical use" means the acquisition, possession, cultivation, manufacture, use, administration, delivery, transfer or transportation of marijuana or paraphernalia relating to the administration of marijuana to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the patient's debilitating medical condition.

SOURCE: A.R.S. § 36-2801.

36.28.11g – Arizona Medical Marijuana Act – Allowable Amount

"Allowable amount of marijuana" means:

[With respect to a registered qualifying patient, 2.5 ounces of usable marijuana.]

[With respect to a registered qualifying patient authorized to cultivate, 2.5 ounces of usable marijuana and 12 plants.]

[With respect to a registered qualifying patient and designated caregiver, 2.5 ounces of usable marijuana for [himself] [herself] and 2.5 ounces of usable marijuana for each registered qualifying patient for whom the defendant was the designated caregiver on [DATE]. A designated caregiver may be linked to up to 5 registered qualifying patients in addition to [himself] [herself].]

[With respect to a designated caregiver who is not also a registered patient, 2.5 ounces of usable marijuana for each registered qualifying patient for whom the defendant was the designated caregiver on [DATE].]

[With respect to a designated caregiver who is authorized to cultivate, 2.5 ounces of usable marijuana and 12 marijuana plants for each registered qualifying patient for whom the defendant was the designated caregiver on [DATE].]

[With respect to a registered qualifying patient who is also a designated caregiver and is authorized to cultivate, 2.5 ounces of usable marijuana and 12 plants for [himself][herself], and 2.5 ounces of usable marijuana and 12 plants for each registered qualifying patient for whom the defendant was the designated caregiver on [DATE].]

"Usable marijuana" means the dried flowers of the marijuana plant, and any mixture or preparation thereof, but does not include the seeds, stalks and roots of the plant and does not include the weight of any non-marijuana ingredients combined with marijuana and prepared for consumption as food or drink.

SOURCE: A.R.S. §§ 36-2801, 36-2802, 36-2811.

36.28.11h – Arizona Medical Marijuana Act – Prohibited Locations

A [registered qualifying patient] [designated caregiver] is not permitted to knowingly possess or engage in the medical use of marijuana [on a school bus] [on the grounds of a preschool] [on the grounds of a primary school] [on the grounds of a secondary school] [in a correctional facility].

A [registered qualifying patient] is not permitted to smoke marijuana [on public transportation] [in a public place].

SOURCE: A.R.S. § 36-2802; *State v. Maestas*, 244 Ariz. 9 ¶ 15 (2018).

USE NOTE: "Possession" may be defined pursuant to Standard Criminal 37 ("Possession Defined").

"Knowingly" may be defined pursuant to Statutory Criminal 1.0510.01 "Included Mental State – Knowingly").

COMMENT: In *State v. Maestas,* 244 Ariz. 9 ¶ 15 (2018), the Arizona Supreme Court overturned A.R.S. § 15-108(A) on the ground that the list of locations where an AMMA cardholder's use or possession of medical marijuana is limited to the three locations listed in A.R.S. § 36-2802.

TITLE 28 – VEHICULAR CRIMES

28.622.01 – Unlawful Flight From Pursuing Law Enforcement Vehicle

The crime of unlawful flight from a pursuing law enforcement vehicle requires proof of the following two things:

1. The defendant, who was driving a motor vehicle, willfully fled from or attempted to elude a pursuing official law enforcement vehicle; *and*
2. The law enforcement vehicle was appropriately marked showing it to be an official law enforcement vehicle.

An act was done willfully if it was done knowingly. You may consider whether the officer operated his emergency lights or siren in determining whether the defendant acted willfully.

SOURCE: A.R.S. §§ 28-622.01 and 28-624(C) (statutory language as of October 1, 1997); *State v. Martinez,* 230 Ariz. 382 (App. 2012); *State v. Gendron*, 166 Ariz. 562, 565 (App. 1990), *vacated in part on other grounds*, 168 Ariz. 153 (1991) (the definition of willfully in felony flight statute is equivalent to the definition of knowingly in A.R.S. § 13-105; *In re Joel R.,* 200 Ariz. 512, 513-14 (App. 2001).

USE NOTE: The court must instruct on the culpable mental state. "Knowingly" is defined in A.R.S. § 13-105 (Statutory Criminal Instruction 1.0510(b)).

28.661 – Leaving the Scene of an Injury or Fatal Accident

The crime of leaving the scene of an injury or fatal accident requires that the defendant:

1. was driving a vehicle involved in an accident resulting in injury to or death of any person; *and*
2. [failed to immediately stop the vehicle at the scene of the accident, or as close to the accident scene as possible and immediately return to the accident scene.]

   failed to remain at the scene of the accident until the defendant fulfilled the duties required by law of a driver involved in an accident resulting in injury or death.]

SOURCE: A.R.S. §§ 28-661 and 28-663 (statutory language as of October 1, 2011).

USE NOTE: Definitions of "physical injury" and "serious physical injury" should be given from A.R.S. § 13-105, if at issue.

This instruction should be given with Statutory Non-Criminal Instruction 28.663 – Driver's Duty to Give Information and Assistance.

This instruction shall also be followed by the instruction concerning knowledge of injury, if that is at issue – Statutory Non-Criminal Instruction 28.6611. *See State v. Blevins*, 128

Ariz. 64, 68 (App. 1981) (holding that failure to instruct the jury on the issue of defendant's knowledge of the personal injury was fundamental, reversible error when defendant's personal knowledge was at issue).

COMMENT: The term "accident" is broadly construed to include any vehicular incident resulting in injury or death, whether or not such harm was intended. *State v. Rodgers*, 184 Ariz. 378, 380 (App. 1995) (holding that statute applied when passenger in defendant driver's vehicle jumped from moving car and was struck and killed by another car).

Leaving the scene is one crime, regardless of the number of persons injured. *State v. Powers*, 200 Ariz. 363 (2001).

The verdict form for this jury instruction is based on *State v. Milligan,* 87 Ariz. 165, 171 (1960).

28.693 – Reckless Driving

The crime of reckless driving requires proof that the defendant drove a vehicle in reckless disregard for the safety or persons or property.

SOURCE: A.R.S. § 28-693 (statutory language as of October 1, 1997).

USE NOTE: The court shall instruct on the culpable mental state.

Use Statutory Definition Instructions 1.0510© defining "reckless disregard."

28.6611 – Knowledge of Injury

The State must prove that the defendant actually knew of the injury to another or that the defendant possessed knowledge that would lead to a reasonable anticipation that such injury had occurred.

SOURCE: *State v. Porras*, 125 Ariz. 490, 493 (1980).

USE NOTE: Use this instruction in conjunction with Statutory Non-Criminal Instruction 28.661.

Failure to instruct the jury on the issue of defendant's knowledge of the personal injury of the victim is fundamental, reversible error. *State v. Blevins*, 128 Ariz. 64, 68 (App. 1981).

COMMENT: The reference to circumstantial evidence in the text of the previous RAJI was removed, given the standard instruction on direct and circumstantial evidence.

28.6612 – Leaving the Scene of an Injury or Fatal Accident – Form of Verdict

We, the jury, duly impaneled and sworn in the above-entitled action, upon our oaths, do find the defendant, on the charge of Leaving the Scene of an Injury or Fatal Accident (check only one):

_____ Not Guilty

_____ Guilty

(Complete this portion of the verdict form only if you found the defendant "guilty" or Leaving the Scene of an Injury or Fatal Accident.)

We, the jury duly impaneled and sworn in the above-entitled action do find beyond a reasonable doubt that (check only one):

_____ The defendant was driving a vehicle involved in an accident resulting in injury to any person, other than death or serious physical injury;

or

_____ The defendant was driving a vehicle involved in an accident resulting in the death, or serious physical injury, of any person.

(Complete this portion of the verdict form only if you decided that the defendant was driving a vehicle involved in an accident resulting in the death or serious physical injury of any person.)

We, the jury duly impaneled and sworn in the above-entitled action do find beyond a reasonable doubt on the allegation that the defendant caused the accident (check only one):

_____ Proved the defendant caused the accident.

_____ Not proved the defendant cause the accident.

SOURCE: A.R.S. § 28-661(B) and (C) (statutory language as of 2011).

USE NOTE: Use bracketed language as appropriate

The verdict form is based on *State v. Milligan,* 87 Ariz. 165, 171 (1960).

"Physical injury" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0533).

"Serious physical injury" is defined in A.R.S. §13-105 (Statutory Definition Instruction 1.0539).

COMMENT: The findings contained in the interrogatories determine the class of felony.

"A driver who is involved in an accident resulting in death or serious physical injury as defined in § 13-105 and who fails to stop or to comply with the requirements of § 28-663 is guilty of a class 3 felony, except that if a driver caused the accident the driver is guilty of a class 2 felony." A.R.S. § 28-661(B).

"A driver who is involved in an accident resulting in an injury other than death or serious physical injury as defined in § 13-105 and who fails to stop or to comply with the requirements of § 28-663 is guilty of a class 5 felony." A.R.S. § 28-661(C).

28.662 – Leaving the Scene of an Accident

The crime of leaving the scene of an accident resulting only in damage to a vehicle that is driven or attended by a person requires that the defendant:

1. was driving a vehicle involved in an accident resulting in damage to a vehicle that is driven or attended by a person; *and*
2. [failed to immediately stop the vehicle at the scene of the accident, or as close to the accident scene as possible and immediately return to the accident scene.]

   [failed to remain at the scene until the defendant fulfilled the duties required by law of a driver involved in an accident resulting in damage to a vehicle driven or attended by a person.]

SOURCE: A.R.S. §§ 28-662 and 28-663 (statutory language as of October 1, 2011).

USE NOTE: This instruction should be given with Statutory Non-Criminal Instruction 28.663 – Driver's Duty to Give Information and Assistance.

COMMENT: The term "accident" is broadly construed to include any vehicular incident resulting in injury or death, whether or not such harm was intended. *State v. Rodgers*, 184 Ariz. 378, 380 (App. 1995) (holding that statute applied when passenger in defendant driver's vehicle jumped from moving car and was struck and killed by another car).

The verdict form for this jury instruction is based on *State v. Milligan,* 87 Ariz. 165, 171 (1960).

28.663 – Driver's Duty to Give Information and Assistance

The driver of a vehicle involved in an accident resulting in injury to or death of a person or damage to a vehicle that driven or attended by a person shall:

1. give the driver's name and address and the registration number of the vehicle the driver was driving; *and*
2. on request, exhibit the person's driver license to the person struck or the driver or occupants of, or person attending, a vehicle collided with; *and*
3. render reasonable assistance to a person injured in the accident, including making arrangements for the carrying of the person to a physician, surgeon, or hospital for medical or surgical treatment if it is apparent that treatment is necessary or if the carrying is requested by the injured person.

SOURCE: A.R.S. § 28-663 (statutory language as of October 1, 1997).

USE NOTE: This instruction must be given in conjunction with Statutory Non-Criminal Instructions 28.661 and/or 28.662.

28.675 – Causing Death by Use of Vehicle

The crime of causing death by use of a vehicle requires proof that:

1. The defendant was not allowed to operate a motor vehicle because

   [the defendant's driving privilege was revoked for any reason.]

[the defendant's driving privilege was suspended.]

[the defendant, in order to obtain a driver's license,

1. knowingly used a false or fictitious name; *or*
2. knowingly made a false statement; *or*
3. knowingly concealed a material fact; *or*
4. committed fraud; or
5. made a false affidavit; or
6. knowingly [swore] [affirmed] falsely to a matter or thing required to be [sworn to] [affirmed].]

[the defendant did not have a valid driver's license and a proper endorsement, if required and defendant was not exempt from having a valid driver's license and a proper endorsement.],

and

2. The defendant, while operating a motor vehicle, caused the death of another person; *and*
3. The defendant committed the following violation: [The court should instruct the jury on the violation alleged under A.R.S. § 28-675(A)(3).]

SOURCE: A.R.S. § 28-675 (statutory language as of January 11, 2011).

USE NOTE: Use language in brackets as appropriate to the facts.

The court must insure that the reason for the suspension falls within those specified in the statute. *See* A.R.S. § 28-675(B). The State is required to prove as part of its case the reason for the suspension.

Subsection 1 definitions:

"Material" is defined in A.R.S. § 13-2701(1) (Statutory Criminal Instruction 27.01(1)).

"Fraud" is defined in A.R.S. § 13-2310 (Statutory Criminal Instruction 23.10).

The court must instruct on the traffic violation alleged to have caused the death of another person, as listed in subsection 3. The court will need to craft an instruction based on the traffic violation alleged. *See* the following:

"Failing to stop before a red signal" is defined in A.R.S. § 28-645(A)(3)(a).

"Driving on roadways laned for traffic" is defined in A.R.S. § 28-729.

"The laws for a vehicle at an intersection" are defined in A.R.S. §§ 28-771 and -773.

"The laws for turning left at an intersection" are defined in A.R.S. § 28-772.

"The laws of right-of-way at a crosswalk" are defined in A.R.S. § 28-792.

"The requirement to exercise due care" is defined at A.R.S. § 28-794.

"The laws for approaching a school crossing" are defined at A.R.S. § 28-797(F), (G), (H), and (I).

"Failing to stop before a stop sign" is defined at A.R.S. § 28-855(B).

"The laws for approaching a school bus displaying a stop signal and alternately flashing lights" is defined at A.R.S. § 28-857(A).

The State must prove that the defendant knew or should have known that the license was suspended or revoked. *State v. Agee*, 181 Ariz. 58, 61 (App. 1994); *State v. Rivera*, 177 Ariz. 476, 479 (App. 1994). The knowledge of suspension or revocation may be presumed if the notice of suspension or revocation was mailed to the last known address pursuant to A.R.S. §§ 28-448 and 28-3318. See Statutory Non-Criminal Instruction 28.3318. This permissive presumption may be rebutted by presenting some evidence that the defendant did not know that the license was suspended or revoked. *State v. Jennings*, 150 Ariz. 90, 94 (1986).

In the event that the State alleges that the defendant committed fraud in order to obtain a driver's license, the court must instruct on the underlying fraud offense.

In the event that the State alleges that the defendant knowingly used a false or fictitious name, knowingly made a false statement, knowingly concealed a material fact in order to obtain a driver's license, and/or knowingly swore or affirmed falsely to a matter or thing required to be sworn to or affirmed, the Court must instruct on the culpable mental state. "Knowingly" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0510(b)).

28.676 – Causing Serious Physical Injury by Use of a Vehicle

The crime of causing serious physical injury by use of a vehicle requires proof that:

1. The defendant was not allowed to operate a motor vehicle because

   [the defendant's driving privilege was revoked for any reason.]

   [the defendant's driving privilege was suspended.]

   [The defendant, in order to obtain a driver's license,

   1. knowingly used a false or fictitious name; *or*
   2. knowingly made a false statement; *or*
   3. knowingly concealed a material fact; *or*
   4. committed fraud; or
   5. made a false affidavit; or
   6. knowingly [swore] [affirmed] falsely to a matter or thing required to be [sworn to] [affirmed].]

   [the defendant did not have a valid driver's license and a proper endorsement, if required and defendant was not exempt from having a valid driver's license and a proper endorsement.]

   and

2. The defendant, while operating a motor vehicle, caused serious physical injury to another person; *and*

3. The defendant committed the following violation: [The court should instruct the jury on the violation alleged under A.R.S. § 28-675(A)(3).]

SOURCE: A.R.S. § 28-676 (statutory language as of January 11, 2011).

USE NOTE: Use language in brackets as appropriate to the facts.

The Court must insure that the reason for the suspension falls within those specified in the statute. *See* A.R.S. § 28-675(B). The State is required to prove as part of its case the reason for the suspension.

Subsection 1 definitions:

"Material" is defined in A.R.S. § 13-2701(1) (Statutory Criminal Instruction 27.01(1)).

"Fraud" is defined in A.R.S. § 13-2310 (Statutory Criminal Instruction 23.10).

"Serious physical injury" is defined in A.R.S. § 13-105(39) (Statutory Definition Instruction 1.0539).

The court must instruct on the traffic violation alleged to have caused the death of another person, as listed in subsection 3. The court will need to craft an instruction based on the traffic violation alleged. *See* the following:

"Failing to stop before a red signal" is defined in A.R.S. § 28-645(A)(3)(a).

"Driving on roadways laned for traffic" is defined in A.R.S. § 28-729.

"The laws for a vehicle at an intersection" are defined in A.R.S. §§ 28-771 and -773.

"The laws for turning left at an intersection" are defined in A.R.S. § 28-772.

"The laws of right-of-way at a crosswalk" are defined in A.R.S. § 28-792.

"The requirement to exercise due care" is defined at A.R.S. § 28-794.

"The laws for approaching a school crossing" are defined at A.R.S. § 28-797(F), (G), (H), and (I).

"Failing to stop before a stop sign" is defined at A.R.S. § 28-855(B).

"The laws for approaching a school bus displaying a stop signal and alternately flashing lights" is defined at A.R.S. § 28-857(A).

The State must prove that the defendant knew or should have known that the license was suspended or revoked. *State v. Agee*, 181 Ariz. 58, 61 (App. 1994); *State v. Rivera*, 177 Ariz. 476, 479 (App. 1994). The knowledge of suspension or revocation may be presumed if the notice of suspension or revocation was mailed to the last known address pursuant to A.R.S. §§ 28-448 and 28-3318. See Statutory Non-Criminal Instruction 28.3318. This permissive presumption may be rebutted by presenting some evidence that the defendant did not know that the license was suspended or revoked. *State v. Jennings*, 150 Ariz. 90, 94 (1986).

In the event that the State alleges that the defendant committed fraud in order to obtain a driver's license, the court must instruct on the underlying fraud offense.

In the event that the State alleges that the defendant knowingly used a false or fictitious name, knowingly made a false statement, knowingly concealed a material fact in order to

obtain a driver's license, and/or knowingly swore or affirmed falsely to a matter or thing required to be sworn to or affirmed, the court must instruct on the culpable mental state. "Knowingly" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0510(b)).

28.8280 – Careless or Reckless Aircraft Operation

The crime of careless or reckless aircraft operation requires proof that the defendant operated an aircraft in the air, on the ground or on the water in a careless or reckless manner that endangers the life or property of another.

"Aircraft" includes a model aircraft and civil unmanned aircraft.

SOURCE: A.R.S. § 28-8280 (statutory language as of August 6, 2016).

USE NOTE: In determining whether the operation was careless or reckless, the court shall consider the standards for safe operations of aircraft prescribed by federal statutes or regulations governing aeronautics.

No Arizona appellate court has determined whether the misdemeanor offense of Careless or Reckless Aircraft Operation is a jury eligible offense.

28.8282(A)(1) – Prohibited Operation

The crime of prohibited operation requires proof of the following:

1. The defendant [operated] [was in actual physical control of] an aircraft in this state; *and*
2. Under the influence of [intoxicating liquor] [narcotic] [other drugs] [marijuana].

SOURCE: A.R.S. § 28-8282(A)(1) (statutory language as of October 1, 1997).

USE NOTE: Use language in brackets as appropriate to the facts.

28.8282(A)(2) – Prohibited Operation

The crime of prohibited operation by the reason of disability requires proof of the following:

1. The defendant [operated] [was in actual physical control of] an aircraft in this state; *and*
2. By reason mental or physical disability, was incapable of operating an aircraft under the circumstances.

SOURCE: A.R.S. § 28-8282(A)(2) (statutory language as of October 1, 1997).

USE NOTE: Use language in brackets as appropriate to the facts.

28.8282(C)(1) – Prohibited Operation

The crime of prohibited operation requires proof of the following:

1. The defendant [operated] [was in actual physical control of] an aircraft in this state; *and*
2. There was 0.04 percent or more by weight of alcohol in the person's blood.

SOURCE: A.R.S. § 28-8282(C)(1) (statutory language as of October 1, 1997).

USE NOTE: Use language in brackets as appropriate to the facts.

28.8282(C)(2) – Prohibited Operation

The crime of prohibited operation requires proof of the following:

1. The defendant [operated] [was in actual physical control of] an aircraft in this state; *and*
2. The [operation] [physical control] occurred within eight hours after consuming [intoxicating liquor] [narcotic] [habit-forming drugs] [marijuana].

SOURCE: A.R.S. § 28-8282(C)(2) (statutory language as of October 1, 1997).

USE NOTE: Use language in brackets as appropriate to the facts.

TITLE 28 – DUI

28.1321 – Refusal to Submit to Test

Any person who operates a motor vehicle within the state gives consent to a test or tests of [his] [her] blood, breath, urine, or other bodily substance for the purposes of determining the alcoholic content of [his] [her] blood if arrested for driving under the influence.

A refusal to submit to chemical test under the Implied Consent Law occurs when the conduct of the arrested motorist is such that a reasonable person in the officer's position would be justified in believing that such motorist was capable of refusal and exhibited an unwillingness to submit to the test.

If you find that the defendant refused to submit to a test, you may consider such evidence together with all the other evidence in determining whether the State has proven the defendant guilty beyond a reasonable doubt.

SOURCE: A.R.S. § 28-1321 (statutory language as of September 1, 2006); *Campbell v. Superior Court*, 106 Ariz. 542 (1971); *McNutt v. Superior Court of Arizona*, 133 Ariz. 7 (1982); *State v. Holland*, 147 Ariz. 453 (1985); *Kunzler v. Pima County Superior Court*, 154 Ariz. 568 (1987); *Kunzler v. Miller*, 154 Ariz. 570 (1987); and *Hively v. Superior Court*, 154 Ariz. 572 (1987).

COMMENT: The statement in the 1989 RAJI that a motorist was not entitled to the assistance of counsel in deciding whether to submit to a test has been deleted because it was an incorrect statement of law. No mention of the right to consult with counsel is included because introduction of evidence that the defendant requested to speak to counsel would be an impermissible comment on the defendant's exercise of constitutional rights. *See State v. Juarez*, 161 Ariz. 76, 80, 81 (1989) ("[I]n a criminal DUI case, the accused has the right to consult with an attorney, if doing so does not disrupt the investigation" and "Informing the driver that he may not call his attorney before taking the test misstates the law and violates the driver's right to consult with counsel under the sixth amendment of the United States Constitution and article 2, section 24 of the Arizona Constitution.").

28.1381(A)(1)-APC – Actual Physical Control Defined

In determining the defendant was in actual physical control of the vehicle, you should consider the totality of circumstances shown by the evidence and whether the defendant's current or imminent control of the vehicle presented a real danger to [himself] [herself] or others at the time alleged. Factors to be considered might include, but are not limited to:

1. whether the vehicle was running;
2. whether the ignition was on;
3. where the ignition key was located;
4. where and in what position the driver was found in the vehicle;
5. whether the person was awake or asleep;

6. whether the vehicle's headlights were on;
7. where the vehicle was stopped;
8. whether the driver had voluntarily pulled off the road;
9. time of day;
10. weather conditions;
11. whether the heater or air conditioner was on;
12. whether the windows were up or down;
13. any explanation of the circumstances shown by the evidence.

This list is not meant to be all-inclusive. It is up to you to examine all the available evidence and weigh its credibility in determining whether the defendant actually posed a threat to the public by the exercise of present or imminent control of the vehicle while impaired.

SOURCE: *State v. Zaragoza,* 221 Ariz. 49 (2009).

USE NOTE: The Arizona Supreme Court in *Zaragoza* noted that this instruction should be used where actual physical control is in issue. *Id.* at ¶ 21.

28.1381(A)(1)-1 – Driving or Actual Physical Control While Under the Influence

The crime of driving or actual physical control while under the influence requires proof that:

1. The defendant [drove] [was in actual physical control of] a vehicle in this state; *and*
2. The defendant was under the influence of [intoxicating liquor] [any drug] [a vapor releasing substance containing a toxic substance] [any combination of liquor, drugs or vapor releasing substances] at the time of [driving] [being in actual physical control]; *and*
3. The defendant was impaired to the slightest degree by reason of being under the influence of [intoxicating liquor] [any drug] [a vapor releasing substance containing a toxic substance] [any combination of liquor, drugs or vapor releasing substances].

SOURCE: A.R.S. § 28-1381(A)(1) (statutory language as of January 1, 2012).

USE NOTE: Use language in brackets as appropriate to the facts.

The under the influence offenses can be committed while driving or while in actual physical control of a vehicle. If there is only evidence of driving, do not include actual physical control in the instruction. If there is no issue of driving, do not refer to driving in the instruction. In some cases there may be issues of actual physical control and circumstantial evidence of driving. In those cases, the jury instruction should include both choices. *See State ex rel. O'Neill v. Brown (Juan Pascal, real party in interest),* 182 Ariz. 525 (1995)

(police observed cloud of dust in field and then found defendant holding the keys and seated in the stopped car).

If "actual physical control" is an issue, see the definition of that term at Instruction 28.1381(A)(1)–APC.

"Drive" means to operate or be in actual physical control of a motor vehicle. A.R.S. § 28-101(17).

28.1381(A)(2) – Driving or Actual Physical Control With an Alcohol Concentration of 0.08 or More Within Two Hours of Driving

The crime of driving or actual physical control with an alcohol concentration of 0.08 or more within two hours of driving requires proof that:

1. The defendant [drove] [was in actual physical control of] a vehicle in this state; *and*
2. The defendant had an alcohol concentration of 0.08 or more within two hours of [driving] [being in actual physical control of] the vehicle; *and*
3. The alcohol concentration resulted from alcohol consumed either before or while [driving] [being in actual physical control of] the vehicle.

SOURCE: A.R.S. § 28-1381(A)(2) (statutory language as of September 19, 2007).

USE NOTE: Use language in brackets as appropriate to the facts.

Under the influence offenses can be committed while driving or while in actual physical control of a vehicle. If there is only evidence of driving, do not include actual physical control in the instruction. If there is no issue of driving, do not refer to driving in the instruction. In some cases there may be issues of actual physical control and circumstantial evidence of driving. In those cases, the jury instruction should include both choices. *See State ex rel. O'Neill v. Brown (Juan-Pascal, real party in interest*), 182 Ariz. 525 (1995) (police observed cloud of dust in field and then found defendant holding the keys and seated in the stopped car).

If "actual physical control" is an issue, see the definition of that term at Statutory Non-Criminal Instruction 28.1381(A)(1)-APC.

The State must prove that the driver was 0.08 or more within two hours based upon alcohol consumed at or prior to driving or actual physical control. If there was drinking after the defendant's driving or being in actual physical control, it could not be considered in determining whether the driver was 0.08 or above at the time of driving or being in actual physical control.

28.1381(A)(3) – Driving or Actual Physical Control While There Is a Drug in the Defendant's Body

The crime of driving or actual physical control while there is a drug in the defendant's body requires proof that:

1. The defendant [drove] [was in actual physical control of] a vehicle in this state; *and*
2. The defendant had in [his] [her] body [(name of drug)] [a metabolite of (name of drug)] at the time of [driving] [being in actual physical control of] the vehicle.

SOURCE: A.R.S. § 28-1381(A)(3) (statutory language as of September 19, 2007).

USE NOTE: Use language in brackets as appropriate to the facts.

Under the influence offenses can be committed while driving or while in actual physical control of a vehicle. If there is only evidence of driving, do not include actual physical control in the instruction. If there is no issue of driving, do not refer to driving in the instruction. In some cases there may be issues of actual physical control and circumstantial evidence of driving. In those cases, the jury instruction should include both choices. *See State ex rel. O'Neill v. Brown (Juan-Pascal, real party in interest)*, 182 Ariz. 525 (1995) (police observed cloud of dust in field and then found defendant holding the keys and seated in the stopped car).

If "actual physical control" is an issue, see the definition of that term at Statutory Non-Criminal Instruction 28.1381(A)(1)-APC.

Insert the name of the particular drug, e.g. "codeine, amphetamine," which is in the body or has been metabolized in the body. The proscribed drugs are any of those found in A.R.S. § 13-3401.

In those cases where a driver ingests a legal substance which through a bodily process unknown to a person of average intelligence and common experience, that substance is transformed into a prohibited substance, the driver is not liable under A.R.S. § 13-1381(A)(3). *State v. Boyd*, 201 Ariz. 27 (App. 2001).

COMMENT: "A person using a drug prescribed by a medical practitioner licensed pursuant to title 32, chapter 7, 11, 13 or 17 is not guilty of violating subsection A, paragraph 3 of this section." A.R.S. § 28-1381(D). The statutory defense applies to only A.R.S. § 28-1381(A)(3).

28.1381(A)(4) – Driving or Actual Physical Control of a Commercial Motor Vehicle With an Alcohol Concentration of 0.04 or More

The crime of driving or actual physical control of a commercial motor vehicle with an alcohol concentration of 0.04 or more requires proof that:

1. The defendant [drove] [was in actual physical control of] a commercial motor vehicle in this state; *and*
2. The defendant had an alcohol concentration of 0.04 or more.

SOURCE: A.R.S. § 28-1381(A)(4) (statutory language as of January 1, 2009).

DEFINITIONS:

"Commercial driver license" means a license that is issued to an individual and that authorizes the individual to operate a class of commercial motor vehicles.

"Commercial motor vehicle" means a motor vehicle or combination of motor vehicles used to transport passengers or property if the motor vehicle either:

(a) Has a gross combined weight rating of twenty-six thousand one or more pounds inclusive of a towed unit with a gross vehicle weight rating of more than ten thousand pounds.

(b) Has a gross vehicle weight rating of twenty-six thousand one or more pounds.

(c) Is a school bus.

(d) Is a bus.

(e) Is used in the transportation of materials found to be hazardous for the purposes of the hazardous materials transportation act 49 United States Code §§ 5101 through 5127 and is required to be placarded under 49 Code of Federal Regulations § 172.504, as adopted by the department pursuant to chapter 14 of this title.

USE NOTE: Use language in brackets as appropriate to the facts.

Under the influence offenses can be committed while driving or while in actual physical control of a vehicle. If there is only evidence of driving, do not include actual physical control in the instruction. If there is no issue of driving, do not refer to driving in the instruction. In some cases there may be issues of actual physical control and circumstantial evidence of driving. In those cases, the jury instruction should include both choices. *See State ex rel. O'Neill v. Brown (Juan-Pascal, real party in interest*), 182 Ariz. 525 (1995) (police observed cloud of dust in field and then found defendant holding the keys and seated in the stopped car).

If "actual physical control" is an issue, see the definition of that term at Statutory Non-Criminal Instruction 28.1381(A)(1)-APC.

The State must prove that the driver was 0.04 or more within two hours based upon alcohol consumed at or prior to driving or actual physical control. If there was drinking after the defendant's driving or being in actual physical control, it could not be considered in determining whether the driver was 0.04 or above at the time of driving or being in actual physical control.

28.1381(D) – Affirmative Defense to Driving or Actual Physical Control While There Is a Drug in the Defendant's Body

A person using a drug as prescribed by a licensed medical practitioner who is authorized to prescribe the drug is not guilty of driving or actual physical control while there is a drug in the defendant's body.

The defendant has raised the affirmative defense of using a drug as prescribed with

respect to the charged offense of driving or actual physical control while there is a drug in the defendant's body. The burden of proving each element of the offense beyond a reasonable doubt always remains on the State. However, the burden of proving the affirmative defense of using a drug as prescribed is on the defendant. The defendant must prove the affirmative defense of using a drug as prescribed by a preponderance of evidence.

If you find that the defendant has proven the affirmative defense of using a drug as prescribed by a preponderance of the evidence, you must find the defendant not guilty of the offense of driving or actual physical control while there is a drug in the defendant's body

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SOURCE: A.R.S. § 28-1381(D) (statutory language as of August 6, 2016); Statutory Criminal 2.025.

USE NOTE: This is a defense to § 28-1381(A)(3) if the person is using a drug as prescribed by a medical practitioner who is licensed under any section of Title 32 and is authorized to prescribe the drug.

Proof of "a preponderance of the evidence" means that a fact is more probably true than not true. *See* Standard Criminal Instruction 4(b).

COMMENT: "Section 28-1381(D) provides a narrow safe harbor for a defendant charged with violating 28-1381(A)(3). *State v. Bayardi*, 230 Ariz. 195, 198 ¶ 10 (App. 2012).

28.1381(G) – Presumptions of Intoxication

The amount of alcohol in a defendant's [blood] [breath] [bodily substance] gives rise to the following presumptions:

1. If there was at that time 0.05 percent or less by concentration of alcohol in the defendant's [blood] [breath] [bodily substance], it may be presumed that the defendant was not under the influence of intoxicating liquor.
2. If there was at that time an excess of 0.05 percent but less than 0.08 percent by concentration of alcohol in the defendant's [blood] [breath] [bodily substance], such fact does not give rise to any presumption that the defendant was or was not under the influence of intoxicating liquor.
3. If there was at that time 0.08 percent or more by concentration of alcohol in the defendant's [blood] [breath] [bodily substance], it may be presumed that the defendant was under the influence of intoxicating liquor.

These are rebuttable presumptions. In other words, you are free to accept or reject these presumptions after considering all the facts and circumstances of the case. Even with these presumptions, the State has the burden of proving each and every element of the offense of driving under the influence beyond a reasonable doubt before you can find the defendant guilty.

SOURCE: A.R.S. § 28-1381(G) and (H) (statutory language as of September 19, 2007).

USE NOTE: Use language in brackets as appropriate to the facts.

The statute provides that these presumptions shall not be construed as limiting the introduction and consideration of any other competent evidence bearing upon the question of whether or not the defendant was under the influence of intoxicating liquor.

28.1381-MJ – Registered Qualifying Patient (Medical Marijuana)

A registered qualifying patient shall not be considered under the influence of marijuana solely because of the presence of metabolites or components of marijuana that appear in insufficient concentration to cause impairment.

SOURCE: A.R.S. § 36-2802 (statutory language as of December 15, 2010).

28.1381-MS – Mental State

The crime of driving while under the influence of intoxicating liquor or drugs does not require proof of a culpable mental state. The defendant is not required to know that [he] [she] was under the influence of intoxicating liquor or drugs.

SOURCE: *State ex rel. Romley v. Superior Court of Maricopa County*, 184 Ariz. 409, 411 (App. 1995); *State v. Parker,* 236 Ariz. 474 (1983); A.R.S. § 13-202(B) (construction of statutes with respect to culpability).

28.1382(A) – Driving or Actual Physical Control While Under the Extreme Influence of Intoxicating Liquor

The crime of driving or actual physical control while under the extreme influence of intoxicating liquor requires proof that:

1. The defendant [drove] [was in actual physical control of] a vehicle in this state; *and*
2. The defendant had an alcohol concentration of [0.20] [0.15] or more within two hours of [driving] [being in actual physical control of] the vehicle; *and*
3. The alcohol concentration resulted from alcohol consumed either before or while [driving] [being in actual physical control of] the vehicle.

SOURCE: A.R.S. § 28-1382(A) (statutory language as of September 19, 2007). The effective date for 0.18 legislation is December 1, 1998. The effective date for 0.15 legislation is 1:00 p.m. on April 14, 2001. The effective date for 0.20 legislation is September 19, 2007, and amended effective January 1, 2009.

USE NOTE: Use language in brackets as appropriate to the facts.

For crimes committed before January 1, 2009, it is recommended that a special verdict form be used requiring the jury to make a finding of whether the alcohol concentration was either more than 0.15 but less than 0.20 or 0.20 or more. This finding is necessary because it determines the length of incarceration. The legislature amended the statute effective January

1, 2009. The amendment makes it clear that the offenses of 0.15 and 0.20 are separate offenses; therefore, a special verdict form likely will not be needed because 0.15 and 0.20 will likely be charged in separate counts or separate verdict forms will be used for lesser-included offenses.

The under the influence offenses can be committed while driving or while in actual physical control of a vehicle. If there is only evidence of driving, do not include actual physical control in the instruction. If there is no issue of driving, do not refer to driving in the instruction. In some cases, there may be issues of actual physical control and circumstantial evidence of driving. In those cases, the jury instruction should include both choices. *See State ex rel O'Neill v. Brown (Juan-Pascal, real party in interest)*, 182 Ariz. 525 (1995) (police observed cloud of dust in field and then found defendant holding the keys and seated in the stopped car).

If "actual physical control" is an issue, see the definition of that term at Statutory Non-Criminal Instruction 28.1381(A)(1)-APC.

The third element must be given for an offense occurring on or after July 18, 2000 when that legislation became effective. The State must prove that the driver's alcohol concentration was at or over the statutory level within two hours based upon alcohol consumed at or prior to driving or actual physical control. If there was drinking after the driving or actual physical control, such consumption should not be considered in determining whether the driver as at or over the statutory level within two hours of driving or being in actual physical control.

28.1383(A)(1)-1 – Aggravated Driving or Actual Physical Control While Under the Influence While [License][Privilege to Drive] Was [Suspended] [Canceled][Revoked][Refused][Restricted]

The crime of aggravated driving or actual physical control while under the influence while [license to drive] [privilege to drive] is [suspended] [canceled] [revoked] [refused] [restricted] requires proof that:

1. The defendant [drove] [was in actual physical control of] a vehicle in this state; *and*
2. The defendant was under the influence of [intoxicating liquor] [any drug] [a vapor releasing substance containing a toxic substance] [any combination of liquor, drugs or vapor releasing substances] at the time of [driving] [being in actual physical control]; *and*
3. The defendant was impaired to the slightest degree by reason of being under the influence of [intoxicating liquor] [any drug] [a vapor releasing substance containing a toxic substance] [any combination of liquor, drugs or vapor releasing substances]; *and*
4. The defendant's [license to drive] [privilege to drive] was [suspended] [canceled] [revoked] [refused] [restricted] at the time the defendant was [driving] [in actual physical control]; *and*

5. The defendant knew or should have known that the defendant's [driver license to drive][privilege to drive] was [suspended] [canceled] [revoked] [refused] [restricted] at the time of [driving] [being in actual physical control].

SOURCE: A.R.S. §§ 28-1383(A)(1) and 28-1381(A)(1) (statutory language as of January 1, 2012).

USE NOTE: Use language in brackets as appropriate to the facts.

The under the influence offenses can be committed while driving or while in actual physical control of a vehicle. If there is only evidence of driving, do not include actual physical control in the instruction. If there is no issue of driving, do not refer to driving in the instruction. In some cases there may be issues of actual physical control and circumstantial evidence of driving. In those cases, the jury instruction should include both choices. *See State ex rel. O'Neill v. Brown (Juan-Pascal, real party in interest),* 182 Ariz. 525 (1995) (police observed cloud of dust in field and then found defendant holding the keys and seated in the stopped car).

The State must prove that the defendant knew or should have known that the license was suspended or revoked. *State v. Williams,* 144 Ariz. 487, 489 (1985); Sta*te v. Agee*, 181 Ariz. 58, 61 (App. 1994); *State v. Rivera*, 177 Ariz. 476, 479 (App. 1994). The knowledge of suspension or revocation may be presumed if the notice of suspension or revocation was mailed to the last known address pursuant to A.R.S. §§ 28-448 and 28-3318. See Statutory Non-Criminal Instruction 28.3318. This permissive presumption may be rebutted by presenting some evidence that the defendant did not know that the license was suspended or revoked. *State v. Jennings*, 150 Ariz. 90, 94 (1986).

COMMENT: Driving under the influence can be established by either direct or circumstantial evidence of driving, or by establishing that the defendant was in actual physical control of a vehicle. The offense of driving while a license or privilege to drive was suspended, canceled, or revoked (hereinafter driving on a suspended license) requires either direct or circumstantial evidence of driving. There is no actual physical control element for driving while on a suspended license. Therefore, if actual physical control is part of the greater charge of aggravated driving under the influence, driving on a suspended license is not a lesser-included offense. *State v. Brown*, 195 Ariz. 206, 208 (App. 1999). Because aggravated driving under the influence can occur on any property and driving on a suspended license can only occur on a public highway, driving on a suspended license is not a lesser-included offense unless the charging document establishes that the driving occurred on a public highway. *State v. Brown*, 195 Ariz. 206, 209 (App. 1999).

A.R.S. 28-1383(A)(1) "prohibits a person from, among other activities, committing a DUI offense 'while a restriction is placed' on her right to drive because of a prior DUI offense." *State v. Skiba*, 199 Ariz. 539 (App. 2001).

28.1383(A)(1)-2 – Aggravated Driving or Actual Physical Control While Under the Influence While [License][Privilege to Drive] Was [Suspended] [Canceled] [Revoked] [Refused] [Restricted] With Lesser-Included Offense of Driving or Actual Physical Control While Under the Influence

The crime of aggravated driving or actual physical control while under the influence while defendant's [license to drive] [privilege to drive] is [suspended] [canceled] [revoked] [refused] [restricted] includes the lesser offense of driving or actual physical control while under the influence. You may consider the lesser offense of driving or actual physical control while under the influence if either:

1. You find the defendant not guilty of aggravated driving or actual physical control while under the influence; *or*
2. After full and careful consideration of the facts, you cannot agree on whether to find the defendant guilty or not guilty of aggravated driving or actual physical control while under the influence.

You cannot find the defendant guilty of [insert the lesser offense] unless you find that the State has proved each element of [insert the lesser offense] beyond a reasonable doubt.

SOURCE: A.R.S. §§ 28-1383(A)(1) and 28-1381(A)(1) (statutory language as of January 1, 2012); *State v. LeBlanc*, 186 Ariz. 437 (1996).

USE NOTE: Use choices in brackets as appropriate to the facts.

Under the influence offenses can be committed while driving or while in actual physical control of a vehicle. Use the [driving/actual physical control] choices in brackets as appropriate to the facts. If there is only evidence of driving, do not include actual physical control in the instruction. If there is no issue of driving, do not refer to driving in the instruction. In some cases, there may be issues of actual physical control and circumstantial evidence of driving. In those cases, the jury instruction should include both choices. *See State ex rel. O'Neill v. Brown (Juan-Pascal, real party in interest)*, 182 Ariz. 525 (1995) (police observed cloud of dust in field and then found defendant holding the keys and seated in the stopped car).

28.1383(A)(1)-3 – Aggravated Driving or Actual Physical Control With an Alcohol Concentration of 0.08 While [License] [Privilege to Drive] Was [Suspended] [Canceled] [Revoked] [Refused] [Restricted]

The crime of aggravated driving or actual physical control with an alcohol concentration of 0.08 while [license to drive][privilege to drive] is [suspended] [canceled][revoked][refused] [restricted] requires proof that:

1. The defendant [drove] [was in actual physical control of] a vehicle in this state; *and*
2. The defendant had an alcohol concentration of 0.08 or more within two hours of [driving] [being in actual physical control of] the vehicle; *and*

3. The alcohol concentration resulted from alcohol consumed either before or while [driving] [being in actual physical control of] the vehicle; *and*
4. The defendant's [license to drive] [privilege to drive] was [suspended] [canceled] [revoked] [refused] [restricted] at the time the defendant was [driving]/[in actual physical control]; *and*
5. The defendant knew or should have known that the defendant's [driver's license to drive] [privilege to drive] was [suspended] [canceled] [revoked] [refused] [restricted] at the time of [driving] [being in actual physical control].

SOURCE: A.R.S. §§ 28-1383(A)(1) and 28-1381(A)(2) (statutory language as of January 1, 2012).

USE NOTE: Use language in brackets as appropriate to the facts.

The under the influence offenses can be committed while driving or while in actual physical control of a vehicle. Use the [driving]/[actual physical control] choices in brackets as appropriate to the facts. If there is only evidence of driving, do not include actual physical control in the instruction. If there is no issue of driving, do not refer to driving in the instruction. In some cases, there may be issues of actual physical control and circumstantial evidence of driving. In those cases, the jury instruction should include both choices. *See State ex rel. O'Neill v. Brown (Juan-Pascal, real party in interest),* 182 Ariz. 525 (1995) (police observed cloud of dust in field and then found defendant holding the keys and seated in the stopped car).

The State must prove that the defendant knew or should have known that the license was suspended or revoked. *State v. Williams,* 144 Ariz. 487, 489 (1985); *State v. Agee*, 181 Ariz. 58, 61 (App. 1994); *State v. Rivera*, 177 Ariz. 476, 479 (App. 1994). The knowledge of suspension or revocation may be presumed if the notice of suspension or revocation was mailed to the last known address pursuant to A.R.S. §§ 28-448 and 28-3318. See Statutory Non-Criminal Instruction 28.3318. This permissive presumption may be rebutted by presenting some evidence that the defendant did not know that the license was suspended or revoked. *State v. Jennings*, 150 Ariz. 90, 94 (1986).

COMMENT: Driving under the influence can be established by either direct or circumstantial evidence of driving, or by establishing that the defendant was in actual physical control of a vehicle. The offense of driving while a license or privilege to drive was suspended, canceled, or revoked (hereinafter driving on a suspended license) requires either direct or circumstantial evidence of driving. There is no actual physical control element for driving while on a suspended license. Therefore, if actual physical control is part of the greater charge of aggravated driving under the influence, driving on a suspended license is not a lesser-included offense. *State v. Brown*, 195 Ariz. 206, 208 (App. 1999). Because aggravated driving under the influence can occur on any property and driving on a suspended license can only occur on a public highway, driving on a suspended license is not a lesser-included offense unless the charging document establishes that the driving occurred on a public highway. *State v. Brown*, 195 Ariz. 206, 209 (App. 1999).

A.R.S. § 28-1383(A)(1) "prohibits a person from, among other activities, committing a DUI offense 'while a restriction is placed' on her right to drive because of a prior DUI offense." *State v. Skiba*, 199 Ariz. 539 (App. 2001).

28.1383(A)(1)-4 – Aggravated Driving or Actual Physical Control While There Is a Drug in the Defendant's Body While [License to Drive] [Privilege to Drive] Was [Suspended] [Canceled] [Revoked] [Refused] [Restricted]

The crime of aggravated driving or actual physical control while there is a drug in the defendant's body while [license to drive] [privilege to drive] is [suspended] [canceled] [revoked] [refused] [restricted] requires proof that:

1. The defendant [drove] [was in actual physical control of] a vehicle in this state; *and*

2. The defendant had in [his] [her] body [(name of drug)] [a metabolite of (name of drug)] at the time of [driving] [being in actual physical control of] the vehicle; *and*

3. The defendant's [license to drive] [privilege to drive] was [suspended] [canceled] [revoked] [refused] [restricted] at the time the defendant was [driving] [in actual physical control]; *and*

4. The defendant knew or should have known that the defendant's [driver license to drive] [privilege to drive] was [suspended] [canceled] [revoked] [refused] [restricted] at the time of [driving] [being in actual physical control].

SOURCE: A.R.S. §§ 28-1383(A)(1) and 28-1381(A)(3) (statutory language as of January 1, 2012).

USE NOTE: Use language in brackets as appropriate to the facts.

The under the influence offenses can be committed while driving or while in actual physical control of a vehicle. Use the [driving/actual physical control] choices in brackets as appropriate to the facts. If there is only evidence of driving, do not include actual physical control in the instruction. If there is no issue of driving, do not refer to driving in the instruction. In some cases, there may be issues of actual physical control and circumstantial evidence of driving. In those cases, the jury instruction should include both choices. *See State ex rel. O'Neill v. Brown (Juan-Pascal, real party in interest),* 182 Ariz. 525 (1995) (police observed cloud of dust in field and then found defendant holding the keys and seated in the stopped car).

The State must prove that the defendant knew or should have known that the license was suspended or revoked. *State v. Williams,* 144 Ariz. 487, 489 (1985); *State v. Agee*, 181 Ariz. 58, 61 (App. 1994); *State v. Rivera*, 177 Ariz. 476, 479 (App. 1994). The knowledge of suspension or revocation may be presumed if the notice of suspension or revocation was mailed to the last known address pursuant to A.R.S. §§ 28-448 and 28-3318. See Statutory Non-Criminal Instruction 28.3318. This permissive presumption may be rebutted by

presenting some evidence that the defendant did not know that the license was suspended or revoked. *State v. Jennings*, 150 Ariz. 90, 94 (1986).

COMMENT: Driving under the influence can be established by either direct or circumstantial evidence of driving, or by establishing that the defendant was in actual physical control of a vehicle. The offense of driving while a license or privilege to drive was suspended, canceled, or revoked (hereinafter driving on a suspended license) requires either direct or circumstantial evidence of driving. There is no actual physical control element for driving while on a suspended license. Therefore, if actual physical control is part of the greater charge of aggravated driving under the influence, driving on a suspended license is not a lesser-included offense. *State v. Brown*, 195 Ariz. 206, 208 (App. 1999). Because aggravated driving under the influence can occur on any property and driving on a suspended license can only occur on a public highway, driving on a suspended license is not a lesser-included offense unless the charging document establishes that the driving occurred on a public highway. *State v. Brown*, 195 Ariz. 206, 209 (App. 1999).

A.R.S. 28-1383(A)(1) "prohibits a person from, among other activities, committing a DUI offense 'while a restriction is placed' on her right to drive because of a prior DUI offense." *State v. Skiba*, 199 Ariz. 539 (App. 2001).

28.1383(A)(2)-1 – Aggravated Driving or Actual Physical Control While Under the Influence – Two Convictions Within Eighty-Four Months

The crime of aggravated driving or actual physical control while under the influence with two prior convictions within eighty-four months requires proof that:

1. The defendant [drove] [was in actual physical control of] a vehicle in this state; and
2. The defendant was under the influence of [intoxicating liquor] [any drug] [a vapor releasing substance containing a toxic substance] [any combination of liquor, drugs or vapor releasing substances] at the time of [driving] [being in actual physical control; and
3. The defendant was impaired to the slightest degree by reason of being under the influence of [intoxicating liquor] [any drug] [a vapor releasing substance containing a toxic substance] [any combination of liquor, drugs or vapor releasing substances]; and
4. The defendant had been convicted twice for driving under the influence; *and*
5. The two driving-under-the-influence offenses were committed within eighty-four months of the date of the current offense.

SOURCE: A.R.S. §§ 28-1383(A)(2) and 28-1381(A)(1) (statutory language as of September 19, 2007).

USE NOTE: Use language in brackets as appropriate to the facts.

The under the influence offenses can be committed while driving or while in actual physical control of a vehicle. If there is only evidence of driving, do not include actual

physical control in the instruction. If there is no issue of driving, do not refer to driving in the instruction. In some cases, there may be issues of actual physical control and circumstantial evidence of driving. In those cases, the jury instruction should include both choices. *See State ex rel. O'Neill v. Brown (Juan-Pascal, real party in interest),* 182 Ariz. 525 (1995) (police observed cloud of dust in field and then found defendant holding the keys and seated in the stopped car).

A.R.S. § 28-1383(B) provides that the dates of commission of the offenses are the determining factors in applying this eighty-four-month provision.

COMMENT: A rebuttable presumption of regularity attaches to prior convictions used to enhance a sentence or as an element of a crime. "When the State seeks to use a prior conviction as a sentence enhancer or as an element of a crime, the State must first prove the existence of the prior conviction. At the time, the presumption of regularity attaches to the final judgment. If the defendant presents some credible evidence to overcome the presumption, the State must fulfill its duty to establish that the prior conviction was constitutionally obtained." *State v. McCann*, 200 Ariz. 27, 31 (2001), *overruling State v. Reagan*, 103 Ariz. 287 (1968), and *State v. Renaud*, 108 Ariz. 417 (1972).

28.1383(A)(2)-2 – Aggravated Driving or Actual Physical Control With an Alcohol Concentration of 0.08 or More Within Two Hours of Driving – Two Convictions Within Eighty-Four Months

The crime of aggravated driving or actual physical control with an alcohol concentration of 0.08 or more within two hours of driving requires proof that:

1. The defendant [drove] [was in actual physical control of] a vehicle in this state; *and*
2. The defendant had an alcohol concentration of 0.08 or more within two hours of [driving] [being in actual physical control of] the vehicle; *and*
3. The alcohol concentration resulted from alcohol consumed either before or while [driving] [being in actual physical control of] the vehicle; *and*
4. The defendant had been convicted twice for driving under the influence; *and*
5. The two driving-under-the-influence offenses were committed within eighty-four months of the date of the current offense.

SOURCE: A.R.S. §§ 28-1383(A)(2) and 28-1381(A)(2) (statutory language as of September 19, 2007).

USE NOTE: The under the influence offenses can be committed while driving or while in actual physical control of a vehicle. If there is only evidence of driving, do not include actual physical control in the instruction. If there is no issue of driving, do not refer to driving in the instruction. In some cases, there may be issues of actual physical control and circumstantial evidence of driving. In those cases, the jury instruction should include both choices. *See State ex rel. O'Neill v. Brown (Juan-Pascal, real party in interest),* 182 Ariz. 525 (1995) (police observed cloud of dust in field and then found defendant holding the keys and seated in the stopped car).

A.R.S. § 28-1383(B) provides that the dates of commission of the offenses are the determining factors in applying this eighty-four-month provision.

COMMENT: A rebuttable presumption of regularity attaches to prior convictions used to enhance a sentence or as an element of a crime. "When the State seeks to use a prior conviction as a sentence enhancer or as an element of a crime, the State must first prove the existence of the prior conviction. At the time, the presumption of regularity attaches to the final judgment. If the defendant presents some credible evidence to overcome the presumption, the State must fulfill its duty to establish that the prior conviction was constitutionally obtained." *State v. McCann*, 200 Ariz. 27, 31 (2001), *overruling State v. Reagan*, 103 Ariz. 287 (1968), and *State v. Renaud*, 108 Ariz. 417 (1972).

28.1383(A)(2)-3 – Aggravated Driving or Actual Physical Control While There Is a Drug in the Defendant's Body – Two Convictions Within Eighty-Four Months

The crime of aggravated driving or actual physical control while there is a drug in the defendant's body with two prior convictions within eighty-four months requires proof that:

1. The defendant [drove] [was in actual physical control of] a vehicle in this state; *and*
2. The defendant had in [his] [her] body [(name of drug)] [a metabolite of (name of drug)] at the time of [driving] [being in actual physical control of] the vehicle; *and*
3. The defendant had been convicted twice for driving under the influence; *and*
4. The two driving-under-the-influence offenses were committed within eighty-four months of the date of the current offense.

SOURCE: A.R.S. §§ 28-1383(A)(2) and 28-1381(A)(3) (statutory language as of September 19, 2007).

USE NOTE: Use language in brackets as appropriate to the facts.

The under the influence offenses can be committed while driving or while in actual physical control of a vehicle. If there is only evidence of driving, do not include actual physical control in the instruction. If there is no issue of driving, do not refer to driving in the instruction. In some cases, there may be issues of actual physical control and circumstantial evidence of driving. In those cases, the jury instruction should include both choices. *See State ex rel. O'Neill v. Brown (Juan-Pascal, real party in interest),* 182 Ariz. 525 (1995) (police observed cloud of dust in field and then found defendant holding the keys and seated in the stopped car).

A.R.S. § 28-1383(B) provides that the dates of commission of the offenses are the determining factors in applying this sixty-month provision.

COMMENT: A rebuttable presumption of regularity attaches to prior convictions used to enhance a sentence or as an element of a crime. "When the State seeks to use a prior conviction as a sentence enhancer or as an element of a crime, the State must first prove the existence of the prior conviction. At the time, the presumption of regularity attaches to the final judgment. If the defendant presents some credible evidence to overcome the

presumption, the State must fulfill its duty to establish that the prior conviction was constitutionally obtained." *State v. McCann*, 200 Ariz. 27, 31 (2001), *overruling State v. Reagan*, 103 Ariz. 287 (1968), and *State v. Renaud*, 108 Ariz. 417 (1972).

28.1383(A)(3)-1 – Aggravated Driving or Actual Physical Control While Under the Influence While There Is a Person Under the Age of Fifteen Years in the Vehicle

The crime of aggravated driving or actual physical control while under the influence while there is a person under the age of fifteen years in the vehicle requires proof that:

1. The defendant [drove] [was in actual physical control of] a vehicle in this state; *and*
2. The defendant was under the influence of [intoxicating liquor] [any drug] [a vapor releasing substance containing a toxic substance] [any combination of liquor, drugs or vapor releasing substances] at the time of [driving] [being in actual physical control]; *and*
3. The defendant was impaired to the slightest degree by reason of being under the influence of [intoxicating liquor] [any drug] [a vapor releasing substance containing a toxic substance][any combination of liquor, drugs or vapor releasing substances]; *and*
4. A person under fifteen years of age was in the vehicle at the time of the offense.

SOURCE: A.R.S. §§ 28-1383(A)(3) and 28-1381(A)(1) (statutory language as of September 1, 2001).

USE NOTE: Use the language in the brackets as appropriate to the facts.

Users are advised to consult *State v. Miller (Oliveri)*, 226 Ariz. 190 (App. 2011) regarding the use of "ability to drive" as part of the instruction. The opinion directed that the RAJI instruction not be given as currently written. The opinion did not suggest how the instruction should be rewritten.

Under the influence offenses can be committed while driving or while in actual physical control of a vehicle. If there is only evidence of driving, do not include actual physical control in the instruction. If there is no issue of driving, do not refer to driving in the instruction. In some cases, there may be issues of actual physical control and circumstantial evidence of driving. In those cases, the jury instruction should include both choices. *See State ex rel. O'Neill v. Brown (Juan-Pascal, real party in interest),* 182 Ariz. 525 (1995) (police observed cloud of dust in field and then found defendant holding the keys and seated in the stopped car).

28.1383(A)(3)-2 – Aggravated Driving or Actual Physical Control With an Alcohol Concentration of 0.08 or More Within Two Hours of Driving While There Is a Person under the Age of Fifteen Years in the Vehicle

The crime of aggravated driving or actual physical control with an alcohol concentration of 0.08 or more within two hours of driving while there is a person under the age of fifteen years in the vehicle requires proof that:

1. The defendant [drove] [was in actual physical control of] a vehicle in this state; *and*
2. The defendant had an alcohol concentration of 0.08 or more within two hours of [driving] [being in actual physical control of] the vehicle; *and*
3. The alcohol concentration resulted from alcohol consumed either before or while [driving] [being in actual physical control of] the vehicle; *and*
4. A person under fifteen years of age was in the vehicle at the time of the offense.

SOURCE: A.R.S. §§ 28-1383(A)(3) and 28-1381(A)(2) (statutory language as of September 19, 2007).

USE NOTE: Use the language in the brackets as appropriate to the facts.

Under the influence offenses can be committed while driving or while in actual physical control of a vehicle. If there is only evidence of driving, do not include actual physical control in the instruction. If there is no issue of driving, do not refer to driving in the instruction. In some cases, there may be issues of actual physical control and circumstantial evidence of driving. In those cases, the jury instruction should include both choices. *See State ex rel O'Neill v. Brown (Juan-Pascal, real party in interest),* 182 Ariz. 525 (1995) (police observed cloud of dust in field and then found defendant holding the keys and seated in the stopped car).

28.1383(A)(3)-3 – Aggravated Driving or Actual Physical Control While There Is a Drug in the Defendant's Body While There Is a Person Under the Age of Fifteen Years in the Vehicle

The crime of aggravated driving or actual physical control while there is a drug in the defendant's body while there is a person under the age of fifteen years in the vehicle requires proof that:

1. The defendant [drove] [was in actual physical control of] a vehicle in this state; *and*
2. The defendant had in [his] [her] body [(name of drug)] [a metabolite of (name of drug)] at the time of [driving] [being in actual physical control of] the vehicle; *and*
3. A person under fifteen years of age was in the vehicle at the time of the offense.

SOURCE: A.R.S. §§ 28-1383(A)(3) and 28-1381(A)(3) (statutory language as of September 19, 2007).

USE NOTE: Use the language in the brackets as appropriate to the facts.

Under the influence offenses can be committed while driving or while in actual physical control of a vehicle. If there is only evidence of driving, do not include actual physical control in the instruction. If there is no issue of driving, do not refer to driving in the

instruction. In some cases, there may be issues of actual physical control and circumstantial evidence of driving. In those cases, the jury instruction should include both choices. *See State ex rel. O'Neill v. Brown (Juan-Pascal, real party in interest),* 182 Ariz. 525 (1995) (police observed cloud of dust in field and then found defendant holding the keys and seated in the stopped car).

28.1383(A)(4)-1 – Aggravated Driving or Actual Physical Control While Subject to an Interlock Device and Under the Influence

The crime of aggravated driving or actual physical control while subject to an interlock device and under the influence requires proof that:

1. The defendant [drove] [was in actual physical control of] a vehicle in this state; *and*
2. The defendant was under the influence of [intoxicating liquor] [any drug] [a vapor releasing substance containing a toxic substance] [any combination of liquor, drugs or vapor releasing substances] at the time of [driving] [being in actual physical control]; *and*
3. The defendant was impaired to the slightest degree by reason of being under the influence of [intoxicating liquor] [any drug] [a vapor releasing substance containing a toxic substance] [any combination of liquor, drugs or vapor releasing substances]; *and*
4. The defendant had been ordered to equip any motor vehicle operated by the defendant with a certified ignition interlock device.

SOURCE: A.R.S. §§ 28-1383(A)(4) and 28-1381(A)(1) (statutory language as of January 1, 2012).

28.1383(A)(4)-2 – Aggravated Driving or Actual Physical Control While Subject to an Interlock Device and an Alcohol Concentration of 0.08 or More Within Two Hours of Driving

The crime of aggravated driving or actual physical control while subject to an interlock device and an alcohol concentration of 0.08 or more within two hours of driving requires proof that:

1. The defendant [drove] [was in actual physical control of] a vehicle in this state; *and*
2. The defendant had an alcohol concentration of 0.08 or more within two hours of [driving][being in actual physical control of] the vehicle; *and*
3. The alcohol concentration resulted from alcohol consumed either before or while [driving] [being in actual physical control of] the vehicle; *and*
4. The defendant had been ordered to equip any motor vehicle operated by the defendant with a certified ignition interlock device.

SOURCE: A.R.S. §§ 28-1383(A)(4) and 28-1381(A)(2) (statutory language as of January 1,

2012).

28.1383(A)(4)-3 – Aggravated Driving or Actual Physical Control While Subject to an Interlock Device and There Is a Drug in the Defendant's Body

The crime of aggravated driving or actual physical control while subject to an interlock device and there is a drug in the defendant's body requires proof that:

1. The defendant [drove] [was in actual physical control of] a vehicle in this state; *and*
2. The defendant had in [his] [her] body [(name of drug)] [a metabolite of (name of drug)] at the time of [driving] [being in actual physical control of] the vehicle; *and*
3. The defendant had been ordered to equip any motor vehicle operated by the defendant with a certified ignition interlock device.

SOURCE: A.R.S. §§ 28-1383(4) and 28-1381(A)(3) (statutory language as of January 1, 2012).

28.1383(A)(4)-4 – Aggravated Driving or Actual Physical Control While Under the Extreme Influence of Intoxicating Liquor While Subject to an Interlock Device

The crime of driving or actual physical control while under the extreme influence of intoxicating liquor while subject to an interlock device requires proof that:

1. The defendant [drove] [was in actual physical control of] a vehicle in this state; *and*
2. The defendant had an alcohol concentration of 0.15 or more within two hours of [driving] [being in actual physical control of] the vehicle; *and*
3. The alcohol concentration resulted from alcohol consumed either before or while [driving] [being in actual physical control of] the vehicle; *and*
4. The defendant had been ordered to equip any motor vehicle operated by the defendant with a certified ignition interlock device.

SOURCE: A.R.S. §§ 28-1383(A)(4) and 28-1382 (statutory language as of January 1, 2012).

28.1383(A)(5)-1 – Aggravated Driving or Actual Physical Control While Driving the Wrong Way on a Highway and Under the Influence

The crime of aggravated driving or actual physical control while driving the wrong way on a highway and under the influence requests proof that:

1. The defendant [drove] [was in actual physical control of] a vehicle in this state; *and*
2. The defendant was under the influence of [intoxicating liquor] [any drug] [a vapor releasing substance containing a toxic substance] [any combination of liquor, drugs

or vapor releasing substances] at the time of [driving] [being in actual physical control]; *and*

3. The defendant was impaired to the slightest degree by reason of being under the influence of [intoxicating liquor] [any drug] [a vapor releasing substance containing a toxic substance] [any combination of liquor, drugs or vapor releasing substances]; *and*
4. The defendant drove the wrong way on a highway.

"Wrong way" means vehicular movement that is in a direction opposing the legal flow of traffic. Wrong way does not include median crossing or a collision where a motor vehicle comes to a stop facing the wrong way.

SOURCE: A.R.S. §§ 28-1383(A)(5), (N)(2) and 28-1381(A)(1) (statutory language as of August 3, 2018).

USE NOTE: Use language in brackets as appropriate to the facts

DEFINITIONS:

"Highway" means the entire width between the boundary lines of every way if a part of the way is open to the use of the public for purposes of vehicular travel. *See* A.R.S. § 28-101(61) (statutory language as of August 3, 2018).

28.1383(A)(5)-2 – Aggravated Driving or Actual Physical Control While Driving the Wrong Way on a Highway and an Alcohol Concentration of 0.08 or More Within Two Hours of Driving

The crime of aggravated driving or actual physical control while driving the wrong way on a highway and an alcohol concentration of 0.08 or more within two hours of driving requires proof that:

1. The defendant [drove] [was in actual physical control of] a vehicle in this state; *and*
2. The defendant had an alcohol concentration of 0.08 or more within two hours of [driving] [being in actual physical control of] the vehicle; *and*
3. The alcohol concentration resulted from alcohol consumed either before or while [driving] [being in actual physical control of] the vehicle; *and*
4. The defendant drove the wrong way on a highway.

"Wrong way" means vehicular movement that is in a direction opposing the legal flow of traffic. Wrong way does not include median crossing or a collision where a motor vehicle comes to a stop facing the wrong way.

SOURCE: A.R.S. §§ 28-1383(A)(5), (N)(2) and 28-1381(A)(2) (statutory language as of August 3, 2018).

USE NOTE: Use language in brackets as appropriate to the facts.

DEFINITIONS:

"Highway" means the entire width between the boundary lines of every way if a part of the way is open to the use of the public for purposes of vehicular travel. *See* A.R.S. § 28–101(61) (statutory language as of August 3, 2018).

28.1383(A)(5)-3 – Aggravated Driving or Actual Physical Control While Driving the Wrong Way on a Highway and There Is a Drug in the Defendant's Body

The crime of aggravated driving or actual physical control while driving the wrong way on a highway and there is a drug in the defendant's body requires proof that:

1. The defendant [drove] [was in actual physical control of] a vehicle in this state; *and*
2. The defendant had in [his] [her] body [(name of drug)] [a metabolite of (name of drug)] at the time of [driving] [being in actual physical control of] the vehicle; *and*
3. The defendant drove the wrong way on a highway.

"Wrong way" means vehicular movement that is in a direction opposing the legal flow of traffic. Wrong way does not include median crossing or a collision where a motor vehicle comes to a stop facing the wrong way.

SOURCE: A.R.S. §§ 28-1383(A)(5), (N)(2) and 28-1381(A)(3) (statutory language as of August 3, 2018).

USE NOTE: Use language in brackets as appropriate to the facts

DEFINITIONS:

"Highway" means the entire width between the boundary lines of every way if a part of the way is open to the use of the public for purposes of vehicular travel. *See* A.R.S. § 28–101(61) (statutory language as of August 3, 2018).

28.1383(A)(5)-4 – Aggravated Driving or Actual Physical Control While Driving the Wrong Way on a Highway and a Commercial Motor Vehicle with an Alcohol Concentration of 0.04 or More

The crime of aggravated driving or actual physical control while driving the wrong way on a highway and there is a drug in the defendant's body requires proof that:

1. The defendant [drove] [was in actual physical control of] a commercial motor vehicle; *and*
2. The defendant had an alcohol concentration of 0.04 or more; *and*
3. The defendant drove the wrong way on a highway.

"Wrong way" means vehicular movement that is in a direction opposing the legal flow of traffic. Wrong way does not include median crossing or a collision where a motor vehicle comes to a stop facing the wrong way.

SOURCE: A.R.S. §§ 28-1383(A)(5), (N)(2) and 28-1381(A)(4) (statutory language as of August 3, 2018).

USE NOTE: Use language in brackets as appropriate to the facts

DEFINITIONS:

"Highway" means the entire width between the boundary lines of every way if a part of the way is open to the use of the public for purposes of vehicular travel. *See* A.R.S. § 28-101(61) (statutory language as of August 3, 2018).

"Commercial driver license" means a license that is issued to an individual and that authorizes the individual to operate a class of commercial motor vehicles. *See* A.R.S. § 28–3001 (statutory language as of August 9, 2017).

"Commercial motor vehicle" means a motor vehicle or combination of motor vehicles used to transport passengers or property if the motor vehicle either:

(a) Has a gross combined weight rating of twenty-six thousand one or more pounds inclusive of a towed unit with a gross vehicle weight rating of more than ten thousand pounds.

(b) Has a gross vehicle weight rating of twenty-six thousand one or more pounds.

(c) Is a school bus.

(d) Is a bus.

(e) Is used in the transportation of materials found to be hazardous for the purposes of the hazardous materials transportation act 49 United States Code §§ 5101 through 5127 and is required to be placarded under 49 Code of Federal Regulations § 172.504, as adopted by the department pursuant to chapter 14 of title 28.

See A.R.S. § 28–1301(3) (statutory language as of August 3, 2018).

28.1383(A)(5)-5 – Aggravated Driving or Actual Physical Control While Driving the Wrong Way on a Highway Under the Extreme Influence of Intoxicating Liquor

The crime of driving or actual physical control while driving the wrong way and while under the extreme influence of intoxicating liquor requires proof that:

1. The defendant [drove] [was in actual physical control of] a vehicle in this state; *and*
2. The defendant had an alcohol concentration of 0.15 or more within two hours of [driving] [being in actual physical control of] the vehicle; *and*
3. The alcohol concentration resulted from alcohol consumed either before or while [driving] [being in actual physical control of] the vehicle; *and*
4. The defendant drove the wrong way on a highway.

"Wrong way" means vehicular movement that is in a direction opposing the legal flow of traffic. Wrong way does not include median crossing or a collision where a motor vehicle comes to a stop facing the wrong way.

SOURCE: A.R.S. §§ 28-1383(A)(5), (N)(2) and 28-1382(A) (statutory language as of August 3, 2018).

USE NOTE: Use language in brackets as appropriate to the facts

DEFINITIONS:

"Highway" means the entire width between the boundary lines of every way if a part of the way is open to the use of the public for purposes of vehicular travel. *See* A.R.S. § 28–101(61) (statutory language as of August 3, 2018).

28.1383(B) − Eighty-Four Month Provision

1. The dates of the commission of the offenses are the determining factor in applying the eighty-four month provision.
2. The time that a probationer is found to be on absconder status or the time that a person is incarcerated in any state, federal, county or city jail or correctional facility is excluded when determining the eighty-four month period.

SOURCE: A.R.S. § 28-1383(B) (statutory language as of September 19, 2007).

28.3318 – Presumption of Receipt of Notice

Once mailed by the Motor Vehicle Department, the defendant is presumed to have received notice of the [suspension] [revocation] [cancellation] [restriction]. The State is not required to prove actual receipt of the notice or actual knowledge of the [suspension] [revocation] [cancellation] [restriction]. Compliance with the notice provision required by state law of the [suspension] [cancellation] [revocation] [restriction] may be presumed if the notice of [suspension] [cancellation] [revocation] [restriction] was mailed by the Motor Vehicle Department to the defendant at the address provided to the Department on the licensee's application or provided to the Department pursuant to a notice of change of address or other source, including the address on a traffic citation received by the Department.

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

SOURCE: A.R.S. §§ 28-3318 (statutory language as of September 18, 2003) and 28-3473 (statutory language as of August 6, 1999).

USE NOTE: Use language in brackets as appropriate to the facts.

The State must prove that the defendant knew or should have known that the license was suspended or revoked. *State v. Agee*, 181 Ariz. 58, 61 (App. 1994); *State v. Rivera*, 177 Ariz. 476, 479 (App. 1994). The knowledge of suspension or revocation may be presumed if the notice of suspension or revocation was mailed to the last known address pursuant to A.R.S. §§ 28-448 and 28-3318. This permissive presumption may be rebutted by presenting some evidence that the defendant did not know that the license was suspended or revoked. *State v. Jennings*, 150 Ariz. 90, 94 (1986).

COMMENT: In *Lee v. State*, 218 Ariz. 235 ¶ 8 (2008), the court addressed the common law "mail delivery rule." The court wrote:

> That is, proof of the fact of mailing will, absent any contrary evidence, establish that delivery occurred. If, however, the addressee denies receipt, the presumption of delivery disappears, but the fact of mailing still has evidentiary force. [Citation omitted.] The denial of receipt creates an issue of fact that the factfinder must resolve to determine if delivery actually occurred.

Whether the same principles apply to the statutory presumption is unresolved.

36.2802(D) Affirmative Defense of Insufficient Concentration of Marijuana to Cause Impairment

The defendant has raised the affirmative defense that the marijuana, or its metabolite, was not present in a sufficient quantity to cause impairment with respect to the charged offense of driving or actual physical control while there is marijuana in the defendant's body. The defendant must prove both of the following:

1. The defendant's use was authorized by the Arizona Medical Marijuana Act (AMMA), and
2. The marijuana, or any metabolite, found in defendant's body was present in an insufficient concentration to cause impairment.

The burden of proving each element of the offense beyond a reasonable doubt always remains on the State. However, the burden of proving the affirmative defense of insufficient concentration to cause impairment is on the defendant. The defendant must prove the affirmative defense of insufficient concentration to cause impairment by a preponderance of the evidence.

If you find that the defendant has proven the affirmative defense of insufficient concentration to cause impairment by a preponderance of evidence, you must find the defendant not guilty of the offense of driving or actual physical control while there is marijuana in the defendant's body.

If the defendant was a Medical Marijuana cardholder at the time of the offense, the

defendant's use is presumed to be authorized by AMMA. The State may rebut this presumption.

SOURCE: A.R.S. §§ 36-2802(D), 36-2811(A)(1), 36-2811(A)(2) (statutory language as of December 14, 2010); Statutory Criminal 2.025.

USE NOTE: This is a defense available to a registered qualifying patient to § 28-1381(A)(3).

Proof of "a preponderance of the evidence" means that a fact is more probably true than not true. *See* Standard Criminal Instruction 4(b).

COMMENT: "Section 36-2802(D), rather than § 28-1381(D), defines the affirmative defense available to a registered qualifying patient to an (A)(3) charge. If their use of marijuana is authorized by § 36-2802(D), such patients cannot be deemed to be under the influence—and thus cannot be convicted under (A)(3)—based solely on concentrations of marijuana or its metabolite insufficient to cause impairment. Possession of a registry card creates a presumption that a qualifying patient is engaged in the use of marijuana pursuant to the AMMA, so long as the patient does not possess more than the permitted quantity of marijuana. A.R.S. § 36-2811(A)(1). That presumption is subject to rebuttal as provided under § 36-2811(A)(2)." *Dobson v. McClennen*, 238 Ariz. 389, 393 ¶ 19 (2015).

"[T]he AMMA does not immunize a medical marijuana cardholder from prosecution under § 28-1381(A)(3), but instead affords an affirmative defense if the cardholder shows that the marijuana or its metabolite was in a concentration insufficient to cause impairment." *Dobson v. McClennen*, 238 Ariz. at 390 ¶ 2.

"The patient may establish an affirmative defense to such a charge by showing that his or her use was authorized by the AMMA—which is subject to the rebuttable presumption under § 36-2811(A)(2)—and that the marijuana or its metabolite was in a concentration insufficient to cause impairment. The patient bears the burden of proof on the latter point by a preponderance of the evidence, as with other affirmative defenses." *Dobson v. McClennen*, 238 Ariz. 389, 393 ¶ 20 (2015).

FOREWORD TO THE COURT
INTRODUCTION TO CAPITAL CASE SENTENCING INSTRUCTIONS
(NOT TO BE READ TO THE JURY)

These instructions are for a capital sentencing hearing. These instructions are divided into two separate sections—one for the eligibility phase and one for the penalty phase. The eligibility phase focuses on alleged aggravating circumstances. Eligibility for a death sentence is considered at the first stage. Actual imposition of a death sentence is considered at the second stage, if that stage is necessary. The Eligibility Phase Instructions are read to the jurors before the State presents its evidence regarding aggravating circumstances. If the State proves at least one aggravating circumstance, then the Penalty Phase Instructions are read to the jurors before the evidence regarding mitigation is presented.

These instructions assume that there is a single defendant. Appropriate modifications should be made if there is more than one defendant. In such cases the jury must be instructed to give separate consideration to each defendant, and a separate verdict form should be used for each defendant.

Some of these instructions assume that there is a single murder victim involved in the case. Appropriate modifications should be made when there is more than one murder victim.

Some of these instructions assume that the defendant has been convicted after a trial. Appropriate modifications should be made when the defendant pled guilty.

The court may have dismissed alternate jurors prior to the guilt phase deliberations. When a conviction for first-degree murder occurs and the State seeks the death penalty, these jurors must then be recalled and instructed for the sentencing phase before again being dismissed as alternates, in case an alternate juror eventually takes the place during the sentencing phase of a previously deliberating juror.

The court may wish to substitute the actual names of the defendant or victim throughout the instructions if it would clarify the instructions for the jurors.

Capital Case 1.0 – Degree of Participation Instruction

Before determining whether the defendant should be sentenced to life imprisonment or death, you must determine whether the State has proved, beyond a reasonable doubt, that the defendant either:

1. killed; *or*
2. attempted to kill; *or*
3. intended that a killing take place; *or*
4. was a "major participant" in the commission of [list predicate felony or felonies] *and* was "recklessly indifferent" regarding a person's life.

In determining whether the defendant was a "major participant" in the felony, some factors to consider include: the degree to which the defendant participated in the planning of the felony; whether the defendant possessed a weapon or furnished weapon(s) to any accomplice(s); the degree to which the defendant participated in the felony; and the scope of the defendant's knowledge of the completion of the felony.

A defendant acts with "reckless indifference" to human life when that defendant knowingly engages in criminal activities known to carry a grave risk of death to another human being. The risk must be of such nature and degree that the conscious disregard of such risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A finding of "reckless indifference" cannot be based solely upon a finding that the defendant was present at the time of the killing, merely participated in a crime resulting in a homicide or failed to render aid to the victims or call for help. The defendant's culpability ultimately rests on whether the defendant knew that the criminal activities of the defendant and/or any of the other participants were likely to result in the death of the person.

You must give consideration to the defendant's individual degree of participation and individual culpability in the killing.

If you do not find at least one of the four factors listed above, then you shall impose a life sentence on the defendant for the person's death.

[Each of you must find that at least one factor has been proven, but you all need not find that it is the same factor.] *or*

[You all must find that at least one factor has been proven. You must be unanimous on one factor.]

Your finding and vote must be set forth on the verdict form.

SOURCE: This is the *Enmund/Tison* instruction. A.R.S. § 13-703.01(P) (statutory language as of August 12, 2005) ("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."); *Tison v. Arizona*, 481 U.S. 137, 158 (1987) (felony murder case) (holding that major participation in the felony committed, combined with a reckless indifference to human life, satisfies the *Enmund* culpability requirement); *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (felony murder case) (holding that the focus must be on the defendant's culpability, and not

on that of those committing the underlying felony); *State v. Garcia*, 224 Ariz. 1, 13-14, ¶¶ 47-52, 226 P.3d 370, 382-83 (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, 929 P.2d 1288, 1299-1300 (1996) (holding that, "reckless indifference may be implicit when one 'knowingly engag[es] in criminal activities known to carry a grave risk of death.' [*Tison*], 481 U.S. at 157[,]" "[i]n almost every felony murder case . . . there is a failure by the defendant to stop and render aid or call for help. 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 that 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. [*Tison*] at 152."); *State v. Dickens*, 187 Ariz. 1, 23, 926 P.2d 468, 490 (1996) (discussing "major participant" factors); *State v. Styers*, 177 Ariz. 104, 114, 865 P.2d 765, 775 (1993) (discussing "major participant" factors); *State v. Salazar*, 173 Ariz. 399, 412-13, 844 P.2d 566, 579-80 (1992) (holding that the death penalty may be imposed if the defendant was a major participant in the predicate felony and acted with reckless disregard for human life); *State v. Robinson*, 165 Ariz. 51, 62, 796 P.2d 853, 864 (1990) (discussing "major participant" factors).

The burden of proof for this finding is beyond a reasonable doubt. *State v. Tison*, 160 Ariz. 501, 502, 774 P.2d 805, 806 (1989).

USE NOTE: This instruction should be given during the eligibility 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 pursuant to A.R.S. § 13-752(P), which states in part that, "[i]f the state bears the burden of proof, the issue shall be determined in the aggravation phase[,]" the *Enmund/Tison* finding must be proved by the State at some point during the eligibility phase. However, § 13-752(P), does not state whether: (1) the *Enmund/Tison* evidence/arguments should be presented, a finding regarding that issue should be made, and if the State carries its burden there, the aggravating circumstances evidence/arguments should then be presented and a finding made; or (2) the evidence/arguments regarding *Enmund/Tison* and the aggravating circumstances should be presented, and findings then made regarding both. The Arizona Supreme Court has noted that the *Enmund/Tison* finding should be made during the aggravation phase, but that bifurcation may be appropriate in some cases to avoid unfair prejudice to the defendant, for example, in cases where evidence about an aggravating circumstance was not presented in the guilt phase. *See State v. Garcia*, 224 Ariz. 1, ¶¶ 40-46, 226 P.3d 370 (2010) (trial court's refusal to bifurcate did not unfairly prejudice the defendant because evidence of his involvement in an earlier robbery would have been admissible in separate *Enmund/Tison* phase to establish his reckless indifference to human life; thus, the jury would still have heard about the most damning of his prior convictions during a separate *Enmund/Tison* phase).

The Committee's definition of "reckless indifference" is based on the language of A.R.S. § 13-105. An argument can be made that the standard is a subjective standard instead of a reasonable person standard. *See State v. Lacy, supra.*

The Committee's instruction omits the language that the defendant "intended the use of deadly force." Although this language was used in *Enmund*, 458 U.S. at 797, this appears to be a reformulation of the language appearing in the language of #3 in the Committee's instruction, *supra.*

For the definitions of "intended" and "recklessly," see A.R.S. § 13-105.

COMMENT: This instruction combines the law from the relevant statutes and case law. The Eighth Amendment to the United States Constitution does not permit the death penalty to 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." *Enmund*, 458 U.S. at 797. "[M]ajor participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." *Tison*, 481 U.S. at 158.

There is a substantial issue whether the jury must be unanimous on one factor, and if so, whether a verdict form indicating the numerical split for each factor should be included so that it can be determined if the jury was unanimous on one factor. Whether the jury must find one factor unanimously has not been decided by the Arizona Supreme Court or United States Supreme Court. Use one of the bracketed sentences depending on how the trial court resolves the issue.

Option One

The following verdict form is suggested if the trial court decides that unanimity on any one factor is not needed:

We the jury unanimously find beyond a reasonable doubt on the allegation that the defendant killed, attempted to kill, intended that a killing take place or was a **"**major participant**"** in the commission of [list predicate felony or felonies] *and* was **"**recklessly indifferent**"** regarding a person's life, as follows (check only one):

_____ Proved.

_____ Not Proved.

You do not need to be unanimous on any one factor, but all of you must find that at least one factor has been proven.

_____
Foreperson

Option Two:

The following verdict form is suggested if the trial court decides that unanimity on any one factor is not needed, but wishes to have the jury set forth its numerical vote:

We the jury unanimously find beyond a reasonable doubt on the allegation that the defendant killed, attempted to kill, intended that a killing take place, or was a "major participant" in the commission of [predicate felony or felonies] *and* was "recklessly indifferent" regarding a person's life, as follows (check only one):

_____ Proved.

_____ Not Proved.

You do not need to be unanimous on any one factor, but all of you must find that at least one factor has been proven.

If you find that the Defendant killed, attempted to kill, intended that a killing take place, or was a "major participant" in the commission of [predicate felony or felonies] *and* was "recklessly indifferent" regarding a person's life, please also indicate the following: (You may find more than one factor)

_____ Number of jurors finding that the defendant killed.

_____ Number of jurors finding that the defendant attempted to kill.

_____ Number of jurors finding that the defendant intended that a killing take place.

_____ Number of jurors finding that the defendant was a "major participant" in the commission of [predicate felony or felonies] *and* was "recklessly indifferent" regarding a person's life.

_____
Foreperson

Option Three

The following verdict form is suggested if the trial court decides that unanimity on at least one factor is required:

We the jury unanimously find beyond a reasonable doubt that the following alleged factor or factors was/were proved (check any that apply):

_____ The defendant killed;

_____ The defendant attempted to kill;

_____ The defendant intended that a killing take place;

_____ The defendant was a **"**major participant**"** in the commission of [list predicate felony or felonies] *and* was **"**recklessly indifferent**"** regarding a person's life.

To check a factor, all twelve of you must find that the factor has been proved beyond a reasonable doubt.

_____
Foreperson

Option Four

The following verdict form is suggested if the trial court decides that unanimity on at least one factor is required and that the jury must set forth its numerical vote:

We the jury find beyond a reasonable doubt that the following alleged factor or factors was/were proved (set forth the number of jurors who find for each factor):

_____ The defendant killed.

_____ The defendant attempted to kill.

_____ The defendant intended that a killing take place.

_____ The defendant was a "major participant" in the commission of [list predicate felony or felonies] *and* was "recklessly indifferent" regarding a person's life.

_____
Foreperson

Capital Case 1.0.1 – Accomplice Liability

[Caution: This instruction will not apply to all of the statutory aggravators. To any aggravator to which it does apply, the court may wish to incorporate the instruction into the instruction regarding that aggravating circumstance.]

In the phase where you found the defendant guilty of first-degree murder, you were instructed that a defendant can be criminally responsible for the actions of the defendant's accomplices. Those instructions regarding accomplices apply only to that phase; they do not apply in the current phase of the trial, or in any later phase that might occur.

In the current phase of the trial, the actions of other individuals are not attributed, or imputed, to the defendant. Your determination of whether or not the State has proved an aggravating circumstance must be based on the defendant's own actions and own mental state. This determination must be based only on what the defendant did, what the defendant intended, what the defendant knew would happen, or what the defendant was reasonably certain would happen.

SOURCE: A.R.S. § 13-751(F); *State v. Carlson*, 202 Ariz. 570, 582-83, 48 P.3d 1180, 1192-93 (2002) ("There is no vicarious liability for cruelty in capital cases absent a plan intended or reasonably certain to cause suffering. The plan must be such that suffering before death must be inherently and reasonably certain to occur, not just an untoward event." Mere foreseeability, which is all that is required to establish accomplice guilt, cannot serve as a "benchmark for death in capital cases [as it] would not permit the aggravators to serve their constitutional purpose of narrowing the class of first-degree murderers who can be sentenced to death."); *State v. Anderson (II)*, 210 Ariz. 327, 353-54, 111 P.3d 369, 395-96 (2005) (stating that the Eighth Amendment does not forbid applying an aggravating circumstance to a defendant who was, "present and actively participated in the … murder[]," where the defendant hit the victim with a lantern, but the accomplice administered the fatal blow with a cinderblock that was handed to him by the defendant); *State v. Dickens*, 187 Ariz. 1, 24-25, 926 P.2d 468, 491-92 (1996) (affirming conviction where defendant planned the murder, provided transportation and a gun to the actual killer known to the defendant to be violent, selected the two robbery victims, issued instructions to leave no witnesses, remained present at the scene, and knew that one victim would watch the execution of the other and that, as a result, the killing would be cruel); *cf. State v. Walton*, 159 Ariz. 571, 587, 769 P.2d 1017, 1033 (1989) (disapproving portion of cruelty finding where defendant shot victim once in head, believed him to be dead, and did not intend victim to wander desert blind for 5 days before dying; however, cruelty finding was approved on the ground of victim's mental suffering prior to being shot).

USE NOTE: This instruction should only be given where (1) evidence shows that there was an accomplice involved; and (2) an aggravating circumstance is charged that requires the jury to assess the defendant's mental state. In a case involving accomplices, the instruction is not appropriate where the only charged aggravating circumstances relate to the status of the defendant, such as (F)(1), (2) and/or (7), but may be appropriate for the other aggravating circumstances.

This instruction should not be confused with the *Enmund/Tison* accomplice liability rule, which permits a defendant convicted of felony murder to become eligible for the death

penalty when an accomplice actually killed the victim if, at a minimum, the defendant was a major participant in the underlying felony and demonstrated a reckless indifference to human life. The *Enmund/Tison* accomplice liability theory is distinct from the application of aggravating circumstances at the sentencing phase. *See Carlson*, 202 Ariz. at 582 n.7, 48 P.3d at 1192 n.7.

ELIGIBILITY PHASE

Capital Case 1.1 – Nature of the Hearing – To be used for offenses occurring before August 2, 2012

Members of the jury, I will now instruct you on the law governing these sentencing proceedings after a finding of guilt of first-degree murder.

The defendant in this case has been convicted of the crime of first-degree murder. Under Arizona law every person guilty of first-degree murder shall be punished by death, [or imprisonment for life without the possibility of release from prison,] [or imprisonment for life with the possibility of release after 25 [35] years.]

This hearing may include as many as two phases. During this current phase, the jury decides whether any aggravating circumstances exist. If the jury unanimously decides beyond a reasonable doubt that at least one aggravating circumstance exists, then the second phase of the hearing begins.

If the State does not prove beyond a reasonable doubt that an aggravating circumstance exists, the judge will sentence the defendant to life imprisonment without the possibility of release, or life imprisonment with the possibility of release after 25 [35] years. If the jury unanimously decides beyond a reasonable doubt that an aggravating circumstance does exist, each juror will decide if mitigating circumstances exist and then, as a jury, you will decide whether to sentence the defendant to life imprisonment or death. If the sentence is life imprisonment then the judge will sentence the defendant to either life imprisonment without the possibility of release from prison, or life imprisonment with the possibility of release from prison after 25 [35] years.

If the defendant is sentenced to "life with the possibility of release," parole is not currently available. The defendant's only option is to petition the Board of Executive Clemency for release. If that Board recommends to the Governor that the defendant should be released, then the Governor would make the final decision regarding whether the defendant would be released.

"Life without the possibility of release from prison" means exactly what it says. The sentence of "life without possibility of release from prison" means the defendant will never be eligible to be released from prison for any reason for the rest of the defendant's life.

SOURCE: A.R.S. §§ 13-751(A), -752(A), (C)–(F), (H) (statutory language until August 1, 2012); *Simmons v. South Carolina*, 512 U.S. 154, 166-67 & n.7 (1994) (life penalty instruction); *State v. Lynch*, 238 Ariz. 84, 103, ¶¶ 64-65, 357 P.3d 119, 138 (2015); *Lynch v. Arizona,* 136 S. Ct. 1818 (2016).

USE NOTE: The bracketed information regarding the term of years addresses the following requirement: "If the defendant is sentenced to life, the defendant shall not be released on any basis until the completion of the service of twenty-five calendar years if the murdered person was fifteen or more years of age and thirty-five years if the murdered person was under fifteen years of age." A.R.S. § 13-752(A).

COMMENT: Because "natural life" is a term of art that the jurors may not understand, the Committee has substituted within the instruction the phrase, "life without possibility of release from prison."

Capital Case 1.1 A – Nature of the Hearing – For Offenses Occurring On or After August 2, 2012

Members of the jury, I will now instruct you on the law governing these sentencing proceedings after a finding of guilt of first-degree murder.

The defendant in this case has been convicted of the crime of first-degree murder. Under Arizona law every person found guilty of first-degree murder shall be punished by death or imprisonment for life without the possibility of release from prison [or imprisonment for life with the possibility of release after 25 [35] years].

This hearing may include as many as two phases. During this current phase, the jury decides whether any aggravating circumstances exist. If the jury unanimously decides beyond a reasonable doubt that at least one aggravating circumstance exists, then the second phase of the hearing begins.

If the State does not prove beyond a reasonable doubt that an aggravating circumstance exists, the judge will sentence the defendant to life imprisonment without the possibility of release [or life imprisonment with the possibility of release after 25 [35] years]. If the jury unanimously decides beyond a reasonable doubt that an aggravating circumstance does exist, each juror will decide if mitigating circumstances exist and then, as a jury, you will decide whether to sentence the defendant to life imprisonment or death. If the sentence is life imprisonment then the judge will sentence the defendant to life imprisonment without the possibility of release [or life imprisonment with the possibility of release after 25 [35] years].

If the defendant is sentenced to "life with the possibility of release," parole is not currently available. The defendant's only option is to petition the Board of Executive Clemency for release. If that Board recommends to the Governor that the defendant should be released, then the Governor would make the final decision regarding whether the defendant would be released.

"Life without the possibility of release from prison" means exactly what it says. The sentence of "life without possibility of release from prison" means the defendant will never be eligible to be released from prison for any reason for the rest of the defendant's life.

SOURCE: A.R.S. §§ 13-751(A), -752(A), (C)–(F), (H) (statutory language as of August 2, 2012); *Simmons v. South Carolina*, 512 U.S. 154, 166-67 & n.7 (1994) (life penalty instruction); *State* v. *Lynch*, 238 Ariz. 84, 103, ¶¶ 64-65, 357 P.3d 119, 138 (2015); *Lynch* v. *Arizona*, 136 S. Ct. 1818 (2016).

USE NOTE: The bracketed information regarding the term of years addresses the following requirement: "If the defendant is sentenced to life, the defendant shall not be released on any basis until the completion of the service of twenty-five calendar years if the murdered person was fifteen or more years of age and thirty-five years if the murdered person was under fifteen years of age." A.R.S. § 13-752(A).

Defendant must be sentenced to life without the possibility of release if convicted of premeditated murder, or killing of a police officer. Life with the possibility of release is an option only for felony murder where the victim is not a police officer. If the jury is not unanimous regarding premeditated murder, the judge may sentence the defendant to either life sentence.

COMMENT: Because "natural life" is a term of art that the jurors may not understand, the Committee has substituted within the instruction the phrase, "life without possibility of release from prison."

Capital Case 1.2 – Duties of the Jury

The law that applies to this hearing is stated in these instructions, and it is your duty to follow all of the instructions. You must not single out certain instructions and disregard others.

In deciding whether an aggravating circumstance exists, you are not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling. Race, color, religion, national ancestry, gender or sexual orientation should not influence you.

I do not mean to indicate any opinion regarding the facts or what your verdict should be by these instructions, nor by any ruling or remark that I have made.

Performance of your duties as jurors is vital to the administration of justice.

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

You are to apply the law to the evidence and in this way decide whether the State has proven beyond a reasonable doubt that an aggravating circumstance exists.

The evidence you shall consider consists of the testimony [and exhibits] the court admitted in evidence [at trial and the evidence admitted at this hearing] [at this hearing.]

It is the duty of the court to rule on the admissibility of evidence. You shall not concern yourselves with the reasons for these rulings. You shall disregard questions [and exhibits] that were withdrawn, or to which objections were sustained.

Evidence that was admitted for a limited purpose shall not be considered for any other purpose.

You shall disregard testimony [and exhibits] the court has not admitted, or the court has stricken.

[The lawyers may stipulate certain facts exist. This means both sides agree those facts exist and are part of the evidence.]

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).

USE NOTE: Regarding the bracketed language in the second paragraph, the appropriate phrase should be used according to whether the jurors previously deliberated at a guilt phase trial and found the defendant guilty of first-degree murder, or whether the jurors did not so deliberate because the defendant instead pleaded guilty and is now proceeding to a sentencing trial.

Capital Case 1.4 – Burden of Proof

Before evidence is presented, you must start with the presumption that the alleged aggravating circumstance is not proven. The State must present evidence to prove any alleged aggravating circumstance beyond a reasonable doubt. The defendant is not required to testify or produce evidence of any kind. The decision on whether to testify or produce evidence is left to the defendant, acting with the advice of an attorney. The defendant's decision not to testify or produce 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 has the burden of proving any alleged aggravating circumstance beyond a reasonable doubt. This means that the State must prove each element of each 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, 898 P.2d 970, 974 (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, 859 P.2d 741, 744 n.1 (1993); *State v. Marquez*, 135 Ariz. 316, 660 P.2d 1243 (App. 1983). The Committee recommends that the court use Capital Case Instruction 1.5 and not deviate from *Portillo*.

Capital Case 1.5.1 – Order of Aggravation Phase

The State may make an opening statement giving you a preview of the State's case. Defendant may then make an opening statement outlining the defense's case or may postpone it until after the State's case has been presented. What is said in opening statements is neither evidence nor argument. The purpose of an opening statement is to help you prepare for anticipated evidence.

The State will present its evidence. After it finishes, Defendant may present evidence. Defendant is not required to produce any evidence, and is not required to testify. If the Defendant does produce evidence, the State may present rebuttal evidence. With each witness there is a direct examination, a cross examination by the opposing side, and finally a redirect examination. Jurors may [then] submit questions in writing, but are not obligated to do so.

After the evidence is completed, I will read to you the final instructions. These instructions detail the rules of law that you are required to follow in reaching your decision on the aggravating circumstances alleged.

The parties then will make closing arguments to tell you what they think the evidence shows, how they believe the law applies and how they think you should decide the issues in this proceeding. The prosecutor has the right to open and close the argument because the State has the burden of proof. Just as in opening statements, what is said in closing arguments is not the law, nor is it evidence but it may help you to understand the law and the evidence.

You will then deliberate in the jury room to decide the issues and render a verdict. Once you reach a verdict, you will return to open court and the verdict will be read with you and the parties present.

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

The State has alleged that the following aggravating circumstance[s] exist[s] in this case:

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

[2. The defendant was previously convicted of a serious offense, either preparatory or completed. Convictions for serious offenses committed on the same occasion as the homicide, or not committed on the same occasion but consolidated for trial with the homicide, shall be treated as a serious offense under this paragraph];

[3. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value [or] the defendant committed the offense as a result of payment, or a promise of payment, of anything of pecuniary value];

[4. The defendant committed the offense in an

[a. especially cruel] or

[b. especially heinous or depraved] manner;]

[5. The defendant committed the offense while in the custody of, or on authorized or unauthorized release from, the state department of corrections, a law enforcement agency or a county or city jail [or while on probation for a felony offense];]

[6. The defendant has been convicted of one or more other homicides, and those homicides were committed during the commission of the offense;]

[7. The defendant was at least eighteen years of age at the time the offense was committed, and the murdered person was under fifteen years of age, or was seventy years of age or older;] [The murdered person was an unborn child in the womb at any stage of its development;]

[8. The murdered person was an on-duty peace officer who was killed in the course of performing the officer's official duties, and the defendant knew, or should have known, that the murdered person was a peace officer;]

[9. The defendant committed the offense 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 offense to prevent a person's cooperation with an official law enforcement investigation, to prevent a person's testimony in a court proceeding, in retaliation for a person's cooperation with an official law enforcement investigation or in retaliation for a person's testimony in a court proceeding;]

As to each aggravating circumstance alleged, you may choose one of the following: (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 your foreperson shall tell the judge.

If you unanimously find that an aggravating circumstance is proven or not proven, you must indicate this finding on the verdict form.

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, 68 P.3d 110, 122 (2003) (same).

USE NOTE: The trial judge should list only the aggravating circumstance(s) of which the defendant was notified prior to trial.

Use bracketed material as applicable.

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

The State has alleged that the following aggravating circumstance[s] exist[s] in this case:

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

[2. The defendant was previously convicted of a serious offense, either preparatory or completed. Convictions for serious offenses committed on the same occasion as the homicide, or not committed on the same occasion but consolidated for trial with the homicide, shall be treated as a serious offense under this paragraph];

[3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the person murdered during the commission of the offense;]

[4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value;]

[5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value;]

[6. The defendant committed the offense in an

[a. especially cruel] or

[b. especially heinous or depraved] manner;]

[7. The defendant committed the offense while in the custody of, or on authorized or unauthorized release from, the state department of corrections, a law enforcement agency or a county or city jail [or while on probation for a felony offense];]

[8. The defendant has been convicted of one or more other homicides, and those homicides were committed during the commission of the offense;]

[9. The defendant was at least eighteen years of age at the time the offense was committed, and the murdered person was under fifteen years of age, or was seventy years of age or older;] [The murdered person was an unborn child in the womb at any stage of its development;]

[10. The murdered person was an on-duty peace officer who was killed in the course of performing the officer's official duties, and the defendant knew, or should have known, that the murdered person was a peace officer;]

[11. The defendant committed the offense 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;]

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

[13. The offense 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 in the commission of the offense. For the purposes of this factor:

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

"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.]

In determining whether an aggravating circumstance is proven, you may consider only those aggravating circumstances listed in these instructions.

As to each aggravating circumstance alleged, you may choose one of the following: (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 your foreperson shall tell the judge.

If you unanimously find that an aggravating circumstance is proven or not proven, you must indicate this finding on the verdict form.

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, 68 P.3d 110, 122 (2003) (same).

USE NOTE: The trial judge should list only the aggravating circumstance(s) of which the defendant was notified prior to trial.

Use bracketed material as applicable.

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)] may apply only if the homicide was committed on or after August 12, 2005.

Capital Case 1.6(a)(1) – Definition of "Serious Offense" (for offenses occurring on or after July 17, 1993)

A "serious offense," as referred to in these instructions, means any of the following offenses, as either a preparatory offense or a completed offense, if committed in this state [or any offense committed outside this state that if committed in this state would constitute one of the following offenses]:

[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 fifteen years of age.]

[12. Burglary in the second degree.]

[13. Terrorism.]

A conviction occurs when a jury, or the court, finds the defendant guilty of an offense, or the defendant pleads guilty to a charge.

[Convictions for serious offenses committed on the same occasion as the homicide, or not committed on the same occasion but consolidated for trial with the homicide, shall be 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, 4 P.3d 345, 365-66 (2000).

USE NOTE: This instruction shall 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).

If the defendant's conviction for the serious offense occurred out of state, the elements of the out-of-state offense must necessarily establish the elements of the Arizona offense alleged as a prior serious offense. Whether the State is able to prove this beyond a reasonable doubt 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).

The options listed in 12 and 13 above are available 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.

Regarding the "serious offense" finding, the court must be sure that the fact finder in the prior case found beyond a reasonable doubt that the defendant had committed every element that would be required to prove the Arizona offense. *State v. Ault*, 157 Ariz. 516, 521, 759 P.2d 1320, 1325 (1988) (non-capital case involving California prior convictions that resulted from a jury trial).

If the prior conviction is from a foreign jurisdiction, the court must first conclude 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, 149 P.3d 753, 755, ¶ 7 (2007); *State v. Roque*, 213 Ariz. 193, 216-17, 141 P.3d 368, 391-92 (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, 819 P.2d 909, 920 (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").

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, 905 P.2d 974, 995-96 (1995); *State v. Romanosky,* 162 Ariz. 217, 228, 782 P.2d 693, 704 (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, 804 P.2d 72, 82 (1990).

Capital Case 1.6(b) – Definition of "Grave Risk of Death to Another"

The "grave risk of death to another" aggravating circumstance is proven if the defendant's act of committing murder placed a ["third person"] [bystander] in the "zone of danger." This circumstance applies if the State proves that:

1. during the course of the murder, the defendant knowingly engaged in conduct that created a real and substantial likelihood that a specific [third person] [bystander] might suffer fatal injury; *and*
2. the defendant knew of the [third person's] [bystander's] presence, although the defendant did not have to know the [third person's] [bystander's] identity; *and*

3. the [third person] [bystander] was not an intended victim of the defendant.

The mere presence of a [third person] [bystander] is insufficient to prove this aggravating circumstance and the actual intent to kill the [third person] [bystander] precludes finding this as an aggravating circumstance.

SOURCE: A.R.S. § 13-751(F)(3) (statutory language as of October 1, 1978); *State v. Johnson*, 212 Ariz. 425, 431, 133 P.3d 735, 741 (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, 107 P.3d 900, 913 (2005) (using "specific third person" language); *State v. McMurtrey,* 151 Ariz. 105, 108, 726 P.2d 202, 205 (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 NOTE: Effective August 27, 2019, this aggravating circumstance was repealed and does not apply for offenses committed on or after that date. This instruction shall be given only if the State alleges the (F)(3) circumstance.

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, 881 P.2d 1158, 1174 (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, 568 P.2d 1054, 1056, 1061 (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, 707 P.2d 289, 300 (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 persons are present in another room, but not actually placed in danger. *See Carreon*, 210 Ariz. at 67, 107 P.3d at 913 (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 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) & (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 for "Consideration for the Receipt, or in Expectation of the Receipt, of Anything of Pecuniary Value"

In order to find this aggravating circumstance, you must find that the State has proven beyond a reasonable doubt that the defendant's motive, cause or impetus for the commission of the first-degree murder was consideration for the receipt, or the expectation of receipt of pecuniary value. This finding may be based on tangible evidence and/or [strong] circumstantial evidence. "Pecuniary value" may be money or property.

Mere taking of items of value before, during or after the first-degree murder is not enough to establish this aggravating circumstance.

You need not find that consideration for the receipt, or the expectation of the receipt of, the pecuniary value was the sole motivation or cause of the first-degree murder in order to find that this circumstance exists. However, the existence of a pecuniary motive at some point during the events surrounding the first-degree murder is not enough to establish this aggravating circumstance. There must be a connection between the motive and the killing. The mere fact that the person was killed, and the defendant made a financial gain, does not by itself establish this aggravating circumstance.

[While a conviction of robbery or burglary indicates a taking of property, the conviction does not itself prove that the motivation for the killing was the consideration for the receipt, or the expectation of, the receipt of pecuniary 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, 111 P.3d 369, 383-84 (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, 107 P.3d 900, 913 (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, 94 P.3d 1119, 1166 (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, 93 P.3d 1076, 1079 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, 26 P.3d 1118, 1124, 1127 (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, 975 P.2d 94, 103 (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, 967 P.2d 106, 114 (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 NOTE: Effective August 27, 2019, this aggravating circumstance was repealed and does not apply for offenses committed on or after that date. This instruction shall be given only if the State alleges the (F)(5) circumstance.

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.

Use bracketed material as applicable.

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, 111 P.3d at 383-84; *see also State v. Garza,* 216 Ariz. 56, 67, ¶ 52, 163 P.3d 1006, 1017 (2007).

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

Concerning this aggravating circumstance, all first-degree murders are to some extent cruel, heinous or depraved. However, this aggravating circumstance cannot be found to exist unless the State has proved beyond a reasonable doubt that the murder was "especially" cruel, "especially" heinous, or "especially" depraved. "Especially" means "unusually great or significant."

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

Especially Cruel

The term "cruel" focuses on the victim's pain and suffering. To find that the murder was committed in an "especially cruel" manner you must find that the victim consciously suffered physical or mental pain, distress or anguish prior to death. The defendant must know or should have known that the victim would suffer.

Especially Heinous or Depraved

The term "especially heinous or depraved" focuses upon 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 if it is hatefully or shockingly evil, in other words, grossly bad. A murder is especially depraved if it is marked by debasement, corruption, perversion or deterioration. To determine whether a murder was "especially heinous or depraved," you must find that the State proved beyond a reasonable doubt that the defendant exhibited such a mental state at the time of the killing by engaging in at least one of the following actions: [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 [full-time] [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, 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.

Inflicted Gratuitous Violence

To find that the defendant "inflicted gratuitous violence," you must find that the defendant intentionally inflicted violence clearly beyond what was necessary to kill the victim, and that 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

"Needlessly mutilating" means that the defendant, apart from the killing, committed acts after the victim's death and separate from the acts that led to the death of the victim, with the intent to disfigure the victim's body. "Needlessly mutilating" indicates a mental state marked by debasement.

Verdict Form

Even if you determine that "especially cruel" and "especially heinous or depraved" have been proven beyond a reasonable doubt, you can only consider this as one aggravating circumstance, which is why you will find only one choice on the verdict form. There is an interrogatory on the verdict form that you must complete to set out your findings regarding "especially cruel" and/or "especially heinous or depraved".

A unanimous finding of "especially cruel" and/or "especially heinous or depraved" establishes this aggravating circumstance.

SOURCE: A.R.S. § 13-751(F)(6) (statutory language as of October 1, 1978); *State v. Bocharski*, 218 Ariz. 476, ¶ 87, 189 P.3d 403 (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, 191 P.3d 164 (2008); *State v. Tucker*, 215 Ariz. 298, 160 P.3d 177 (2007); *State v. Andriano*, 215 Ariz. 497, 161 P.3d 540 (2007); *State v. Velazquez*, 216 Ariz. 300, 166 P.3d 91 (2007); *State v. Anderson*, 210 Ariz. 327, 352 n.19, 111 P.3d 369, 394 n.19 (2005) (defining gratuitous violence and using "clearly beyond" language); *State v. Carlson*, 202 Ariz. 570, 581-83, 48 P.3d 1180, 1191-93 (2002) (especial cruelty); *State v. Canez*, 202 Ariz. 133, 161, 42 P.3d 564, 592 (2002) (holding that re especial cruelty, defendant knew or should have known that victim would consciously suffer); *State v. Medina*, 193 Ariz. 504, 513, 975 P.2d 94, 103 (1999) (disjunctive); *State v. Doerr*, 193 Ariz. 56, 67-68, 969 P.2d 1168, 1179-80 (1999) (relishing); *State v. Miles*, 186 Ariz. 10, 18-19, 918 P.2d 1028, 1036-37 (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, 906 P.2d 542, 570 (1995) (especial cruelty); *State v. Ross*, 180 Ariz. 598, 605-06, 886 P.2d 1354, 1361 (1994) (witness elimination/extraordinary circumstances language); *State v. Richmond*, 180

Ariz. 573, 580, 886 P.2d 1329, 1336 (1994) (mutilation); *State v. King*, 180 Ariz. 268, 284-85, 883 P.2d 1024, 1040-41 (1994) (witness elimination alone insufficient); *State v. Milke*, 177 Ariz. 118, 124-26, 865 P.2d 779, 785-87 (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, 865 P.2d 765, 776 (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, 800 P.2d 1260, 1286 (1990) (gratuitous violence); *State v. Beaty*, 158 Ariz. 232, 242, 762 P.2d 519, 529 (1988) (individual definitions of especially heinous or depraved).

USE NOTE: Effective August 27, 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, 707 P.2d 289, 301 (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, 601 P.2d 1322, 1325 (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, 160 P.3d 177-81 (2007). *See also State v. Andriano*, 215 Ariz. 497, 161 P.3d 540 (2007) and *State v. Velazquez*, 216 Ariz. 300, 166 P.3d 91 (2007) in which instructions were approved 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, 160 P.3d 177 (2007). *See also State v. Andriano*, 215 Ariz. 497, 161 P.3d 540 (2007) and *State v. Velazquez*, 216 Ariz. 300, 166 P.3d 91 (2007) in which instructions were approved without the bracketed language; *State v. Cropper*, 223 Ariz. 522, ¶ 13, 225 P.3d 579 (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, 236 P.3d 409, 417 (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, 191 P.3d 164 (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, 133 P.3d 735 (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, 140 P.3d 950 (2006).

Witness Elimination

The Committee has not included "witness elimination" as a possible finding supporting the "especially heinous" or "especially depraved" finding. *See e.g.*, *State v. Barreras*, 181 Ariz. 516, 522, 892 P.2d 852, 858 (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.

The bracketed language below may be given if the State seeks to prove "witness elimination." The court should keep in mind that if the State, for first-degree murders occurring on or after August 12, 2005, has alleged "witness elimination" as a "stand-alone" aggravating factor, also instructing on this option as part of the "heinous or depraved" (F)(6) option may result in double counting and/or double jeopardy problems.

For murders committed before that date, witness elimination may be 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, 947 P.2d 315, 327 (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, 918 P.2d 1028, 1036-37 (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, 865 P.2d 765 (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 a caregiver or other 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, 692 P.2d 991, 1009 (1984) (using "mental distress"); *State v. Murdaugh*, 209 Ariz. 19, 30, 97 P.3d 844, 855 (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, 111 P.3d 369, 396, 402 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, 140 P.3d 899 (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, 892 P.2d at 857. Caution should be exercised in expanding the factors. *See State v. Hampton*, *supra*, at ¶ 2 (2006).

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

To find that the defendant committed one or more homicides "during the commission of the offense," you must find [that the other homicide was] [those other homicides were] related in

1. time, *and*
2. space, *and*
3. motivation

to the first-degree murder at issue.

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, 79 P.3d 58, 60 (2003) (requiring all 3 subfactors of time, space and motivation); *State v. Rogovich*, 188 Ariz. 38, 45, 932 P.2d 794, 801 (1997); *State v. Lavers*, 168 Ariz. 376, 393, 814 P.2d 333, 350 (1991).

USE NOTE: This instruction shall be given only if the State alleges the (F)(6) circumstance. Use applicable bracketed material.

Capital Case 1.6(f) – Definition of "Cold, Calculated Manner Without Pretense of Moral or Legal Justification"

The State alleges that the murder was committed in a cold, calculated manner without pretense of moral or legal justification. This aggravating circumstance requires more than the premeditation necessary to find a defendant guilty of first-degree murder. This aggravating circumstance cannot be found to exist unless the State has proved beyond a reasonable doubt that the defendant exhibited a cold-blooded intent to kill that is more contemplative, more methodical, more controlled than that necessary to prove premeditated first-degree murder. In other words, a heightened degree of premeditation is required.

"Cold" means the murder was the product of calm and cool reflection.

"Calculated" means having a careful plan or prearranged design to commit 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.

A "pretense of moral or legal justification" is any claim of justification or excuse that, though insufficient to reduce the degree of murder, nevertheless rebuts the otherwise cold, calculated nature of the murder.

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, 280 P.3d 604 (2012).

USE NOTE: Effective August 27, 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 – Date of Offense Before August 27, 2019)

ARIZONA SUPERIOR COURT
_____ COUNTY

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

We, the jury, empaneled and sworn in the above-entitled cause, do upon our oaths unanimously find the following aggravating circumstance or circumstances as shown by the circumstance or circumstances checked:

Proven Beyond a Reasonable Doubt	Not Proven	Aggravating circumstance related to the death of [victim's name here].
		The Defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death could be or was imposed.
		The Defendant was previously convicted of a serious offense, either preparatory or completed.
		In the commission of the offense the Defendant knowingly created a grave risk of death to another person or persons in addition to the person murdered during the commission of the offense.
		The Defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.
		The Defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.
		The Defendant committed the offense in an especially cruel, heinous or depraved manner.

		The Defendant committed the offense while in the custody of or on authorized or unauthorized release from the state department of corrections, a law enforcement agency or a county or city jail [or while on probation].
		The Defendant has been convicted of one or more other homicides, and those homicides were committed during the commission of the offense.
		The Defendant was at least eighteen years of age at the time the offense was committed and the murdered person was under fifteen years of age or was seventy years of age or older. *or* The murdered person was an unborn child at any state of its development.
		The murdered person was an on duty peace officer who was killed in the course of performing the officer's official duties and the defendant knew, or should have known, that the murdered person was a peace officer.
		The Defendant committed the offense 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.
		The Defendant committed the offense to prevent a person's cooperation with an official law enforcement investigation, to prevent a person's testimony in a court proceeding, in retaliation for a person's cooperation with an official law enforcement investigation or in retaliation for a person's testimony in a court proceeding.
		The offense was committed in a cold, calculated manner without pretense of moral or legal justification.
		The Defendant used a remote stun gun or an authorized remote stun gun in the commission of the offense.

[If you have unanimously found beyond a reasonable doubt that the offense was committed in an especially cruel and/or especially heinous or depraved manner, then you must answer the following interrogatories:

We, the jury, duly empaneled and sworn in the above-entitled cause, do upon our oaths unanimously find beyond a reasonable doubt that the murder was committed in an especially cruel manner (check only one):

_____ Yes

_____ No

We, the jury, duly empaneled and sworn in the above-entitled cause, do upon our oaths unanimously find beyond a reasonable doubt that the murder was committed in an especially heinous or depraved manner (check only one):

_____ Yes

_____ No]

_____

FOREPERSON]

SOURCE: A.R.S. §§ 13-751(F), -752(E).

USE NOTE: The verdict form shall include only the theory or theories that the State is pursuing. Use the bracketed material only if the State is pursuing the (F)(6) circumstance.

If aggravation findings are made as to more than one victim, separate verdict forms shall be used for each victim.

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, 975 P.2d 94, 103 (1999); *State v. Beaty*, 158 Ariz. 232, 242, 762 P.2d 519, 529 (1988).

Regarding hung juries at the eligibility 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."

Capital Case Verdict Form Aggravating Circumstances – Date of Offense On or After August 27, 2019)

ARIZONA SUPERIOR COURT
_____ COUNTY

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

We, the jury, empaneled and sworn in the above-entitled cause, do upon our oaths unanimously find the following aggravating circumstance or circumstances as shown by the circumstance or circumstances checked:

Proven Beyond a Reasonable Doubt	Not Proven	Aggravating circumstance related to the death of [victim's name here].
		The Defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death could be or was imposed.
		The Defendant was previously convicted of a serious offense, either preparatory or completed.
		The Defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value, or the Defendant committed the offense as a result of payment, or a promise of payment, of anything of anything of pecuniary value.
		The Defendant committed the offense in an especially cruel, heinous or depraved manner.
		The Defendant committed the offense while in the custody of or on authorized or unauthorized release from the state department of corrections, a law enforcement agency or a county or city jail [or while on probation].

		The Defendant has been convicted of one or more other homicides, and those homicides were committed during the commission of the offense.
		The Defendant was at least eighteen years of age at the time the offense was committed and the murdered person was under fifteen years of age or was seventy years of age or older. *or* The murdered person was an unborn child at any state of its development.
		The murdered person was an on duty peace officer who was killed in the course of performing the officer's official duties and the defendant knew, or should have known, that the murdered person was a peace officer.
		The Defendant committed the offense 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.
		The Defendant committed the offense to prevent a person's cooperation with an official law enforcement investigation, to prevent a person's testimony in a court proceeding, in retaliation for a person's cooperation with an official law enforcement investigation or in retaliation for a person's testimony in a court proceeding.

[If you have unanimously found beyond a reasonable doubt that the offense was committed in an especially cruel and/or especially heinous or depraved manner, then you must answer the following interrogatories:

We, the jury, duly empaneled and sworn in the above-entitled cause, do upon our oaths unanimously find beyond a reasonable doubt that the murder was committed in an especially cruel manner (check only one):

_____ Yes

_____ No

We, the jury, duly empaneled and sworn in the above-entitled cause, do upon our oaths unanimously find beyond a reasonable doubt that the murder was committed in an especially heinous or depraved manner (check only one):

_____ Yes

_____ No]

_____

FOREPERSON]

SOURCE: A.R.S. §§ 13-751(F), -752(E).

USE NOTE: The verdict form shall include only the theory or theories that the State is pursuing. Use the bracketed material only if the State is pursuing the (F)(6) circumstance.

If aggravation findings are made as to more than one victim, separate verdict forms shall be used for each victim.

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, 975 P.2d 94, 103 (1999); *State v. Beaty*, 158 Ariz. 232, 242, 762 P.2d 519, 529 (1988).

Regarding hung juries at the eligibility 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."

PENALTY PHASE

Capital Case 2.1 – Nature of Hearing and Duties of Jury

Members of the jury, at this phase of the sentencing hearing, you will determine whether the defendant will be sentenced to life imprisonment or death.

The law that applies is stated in these instructions and it is your duty to follow all of them whether you agree with them or not. You must not single out certain instructions and disregard others.

You must not be influenced at any point in these proceedings by conjecture, passion, prejudice, public opinion or public feeling. You are not to be swayed by mere sympathy not related to the evidence presented during the penalty phase.

You must not be influenced by your personal feelings of bias or prejudice for or against the defendant or any person involved in this case on the basis of anyone's race, color, religion, national ancestry, gender or sexual orientation.

Both the State and the defendant have a right to expect that you will consider all the evidence, follow the law, exercise your discretion conscientiously and reach a just verdict.

I do not mean to indicate any opinion on the evidence or what your verdict should be by any ruling or remark I have made or may make during this penalty phase. I am not allowed to express my feelings in this case, and if I have shown any you must disregard them. You and you alone are the triers of fact.

SOURCE: Preliminary Criminal Instruction 1 and Standard Criminal Instruction 1 (non-capital) (2005); CALJIC 8.84.1 (modified); *California v. Brown*, 479 U.S. 538, 542-43 (1987) ("We think a reasonable juror would . . . understand the instruction not to rely on 'mere sympathy' as a directive to ignore only the sort of sympathy that would be totally divorced from the evidence adduced during the penalty phase.")

Capital Case 2.2 – Evidence

You are to apply the law to the evidence and in this way decide whether the defendant will be sentenced to life imprisonment or death.

The evidence you shall consider consists of the testimony [and exhibits] the court admitted in evidence during the trial of this case, during the first part of the sentencing hearing, and during the second part of the sentencing hearing.

It is the duty of the court to rule on the admissibility of evidence. You shall not concern yourselves with the reasons for these rulings. You shall disregard questions [and exhibits] that were withdrawn or to which objections were sustained.

Evidence that was admitted for a limited purpose shall not be considered for any other purpose.

You shall disregard testimony [and exhibits] that the court has not admitted, or the court has stricken.

[The lawyers may stipulate certain facts exist. This means both sides agree that evidence exists and is to be considered by you during your deliberations at the conclusion of the trial. You are to treat a stipulation as any other evidence. You are free to accept it or reject it, in whole or in part, just as any other evidence.]

During the first part of the sentencing hearing, you found that the State had proved that [a statutory aggravating circumstance exists] [statutory aggravating circumstances exist] making the defendant eligible for the death sentence. During this part of the sentencing hearing, the defendant and the State may present any evidence that is relevant to the determination of whether there is mitigation that is sufficiently substantial to call for a sentence less than death. The State may also present any evidence that demonstrates that the defendant should not be shown leniency, which means a sentence less than death.

Mitigating circumstances may be found from any evidence presented during the trial, during the first part of the sentencing hearing or during the second part of the sentencing hearing.

You should consider all of the evidence without regard to which party presented it. Each party is entitled to consideration of the evidence whether produced by that party or by another party.

You are the sole judges of the credibility of the witnesses and what weight is to be given the testimony of each witness. In considering the testimony of each witness, you may take into account the opportunity and ability of the witness to observe, the witness' memory and manner while testifying, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in a light of all the evidence, and any other factors that bear on credibility and weight.

The attorneys' remarks, statements and arguments are not evidence, but are intended to help you understand the evidence and apply the law.

The attorneys are entitled to make any objections that they deem appropriate. These objections should not influence you, and you should make no assumptions because of objections by the attorneys.

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: Use bracketed material as applicable.

Capital Case 2.3 – Mitigation

Mitigating circumstances are any factors that are a basis for a life sentence instead of a death sentence, so long as they relate to any sympathetic or other aspect of the defendant's character, propensity, history or record, or circumstances of the offense.

Mitigating circumstances are not an excuse or justification for the offense, but are factors that in fairness or mercy may reduce the defendant's moral culpability.

Mitigating circumstances may be offered by the defendant or State or be apparent from the evidence presented at any phase of these proceedings. You are not required to find that there is a connection between a mitigating circumstance and the crime committed in order to

consider the mitigation evidence. Any connection or lack of connection may impact the quality and strength of the mitigation evidence. You must disregard any jury instruction given to you at any other phase of this trial that conflicts with this principle.

[The circumstances proposed as mitigation by the defendant for your consideration in this case are:

[List the factors]. You are not limited to these proposed mitigating circumstances in considering the appropriate sentence. You also may consider anything related to the defendant's character, propensity, history or record, or circumstances of the offense.]

The fact that the defendant has been convicted of first-degree murder is unrelated to the existence of mitigating circumstances. You must give independent consideration to all of the evidence concerning mitigating circumstances, despite the conviction.

SOURCE: A.R.S. § 13-751(G); *State v. Pandelli,* 215 Ariz. 114, 126, ¶ 33, 161 P.3d 557, 569 (2007) (the defendant need not prove that the mitigating circumstances were the direct cause of the offense); *Smith v. Texas,* 125 S. Ct. 400, 404 (2004); *Tennard v. Dretke,* 124 S. Ct. 2562, 2570 (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 the defendant's character or record and circumstances of the offense that the defendant proffers as a basis for a sentence less than death."); *Coker v. Georgia*, 433 U.S. 584, 590-91 (1977) (Mitigating circumstances are "circumstances which 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."); *State v. Tucker*, 215 Ariz. 298, 322, ¶ 106, 160 P.3d 177, 201 (2007).

USE NOTE: Use bracketed material as applicable. The defendant shall provide the court with a list of mitigating circumstances, but the defense is not required to list the circumstances.

Capital Case 2.4 – Duty to Consult with One Another

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a just verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and change your opinion if you become convinced that it is wrong. However, you should not change your honest belief concerning the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

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

USE NOTE: In *State v. Andriano*, 215 Ariz. 497, ¶¶ 59-60, 161 P.3d 540 (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 use of the instruction in that context.

Capital Case 2.5 – Victim Impact Information

A relative of the victim made a statement relating to personal characteristics and uniqueness of the victim and the impact of the murder on the victim's family. You may consider this information to the extent that it rebuts mitigation. You may not consider the information as a new aggravating circumstance.

SOURCE: *State v. Tucker*, 215 Ariz. 298, ¶ 92, 160 P.3d 177 (2007); *State v. Ellison*, 213 Ariz. 116, 140, 140 P.3d 899, 923 (2006).

Capital Case 2.6 – Mitigation Assessment and the Sentence Burden of Proof

[The State may not rely upon a single fact or an aspect of the offense to establish more than one aggravating circumstance. Therefore, if you have found that two or more of the aggravating circumstances were proved beyond a reasonable doubt by a single fact or aspect of the offense, you are to consider that fact or aspect of the offense only once. In other words, you shall not consider twice any fact or aspect of the offense.]

While all twelve of you had to unanimously agree that the State proved beyond a reasonable doubt the existence of a statutory aggravating circumstance, you do not need to unanimously agree on a particular mitigating circumstance. Each one of you must decide individually whether any mitigating circumstance exists.

You are not limited to the mitigating circumstances offered by the defendant. You must also consider any other information that you find is relevant in determining whether to impose a life sentence, so long as it relates to an aspect of the defendant's background, character, propensities, record, or circumstances of the offense.

The defendant bears the burden of proving the existence of any mitigating circumstance that the defendant offers by a preponderance of the evidence. That is, although the defendant need not prove its existence beyond a reasonable doubt, the defendant must convince you by the evidence presented that it is more probably true than not true that such a mitigating circumstance exists. In proving a mitigating circumstance, the defendant may rely on any evidence already presented and is not required to present additional evidence.

You individually determine whether mitigation exists. In light of the aggravating circumstance[s] you have found, you must then individually determine if the total of the mitigation is sufficiently substantial to call for leniency. "Sufficiently substantial to call for leniency" means that 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.

Even if a juror believes that the aggravating and mitigating circumstances are of the same quality or value, that juror is not required to vote for a sentence of death and may instead vote for a sentence of life in prison. A juror may find mitigation and impose a life sentence even if the defendant does not present any mitigation evidence.

A mitigating factor 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 assessment of the appropriate penalty. In other words, each of you must determine

whether, in your individual assessment, the mitigation is of such quality or value that it warrants leniency in this case.

The law does not presume what is the appropriate 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.

In reaching a reasoned, moral judgment about which sentence is justified and appropriate, you must decide whether the totality of the mitigating factors is sufficiently substantial to call for leniency. To do this, you must consider the quality and the strength of aggravating and mitigating factors, as well as the facts and circumstances of the case. This assessment is not a mathematical one, but instead must be made in light of each juror's individual, qualitative evaluation of the facts and circumstances of the case, the severity of the aggravating factors, and the quality or value of the mitigating factors found by each juror.

If you unanimously agree there is mitigation sufficiently substantial to call for leniency, then you shall return a verdict of life. If you unanimously agree there is no mitigation, or the mitigation is not sufficiently substantial to call for leniency, then you shall return a verdict of death.

Your decision is not a recommendation. Your decision is binding. If you unanimously find that the defendant should be sentenced to life imprisonment, your foreperson shall sign the verdict form indicating your decision. If you unanimously find that the defendant should be sentenced to death, your foreperson shall sign the verdict form indicating your decision. If you cannot unanimously agree on the appropriate sentence, your foreperson shall tell the judge.

SOURCE: A.R.S. §§ 13-703(C), (E), -703.01(G); *e.g.*, *State v. Scott*, 177 Ariz. 131, 144, 856 P.2d 792, 805 (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. Granville (Baldwin)*, 211 Ariz. 468, 471-73, 123 P.3d 662, 665-67 (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." ¶ 12; (2) "Even if a juror believes that the aggravating and mitigating factors are equally balanced, A.R.S. § 13-703(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." n.3; (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." ¶ 18; (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. § 13-703(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." ¶ 21.

In *State* v. *Carlson*, 237 Ariz. 381, n. 6, 351 P.3d 1079, n. 6 (2015), the supreme court noted that use of the terms "compared against" in this instruction might confuse or mislead jurors. "Terms such as 'balance,' 'outweigh,' and 'compare' should not be used." It suggested "a more precise instruction should be fashioned."

In *State* v. *Gomez*, 231 Ariz. 219, 227, 293 P.3d 495, 503 (2012), the supreme court noted that "We consider the quality and the strength, not simply the number, of aggravating and mitigating factors." *Id.* at ¶ 41.

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

Capital Case 2.7 – Order of This Phase

This phase of the trial, unless otherwise directed by the court, will proceed as follows:

The defense may make an opening statement. The State may then make an opening statement or may defer until the close of the defense case. Again, what counsel says in opening statements is not evidence.

The victims' relatives may make a statement relating to the personal characteristics of the victim and the impact of his/her murder on his/her family. [They are not allowed to offer any opinion or recommendation regarding an appropriate sentence. Victim impact evidence is not an aggravating circumstance and you cannot consider it as such. Victim impact evidence may be considered to rebut the mitigation presented. You are to consider this information only for this limited purpose.]

The defense may offer evidence in support of mitigation.

The State may make an opening statement if it was deferred, and may offer evidence to demonstrate that the defendant should not be shown leniency. [This evidence is not a new aggravating circumstance.]

The defense may offer evidence in rebuttal to the State's evidence.

The defendant may make a statement, but he/she is not required to do so. You cannot hold this against him/her if he/she chooses to not make a statement.

The court will then give you the final instructions on the law.

The parties will present final arguments, with the defense having the opportunity to make an opening and a closing argument.

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

Capital Case 2.8 – Jury Not to Consider Financial Cost of Penalty

You must decide the appropriate sentence based on the facts of the case and by applying these jury instructions. You must 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, 983 P.2d 748, 757 (1999).

Capital Case 2.9 – State's Evidence

The defendant and the state may present any evidence that is relevant to the determination of whether there is mitigation that is sufficiently substantial to call for leniency. Regardless of whether defendant presents evidence of mitigation, the State may present any evidence that demonstrates that defendant should not be shown leniency. This evidence may include evidence regarding defendant's character, propensities, criminal record or other acts. You may individually consider the State's evidence in determining the existence of a mitigating circumstance or in assessing its quality or value. You shall not consider this part of the state's evidence as aggravation, but only in determining whether defendant should be shown leniency.

SOURCE: A.R.S. § 13-752(G) (statutory language as of August 2, 2012); *State ex rel. Thomas v. Granville (Baldwin)*, 211 Ariz. 468, 473 ¶ 18, 123 P.3d 662, 667 (2005); *State v. Nordstrom*, 230 Ariz. 110, 280 P.3d 1244 (2012). *But see State v. Hampton*, 213 Ariz. 167, 140 P.3d 950 (2006).

Capital Case 2.10 – Intellectual Disability

A defendant who is otherwise eligible for the death penalty may not be sentenced to death if he/she is determined by you to have an intellectual disability under the law. It is the defendant's burden to prove whether he/she has an intellectual disability by a preponderance of the evidence. That is, although the defendant need not prove its existence beyond a reasonable doubt, the defendant must convince you by the evidence presented that it is more probably true than not true. The defendant may rely on any evidence presented by either party at any phase of the trial.

You must find that the defendant has an intellectual disability under the law if the defense proves each of the following by a preponderance of the evidence:

1. The defendant has a mental deficit that involves a full scale intelligence quotient (IQ) of seventy or lower when taking into account the margin of error for the type of IQ test administered; **and**
2. The defendant has significant impairment in adaptive behavior; **and**
3. Both of these conditions existed before the defendant reached age eighteen.

"Adaptive behavior" means the effectiveness or degree to which the defendant meets the standard of personal independence and social responsibility expected of a person of his age and cultural group.

Thus, if 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, you must vote for a life sentence.

If you each individually do not find that the defendant meets all of the criteria for an intellectual disability under the law, you may still consider this evidence as a mitigating circumstance which, alone or with any other mitigating circumstance you believe proven, may be deemed by you to be sufficiently substantial to call for a life sentence.

SOURCE: A.R.S. § 13-753; *State v. Escalante-Orozco*, 241 Ariz. 254 ¶¶ 128-39, 386 P.3d 798 (January 12, 2017) (holding 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 defendant is intellectually disabled).

CAPITAL CASE INSTRUCTIONS

FOREWORD TO THE COURT
INTRODUCTION TO STATUTORY MITIGATING CIRCUMSTANCE INSTRUCTIONS
(NOT TO BE READ TO THE JURY)

These instructions are presented to aid the court in giving a legally correct instruction if the court decides to give an instruction on a specific statutory mitigating circumstance when requested by counsel. *See* A.R.S. § 13-751(G)(1)–(5). If the court does give one or more of these instructions, the court should also instruct 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.

These instructions are based on the mitigating circumstances listed in A.R.S. § 13-751(G)(1) through (5). The Committee has not attempted to draft non-statutory variations of these mitigating circumstances because the variations are too numerous. It should be made clear to the jury that statutory mitigation does not preclude the defendant from presenting and arguing any other mitigating circumstance that may call for leniency.

Capital Case 3.1 – Mitigation Evidence

The evidence you shall consider in determining mitigation includes any aspect of the defendant's character, propensities, 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.

You may consider any mitigating evidence in deciding whether leniency is appropriate. This includes any variation of the mitigating circumstances that I have specifically defined in these instructions. You are not limited to considering these mitigating circumstances.

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

Capital Case 3.2 – Significant Impairment

It is a mitigating circumstance that the defendant's capacity to appreciate the wrongfulness of [his] [her] conduct, or to conform [his] [her] conduct to the requirements of law, was significantly impaired, but not so impaired as to constitute a defense to prosecution. The defendant has the burden of proving this mitigating circumstance by a preponderance of the evidence.

"Significantly impaired" means that the defendant suffered from [mental illness] [personality disorder] [character disorder] [substance abuse] [alcohol abuse] at or near the time of the offense, that substantially reduced the defendant's ability to appreciate the wrongfulness of the conduct or conforming [his][her] conduct to the requirements of the law.

If any juror finds by a preponderance of the evidence that the defendant was significantly impaired, then that juror shall consider this impairment as a mitigating circumstance when determining whether to sentence the defendant to life imprisonment ***or*** death.

The effect you give to any mitigation is left to your sound discretion in determining whether there are mitigating circumstances sufficiently substantial to call for leniency.

SOURCE: A.R.S. § 13-751(G)(1) (statutory language as of August 1, 2002); *State v. Gallegos*, 178 Ariz. 1, 17-19, 870 P.2d 1097, 1113-15 (1994) (substance/alcohol abuse); *State v. McMurtrey I*, 136 Ariz. 93, 101-02, 664 P.2d 637, 645-46 (1983) (character/personality disorder).

USE NOTE: Use bracketed language as appropriate.

Capital Case 3.3 – Duress

It is a mitigating circumstance that the defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.

"Duress" means any illegal imprisonment, or legal imprisonment used for an illegal purpose, or threats of bodily or other harm, or other means amounting to or tending to coerce the will of another, and actually inducing him or her to do an act contrary to his or her free will.

If any juror finds by a preponderance of the evidence that the defendant was under unusual and substantial duress, then that juror shall consider such duress as a mitigating circumstance when determining whether to sentence the defendant to life imprisonment or death.

The effect you give to any mitigation is left to your sound discretion in determining whether there are mitigating circumstances sufficiently substantial to call for leniency.

SOURCE: A.R.S. § 13-751(G)(2) (statutory language as of August 1, 2002).

Capital Case 3.4 – Relatively Minor Participation

It is a mitigating circumstance that although the defendant was legally accountable for the conduct of another, [his] [her] participation was relatively minor, although not so minor as to constitute a defense to prosecution.

The defendant was legally accountable for the conduct of another if [he] [she]:

[was made accountable for such conduct by the statute defining the offense]

[acting with the culpable mental state sufficient for the commission of the offense, caused another person, whether or not such other person was capable of forming the culpable mental state, to engage in such conduct]

[was an accomplice of such other person in the commission of an offense].

"Relatively minor" means that the defendant's involvement in the [homicide] [name of underlying felony offense] as an accomplice did not involve the defendant actually killing the victim, attempting to kill the victim, or intending to kill the victim.

If any juror finds by a preponderance of the evidence that the defendant's participation was relatively minor, that juror shall consider such participation as a mitigating circumstance when determining whether to sentence the defendant to life imprisonment or death.

The effect you give to any mitigation is left to your sound discretion in determining whether there are mitigating circumstances sufficiently substantial to call for leniency.

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 NOTE: 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 foreseen that [his] [her] conduct during the commission of the offense would either:

1. cause the death of the victim; *or*,
2. create a grave risk of causing the death of the victim.

"Could not have reasonably foreseen" means that a person situated in the defendant's position at the time of the offense could not have intended or known that [his] [her] conduct would result in the death of victim.

If any juror finds by a preponderance of the evidence that the defendant could not have reasonably foreseen the victim's death, then that juror shall consider such unforeseeability as a mitigating circumstance when determining whether to sentence the defendant to life imprisonment or death.

The effect you give to any mitigation is left to your sound discretion in determining whether there are mitigating circumstances sufficiently substantial to call for leniency.

SOURCE: A.R.S. § 13-751(G)(4) (statutory language as of August 1, 2002); *State v. Bolton*, 182 Ariz. 290, 314, 896 P.2d 830, 854 (1995).

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

Capital Case 3.6 – Age

The defendant's age may be a mitigating circumstance.

"Age" is not limited solely to chronological age. You may also consider, but are not limited to considering, the defendant's level of intelligence, maturity, ability to be manipulated by others, involvement in the crime and past experience when determining whether this mitigating circumstance exists.

If any juror finds by a preponderance of the evidence that the defendant's age was a mitigating circumstance, then that juror shall consider the defendant's age when determining whether to sentence the defendant to life imprisonment or death.

The effect you give to any mitigation is left to your sound discretion in determining whether there are mitigating circumstances sufficiently substantial to call for leniency.

SOURCE: A.R.S. § 13-751(G)(5) (statutory language as of August 1, 2002); *State v. Poyson*, 198 Ariz. 70, 81, 7 P.3d 79, 90 (2000) (age of nineteen and "low average" intelligence sufficient

to prove mitigation); *State v. Trostle*, 191 Ariz. 4, 21, 951 P.2d 869, 886 (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, 918 P.2d 1038, 1049 (1996) ("In addition to youth, we consider defendant's level of intelligence, maturity, involvement in the crime, and past experience.").

USE NOTE: *Roper v. Simmons*, 125 S. Ct. 1183, 1198 (2005) ("[T]he death penalty cannot be imposed upon juvenile offenders[.]").

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, 694 P.2d 222, 236 (1985).

Capital Case Verdict Form 2

ARIZONA SUPERIOR COURT
_____ COUNTY

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

We, the jury, empanelled and sworn in the above-entitled cause, do upon our oaths unanimously find, having considered all of the facts and circumstances of this case, that the Defendant should be sentenced to:

[ ] "LIFE"

(In which case the Defendant shall be sentenced to life imprisonment with or without the possibility of release)

[ ] "DEATH"

(In which case the Defendant shall be sentenced to 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."