PRELIMINARY CRIMINAL INSTRUCTIONS

Preliminary Criminal 1 – Importance of Jury Service

Jury service is an important part of our system of justice, with a long and distinguished tradition in American law. From the beginning, American law has viewed the jury system as an effective means of drawing on the collective wisdom, experience, and fact-finding abilities of persons such as yourselves. While it may be an occasional inconvenience, or worse, jury service is an important responsibility for you, one, which I am sure, you will take seriously.

SOURCE: Bench Book for Superior Court Judges; Preliminary 2, RAJI (Civil) 5th.

COMMENT: Rule 21.1, Arizona Rules of Criminal Procedure: "The law relating to instructions to the jury in civil actions shall apply to criminal actions, except as otherwise provided."

USE NOTE: The trial judge may wish to consider incorporating this instruction as the first paragraph of Preliminary Criminal 2.

Preliminary Criminal 2 – Duty of Jurors

Ladies and Gentlemen:

Now that you have been sworn, I will briefly tell you something about your duties as jurors and give you some instructions. At the end of the trial I will give you more detailed instructions, and those instructions will control your deliberations.

It will be your duty to decide the facts. You must decide the facts only from the evidence produced in court. You must not speculate or guess about any fact. In deciding this case, 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.

You will hear the evidence, decide the facts, and then apply the law I will give to you to those facts. That is how you will reach your verdict. In doing so you must follow that law whether you agree with it or not.

You must not take anything I may say or do during the trial as indicating any opinion about the facts. You, and you alone, are the judges of the facts.

SOURCE: Capital Case Instruction 1.2.

COMMENT: Rule 21.1, Arizona Rules of Criminal Procedure: "The law relating to instructions to the jury in civil actions shall apply to criminal actions, except as otherwise provided."

Preliminary Criminal 3 – Evidence

You will decide what the facts are from the evidence presented here in court. That evidence will consist of testimony of witnesses, any documents and other things received into evidence as exhibits, and any evidence stipulated to by the parties or that you are instructed to consider.

[You may hear reference to exhibits that are not admitted and are not asked to be admitted. These exhibits are not admitted as evidence, but the information from them that is testified to by witnesses is evidence that you may consider.]

You will decide the credibility of the witnesses and weight to be given to any evidence presented in the case, whether it is direct evidence or circumstantial evidence.

SOURCE: Preliminary 3, RAJI (Civil) 5th modified.

USE NOTE: Use of bracketed paragraph two is left to the discretion of the judge.

COMMENT: Rule 21.1, Arizona Rules of Criminal Procedure: "The law relating to instructions to the jury in civil actions shall apply to criminal actions, except as otherwise provided."

Preliminary Criminal 4 – Direct and Circumstantial Evidence

Evidence may be direct or circumstantial. Direct evidence is a physical exhibit or the testimony of a witness who saw, heard, touched, smelled or otherwise actually perceived an event. Circumstantial evidence is the proof of a fact or facts from which the existence of another fact may be determined. The law makes no distinction between direct and circumstantial evidence. You must determine the weight to be given to all the evidence without regard to whether it is direct or circumstantial.

SOURCE: Preliminary 3, RAJI (Civil) 5th modified.

COMMENT: Rule 21.1, Arizona Rules of Criminal Procedure: "The law relating to instructions to the jury in civil actions shall apply to criminal actions, except as otherwise provided."

Preliminary Criminal 5 – Stipulations

During the trial, the lawyers are permitted to stipulate that certain evidence exits. This means both sides agree that evidence exists and is to be considered by you during your deliberations at the conclusion of the trial.

SOURCE: Standard 3, RAJI (Criminal), modified.

Preliminary Criminal 6 – Evidence, Statements of Lawyers and Rulings

As I mentioned earlier, it is your job to decide from the evidence what the facts are. Here are six rules on what is and what is not evidence:

1. Evidence to be considered: You must determine the facts only from the testimony of witnesses and from exhibits admitted in evidence. Anything you may see or hear when the court is not in session, even if what you see or hear is done or said by one of the parties or by one of the witnesses, is not evidence and must not be considered by you. If you should hear or see anything pertaining to the case outside the courtroom or if anyone should attempt to speak to you about this case outside the courtroom, please report to me as soon as you can.
2. Lawyers' statements: Statements or arguments made by the lawyers in the case are not evidence. Their purpose is to help you understand the evidence and law.
3. Questions to a witness: A question is not evidence. A question can only be used to give meaning to a witness' answer.
4. Objections to questions: If a lawyer objects to a question and I do not allow the witness to answer, you must not try to guess what the answer might have been. You must also not try to guess the reason why the lawyer objected in the first place.
5. Rejected evidence: At times during the trial, evidence may be offered that I do not admit as evidence. When evidence is not admitted, you must not consider it for any purpose.
6. Stricken evidence: At times I may order some evidence to be stricken from the record. Then it is no longer evidence and you must not consider it for any purpose.

SOURCE: Bench Book for Superior Court Judges; Preliminary 7, RAJI (Civil) 5th modified.

COMMENT: Rule 21.1, Arizona Rules of Criminal Procedure: "The law relating to instructions to the jury in civil actions shall apply to criminal actions, except as otherwise provided."

Preliminary Criminal 7 – Rulings of the Court

Admission of evidence in court is governed by rules of law. I will apply those rules and resolve any issues that arise during the trial concerning the admission of evidence.

If an objection to a question is sustained, you must disregard the question and you must not guess what the answer to the question might have been. If an exhibit is offered into evidence and an objection to it is sustained, you must not consider that exhibit as evidence. If testimony is ordered stricken from the record, you must not consider that testimony for any purpose.

Do not concern yourselves with the reasons for my rulings on the admission of evidence. Do not regard those rulings as any indication from me of the credibility of the witnesses or the weight you should give to any evidence that has been admitted.

SOURCE: Preliminary 4, RAJI (Civil) 5th.

USE NOTE: The second paragraph may be deleted if used with Preliminary Criminal 6.

COMMENT: Rule 21.1, Arizona Rules of Criminal Procedure: "The law relating to instructions to the jury in civil actions shall apply to criminal actions, except as otherwise provided."

Preliminary Criminal 8 – Exclusion of Witnesses

The Rule of Exclusion of Witnesses is in effect and will be observed by all witnesses until the trial is over and a result announced. This means that all witnesses will remain outside the courtroom during the entire trial except when one is called to the witness stand. They will wait in the areas directed by the bailiff unless other arrangements have been made with the attorney who has called them. [However, [both the defendant and the State are nevertheless entitled to the presence of one investigator at counsel table] [and] [the victim has a right to be present during trial]]. The rule also forbids witnesses from telling anyone but the lawyers what they will testify about or what they have testified to. If witnesses do talk to the lawyers about their testimony, other witnesses and jurors should avoid being present or overhearing.

The lawyers are directed to inform all their witnesses of these rules and to remind them of their obligations from time to time, as may be necessary. The parties and their lawyers should keep a careful lookout to prevent any potential witness from remaining in the courtroom if they accidentally enter.

SOURCE: Bench Book for Superior Court Judges; Preliminary 12, RAJI (Civil) 5th.

USE NOTE: Give this instruction only if the Rule of Exclusion of Witnesses has been invoked.

COMMENT: Rule 21.1, Arizona Rules of Criminal Procedure: "The law relating to instructions to the jury in civil actions shall apply to criminal actions, except as otherwise provided."

Both Rule 9.3, Arizona Rules of Criminal Procedure, and Rule 615, Arizona Rules of Evidence, deal with exclusion of witnesses from the courtroom.

Preliminary Criminal 9 – Bench Conferences and Recesses

From time to time during the trial, it may become necessary for me to talk with the attorneys out of the hearing of the jury, either by having a conference at the bench when the jury is present in the courtroom, or by calling a recess. Please understand that while you are waiting, we are working. The purpose of these conferences is not to keep relevant information from you, but to decide how certain evidence is to be treated under the rules of evidence and to avoid confusion and error. We will, of course, do what we can to keep the number and length of these conferences to a minimum. I may not always grant an attorney's request for a conference. Do not consider my granting or denying a request for a conference as any indication of my opinion of the case or of what your verdict should be. Please do not be concerned with what we are discussing at any bench conference we may have. Please

respect the privacy of those participating in the bench conference in order to maintain the fairness of the trial.

SOURCE: Ninth Circuit Manual of Model Civil Jury Instructions, Instruction 2.2, modified by addition of the last two sentences.

Preliminary Criminal 10 – Credibility of Witnesses

In deciding the facts of this case, you should consider what testimony to accept, and what to reject. You may accept everything a witness says, or part of it, or none of it.

In evaluating testimony, you should use the tests for accuracy and truthfulness that people use in determining matters of importance in everyday life, including such factors as: the witness's ability to see or hear or know the things the witness testified to; the quality of the witness's memory; the witness's manner while testifying; whether the witness has any motive, bias, or prejudice; whether the witness is contradicted by anything the witness said or wrote before trial, or by other evidence; and the reasonableness of the witness's testimony when considered in the light of the other evidence.

Consider all of the evidence in light of reason, common sense, and experience.

SOURCE: Bench Book for Superior Court Judges; Standard 18, RAJI (Criminal) 3rd; Preliminary 5, RAJI (Civil) 5th.

COMMENT: Rule 21.1, Arizona Rules of Criminal Procedure: "The law relating to instructions to the jury in civil actions shall apply to criminal actions, except as otherwise provided."

Preliminary Criminal 11 – Expert Witness

A witness qualified as an expert by education or experience may state opinions on matters in that witness's field of expertise, and may also state reasons for those opinions.

Expert opinion testimony should be judged just as any other testimony. You are not bound by it. You may accept it or reject it, in whole or in part, and you should give it as much credibility and weight as you think it deserves, considering the witness's qualifications and experience, the reasons given for the opinions, and all the other evidence in the case.

SOURCE: Bench Book for Superior Court Judges; Standard 25, RAJI (Criminal) 3rd; Preliminary 6, RAJI (Civil) 5th.

USE NOTE: Give only if it is anticipated that an expert witness will testify.

COMMENT: Rule 21.1, Arizona Rules of Criminal Procedure: "The law relating to instructions to the jury in civil actions shall apply to criminal actions, except as otherwise provided."

Preliminary Criminal 12 – No Transcript Available to Jury; Taking Notes

At the end of the trial you will have to make your decision based on what you recall of the evidence. You will not be given a written transcript of any testimony; you should pay close attention to the testimony as it is given.

You have been provided with note pads and pens. The court encourages you to take notes during the trial if you wish to do so. Do not let note taking distract you so that you miss hearing or seeing other testimony. You may use your notes during your deliberations at the end of the trial. Until then, keep your notes to yourself. During recesses in the trial, you may leave your notes on your seat. Your notes are confidential and my bailiff will guard them. No one will be allowed to read your notes. Whether you take notes or not, you should rely upon your own memory of what was said and not be overly influenced by the notes of other jurors. After you have rendered your verdict, the bailiff will collect your notes and destroy them.

Do not be influenced at all by my taking notes at times. What I write down may have nothing to do with what you will be concerned with at this trial.

SOURCE: Bench Book for Superior Court Judges; Preliminary 8, RAJI (Civil) 5th modified.

USE NOTE: Rule 18.6(d), Arizona Rules of Criminal Procedure, requires the court to "instruct the jurors that they may take notes" during the trial.

COMMENT: Rule 21.1, Arizona Rules of Criminal Procedure: "The law relating to instructions to the jury in civil actions shall apply to criminal actions, except as otherwise provided."

Preliminary Criminal 13 – Admonition

I am now going to say a few words about your conduct as jurors. I am going to give you some dos and don'ts, mostly don'ts, which I will call "The Admonition."

Do wear your juror badge at all times in and around the courthouse so everyone will know you are on a jury.

Each of you has gained knowledge and information from the experiences you have had prior to this trial. Once this trial has begun you are to determine the facts of this case only from the evidence that is presented in this courtroom. Arizona law prohibits a juror from receiving evidence not properly admitted at trial. Therefore, do not do any research or make any investigation about the case on your own. Do not view or visit the locations where the events of the case took place. Do not consult any source such as a newspaper, a dictionary, a reference manual, television, radio or the Internet for information. If you have a question or need additional information, submit your request **in writing** and I will discuss it with the attorneys.

Do not talk to anyone about the case, or about anyone who has anything to do with it, and do not let anyone talk to you about those matters, until the trial has ended, and you have been discharged as jurors. This prohibition about not discussing the case includes using an electronic device such as a telephone, cell phone, smart phone, or computer, the internet, any internet service, or any text or instant messaging service; or any internet chat room,

blog, website, social media or any other form of electronic communication for any purpose whatsoever, if it relates in any way to this case. This includes, but is not limited to, blogging about the case or your experience as a juror on this case, discussing the evidence, the lawyers, the parties, the court, your deliberations, your reactions to testimony or exhibits or any aspect of the case or your courtroom experience with anyone whatsoever, until the trial has ended, and you have been discharged as jurors. Until then, you may tell people you are on a jury, and you may tell them the estimated schedule for the trial, but do not tell them anything else except to say that you cannot talk about the trial until it is over.

One reason for these prohibitions is because the trial process works by each side knowing exactly what evidence is being considered by you and what law you are applying to the facts you find. As I previously told you, the only evidence you are to consider in this matter is that which is introduced in the courtroom. The law that you are to apply is the law that I give you in the final instructions. This prohibits you from consulting any outside source.

If you have cell phones, laptops or other communication devices, please turn them off and do not turn them on while in the courtroom. You may use them only during breaks, so long as you do not use them to communicate about any matter having to do with the case. You are not permitted to take notes with laptops, phones, tape recorders or any other electronic device. You are only permitted to take notes on the notepad provided by the court. Devices that can take pictures are prohibited and may not be used for any purpose.

It is your duty not to speak with or permit yourselves to be addressed by any person on any subject connected with the trial. If someone should try to talk to you about the case, stop him or her or walk away. If you should overhear others talking about the case, stop them or walk away. If anything like this does happen, report it to me or any member of my staff [insert phone number] as soon as you can. To avoid even the appearance of improper conduct, do not talk to any of the parties, the lawyers, the witnesses or media representatives about anything until the case is over, even if your conversation with them has nothing to do with the case. For example, you might pass an attorney in the hall, and ask what good restaurants there are downtown, and somebody from a distance may think you are talking about the case. So, again, please avoid even the appearance of improper conduct.

The lawyers and parties have been given the same instruction about not speaking with you jurors, so do not think they are being unfriendly to you. When you go home tonight and family and friends ask what the case is about, remember you cannot speak with them about the case. All you can tell them is that you are on a jury, the estimated schedule for the trial, and that you cannot talk about the case until it is over.

In a civil case, the jurors are permitted to discuss the evidence during the trial while the trial progresses. In a criminal case such as this, however, the jurors are not permitted to discuss the evidence until all the evidence has been presented and the jurors have retired to deliberate on the verdict. You may not discuss the evidence among yourselves until you retire to deliberate on your verdict. Therefore, during breaks and recesses whether you are assembled in the jury room or not, you shall not discuss any aspect of the case with each other until the case is submitted to you for your deliberations at the end of the trial. Again, if you have a question or need additional information, submit your request in writing and I will discuss it with the attorneys.

During the trial, you are not to engage in any conduct that impairs or interferes with your ability to hear and understand the court proceedings.

Do not form final opinions about any fact or about the outcome of the case until you have heard and considered all of the evidence, the closing arguments, and the rest of the instructions I will give you on the law. Keep an open mind during the trial. Form your final opinions only after you have had an opportunity to discuss the case with each other in the jury room at the end of the trial.

Please advise me in writing immediately if you believe that any juror has violated any provision of this admonition.

Before each recess, I will not repeat the entire Admonition I have just given you. I will probably refer to it by saying, "Please remember the Admonition," or something like that. However, even if I forget to make any reference to it, remember that the Admonition still applies at all times during the trial.

SOURCE: Bench Book for Superior Court Judges; Preliminary 9, RAJI (Civil) 5th, modified.

COMMENT: Rule 21.1, Arizona Rules of Criminal Procedure: "The law relating to instructions to the jury in civil actions shall apply to criminal actions, except as otherwise provided."

Preliminary Criminal 14 – Media Coverage

There may or may not be news media coverage of the trial. What the news media covers is up to them. If there is media coverage, you must avoid it during the trial. If you do encounter something about this case in the news media during the trial, end your exposure to it immediately and report to me as soon as you can. If there are cameras in the courtroom during the trial, do not be concerned about them. Court rules require that the proceedings be photographed or televised in such a way that no juror can be recognized.

SOURCE: Bench Book for Superior Court Judges; Preliminary 10, RAJI (Civil) 5th.

USE NOTE: Where there is extensive media coverage about a case, the trial judge may wish to consider asking the jurors at the start of the trial each day whether any juror has seen or heard anything in the media about the case.

COMMENT: Rule 21.1, Arizona Rules of Criminal Procedure: "The law relating to instructions to the jury in civil actions shall apply to criminal actions, except as otherwise provided."

Preliminary Criminal 15 – Presence of a Deputy

Deputies are assigned to courtroom by the sheriff's office. A deputy's presence in this courtroom should not be considered by you for any purpose, influence your view of the evidence, or impact your deliberations in anyway.

USE NOTE: The court should exercise its discretion in giving this instruction.

Preliminary Criminal 16 – Questions by Jurors

If at any time during the trial you have difficulty hearing or seeing something that you should be hearing or seeing, or if you get into personal distress for any reason, raise your hand and let me know.

If you have any questions about parking, restaurants, or other matters relating to jury service, feel free to ask one of the court staff. But remember that the Admonition applies to court staff, as it does to everyone else, so do not try to discuss the case with court staff.

If you have a question about the case for a witness or for me, write it down, but do not sign it. Hand the question to the bailiff. If your question is for a witness who is about to leave the witness stand, please signal the bailiff or me before the witness leaves the stand.

The lawyers and I will discuss the question. The rules of evidence or other rules of law may prevent some questions from being asked. If the rules permit the question and the answer is available, an answer will be given at the earliest opportunity. When we do not ask a question, it is no reflection on the person submitting it. You should attach no significance to the failure to ask a question. I will apply the same legal standards to your questions as I do to the questions asked by the lawyers. If a particular question is not asked, please do not guess why or what the answer might have been.

SOURCE: Bench Book for Superior Court Judges; Preliminary 11, RAJI (Civil) 5th.

USE NOTE: Rule 18.6(e), Arizona Rules of Criminal Procedure, requires the court to instruct the jurors that "they are permitted to submit to the court written questions directed to witnesses or to the court." Review of the juror questions must be done out of the presence of the jury (for example, at a bench conference) and should be done on the record.

COMMENT: Rule 21.1, Arizona Rules of Criminal Procedure: "The law relating to instructions to the jury in civil actions shall apply to criminal actions, except as otherwise provided."

Preliminary Criminal 17 – Alternate Jurors

The law provides for a jury of _____ persons in a case such as this. We have more than _____ jurors so that, if a juror becomes ill or has a personal emergency, the trial can continue without that juror.

At the end of the case, alternate jurors will be determined by lot in a drawing held in open court. Please do not be concerned with who may or may not be chosen as an alternate at the end of the case.

SOURCE: Bench Book for Superior Court Judges; Preliminary 13, RAJI (Civil), 5th.

COMMENT: ARIZ. CONST., art. 2, § 23 and A.R.S. § 21-102(A) require a 12-person jury if the potential sentence is 30 years or more. "A defendant's exposure to a sentence of at least thirty years' imprisonment establishes his or her right to a twelve-person jury, notwithstanding the actual sentence imposed. *State v. Luque,* 171 Ariz. 198, 201 (App.1992) ("commencement of deliberations is the crucial point" in determining when defendant's

right to twelve-person jury under article II, § 23 of Arizona Constitution attaches); *see also State v. Smith,* 197 Ariz. 333 (App. 1999)." *State v. Benenati*, 203 Ariz. 235, 239 n. 3 (App. 2002); *State v. Kuck*, 210 Ariz. 288 (App. 2005) distinguishing *State v. Maldonado*, 206 Ariz. 339, 342 (App. 2003) (jury size is determined at the outset of the trial) and holding that the size of the jury is determined by the maximum sentence to which the defendant is exposed when the case goes to the jury. Defense counsel's waiver of a twelve-person jury without the defendant's knowing waiver is fundamental error requiring reversal and a new trial. *Maldonado*, 206 Ariz. 339 (App. 2003). The possible prison sentence, even if it is a mandatory consecutive sentence, in a probation violation matter is not required to be included in determining whether a twelve-person jury is required for defendant's new, untried case. *State v. Nguyen*, 208 Ariz. 316, 318 (App. 2004).

Preliminary Criminal 18 – Constitutional Right Not to Testify

A defendant in a criminal case has a constitutional right to not testify at trial, and the exercise of that right cannot be considered by the jury in determining whether a defendant is guilty or not guilty.

SOURCE: Standard 15, RAJI (Criminal) 3rd.

Preliminary Criminal 19 – Statements of Defendant

If there is testimony in this case about what a defendant said to a law enforcement officer, you must not consider any such statements unless you determine beyond a reasonable doubt that the defendant made the statements voluntarily.

A defendant's statement to a law enforcement officer was not voluntary if it resulted from the defendant's will being overcome by a law enforcement officer's use of any sort of violence, coercion, or threats or by any direct or implied promise, however slight.

You must give such weight to the defendant's statement as you feel it deserves under all the circumstances.

SOURCE: *See* Standard 6, RAJI (Criminal) 3rd.

USE NOTE: Give this instruction only if a statement of the defendant to law enforcement is going to be introduced by the State.

Preliminary Criminal 20 – Presumption of Innocence and Burden of Proof

The State has charged the defendant with a crime. The charge is not evidence against the defendant. You must not think the defendant is guilty just because the defendant has been charged with a crime. The defendant has pled "not guilty." The defendant's plea of "not guilty" means that the State must prove every part of the charge beyond a reasonable doubt.

The law does not require a defendant to prove innocence. Every defendant is presumed by law to be innocent.

The State has the burden of proving the defendant guilty beyond a reasonable doubt. In civil cases, it is only necessary to prove that a fact is more likely true than not or that its truth is highly probable. In criminal cases such as this, the State's proof must be more powerful than that. It must be beyond a reasonable doubt.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. 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 the defendant is guilty of the crime charged, you must find him/her guilty. If, on the other hand, you think there is a real possibility that he/she is not guilty, you must give him/her the benefit of the doubt and find him/her not guilty.

In deciding whether the defendant is guilty or not guilty, do not consider the possible punishment.

SOURCE: *See* Standard 5a and 5b(1), RAJI (Criminal) 3rd; *State v. Portillo*, 182 Ariz. 592, 596, 898 P.2d 970, 974 (1995).

COMMENT: This instruction is to be given in every criminal case. *Portillo*, *supra*. The instruction should be given exactly as written without any modification. *State v. Sullivan*, 205 Ariz. 285, 288 (App. 2003).

Preliminary Criminal 21 (Short Version) – Jury to Be Guided by Official English Translation/ Interpretation

[*Language to be used*] may be used during this trial. The evidence you are to consider is only that provided through the official court [interpreters] [translators]. Although some of you may know [*language to be used*], it is important that all jurors consider the same evidence. Therefore, you must consider only the English interpretation, disregarding what you heard in [insert language]. You must disregard any different meaning. You may not comment to fellow jurors on what you heard in [insert language]. Additionally, you may not reinterpret for other jurors testimony that has been interpreted by the court interpreter because that would be providing your fellow jurors with information not on the record.

SOURCE: Ninth Circuit Manual of Model Civil Jury Instructions, Instruction 1.16.

USE NOTE: Use the bracketed language as applicable to the case. "Interpreter" or "interpretation" will be used for the spoken language and "translator" or "translation" will be used for written documents.

Should there be an issue with the accuracy of the interpretation or translation, counsel should raise the issue with the trial judge.

Preliminary Criminal 21 (Long Version) – Jury to Be Guided by Official English Translation/ Interpretation

[Insert language] may be used during this trial. The evidence you are to consider is only that provided through the official court interpreters. Although some of you may know [insert language], it is important that all jurors consider the same evidence. Therefore, you must accept the English interpretation. You must disregard any different meaning.

The court interpreter is required to remain neutral and to interpret between English and [insert language] accurately and impartially to the best of the interpreter's skill and judgment. The court interpreter is trained to give as accurate a translation as possible under the circumstances.

You must evaluate interpreted testimony as you would any other testimony. That is, you must not give interpreted testimony any greater or lesser weight than you would if the witness had spoken English.

It is important that each juror reach a decision based on the same set of facts. The possibility that a word or phrase may have another meaning is not a topic for discussion unless it is raised by counsel and resolved by the court. Therefore, you must consider only the English interpretation, disregarding what you heard in [insert language]. You may not comment to fellow jurors on what you heard in [insert language]. Additionally, you may not retranslate for other jurors testimony that has been translated by the court interpreter because that would be providing your fellow jurors with information not on the record.

USE NOTE: "Interpreter" or "interpretation" will be used for the spoken language and "translator" or "translation" will be used for written documents.

Preliminary Criminal 21.1 – Interpreter for the Defendant

Every person is entitled to a fair trial regardless of the language a person speaks and regardless of how well a person may, or may not, use the English language. Many citizens and noncitizens have a primary language other than English. Our Constitution protects all people within our state regardless of their nationality or their proficiency with the English language. Bias against or for a person who has little or no proficiency in English, or because the speaker does not use English, is not allowed. The fact that the defendant requires an interpreter must not influence you, in your deliberations, in any way.

Preliminary Criminal 21.2 – Citizenship/Nationality Instruction

Every person is entitled to a fair trial regardless of nationality or citizenship. Our Constitution and laws protect all people within our state regardless of their nationality or citizenship. Bias against or for a person because of their nationality or citizenship is not allowed. The defendant's nationality or citizenship must not influence you in your deliberations, in any way.

Preliminary Criminal 22 – The Charged Offense

To assist you in considering the evidence that will be presented during the trial, I will now tell you about the crime[s] with which the defendant is charged. The defendant is charged with ["insert name of crime[s]"], which crime[s] require[s] proof of the following:

[Set out the elements of the charged crime or crimes along with any definitions that may prove useful to the jury during presentation of the evidence.]

The defendant has pled "not guilty" to [this charge] [these charges]. The State must prove each element of the charged crime beyond a reasonable doubt. I will give you more details and definitions about the alleged crime in the final jury instructions.

SOURCE: Rule 18.6(c), Arizona Rules of Criminal Procedure.

COMMENT: Rule 18.6(c) provides that immediately after the jury is sworn, the court is to instruct the jury on, "the elementary legal principles that will govern the proceeding." It is recommended that the jury be instructed on the elements of the charged crime and any basic definitions so that the jury can put the evidence in context during the trial.

Preliminary Criminal 23 – Scheduling During Trial

The trial is expected to last through _____. We will all do our best to move the case along, but delays frequently occur. These won't be anyone's fault, so don't hold them against the parties. Delays usually occur because the attorneys and I often need to resolve certain legal matters before these matters may be presented to you in court or because I am busy with matters in other cases.

The usual hours of trial will be from _____ to _____. We will take short recesses about every mid-morning and mid-afternoon and occasionally stretch breaks in place. We will recess at _____ and begin again at _____. Unless a different starting time is announced prior to recessing for the evening, you may assume a starting time of _____ for the next day. At the beginning of the day, please assemble in the jury room for this division. Please do not come back into the courtroom until you are called by the bailiff.

SOURCE: Bench Book for Superior Court Judges; Preliminary 15, RAJI (Civil) 5th.

COMMENT: Rule 21.1, Arizona Rules of Criminal Procedure: "The law relating to instructions to the jury in civil actions shall apply to criminal actions, except as otherwise provided."

Preliminary Criminal 24 – Order of Trial

Criminal trials generally proceed in the following order:

First, the prosecuting attorney will make an opening statement giving a preview of the case. The defendant's attorney may make an opening statement outlining the defense case immediately after the prosecutor's statement, or it may be postponed until after the State's case has been presented. What is said in opening statements is not evidence. Nor is it an

argument. The purpose of an opening statement is to help you prepare for anticipated evidence.

Second, the State will present its evidence. After the State finishes the presentation of its evidence, the defendant may present evidence. If the defendant does produce evidence, the State may present additional, or rebuttal, evidence. With each witness, there is a direct examination, a cross-examination by the opposing side, and, finally, redirect examination. This usually ends the testimony of that witness.

Third, after all the evidence is in, I will read and give you copies of the final instructions, the rules of law you must follow in reaching your verdict.

[Fourth, the attorneys will make closing arguments to tell you what they think the evidence shows and how they think you should decide the case. The State has the right to open and close the argument since the State has the burden of proof. Just as in opening statements, what is said in closing arguments is not evidence.]

[Fourth, the attorneys will make closing arguments to tell you what they think the evidence shows and how they think you should decide the case. The State has the right to open the argument, but if the defendant presents an affirmative defense, the defendant may be allowed to close the argument because the defendant has the burden of proof on the affirmative defense. If no affirmative defense is presented, the State has the right to close the argument. Just as in opening statements, what is said in closing arguments is not evidence.]

Fifth, you will deliberate in the jury room about the evidence and rules of law in an effort to reach the verdict[s]. If you unanimously agree upon the verdict[s], [it] [they] will be read in court with you and the parties present.

[Sixth, in some circumstances, it may be necessary for you to make additional findings. If this is the case, I will give you further instructions at that time.]

Finally, you will be discharged and released from the Admonition.

The rules of law I have shared with you in the past few minutes are preliminary only. At the end of the case I will read to you and give you a copy of the final instructions of law. In deciding the case you must be guided by the final instructions.

SOURCE: Bench Book for Superior Court Judges; Rule 19.1(a), Arizona Rules of Criminal Procedure.

COMMENT: The second bracketed "fourth" paragraph is included because where the defense has the burden of proof on an affirmative defense, the trial court has the discretion to grant surrebuttal. *See State v. Moody*, 208 Ariz. 424, 468-69, ¶¶ 202-04 (2004); *State v. Steelman,* 120 Ariz. 301, 319 (1978). If the court has made the decision to allow surrebuttal before hearing the evidence, the court may wish to use the second bracketed "fourth" paragraph.

STANDARD CRIMINAL INSTRUCTIONS

Standard Criminal 1 – Duty of Jury

It is your duty as a juror to decide this case by applying these jury instructions to the facts as you determine them. You must follow these jury instructions. They are the rules you should use to decide this case.

It is your duty to determine what the facts are in the case by determining what actually happened. Determine the facts only from the evidence produced in court. When I say "evidence," I mean the testimony of witnesses and the exhibits introduced in court. You should not guess about any fact. You must not be influenced by sympathy or prejudice. You must not be concerned with any opinion that you feel I have about the facts. You, as jurors, are the sole judges of what happened.

You must consider all these instructions. Do not pick out one instruction, or part of one, and ignore the others. As you determine the facts, however, you may find that some instructions no longer apply. You must then consider the instructions that do apply, together with the facts as you have determined them.

SOURCE: RAJI (Criminal) No. 1 (1996).

Standard Criminal 2 – Indictment/Information Is Not Evidence

The State has charged the defendant with [a crime] [certain crimes]. A charge is not evidence against the defendant. You must not think that the defendant is guilty just because of a charge. The defendant has pled "not guilty."

This plea of "not guilty" means that the State must prove each element of the charge[s] beyond a reasonable doubt.

Standard Criminal 3 – Presumption of Innocence

The law does not require a defendant to prove innocence. Every defendant is presumed by law to be innocent. You must start with the presumption that the defendant is innocent.

SOURCE: The instruction is based on language from the 1989 and 1996 versions of the Revised Arizona Jury Instructions.

USE NOTE: The Committee strongly recommends the court use this instruction in every case along with the required reasonable doubt instruction.

COMMENT: In *Taylor v. Kentucky,* 436 U.S. 478 (1978), the United States Supreme Court held that, under facts of that case, the failure of the trial court to give defendant's requested instruction on presumption of innocence violated defendant's due process rights to a fair trial. In *Kentucky v. Whorton,* 441 U.S. 786, 789 (1979), the United States Supreme Court held

that the failure to give a requested instruction on the presumption of innocence in and of itself does not violate the Constitution, and noted that the error it found in *Taylor* was based on the facts of that case. *Accord State v. White,* 160 Ariz. 24, 31 (1989). Because any error in the failure to give a presumption of innocence instruction will depend on the facts of the case, the Committee is of the opinion that the better practice is to give this instruction in every case.

Standard Criminal 4(a) – Burden of Proof

The State has the burden of proving the defendant guilty beyond a reasonable doubt. This means the State must prove each element of each charge beyond a reasonable doubt. In civil cases, it is only necessary to prove that a fact is more likely true than not or that its truth is highly probable. In criminal cases such as this, the State's proof must be more powerful than that. It must be beyond a reasonable doubt.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. 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 the defendant is guilty of the crime charged, you must find [him][her] guilty. If, on the other hand, you think there is a real possibility that [he][she] is not guilty, you must give [him][her] the benefit of the doubt and find [him][her] not guilty.

SOURCE: *State v. Portillo,* 182 Ariz. 592, 596 (1995), with the addition of the language contained in the second sentence of the first paragraph.

COMMENT: This is the instruction verbatim from *State v. Portillo,* 182 Ariz. 592, 596, 898 P.2d 970, 974 (1995), with the addition of the language contained in the second sentence of the first paragraph. In *State v. Van Adams,* 194 Ariz. 408, 418, 984 P.2d 16, 26 (1999), the Arizona Supreme Court rejected a challenge to the "firmly convinced" language in the *Portillo* instruction, and stated: "We have clearly indicated our preference for this instruction, which is based upon the Federal Judicial Center's proposed instruction." 194 Ariz. 408, ¶ 30. This instruction is included for those who are of the opinion that the Arizona Supreme Court has mandated that the courts must now use only the exact language given in *Portillo.* The Committee believes, however, that the *Portillo* instruction is incorrect to the extent that it states that the preponderance of the evidence standard and the clear and convincing evidence standard apply only in a civil case. In a criminal case, facts in general must be proved by a preponderance of the evidence, and certain specific facts must be proved by either a preponderance of the evidence or by clear and convincing evidence. A.R.S. § 13-205(A) (unless otherwise provided, a defendant must prove an affirmative defense by a preponderance of the evidence); A.R.S. § 13-206(B) (defendant must prove entrapment by clear and convincing evidence); A.R.S. § 13-502 (defendant must prove legal insanity by clear and convincing evidence); *State v. Terrazas,* 189 Ariz. 580, 582 (1997) (State must prove by clear and convincing evidence that defendant committed other act). Standard Criminal Instruction 5b(2) defines these other standards for the jurors.

Standard Criminal 4(b) – Standards for the Burden of Proof

There are three standards for the burden of proof:

1. Preponderance of the evidence;
2. Clear and convincing evidence;
3. Beyond a reasonable doubt.

Preponderance of the Evidence – A party having the burden of proof by a preponderance of the evidence must persuade you, by the evidence, that the claim or a fact is more probably true than not true. This means the evidence that favors that party outweighs the opposing evidence.

Clear and Convincing Evidence – A party having the burden of proof by clear and convincing evidence must persuade you, by the evidence, that the claim or a fact is highly probable. This standard is higher than the standard for proof by a preponderance of the evidence, but is lower than the standard for proof beyond a reasonable doubt.

Beyond a Reasonable Doubt – The State has the burden of proving the defendant guilty beyond a reasonable doubt. This means the State must prove each element of each charge beyond a reasonable doubt. Proof beyond a reasonable doubt is proof, by the evidence that leaves you firmly convinced of the defendant's guilt. This standard is higher than the standard for either proof by a preponderance of the evidence or proof by clear and convincing evidence.

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 the defendant is guilty of the crime charged, you must find [him][her] guilty. If, on the other hand, you think there is a real possibility that [he][she] is not guilty, you must give [him][her] the benefit of the doubt and find [him][her] not guilty.

COMMENT: This instruction takes the instruction given in *State v. Portillo,* 182 Ariz. 592, 596 (1995), and combines it with the definitions for preponderance of the evidence and clear and convincing evidence from the civil RAJI. In a criminal case, facts in general must be proved by a preponderance of the evidence, and certain specific facts must be proved by either a preponderance of the evidence or by clear and convincing evidence. A.R.S. § 13-205(A) unless otherwise provided, a defendant must prove an affirmative defense by a preponderance of the evidence); A.R.S. § 13-206(B) (defendant must prove entrapment by clear and convincing evidence); A.R.S. § 13-502 (defendant must prove legal insanity by clear and convincing evidence); *State v. Terrazas,* 189 Ariz. 580, 582 (1997) (State must prove by clear and convincing evidence that defendant committed other act).

Standard Criminal 5 – Jury Not to Consider Penalty

You must decide whether the defendant is guilty or not guilty by determining what the facts in the case are and applying these jury instructions.

You must not consider the possible punishment when deciding on guilt; punishment is left to the judge.

SOURCE: RAJI (Criminal) No. 7 (1996); *State v. Koch*, 138 Ariz. 99, 105 (1983); *State v. Van Dyke*, 127 Ariz. 335, 337 (1983).

Standard Criminal 6 – Defendant's Right to Represent Himself/Herself

Every defendant has a right to represent [himself] [herself]. [The Defendant will be representing himself/herself with the assistance of an advisory lawyer.] The Defendant's decision to represent [himself] [herself] means that [he] [she] will be required to follow the same rules and procedures as any lawyer.

You should not let the fact that the Defendant has chosen to represent [himself] [herself] affect your deliberations in any way.

SOURCE: *Faretta v. California*, 422 U.S. 806, 821 (1975).

Standard Criminal 7 – Defendant Absent at Trial

You are not to consider or speculate about the defendant's absence from the courtroom. It is not evidence, and you must not consider it in deciding if the State has proved its case beyond a reasonable doubt.

SOURCE: RAJI (Criminal) No. 33 (1996); Rule 9.1, Arizona Rules of Criminal Procedure.

Standard Criminal 8 – Evidence to Be Considered

You are to determine what the facts in the case are from the evidence produced in court. If an objection to a question was sustained, you must disregard the question and you must not guess what the answer to the question might have been. If an exhibit was offered into evidence and an objection to it was sustained, you must not consider that exhibit as evidence. If testimony was ordered stricken from the record, you must not consider that testimony for any purpose.

SOURCE: RAJI (Criminal) No. 4 (2016).

COMMENT: When the trial court sustains a defendant's objection to an improper comment and admonishes the jury to disregard it, this is generally sufficient to cure the prejudicial impact unless it is highly damaging or the instruction from the court is clearly inadequate. *State v. Clow*, 130 Ariz. 125, 127 (1981).

Standard Criminal 9 – Defendant Need Not Produce Evidence

The State must prove guilt beyond a reasonable doubt based on the evidence. The defendant is not required to produce evidence of any kind. The defendant's decision not to produce any evidence is not evidence of guilt.

SOURCE: RAJI (Criminal) No. 16 (1996); A.R.S. § 13-115 (statutory language as of October 1, 1978).

USE NOTE: If a defendant testifies and refers to absent witnesses or defense counsel argues about others involved or infers that the State could have called other witnesses, the State may argue to the jury that although the State has the burden of proof, the defense has the power of subpoena also. This comment is not a comment on defendant's right not to testify. *See State v. Petzolt*, 172 Ariz. 272, 278 (App.1991); *State v. Rutledge,* 205 Ariz. 7, 14 (2003) (stating that the comments must be taken in the context of the facts presented and in that case, where defense raised an alibi defense, it was proper for prosecutor to comment that the defendant's interview with the police did not include any alibi evidence). It is well settled law that a prosecutor may comment on defendant's failure to produce exculpatory evidence as long as the State does not call attention to defendant's failure to testify. *State v. Herrera*, 203 Ariz. 131, 137 (App. 2002). However, the State is not permitted to argue to the jury about the defense failure to produce witnesses or evidence when there has been no evidence presented or arguments made by counsel about absent witnesses or evidence or the failure of the State to call witnesses or present specific evidence. *See State v. Corona*, 188 Ariz. 85, 89 (App. 1997).

Standard Criminal 10 – Lawyers' Comments Are Not Evidence

In their opening statements and closing arguments, the lawyers have talked to you about the law and the evidence. What the lawyers said is not evidence, but it may help you to understand the law and the evidence.

SOURCE: RAJI (Criminal) No. 2 (1996).

COMMENT: The opening statement should not contain any facts that the parties cannot prove at trial. *State v. Bowie*, 119 Ariz. 336, 339 (1978). The trial court should not restrict an opening statement containing facts that the party believes in good faith that it can establish at trial. *State v. Pedroza-Perez*, 240 Ariz. 114 (2016).

Standard Criminal 11 – Stipulations

The lawyers are permitted to stipulate that certain facts exist. This means that both sides agree those facts do exist and are part of the evidence. 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.

SOURCE: RAJI (Criminal) Standard 3 (1996).

USE NOTE: In *State v. Allen*, 223 Ariz. 125, 126, ¶ 10, n. 2 (Ariz. 2009), the Arizona Supreme Court noted that it was incorrect to instruct the jury that it "should accept * * * as true" any fact stipulated to by the parties.

Standard Criminal 12 – Judicial Notice of Adjudicative Facts

During the course of the trial, you were informed that the Court had taken judicial notice that [describe adjudicative facts]. You may or may not accept this judicial notice as conclusive.

C Rule 201(f), Arizona Rules of Evidence (effective as of January 1, 2012).

USE NOTE: This instruction should be given to the jury during the trial after the trial court has taken judicial notice of an adjudicative fact pursuant to Rule 201, and should be given again in the final instructions.

COMMENT: The Arizona Supreme Court adopted a new Rule 201 on September 8, 2010, that is effective on January 1, 2012, as part of R-10-0035, in which subsection (f) specifically requires that this instruction be given in criminal cases when the trial court has taken judicial notice of an adjudicative fact.

Standard Criminal 13 – Redacted Exhibits

Some of the exhibits that have been admitted into evidence have had portions deleted from them for legal reasons. Do not concern yourselves with the reasons why some portions of the exhibits have been deleted. Do not speculate upon what the deleted portions might, or might not, reveal.

SOURCE: *State v. Kennedy*, 122 Ariz. 22, 27 (App. 1979).

USE NOTE: This instruction should be given to the jury d t the time that the redacted exhibit has been admitted and published to the jury, and should be given again in the final instructions

Standard Criminal 14 – Direct and Circumstantial Evidence

Evidence may be direct or circumstantial. Direct evidence is the testimony of a witness who saw, heard, or otherwise sensed an event. Circumstantial evidence is the proof of a fact or facts from which you may find another fact. The law makes no distinction between direct and circumstantial evidence. It is for you to determine the importance to be given to the evidence, regardless of whether it is direct or circumstantial.

SOURCE: RAJI (Criminal) No. 24 (1996); *State v. Carter*, 118 Ariz. 562, 564 (1978); *State v. Salinas*, 106 Ariz. 526, 527 (1971); *State v. Harvill*, 106 Ariz. 386, 390 (1970).

Standard Criminal 15 – Credibility [Believability] of Witnesses

In deciding the facts of this case, you should consider what testimony to accept, and what to reject. You may accept everything a witness says, or part of it, or none of it.

In evaluating testimony, you should use the tests for truthfulness that people use in determining matters of importance in everyday life, including such factors as: the witness's ability to see or hear or know the things the witness testified to; the quality of the witness's memory; the witness's manner while testifying; whether the witness had any motive, bias, or prejudice; whether the witness was contradicted by anything the witness said or wrote before trial, or by other evidence; and the reasonableness of the witness's testimony when considered in the light of the other evidence.

Consider all of the evidence in the light of reason, common sense, and experience.

SOURCE: Preliminary 4 and Standard 6, RAJI (Civil) 3d; Rule 21.1, Arizona Rules of Criminal Procedure: "The law relating to instructions to the jury in civil actions shall apply to criminal actions, except as otherwise provided."

USE NOTE: If a witness has been impeached pursuant to Rule 609 with evidence of a prior felony, Standard Criminal 19 (witness was the defendant) or Standard 20 (third-party witness) should also be given. If character evidence was admitted pursuant to Rule 404, the court should consider either modifying Standard 19 or Standard 20 if given or giving a separate instruction regarding for what purpose(s) the jury may consider the Rule 404 evidence.

Standard Criminal 16 – Testimony of Law Enforcement Officers

The testimony of a law enforcement officer is not entitled to any greater or lesser importance or believability merely because of the fact that the witness is a law enforcement officer. You are to consider the testimony of a police officer just as you would the testimony of any other witness.

SOURCE: RAJI (Criminal) No. 34 (1996); *State v. Walters*, 155 Ariz. 548, 552 (1987).

Standard Criminal 17 – Expert Witness

A witness qualified as an expert by education or experience may state opinions on matters in that witness's field of expertise, and may also state reasons for those opinions.

Expert opinion testimony should be judged just as any other testimony. You are not bound by it. You may accept it or reject it, in whole or in part, and you should give it as much credibility and weight as you think it deserves, considering the witness's qualifications and experience, the reasons given for the opinions, and all the other evidence in the case.

SOURCE: Rule 702, Arizona Rules of Evidence; Preliminary 6, RAJI (Civil) 4th; Rule 21.1, Arizona Rules of Criminal Procedure: "The law relating to instructions to the jury in civil

actions shall apply to criminal actions, except as otherwise provided." *State v. Roberts*, 139 Ariz. 117, 122-23 (App. 1983).

Standard Criminal 18(a) – Defendant Need Not Testify

The defendant is not required to testify. The decision on whether or not to testify is left to the defendant acting with the advice of an attorney. You must not let this choice affect your deliberations in any way. [You must not conclude that the defendant is likely to be guilty because the defendant did not testify.]

SOURCE: RAJI (Criminal) No. 15 (1996); A.R.S. §§ 13-115 and 13-117 (statutory language as of October 1, 1978); *Griffin v. California*, 380 U.S. 609 (1965).

Standard Criminal 18(b) – Defendant's Testimony

You must evaluate the defendant's testimony the same as any witness' testimony.

SOURCE: RAJI (Criminal) No. 36 (1996).

Standard Criminal 19 – Voluntariness of Defendant's Statements

You must not consider any statements made by the defendant to a law enforcement officer unless you determine beyond a reasonable doubt that the defendant made the statements voluntarily.

A defendant's statement was not voluntary if it resulted from the defendant's will being overcome by a law enforcement officer's use of any sort of violence, coercion, or threats, or by any direct or implied promise, however slight.

You must give such weight to the defendant's statement as you feel it deserves under all the circumstances.

SOURCE: RAJI (Criminal) No. 6 (1996); A.R.S. § 13-3988 (statutory language as of October 1, 1978); *State v. Williams*, 136 Ariz. 52, 56 (1983); *State v. McVay*, 127 Ariz. 18, 20 (1980); *State v. Brooks*, 127 Ariz. 130, 138 (App. 1980).

Standard Criminal 20 – Reserved

Standard Criminal 21 – Defendant Witness (Prior Conviction)

You have heard evidence that defendant has previously been convicted of a criminal offense. You may consider that evidence only as it may affect defendant's believability as a

witness. You must not consider a prior conviction as evidence of guilt of the crime for which the defendant is now on trial.

SOURCE: RAJI (Criminal) No. 19 (1996); Rule 609, Arizona Rules of Evidence; *State v. Green*, 200 Ariz. 496, 499 (2001).

USE NOTE: This instruction must be given if the court allows evidence of defendant's prior conviction. "Whenever evidence is admitted of other offenses there is an imperative duty on the trial court to clearly instruct the jury as to the restricted and limited purpose for which such evidence is to be considered." *State v. Canedo*, 125 Ariz. 197, 200 (1980). The court's failure to provide this type of instruction constitutes reversible error. *Id.*

COMMENT: The above instruction is appropriate when the trial court admits the evidence of the prior conviction only for impeachment under Ariz. R. Evid. 609. If relevant, the trial court may also admit the evidence of the prior conviction under Ariz. R. Evid. 404(b); *State v. Smith*, 146 Ariz. 491, 499 (1985); *State v. Burciaga*, 146 Ariz. 333, 335 (App. 1985).

If the trial court admits the evidence under both Rule 404(b) and Rule 609, the trial court should delete the word "only" in the second sentence. Also, the trial court should consider combining this instruction with Standard Criminal 26A or 26B, dealing with evidence of other crimes, wrongs, or acts. The Court should also consider whether the specific reference to the nature of the prior offense(s) should or should not be sanitized to prevent prejudice. *See State v. Smyers,* 207 Ariz. 314, 318 (2004); *State v. Montano,* 204 Ariz. 413, 426 (2003).

Standard Criminal 22 – Witness (Prior Conviction)

You have heard evidence that a witness has previously been convicted of a criminal offense. You may consider this evidence only as it may affect the witness' believability.

SOURCE: RAJI (Criminal) No. 20 (1996); Rule 609, Arizona Rules of Evidence.

USE NOTE: The Court should consider whether the specific reference to the nature of the prior offense(s) of a witness should be sanitized to prevent prejudice. *See State v. Montano,* 204 Ariz. 413, 426 (2003) (case involving witness' prior conviction).

SOURCE: RAJI (Criminal) No. 21 (1996); *State v. Nieto,* 186 Ariz. 449, 457 (1996); *State v. Amaya-Ruiz*, 166 Ariz. 152, 174 (1990), *cert. denied*, 500 U.S. 929 (1991).

Standard Criminal 23 – Evidence for Limited Purpose

You [are about to hear] [have heard] evidence that [*describe evidence to be received for limited purpose*]. This evidence is admitted only for the limited purpose of [*describe purpose*] and, therefore, you must consider it only for that limited purpose and not for any other purpose.

SOURCE: Federal Jury Instruction 2.11; Arizona Rules of Evidence 105 (effective as of September 1. 1977).

USE NOTE: This instruction should be given to the jury before such evidence is admitted, and should be given again in the final instructions.

Standard Criminal 24 – Other Acts

Evidence of other acts has been presented. You may consider [this act][these acts] only if you find that the State has proved by clear and convincing evidence that the defendant committed [this act][these acts]. You may only consider [this act][these acts] to establish the defendant's [motive], [opportunity], [intent], [preparation], [plan], [knowledge], [identity], [absence of mistake or accident]. You must not consider [this act][these acts] to determine the defendant's character or character trait, or to determine that the defendant acted in conformity with the defendant's character or character trait and therefore committed the charged offense.

SOURCE: RAJI (Criminal) No. 26A (1996); Rule 404(b), Arizona Rules of Evidence (Statutory language as of Nov. 1, 1988); *State v. Terrazas,* 189 Ariz. 580, 582 (1997) (added the requirement of proof by clear and convincing evidence).

USE NOTE: Use language in bracketed portions as applicable to facts of case. "Clear and convincing evidence" is defined in Standard Criminal Instruction 5(b)(2).

The bracketed list in the third sentence is not exhaustive. The trial court should include in the instruction the specific relevant purpose or purposes for which the evidence was admitted. For a broad listing of relevant purposes, see M. UDALL ET AL., LAW OF EVIDENCE § 84, at 182-89 (3d ed. 1991). If the defendant requests a limiting instruction, the trial court MUST give a limiting instruction. *State v. Ives,* 187 Ariz. 102, 111 (1996).

COMMENT: Based on Arizona Supreme Court cases, the Committee recommends that the trial court conduct a Rule 403 balancing and state on the record that it has done so. *See State v. Hughes,* 189 Ariz. 62, 68 (1997); *State v. Ives*, 187 Ariz. 102, 111 (1996); *State v. Dickens,* 187 Ariz. 1, 19 (1996); *State v. Taylor,* 169 Ariz. 121, 125-26 (1991). *But see State v. Cannon,* 148 Ariz. 72, 76 (1985) (when defendant makes Rule 404(b) objection, trial court not required *sua sponte* to conduct Rule 403 balancing).

Standard Criminal 25 – Character Evidence in Sexual Misconduct Cases

Evidence of other acts has been presented. [Evidence to rebut this has also been presented.] You may consider this evidence in determining whether the defendant had a character trait that predisposed [him][her] to commit the [crime][crimes] charged. You may determine that the defendant had a character trait that predisposed [him][her] to commit the [crime][crimes] charged only if you decide that the State has proved by clear and convincing evidence that:

1. The defendant committed these acts; and
2. These acts show the defendant's character predisposed [him][her] to commit abnormal or unnatural sexual acts.

You may not convict the defendant of the [crime][crimes] charged simply because you find that [he][she] committed these acts, or that [he][she] had a character trait that predisposed [him][her] to commit the [crime][crimes] charged.

Evidence of these acts does not lessen the State's burden to prove the defendant's guilt beyond a reasonable doubt.

SOURCE: RAJI (Criminal) No. 26B (1996); Rule 404(c), Arizona Rules of Evidence (statutory language as of Nov. 1, 1988); A.R.S. § 13-1420 (statutory language as of April 28, 1997); *State v. Terrazas,* 189 Ariz. 580, 583 (1997) (added the requirement of proof by clear and convincing evidence).

USE NOTE: Use language in bracketed portions as applicable to facts of case. "Clear and convincing evidence" is defined in Standard Criminal Instruction 5(b)(2).

Under Ariz. R. Evid. 404(c)(2), the trial court MUST give a limiting instruction. This instruction replaces RAJI (Criminal) No. 14.101, Previous Sexual Acts (1989).

COMMENT: Under Ariz. R. Evid. 404(c)(1)(A) and (B), the trial court must make preliminary specific findings, and under Ariz. R. Evid. 404(c)(1)(C), it MUST conduct a Ariz. R. Evid. 403 balancing.

The Committee preferred the language "abnormal or unnatural sexual acts" rather than "aberrant sexual propensity" because "aberrant sexual propensity" is difficult to understand and define.

Standard Criminal 26 – Character and Reputation of the Defendant

You have heard evidence of the defendant's character for [truthfulness,] [peacefulness,] [honesty,] [etc.]. In deciding this case, you should consider that evidence together with, and in the same manner as, all the other evidence in the case.

SOURCE: RAJI (Criminal) No. 8 (1996); *State v. Childs*, 113 Ariz. 318, 322 (1976); *State v. Vild*, 155 Ariz. 374, 379-380 (App. 1987).

Standard Criminal 27– Facility Dog

A witness may be accompanied by a dog while testifying in court. The dog's presence is not and should not be a reflection on the truthfulness or credibility of any testimony that is offered by the witness. The dog is trained to assist witnesses in court proceedings. The presence of the dog should not influence your deliberations in any way.

SOURCE: A.R.S. § 13-4442 (statutory language as of August 3, 2018).

Standard Criminal 28 – Absence of Other Participant

The only matter for you to determine is whether the State has proved the defendant guilty beyond a reasonable doubt. The defendant's guilt or innocence is not affected by the

fact that another person or persons might have participated or cooperated in the crime and is not on trial now. You should not guess about the reason any other person is absent from the courtroom.

SOURCE: RAJI (Criminal) No. 12 (1996); *State v. Cannon*, 148 Ariz. 72, 79-80 (1985).

Standard Criminal 29 – Consider Evidence Separately

There are ___ defendants. You must consider the evidence in the case as a whole. However, you must consider the charge[s] against each defendant separately.

Each defendant is entitled to have the jury determine the verdict as to each of the crimes charged based upon that defendant's own conduct and from the evidence which applies to that defendant, as if that defendant were being tried alone.

The defendant's conduct may include acting as [a principal] [an accomplice] [a co-conspirator].

SOURCE: RAJI (Criminal) No. 32 (1996); *Zafiro v. United States*, 506 U.S. 534 (1993); *State v. Runningeagle*, 176 Ariz. 59, 68 (1993).

USE NOTE: Use language in bracketed portions as applicable to the facts of the case.

If applicable, the court shall instruct on accomplice liability [See Statutory Criminal Instruction 3.01] or conspiracy [See Statutory Criminal Instruction 10.03].

Standard Criminal 30 – Separate Counts

Each count charges a separate and distinct offense. You must decide each count separately on the evidence with the law applicable to it, uninfluenced by your decision on any other count. You may find that the State has proved beyond a reasonable doubt, all, some, or none of the charged offenses. Your finding for each count must be stated in a separate verdict.

SOURCE: RAJI (Criminal) No. 35 (1996); *State v. Hoskins*, 199 Ariz. 127, 145 (2000); *State v. Parra*, 10 Ariz. App. 427, 431 (1969).

Standard Criminal 31 – Dismissal/Severance of Some Charges Against Defendant

At the beginning of the trial, the charge[s] against the defendant [was][were] read to you. [Specify count[s] or charge[s]] [is] [are] no longer before you. You should not speculate about why the charge[s] [is] [are] no longer part of this trial.

The defendant is on trial only for the charge[s] of [remaining count[s]]. You may consider the evidence presented only as it relates to the remaining count[s].

SOURCE: Federal Jury Instruction 2.13.

USE NOTE: This instruction should be given to the jury during the trial after the dismissal or severance of charges, and should be given again in the final instructions.

Standard Criminal 32 – Disposition of Charge Against Defendant

For reasons that do not concern you, the case against codefendant [name] is no longer before you. Do not speculate why. This fact should not influence your verdict[s] with reference to the remaining defendant[s], and you must base your verdict[s] solely on the evidence against the remaining defendant[s].

SOURCE: Federal Jury Instruction 2.14.

USE NOTE: This instruction should be given to the jury during the trial after the dismissal of a codefendant from the case, and should be given again in the final instructions.

It may not be appropriate to give this instruction if the defense is based on third-party culpability of a dismissed codefendant.

Standard Criminal 33 – Multiple Acts

The defendant is accused of having committed the crime of _____ [in Count _____]. The prosecution has introduced evidence for the purpose of showing that there is more than one [act] [or] [omission] upon which a conviction [on Count ____] may be based. Defendant may be found guilty if the proof shows beyond a reasonable doubt that [he][she] committed any one or more of the [acts] [or] [omissions]. However, in order to return a verdict of guilty [to Count _____], all jurors must agree that [he] [she] committed the same [act] [or] [omission] [or] [acts] [or] [omissions]. It is not necessary that the particular [act] [or] [omission] agreed upon be stated in your verdict.

SOURCE: CALJIC 17.01 (West 2008).

USE NOTES: In *State v. Klokic*, 219 Ariz. 241, 244, ¶ 14 (App. 2008), the court wrote:

> "[I]n drafting an indictment, the State may choose to charge as one count separate criminal acts that occurred during the course of a single criminal undertaking even if those acts might otherwise provide a basis for charging multiple criminal violations. In such cases, however, if the State introduces evidence of multiple criminal acts to prove a single charge, the trial court is normally obliged to take one of two remedial measures to insure that the defendant receives a unanimous jury verdict."

One of these measures is to, "instruct the jury that they must agree unanimously on a specific act that constitutes the crime before the defendant can be found guilty." *Id.,* (footnote and citations omitted).

Standard Criminal 34 – Reserved

Standard Criminal 35 – Voluntary Act

Before you may convict the defendant of the charged crime(s), you must find that the State proved beyond a reasonable doubt that the defendant [committed a voluntary act] [omitted to perform a duty imposed upon the defendant by law that the defendant was capable of performing]. A voluntary act means a bodily movement performed consciously and as a result of effort and determination. You must consider all the evidence in deciding whether the defendant [committed the act voluntarily] [failed to perform the duty imposed on the defendant].

SOURCE: RAJI (Criminal) No. 17 (1996); A.R.S. §§ 13-105 (statutory language as of April 19, 1994) and 13-201 (statutory language as of October 1, 1978); *State v. Lara*, 183 Ariz. 233, 234-35 (1995).

USE NOTE: The appropriate bracketed language should be used in cases depending on whether a defendant is accused of committing a voluntary act or failing to perform a duty imposed by law. "Voluntary act" is defined in A.R.S. § 13-105.

Standard Criminal 36 – Lesser-Included Offense

The crime of [_____] includes the lesser offense of [_____]. You may consider the lesser offense of [_____] if either

1. you find the defendant not guilty of [insert the greater offense]; *or*
2. after full and careful consideration of the facts, you cannot agree on whether to find the defendant guilty or not guilty of [insert the greater offense].

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: RAJI (Criminal) No. 22; *State v. LeBlanc*, 186 Ariz. 437, 439-40 (1996).

USE NOTE: In determining whether an instruction on a lesser-included offense is proper, the Arizona Supreme Court has set forth a two-part test: (1) whether the offense is a lesser-included offense of the crime charged, and (2) whether the evidence otherwise supports the giving of the instruction. *State v. Vickers,* 159 Ariz. 532, 542 (1989), *cert. denied,* 497 U.S. 1033 (1990); *State v. Celaya,* 135 Ariz. 248, 251 (1983).

To determine whether a lesser-included offense instruction is warranted, the trial court may consider whether by its very nature the included offense is always a constituent part of the greater offense or whether the terms of the charging document describe the lesser offense even though the lesser offense would not always form a constituent part of the greater offense. *State v. Gooch,* 139 Ariz. 365, 366 (1984); *State v. Magana,* 178 Ariz. 416, 418 (App. 1994).

As a general rule, a defendant is entitled to a lesser-included offense instruction if there is evidence from which the jury could convict on the lesser offense and find that the State failed to prove an element of the greater offense. *State v. Jansing,* 186 Ariz. 63, 68 (1996); *State v. Ruelas,* 165 Ariz. 326, 328 (App. 1990); *State v. Conroy,* 131 Ariz. 528, 532 (App. 1982). The

evidence supporting the lesser-included offense may be circumstantial and it may be in dispute. *State v. Cousin,* 136 Ariz. 83, 87 (App. 1983).

When the record is such that the defendant is either guilty of the crime charged or not guilty, the trial court should refuse to give a lesser-included instruction. *State v. Jackson,* 186 Ariz. 20, 27 (1996); *State v. Salazar,* 173 Ariz. 399, 408 (1992), *cert. denied,* 509 U.S. 912 (1993); *State v. Williams,* 144 Ariz. 479, 486 (1985); *State v. Gendron,* 166 Ariz. 562, 566 (App. 1990).

COMMENT: Where the evidence could support a conviction for a lesser offense, however, the trial court must not refuse to give it on the ground that the defendant pursued an "all-or-nothing" defense before the jury. *State v. Wall*, 212 Ariz. 1 (2006).

The trial court should not refuse to give a lesser offense instruction on the ground that the lesser offense is not entirely subsumed by the greater offense. *State v. Lua*, 237 Ariz. 301 (2015).

Standard Criminal 37 – Possession Defined

The law recognizes different types of possession.

"Actual possession" means the defendant knowingly had direct physical control over an object.

"Constructive possession" means the defendant, although not actually possessing an object, knowingly exercised dominion or control over it, either acting alone or through another person. "Dominion or control" means either actual ownership of the object or power over it. Constructive possession may be proven by direct or circumstantial evidence.

Both actual and constructive possession may be sole or joint. "Sole possession" means the defendant, acting alone, had actual or constructive possession of an object. "Joint possession" means the defendant and one or more persons shared actual or constructive possession of an object.

You may find that the element of possession, as the term is used in these instructions, is present if you find beyond a reasonable doubt that the defendant had actual or constructive possession, either acting alone or with another person.

SOURCE: RAJI (Rev. Criminal) No. 37 (1996); A.R.S. § 13-105; (statutory language as of September 21, 2006); *State v. Cox,* 214 Ariz. 518, 520 (App. 2007); *State v. Barreras,* 112 Ariz. 421, 422-23 (1975); *State v. Scarborough,* 110 Ariz. 1, 2, 5 (1973); *State v. Arce,* 107 Ariz. 156, 163 (1971).

Standard Criminal 38 – Deliberate Ignorance

The State is required to prove beyond a reasonable doubt that the defendant knew that [he] [she] was [transporting] [in possession of] [transferring] {*insert name of illegal drug*}. That knowledge can be established by either direct or circumstantial evidence showing that the defendant was aware of the high probability that the [package(s)] [container(s)] [vehicle] contained {*insert name of illegal drug*}, and that the defendant acted with conscious purpose to avoid learning the true contents of the [package(s)] [container(s)] [vehicle]. You may not find

such knowledge, however, if you find that the defendant actually believed that no {*insert name of illegal drug*} were in the [vehicle driven by the defendant] [package(s)] [container], or if you find that the defendant was simply careless.

SOURCE: *State v. Haas*, 138 Ariz. 413 (1983); *State v. Diaz*, 166 Ariz. 442 (App. 1990), *vacated in part on other grounds*, 168 Ariz. 363 (1991); *State v. Fierro*, 220 Ariz. 337 (App. 2008); *United States v. Heredia*, 483 F.3d 913 (9th Cir. 2007).

USE NOTE: This instruction is drafted in the context of a drug offense because the issue of deliberate ignorance appears most often in that context. For example, in *State v. Diaz*, 166 Ariz. 442 (App. 1990), *vacated in part on other grounds*, 168 Ariz. 363 (1991) the defendant was charged with transporting marijuana. Although the defendant admitted being told that the truck contained "drugs," the defendant claimed he did not know the true contents of the truck. Addressing defendant's claim of ignorance, the court wrote:

> We agree with appellant that the instruction given was improper. First, the court refused appellant's request that it define the term "illegal substance." That term could include innumerable items both within and without the list of drug offenses. Secondly, the statute under which appellant was charged requires the state to prove that the defendant knowingly transported or transferred a narcotic drug. A.R.S. § 13-3408(A)(7); *see State v. Arce,* 107 Ariz. 156, 483 P.2d 1395 (1971). The state is thus required to show that appellant knew that what he was transporting was a narcotic drug, not an illegal substance. That knowledge can be established either by direct or circumstantial evidence. It can be established by showing that appellant was aware of the high probability that the packages contained a narcotic drug and that he acted with a conscious purpose to avoid learning the true contents of the packages. *United States v. Lopez-Martinez,* 725 F.2d 471 (9th Cir.), *cert. denied,* 469 U.S. 837, 105 S. Ct. 134, 83 L. Ed. 2d 74 (1984). Any self-imposed ignorance cannot protect appellant from criminal responsibility.
>
> 166 Ariz. at 445.

Deliberate ignorance can be an issue in other types of cases. *E.g., see, State v. Haas*, 138 Ariz. 413, 420 (1983) ("Thus, the jury could easily have concluded that even if defendant had no actual knowledge of the fraud, he was aware of the high probability that the scheme was fraudulent and deliberately shut his eyes to avoid learning the truth. Such a conclusion justifies the ultimate inference of knowing participation.") The instruction should be modified to reflect the nature of the case and the type of knowledge required to be proved.

COMMENT: Users are referred to A.R.S. § 13-204 and Ninth Circuit Model Criminal Jury Instruction 5.7. Some members of the committee felt that the "high probability" language could be confusing to the jury in light of the *Portillo* instruction.

The instruction should only be given "'when the defendant claims a lack of guilty knowledge and there are facts and evidence that support an inference of deliberate ignorance." *United States v. McAllister,* 747 F.2d 1273, 1275 (9th Cir.1984), *cert. denied,* 474 U.S. 829, 106 S. Ct. 92, 88 L. Ed.2d 76 (1985). The reason such an instruction should not be given in all cases is "because of the possibility that the jury will be led to employ a negligence standard and convict a defendant on the impermissible ground that he should have known

[an illegal act] was taking place." *United States v. Beckett,* 724 F.2d 855, 856 (9th Cir.1984) (per curiam)." *United States v. White*, 794 F.2d 367, 371 (8th Cir. 1986).

Standard Criminal 39 – Involuntary Intoxication

Unlike voluntary intoxication, intoxication resulting from the involuntary use of alcohol or drugs may be considered in deciding whether the defendant had the mental state required to prove an offense. The State has the burden of proving beyond a reasonable doubt all the elements of the offense, including the required mental state.

If you determine that the defendant became intoxicated solely as a result of drugs or alcohol administered to [him] [her] against [his] [her] will or without [his] [her] knowledge, you should then consider whether the involuntary intoxication prevented the defendant from acting with a particular mental state or states required to establish the offense.

If you have a reasonable doubt that the defendant had the required mental state for the offense, you must find the defendant "not guilty."

SOURCE: *State v. Edmisten*, 220 Ariz. 517, 521, ¶ 9 (App. 2009); *State v. McKeon*, 201 Ariz. 571 (App. 2002).

USE NOTE: The court should also consider giving the voluntary intoxication instruction, Criminal Jury Instruction 1.0538.

Comment: A.R.S. § 13-503 provides that "the abuse of prescribed medications does not constitute insanity and is not a defense for any criminal act or requisite state of mind." This phrase suggests that this instruction may apply if the defendant presents evidence that the intoxication resulted from the non-abuse of prescription medication. If so, the following "non-abuse" language may be considered for use:

> If you find that the defendant became intoxicated solely as a result of the non-abuse of prescription medication, you should then consider whether the degree of intoxication caused the defendant to be unable to act with the mental state[s] required to establish the offense[s].

Standard Criminal 40 – Flight or Concealment

In determining whether the State has proved the defendant guilty beyond a reasonable doubt, you may consider any evidence of the defendant's running away, hiding, or concealing evidence, together with all the other evidence in the case. [You may also consider the defendant's reasons for running away, hiding, or concealing evidence.] Running away, hiding, or concealing evidence after a crime has been committed does not by itself prove guilt.

SOURCE: RAJI (Criminal) No. 9 (1996).

USE NOTE: Use language in brackets if supported by the facts. Case law allows the jury to consider the defendant's offered reasons for the alleged flight or concealment. *State v. Hunter*,

136 Ariz. 45, 49 (1983). Thus, the bracketed language should be given only upon the defendant's request.

"Use of the flight instruction is proper where the circumstances of leaving the crime scene reveal a defendant's consciousness of guilt. . . . It is not necessary to show that law enforcement officers were pursuing the defendant at the time in order to satisfy the 'consciousness of guilt' requirement." Merely leaving the crime scene is not tantamount to flight. The inquiry focuses on "whether [the defendant] voluntarily withdrew himself in order to avoid arrest or detention." *State v. Wilson*, 185 Ariz. 254, 257 (App. 1995). "A two-fold test must be applied to determine whether a flight instruction should be given. First, the evidence is viewed to ascertain whether it supports a reasonable inference that the flight or attempted flight was open, such as the result of an immediate pursuit. If this is not the case then the evidence must support the inference that the accused utilized the element of concealment or attempted concealment. The absence of any evidence supporting either of these findings would mean that the giving of an instruction on flight would be prejudicial error." *Wilson*, *supra*, 185 at 257. Depending on the facts, the failure of a defendant to appear at trial may be justification for the court to give a flight instruction. *State v. Roderick*, 9 Ariz. App. 19, 22-23 (1968). Absence of the defendant at the time set for trial after being released on bond, is insufficient to support an inference of the element of concealment or attempted concealment, which is essential to warrant the giving of a flight instruction unless the flight or attempted flight is open, as upon immediate pursuit. *State v. Camino*, 118 Ariz. 89, 91 (App. 1977).

Standard Criminal 41 – Threats by Defendant

In determining whether the State has proved the defendant guilty beyond a reasonable doubt, you may consider, along with all the other evidence in the case, evidence that the defendant sought to influence testimony by threatening a witness to the alleged offense. Such threats do not by themselves prove guilt.

SOURCE: RAJI (Criminal) No. 14 (1996); *State v. Settle*, 111 Ariz. 394, 397 (1975); *State v. Contreras*, 122 Ariz. 478, 481 (App. 1979).

Standard Criminal 42 – Lost, Destroyed, or Unpreserved Evidence

If you find that the State has lost, destroyed, or failed to preserve evidence whose contents or quality are important to the issues in this case, then you should weigh the explanation, if any, given for the loss or unavailability of the evidence. If you find that any such explanation is inadequate, then you may draw an inference unfavorable to the State, which in itself may create a reasonable doubt as to the defendant's guilt.

SOURCE: *State v. Willits*, 96 Ariz. 184, 187 (1964); *State v. Eagle*, 196 Ariz. 27, 31, 992 P.2d 1122, 1126 (App. 1998) and *State v. Tucker*, 157 Ariz. 433, 443 (1988); *State v. Glissendorf*, 235 Ariz. 147, ¶¶ 7-19 (2014).

USE NOTE: "A *Willits* instruction is appropriate when the State destroys or loses evidence potentially helpful to the defendant." *State v. Murray*, 184 Ariz. 9, 33 (1995) (quoting *State v. Lopez,* 163 Ariz. 108, 113 (1990)). However, the destruction or nonretention of evidence does not automatically entitle a defendant to a *Willits* instruction. *Id.* A *Willits* instruction is not given merely because a more exhaustive investigation could have been made. To merit the instruction, a defendant must show "(1) that the State failed to preserve material and reasonably accessible evidence having a tendency to exonerate [the defendant], and (2) that this failure resulted in prejudice." *Murray, id.* (citing *State v. Henry*, 176 Ariz. 569 (1993)).

COMMENT: The instruction restores the language of *Willits,* which stated that the jury "may infer" that the evidence was unfavorable to the State. The 1996 Revised Instruction changed that permissive inference to a mandatory one (jury "should assume"). In *Eagle*, *supra*, 196 Ariz. at 31, the Arizona Court of Appeals noted that the 1996 Revised Instruction's language did not follow the permissive inference language of *Willits*.

In *Sate v. Glissendorf*, 235 Ariz. 147, ¶¶ 7-19 (2014), the Arizona Supreme Court explained that the standard for giving a *Willits* instruction requires only that the lost evidence would have been "potentially helpful" or "potentially useful" to the defense. The court, at ¶¶ 17-18, specifically held that an entire line of cases from Division One of the Court of Appeals applied an erroneous standard for giving a *Willits* instruction.

In *State v. Hernandez*, 250 Ariz. 28, 474 P.3d 1191 (2020), the Arizona Supreme Court reaffirmed *Willits* and *Glissendorf*, and stated that a defendant must do more than speculate about how evidence may have been helpful.

Standard Criminal 43 – Mere Presence

Guilt cannot be established by the defendant's mere presence at a crime scene, mere association with another person at a crime scene or mere knowledge that a crime is being committed. The fact that the defendant may have been present, or knew that a crime was being committed, does not in and of itself make the defendant guilty of the crime charged. One who is merely present is a passive observer who lacked criminal intent and did not participate in the crime.

SOURCE: *State v. Doerr*, 193 Ariz. 56, 65 (1998); *State v. Noriega,* 187 Ariz. 282, 286 (App. 1996).

USE NOTE: In a prosecution for accomplice liability based on actual presence, the trial judge must, if requested, give a mere presence instruction. *State v. Noriega, supra*, (reversible error to refuse to give mere presence instruction in this circumstance). However, the instruction must be supported by competent evidence. *State v. Portillo,* 179 Ariz. 116, 119, *affirmed in part, vacated in part on other grounds,* 182 Ariz. 592 (1995); *State v. Martinez,* 175 Ariz. 114, 118 (App. 1993) (trial court properly refused to give a mere presence instruction where the defendant's presence at the crime scene was not an issue and the instruction did not fit the facts).

Standard Criminal 44 – Motive

The State need not prove motive, but you may consider motive or lack of motive in reaching your verdict.

SOURCE: RAJI (Criminal) No. 38 (1996); *State v. Tucker*, 157 Ariz. 433, 447 (1988); *State v. Hunter*, 136 Ariz. 45, 50 (1983).

COMMENT: The court's failure to instruct the jury on motive did not deny defendant a fair trial. *State v. Tucker*, 157 Ariz. 433, 447 (1986). The presence or absence of motive is relevant in a murder prosecution and a proper motive instruction should be given upon request. *Id.*

Motive is not an element of the crime of murder; nonetheless, in a murder prosecution, the presence or absence of motive is relevant. *State v. Hunter*, 136 Ariz. 45, 50 (1983).

Standard Criminal 45 – Identification

The State must prove beyond a reasonable doubt that the in-court identification of the defendant at this trial is reliable. In determining whether this in-court identification is reliable you may consider such things as:

1. the witness' opportunity to view at the time of the crime;
2. the witness' degree of attention at the time of the crime;
3. the accuracy of any descriptions the witness made prior to the pretrial identification;
4. the witness' level of certainty at the time of the pretrial identification;
5. the time between the crime and the pretrial identification;
6. any other factor that affects the reliability of the identification.

If you determine that the in-court identification of the defendant at this trial is not reliable, then you must not consider that identification.

SOURCE: RAJI (Criminal) No. 39 (1996); *State v. Dessureault*, 104 Ariz. 380, 381-85 (1969), *cert. denied,* 397 U.S. 965 (1970). *See also*; *Manson v. Brathwaite*, 432 U.S. 98 (1977); *Neil v. Biggers*, 409 U.S. 188 (1972).

USE NOTE: This instruction must be given, upon request, when the defendant has shown suggestive circumstances attendant to a pretrial identification that tend to bring the reliability of the identification testimony into question. *State v. Nottingham,* 231 Ariz. 21, 289 P.3d 949 (App. 2012); 565 U.S. 228, 132 S. Ct. 716 (2012).

Standard Criminal 46 – Alibi or Non-Presence of the Defendant

The State has the burden of proving that the defendant was present at the time and place the alleged crime was committed. If you have a reasonable doubt whether the defendant was present at the time and place the alleged crime was committed, you must find the defendant not guilty.

SOURCE: RAJI Criminal Standard 11 (1996 Revisions).

COMMENT: On the other hand, in *State v. Rodriguez*, 192 Ariz. 58, 61-63 ¶¶ 16-26 (1998), the Supreme Court found reversible error where a requested alibi instruction was denied. In *Rodriguez*, the Supreme Court noted that alibi is not an affirmative defense and thus would fall under the "aegis of a general denial" of the charges, reliance on other instructions regarding the state's requirement to prove guilt would be "inconsistent with the general rule entitling a party to an instruction on any theory reasonably supported by the evidence." *Id.* at 63 ¶¶ 23-24. *See also State v. Edmisten*, 220 Ariz. 517, 524 ¶ 21 (App. 2009) (distinguishing harmless error review conducted in *Rodriguez* from the fundamental error review Court of Appeals must apply when trial counsel failed to preserve error for appeal).

Standard Criminal 47 – Third Party Culpability

The State has the burden of proving that the defendant is the person who committed the alleged crime[s]. If you have a reasonable doubt whether the defendant committed the alleged crime[s] because the crime may have been committed by a third party, you must find the defendant not guilty.

SOURCE: Standard Criminal 43 (Alibi or Non-Presence of the Defendant) (noting conceptual similarity between alibi and third party culpability).

USE NOTE: Although instructions should be given on any theory of the case reasonably supported by the evidence, failure to give a third party culpability instruction *sua sponte* does not rise to the level of fundamental error. *State v. Parker*, 231 Ariz. 391, ¶¶ 51-56 (2013).

COMMENT: In *State v. Parker*, 231 Ariz. 391, ¶¶ 51-56 (2013), the Arizona Supreme Court found no error in the trial court's failure *sua sponte* to give a proper third party culpability instruction when trial counsel's requested instruction violated the constitutional prohibition against commenting on the evidence and trial counsel refused the trial judge's invitation to modify the requested instruction.

Standard Criminal 48 – Reserved

Standard Criminal 49 – Reserved

Standard Criminal 50 – Reserved

Standard Criminal 51 – Jury Foreperson

When you go to the jury room you will choose a foreperson.

The role of jury foreperson is important, but please remember that the foreperson's opinion about the case is not more important than that of the other jurors. The opinions of each juror count equally.

The jury foreperson's responsibilities include the following:

1. Make sure every member of the jury is present during all discussions and deliberations.

2. Preside over deliberations and make sure that the deliberations are conducted respectfully and that all issues are fully discussed. The discussions should be open and free so that every juror may participate.

3. All jurors should be allowed to state their views about the case and what they think the verdict should be and why.

4. All members must agree unanimously on any verdict. Therefore, the foreperson should count the votes to ensure that every juror has voted.

5. If you reach a verdict [verdicts], fill out the verdict form[s] and then sign the form on behalf of the jury.

6. If the jury reaches a verdict, the foreperson will inform the bailiff. When the jury returns to the courtroom, the foreperson will bring the signed or unsigned verdict form[s] as well as any question forms that may have been used.

7. When you return to the courtroom, the court will ask the foreperson whether the jury has reached any verdict. The foreperson will respond "yes" or "no." The foreperson is not expected to read any verdict to the court; that will be done by the clerk.

COMMENT: This instruction was developed based on a 1999 publication by the American Judicature Society entitled "Behind Closed Doors, A Resource Manual to Improve Jury Deliberations

Standard Criminal 52 – Closing Instruction

The case is now submitted to you for decision. When you go to the jury room you will choose a Foreperson. He or she will preside over your deliberations.

I suggest that you discuss and then set your deliberation schedule. You are in charge of your schedule, and may set and vary it by agreement and the approval of the Court. After you have decided on a schedule, please advise the bailiff.

You are to discuss the case and deliberate only when all jurors are together in the jury room. You are not to discuss the case with each other or anyone else during breaks or recesses. The admonition I have given you during the trial remains in effect when all of you are not in the jury room deliberating.

After setting your schedule, I suggest that you next review the written jury instructions and verdict [form] [forms]. It may be helpful for you to discuss the instructions and verdict [form] [forms] to make sure that you understand them. Again, during your deliberations you must follow the instructions and refer to them to answer any questions about applicable law, procedure and definitions.

Should any of you, or the jury as a whole, have a question for me during your deliberations or wish to communicate with me on any other matter, please utilize the jury

question form that we will provide you. Your question or message must be communicated to me in writing and must be signed by you or the Foreperson.

I will consider your question or note and consult with counsel before answering it in writing. I will answer it as quickly as possible.

During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, website, or social media to communicate to anyone any information about this case or to conduct any research about this case until you are discharged.

Remember that you are not to tell anyone, including me, how you stand, numerically or otherwise, until after you have reached a verdict or have been discharged.

All [eight] [twelve] of you must agree on [the] [each] verdict. You must be unanimous. Once all [eight] [twelve] agree on a verdict, only the Foreperson need sign the verdict form on the line marked "Foreperson."

You will be given [insert number] form(s) of verdict. The verdict form(s) read as follows and there is no significance to the order in which the options of "guilty," "not guilty," ["unable to agree"] ["proven"] ["not proven"] are listed on the verdict [form] [forms]:

USE NOTE: Use bracketed language as appropriate to the case.

Standard Criminal 53 – Impasse Instruction

This is offered to help you, not to force you to reach a verdict.

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 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.

You may wish to identify areas of agreement and disagreement and then discuss the law and the evidence as they relate to the areas of disagreement.

If you still disagree, you may wish to tell the attorneys and me which issues, questions, law or facts you would like us to assist you with. If you decide to follow these steps, please write down the issues where further assistance might help bring about a verdict and give the note to the bailiff. The attorneys and I will then discuss your note and try to help you.

I do not wish or intend to force a verdict. We are merely trying to be responsive to your apparent need for help. If it is possible that you could reach a verdict as a result of this procedure, you should consider doing so.

Please take a few minutes and discuss this instruction among yourselves. Then advise me in writing of whether we can attempt to assist you in the manner indicated above or whether you

do not believe that such assistance and additional deliberation would assist you in reaching a verdict.

SOURCE: Comment to Rule 22.4, Arizona Rules of Criminal Procedure, as amended; Comment to Rule 39(h), Arizona Rules of Criminal Procedure, as amended (Trb. 2016); Capital Case Instruction 2.4, RAJI Criminal 4th.

COMMENT: Before giving an impasse instruction, the trial judge must determine whether the jury is at an impasse because "prematurely giving an impasse instruction may * * * be a form of coercion." *State v. Fernandez,* 216 Ariz. 545, 550, ¶ 13 (App. 2007); *State v. Huerstel,* 206 Ariz. 93, 99, ¶ 17, 101, ¶ 25 (2003).

Where a jury has not reached a unanimous decision and has notified the court, the trial judge should ask the jury whether it is at an impasse and needs assistance from the court. If the jurors indicate their decision is final, the impasse instruction is not appropriate. *State* v. *Kuhs*, 223 Ariz. 376, 385 (2010).

In 2016-2017, the Criminal Rules Task Force recommended to the Supreme Court that most of the comments to the Arizona Rules of Criminal Procedure be deleted. The adoption of Standard 42 provided judges and practitioners with a more readily accessible source for the impasse instruction, thus rendering the comments to the rules duplicative and unnecessary.

Standard Criminal 54 – Reconstituting the Jury

Members of the jury, I have replaced a deliberating juror with an alternate juror. The alternate juror will now be a deliberating juror. Please do not speculate or guess about the reasons for this change.

You remain under the admonitions previously given to you. You are also required to follow the final jury instructions previously provided and read to you.

You are to start your deliberations anew, starting with selection of a [Presiding Juror] [Jury Foreperson]. Any preliminary or final decisions you may have made about [any aspect of the case] [this phase] must be set aside and discussed anew. You shall not consider any part of your prior deliberations and/or discussions.

[For capital case sentencing proceedings and non-capital aggravation proceedings (in which the alternate juror has been present during the aggravation proceeding), add the following: You shall begin anew only for the phase you are currently deliberating. You shall not deliberate anew about a verdict(s) already reached and entered.]

SOURCE: Rule 18.5(h) and (i), Arizona Rules of Criminal Procedure; *State v. Martinez*, 198 Ariz. 5, 7, 6 P.3d 310, 312(App. 2000).

USE NOTE: Use bracketed language as appropriate to the case.

Standard Criminal 55 – Jury Polling

In a moment, the clerk will ask each of you the following question: "Is this [Are these] your True Verdict[s]?" You need only answer "yes" or "no" to the question. The question is intended to determine whether you individually agree with the verdict[s] that [has][have] been announced here in court. If you now disagree for any reason with the verdict[s] that [has][have] been announced here in court, now is the time to tell me by answering "no" to the question. If you agree with the verdict[s] that [has][have] been announced, please answer "yes" when asked.

USE NOTE: This instruction should be read before the jury is polled; the judicial officer should decide whether to poll on each individual count.

CHAPTER 1
STATUTORY DEFINITIONS

1.052 – Definition of "Act"

"Act" means a bodily movement.

1.053 – Definition of "Benefit"

"Benefit" means anything of value or an advantage, present or future.

1.054 – Definition of "Calendar Year"

"Calendar Year" means three hundred sixty-five days actual time served without release, suspension or commutation of sentence, probation, pardon or parole, work furlough or release from confinement on any other basis.

1.056 – Definition of "Conduct"

"Conduct" means an act or omission and its accompanying culpable mental state.

1.057 – Definition of "Crime"

"Crime" means a misdemeanor or a felony.

1.058 – Definition of "Criminal Street Gang"

"Criminal street gang" means an ongoing formal or informal association of persons in which members or associates individually or collectively engage in the commission, attempted commission, facilitation or solicitation of any felony act and that has at least one individual who is a criminal street gang member.

1.059 – Definition of "Criminal Street Gang Member"

"Criminal street gang member" means an individual to whom at least two of the following seven criteria that indicate criminal street gang membership apply:

(a) Self-proclamation.

(b) Witness testimony or official statement.

(c) Written or electronic correspondence.

(d) Paraphernalia or photographs.

(e) Tattoos.

(f) Clothing or colors.

(g) Any other indicia of street gang membership.

1.0510(a)(1) – Definition of "Intentionally" or "With Intent To"

"Intentionally" [or "with intent to"] as used in these instructions means that a defendant's objective is to cause that result or to engage in that conduct.

SOURCE: A.R.S. § 13-105(10)(a).

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

The Committee feels that the language of the instruction is more understandable to jurors than is the statutory language.

Use in conjunction with instructions defining the criminal statute involved.

It is error to instruct that intent may be presumed from an inherently dangerous act. *People v. Burres,* 101 Cal. App. 3d 341 (1980).

COMPARABLE INSTRUCTION: CALJIC 3.34 (1979 revision) describes proof of intent by statement and circumstances.

1.0510(a)(2) – Intent – Inference

Intent may be inferred from all the facts and circumstances disclosed by the evidence. It need not be established exclusively by direct sensory proof. The existence of intent is one of the questions of fact for your determination.

SOURCE: *State v. Quatsling,* 24 Ariz. 105 (App. 1975), with "direct sensory proof" substituted for the language of the opinion.

1.0510(b) – Definition of "Knowingly"

"Knowingly" means that a defendant acted with awareness of [or belief in] the existence of conduct or circumstances constituting an offense. It does not mean that a defendant must have known the conduct is forbidden by law.

[It is no defense that the defendant was not aware of [or could not believe in] the existence of conduct or circumstances solely because of voluntary intoxication.]

SOURCE: A.R.S. § 13-105(10)(b).

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

The Committee feels that the language of the instruction is more understandable to jurors than is the statutory language.

Use this language where the defendant does not possess actual knowledge but has a belief that a certain circumstance exists, *e.g.,* believing that property is stolen when in fact it is not, or believing that a co-conspirator is a trusted accomplice who in fact is an undercover agent.

Ignorance of the law is no defense. *See* A.R.S. § 13-204(B). This final sentence is intended to counter the possibility that jurors may interpret the preceding sentence to establish that defense. There may be an exception to this general rule in conspiracy cases involving public welfare offenses. *See State v. Gunnison,* 127 Ariz. 110 (1980), and the comments to Statutory Criminal Instruction 10.031.

1.0510(c) – Definition of "Recklessly (Reckless Disregard)"

"Recklessly [reckless disregard] _____" means that a defendant is aware of and consciously disregards a substantial and unjustifiable risk that conduct will result in _____. The risk must be of such nature and degree that disregarding it is a gross deviation from what a reasonable person would do in the situation.

[It is no defense that a person who created such a risk was unaware of it solely because of voluntary intoxication.]

SOURCE: A.R.S. § 13-105(10)(c).

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

The Committee believes that the language of the instruction is more understandable to jurors than is the statutory language.

Insert the appropriate conduct, *e.g.,* "causing any physical injury," A.R.S. § 13-1203(A)(1); or "infringing on the inhabitant's right of privacy," A.R.S. § 13-1504(A)(2). This instruction is not necessary in cases of manslaughter under A.R.S. § 13-1103(A)(1) and (3), second degree murder under A.R.S. § 13-1104(A)(3), endangerment under A.R.S. § 13-1201 and reckless burning under A.R.S. § 13-1702 because "recklessly" has been incorporated in the instructions defining those crimes.

Insert the appropriate result. Generally, the same language inserted at 2, *supra,* will suffice. However, if the charge is criminal damage under A.R.S. § 13-1602(A)(4), the appropriate language would be "depriv[ing] livestock of access to the only reasonably available water." If the charge is trafficking in stolen property under A.R.S. § 13-2306, "conduct will result in" should be deleted from the first sentence of the instruction and the following language should be inserted: "[he] [she] possesses property the permanent identifying features of which, including serial numbers and labels, have been removed or in any fashion altered."

Use this sentence only if there is evidence that the defendant was intoxicated.

"Recklessness" is more than merely engaging in "dangerous conduct" because of the conscious disregard for the known danger. *State v. Huffman,* 137 Ariz. 300 (App. 1983).

1.0510(d) – Criminal Negligence

"Criminal negligence" means, with respect to a result or a circumstance described by a statute defining an offense, that a person fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and

degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

[It is no defense that the defendant is unaware of or disregards the risk solely because of voluntary intoxication.]

SOURCE: A.R.S. § 13-105(10)(d).

USE NOTE: This instruction should be used only in those statutes whose mental state involves the rarely-criminalized standard of negligence, *e.g.*, A.R.S. § 13-1102, negligent homicide.

1.0510.01 – Included Mental State – Knowingly

If the State is required to prove that the defendant acted "knowingly," that requirement is satisfied if the State proves that the defendant acted "intentionally."

SOURCE: A.R.S. § 13-202(C) (statutory language as of October 1, 1978.)

USE NOTE: Although the source for this instruction is in Chapter 2, the instruction is included in the Chapter 1 definitions for ease of use.

1.0510.02 – Included Mental State – Recklessly

If the State is required to prove that the defendant acted "recklessly," that requirement is satisfied if the State proves that the defendant acted "intentionally" or "knowingly."

SOURCE: A.R.S. § 13-202(C) (statutory language as of October 1, 1978.)

USE NOTE: Although the source for this instruction is in Chapter 2, the instruction is included in the Chapter 1 definitions for ease of use.

1.0510.03 – Included Mental State – Criminal Negligence

If the State is required to prove that the defendant acted "with criminal negligence," that requirement is satisfied if the State proves that the defendant acted "intentionally," "knowingly," or "recklessly."

SOURCE: A.R.S. § 13-202(C) (statutory language as of October 1, 1978.)

USE NOTE: Although the source for these three instructions is in Chapter 2, the instructions are included in the Chapter 1 definitions for ease of use.

1.0512 – Definition of "Dangerous Instrument"

"Dangerous instrument" means anything that is readily capable of causing death or serious physical injury under the circumstances in which it is [used] [attempted to be used] or [threatened to be used].

SOURCE: A.R.S. § 13-105(12).

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

"Dangerous instrument" as defined by subsection (12) includes a fire, *State v. Wilson,* 135 Ariz. 395 (App. 1983) and an automobile when used under circumstances that are "readily capable of causing death or serious physical injury." *State v. Venegas,* 137 Ariz. 171 (App. 1983). Whether an object is a dangerous instrument is usually a jury question. *State v. Caldera,* 141 Ariz. 634 (1984).

1.0513 – Definition of "Dangerous Offense"

"Dangerous offense" means an offense that involved [the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument] [the intentional or knowing infliction of serious physical injury on another person].

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

1.0514 – Definition of "Deadly Physical Force"

"Deadly physical force" means either:

1. force which is used with the purpose of causing death or serious physical injury, *or*
2. force which in the manner of its use is capable of creating a substantial risk of causing death or serious physical injury.

1.0515 – Definition of "Deadly Weapon"

"Deadly weapon" means anything designed for lethal use, including a firearm.

Use Note: An unloaded gun may qualify as a deadly weapon. A firearm is a deadly weapon unless it is permanently inoperable. A missing pin makes it only temporarily inoperable. *State v. Spratt,* 126 Ariz. 184 (App. 1980). Whether an object is a deadly weapon is usually a jury question. *State v. Caldera,* 141 Ariz. 634 (1984).

1.0516 – Definition of "Economic Loss"

"Economic Loss" means any loss incurred by a person as a result of the commission of an offense. Economic loss includes lost interest, lost earnings and other losses which would not have been incurred but for the offense. Economic loss does not include losses incurred

by the convicted person, damages for pain and suffering, punitive damages or consequential damages.

1.0517 – Definition of "Enterprise"

"Enterprise" includes any corporation, association, labor union, or other legal entity.

COMMENT: If the alleged offense is a violation under Chapter 23, the Court should use the definition of "Enterprise" in Criminal Instruction 23.01.D.02 instead of this instruction.

1.0518 – Definition of "Felony"

"Felony" means an offense for which a sentence to a term of imprisonment in the custody of the state department of corrections is authorized by any law of this state.

1.0519 – Definition of "Firearm"

"Firearm" means any loaded or unloaded handgun, pistol, revolver, rifle, shotgun or other weapon that will or is designed to or may readily be converted to expel a projectile by the action of expanding gases [except that it does not include a firearm in permanently inoperable condition.]

USE NOTE: Language contained in the brackets should only be used when evidence is presented raising a reasonable doubt as to the operability of the firearm. *State v. Rosthenhausier*, 147 Ariz. 486, 493 (App. 1985) *cited with approval in State v. Valles*, 162 Ariz. 1, 7 (1989).

1.0523 – Definition of "Human Smuggling Organization" - deleted

Users are advised that in *United States v. State of Arizona,* 119 F. Supp. 3d 955 (2014), the court held that federal law preempts Arizona law governing human smuggling.

1.0524 – Definition of "Intoxication"

"Intoxication" means any mental or physical incapacity resulting from use of drugs, toxic vapors or intoxicating liquors.

1.0528 – Definition of "Omission"

"Omission" means the failure to perform an act as to which a duty of performance is imposed by law.

1.0529 – Definition of "Peace Officer"

"Peace officer" means any person vested by law with a duty to maintain public order and make arrests.

1.0530 – Definition of "Person"

"Person" means a human being and, as the context requires, an enterprise, a public or private corporation, an unincorporated association, a partnership, a firm, a society, a government, a governmental authority or an individual or entity capable of holding a legal or beneficial interest in property.

1.0532 – Definition of "Physical Force"

"Physical force" means force used upon or directed toward the body of another person and includes confinement, but does not include deadly physical force.

1.0533 – Definition of "Physical Injury"

"Physical injury" means the impairment of physical condition.

1.0534 – Definition of "Possess"

"Possess" means knowingly to have physical possession or otherwise to exercise dominion or control over property.

1.0535 – Definition of "Possession"

"Possession" means a voluntary act if the defendant knowingly exercised dominion or control over property.

1.0537 – Definition of "Property"

"Property" means anything of value, tangible or intangible.

1.0538 – Definition of "Public Servant"

A "public servant" is a person who is an officer or employee of any branch of government, whether elected, appointed, or otherwise employed. [The term includes a peace officer and any person participating as an advisor, consultant, or otherwise in performing a governmental function.]

[A public servant includes any person who has been elected, appointed, employed, or designated to become a public servant as defined here, even though this person does not yet occupy that position.]

SOURCE: A.R.S. § 13-105(38).

USE NOTE: Use the bracketed language only when evidence shows the public servant was an advisor or consultant or acted in a similar capacity.

Use this version where the evidence indicates the public servant did not occupy the office in question at the time of the crime.

COMMENT: By statute, A.R.S. § 13-105(38), a "public servant" does not include a "juror or witness." These words are not included in the instruction because of the infrequency of any definitional problem regarding these two roles.

1.0539 – Definition of "Serious Physical Injury"

"Serious physical injury" includes physical injury that creates a reasonable risk of death, or that causes serious and permanent disfigurement, serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb.

SOURCE: A.R.S. §13-105(39) (Statutory language as of January 1, 2009).

COMMENT: A.R.S. §13-3623(F)(5) defines serious physical injury identically, except that it provides for "serious ***or*** permanent disfigurement."

1.0540 – Definition of "Unlawful"

"Unlawful" means contrary to law or, where the context so requires, not permitted by law.

1.0541 – Definition of "Vehicle"

"Vehicle" means a device in, upon or by which any person or property is or may be transported or drawn upon a highway, waterway or airway, excepting devices moved by human power or used exclusively upon stationary rails or tracks.

1.0542 – Definition of "Voluntary Act"

"Voluntary act" means a bodily movement performed consciously and as a result of effort and determination.

1.0543 – Definition of "Voluntary Intoxication"

"Voluntary intoxication" means intoxication caused by the knowing use of drugs, toxic vapors or intoxicating liquors by a person, the tendency of which to cause intoxication the person knows or ought to know, unless the person introduces them pursuant to medical advice or under such duress as would afford a defense to an offense.

SOURCE: A.R.S. § 13-105 (statutory language as of August 2, 2012).

CHAPTER 2

2.024 – Transferred Intent

You may find that the defendant acted "intentionally" or with "intent to" as to [name of the alleged victim] on the charge of [name of offense and, if need for clarity, the count number] if you find "transferred intent." Transferred intent is established if the actual result of the defendant's action differs from that which the defendant intended or contemplated only in the respect that:

1. A different person or different property is injured or affected; *or*
2. The injury or harm intended or contemplated would have been more serious or extensive than that caused.

SOURCE: A.R.S. § 13-203(B) (statutory language as of October 1, 1978).

USE NOTE: The court shall instruct on the definition of intent.

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

The actual intended victim can be different or the intended harm may be different in degree but not both. *State v. Johnson,* 205 Ariz. 413 (App. 2003).

There must be an intent to cause a particular result as an element of an offense before the doctrine of transferred intent applies. *State v. Siner*, 205 Ariz. 301 (App. 2003); *State v. Lopez,* 234 Ariz. 465 (App. 2014).

2.025 – Affirmative Defense

The defendant has raised the affirmative defense of [_____] with respect to the charged offense[s] of [_____]. The burden of proving each element of the offense[s] beyond a reasonable doubt always remains on the State. However, the burden of proving the affirmative defense of [_____] is on the defendant. The defendant must prove the affirmative defense of [_____] by a preponderance of the evidence. If you find that the defendant has proven the affirmative defense of [_____] by a preponderance of the evidence you must find the defendant not guilty of the offense[s] of [_____].

SOURCE: A.R.S. § 13-205 (statutory language as of July 21, 1997).

USE NOTE: Justification defenses under Chapter 4 of A.R.S. Title 13 are not affirmative defenses for crimes occurring on or after April 24, 2006, pursuant to legislative enactment. However for crimes occurring before this date, they remain affirmative defenses. In such cases, the court shall instruct on "affirmative defense" so as to inform the jury on the burden of proof. "Affirmative defense" is defined in A.R.S. § 13-205 (Statutory Instruction 2.025). An affirmative defense must be shown by a preponderance of the evidence. "Preponderance of the evidence" is defined in Standard 4(b).

The affirmative defense at issue may apply to all charged offenses. The instruction should specify the particular offenses to which it is applicable. Use language in the brackets as appropriate to the facts and charges.

COMMENT: In the vast majority of cases proof of the affirmative defense will require the jurors to acquit the defendant on the applicable charged offense[s]. However, in certain instances proof of the affirmative defense may only reduce the defendant's legal culpability. In those instances, the final sentence of the instruction should be modified accordingly.

A.R.S. § 13-205 provides that "[e]xcept as otherwise provided by law" the defendant must prove an affirmative defense by a preponderance of the evidence. Currently, the only exceptions to the preponderance of evidence standard are the affirmative defenses of entrapment and insanity, which must be proven by clear and convincing evidence. *See* A.R.S. §§ 13-206, -502(C). When the affirmative defenses of entrapment or insanity are raised, this instruction should not be given. The entrapment (2.026) and insanity (5.02) instructions should be given, which include the clear and convincing evidence standard.

This instruction is consistent with the affirmative defense instruction (on self defense) suggested by the court of appeals in *State v. Sierra-Cervantes*, 201 Ariz. 459 (App. 2001).

2.03 – Causation Instruction – Intervening Event

Conduct is the cause of a result when both of the following exist:

1. But for the conduct the result in question would not have occurred.
2. The relationship between the conduct and result satisfies any additional causal requirements imposed by the definition of the offense.

In order to find the defendant guilty of [the crime], you must find that the [death] [injury] was proximately caused by the acts of the defendant.

The proximate cause of a [death] [injury] is a cause which, in natural and continuous sequence, produces the [death] [injury], and without which the [death] [injury] would not have occurred.

Proximate cause does not exist if the chain of natural effects and cause either does not exist or is broken by a superseding intervening event that was unforeseeable by the defendant and, with the benefit of hindsight, may be described as abnormal or extraordinary.

The State must prove beyond a reasonable doubt that a superseding intervening event did not cause the [death] [injury].

SOURCE: A.R.S. § 13-203(A) (statutory language as of October 1, 1978); *State v. Bass*, 198 Ariz. 571 (2000); *State v. Cocio*, 147 Ariz. 277, 279 (1985); *State v. Freeland,* 176 Ariz. 544, 548 (App.1993) (holding that a victim's failure to wear a seat belt was not a superseding cause of injury in an aggravated assault case arising from a DUI-related accident because "[o]ne who drinks and drives should reasonably foresee that some among the potential victims of drunken driving will not wear seat belts and that such victims, among others, might be seriously injured in an alcohol-induced collision").

2.03.02 – Causation Instruction – Pre-existing Physical Condition

When a person causes injury to another, the consequences are not excused, nor is the criminal responsibility for the resulting [death] [injury] lessened, by the pre-existing physical condition of the person [killed] [injured].

SOURCE: *State v. Decello,* 111 Ariz. 46, 50-51 (1974).

Use Note: This instruction should be given with general causation instruction. *See* Statutory Criminal Instruction 2.03.

2.03.03 – Causation (Multiple Actors)

The unlawful acts of two or more people may combine to cause the [death] [injury] of another. If the unlawful act of the other person was the sole proximate cause of [death] [injury], the defendant's conduct was not a proximate cause of the [death] [injury]. If you find that the defendant's conduct was not a proximate cause of the [death] [injury], you must find the defendant not guilty.

SOURCE: *State v. Cocio*, 147 Ariz. 277, 278-79 (1985); *see also State v. Bass*, 198 Ariz. 571, 576 (2000); *State v. Sucharew*, 205 Ariz. 16, 25-26 (App. 2003).

USE NOTE: This instruction may be appropriate to give if there is a dispute regarding the unlawful acts of two or more people where there is no accomplice liability. It should be given along with the general causation instruction that requires the state to prove causation. *See* Statutory Criminal Instruction 2.03.

2.04.01(A) – Causation Ignorance of Fact

Ignorance or a mistaken belief as to a matter of fact does not relieve a person of criminal liability unless:

1. The ignorance or a mistaken belief as to a matter of fact negates the culpable mental state required for a commission of the offense; or
2. The ignorance or a mistaken belief as to a matter of fact establishes a defense of justification.

SOURCE: A.R.S. § 13-204(A) (statutory language as of October 1, 1978).

2.04.01(B) – Causation Ignorance of Law

Ignorance or mistake as to a matter of law does not relieve a person of criminal responsibility.

SOURCE: A.R.S. § 13-204(B) (statutory language as of October 1, 1978).

2.06 [Replaces Standard 13] – Entrapment

The defendant has raised the affirmative defense of entrapment with respect to the charged offenses[s] of [_____]. The defendant must prove the following by clear and convincing evidence:

1. The idea of committing the offense[s] started with law enforcement officers or their agents rather than the defendant; *and*
2. The law enforcement officers or their agents urged and induced the defendant to commit the offense[s], and
3. The defendant was not predisposed to commit the type of offenses[s] charged before the law enforcement officers or their agents urged and induced the defendant to commit the offenses[s].

The defendant does not establish entrapment if [he] [she] was predisposed to commit the offenses[s]. It is not entrapment for law enforcement officers or their agents to use a ruse or to conceal their identity.

The conduct of law enforcement officers and their agents may be considered in determining if the defendant has proven entrapment.

If you find that the defendant has proven entrapment by clear and convincing evidence you must find the defendant not guilty of the offense[s].

SOURCE: A.R.S. § 13-206 (statutory language as of July 21, 1997).

USE NOTE: Use language in brackets as applicable to the charges.

COMMENT: In 1997, the legislature codified the entrapment defense in A.R.S. § 13-206. *See State v. Preston,* 197 Ariz. 461, 463-64 (App. 2000). Consistent with prior case law, the statute requires that the defendant admit the substantial elements of the offense[s] as a condition of raising the entrapment defense. 197 Ariz. at 464. However, the statute now requires the defendant to prove entrapment by clear and convincing evidence. *Id.* Consistent with prior case law, admission of the substantial elements of the offense must be accomplished either by the defendant's testimony, by a written stipulation admitting to the elements entered into evidence, or a reliable out-of-court admission, such as would be made in a confession to law enforcement after *Miranda* warnings had been read. *State v. Gray*, 239 Ariz. 475 (2016).

Subsection D of the statute required that the trial court instruct the jurors that the defendant had admitted the elements of the offense[s] and "that the only issue for their consideration is whether the [defendant] has proven the affirmative defense of entrapment by clear and convincing evidence." A.R.S. § 13-206(D). However, in *Preston,* the Arizona Court of Appeals declared subsection D of the statute unconstitutional because it effectively denied a criminal defendant the presumption of innocence and the right to a jury determination of guilt. 197 Ariz. at 466-68. The court held that subsection D was severable from the remainder of the statute. *Id.* at 468. The court upheld placing upon the defendant the burden of proving the affirmative defense of entrapment by "clear and convincing evidence." *Id.* at 464-65.

CHAPTER 3

3.01 – Accomplice

"Accomplice" means a person, who, with the intent to promote or facilitate the commission of the offense, does any of the following:

1. solicits or commands another person to commit the offense; *or*
2. aids, counsels, agrees to aid, or attempts to aid another person in planning or committing the offense; *or*
3. provides means or opportunity to another person to commit the offense.

A defendant is criminally accountable for the conduct of another if the defendant is an accomplice of such other person in the commission of the offense, including any offense that is a natural and probable or reasonably foreseeable consequence of the offense for which the person was an accomplice.

SOURCE: A.R.S. §§ 13-301 and -303(A)(3) (statutory language as of September 26, 2008).

USE NOTE: For offenses that occurred before September 26, 2008, the following instruction should be used:

"Accomplice" means a person, who, with the intent to promote or facilitate the commission of the offense, does any of the following:

1. solicits or commands another person to commit the offense; *or*
2. aids, counsels, agrees to aid, or attempts to aid another person in planning or committing the offense; *or*
3. provides means or opportunity to another person to commit the offense.

A defendant is criminally accountable for the conduct of another if the defendant is an accomplice of such other person in the commission of the offense. This criminal liability extends only to offenses that the defendant intended to aid, solicit, facilitate or command.

In *State v. Phillips*, 202 Ariz. 427, 436 (2002), the court reversed a premeditated murder conviction, affirmed a felony murder conviction and held that to be an accomplice to premeditated murder, the defendant must intend to aid or facilitate another in committing the murder. The 2008 legislative amendment supersedes *Phillips*.

3.03B – Accomplice Liability Based on Result

A person who acts [intentionally] [knowingly] [recklessly] [negligently] with respect to the result that is sufficient for commission of the offense is guilty of that offense if:

1. The person solicits or commands another person to engage in the conduct causing the result; *or*
2. The person aids, counsels, agrees to aid or attempts to aid another person in planning or engaging in the conduct causing such result.

SOURCE: A.R.S. § 13-303(B).

USE NOTE: Use culpable mental state required for commission of the underlying charged offense and use applicable Statutory Definition Instructions. This instruction should be given instead of the Accomplice Instruction 3.01 when causing a particular result is an element of an offense.

3.05 – Enterprise Liability

An enterprise commits an offense if:

[the conduct constituting the offense consist of a failure to discharge a specific duty imposed by law.]

[the conduct undertaken in behalf of the enterprise and constituting the offense is engaged in, authorized, solicited, commanded or recklessly tolerated by the directors of the enterprise in any manner or by a high managerial agent acting within the scope of employment.]

[the conduct constituting the offense is engaged in by an agent of the enterprise while acting within the scope of employment and in behalf of the enterprise, and the offense is a misdemeanor or petty offense.]

[the conduct constituting the offense is engaged in by an agent of the enterprise while acting within the scope of employment and in behalf of the enterprise, and the offense is defined by a statute which imposes criminal liability on an enterprise.]

["Agent" means any officer, director, employee of an enterprise or any other person who is authorized to act in behalf of the enterprise.]

["High managerial agent" means an officer of an enterprise or any other agent in a position of comparable authority with respect to the formulation of enterprise policy.]

SOURCE: A.R.S. § 13-306 (statutory language as of October 1, 1978); *State v. Far West Water & Sewer, Inc.,* 224 Ariz. 173 (App. 2010).

3.06 – Personal Liability for Conduct of an Enterprise

A person is criminally liable for conduct constituting an offense which such person performs or causes to be performed in the name of or in behalf of an enterprise to the same extent as if such conduct were performed in such person's own name or behalf.

SOURCE: A.R.S. § 13-306 (statutory language as of October 1, 1978).

USE NOTE: This instruction may not apply in cases where the person's conduct was a failure to act. *See State v. Angelo,* 166 Ariz. 24 (App. 1990).

CHAPTER 4

Prefatory Use Note:

Justification defenses under Chapter 4 of A.R.S. Title 13 are no longer affirmative defenses. Justification defenses contained in Chapter 4 of Title 13 do not apply to criminal prosecutions for criminal offenses under Title 28. *See State v. Fell*, 203 Ariz. 186, 188-89 ¶¶ 8, 9 (App. 2002) (holding that Title 13 justification defenses do not apply to Title 28 violations).

4.02 – Justification Defense in Execution of Public Duty

A defendant is justified in using or threatening physical force or deadly physical force if:

1. It was required or authorized by law; *or*
2. A reasonable person in a similar situation would believe that it was required or authorized [by the judgment or direction of a competent court or tribunal, even though the court or tribunal may have lacked jurisdiction] [in the lawful execution of legal process, even though there may have been a defect in the legal process]; *or*
3. A reasonable person in a similar situation would believe that it was required or authorized to assist a peace officer in the performance of such officer's duties, even though the officer may have exceeded the officer's legal authority.

A defendant may use deadly physical force in execution of public duty only to protect against another's use or apparent attempted or threatened use of deadly physical force.

Defense in execution of public duty justifies the use or threat of physical force or deadly physical force only while the apparent danger continues, and it ends when the apparent danger ends. The force used may not be greater than reasonably necessary to defend against the apparent danger.

The use of physical force or deadly physical force is justified if a reasonable person in the situation would have reasonably believed that immediate physical danger appeared to be present. Actual danger is not necessary to justify the use of physical force or deadly physical force in defense of execution of public duty.

You must measure the defendant's belief against what a reasonable person in the situation would have believed.

The State has the burden of proving beyond a reasonable doubt that the defendant did not act with such justification. If the State fails to carry this burden, then you must find the defendant not guilty of the charge. *[The user is directed to the Prefatory Use Note regarding the applicability of this paragraph.]*

SOURCE: A.R.S. §§ 13-402 (statutory language as of October 1, 1978) and 13-205 (statutory language as of April 24, 2006); *State v. Grannis,* 183 Ariz. 52, 60-61 (1995).

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

"Physical Force" and "Deadly Physical Force" are defined in A.R.S. § 13-105 (Statutory Definition Instructions 1.0528 and 1.059).

COMMENT: The Arizona Supreme Court has required that an instruction under A.R.S. §§ 13-404 and -405 must include a reference to the reasonable person standard. *State v. Grannis,* 183 Ariz. 52, 60-61 (1995). Because A.R.S. § 13-402 requires a reasonable person standard in paragraphs 2 and 3 above, the direction given in *Grannis* will likely apply in this Instruction.

4.03 – Justification: Use of Physical Force

A defendant is justified in using physical force as follows:

[A parent/guardian/teacher/person entrusted with the care or supervision of a minor or incompetent person may use reasonable and appropriate physical force upon such minor or incompetent person when and to the extent reasonably necessary and appropriate to maintain discipline.]

[A superintendent/entrusted official of a jail/prison/correctional institution may use physical force for the preservation of peace, to maintain order or discipline, or to prevent the commission of any felony or misdemeanor.]

[A person responsible for the maintenance of order in a place where others are assembled/on a common carrier of passengers may use physical force if and to the extent that a reasonable person in a similar situation would believe it necessary to maintain order. Such person may use deadly physical force only if reasonably necessary to prevent death or serious physical injury. This defense is also available to a person acting under the direction of the responsible person. A defendant may use deadly physical force only to protect against another's use or apparent, attempted or threatened use of deadly physical force. You must measure the defendant's belief against what a reasonable person in the situation would have believed.]

[A person acting under a reasonable belief that another person is about to commit suicide or to inflict serious physical injury upon himself/herself may use physical force upon such other person to the extent reasonably necessary to thwart the result.]

[A duly licensed physician/registered nurse/person acting under the direction of a duly licensed physician/person acting under the direction of a registered nurse/person who renders emergency care at the scene of an emergency occurrence may use reasonable physical force for the purpose of administering a recognized and lawful form of treatment that is reasonably adapted to promoting the physical or mental health of the patient only if the following condition exists/conditions exist:

1. The treatment is administered with the consent of the patient/if the patient is a minor or an incompetent person, with the consent of the parent, guardian or other person entrusted with the care and supervision of the minor or incompetent person; *or*
2. The treatment is administered in an emergency when a reasonable person in a similar situation administering such treatment believes that no one competent to consent can be consulted and that a reasonable person in a similar situation as a patient, wishing to safeguard his/her welfare, would consent.]

The use or threat of [physical force] [deadly physical force] is justified only while the apparent danger continues, and it ends when the apparent danger ends. The force used may not be greater than reasonably necessary to defend against the apparent danger.

The use of [physical force] [deadly physical force] is justified if a reasonable person in the situation would have reasonably believed that immediate physical danger appeared to be present. Actual danger is not necessary to justify the use of physical force or deadly physical force.

The State has the burden of proving beyond a reasonable doubt that the defendant did not act with such justification. If the State fails to carry this burden, then you must find the defendant not guilty of the charge. *[The user is directed to the Prefatory Use Note regarding the applicability of this paragraph.]*

SOURCE: A.R.S. §§ 13-403 (statutory language as of October 1, 1978) and 13-205 (statutory language as of April 24, 2006).

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

"Physical Force" and "Deadly Physical Force" are defined in A.R.S. § 13-105 (Statutory Definition Instructions 1.0528 and 1.059).

In regard to the bracketed portion pertaining to jail/prison officials, the following instruction should be given if the facts are appropriate: "Actual danger is not necessary to justify the use of [physical force for the preservation of peace, to maintain order or discipline, or to prevent the commission of any felony or misdemeanor] [deadly physical force to prevent death or serious physical injury]. Mere words may be sufficient to justify the use of physical force." *See State v. Bojorquez,* 138 Ariz. 495, 498-99 (1984) (holding that these instructions could be appropriate if the facts warranted them).

4.04 – Justification for Self-Defense

A defendant is justified in using or threatening physical force in self-defense if the following two conditions existed:

1. A reasonable person in the situation would have believed that physical force was immediately necessary to protect against another's use or apparent attempted or threatened use of unlawful physical force; *and*
2. The defendant used or threatened no more physical force than would have appeared necessary to a reasonable person in the situation.

A defendant may use deadly physical force in self-defense only to protect against another's use or apparent attempted or threatened use of deadly physical force.

Self-defense justifies the use or threat of physical force or deadly physical force only while the apparent danger continues, and it ends when the apparent danger ends. The force used may not be greater than reasonably necessary to defend against the apparent danger.

The use of physical force is justified if a reasonable person in the situation would have reasonably believed that immediate physical danger appeared to be present. Actual danger is not necessary to justify the use of physical force in self-defense.

You must decide whether a reasonable person in a similar situation would believe that: physical force was immediately necessary to protect against another's [use] [attempted use] [threatened use] [apparent attempted use] [apparent threatened use] of unlawful physical force; *or*

You must measure the defendant's belief against what a reasonable person in the situation would have believed.

[The threat or use of physical force is not justified:

1. In response to verbal provocation alone;
2. To resist an arrest that the defendant knew or should have known was being made by a peace officer or by a person acting in a peace officer's presence and at the peace officer's direction, whether the arrest was lawful or unlawful, unless the physical force used by the peace officer exceeded that allowed by law; or
3. If the defendant provoked the other's use of unlawful physical force, unless:
    a. The defendant withdrew from the encounter or clearly communicated to the other person the defendant's intent to withdraw, reasonably believing that the defendant could not withdraw from the encounter; and
    b. The other person nevertheless continued or attempted to use unlawful physical force against the defendant.]

The State has the burden of proving beyond a reasonable doubt that the defendant did not act with such justification. If the State fails to carry this burden, then you must find the defendant not guilty of the charge. *[The user is directed to the Prefatory Use Note regarding the applicability of this paragraph.]*

SOURCE: A.R.S. § 13-404 (statutory language as of October 1, 1978) and § 13-405 (statutory language as of July 29, 2010) and § 13-205 (statutory language as of April 24, 2006); *State v. Grannis,* 183 Ariz. 52, 60-61 (1995); *State v. Dumaine,* 162 Ariz. 392, 404 (1989); *State v. Noriega,* 142 Ariz. 474, 482 (1984), *overruled on other grounds, State v. Burge,* 167 Ariz. 25, 28 n.7 (1990) (overruling only on *Noriega's* holding that a grand jury's allegation of dangerousness in an indictment is insufficient to invoke 13-604's sentence enhancement allegations); *State v. King*, 225 Ariz. 87 (2010) (overruling *Grannis, Dumaine*, and *Noriega* to the extent they required that a defendant act in self defense based solely on a fear of imminent harm).

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

If the charged offense involves the threat or use of deadly physical force, use Statutory Criminal Instruction 4.05.

If the defense asserts that the arrest exceeded that allowed by law, use Statutory Criminal Instructions 38.81, 38.87 and/or 38.88, as applicable.

If there have been past acts of domestic violence as defined in A.R.S. § 13-3601, subsection A, against the defendant by the victim, the state of mind of a reasonable person shall be determined from the perspective of a reasonable person who has been a victim of those past acts of domestic violence. A.R.S. § 13-415.

When defendant's residential structure or occupied vehicle is involved, the presumption set forth in A.R.S. § 13-419 may apply.

Physical Force and Deadly Physical Force are defined in A.R.S. § 13-105 (Statutory Definition Instructions 1.0528 and 1.059).

Unlawful is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0540).

If the defense asserts that another person committed the charged act, the defendant is still entitled to justification instructions so long as they are supported by the slightest evidence. *State v. Carson*, 243 Ariz. 463 (2018).

COMMENT: This instruction modifies the 1989 RAJI version of Statutory Criminal Instruction 4.04. An instruction that was almost identical to former 4.04 was held reversible error in *Grannis:* A defendant may only use deadly physical force in self-defense to protect himself from another's use or attempted use of deadly physical force. 183 Ariz. at 61, 900 P.2d at 10. Furthermore, [u]nder A.R.S. §§ 13-404 and -405, *apparent* deadly force can be met with deadly force, so long as defendants belief as to apparent deadly force is a reasonable one. An instruction on self-defense is required when a defendant acts under a reasonable belief; actual danger is not required. (Emphasis in the original.)

In *State v. King*, 225 Ariz. 87 ¶ 12 (2010), the Arizona Supreme Court stated that "the sole question is whether a reasonable person in the defendant's circumstances would have believed that physical force was 'immediately necessary to protect himself.'" The court rejected any instruction that suggests or requires that a defendant's fear of imminent harm be the sole motivation for employing self defense. *Id.* The court disapproved language in previous supreme court cases that required the defendant to act solely because of a belief or fear of imminent harm, noting that such a requirement ignored the fact that the statute has been based on an objective standard since 1977. *Id.* at ¶ 9

4.04-1 – Non-Justification for Threat or Use of Physical Force

A defendant is not justified in using or threatening physical force against another:

[in response to verbal provocation alone.]

[to resist an arrest that the defendant knew or should have known was being made by a peace officer or by a person acting in a peace officer's presence and at the peace officer's direction, whether the arrest is lawful or unlawful, unless the physical force used by the peace officer exceeds that allowed by law.]

[if the defendant provoked the other person's use or attempted use of unlawful physical force, unless:

1. the defendant withdrew from the encounter or clearly communicated to the other person the intent to withdraw with the reasonable belief that the defendant could not safely withdraw; *and*
2. the other person continued or attempted to use unlawful physical force against the defendant.]

The State has the burden of proving beyond a reasonable doubt that the defendant did not act with such justification. If the State fails to carry this burden, then you must find the defendant not guilty of the charge. *[The user is directed to the Prefatory Use Note regarding the applicability of this paragraph.]*

SOURCE: A.R.S. § 13-404(B) (statutory language as of October 1, 1978).

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

When defendant's residential structure or occupied vehicle is involved, the presumption set forth in A.R.S. § 13-419 may apply.

The court should instruct on the culpable mental state.

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

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

"Physical Force" and "Unlawful" are defined in A.R.S. § 13-105 (Statutory Definition Instructions 1.0528) and 1.0540).

In cases asserting a defense based upon excessive force by police, the court may also choose to instruct on "arrest" and "method of arrest by officer" as defined in A.R.S. §§ 13-3881, -3887 and -3888 (Statutory Definition Instructions 38.81, 38.87 and 38.88).

COMMENT: The privilege of self-defense is not available to one who is at fault in provoking an encounter or difficulty that results in a crime. *State v. Lujan,* 136 Ariz. 102, 104-05 (1983) (stating that "an aggressor may not claim self-defense unless he withdraws from the combat in such a manner as will indicate his intention in good faith to refrain from further aggressive conduct.")

The public policy prohibiting force against an unlawful arrest accomplished without excessive force is to avoid violence against police officers by relegating the interest of the individual to the interest of the public, and by allowing the individual to seek recourse through civil damages in a subsequent lawsuit. *See State v. Lockner,* 20 Ariz. App. 367, 371 (1973).

A suspect has no right to use physical force against the lawful use of a police dog to apprehend the suspect. *State v. Doss,* 192 Ariz. 408, 412-13 (App. 1998).

4.05 – Justification for Self-Defense Physical Force

A defendant is justified in using or threatening deadly physical force in self-defense if the following two conditions existed:

1. A reasonable person in the situation would have believed that deadly physical force was immediately necessary to protect against another's use or apparent attempted or threatened use of unlawful deadly physical force; *and*
2. The defendant used or threatened no more deadly physical force than would have appeared necessary to a reasonable person in the situation.

A defendant may use deadly physical force in self-defense only to protect against another's use or apparent attempted or threatened use of deadly physical force.

Self-defense justifies the use or threat of deadly physical force only while the apparent danger continues, and it ends when the apparent danger ends. The force used may not be greater than reasonably necessary to defend against the apparent danger.

The use of deadly physical force is justified if a reasonable person in the situation would have reasonably believed that immediate deadly physical danger appeared to be present. Actual danger is not necessary to justify the use of deadly physical force in self-defense.

You must decide whether a reasonable person in a similar situation would believe that:

Deadly physical force was immediately necessary to protect against another's [use] [attempted use] [threatened use] [apparent attempted use] [apparent threatened use] of unlawful deadly physical force.

You must measure the defendant's belief against what a reasonable person in the situation would have believed.

A defendant has no duty to retreat before threatening or using deadly physical force in self-defense if the defendant:

1. Had a legal right to be in the place where the use or threatened deadly physical force in self-defense occurred; and
2. Was not engaged in an unlawful act at the time when the use or threatened deadly physical force in self-defense occurred.

The State has the burden of proving beyond a reasonable doubt that the defendant did not act with such justification. If the State fails to carry this burden, then you must find the defendant not guilty of the charge**.** *[The user is directed to the Prefatory Use Note regarding the applicability of this paragraph.]*

SOURCE: A.R.S. § 13-404 (statutory language as of October 1, 1978) and § 13-405 (statutory language as of July 29, 2010) and § 13-205 (statutory language as of April 24, 2006); *State v. Grannis,* 183 Ariz. 52, 60-61 (1995); *State v. Dumaine,* 162 Ariz. 392, 404 (1989); *State v. Noriega,* 142 Ariz. 474, 482 (1984), *overruled on other grounds, State v. Burge,* 167 Ariz. 25, 28 n.7 (1990) (overruling only on *Noriega's* holding that a grand jury's allegation of dangerousness in an indictment is insufficient to invoke § 13-604's sentence enhancement allegations); *State v. King*, 225 Ariz. 87 ¶ 12 (2010) (overruling *Grannis, Dumaine*, and *Noriega* to the extent they required that a defendant act in self defense based solely on a fear of imminent harm).

Use Note: Use the language in brackets as appropriate to the facts.

If there have been past acts of domestic violence as defined in A.R.S. § 13-3601, subsection A, against the defendant by the victim, the state of mind of a reasonable person shall be determined from the perspective of a reasonable person who has been a victim of those past acts of domestic violence. A.R.S. § 13-415.

Physical Force and Deadly Physical Force are defined in A.R.S. § 13-105 (Statutory Definition Instructions 1.0532 and 1.0514).

Unlawful is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0540).

If the defense asserts that another person committed the charged act, the defendant is still entitled to justification instructions so long as they are supported by the slightest evidence. *State v. Carson*, 243 Ariz. 463 (2018).

COMMENT: This instruction modifies the 1989 RAJI version of Statutory Criminal Instruction 4.04. An instruction that was almost identical to former § 4.04 was held reversible error in *Grannis:* A defendant may only use deadly physical force in self-defense to

protect himself from another's use or attempted use of deadly physical force. 183 Ariz. at 61. Furthermore, [u]nder A.R.S. §§ 13-404 and -405, *apparent* deadly force can be met with deadly force, so long as defendants belief as to apparent deadly force is a reasonable one. An instruction on self-defense is required when a defendant acts under a reasonable belief; actual danger is not required. (Emphasis in the original.)

In *State v. King*, 225 Ariz. 87 ¶ 12 (2010), the Arizona Supreme Court stated that "the sole question is whether a reasonable person in the defendant's circumstances would have believed that physical force was 'immediately necessary to protect himself.'" The court rejected any instruction that suggests or requires that a defendant's fear of imminent harm be the sole motivation for employing self defense. *Id.* The court disapproved language in previous supreme court cases that required the defendant to act solely because of a belief or fear of imminent harm, noting that such a requirement ignored the fact that the statute has been based on an objective standard since 1977. *Id.* at ¶ 9.

4.06 – Justification for Defense of a Third Person

A defendant is justified in using or threatening physical force in defense of a third person if the following two conditions existed:

1. A reasonable person in the situation would have believed that physical force was necessary to protect against another's [use] [attempted use] [apparent attempted use] [threatened use] of unlawful physical force against a third person; *and*
2. The defendant used or threatened no more physical force than would have appeared necessary to a reasonable person in the situation.

A defendant may use deadly physical force in defense of a third person only to protect against another's [use] [attempted use] [apparent attempted use] [threatened use] of deadly physical force.

Defense of a third person justifies the use or threat of physical force or deadly physical force only while the danger continues, and it ends when the danger ends. The force used may not be greater than reasonably necessary to defend against the danger.

Actual danger is not necessary to justify the use of physical force or deadly physical force in defense of a third person.

The use of physical force or deadly physical force is justified if a reasonable person in the situation would have reasonably believed that immediate physical danger appeared to be present.

You must decide whether a reasonable person in a similar situation would believe that:

1. Physical force was necessary to protect against another's [use] [attempted use] [apparent attempted use] [threatened use] of unlawful physical force against a third person;
2. Deadly physical force was necessary to protect against another's [use] [attempted use] [apparent attempted use] [threatened use] of unlawful physical force against a third person.

You must measure the defendant's belief against what a reasonable person in the situation would have believed.

The State has the burden of proving beyond a reasonable doubt that the defendant did not act with such justification. If the State fails to carry this burden, then you must find the defendant not guilty of the charge. *[The user is directed to the Prefatory Use Note regarding the applicability of this paragraph.]*

SOURCE: A.R.S. § 13-404 (statutory language as of October 1, 1978); A.R.S. § 13-405 (statutory language as of July 29, 2010); A.R.S. § 13-406 (statutory language as of July 20, 2011) and 13-205 (statutory language as of April 24, 2006); *State v. Grannis,* 183 Ariz. 52, 60-61 (1995); *State v. Dumaine,* 162 Ariz. 392, 404 (1989); *State v. Noriega,* 142 Ariz. 474, 482 (1984), *overruled on other grounds, State v. Burge,* 167 Ariz. 25, 28 n.7 (1990) (overruling only on *Noriega's* holding that a grand jury's allegation of dangerousness in an indictment is insufficient to invoke § 13-604's sentence enhancement allegations).

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

If there have been past acts of domestic violence as defined in A.R.S. § 13-3601, subsection A, against the defendant by the victim, the state of mind of a reasonable person shall be determined from the perspective of a reasonable person who has been a victim of those past acts of domestic violence. A.R.S. § 13-415.

When defendant's residential structure or occupied vehicle is involved, the presumption set forth in A.R.S. § 13-419 may apply.

"Physical Force" and "Deadly Physical Force" are defined in A.R.S. § 13-105 (Statutory Definition Instructions 1.0532 and 1.0514).

If the defense asserts that another person committed the charged act, the defendant is still entitled to justification instructions so long as they are supported by the slightest evidence. *State v. Carson*, 243 Ariz. 463 (2018).

COMMENT: This instruction modifies the 1989 RAJI version of Statutory Criminal Instruction 4.06 in light of modifications to Statutory Criminal Instruction 4.04. An instruction that was almost identical to former 4.04 was held reversible error in *Grannis:* "A defendant may only use deadly physical force in self-defense to protect himself from another's use or attempted use of deadly physical force." 183 Ariz. at 61. Furthermore, "[u]nder A.R.S. §§ 13-404 and -405, *apparent* deadly force can be met with deadly force, so long as defendant's belief as to apparent deadly force is a reasonable one. An instruction on self-defense is required when a defendant acts under a reasonable belief; actual danger is not required." (Emphasis in the original).

4.07 – Justification in Defense of Premises

A defendant in lawful possession or control of the premises is justified [in threatening to use deadly physical force] [in using physical force] [in attempting to use physical force] [in threatening to use physical force] in defense of premises if a reasonable person in the situation would have believed it immediately necessary to prevent or terminate the commission or attempted commission of a criminal trespass by another person in or upon the premises. The force used may not be greater than reasonably necessary to prevent the [attempted] criminal trespass.

An actual criminal trespass is not necessary to justify the use of physical force in defense of premises. A defendant is justified in defending premises if the defendant reasonably believed that a criminal trespass was being [committed] [attempted]. You must measure the defendant's belief against what a reasonable person in the situation would have believed.

The defense ends when the [attempted] criminal trespass ends.

The State has the burden of proving beyond a reasonable doubt that the defendant did not act with such justification. If the State fails to carry this burden, then you must find the defendant not guilty of the charge. *[The user is directed to the Prefatory Use Note regarding the applicability of this paragraph.]*

SOURCE: A.R.S. §§ 13-407 (statutory language as of October 1, 1978) and 13-205 (statutory language as of April 24, 2006).

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

A.R.S. § 13-407(A) provides that a person or the person's agent in lawful possession or control of the premises may be entitled to claim this defense.

When defendant's residential structure or occupied vehicle is involved, the presumption set forth in A.R.S. § 13-419 may apply.

"Physical Force" and "Deadly Physical Force" are defined in A.R.S. § 13-105 (Statutory Definition Instructions 1.0532 and 1.0514).

"Possess" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0534).

"Possession" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0535).

"Premises" is defined in A.R.S. § 13-407(C).

"Criminal Trespass" is defined in A.R.S. § 13-1501 *et seq*.

COMMENT: A person may use deadly physical force in the defense of premises only if it is used in the defense of the person or third persons as described in A.R.S. §§ 13-405 and -406. *See* A.R.S. § 13-407(B).

The term "lawful" possession or control is not defined by statute. However, it appears from case law that it has the same meaning as "possession" as defined in A.R.S. § 13-105. *See, e.g., State v. Malory,* 113 Ariz. 480, 483 (1976) (noting that lawful possession or control is shown if the accused had the property under his control in the sense that it was under his direction or management).

While a person's entry on premises may be initially lawful based on express or implied invitation, the person in lawful possession or control always has the right to withdraw that invitation, making such entry a trespass, at which time reasonable force may be used to eject the trespasser. *See Ramirez v. Chavez,* 71 Ariz. 239 (1951) (bar owner had the right to remove an unruly bar customer).

4.08 – Justification in Defense of Property

A defendant is justified in using physical force against another in defense of property if a reasonable person in the situation would believe it necessary to prevent what a reasonable person in the situation would believe was [an attempt] [a commission] [a threat] by the other

person of [theft] [criminal damage] involving tangible movable property under the defendant's possession or control.

Defense of property justifies the use physical force only while the danger continues, and it ends when the danger ends. The force used may not be greater than reasonably necessary to defend against the danger.

Actual danger is not necessary to justify the use of physical force or deadly physical force in defense of property.

The use of physical force is justified if a reasonable person in the situation would have reasonably believed that immediate physical danger appeared to be present.

You must measure the defendant's belief against what a reasonable person in the situation would have believed.

The State has the burden of proving beyond a reasonable doubt that the defendant did not act with such justification. If the State fails to carry this burden, then you must find the defendant not guilty of the charge. *[The user is directed to the Prefatory Use Note regarding the applicability of this paragraph.]*

SOURCE: A.R.S. §§ 13-408 (statutory language as of October 1, 1978) and 13-205 (statutory language as of April 24, 2006); *State v. Grannis,* 183 Ariz. 52, 60-61 (1995).

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

"Physical Force" and "Deadly Physical Force" are defined in A.R.S. § 13-105 (Statutory Definition Instructions 1.0532 and 1.0514).

"Theft" is defined in A.R.S. § 13-1801 *et seq.*

"Criminal damage" is defined in A.R.S. § 13-1601 *et seq.*

A person may use deadly physical force in the defense of property only if it is used in the defense of the person, third persons or for crime prevention as described in A.R.S. §§ 13-405, -406 and -411. *See* A.R.S. § 13-408.

When defendant's residential structure or occupied vehicle is involved, the presumption set forth in A.R.S. § 13-419 may apply.

4.09 – Justification for Use of Physical Force in Law Enforcement

A defendant was justified in using or threatening physical force in law enforcement if:

1. The defendant was [making an arrest or detention] [assisting in making an arrest or detention] [preventing the escape after arrest or detention] [assisting in preventing the escape after arrest or detention] of another person; *and*
2. A reasonable person in the situation would have believed that using or threatening physical force was immediately necessary [to effect the arrest or detention] [to prevent the escape]; *and*
3. [The defendant made known to the other person the purpose of the arrest or detention] [The defendant believed that the other person knew the purpose of the arrest or detention] [The defendant could not have reasonably made known to the person to be arrested or detained, the purpose of the arrest or detention]; *and*

4. A reasonable person would have believed that the arrest or detention was lawful.

The use of physical force in law enforcement is justified only while the danger continues, and it ends when the danger ends. The force used may not be greater than reasonably necessary to defend against the danger.

Actual danger is not necessary to justify the use of physical force in law enforcement.

The use of physical force is justified if a reasonable person in the situation would have reasonably believed that there was immediate physical danger. You must measure the defendant's belief against what a reasonable person in the situation would have believed.

The State has the burden of proving beyond a reasonable doubt that the defendant did not act with such justification. If the State fails to carry this burden, then you must find the defendant not guilty of the charge. *[The user is directed to the Prefatory Use Note regarding the applicability of this paragraph.]*

SOURCE: A.R.S. §§ 13-409 (statutory language as of October 1, 1978) and 13-205 (statutory language as of April 24, 2006; *State v. Grannis,* 183 Ariz. 52, 60-61 (1995).

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

"Physical Force" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0532).

4.10(1) – Justification for Threatened Deadly Physical Force in Law Enforcement

A defendant was justified in threatening deadly physical force against another if:

1. The defendant was [making an arrest or detention] [assisting in making an arrest or detention] [preventing the escape after arrest or detention] [assisting in preventing the escape after arrest or detention] of another person; *and*
2. A reasonable person would have believed that threatening deadly physical force was immediately necessary [to effect the arrest or detention] [to prevent the escape]; *and*
3. [The defendant made known to the other person the purpose of the arrest or detention] [The defendant believed that the other person knew the purpose of the arrest or detention] [The defendant could not have reasonably made known to the person to be arrested or detained, the purpose of the arrest or detention]; *and*
4. A reasonable person effecting the arrest or detention would have believed that the arrest or detention was lawful; *and*
5. A reasonable person effecting the arrest or detention would have believed that the person [being arrested] [escaping] was:

   [Actually resisting the discharge of a legal duty with deadly physical force.]

   [Actually resisting the discharge of a legal duty with the apparent capacity to use deadly physical force.]

   [A felon who had escaped from lawful confinement.]

   [A felon who was fleeing from justice.]

   [A felon who was resisting arrest with physical force.]

A person is justified in threatening deadly physical force only while the [flight] [escape] [resisting] continues, and the justification ends when the [flight] [escape] [resisting] ends.

You must measure the defendant's belief against what a reasonable person in the situation would have believed.

The State has the burden of proving beyond a reasonable doubt that the defendant did not act with such justification. If the State fails to carry this burden, then you must find the defendant not guilty of the charge. *[The user is directed to the Prefatory Use Note regarding the applicability of this paragraph.]*

SOURCE: A.R.S. §§ 13-410(A) (statutory language as of 1989) and 13-205 (statutory language as of April 24, 2006); *State v. Olsen,* 157 Ariz. 603, 610 (App. 1988); *State v. Barr,* 115 Ariz. 346, 349-50 (App. 1977).

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

If the defendant is a peace officer, Statutory Criminal Instruction 4.10(4) should be used instead of this instruction when the peace officer threatened deadly physical force in response to the potential use of physical or deadly physical force against the peace officer. *See* A.R.S. § 13-410(D).

["Physical Force" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0532).

"Felon" is not a defined statutory term. "Felon" for purposes of this statute should be defined as someone who has committed a felony or is suspected of having committed a felony. *See Tennessee v. Garner,* 471 U.S. 1, 11-15 (1985); *Olsen, supra.*

"Felony" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0518).

COMMENT: The underlying factual prerequisites are identical to Statutory Criminal Instruction 4.09, because A.R.S. § 13-410 predicates the threatened use of deadly force on the prerequisites countenanced under A.R.S. § 13-409.

The justification for threatening deadly physical force against a fleeing felon ends when the fleeing felon has stopped fleeing. *State v. Bojorquez,* 138 Ariz. 495, 498 (1984); *State v. Gendron,* 166 Ariz. 562, 566 (App. 1990), *vacated in part on other grounds, State v. Gendron,* 168 Ariz. 153 (1991).

4.10(2) – Justification for Using Deadly Physical Force in Law Enforcement by a Non-Peace Officer

A defendant who was not a peace officer was justified in using deadly physical force against another if:

1. The defendant was [making an arrest or detention] [assisting in making an arrest or detention] [preventing the escape after arrest or detention] [assisting in preventing the escape after arrest or detention] of another person; *and*
2. A reasonable person would have believed that the other person was actually resisting the discharge of a legal duty with [physical force] [the apparent capacity to use deadly physical force]; *and*

3. [The defendant made known to the other person the purpose of the arrest or detention] [The defendant believed that the other person knew the purpose of the arrest or detention] [The defendant could not have reasonably made known to the person to be arrested or detained, the purpose of the arrest or detention]; *and*
4. A reasonable person would have believed that the arrest or detention was lawful.

The use of deadly physical force is justified only while the danger continues, and the justification ends when the danger ends. The force used may not be greater than reasonably necessary to defend against the danger.

Actual danger is not necessary to justify the use of physical force or deadly physical force in law enforcement. The use of deadly physical force is justified if a reasonable person in the situation would have reasonably believed that immediate physical danger was present. You must measure the defendant's belief against what a reasonable person in the situation would have believed.

The State has the burden of proving beyond a reasonable doubt that the defendant did not act with such justification. If the State fails to carry this burden, then you must find the defendant not guilty of the charge. *[The user is directed to the Prefatory Use Note regarding the applicability of this paragraph.]*

SOURCE: A.R.S. §§ 13-410(B) (statutory language as of 1989) and 13-205 (statutory language as of April 24, 2006); *Tennessee v. Garner,* 471 U.S. 1, 11-12 (1985); *State v. Grannis,* 183 Ariz. 52, 60-61 (1995); *State v. Olsen,* 157 Ariz. 603, 610 (App. 1988); *State v. Barr,* 115 Ariz. 346, 349-50 (App. 1977).

USE NOTE: This instruction is available to defendants who raise a factual issue as to resisting excessive police force. *State v. Gendron,* 166 Ariz. 562, 566 (App. 1990), *vacated in part on other grounds, State v. Gendron,* 168 Ariz. 153 (1991).

Use the language in brackets as appropriate to the facts.

"Peace officer," "physical force," "serious physical injury," and "deadly physical force" are defined in A.R.S. § 13-105 (Statutory Definition Instructions 1.0529, 1.0532, 1.0539 and 1.0514).

COMMENT: This instruction tracks the statutory language. In *Tennessee v. Garner,* 471 U.S. 1, 11-12 (1985), the Court, in a civil damage action, held that deadly physical force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others. The Arizona statute arguably conflicts with *Garner* because in paragraph 2 above, the statute allows use of physical force by a civilian when the danger did not involve the use of deadly physical force. The impact of this possible conflict has not been decided in Arizona.

The underlying factual prerequisites are identical to Statutory Criminal Instruction 4.09, except that it has been changed to comply with the deadly force language in A.R.S. § 13-410(B), because A.R.S. § 13-410(B) predicates the use of deadly force by a non-peace officer on the underlying factual prerequisites countenanced under A.R.S. § 13-409.

A.R.S. § 13-410(B) creates a limited right for members of the public to resist excessive police force. *State v. Bojorquez,* 138 Ariz. 495, 498 (1984); *State v. Gendron,* 166 Ariz. 562, 566 (App. 1990), *vacated in part on other grounds, State v. Gendron,* 168 Ariz. 153 (1991).

4.10(3a) – Justification for Using Deadly Physical Force in Law Enforcement by a Peace Officer

A defendant who was a peace officer was justified in using deadly physical force against another if:

1. The defendant was [making an arrest or detention] [assisting in making an arrest or detention] [preventing the escape after arrest or detention] [assisting in preventing the escape after arrest or detention] of another person; *and*
2. A reasonable person would have believed that using deadly physical force was immediately necessary [to effect the arrest or detention] [to prevent the escape]; *and*
3. [The defendant made known to the other person the purpose of the arrest or detention] [The defendant believed that the other person knew the purpose of the arrest or detention] [The defendant could not have reasonably made known to the person to be arrested or detained, the purpose of the arrest or detention]; *and*
4. A reasonable person would have believed that the arrest or detention was lawful; *and*
5. The defendant reasonably believed it necessary to defend himself/herself or a third person from what the defendant believed to be the [use] [imminent use] of deadly physical force.

The State has the burden of proving beyond a reasonable doubt that the defendant did not act with such justification. If the State fails to carry this burden, then you must find the defendant not guilty of the charge. *[The user is directed to the Prefatory Use Note regarding the applicability of this paragraph.]*

SOURCE: A.R.S. §§ 13-410(C)(1) (statutory language as of 1989) and 13-205 (statutory language as of April 24, 2006); *State v. Grannis,* 183 Ariz. 52, 60-61 (1995).

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

"Deadly Physical Force" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0514).

COMMENT: Unlike the language in A.R.S. §§ 13-410(A) and (B), which specifically requires a "reasonable person" standard, or in A.R.S. § 13-410(D), which specifically requires a "reasonable officer" standard, the language in A.R.S. § 13-410(C) is unclear as to whether the legislature intended to require an objective or subjective standard. A plain reading of A.R.S. § 13-410(C) allows the use of deadly force by a peace officer based upon what the defendant officer reasonably believes is necessary, thereby creating a subjective standard. However, because § 13-410(C) relies upon § 13-409, which contains a reasonable person standard, it is possible for a court to conclude that an objective standard should apply. In such case, the court should include the following sentence in the text of the instruction: "You must measure the defendant's belief against what a reasonable [person] [peace officer] in the situation would have believed." *See State v. Grannis,* 183 Ariz. 52, 60-61 (1995). There is no statutory definition of "reasonable peace officer" in A.R.S. § 13-410, and the Committee was unable to locate any criminal cases providing such a definition. However, the reader is directed to the following two cases that discuss reasonable police conduct: *State v. Superior Court,* 185 Ariz. 47 (App. 1996); *State v. Fortier,* 113 Ariz. 332 (1976).

The underlying factual prerequisites are identical to Statutory Criminal Instruction 4.09, because A.R.S. § 13-410(C) predicates the use of deadly physical force by a peace officer on the situations countenanced under A.R.S. § 13-409.

Notwithstanding, a peace officer may threaten deadly physical force at any time when reasonably necessary to protect against another's potential use of physical force or deadly physical force. *See* A.R.S. § 13-410(D).

4.10(3b) – Justification for Using Deadly Physical Force in Law Enforcement by a Peace Officer

A defendant who was a peace officer was justified in using deadly physical force against another if:

1. The defendant was [making an arrest or detention] [assisting in making an arrest or detention] [preventing the escape after arrest or detention] [assisting in preventing the escape after arrest or detention] of another person; *and*
2. [The defendant made known to the other person the purpose of the arrest or detention] [The defendant believed that the other person knew the purpose of the arrest or detention] [The defendant could not have reasonably made known to the person to be arrested or detained, the purpose of the arrest or detention]; *and*
3. A reasonable person would have believed that the arrest or detention was lawful; *and*
4. The defendant reasonably believed that the use of deadly physical force was necessary to (effect an arrest) (prevent the escape from custody) of the (suspect) (escapee) whom the peace officer reasonably believed:

   [had (committed/attempted to commit/was committing/was attempting to commit) a felony involving the use or threatened use of a deadly weapon.]

   [was attempting to escape by use of a deadly weapon.]

   [through past or present conduct of the (suspect/escapee), which conduct was known by the defendant that the (suspect/escapee) was likely to endanger human life or inflict serious bodily injury to another unless apprehended immediately.]

   [was necessary to lawfully suppress a riot if the (suspect/escapee) or another person participating in the riot was armed with a deadly weapon.]

The State has the burden of proving beyond a reasonable doubt that the defendant did not act with such justification. If the State fails to carry this burden, then you must find the defendant not guilty of the charge. *[The user is directed to the Prefatory Use Note regarding the applicability of this paragraph.]*

SOURCE: A.R.S. §§ 13-410(C)(2) (statutory language as of 1989 and 13-205 (statutory language as of April 24, 2006); *State v. Grannis,* 183 Ariz. 52, 60-61 (1995).

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

"Deadly weapon," "peace officer," "physical force" and "deadly physical force" are defined in A.R.S. § 13-105 (Statutory Definition Instructions 1.0515, 1.0529, 1.0532, and 1.0514).

COMMENT: Unlike the language in A.R.S. § 13-410(A) and (B), which specifically requires a "reasonable person" standard, or in A.R.S. § 13-410(D), which specifically requires a "reasonable officer" standard, the language in A.R.S. § 13-410(C) is unclear as to whether the legislature intended to require an objective or subjective standard. A plain reading of A.R.S. § 13-410(C) allows the use of deadly force by a peace officer based upon what the defendant officer reasonably believes is necessary, thereby creating a subjective standard. However, because § 13-410(C) relies upon § 13-409, which contains a reasonable person standard, it is possible for a court to conclude that an objective standard should apply. In such case, the court should include the following sentence in the text of the instruction: "You must measure the defendant's belief against what a reasonable [person] [peace officer] in the situation would have believed." *See State v. Grannis,* 183 Ariz. 52, 60-61 (1995). There is no statutory definition of "reasonable peace officer" in A.R.S. § 13-410, and the Committee was unable to locate any criminal cases providing such a definition. However, the reader is directed to the following two cases that discuss reasonable police conduct: *State v. Superior Court,* 185 Ariz. 47 (App. 1996); *State v. Fortier,* 113 Ariz. 332 (1976).

The underlying factual prerequisites are identical to Statutory Criminal Instruction 4.09, because A.R.S. § 13-410(C) predicates the use of deadly physical force by a peace officer in the situations countenanced under A.R.S. § 13-409.

Notwithstanding, a peace officer may threaten deadly physical force at any time when reasonably necessary to protect against another's potential use of physical force or deadly physical force. *See* A.R.S. § 13-410(D).

4.10(4) – Justification for Threatening Deadly Physical Force in Law Enforcement by a Peace Officer

A defendant who was a peace officer was justified in threatening deadly physical force against another if a reasonable peace officer in the situation would have believed it necessary to protect such peace officer against another's potential use of physical force or deadly physical force.

You must measure the defendant's belief against what a reasonable peace officer in the situation would have believed.

The State has the burden of proving beyond a reasonable doubt that the defendant did not act with such justification. If the State fails to carry this burden, then you must find the defendant not guilty of the charge. *[The user is directed to the Prefatory Use Note regarding the applicability of this paragraph.]*

SOURCE: A.R.S. §§ 13-410(D) (statutory language as of 1989 and 13-205 (statutory language as of April 24, 2006); *State v. Grannis,* 183 Ariz. 52, 60-61 (1995).

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

"Peace Officer," "Physical Force" and "Deadly Physical Force" are defined in A.R.S. § 13-105 (Statutory Definition Instructions 1.0529, 1.0532, and 1.0514).

Because A.R.S. § 13-410(D) provides that it is "notwithstanding any other provisions of this chapter …," it appears to override any other justification defenses.

COMMENT: The Arizona Supreme Court has required that an instruction under A.R.S. §§ 13-404 and -405 must include a reference to the reasonable person standard. *State v. Grannis,* 183 Ariz. 52, 60-61 (1995). Because A.R.S. § 13-410 requires a reasonable person standard, the direction given in *Grannis* will likely apply in those situations, although the instruction should be modified to apply to peace officers. There is no statutory definition of "reasonable peace officer" in A.R.S. § 13-410, and the Committee was unable to locate any criminal cases providing such a definition. However, the reader is directed to the following two cases that discuss reasonable police conduct: *State v. Superior Court,* 185 Ariz. 47 (App. 1996); *State v. Fortier,* 113 Ariz. 332 (1976).

The ability to threaten deadly physical force against a fleeing felon ends when the fleeing felon has stopped fleeing. *State v. Bojorquez,* 138 Ariz. 495, 498 (1984); *State v. Gendron,* 166 Ariz. 562, 566 (App. 1990), *vacated in part on other grounds, State v. Gendron,* 168 Ariz. 153 (1991).

The use of deadly physical force against a fleeing felon is constitutionally unreasonable under the Fourth Amendment unless the officer has probable cause to believe that the suspect "poses a threat of serious physical harm, either to the officer or to others." *Tennessee v. Garner,* 471 U.S. 1, 11-12 (1985).

4.11 – Use of Force in Crime Prevention

The defendant was justified in threatening or using physical force and/or deadly physical force against another if and to the extent the person reasonably believed that physical force or deadly physical force was immediately necessary to prevent another from committing or apparently committing the crime[s] of:

[List applicable enumerated crime[s] from A.R.S. § 13-411(A)].

There is no duty to retreat before threatening or using deadly physical force. There is no requirement that any threat to the defendant's safety exist before the defendant may use physical force and/or deadly physical force. However, physical force and/or deadly physical force can be used only to the extent it appears reasonable and immediately necessary to prevent commission of the crime[s].

The defendant's use or threatened use of physical or deadly force is not limited to a person's home, residence, place of business, land the person owns or leases, or conveyance of any kind, but includes any place in this state where a person has a right to be.

The defendant is presumed to have acted reasonably if the defendant reasonably believed [he/she] was acting to prevent the imminent or actual commission of [list applicable enumerated crime[s] from A.R.S. § 13-411(A)].

The defendant is justified in using physical force and/or deadly physical force against another person even if that person is not actually committing or attempting to commit the crime[s] if the defendant reasonably believed he/she was preventing the commission of the

crime[s]. Actual danger is not necessary to justify the use of physical force or deadly physical force in crime prevention.

If evidence was presented that raised this justification defense for [insert count number and name of offense], then the State has the burden of proving beyond a reasonable doubt that the defendant did not act with such justification. If the State fails to carry this burden, then you must find the defendant not guilty of the charge. *[The user is directed to the Use Note regarding the applicability of this paragraph.]*

SOURCE: A.R.S. §§ 13-411(A)(D) (statutory language as of July 20, 2011); *State v. Korzep,* 165 Ariz. 490, 492-94 (1990); *Korzep v. Superior Court (Ellsworth),* 172 Ariz. 534, 537-38 (App. 1991); *State v. Taylor,* 169 Ariz. 121, 122-23 (1991) (holding that the defense applied where the defendant shot and killed the deceased, but could not tell whether the deceased had a gun); *State v. Hussain*, 189 Ariz. 336, 339 (App. 1997) (holding that a person may use deadly physical force under A.R.S. § 13-411 if the person reasonably believes that it is immediately necessary to prevent an enumerated crime it is not necessary that the other person used or attempted to use unlawful deadly physical force); *Korzep*, 165 Ariz. at 492 (holding that the only limitation upon the use of deadly force under A.R.S. § 13-411 is the reasonableness of the response.); *cf.*, *State v. Grannis,* 183 Ariz. 52, 60 (1995) (self-defense) (holding that [u]nder A.R.S. 13-404 and -405, *apparent* deadly force can be met with deadly force) (emphasis in the original); *State v. Almeida,* 238 Ariz. 77 (App. 2015).

USE NOTE: Use the language in brackets as appropriate. The court should also give definitions of the enumerated crimes if it gives this instruction. To the lay person, some of the legal definitions are not intuitive, especially that of kidnapping. If the crime of burglary in the second degree is defined, the predicate felony should also be specified and defined.

A defendant is entitled to a justification instruction if it is supported by the slightest evidence. *Hussain*, 189 Ariz. at 337.

Physical force and deadly physical force are defined in A.R.S. § 13-105 (Statutory Definition Instructions 1.0532 and 1.0514).

Justification defenses under Chapter 4 of A.R.S. Title 13 are not affirmative defenses for crimes occurring on or after April 24, 2006, pursuant to legislative enactment. However, for crimes occurring before this date, they remain affirmative defenses. In such cases, the court shall delete the last paragraph and instruct on affirmative defense so as to inform the jury on the burden of proof. Affirmative defense is defined in A.R.S. § 13-205 (Statutory Definition Instruction 2.025). An affirmative defense must be shown by a preponderance of the evidence. Preponderance of the evidence is defined in Standard Criminal Instruction 4(b).

If the defense asserts that another person committed the charged act, the defendant is still entitled to justification instructions so long as they are supported by the slightest evidence. *State v. Carson*, 243 Ariz. 463 (2018).

COMMENT: A.R.S. § 13-411(D) provides that this section includes the use or threatened use of physical force or deadly physical force in a person's home, residence, place of business, land the person owns or leases, conveyance of any kind, or any other place in this state where a person has a right to be.

4.12 – Duress

A defendant is justified in committing the conduct giving rise to the charged offense if a reasonable person in the defendant's circumstances would have believed that he/she was compelled to commit such conduct by the [threat] [use] of immediate physical force against [him/her] [another person] that [resulted] [could have resulted] in serious physical injury that a reasonable person in the situation would not have resisted.

[A defendant is not justified in committing an offense if the defendant intentionally, knowingly or recklessly placed himself/herself in a situation in which it was probable that the defendant would be subjected to duress.]

You must compare the defendant's belief with what a reasonable person in the defendant's circumstances would have believed.

The State has the burden of proving beyond a reasonable doubt that the defendant did not act with such justification. If the State fails to carry this burden, then you must find the defendant not guilty of the charge. *[The user is directed to the Prefatory Use Note regarding the applicability of this paragraph.]*

SOURCE: A.R.S. §§ 13-412 (statutory language as of October 1, 1978) and 13-205 (statutory language as of April 24, 2006); *State v. Grannis,* 183 Ariz. 52, 60-61 (1995).

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

The court shall instruct on the culpable mental state.

"Intentionally," "knowingly," and "recklessly" are defined in A.R.S. § 13-105 (Statutory Definition Instructions 1.0510(a)(1), 1.0510(b) and 1.0510(c)).

"Serious physical injury," "physical force" and "deadly physical force" are defined in A.R.S. § 13-105 (Statutory Definition Instructions 1.0539, 1.0532 and 1.0514.

The defense of duress is not available to a defendant in offenses involving homicide or serious physical injury. *See* A.R.S. § 13-412(C).

COMMENT: The defense of duress cannot be used for offenses involving homicide or serious physical injury. A.R.S. § 13-412(C). However, if death or serious physical injury is not an element of a lesser-included offense, a duress instruction may be given only as to the lesser-included offense.

In *State* v. *Richter*, 245 Ariz. 1 ¶¶ 22-31 (2018), the Arizona Supreme Court held that the reasonable person standard applies to the duress defense, but that the jury must view how a reasonable person, in the defendant's circumstances, would have viewed the situation. If the defendant raises the slightest evidence supporting a duress defense, the trial court must instruct on that defense.

The State Bar Criminal Jury Instructions Committee substituted "the defendant's circumstances" for the statutory language ("situation") based on *Richter*.

4.14 – Justification for Correctional Officer to Use Reasonable and Necessary Means

A defendant who was a correctional officer was justified in using all reasonable and necessary means, including deadly force, to prevent the attempt of a prisoner sentenced to the custody of the Arizona Department of Corrections from:

[Escaping from custody or from a correctional facility.]

[Taking another person as a hostage.]

[Causing serious bodily injury to another person.

"Correctional officer" is defined as a person, other than an elected official, who is employed by the State of Arizona or a county, city or town in Arizona and who is responsible for the supervision, protection, care, custody or control of inmates in a state, county or municipal correctional institution, including counselors, but excluding secretarial, clerical and professionally trained personnel.

The State has the burden of proving beyond a reasonable doubt that the defendant did not act with such justification. If the State fails to carry this burden, then you must find the defendant not guilty of the charge. *[The user is directed to the Use Note regarding the applicability of this paragraph.]*

SOURCE: A.R.S. §§ 13-414 and 41-1661 (statutory language as of June 26, 1997); A.R.S. § 13-205 (statutory language as of April 24, 2006).

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

4.15 – Justification – Domestic Violence

If you find there have been past acts of domestic violence against the defendant by the listed victim, the state of mind of a reasonable person for purposes of [self-defense,] [justified use of deadly physical force,] [and/or] [defense of a third person] must be determined from the perspective of a reasonable person who has been a victim of those past acts of domestic violence.

SOURCE: A.R.S. § 13-415 (1992).

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

If this instruction is given, an instruction defining "domestic violence" such as Criminal Instruction 36.01 dealing with A.R.S. § 13-3601(A) should be given.

4.16 – Justification for Security Officer to Use Reasonable and Necessary Means

A defendant who was a security officer employed by a private contractor was justified in using all reasonable and necessary means, including deadly force, to prevent a prisoner in the custody of the private contractor from:

[escaping from the custody of (a law enforcement officer/an authorized custodial agent/a correctional facility).]

[taking another person as a hostage.]

[causing death or serious bodily harm to another person.]

"Security officer" is an individual employed by a private prison in Arizona who has met or exceeded the minimal training standards established by the American Correctional Association.

"Private contractor" is a person that contracts with any governmental entity to provide detention or incarceration services for prisoners.

The State has the burden of proving beyond a reasonable doubt that the defendant did not act with such justification. If the State fails to carry this burden, then you must find the defendant not guilty of the charge. *[The user is directed to the Prefatory Use Note regarding the applicability of this paragraph.]*

SOURCE: A.R.S. §§ 13-416 (statutory language as of June 26, 1997) and 13-205 (statutory language as of April 24, 2006).

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

4.16(1) – Definition of "Security Officer"

"Security officer" is defined as an individual employed by a private prison in Arizona who has met or exceeded the minimal training standards established by the American Correctional Association.

SOURCE: A.R.S. § 13-416(B) (statutory language as of June 26, 1997).

4.16(2) – Definition of "Private Contractor"

"Private contractor" is defined as a person that contracts with any governmental entity to provide detention or incarceration services for prisoners.

SOURCE: A.R.S. § 13-416(C) (statutory language as of June 26, 1997).

4.17 – Necessity Defense

The defendant was justified in engaging in conduct that constituted the offense[s] of [_____] if:

1. A reasonable person in the defendant's situation would be compelled to engage in the conduct; *and*

2. The defendant had no reasonable alternative to avoid imminent public or private injury greater than the injury the defendant reasonably believed might have resulted from the conduct constituting the offense[s]; *and*
3. The defendant did not intentionally, knowingly or recklessly place [himself] [herself] in a situation in which it was probable that the defendant would have to engage in the conduct constituting the offense[s].

You must measure the defendant's belief against what a reasonable person in the situation would have believed.

The State has the burden of proving beyond a reasonable doubt that the defendant did not act with such justification. If the State fails to carry this burden, then you must find the defendant not guilty of the charge. *[The user is directed to the Prefatory Use Note regarding the applicability of this paragraph.]*

SOURCE: A.R.S. §§ 13-417 (statutory language as of July 21, 1997) and 13-205 (statutory language as of April 24, 2006).

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

The court shall instruct on the culpable mental state.

"Intentionally," "knowingly," and recklessly" are defined in A.R.S. § 13-105 (Statutory Definition Instructions 1.0510(a)(1), 1.0510(b), and 1.0510(c)).

COMMENT: A defendant may *not* assert the defense of necessity for offenses involving homicide or serious physical injury. A.R.S. § 13-417(C). For those offenses, the instruction may *not* be given. However, where serious physical injury is an element of a charged offense and the jurors are instructed on a lesser-included offense that does not include the element of serious physical injury, a necessity instruction may be given relating to the lesser-included offense, if supported by the evidence.

The Arizona Supreme Court has required that an instruction under A.R.S. §§ 13-404 and -405 must include a reference to the reasonable person standard. *State v. Grannis,* 183 Ariz. 52, 60-61 (1995). Because A.R.S. § 13-417 requires a reasonable person standard, the direction given in *Grannis* will likely apply in those situations.

4.18 – Justification for Using Force in Defense of Residential Structure or Occupied Vehicles

The defendant was justified in threatening to use or using physical force or deadly physical against another person if the defendant reasonably believed the following:

1. The defendant, or another person, was in imminent peril of death or serious physical injury; *and*
2. [The person against whom the physical force or deadly physical force was threatened or used was in the process of unlawfully or forcefully entering or had unlawfully or forcefully entered a residential structure or occupied vehicle.]

   [The person against whom the physical force or deadly physical force was threatened or used had removed or was attempting to remove [the defendant] [another person]

against the [defendant's] [other person's] will from a residential structure or occupied vehicle.]

"Residential structure" means any structure, movable or immovable, permanent or temporary, that is adapted for both human residence and lodging whether occupied or not.

"Vehicle" means a conveyance of any kind, whether or not motorized, that is designed to transport persons or property.

The defendant has no duty to retreat before threatening or using physical force or deadly physical force.

The State has the burden of proving beyond a reasonable doubt that the defendant did not act with such justification. If the State fails to carry this burden, then you must find the defendant not guilty of the charge. *[The user is directed to the Prefatory Use Note regarding the applicability of this paragraph.]*

SOURCE: A.R.S. §§ 13-418 and 13-205 (statutory language as of April 24, 2006) and 13-1501 (statutory language as of September 30, 2009).

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

When defendant's residential structure or occupied vehicle is involved, the presumption set forth in A.R.S. § 13-419 may apply.

4.19 – Justification: Presumption and Exceptions

The defendant is presumed to reasonably believe that the threat or use of physical force or deadly force is immediately necessary if the defendant knows or has reason to believe that the person against whom physical force or deadly force is threatened or used is unlawfully or forcefully entering or has unlawfully or forcefully entered and is present in the defendant's residential structure or occupied vehicle.

For the purposes of justification, a person who is unlawfully or forcefully entering or who has unlawfully or forcefully entered and is present in a residential structure or occupied vehicle is presumed to pose an imminent threat of unlawful deadly harm to any person who is in the residential structure or occupied vehicle.

These presumptions do *not* apply if:

[The person against whom physical force or deadly physical force was threatened or used had the right to be in or was a lawful resident of the residential structure or occupied vehicle, including an owner, lessee, invitee or titleholder, and an order of protection or injunction against harassment had not been filed against that person.]

[The person against whom physical force or deadly physical force was threatened or used was the parent or grandparent, or had legal custody or guardianship, of a child or grandchild sought to be removed from the residential structure or occupied vehicle.]

[The person who threatened or used physical force or deadly physical force was engaged in an unlawful activity or was using the residential structure or occupied vehicle to further an unlawful activity.]

[The person against whom physical force or deadly physical force was threatened or used was a law enforcement officer who entered or attempted to enter a residential structure or occupied vehicle in the performance of official duties.]

["Residential structure" means any structure, movable or immovable, permanent or temporary, that is adapted for both human residence and lodging whether occupied or not.]

["Vehicle" means a conveyance of any kind, whether or not motorized, that is designed to transport persons or property.]

SOURCE: A.R.S. §§ 13-419 (statutory language as of July 20, 2011) and 13-1501 (statutory language as of September 30, 2009); *State v. Abdi,* 226 Ariz. 361 (App. 2011).

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

When the defendant's residential structure or occupied vehicle is involved, the presumption applies to the justification defenses set forth in A.R.S. §§ 13-404–408, and 13-418.

4.21 – Justification: Defensive Display of a Firearm

The defendant is justified in defensively displaying a firearm if a reasonable person would have believed that physical force was immediately necessary to protect himself/herself against the [use] [attempted use] of unlawful [physical force] [deadly physical force].

The defendant was not justified in displaying a firearm if:

[The defendant intentionally provoked another person to [use] [attempt to use] unlawful physical force.]

[The defendant used a firearm during the commission of a (list serious offense from A.R.S. § 13-706) (list violent crime from A.R.S. § 13-901.03)].

"Defensive display of a firearm" includes:

1. verbally informing another person that the person possesses or has available a firearm.
2. exposing or displaying a firearm in a manner that a reasonable person would understand was meant to protect the person against another's use or attempted use of unlawful physical force or deadly physical force.
3. placing the person's hand on a firearm while the firearm is contained in a pocket, purse or other means of containment or transport.

[The defendant was not required to defensively display a firearm before using physical force or threatening physical force that was otherwise justified.]

The State has the burden of proving beyond a reasonable doubt that the defendant did not defensively display a firearm. If the State fails to carry this burden, then you must find the defendant not guilty of the charge. *[The user is directed to the Prefatory Use Note regarding the applicability of this paragraph.]*

SOURCE: A.R.S. § 13-421 (statutory language as of September 30, 2009).

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

The court should instruct on the culpable mental state.

"Knowingly" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.05(9b)).

"Intentionally" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.05(9a)).

"Physical Force" and "Deadly Physical Force" are defined in A.R.S. § 13-105 (Statutory Definition Instructions 1.05(12) & (28)).

"Unlawful" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0540).

"Firearm" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0519).

"Possess" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0534).

"Possession" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0535).

Paragraph C of the statute provides that the defensive display of a firearm by the defendant is not required before the use or threat of physical force by a defendant who was otherwise justified in the use or threatened use of physical force.

If the Court is instructing the jury on the second bracketed item of when the justification does not apply, the Court must specify the serious crime or violent crime that the defendant is alleged to have committed.

If the defense asserts that another person committed the charged act, the defendant is still entitled to justification instructions so long as they are supported by the slightest evidence. *State v. Carson*, 243 Ariz. 463 (2018).

CHAPTER 5

5.02 – Insanity (Not Guilty by Reason of Insanity) (for offenses committed prior to January 2, 1994)

You must determine from the evidence whether the defendant was insane at the time the crime was committed.

A defendant is not responsible for criminal conduct by reason of insanity if at the time of such conduct the defendant was suffering from such a mental disease or defect as not to know the nature and quality of the act, or if the defendant did know, the defendant nonetheless did not know that the conduct was wrong.

The defendant must prove insanity by clear and convincing evidence, which means it is highly probably that the defendant was insane. This is a lesser standard of proof than "beyond a reasonable doubt."

SOURCE: A.R.S. § 13-502 (statutory language as of September 15, 1989); *State v. King,* 158 Ariz. 419, 424 (1988).

USE NOTE: This instruction should be used for offenses committed prior to January 2, 1994. For offenses committed after that date, Statutory Criminal Instruction 5.02 must be used. *See State v. Fletcher*, 149 Ariz. 187, 192 (1986) (holding that the burden of proof is substantive and a defendant is entitled to have the burden of proof applied "as it existed at the time of his crime.").

A.R.S. § 13-502(B) places the burden of proof on the defendant. The jury should be told about this burden, because it is an exception to the prosecution's general burden of proof of all elements of the crime. *State v. King,* 158 Ariz. 419, 424 (1988) (holding that jurors should be informed that "clear and convincing evidence is evidence that makes the existence of the issue propounded 'highly probable.'").

The insanity defense is limited to cognitive defects and does not include emotional insanity, irresistible impulse or partial impairment. *State v. Howland,* 134 Ariz. 541 (App. 1982).

A special verdict on insanity is required under A.R.S. § 13-502(C).

COMMENT: "The State continues to have the burden of establishing beyond a reasonable doubt the elements of the crime charged, including any culpable mental state required for commission of the crime. *State v. Fletcher,* 149 Ariz. at 192, *citing County Court of Ulster County v. Allen,* 442 U.S. 140, 156 (1979).

Lay testimony is admissible on the issue of insanity; precluding it may result in reversible error. Expert testimony is not required. *State v. Bay,* 150 Ariz. 112, 116 (1986).

5.02-1 – Insanity (Guilty Except Insane) (for offenses committed on or after January 2, 1994)

You must determine from the evidence whether the defendant was guilty except insane at the time the crime was committed.

A defendant is guilty except insane if at the time of the crime the defendant was afflicted with a mental disease or defect of such severity that the defendant did not know the criminal act was wrong.

The defendant must prove guilty except insane by clear and convincing evidence, which means that it is highly probable that the defendant was insane. This is a lesser standard of proof than "beyond a reasonable doubt."

A mental disease or defect does not include disorders that result from acute voluntary intoxication or withdrawal from alcohol or drugs, character defects, psychosexual disorders or impulse control disorders.

Conditions that do not constitute insanity include, but are not limited to:

[momentary, temporary conditions arising from the pressure of the circumstances]

[moral decadence]

[depravity]

[passion growing out of anger, jealousy, revenge, hatred]

[passion growing out of other motives in a person who does not suffer from a mental disease or defect or an abnormality that is manifested only by criminal conduct]

SOURCE: A.R.S. § 13-502 (statutory language as of 1996); *State v. King,* 158 Ariz. 419, 424 (1988) (holding that the jurors should be informed that "clear and convincing evidence is evidence that makes the existence of the issue propounded 'highly probable.'").

USE NOTE: This instruction must be used for offenses committed on and after January 2, 1994. For offenses committed prior to that date, Statutory Criminal Instruction 5.02-2 must be used. *See State v. Fletcher*, 149 Ariz. 187, 192 (1986) (holding that the burden of proof is substantive and a defendant is entitled to have the burden of proof applied "as it existed at the time of his crime").

Use the language in brackets as appropriate to the facts.

The court shall instruct on "affirmative defense" so as to inform the jury on the burden of proof.

"Affirmative defense" is defined in A.R.S. § 13-205 (Statutory Definition Instruction 2.025).

Because the burden of proof for the defendant is clear and convincing for insanity, but only preponderance of the evidence for intoxication, the court shall use Standard Criminal Instruction 4(b), which discusses the different burdens of proof.

"Intoxication," and "voluntary intoxication" are defined in A.R.S. § 13-105 (Statutory Definition Instructions 1.0524 and 1.0543).

If a defense of involuntary intoxication is raised, the trial court should instruct the jury on A.R.S. § 13-503 (Statutory Criminal Instructions 5.03-1a, 5.03-1b, 5.03-2a and/or 5.03-2b).

Because this defense requires a lesser standard of proof than the State's burden, the trial court should use Standard Criminal Instruction 4(b) so that the jury is apprised of the different standards of proof.

COMMENT: "The State continues to have the burden of establishing beyond a reasonable doubt the elements of the crime charged, including any culpable mental state required for commission of the crime." *State v. Fletcher,* 149 Ariz. at 192, *citing County Court of Ulster County v. Allen,* 442 U.S. 140, 156 (1979).

Lay testimony is admissible on the issue of insanity; precluding it may result in reversible error. Expert testimony is not required. *State v. Bay,* 150 Ariz. 112, 116 (1986).

It is an open question whether a defendant who is found guilty of the charged offense is entitled to a retrial on the "guilty except insane" issue if the jury was not unanimous on that issue. *See United States v. Southwell*, 432 F.3d 1050 (9th Cir. 2005). The issue may need to be addressed in the form of verdict.

5.02-2 – Insanity (Not Guilty by Reason of Insanity) (for offenses committed prior to January 2, 1994)

You must determine from the evidence whether the defendant was insane at the time the crime was committed.

A defendant is not responsible for criminal conduct by reason of insanity if at the time of such conduct the defendant was suffering from such a mental disease or defect as not to know the nature and quality of the act, or if the defendant did know, the defendant nonetheless did not know that the conduct was wrong.

The defendant must prove insanity by clear and convincing evidence, which means it is highly probable that the defendant was insane. This is a lesser standard of proof than "beyond a reasonable doubt."

SOURCE: A.R.S. § 13-502 (statutory language as of September 15, 1989)**;** *State v. King,* 158 Ariz. 419, 424 (1988).

USE NOTE: This instruction must be used for offenses committed prior to January 2, 1994. For offenses committed after that date, Statutory Criminal Instruction 5.02-1 must be used. *See State v. Fletcher*, 149 Ariz. 187, 192 (1986) (holding that the burden of proof is substantive and a defendant is entitled to have the burden of proof applied "as it existed at the time of his crime.").

A.R.S. § 13-502(B) places the burden of proof on the defendant. The jury **must** be told about this burden, because it is an exception to the prosecution's general burden of proof of all elements of the crime. *State v. King,* 158 Ariz. 419, 424 (1988) (holding that jurors should be informed that "clear and convincing evidence is evidence that makes the existence of the issue propounded 'highly probable.'").

"Affirmative defense" is defined in A.R.S. § 13-205 (Statutory Definition Instruction 2.025).

Because the burden of proof for the defendant is clear and convincing for insanity, but only preponderance of the evidence for intoxication, the court shall use Standard Criminal Instruction 4(b), which discusses the different burdens of proof.

The insanity defense is limited to cognitive defects and does not include emotional insanity, irresistible impulse or partial impairment. *State v. Howland,* 134 Ariz. 541 (App. 1982).

A special verdict on insanity is required under A.R.S. § 13-502(C).

COMMENT: "The State continues to have the burden of establishing beyond a reasonable doubt the elements of the crime charged, including any culpable mental state required for commission of the crime." *State v. Fletcher,* 149 Ariz. at 192, *citing County Court of Ulster County v. Allen,* 442 U.S. 140, 156 (1979).

Lay testimony is admissible on the issue of insanity; precluding it may result in reversible error. Expert testimony is not required. *State v. Bay,* 150 Ariz. 112, 116 (1986).

5.03-1a – Effect of Non-Prescribed Alcohol or Drug Use or Abuse of Prescribed Medication (Non-Insanity Case)

It is not a defense to any criminal act if the criminal act(s) [was] [were] committed due to temporary intoxication resulting from the voluntary [ingestion] [consumption] [inhalation] [injection] of [alcohol] [illegal substance(s)] [psychoactive substance(s)] [abuse of prescribed medication(s)].

SOURCE: A.R.S. § 13-503 (statutory language as of January 2, 1994).

USE NOTE: Use this instruction when a defense is raised as to voluntary intoxication in a case in which insanity is not a defense. If insanity has been raised as a defense, the trial court shall use this instruction and Statutory Criminal Instructions 5.02 and 5.03-1b.

Use the language in brackets as appropriate to the facts.

"Intoxication," and "voluntary intoxication" are defined in A.R.S. § 13-105 (Statutory Definition Instructions 1.0524 and 1.0543).

If there is any evidence to support a defense of temporary intoxication caused by the defendant's nonabusive use of prescribed medication or a prescribed psychoactive substance, the court shall also instruct on Statutory Criminal Instruction 5.03-2a, along with this Instruction.

COMMENT: The defense of temporary intoxication can be asserted arising from the nonabusive use of prescription medication to negate the requisite state of mind for a criminal act. *State v. McKeon,* 201 Ariz. 571, 575 (App. 2002).

A psychoactive substance that was prescribed to the defendant and was used in a nonabusive manner should be considered as nonabusive use of prescription medicine. *State v. McKeon,* 201 Ariz. 571, 574-75 (App. 2002).

5.03-1b – Effect of Non-Prescribed Alcohol or Drug Use or Abuse of Prescribed Medication (Insanity Case)

A defendant cannot be considered guilty except insane in committing the offense(s) charged if the offense(s) [was] [were] committed due to temporary intoxication resulting from the voluntary [ingestion] [consumption] [inhalation] [injection] of [alcohol] [illegal substance(s)] [psychoactive substance(s)] [abuse of prescribed medication(s)].

SOURCE: A.R.S. § 13-503 (statutory language as of January 2, 1994).

USE NOTE: Use this Instruction when a defense is raised as to voluntary intoxication in a case in which insanity is a defense. If insanity has not been raised as a defense, but voluntary intoxication is an issue, the trial court should instead use Statutory Criminal Instruction 5.03-1a.

The court shall also instruct on guilty except insane (Statutory Criminal Instruction 5.02).

Use the language in brackets as appropriate to the facts.

"Intoxication," and "voluntary intoxication" are defined in A.R.S. § 13-105 (Statutory Definition Instructions 1.0524 and 1.0543).

If there is any evidence to support a defense of temporary intoxication caused by the defendant's nonabusive use of prescribed medication or a prescribed psychoactive substance, the court shall also instruct on Statutory Criminal Instruction 5.03-2b, along with this Instruction.

COMMENT: The defense of temporary intoxication can be asserted arising from the nonabusive use of prescription medication to negate the requisite state of mind for a criminal act. *State v. McKeon,* 201 Ariz. 571, 575 (App. 2002).

A psychoactive substance that was prescribed to the defendant and was used in a nonabusive manner should be considered as nonabusive use of prescription medicine. *State v. McKeon,* 201 Ariz. 571, 574-75 (App. 2002).

5.03-2a – Effect of Non-Abusive Use of Prescribed Medication (Non-Insanity Case)

A defendant may be justified in committing the offense(s) charged if the offense(s) [was] [were] committed due to temporary intoxication resulting from the voluntary non-abusive [ingestion] [consumption] [inhalation] [injection] of [prescribed medication(s)] [prescribed psychoactive substance(s)].

SOURCE: A.R.S. § 13-503 (statutory language as of January 2, 1994); *State v. McKeon,* 201 Ariz. 571 (App. 2002).

USE NOTE: Use this instruction only if there is any evidence that the defense is based upon the defendant's non-abusive use of prescribed medication or a prescribed psychoactive substance, and insanity has not been raised a defense. If insanity has been raised as a defense, the trial court shall use this instruction and Statutory Criminal Instructions 5.02 and 5.03-2b.

The court shall also instruct on Statutory Criminal Instruction 5.03-1a and/or Statutory Criminal Instruction 5.03-1b.

Use the language in brackets as appropriate to the facts.

The court shall instruct on "affirmative defense" so as to inform the jury on the burden of proof.

"Affirmative defense" is defined in A.R.S. § 13-205 (Statutory Definition Instruction 2.025).

Because the burden of proof for the defendant is a preponderance of the evidence, the court shall use Standard Criminal Instruction 4(b), which discusses the different burdens of proof.

"Intoxication," and "voluntary intoxication" are defined in A.R.S. § 13-105 (Statutory Definition Instructions 1.0524 and 1.0543).

COMMENT: The defense of temporary intoxication can be asserted arising from the nonabusive use of prescription medication to negate the requisite state of mind for a criminal act. *State v. McKeon,* 201 Ariz. 571, 575 (App. 2002).

A psychoactive substance that was prescribed to the defendant should be considered as a prescription medicine, even though the statute seems to differentiate them. *State v. McKeon,* 201 Ariz. 571, 574-75 (App. 2002).

5.03-2b – Effect of Non-Abusive Use of Prescribed Medication (Insanity Case)

A defendant may be considered guilty except insane in committing the offense(s) charged if the offense(s) [was] [were] committed due to temporary intoxication resulting from the voluntary non-abusive [ingestion] [consumption] [inhalation] [injection] of [prescribed medication(s)] [prescribed psychoactive substance(s)].

SOURCE: A.R.S. § 13-503 (statutory language as of January 2, 1994); *State v. McKeon,* 201 Ariz. 571, 38 P.3d 1236 (App. 2002).

USE NOTE: Use this instruction only if there is any evidence that the defense is based upon the defendant's non-abusive use of prescribed medication or a prescribed psychoactive substance, and insanity has been raised a defense. If insanity has not been raised as a defense, the trial court should use instead Statutory Criminal Instruction 5.03-2a.

The court shall also instruct on Statutory Criminal Instructions 5.02, 5.03-1a and 5.03-1b.

Use the language in brackets as appropriate to the facts.

The court shall instruct on "affirmative defense" so as to inform the jury on the burden of proof.

"Affirmative defense" is defined in A.R.S. § 13-205 (Statutory Definition Instruction 2.025).

Because the burden of proof for the defendant is a preponderance of the evidence, the court shall use Standard Criminal Instruction 4(b), which discusses the different burdens of proof.

"Intoxication," and "voluntary intoxication" are defined in A.R.S. § 13-105 (Statutory Definition Instructions 1.0524 and 1.0543).

COMMENT: The defense of temporary intoxication can be asserted arising from the nonabusive use of prescription medication to negate the requisite state of mind for a criminal act. *State v. McKeon,* 201 Ariz. 571, 575 (App. 2002).

A psychoactive substance that was prescribed to the defendant should be considered as a prescription medicine, even though the statute seems to differentiate them. *State v. McKeon,* 201 Ariz. 571, 574-75 (App. 2002).

CHAPTER 7

7.03A – Not Committed on Same Occasion But Consolidated for Purposes of Trial

The State has alleged that Counts [list the count numbers] were committed on different occasions. In deciding whether these offenses were committed on the same occasion or on different occasions, factors to be considered include, but are not limited to:

1. Time;
2. Place;
3. Number of victims;
4. Whether the crimes were continuous and uninterrupted; and
5. Whether the offenses were part of a single criminal episode.

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 these offenses were committed on the same occasion or on different occasions.

The State bears the burden of proving beyond a reasonable doubt that the defendant committed the offenses on different occasions.

SOURCE: A.R.S. § 13-703(A); *State v. Ortiz,* 238 Ariz. 329, 343 ¶ 64 (App. 2015); *State v. Kelly*, 190 Ariz. 532, 534 (1997).

USE NOTE: The court should submit this allegation, and provide this instruction, in a bifurcated proceeding, after the jury returns verdicts in the guilt phase of the trial. *See* Ariz. R. Crim. P. 19.1(c); *State v. Patterson*, 230 Ariz. 270, 277 ¶¶ 29-30 (2012).

COMMENT: In *State v. Ortiz,* 238 Ariz. 329, 343 ¶ 64 (App. 2015), the court held that the allegation that offenses were committed on different occasions must be submitted to the jury under *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

7.04 – Definition of "Dangerous Offense"

An offense is a dangerous offense if it involved [the intentional or knowing infliction of serious physical injury] [the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument]. The State has the burden of proving beyond a reasonable doubt that the offense was a dangerous offense. Your finding on this issue must be unanimous.

SOURCE: A.R.S. § 13-105(13) (statutory language as of January 1, 2009).

USE NOTE: Dangerousness must be found by the jury except when it is an element of the offense. This instruction should be used during the aggravation phase for any offense that is alleged to be dangerous when the dangerous nature of the offense is not an element of the offense. Ariz. R. Crim. P. 19.1(c)(2)(B); *State v. Patterson,* 230 Ariz. 270 (2012). Use bracketed language as appropriate to the case.

"Serious physical injury" is defined in A.R.S. § 13-105(39) (Statutory Definition Instruction 1.0539).

"Deadly weapon" is defined in A.R.S. § 13-105(15) (Statutory Definition Instruction 1.0515).

"Dangerous instrument" is defined in A.R.S. § 13-105(12) (Statutory Definition Instruction 1.0512).

"Intentional" is defined in A.R.S. § 13-105(10)(a) (Statutory Definition Instruction 1.0510(a)(1)).

"Knowingly" is defined in A.R.S. § 13-105(10)(b) (Statutory Definition Instruction 1.0510(b)).

COMMENT: The infliction of serious physical injury must be done intentionally or knowingly to be a dangerous offense. Those mental states are not required for the use or threatening exhibition of a deadly weapon or a dangerous instrument to be a dangerous offense. *State v. Garcia*, 165 Ariz. 547 (App. 1990); *State v. Tamplin*, 146 Ariz. 377 (App. 1985); *State v. Venegas*, 137 Ariz. 171 (App. 1983).

7.05 – Dangerous Crime Against a Child

An offense is a dangerous crime against a child if the defendant's conduct was focused on, directed against, aimed at, or targeted a victim under the age of fifteen.

The defendant need not have known that the victim was under the age of fifteen.

[It is not a defense to a dangerous crime against children that the minor is [a person posing as a minor] [fictitious] if the defendant knew or had reason to know the purported minor was under fifteen years of age.]

SOURCE: A.R.S. § 13-705 (statutory language as of August 3, 2018); *State v. Sepahi*, 206 Ariz. 321 (2003).

USE NOTE: Use the bracketed language when appropriate.

COMMENT: If appropriate, this instruction should only be given in an aggravation phase. Rule 19.1(c), (d); *see State v. Patterson,* 230 Ariz. 270, 283 (2012).

In *State v. Sepahi*, 206 Ariz. 321 ¶ 1 (2003), the court rejected an interpretation of A.R.S. § 13-604.01 (now § 13-705) that would have required a finding that the defendant "was 'particularly dangerous to children' or that he 'pose[s] a direct and continuing threat to the children of Arizona.'" The court held that "in order to prove that a defendant has committed a dangerous crime against a child, the State must prove that the defendant committed one of the statutorily enumerated crimes and that his conduct was 'focused on, directed against, aimed at, or target[ed] a victim under the age of fifteen.'" *Id.* at ¶ 19; *see also State v. Williams*, 175 Ariz. 98 (1993). The defendant need not know the victim's age; however, the statute is not intended to apply to a defendant who fortuitously injures a child by "unfocused conduct." *Sepahi*, ¶¶ 11, 12, *citing Williams*. *Williams* also notes that "[a]s a practical matter, the question of whether the child victim is the target of the defendant's conduct will rarely be an issue given the nature of the crimes listed in [§ 13-705(P)]."

Because A.R.S. § 13-705 subjects a defendant who has been found to have committed a dangerous crime against a child to enhanced sentencing ranges, the Committee is of the opinion that where the element of the charged offense does not require a finding that the victim was a minor, a jury must make this finding to satisfy the requirements of *Blakely v. Washington*, 542 U.S. 296 (2004).

The sentence under A.R.S. § 13-705 differs depending on the age of the victim. Therefore, the jury will still have to find the age of the child as part of its verdict. In *State v. Hollenback*, 212 Ariz. 12 (App. 2005), the court approved the use of a jury interrogatory as part of a verdict form asking the jury whether the State had proven the victims were less than twelve years of age.

Conspiracy to commit a dangerous crime against children is still considered a preparatory offense—even if the conspiracy is completed—and is a dangerous crime against children in the second degree. *State v. Allen*, 248 Ariz. 352 (2020).

7.05 – Verdict Form

[Complete this portion of the verdict form only if you find that the offense was a dangerous crime against a child.]

We the jury, duly empanelled and sworn in the above entitled action, upon our oaths, do find that (check only one):

[_____ the defendant was at least eighteen years of age and the victim was under twelve years of age.]

[_____ the defendant was at least eighteen years of age and the victim was twelve years of age or younger.]

[_____ the defendant was at least eighteen years of age and the victim was under fifteen years of age but at least twelve years old.]

USE NOTE: This interrogatory should be presented along with the standard aggravating factor verdict form. The sentence under A.R.S. § 13-705 differs depending on the age of the victim. Therefore, the jury will still have to find the age of the child as part of its aggravation verdict. In *State v. Hollenback*, 212 Ariz. 12 (App. 2005), the court approved the use of a jury interrogatory as part of a verdict form asking the jury whether the state had proven the victims were less than twelve years of age.

Which of the bracketed alternatives to use depends on which subsection of § 13-705 is charged.

7.08-C – Release Status

The State alleges that Defendant committed the offense of "[insert name of offense on which jury found defendant guilty]" while [he/she] [was on probation for a conviction of a felony offense] [was on parole, work furlough, community supervision or any other release following a conviction of a felony offense] [escaped from confinement following a felony conviction] in [insert case number]. The law provides that the jury must decide whether an

allegation of commission of a felony [while on probation for a conviction of a felony offense] [while on parole, work furlough, community supervision or any other release following a conviction of a felony offense] [after escape from confinement following a felony conviction] is proven or not proven.

Defendant has denied this allegation.

You must now determine whether the allegation that Defendant [was on probation for a conviction of a felony offense] [was on parole, work furlough, community supervision or any other release following a conviction of a felony offense] [escaped from confinement following a felony conviction] in [insert case number] at the time [he/she] committed the crime of "[insert name of offense on which jury found defendant guilty]" is proven or not proven. You must consider all the instructions I have previously given to you, together with the following instructions:

To prove the allegation that Defendant [was on probation for a conviction of a felony offense] [was on parole, work furlough, community supervision or any other release following a conviction of a felony offense] [escaped from confinement following a felony conviction] at the time [he/she] committed the crime of "[insert name of offense on which jury found defendant guilty]," the State must prove beyond a reasonable doubt that:

1. Defendant had been convicted of a felony offense prior to [insert date of offense on which defendant was found guilty]; *and*
2. Defendant is the person who was convicted of that felony offense; *and*
3. Defendant [was on probation for a conviction of a felony offense] [was on parole, work furlough, community supervision or any other release following a conviction of a felony offense] [had escaped from confinement following a felony conviction] prior to [insert date of offense on which defendant was found guilty]; *and*
4. Defendant knew that [he/she] [was on probation for a conviction of a felony offense] [was on parole, work furlough, community supervision or any other release following a conviction of a felony offense] [had escaped from confinement following a felony conviction] prior to [insert date of offense on which defendant was found guilty]; *and*
5. Defendant committed the offense of "[insert name of offense on which jury found defendant guilty]" while [was on probation for a conviction of a felony offense] [was on parole, work furlough, community supervision or any other release following a conviction of a felony offense] [escaped from confinement following a felony conviction].

The State has the burden of proving each of these five elements beyond a reasonable doubt. In civil cases, it is only necessary to prove that a fact is more likely true than not or that its truth is highly probable. In criminal cases such as this, the state's proof must be more powerful than that. It must be beyond a reasonable doubt.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced that the allegation is true. 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 the allegation is true, you must find that the allegation has been proven. If, on the other hand, you think

there is a real possibility that the allegation is not true, you must give [him/her] the benefit of the doubt and find that the allegation has not been proven.

In order to reach a verdict, all of you must agree on the verdict. All of you must agree on whether the allegation is proven or not proven. You will be given one form of verdict on which to indicate your decision. It reads as follows and there is no significance to the order in which the options are listed:

SOURCE: A.R.S. § 13-708(C) (statutory language effective January 1, 2009.)

USE NOTE: The following script may be used by the judge prior to giving this instruction:

> Members of the jury, there is another matter that must be presented to you for decision. The State alleges that Defendant committed the offense of "[insert name of offense on which defendant convicted]" while he/she [was on probation for a conviction of a felony offense] [was on parole, work furlough, community supervision or any other release following a conviction of a felony offense] [escaped from confinement following a felony conviction]. The law provides that the jury must decide whether an allegation of commission of a felony while [on probation for a conviction of a felony offense] [on parole, work furlough, community supervision or any other release following a conviction of a felony offense] [escaped from confinement following a felony conviction] is proven or not proven. We estimate that the presentation of evidence and argument on this issue will take about ____ minutes.
>
> I am going to read to you the allegation: [read from the State's notice]
>
> Defendant has denied this allegation.
>
> After the evidence has been presented and counsel have made any arguments, I will give to you and read the jury instruction you are to follow in deciding this issue.
>
> *[Opening Statement, Evidence, Argument]*
>
> *[Read the jury instruction and verdict form.]*

If the § 13-708(C) allegation is being tried at a time other than immediately following the trial on the main offense, other appropriate instructions should be given.

COMMENT: If the conviction on which the allegation made pursuant to A.R.S. § 13-708 is made is "a serious offense as defined by A.R.S. § 13-706," resulted in serious physical injury or "involved the use or exhibition of a deadly weapon or dangerous instrument," the court must sentence the defendant to the maximum sentence allowed by law. If at least two aggravating factors listed in A.R.S. § 13-701(D) are found, the court may increase the sentence by up to twenty-five percent. The court shall also revoke any release status on the prior felony and impose a consecutive sentence on the new offense unless the prior conviction was in another state.

The determination of whether the underlying felony is a serious offense, resulted in serious physical injury or involved the use or exhibition of a deadly weapon or dangerous instrument is probably one for the court to make as a matter of law if the determination can

be made by reference to the statutory definition of the prior offense or to findings made by the sentencing court. *See Cherry v. Araneta*, 203 Ariz. 532 (App. 2002).

7.08-C – Verdict Form

We the jury, duly empanelled and sworn in the above entitled action, and upon our oaths, do find as follows on the allegation that Defendant, [insert defendant's name], committed the offense of "[insert name of offense on which jury found defendant guilty]" while [he/she] [was on probation for a conviction of a felony offense] [was on parole, work furlough, community supervision or any other release following a conviction of a felony offense] [escaped from confinement following a felony conviction] [released on bond] in [insert case number of "release" case] to be:

_____ Proven

_____ Not Proven

_____

Presiding Juror

Printed Name _____

Juror # _____

7.08-D – Release Status

The State alleges that defendant committed the offense of "[insert name of offense on which jury found defendant guilty]" while [he/she] [was released on bond] [was released on his/her own recognizance] [escaped from preconviction custody] on another felony charge in [insert case number]. The law provides that the jury must decide whether an allegation of commission of a felony [while on release] [after escape from preconviction custody] on another felony charge is proven or not proven.

Defendant has denied this allegation.

You must now determine whether the allegation is proven or not proven. You must consider all the instructions I have previously given to you, together with the following instructions:

The State must prove beyond a reasonable doubt that:

1. This defendant had [been released on bond] [been released on his/her own recognizance] [escaped from preconviction custody] on a separate felony offense prior to [insert date of offense on which defendant was found guilty]; *and*
2. This defendant committed the offense of "[insert name of offense on which jury found defendant guilty]" while [released on bond] [on his/her own recognizance] [escaped from preconviction custody].

The State has the burden of proving each of these two elements beyond a reasonable doubt. In civil cases, it is only necessary to prove that a fact is more likely true than not or

that its truth is highly probable. In criminal cases such as this, the State's proof must be more powerful than that. It must be beyond a reasonable doubt.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced that the allegation is true. 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 the allegation is true, you must find that the allegation has been proven. If, on the other hand, you think there is a real possibility that the allegation is not true, you must give [him/her] the benefit of the doubt and find that the allegation has not been proven.

In order to reach a verdict, all of you must agree on the verdict. All of you must agree on whether the allegation is proven or not proven. You will be given one form of verdict on which to indicate your decision. It reads as follows and there is no significance to the order in which the options are listed:

SOURCE: A.R.S. § 13-708(D) (statutory language effective January 1, 2009.)

USE NOTE: The following script may be used by the judge prior to giving this instruction:

> Members of the jury, there is another matter that must be presented to you for decision. The State alleges that Defendant committed the offense of "[insert name of offense on which defendant convicted]" while he was [released on bond] [released on his/her own recognizance] [had escaped from preconviction custody] on another felony charge. The law provides that the jury must decide whether an allegation of commission of a felony while [on release] [on escape status] on another felony charge is proven or not proven. We estimate that the presentation of evidence and argument on this issue will take about _____ minutes.
>
> I am going to read to you the allegation: [read from the State's notice]
>
> Defendant has denied this allegation.
>
> After the evidence has been presented and counsel have made any arguments, I will give to you and read the jury instruction you are to follow in deciding this issue.
>
> *[Opening Statement, Evidence, Argument]*
>
> *[Read the jury instruction and verdict form.]*

If the § 13-708(D) allegation is being tried at a time other than immediately following the trial on the main offense, other appropriate instructions must be given.

COMMENT: The allegation made pursuant to A.R.S. § 13-708(D) (formerly § 13-604(R)) that the defendant committed the offense while on release status from the commission of another felony offense must be tried to a jury. *State v. Beasley*, 205 Ariz. 334 (App. 2003). If proved, two years must be added to the defendant's sentence. Release status must be determined by a jury beyond a reasonable doubt. *State v. Gross,* 201 Ariz. 41 (App. 2001); *see also State v. Benenati,* 203 Ariz. 235 (App. 2002) (agreeing with *Gross* and holding that release status adding two years to sentence as enhancement under§ 13-604(R) [now § 13-708(D)] must be determined by a jury in light of *Apprendi*).

7.08-D – Verdict Form

We the jury, duly empanelled and sworn in the above entitled action, and upon our oaths, do find as follows on the allegation that Defendant, [insert defendant's name], committed the offense of "[insert name of offense on which jury found defendant guilty]" while [released on bond] [released on his/her own recognizance] [escaped from preconviction custody] on another felony charge in [insert case number of "release" case] to be:

_____ Proven

_____ Not Proven

_____

Presiding Juror

Printed Name _____

Juror # _____

CHAPTER 10

10.01 – Attempt

The crime of attempted _____ requires proof that the defendant:

1. intentionally engaged in conduct that would have been a crime if the circumstances relating to the crime were as the defendant believed them to be; or
2. intentionally [committed][failed to commit] any act that was a step in a course of conduct that the defendant [planned would end] [believed would end] in the commission of a crime; *or*
3. engaged in conduct intended to aid another person to commit a crime, in a manner that would make the defendant an accomplice, had the crime been committed or attempted by the other person.

SOURCE: A.R.S. § 13-1001 (statutory language as of October 1, 1978); *State v. Nunez,* 159 Ariz. 594, 596 (App. 1989); *State v. Adams,* 155 Ariz. 117, 119 (App. 1987).

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

"Intentionally" is defined in A.R.S. § 13-105(10)(a) (Statutory Definition Instruction 1.0510(a)(1)).

Use language in brackets as appropriate to the facts.

The court shall instruct on the Statutory Criminal Instruction 3.01 – Accomplice.

Factual impossibility is not a defense to an attempted crime; "words may be acts sufficient to sustain a conviction for an attempt when viewed in the light of the circumstances in which they were uttered." *State v. Carlisle,* 198 Ariz. 203, 207 (App. 2000), quoting *State v. Dale*, 121 Ariz. 433, 435 (1979).

Attempted conspiracy is not a cognizable offense. *State v. Sanchez,* 174 Ariz. 44, 47 (App. 1993).

There is no cognizable offense of attempted second degree murder as to the subsection relating to reckless conduct because reckless conduct is an unintended consequence. *State v. Curry*, 187 Ariz. 623, 627 (App. 1996). Likewise, attempted manslaughter is not a cognizable offense. *State v. Adams,* 155 Ariz. 117, 120 (App. 1987).

Attempted second degree murder requires proof that the defendant either intended to or knowingly attempted to cause the death of another; it is not sufficient to show that the defendant intended to do serious bodily harm. *State v. Ontiveros*, 206 Ariz. 539, 541 (App. 2003).

10.02 – Solicitation

The crime of solicitation to commit [insert name of crime] requires proof that the defendant:

1. intended to promote or facilitate the commission of [insert name of crime]; *and*
2. [encouraged, commanded, requested, or solicited another person to engage in specific conduct that would constitute [insert name of crime]]

   [encouraged, commanded, requested, or solicited another person to engage in specific conduct that would establish the other person's complicity in the commission of [insert name of crime]].

SOURCE: A.R.S. § 13-1002 (statutory language as of April 23, 1980).

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

The court shall instruct on the culpable mental state.

"Intent" is defined in A.R.S. § 13-105(10)(a) (Statutory Definition Instruction 1.0510(a)(1)).

Depending on the type of offense, the court may need to submit a special form of verdict to determine the class of the crime solicited, *e.g.*, a theft or criminal damage case.

COMMENT: Solicitation does not apply to a peace officer acting in his official capacity, in the line of duty, and within the scope of authority, *e.g.*, as an undercover agent. A.R.S. § 13-1002(A).

10.031 – Elements of Conspiracy

The crime of conspiracy to commit _____ requires proof:

1. The defendant agreed with one or more persons that one of them or another person would engage in certain conduct; and
2. The defendant intended to promote or assist in the commission of such conduct; and
3. The intended conduct would constitute the crime charged], and the defendant knew that such conduct was a crime[.] [; *and*]
4. [An overt act was committed in furtherance of such conduct.]

SOURCE: A.R.S. § 13-1003 (statutory language as of October 1, 1978); *State v. Gunnison*, 127 Ariz. 110, 114 (1980).

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

"Intentionally" is defined in A.R.S. § 13-105(10)(a) (Statutory Definition Instruction 1.0510(a)(1)).

Use language in brackets as appropriate to the facts.

Ignorance of the law is not among the elements of the mental state of "knowingly" defined in A.R.S. § 13-105(10)(b), and hence the claim of ignorance of the law is no defense.

State v. Morse, 127 Ariz. 25, 31 (1980). The State must show that the defendant participated in a known, criminal agreement; it does not appear necessary under A.R.S. § 13-1003 to prove that the defendant knew the statutory provision or intended to violate a specific law.

Paragraph 4 should be omitted where an overt act is not required. An overt act is not required for felonies against a person, arson of an occupied structure, and burglary in the first degree. A.R.S. § 13-1003(A).

If the defendant knows or has reason to know that the person with whom he or she conspired has conspired with another person to commit the same offense, the defendant is guilty of conspiring to commit the offense with the third person even if the third person's identity is unknown. A.R.S. § 13-1003(B).

COMMENT: *State v. Gunnison,* 127 Ariz. 110, 114 (1980) held that the defendant had to know that the underlying act of the conspiracy was a criminal act.

10.032 – Relationship Among Multiple Co-Conspirators [Deleted]

10.033 – Liability for a Single Conspiracy to Commit Multiple Offenses

A person who conspired to commit multiple offenses is guilty of a single conspiracy if each offense that was the object of the conspiracy arose out of the same agreement or relationship.

SOURCE: A.R.S. § 13-1003(C) (statutory language as of October 1, 1978).

USE NOTE: This instruction should not be given in instances where multiple conspiracies, as distinguished from multiple objects within a single conspiracy, are charged. *See Kotteakos v. United States*, 328 U.S. 750, 772 (1946); *Blumenthal v. United States*, 332 U.S. 539, 553 (1947), and their progeny. Because of the possibility of complex instructions in this area, care should be taken to avoid this and other collateral conspiracy instructions when there is no supporting evidence.

10.034 – Verdict Form [Deleted]

Note: The committee chose to delete the recommended verdict form that required jurors to state the specific object[s] they found to be objects of the conspiracy. The charging document and jury instructions should make it clear to the jurors what the charge is and the verdict would be based on those instructions. Any issues that must be determined by a jury that require more specificity should be indicated on the verdict form in every criminal case.

10.035 – Liability for Other Conspirator's Acts [Deleted]

NOTE: The instruction in the 1989 RAJI was based on *Pinkerton v. United States*, 328 U.S. 640 (1946), case. In *State ex rel. Woods v. Cohen*, 173 Ariz. 497 (1992), the Arizona Supreme Court held that *Pinkerton* is not the law in Arizona. In *State v. Portillo*, 179 Ariz. 116

(App. 1994), the court of appeals held that it was reversible error to give the 1989 RAJI instruction.

In Arizona, for a conspirator to be guilty of a substantive crime committed by a co-conspirator, the evidence must be sufficient to support a finding of guilt as a principal or as an accomplice. *State ex rel. Woods v. Cohen*, 173 Ariz. 497 (1992); *State v. Portillo*, 179 Ariz. 116 (App. 1994).

10.036 – Mere Association Not Sufficient for Conspiracy

The fact that persons conduct themselves in a similar manner or associate with each other or assemble together or discuss common aims does not alone prove a conspiracy.

SOURCE: *State v. Sullivan*, 68 Ariz. 81 (1948); *State v. Green*, 117 Ariz. 92 (App. 1977); DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS, 3D ED., § 27.04.

USE NOTE: This instruction is consistent with *State v. Salazar,* 27 Ariz. 620, 625 (App. 1976), which holds that conspiracy is not established by mere knowledge or approval of, or acquiescence in the object of the conspiracy. However, a person who aids and abets with the knowledge of the existence of a conspiracy can be convicted of conspiracy. *Id.*

Because of the complexity of instructions in this area, care should be taken to avoid this and other collateral conspiracy instructions when there is no supporting evidence.

10.037 – Scope of Proof of Conspiracy

To prove a conspiracy, it is not necessary to show a formal meeting or an express agreement. A conspiracy may be inferred from circumstances showing a common criminal objective and does not require proof that all means set forth in the charging document were agreed upon or actually used nor that every person involved was a member of the conspiracy.

SOURCE: DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS, 3D ED., § 27.04.

USE NOTE: The court shall instruct on the Statutory Criminal Instruction 10.031.

If a defendant engages in conduct outside of Arizona that constitutes a conspiracy to commit an offense in Arizona and an act in furtherance of the conspiracy is committed in Arizona by a co-conspirator, there is jurisdiction to proceed in Arizona. *State v. Chan*, 188 Ariz. 272, 275 (App. 1996).

Because of the complexity in this area, care should be taken to avoid collateral conspiracy instructions when there is no supporting evidence.

10.038 – Proof of Membership in Conspiracy

One may become a member of a conspiracy without full knowledge of all the details of the conspiracy. On the other hand, a person who has no knowledge of a conspiracy but happens to act in a way that furthers some object of the conspiracy does not thereby become a conspirator.

Before you find that a defendant or any other person was a member of a conspiracy, the evidence must show beyond a reasonable doubt that the conspiracy was knowingly formed and that the defendant or other person knowingly participated in the unlawful plan with the intent to promote or assist the carrying out of the conspiracy. One who knowingly joins an existing conspiracy is as responsible as an originator or instigator of the conspiracy.

A person understanding the unlawful character of a plan who knowingly encourages, advises, or assists the undertaking thereby also becomes a conspirator.

In determining whether a conspiracy exists, you should consider the actions and statements of all of the alleged participants. However, in determining whether a particular defendant was a member of the conspiracy, you should consider only that person's acts and statements. A person cannot be bound by the acts or statements of other participants until it is established that a conspiracy existed, and that person was one of its members.

SOURCE: *State v. Cohen*, 173 Ariz. 497, 498-501 (1992).

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

"Intentionally" is defined in A.R.S. § 13-105(10)(a) (Statutory Definition Instruction 1.0510(a)(1)).

"Knowingly" is defined in A.R.S. § 13-105(10)(b) (Statutory Definition Instruction 1.0510(b)).

10.039 – Acts and Statements of Co-Conspirators

Acts or statements of any co-conspirator which do not further the conspiracy or which occur before its existence or after its termination may be considered as evidence only against the person making them.

SOURCE: DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS, 3D ED., § 27.06.

USE NOTE: Great care should be given in the introduction of any statements made by a person other than the defendant when the person is not available as a witness. There are confrontation clause concerns that are addressed in *Crawford v. Washington*, 541 U.S. 36 (2004).

If it appears beyond a reasonable doubt from the evidence that a conspiracy existed and that a defendant was one of the members, then any member's statements and acts occurring thereafter may be considered by you as evidence as to that defendant, even though the statements and acts may have occurred in the absence and without the knowledge of that

defendant, provided such statements and acts occurred during the conspiracy and in furtherance of its purpose.

10.0310 – Consideration of Evidence of Success of Conspiracy

In considering the evidence relating to the offense of conspiracy, there may be liability even if the people involved do not succeed in accomplishing their common object. In order for a conspiracy to be proven, it is not necessary that the prosecution show that the conspirators succeeded.

SOURCE: DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS, 3D ED., §§ 27.07 and 27.04.

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

"Knowingly is defined in A.R.S. § 13-105(10)(b) (Statutory Definition Instruction 1.0510(b)).

The court shall instruct on the Statutory Criminal Instructions 10.031 on the "elements of conspiracy" and 10.0312 for "overt act."

10.0312 – "Overt Act" for Conspiracy

An "overt act" is any act knowingly committed by one of the conspirators in an effort to accomplish some object of the conspiracy. This overt act need not be criminal in nature, but it must be an act that tends toward accomplishment of the plan, and it must be knowingly done in furtherance of some object of the conspiracy.

SOURCE: A.R.S. § 13-1003(A) (statutory language as of October 1, 1978); *State v. Dupuy*, 116 Ariz. 151, 153-54 (1977) and *State v. Sullivan*, 68 Ariz. 81, 90 (1948); DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS, 3D ED., § 27.07.

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

"Knowingly" is defined in A.R.S. § 13-105(10)(b) (Statutory Definition Instruction 1.0510(b)).

Proof of an overt act is required to show that some step has been taken toward executing the agreement; any act that corroborates the agreement or shows that the agreement is being put into effect is sufficient. *State v. Gessler,* 142 Ariz. 379, 383 (App. 1984).

This instruction must be given where an overt act is required by statute. It is not required where the object of the conspiracy is the commission of a felony upon the person of another or where an offense under A.R.S. § 13-1508 (burglary) or A.R.S. § 13-1704 (arson) is an object of the conspiracy.

10.0313 – Conspiracy – Guilt of Substantive Offense

The defendant is charged with conspiracy and the crime[s] of _____. These charges are independent, and the evidence should be considered separately for each charge.

SOURCE: *State v. Olea*, 139 Ariz. 280, 294 (App. 1983).

USE NOTE: Commission of a substantive offense and conspiracy to commit it are separate and distinct offenses. *State v. Olea,* 139 Ariz. 280, 294 (App. 1983).

A defendant cannot be convicted of conspiracy if it is based on felony murder or if the defendant had merely the requisite intent to commit the underlying felony; there must be an agreement to kill and an intent to kill or promote or aid in the killing. *Evanchyk v. Stewart*, 202 Ariz. 476, 481 (2002).

10.04 – Facilitation

The crime of facilitation to commit [insert name of crime] requires proof of the following:

1. The defendant, acting with knowledge that another person was committing or intended to commit [insert name of crime], knowingly provided such other person with the means or opportunity for the commission of [insert name of crime]; *and*
2. The defendant's conduct in fact aided the other person in committing the offense.

SOURCE: A.R.S. § 13-1004 (statutory language as of April 23, 1980); *In re Christopher R.*, 191 Ariz. 461, 462 (App. 1997).

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

"Knowingly" is defined in A.R.S. § 13-105(10)(b) (Statutory Definition Instruction 1.0510(b)).

COMMENT: Facilitation does not apply to a peace officer acting in an official capacity within the scope of authority and in the line of duty, *e.g.*, as an undercover agent. A.R.S. § 13-1004(B).

CHAPTER 11

Many of the homicide instructions in the 1989 edition of the RAJI Criminal Instructions contained a comment that "[t]he latest version of § 13-503 makes intoxication a partial defense only to the mental state of intentionally." The comment was based on A.R.S. § 13-503 which, prior to its amendment in 1993, stated:

> § 13-503. Effect of intoxication; consideration by jury
>
> No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition, but when the actual existence of the culpable mental state of *intentionally or with the intent to* is a necessary element to constitute any particular species or degree of offense, the jury may take into consideration the fact that the accused was intoxicated at the time in determining the culpable mental state with which he committed the act.

Laws 1980, Ch. 229, § 6.

A.R.S. § 13-503 now reads:

> Effect of alcohol or drug use
>
> Temporary intoxication resulting from the voluntary ingestion, consumption, inhalation or injection of alcohol, an illegal substance under chapter 34 of this title or other psychoactive substances or the abuse of prescribed medications does not constitute insanity and is not a defense for any criminal act or requisite state of mind.

The exception regarding voluntary intoxication and the mental state of "intentionally" was eliminated. Therefore, the comments in the 1989 edition of the RAJI Criminal Instructions based on the former A.R.S. § 13-503 should be considered incorrect.

Because lesser-included offense instructions are often given with first or second degree murder instructions, the Committee believed it would be helpful to include a sample first degree murder instruction including some possible lesser-included offenses and sample jury verdict form.

11.02 – Negligent Homicide

The crime of negligent homicide requires proof that the defendant:

1. caused the death of another person; *and*
2. failed to recognize a substantial and unjustifiable risk of causing the death of another person.

The risk must be such that the failure to perceive it is a gross deviation from what a reasonable person would observe in the situation.

[The distinction between manslaughter and negligent homicide is this: for manslaughter the defendant must have been aware of a substantial risk and consciously disregarded the risk that [his] [her] conduct would cause death. Negligent homicide only requires that the defendant failed to recognize the risk.]

[If you determine that the defendant is guilty of either manslaughter or negligent homicide but you have a reasonable doubt as to which it was, you must find the defendant guilty of negligent homicide.]

SOURCE: A.R.S. § 13-1102 (statutory language as of August 12, 2005.)

USE NOTE: Use the bracketed language if this instruction is given as a lesser-included offense instruction.

Because the culpable mental state is included in the instruction, there is no need to add any additional language.

COMMENT: The statute provides that it "applies to an unborn child in the womb at any stage of its development" and then gives three exceptions to its application. *See* A.R.S. § 13-1102(B).

"Negligent homicide is distinguished from reckless manslaughter in that for the latter offense, the defendant is aware of the risk of death and consciously disregards it, whereas, for the former offense, he is unaware of the risk." *State v. Walton*, 133 Ariz. 282, 291 (App. 1982).

11.03A1 – Manslaughter (Reckless)

The crime of manslaughter requires proof that the defendant:

1. caused the death of another person; *and*
2. was aware of and showed a conscious disregard of a substantial and unjustifiable risk of death.

The risk must be such that disregarding it was a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

[It is no defense that the defendant was unaware of the risk solely by reason of voluntary intoxication as a result of the ingestion of alcohol or drugs.]

[Second degree murder and manslaughter may both result from recklessness. The difference is that the culpable recklessness involved in manslaughter is less than the culpable recklessness involved in second degree murder.]

[If you determine that the defendant is guilty of either second degree murder or manslaughter but you have a reasonable doubt as to which it was, you must find the defendant guilty of manslaughter.]

SOURCE: A.R.S. § 13-1103(A)(1) (statutory language as of August 12, 2005).

USE NOTE: Include the first bracketed paragraph only if there is evidence that the defendant was intoxicated.

Use both the second and third bracketed paragraphs if this instruction is given as a lesser-included offense instruction.

COMMENT: The statute provides that it "applies to an unborn child in the womb at any stage of its development" and then gives three exceptions to its application. *See* A.R.S. § 13-1103(B).

11.03A2 – Manslaughter by Sudden Quarrel or Heat of Passion

The crime of manslaughter by sudden quarrel or heat of passion requires proof that:

1. a. The defendant intentionally killed another person; *or*

   b. The defendant caused the death of another person by conduct which the defendant knew would cause death or serious physical injury; *or*

   c. Under circumstances which showed an extreme indifference to human life, the defendant caused the death of another person by consciously disregarding a grave risk of death. The risk must be such that disregarding it was a gross deviation from what a reasonable person in the defendant's situation would have done; *and*

2. The defendant acted upon a sudden quarrel or heat of passion; *and*

3. The sudden quarrel or heat of passion resulted from adequate provocation by the person who was killed.

[It is no defense that the defendant was unaware of the risk solely by reason of intoxication.]

"Adequate provocation" means conduct or circumstances sufficient to deprive a reasonable person of self-control. Words alone are not adequate provocation to justify reducing an intentional killing to manslaughter. [There must not have been a "cooling off" period between the provocation and the killing. A "cooling off" period is the time it would take a reasonable person to regain self-control under the circumstances.]

[If you determine that the defendant is guilty of either second degree murder or manslaughter but you have a reasonable doubt as to which it was, you must find the defendant guilty of manslaughter.]

SOURCE: A.R.S. § 13-1103(A)(2) (statutory language as of August 12, 2005).

USE NOTE: Use the bracketed language if this instruction is given as a lesser-included offense instruction.

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

Use Statutory Definition Instructions 1.0510(a)(1) and 1.0510(a)(2) defining "intent" and "intent – inference."

COMMENT: "Adequate provocation" is defined in A.R.S. § 13-1101(4). In *State v. Doss*, 116 Ariz. 156, 162 (1977), the court held that "words alone are not adequate provocation to justify reducing an intentional killing to manslaughter." In *State v. Ortiz*, 158 Ariz. 528 (1988), the Arizona Supreme Court approved the definition contained in the model instruction. If there is evidence to support an instruction on the "cooling-off" period, use the bracketed language.

The statute provides that it "applies to an unborn child in the womb at any stage of its development" and then gives three exceptions to its application. *See* A.R.S. § 13-1103(B).

In *State v. Eddington*, 226 Ariz. 72 (App. 2011), the court suggested that "heat-of-passion manslaughter" may not be a lesser-included offense of second-degree murder. *See also State v. Garcia*, 220 Ariz. 49 (App. 2008).

11.03A3 – Manslaughter by Aiding Suicide

The crime of manslaughter by aiding suicide requires proof that the defendant intentionally provided the physical means that another person used to die by suicide, with the knowledge that the person intended to die by suicide.

SOURCE: A.R.S. § 13-1103(A)(3) (statutory language as of March 17, 2021).

USE NOTE: Use Statutory Definition l Instructions 1.0510(a)(1) and 1.0510(a)(2) defining "intent" and "intent – inference."

COMMENT: Manslaughter by aiding suicide is not a lesser-included offense of first-degree murder. *State v. Khoshbin*, 166 Ariz. 570 (App. 1990).

11.03A4 – Manslaughter by Coercion

The crime of manslaughter by coercion requires proof that:

1. Under circumstances manifesting extreme indifference to human life, the defendant recklessly engaged in conduct which created a grave risk of death and thereby caused the death of another person; *and*
2. The defendant was coerced to engage in the conduct by the use or threatened immediate use of unlawful deadly physical force upon the defendant or another person, which a reasonable person in the defendant's situation would have been unable to resist.

SOURCE: A.R.S. § 13-1103(A)(4) (statutory language as of August 12, 2005).

USE NOTE: Use Statutory Definition Instruction 1.0510(c) defining "reckless."

11.03A5 – Manslaughter of Unborn Child

The crime of manslaughter of an unborn child requires proof that the defendant:

[1. Knew or should have known that the mother was pregnant; *and*

2.] Knowingly or recklessly caused the death of an unborn child by any physical injury to the mother.

SOURCE: A.R.S. § 13-1103(A)(5) (statutory language as of August 12, 2005).

USE NOTE: Use Statutory Criminal Instructions 1.0510(b) and 1.0510(c) for the mental states of "knowingly" and "recklessly."

There are a number of exceptions set forth in A.R.S. § 13-1103(B).

COMMENT: Element 1 is bracketed. The statute reads:

> A person commits manslaughter by knowingly or recklessly causing the death of an unborn child by any physical injury to the mother.

Because this is a dangerous crime against children (*see* A.R.S. § 13-705), the Committee was of the opinion that the statute requires that the defendant knew or should have known that the mother was pregnant. A dangerous crime against children requires that the conduct be directed against the child. Also, the statute could be viewed as a strict liability offense where, for example, an unborn child dies as a result of injuries received in an automobile accident. The general rule is that a statute should not be interpreted as imposing strict liability. If the trial judge concludes that there is no requirement that the defendant knew or should have known that the mother was pregnant, then the instruction should be given without element 1.

In *State v. Cotton*, 197 Ariz. 584 (App. 2000), the court held that this statute applies only to the killing of an unborn child and, therefore, the defendant could not be charged with manslaughter under A.R.S. § 13-1103(A)(5) where the child was born alive and died the next day after its mother had been killed by the defendant.

In *State v. Amaya-Ruiz*, 166 Ariz. 152, 173 (1990), the court wrote:

> Although the doctrine of transferred intent generally applies in criminal law, a particular statute may be worded so as to preclude its application. *See* W. LaFave & A. Scott, *Criminal Law* 253 n. 36 (1972). We hold that A.R.S. § 13-1103(A)(5) is such a statute that precludes the doctrine of transferred intent because it explicitly requires two separate mental states, one toward the mother, and the other toward the unborn child. The defendant must (1) knowingly or recklessly cause the death of an unborn child at any stage of its development, *and* (2) death must be caused by a physical injury to the mother of the unborn child that would be murder if the death of the mother had occurred. [FN1]
>
> FN1. We need not address the second criminal intent required by A.R.S. § 13-1103(A)(5). We note that the statutory language appears susceptible to differing interpretations. The phrase "*if* the death of the mother *had occurred*" might support an argument that the statute is inapplicable if the woman is murdered, and is only applicable if she survives. Defendant did not raise this argument and, because we reverse his manslaughter conviction on other grounds, we decline to decide the question.

The statute was amended in 2005 and the phrase "if the death of the mother had occurred" was deleted. Because that phrase was deleted, there is likely no further requirement of a "second criminal intent" under the statute.

11.03B – Manslaughter by Advising or Encouraging Suicide of Minor

The crime of manslaughter by advising or encouraging suicide of a minor requires proof that the defendant is at least eighteen years of age and intentionally provided advice or

encouragement that a minor uses to die by suicide with knowledge that the minor intends to die by suicide.

SOURCE: A.R.S. § 13-1103(A)(3) (statutory language as of March 17, 2021).

USE NOTE: Use Statutory Definition Instructions 1.0510(a)(1) and 1.0510(a)(2) defining "intent" and "intent – inference."

11.04 – Second-Degree Murder

The crime of second-degree murder requires proof of one of the following:

1. The defendant intentionally caused the death of [another person] [an unborn child]; *or*
2. The defendant caused the death of [another person] [an unborn child] by conduct which the defendant knew would cause death or serious physical injury; *or*
3. Under circumstances manifesting extreme indifference to human life, the defendant recklessly engaged in conduct that created a grave risk of death and thereby caused the death of [another person] [an unborn child]. The risk must be such that disregarding it was a gross deviation from what a reasonable person in the defendant's situation would have done; *or*

[The difference between first-degree murder and second-degree murder is that second-degree murder does not require premeditation by the defendant.]

[If you determine that the defendant is guilty of either first-degree murder or second-degree murder and you have a reasonable doubt as to which it was, you must find the defendant guilty of second-degree murder.].

[If you find the elements of second-degree murder proven beyond a reasonable doubt, you must consider whether the homicide was committed upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim. If you unanimously find that the homicide was committed upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim, then you must find the defendant guilty of manslaughter rather than second-degree murder.

SOURCE: A.R.S. § 13-1104 (statutory language as of January 1, 2009).

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

Use Statutory Definition Instructions 1.0510(a)(1) and 1.0510(a)(2) defining "intent" and "intent – inference."

Use Statutory Definition Instruction 1.0510(c) defining "reckless."

Use the first and/or second bracketed language if this instruction is given as a lesser-included offense instruction of first-degree murder.

Use the third bracketed language only when there is a claim that the homicide was committed upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim.

COMMENT: The statute provides that it "applies to an unborn child in the womb at any stage of its development" and gives three exceptions to its application. *See* A.R.S. § 13-1104(B).

If the victim was under fifteen years of age or an unborn child, the crime is a "dangerous crime against children" and sentencing is pursuant to A.R.S. § 13-604.01. *See* A.R.S. § 13-1104(C). If the victim was under fifteen years of age or an unborn child, a finding by the jury regarding that fact should be made as part of its verdict.

There is no crime of attempted second-degree murder if the defendant only knows that his or her action would cause serious physical injury rather than death. *See State v. Ontiveros*, 206 Ariz. 539, 542 (App. 2003). *See also State v. Felix,* 237 Ariz. 280, ¶ 14 (App. 2015).

In *State v. Eddington*, 226 Ariz. 72, 81-82, ¶¶ 29-33 (App. 2010), the Court of Appeals held that fundamental, prejudicial error did not result from instructing the jury that it may only consider the offense of manslaughter upon a sudden quarrel or heat of passion if it first acquits or cannot reach a verdict on second-degree murder. *See State v. LeBlanc*, 186 Ariz. 437, 438 (1996). The Court recognized, however, that the Arizona Supreme Court had already decided in *Peak v. Acuña*, 203 Ariz. 83, 84-85, ¶¶ 5-6 (2002), that "heat-of-passion manslaughter" is not a true lesser-included offense of second-degree murder, because manslaughter includes all of the elements of second-degree murder and has the additional "circumstance" of being caused by a sudden quarrel or heat of passion. *Eddington* recognized that juries are presumed to follow the instructions, and a jury that follows the *LeBlanc*-modeled instruction for homicide lesser offenses could never reach the question of whether there was a sudden quarrel or heat of passion upon adequate provocation because the jury would have already found all of the elements of second-degree murder proven and found the defendant guilty. A majority of the committee recognized that the previous *LeBlanc*-modeled instruction rendered manslaughter under A.R.S. § 13-1103(A)(2) a nullity and modified the instruction to ensure that the jury would consider whether the circumstance justifying the lesser offense was present.

11.04A – Second-Degree Murder (Mother and Unborn Child)

The crime of second-degree murder requires proof that the defendant intentionally, knowingly or under circumstances manifesting extreme indifference to human life recklessly engaged in conduct that created a grave risk of death and caused the death of another person and thereby caused the death of an unborn child.

[The difference between first-degree murder and second-degree murder is that second-degree murder does not require premeditation by the defendant.]

[If you determine that the defendant is guilty of either first-degree murder or second-degree murder and you have a reasonable doubt as to which it was, you must find the defendant guilty of second-degree murder.]

[If you find the elements of second-degree murder proven beyond a reasonable doubt, you must consider whether the homicide was committed upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim. If you unanimously find that the homicide was committed upon a sudden quarrel or heat of passion resulting from adequate

provocation by the victim, then you must find the defendant guilty of manslaughter rather than second-degree murder.]

SOURCE: A.R.S. § 13-1104 (statutory language as of January 1, 2009).

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

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

Use Statutory Definition Instructions 1.0510(a)(1) and 1.0510(a)(2) defining "intent" and "intent – inference."

Use Statutory Definition Instruction 1.0510(c) defining "reckless."

This instruction should only be given when the defendant's culpable mental state was directed at the mother of the unborn child, and the defendant's conduct resulted in the death of the mother and the unborn child.

Use the first and/or second bracketed language if this instruction is given as a lesser-included offense instruction of first-degree murder.

Use the third bracketed language only when there is a claim that the homicide was committed upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim.

COMMENT: The statute provides that it "applies to an unborn child in the womb at any stage of its development" and gives three exceptions to its application. *See* A.R.S. § 13-1104(B).

If the victim was under fifteen years of age or an unborn child, the crime is a "dangerous crime against children" and sentencing is pursuant to A.R.S. § 13-604.01. *See* A.R.S. § 13-1104(C). If the victim was under fifteen years of age or an unborn child, a finding by the jury regarding that fact should be made as part of its verdict.

There is no crime of attempted second-degree murder if the defendant only knows that his or her action would cause serious physical injury rather than death. *See State v. Ontiveros*, 206 Ariz. 539, 542 (App. 2003).

In *State v. Eddington*, 226 Ariz. 72, 81-82, ¶¶ 29-33 (App. 2010), the Court of Appeals held that fundamental, prejudicial error did not result from instructing the jury that it may only consider the offense of manslaughter upon a sudden quarrel or heat of passion if it first acquits or cannot reach a verdict on second-degree murder. *See State v. LeBlanc*, 186 Ariz. 437, 438 (1996). The Court recognized, however, that the Arizona Supreme Court had already decided in *Peak v. Acuña*, 203 Ariz. 83, 84-85, ¶¶ 5-6 (2002), that "heat-of-passion manslaughter" is not a true lesser-included offense of second-degree murder, because manslaughter includes all of the elements of second-degree murder and has the additional "circumstance" of being caused by a sudden quarrel or heat of passion. *Eddington* recognized that juries are presumed to follow the instructions, and a jury that follows the *LeBlanc*-modeled instruction for homicide lesser offenses could never reach the question of whether there was a sudden quarrel or heat of passion upon adequate provocation because the jury would have already found all of the elements of second-degree murder proven and found the defendant guilty. A majority of the committee recognized that the *LeBlanc*-modeled instruction rendered manslaughter under A.R.S. § 13-1103(A)(2) a nullity and modified the

instruction to ensure that the jury would consider whether the circumstance justifying the lesser offense was present.

11.04B – Attempted Second-Degree Murder

The crime of attempted second-degree murder requires proof that the defendant:

1. Intentionally engaged in conduct that would have been second-degree murder if the circumstances relating to the crime were as the defendant believed them to be; or
2. Intentionally [committed] [failed to commit] any act that was a step in the course of conduct that the defendant [planned would end] [believed would end] in the commission of second-degree murder; or
3. Engaged in conduct intended to aid another person to commit second-degree murder in a manner that would make the defendant an accomplice, had the crime been committed or attempted by another person.

The crime of second-degree murder requires that the defendant intentionally or knowingly caused the death of [another person] [unborn child].

SOURCE: A.R.S. §§ 13-1001, 13-1104; *State v. Felix*, 237 Ariz. 280 (App. 2015); *State v. Ontiveros*, 206 Ariz. 539 (App. 2003), *State v. Curry*, 187 Ariz. 623 (App. 1996).

USE NOTE: Use Statutory Definition Instructions 1.0510(a)(1), 1.0510(a)(2), 1.0510(b), and 1.0510.01 defining "intentionally," "intent – inference," "knowingly," and "included mental state – knowingly."

COMMENT: There is no crime of attempted second-degree murder if the defendant only knows that his or her action would cause serious physical injury rather than death. *See State v. Ontiveros*, 206 Ariz. 539, 542 (App. 2003); *see also State v. Felix*, 237 Ariz. 280, ¶ 14 (App. 2015). For this reason, this instruction should be used for the crime of attempted second-degree murder instead of Instructions 10.01 and 11.04.

11.05 – First-Degree Premeditated Murder

The crime of first-degree premeditated murder requires proof that the defendant:

1. caused the death of another person; *and*
2. intended or knew that [he] [she] would cause the death of another person; *and*
3. acted with premeditation.

"Premeditation" means that the defendant intended to kill another human being or knew [he] [she] would kill another human being, and that after forming that intent or knowledge, reflected on the decision before killing. It is this reflection, regardless of the length of time in which it occurs, that distinguishes first-degree murder from second degree murder. An act is not done with premeditation if it is the instant effect of a sudden quarrel or heat of passion. [The time needed for reflection is not necessarily prolonged, and the space of time between the intent or knowledge to kill and the act of killing may be very short.]

SOURCE: A.R.S. § 13-1105 (statutory language as of August 12, 2005.)

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

Use Statutory Definition Instructions 1.0510(a)(1) and 1.0510(a)(2) defining "intent" and "intent – inference."

If the court gives both the first-degree premeditated murder instruction and first-degree felony-murder instruction, the court should include the following in the instruction:

> You must unanimously agree that the State has proven "first-degree murder" beyond a reasonable doubt before you may find the defendant guilty of "first-degree murder." However, all of you do not have to agree on whether it was "premeditated murder" or "felony murder."

The court also should include the following in the verdict form:

> [Complete this portion of the verdict form only if you find the defendant "guilty" of "first-degree murder."]
>
> Please indicate the number of jurors who found beyond a reasonable doubt that the offense of "first-degree murder" was committed as follows:
>
> _____ Premeditated murder
>
> _____ Felony murder
>
> _____ Both premeditated murder and felony murder

COMMENT: In *State v. Thompson*, 204 Ariz. 471 (2003), the Arizona Supreme Court directed trial courts to give the definition of "premeditation" as set forth in this instruction. The bracketed language of that definition is to be included "only when the facts of the case require it." *Id.* at 480. Therefore, this definition should not be modified.

The statute provides that it "applies to an unborn child in the womb at any stage of its development." *See* A.R.S. § 13-1105(C). Statutory Criminal Instruction 11.05A1 deals with the unborn child situation.

11.05A1 – First-Degree Murder of an Unborn Child

The crime of first degree murder of an unborn child requires proof that the defendant committed one of the following:

1. Intentionally or knowingly, with premeditation, caused the death of an unborn child; *or*
2. Intentionally or knowingly, with premeditation, caused the death of a person and thereby caused the death of an unborn child.

"Premeditation" means that the defendant intended to kill another human being or knew [he] [she] would kill another human being, and that after forming that intent or knowledge, reflected on the decision before killing. It is this reflection, regardless of the length of time in which it occurs, that distinguishes first degree murder from second degree murder. An act is not done with premeditation if it is the instant effect of a sudden quarrel or heat of passion. [The time needed for reflection is not necessarily prolonged, and the

space of time between the intent or knowledge to kill and the act of killing may be very short.]

SOURCE: A.R.S. § 13-1105(A)(1) (statutory language as of August 12, 2005).

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

Use Statutory Definition Instructions 1.0510(a)(1) and 1.0510(a)(2) defining "intent" and "intent – inference."

COMMENT: In *State v. Thompson*, 204 Ariz. 471 (2003), the Arizona Supreme Court directed trial courts to give the definition of "premeditation" as set forth in this instruction. The bracketed language of that definition is to be included "only when the facts of the case require it." *Id.* at 480. Therefore, this definition should not be modified.

The statute provides that it "applies to an unborn child in the womb at any stage of its development" and gives three exceptions to its application. *See* A.R.S. § 13-1105(C).

11.05A3 – First-Degree Murder of a Law Enforcement Officer

The crime of first-degree murder of a law enforcement officer requires proof that:

1. The defendant engaged in conduct intending or knowing that the conduct would cause the death of a person, who the defendant knew was a law enforcement officer; *and*
2. The defendant caused the death of a law enforcement officer; *and*
3. The law enforcement officer was in the line of duty.

SOURCE: A.R.S. § 13-1105(A)(3) (statutory language as of August 12, 2005).

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

Use Statutory Definition Instructions 1.0510(a)(1) and 1.0510(a)(2) defining "intent" and "intent – inference."

11.052 – First-Degree Felony Murder

The crime of first-degree felony murder requires proof that:

1. The defendant [and another person] [and other persons] committed or attempted to commit [insert one of the offenses listed in A.R.S. § 13-1105(A)(2)]; and
2. In the course of and in furtherance of this crime or immediate flight from this crime, the defendant or another person caused the death of any person.

SOURCE: A.R.S. § 13-1105(A)(2) (statutory language as of August 12, 2005).

USE NOTE: A.R.S. § 13-1105(B) provides that this offense "requires no specific mental state other than what is required for the commission of any of the enumerated felonies."

The court will need to instruct the jury on the predicate felony.

If the court gives both the first-degree premeditated murder instruction and first-degree felony-murder instruction, the court should include the following in the instruction:

> You must unanimously agree that the State has proven "first-degree murder" beyond a reasonable doubt before you may find the defendant guilty of "first-degree murder." However, all of you do not have to agree on whether it was "premeditated murder" or "felony murder."

The court also should include the following in the verdict form:

> [Complete this portion of the verdict form only if you find the defendant "guilty" of "first-degree murder."]
>
> Please indicate the number of jurors who found beyond a reasonable doubt that the offense of "first-degree murder" was committed as follows:
>
> _____ Premeditated murder
>
> _____ Felony murder
>
> _____ Both premeditated murder and felony murder

COMMENT: First-degree felony murder has no lesser-included offenses. *State v. Bocharski*, 200 Ariz. 50 (2001).

Sample Instruction with Lesser-Included Offenses and Verdict Form

The Charged Offense

I will now tell you about the crime with which [insert defendant's name] is charged. [Insert defendant's name] is charged with one count of "first-degree murder."

First-Degree Murder

The crime of first-degree murder requires proof that the defendant:

1. caused the death of another person; *and*
2. intended or knew that [he] [she] would cause the death of another person; *and*
3. acted with premeditation.

"Premeditation" means that the defendant intended to kill another human being or knew [he] [she] would kill another human being, and that after forming that intent or knowledge, reflected on the decision before killing. It is this reflection, regardless of the length of time in which it occurs, that distinguishes first-degree murder from second degree murder. An act is not done with premeditation if it is the instant effect of a sudden quarrel or heat of passion. [The time needed for reflection is not necessarily prolonged, and the space of time between the intent or knowledge to kill and the act of killing may be very short.]

"Intentionally" or "With Intent To" Defined

"Intentionally" or "with intent to" means that a defendant's objective is to cause that result or to engage in that conduct.

Intent – Inference

Intent may be inferred from all the facts and circumstances disclosed by the evidence. It need not be established exclusively by direct sensory proof. The existence of intent is one of the questions of fact for your determination.

"Knew" or "Knowingly" Defined

"Knew" or "knowingly" means that a defendant acted with awareness of, or belief in, the existence of conduct or circumstances constituting an offense. It does not mean that a defendant must have known the conduct is forbidden by law.

Included Mental States – Knowingly

If the State is required to prove that the defendant acted "knowingly," that requirement is satisfied if the State proves that the defendant acted "intentionally."

Lesser-Included Offenses of First-Degree Murder – Sample Instruction and Verdict Form

Second-Degree Murder

The crime of "first degree murder" includes the lesser offenses of "second degree murder," "manslaughter" and "negligent homicide." You may consider the lesser offense of "second degree murder" if either:

1. You find the defendant not guilty of "first-degree murder"; *or*
2. After full and careful consideration of the facts, you cannot agree on whether to find the defendant guilty or not guilty of "first-degree murder."

The crime of second-degree murder requires proof of one of the following:

1. The defendant intentionally caused the death of [another person] [an unborn child]; *or*
2. The defendant caused the death of [another person] [an unborn child] by conduct which the defendant knew would cause death or serious physical injury; *or*
3. Under circumstances manifesting extreme indifference to human life, the defendant recklessly engaged in conduct that created a grave risk of death and thereby caused the death of [another person] [an unborn child]. The risk must be such that disregarding it was a gross deviation from what a reasonable person in the defendant's situation would have done; *or*
4. The defendant intentionally, knowingly or under circumstances manifesting extreme indifference to human life recklessly engaged in conduct that created a grave risk of death and caused the death of another person and thereby caused the death of an unborn child.

The above definitions of "intentionally," "intent – inference" and "knowingly" apply. "Recklessly" means that a defendant is aware of and consciously disregards a substantial and

unjustifiable risk that conduct will result in the death of another. The risk must be such that disregarding it is a gross deviation from what a reasonable person would do in the situation.

If the State is required to prove that the defendant acted "recklessly," that requirement is satisfied if the State proves that the defendant acted "intentionally" or "knowingly."

The difference between first-degree murder and second degree murder is that second degree murder does not require premeditation by the defendant.

If you determine that the defendant is guilty of either first-degree murder or second degree murder and you have a reasonable doubt as to which it was, you must find the defendant guilty of second degree murder.

Manslaughter

You may consider the lesser offense of "manslaughter" if either:

1. You find the defendant not guilty of both "first-degree murder" and "second degree murder"; *or*
2. After full and careful consideration of the facts, you cannot agree on whether to find the defendant guilty or not guilty of "first-degree murder" or "second-degree murder."

The crime of manslaughter can be committed in two ways. The first is "reckless manslaughter." Reckless manslaughter requires proof that the defendant recklessly caused the death of another person.

"Reckless" has the same definition as used above.

The second way to commit "manslaughter" is manslaughter by sudden quarrel or heat of passion. Manslaughter by sudden quarrel or heat of passion requires proof that:

1. a. The defendant intentionally killed another person; *or*

   b. The defendant caused the death of another person by conduct which the defendant knew would cause death or serious physical injury; *or*

   c. Under circumstances which showed an extreme indifference to human life, the defendant caused the death of another person by consciously disregarding a grave risk of death. The risk must be such that disregarding it was a gross deviation from what a reasonable person in the defendant's situation would have done; *and*

2. The defendant acted upon a sudden quarrel or heat of passion; *and*
3. The sudden quarrel or heat of passion resulted from adequate provocation by the person who was killed.

[It is no defense that the defendant was unaware of the risk solely by reason of intoxication.]

"Adequate provocation" means conduct or circumstances sufficient to deprive a reasonable person of self-control. Words alone are not adequate provocation to justify reducing an intentional killing to manslaughter. [There must not have been a "cooling off" period between the provocation and the killing. A "cooling off" period is the time it would take a reasonable person to regain self-control under the circumstances.]

You must unanimously agree that the State has proven "manslaughter" beyond a reasonable doubt before you may find the defendant guilty of "manslaughter." However, all of you do not have to agree on whether it was "reckless manslaughter" or "manslaughter by sudden quarrel or heat of passion."

If you determine that the defendant is guilty of either second-degree murder or manslaughter but you have a reasonable doubt as to which it was, you must find the defendant guilty of manslaughter.

Negligent Homicide

You may consider the lesser offense of "negligent homicide" if either:

1. You find the defendant not guilty of "first-degree murder," "second-degree murder," and "manslaughter"; or
2. After full and careful consideration of the facts, you cannot agree on whether to find the defendant guilty or not guilty of "first-degree murder," "second-degree murder," or "manslaughter."

The crime of negligent homicide requires proof that the defendant:

1. caused the death of another person; *and*
2. failed to recognize a substantial and unjustifiable risk of causing the death of another person.

The risk must be of such nature and degree that the failure to perceive it is a gross deviation from what a reasonable person would observe in the situation.

The distinction between manslaughter and negligent homicide is this: for manslaughter the defendant must have been aware of a substantial risk and consciously disregarded the risk that [his] [her] conduct would cause death. Negligent homicide only requires that the defendant failed to recognize the risk.

If you determine that the defendant is guilty of either manslaughter or negligent homicide but you have a reasonable doubt as to which it was, you must find the defendant guilty of negligent homicide.

You cannot find the defendant guilty of any lesser-included offense unless you find that the State has proved each element of the lesser-included offense beyond a reasonable doubt.

Verdict – Count One (First-Degree Murder)

We the jury, duly empanelled and sworn in the above entitled action, and upon our oaths, do find the Defendant, [insert defendant's name], on the charge of "first-degree murder" on [insert date of the offense] as the result of the death of [insert victim's name] as follows (check only one):

_____ Not Guilty

_____ Guilty

_____ Unable to agree

[Lesser-Included Offense Verdict on "second degree murder": If you find the defendant "guilty" of "first-degree murder", **do not** complete this portion of the verdict form. In other

words, complete this portion only if you find the defendant either "not guilty" of "first-degree-murder" or you are unable to decide.]

We the jury, duly empanelled and sworn in the above entitled action, and upon our oaths, do find the Defendant, [insert defendant's name], on the lesser-included offense of "second degree murder" on [insert date of the offense] as the result of the death of [insert victim's name], as follows (check only one):

_____ Not guilty

_____ Guilty

_____ Unable to agree

[Lesser-Included Offense Verdict on "manslaughter": If you find the defendant "guilty" of "first-degree murder" or "guilty" of "second degree-murder," **do not** complete this portion of the verdict form. In other words, complete this portion only if you find the defendant either "not guilty" of both "first-degree murder" and "second degree murder" or you are unable to decide.]

We the jury, duly empanelled and sworn in the above entitled action, and upon our oaths, do find the Defendant, [insert defendant's name], on the lesser-included offense of "manslaughter" on [insert date of the offense] as the result of the death of [insert victim's name], as follows (check only one):

_____ Not guilty

_____ Guilty

_____ Unable to agree

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

Please indicate the number of jurors who found beyond a reasonable doubt that the offense of "manslaughter" was committed as follows:

_____ Reckless manslaughter

_____ Manslaughter by sudden quarrel or heat of passion

_____ Both reckless manslaughter and manslaughter by sudden quarrel or heat of passion

[Lesser-Included Offense Verdict on "negligent homicide": If you find the defendant "guilty" of "first-degree murder" or "guilty" of "second-degree murder" or "guilty" of "manslaughter," **do not** complete this portion of the verdict form. In other words, complete this portion only if you find the defendant either "not guilty" of "first-degree murder," "second-degree murder," and "manslaughter" or you are unable to decide.]

We the jury, duly empanelled and sworn in the above entitled action, and upon our oaths, do find the Defendant, [insert defendant's name], on the lesser-included offense of "negligent homicide" on [insert date of the offense] as the result of the death of [insert victim's name], as follows (check only one):

_____ Not guilty

_____ Guilty

Signed: _____

Foreperson (Juror # _____)

Foreperson (please print name): _____

USE NOTE: This sample instruction and verdict form is provided to illustrate how to structure the lesser-included instructions and verdict form in a first-degree murder case where the facts support instructing on lesser-included offenses. This instruction and verdict must be modified if the facts do not support all of the lesser-included offenses set forth in this sample instruction and verdict form. For example, if "manslaughter by sudden quarrel or heat of passion" is not a theory supported by the evidence, that theory must be deleted.

11.99 – "Modified LeBlanc" Instruction for Felony Murder

As an alternative to [First] [Second] Degree Murder, you must also consider [Second Degree Murder] [and] [Manslaughter]. If you unanimously agree the defendant committed a homicide, you must indicate on your verdict form the charge or charges on which you agree. If you believe a homicide was committed, but are uncertain as to which charge was proven, you must vote to convict the defendant of [insert less serious offense]. You may not find the defendant guilty of any offense unless you find that the state has proven each element of the charge beyond a reasonable doubt.

SOURCE: *State v. Lua*, 237 Ariz. 301, 306-07 ¶¶ 19-20 (2015); *State v. Dansdill*, 246 Ariz. 593, 609 ¶ 64 (App. 2019).

USE NOTE: If the court instructs the jury not only on second-degree murder but also on manslaughter and/or negligent homicide, then the court should use the bracketed language for "homicide."

COMMENT: In *State v. Dansdill*, 246 Ariz. 593, 609 ¶ 64 (App. 2019), the court addressed the propriety of using the standard instruction for lesser-included offenses pursuant to *State v. LeBlanc*, 186 Ariz. 437 (1996), in a situation where the State charged the defendant with "first-degree felony murder, or in the alternative, second-degree murder." The court recognized that this was a duplicitous indictment because second-degree murder is not a lesser-included offense of first-degree felony murder. Because Dansdill's convictions were reversed on other grounds, and because Dansdill did not preserve an objection to the indictment or the instruction below, the court of appeals noted the impropriety of the *LeBlanc* instruction in this context but did not suggest a proper instruction, leaving it to the trial court in the first instance "to provide the correct instruction."

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

"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 13

13.01 – Definition of "Restrain"

"Restrain" means to restrict a person's movements without consent, without legal authority, and in a manner that interferes substantially with such person's liberty, by either moving such person from one place to another or by confining such person. Restraint is without consent if it is accomplished by [(physical force) (intimidation) (or) (deception)] [any means including acquiescence of the victim if the victim is a child less than eighteen years old or an incompetent person and victim's lawful custodian has not acquiesced in the movement or confinement.]

SOURCE: A.R.S. § 13-1301(2) (statutory language as of April 23, 1980).

13.02 – Custodial Interference

The crime of custodial interference requires proof that the defendant;

1. [took] [enticed] [kept] from lawful custody any [child] [incompetent person] entrusted by authority of law to the custody of another person or institution; *or*

   before a court order determining custodial rights denying that parent access to any child, [took] [enticed] [withheld] any child from the other parent; *or*

   had joint legal custody of the child and [took] [enticed] [withheld] the child from the physical custody of the other custodian; *or*

   intentionally failed or refused to return [or impeded the return] of the child to the lawful custodian at the time the defendant's access rights outside this state had expired; *and*

2. knew or had reason to know that the defendant had no legal right to do so.

SOURCE: A.R.S. § 13-1302 (statutory language as amended in August 21, 1998).

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

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

For A.R.S. §13-1302(a)(2) & (3), if justified by the facts, the following instruction should be given:

It is not a crime if the defendant is the child's parent and both of the following are found:

1. Defendant had filed an emergency petition regarding custodial rights with the superior court and had received a hearing date from the court; and
2. Defendant had a good faith and reasonable belief that the child would be in immediate danger if the child was left with the other parent.

A.R.S. § 13-1302(D).

The state must convince you beyond a reasonable doubt that the exception to the crime does not apply to the defendant.

Use Verdict Form 13.02 for Statutory Criminal Instruction 13.02.

COMMENT: "Out of wedlock" children are assumed to be in the custody of the mother until paternity and custody are determined by a court. A.R.S. § 13-1302(B). A.R.S. § 13-1302(B) making the mother of child born out of wedlock legal custodian until paternity is established is substantially related to important state interest and, therefore, is not a gender-based equal protection violation nor does the statute violate due process. *State v. Bean*, 174 Ariz. 544 (App. 1992).

"Custody" includes parental authority and other lawful authority to have control of the person; it does not mean arrest or incarceration as "custody" is defined in A.R.S. § 13-2501(3).

A.R.S. § 13-1302(A)(2) does not require that there be ongoing custody proceedings before a person may be charged with custodial interference. "Pending custody proceedings are not a prerequisite to a prosecution for custodial interference under this section." *State v. Wood*, 198 Ariz. 275, 277 (App. 2000).

13.02 – Verdict Form (Custodial Interference)

We the jury, duly empanelled and sworn in the above-entitled action, upon our oaths, do find the Defendant, [insert the defendant's name], on the charge of custodial interference as follows (check only one):

_____ Not guilty

_____ Guilty

_____ Unable to agree

(Complete this portion of the verdict form only if you find the defendant guilty of custodial interference.)

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

[____ the defendant was child's [parent] [agent of a parent].

____ the defendant was not the child's [parent] [agent of a parent].]

[____ the defendant was the incompetent person's [custodian] [agent of the custodian].

____ the defendant was not the incompetent person's [custodian] [agent of the custodian].]

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

_____ the [child] [incompetent person] was [taken] [enticed] [kept] out of this state.

_____ the [child] [incompetent person] was not [taken] [enticed] [kept] out of this state.

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

_____ the [child] [incompetent person] was voluntarily returned without physical injury prior to arrest or the issuance of an arrest warrant.

_____ the [child] [incompetent person] was not voluntarily returned without physical injury prior to arrest or the issuance of an arrest warrant.

USE NOTE: These elements must be found by the jury in order to determine the classification of the offense as a misdemeanor or a felony and sentencing range for the offense. *See* A.R.S. § 13-1302(D); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *State v. Gross*, 201 Ariz. 41 (App. 2001).

13.02C – Defense to Custodial Interference

It is a defense to the charge of custodial interference if the defendant proves the following had occurred:

1. The defendant had begun the process to obtain an order of protection or filed a petition for custody within a reasonable period of time after taking the child and the order of protection or petition states the defendant's belief that the child was at risk if left with the other parent; *and*
2. The defendant is the child's parent, had the right of custody and, before the events giving rise to the charge of custodial interference, the defendant either:
   a. had a good faith and reasonable belief that the taking, enticing or withholding was necessary to protect the child from immediate danger; *or*
   b. was a victim of domestic violence by the other parent and had a good faith and reasonable belief that the child would be in immediate danger if the child was left with the other parent.

The defendant has the burden of proving this defense by a preponderance of the evidence, which is a lesser burden than proof beyond a reasonable doubt. As stated earlier, the state always has the burden of proving the crime charged beyond a reasonable doubt, and this burden never shifts during the trial.

Proof by "a preponderance of the evidence" means that a fact is more probably true than not true.

If you find that the defendant has proved this defense by a preponderance of the evidence then you must find the defendant not guilty of custodial interference.

SOURCE: A.R.S. § 13-1302(C) (statutory language as of August 21, 1998); Statutory Criminal Instruction 2.025.

USE NOTE: This is a defense **only** to paragraph A, subsection 2 of A.R.S. § 13-1302. *See* A.R.S. § 13-1302(C).

This instruction includes Statutory Criminal Instruction 2.025 so it need not be given. The court may also wish to give Standard Criminal Instruction 4(b).

COMMENT: In *State v. Wood*, 198 Ariz. 275 (App. 2000), the court held that the events giving rise to the charge of custodial interference must have already taken place before custody proceedings began or the defense under this statute would be meaningless.

13.031 – Unlawful Imprisonment

The crime of unlawful imprisonment requires proof that the defendant knowingly restrained another person.

SOURCE: A.R.S. § 13-1303 (statutory language as of October 1, 1978).

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

Use Statutory Criminal Instruction 13.01 defining "restrain."

COMMENT: This offense may be a lesser-included offense of kidnapping. *State v. Detrich*, 178 Ariz. 380 (1994); *State v. Atwood*, 171 Ariz. 576 (1992); *State v. Gonzales,* 140 Ariz. 349, 351 (1984); *State v. Tschilar*, 200 Ariz. 427, 437 (App. 2001); *State v. Flores*, 140 Ariz. 469 (App. 1984); *State v. Mendibles*, 126 Ariz. 218 (App. 1980). However, if the evidence is that the defendant is guilty of kidnapping or no crime at all, it is not error to not instruct on the lesser-included offense of unlawful imprisonment. *State v. Lucas*, 146 Ariz. 597, 604 (1985).

13.032 – Unlawful Imprisonment – Defense

It is a defense to the crime of unlawful imprisonment if the following existed:

[The restraint was accomplished by a peace officer or a detention officer acting in good faith in the lawful performance of his or her duty.] *or*

[1. The defendant was a relative of the person restrained; *and*

2. The defendant's sole intent was to take lawful custody of the person restrained; *and*

3. The restraint was accomplished without physical injury to (insert name of the victim).

"Relative" means a parent or stepparent, ancestor, descendant, sibling, uncle or aunt, including an adoptive relative of the same degree through marriage or adoption, or a spouse.]

The defendant has the burden of proving this defense by a preponderance of the evidence, which is a lesser burden than proof beyond a reasonable doubt. As stated earlier, the state always has the burden of proving the crime charged beyond a reasonable doubt, and this burden never shifts during the trial.

Proof by "a preponderance of the evidence" means that a fact is more probably true than not.

If you find that the defendant has proved this defense by a preponderance of the evidence then you must find the defendant not guilty of unlawful imprisonment.

SOURCE: A.R.S. §§ 13-1301(1) and 13-1303(B)(2) (statutory language as of July 24, 2014).

13.04 – Kidnapping

The crime of kidnapping requires proof that the defendant knowingly restrained another person with the intent to:

[hold the person (for ransom) (as a shield) (or) (as a hostage)]

[hold the person for involuntary servitude]

[inflict (death) (physical injury) (or) (a sexual offense) on the person]

[aid in the commission of a felony]

[place the victim or a third person in reasonable fear of imminent physical injury to the victim or such third person]

[interfere with the performance of a governmental or political function]

[seize or exercise control over any (airplane) (train) (bus) (ship) (other vehicle)].

SOURCE: A.R.S. § 13-1304 (statutory language as of May 16, 1985).

USE NOTE:

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

Use Statutory Definition Instructions 1.0510(a)(1) and 1.0510(a)(2) defining "intent" and "intent – inference."

Use Statutory Criminal Instruction 13.01 defining "restrain."

If the restriction was with the intent to commit a sexual offense on the person, the court should insert the name of the sexual offense and give an instruction defining the sexual offense.

COMMENT: A.R.S. § 13-1304(B) provides that kidnapping is a class 2 felony "unless the victim is released voluntarily by the defendant without physical injury in a safe place prior to arrest and prior to accomplishing any of the further enumerated offenses in subsection A." In *State v. Eagle*, 196 Ariz. 188, 192 (2000), the Arizona Supreme Court held that the factors listed in subsection B do not change the elements of kidnapping, that kidnapping is presumptively a class 2 felony, that all of the elements in B must be met to justify a decrease in the classification of the offense from a class 2 felony to a class 4 felony, that subsection B "is a mitigating factor relevant solely for sentencing purposes" and that "because the defendant alone benefits from the presence of mitigating circumstances, it is proper to place the burden of proving them on the defense" by a preponderance of the evidence. Because this is a sentencing issue and mitigating factors may be determined by the judge without a jury finding, no jury instruction or verdict form concerning subsection B has been provided. *See also State v. Tschilar*, 200 Ariz. 427 (App. 2001).

The *Eagle* court also noted that the kidnapping statute does not require the defendant to complete a predicate offense, such as a sexual assault; all that is required is "the intent to commit" a predicate offense. *Eagle,* 196 Ariz. at 190. If the defendant has been convicted of both kidnapping and a predicate offense, the court may wish to review *State v. Gordon*, 161 Ariz. 308 (1989), which discusses the factors to consider in deciding whether to impose concurrent or consecutive sentences.

13.05 – Access Interference

The crime of access interference requires proof that the defendant:

1. knowingly engaged in a pattern of behavior that prevented, obstructed or frustrated a person's court ordered access rights to a child knowing or having reason to know that the defendant had no legal right to do so; *and*
2. removed the child from this state.

"Access order" means a court order that allows a person to have direct access to a child.

SOURCE: A.R.S. § 13-1305 (statutory language as of July 21, 1997).

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

COMMENT: The statute requires that the "access order" was issued pursuant to Title 25.

13.06 – Unlawfully Obtaining Labor or Services

The crime of unlawfully obtaining labor or services requires proof that the defendant knowingly obtained labor or services of another person by [causing or threatening to cause bodily injury to that person or another person] [restraining or threatening to restrain that person or another person without lawful authority and against that person's will] [withholding that person's governmental records, identifying information or other personal property].

SOURCE: A.R.S. § 13-1306 (statutory language as of August 12, 2005).

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

Use language in brackets as appropriate to the facts.

13.07.01 – Sex Trafficking

The crime of sex trafficking requires proof that the defendant knowingly transported another person with [the intent to cause the other person to] [knowledge that the other person will] engage in any prostitution or sexually-explicit performance by deception, force or coercion.

"Coercion" means [abusing or threatening to abuse the law or the legal system] [knowingly destroying, concealing, removing, confiscating, possessing or withholding another person's actual or purported passport or other immigration document, government issued identification document, government record or personal property] [extortion] [causing or threatening to cause financial harm to any person] [facilitating or controlling another person's access to a controlled substance].

"Force" means [to cause or threaten to cause serious harm to another person] [physically restraining or threatening to physically restrain another person].

"Prostitution" means engaging in or agreeing or offering to engage in sexual contact, sexual intercourse, oral sexual contact or sadomasochistic abuse under a fee arrangement with any person for money or any other valuable consideration.

"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.

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

"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.

"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.

[or]

The crime of sex trafficking requires proof that the defendant knowingly [recruited] [enticed] [harbored] [provided] [obtained] another person for transport with [the intent to cause the other person to] [knowledge that the other person will] engage in any prostitution or sexually-explicit performance by deception, force or coercion.

"Coercion" means [abusing or threatening to abuse the law or the legal system] [knowingly destroying, concealing, removing, confiscating, possessing or withholding another person's actual or purported passport or other immigration document, government issued identification document, government record or personal property] [extortion] [causing or threatening to cause financial harm to any person] [facilitating or controlling another person's access to a controlled substance].

"Force" means [to cause or threaten to cause serious harm to another person] [physically restraining or threatening to physically restrain another person].

"Prostitution" means engaging in or agreeing or offering to engage in sexual contact, sexual intercourse, oral sexual contact or sadomasochistic abuse under a fee arrangement with any person for money or any other valuable consideration.

"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.

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

"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.

"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. § 13-1307(A) (statutory language as of September 30, 2009) and § 13-3211 (statutory language as of June 13, 2007).

USE NOTE: Use Statutory Definition Instruction 1.0510(a)(1) defining "intentionally" or 1.0510(b) defining "knowingly."

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

13.07.02 – Sex Trafficking of a Minor

The crime of sex trafficking of a minor requires proof that the defendant knowingly transported another person under the age of eighteen with [the intent to cause the other person to] [knowledge that the other person will] engage in any prostitution or sexually-explicit performance.

"Prostitution" means engaging in or agreeing or offering to engage in sexual contact, sexual intercourse, oral sexual contact or sadomasochistic abuse under a fee arrangement with any person for money or any other valuable consideration.

"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.

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

"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.

"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.

[or]

The crime of sex trafficking of a minor requires proof that the defendant knowingly [recruited] [enticed] [harbored] [provided] [obtained] another person under the age of eighteen for transport with [the intent to cause the other person to] [knowledge that the other person will] engage in any prostitution or sexually-explicit performance.

"Prostitution" means engaging in or agreeing or offering to engage in sexual contact, sexual intercourse, oral sexual contact or sadomasochistic abuse under a fee arrangement with any person for money or any other valuable consideration.

"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.

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

"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.

"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. § 13-1307(B) (statutory language as of September 30, 2009) and § 13-3211 (statutory language as of June 13, 2007).

USE NOTE: This instruction should only be used for offenses committed prior to August 9, 2017. For offenses committed after that date, see A.R.S. § 13-3212; Statutory Criminal Jury Instructions 32.12A and 32.12B.

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

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

A.R.S. § 13-1307(D) provides that if this "offense is committed against a person who is under fifteen years of age, the offense is a dangerous crime against children punishable pursuant to A.R.S. § 13-705." Accordingly, if the victim is alleged to have been under the age of fifteen, a separate jury finding should be made regarding the victim's age.

13.07.A – Sex Trafficking (Victim Eighteen Years of Age or Older)

The crime of sex trafficking requires proof that the defendant knowingly [recruited] [enticed] [harbored] [transported] [provided] [obtained] by any means another person who was eighteen years of age or older [with the intent of causing the other person to engage in prostitution or sexually explicit performance by force, deception or coercion**]** [knowing that the other person would engage in prostitution or sexually explicit performance by deception, coercion or force].

"Coercion" means any of the following

(a) Abusing or threatening to abuse the law or the legal system.

(b) Knowingly destroying, concealing, removing, confiscating, possessing or withholding another person's actual or purported passport or other immigration document, government issued identification document, government record or personal property.

(c) Extortion.

(d) Causing or threatening to cause financial harm to any person.

(e) Facilitating or controlling another person's access to a controlled substance.

"Force" includes causing or threatening to cause serious harm to another person or physically restraining or threatening to physically restrain another person.

"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. § 13-1307 (statutory language as of July 29, 2010).

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

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

13.07.B – Sex Trafficking (Victim Under Eighteen Years of Age)

The crime of sex trafficking requires proof that the defendant knowingly [recruited] [enticed] [harbored] [transported] [provided] [obtained] by any means another person who was under eighteen years of age [with the intent of causing the other person to engage in

prostitution or sexually explicit performance] [knowing that the other person would engage in prostitution or sexually explicit performance].

"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. § 13-1307 (statutory language as of July 29, 2010).

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

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

A.R.S. § 13-1307(D) provides that if this "offense is committed against a person who is under fifteen years of age, the offense is a dangerous crime against children punishable pursuant to A.R.S. § 13-705." Accordingly, if the victim is alleged to have been under the age of fifteen, a separate jury finding should be made regarding the victim's age.

This instruction should only be used for offenses committed prior to August 9, 2017. For offenses committed after that date, see A.R.S. § 13-3212; Statutory Criminal Jury Instructions 32.12A and 32.12B.

13.08 – Trafficking of Persons for Forced Labor or Services

The crime of trafficking of persons for forced labor or services requires proof that the defendant knowingly:

[trafficked another person with the intent or knowledge that the other person would be subject to forced labor or services]

[benefited, financially or by receiving anything of value, from participation in a venture that was engaged in an act of unlawfully obtaining labor or services]

[benefited, financially or by receiving anything of value, from participation in a venture that was engaged in an act of sex trafficking]

[benefited, financially or by receiving anything of value, from participation in a venture that was engaged in an act of trafficking of persons for forced labor or services]

[benefited, financially or by receiving anything of value, from participation in a venture that was engaged in an act of [recruitment] [enticement] [harboring] [transportation] [making available to another] [obtaining] by any means a minor with the intent of causing the minor to engage in prostitution or sexually explicit performance]

[benefited, financially or by receiving anything of value, from participation in a venture that was engaged in an act of [recruitment] [enticement] [harboring] [transportation] [providing] [obtaining] by any means a minor knowing that the minor would engage in prostitution or sexually explicit performance]

"Forced labor or services" means labor or services that are performed or provided by another person and that are obtained through the defendant [either] [causing or threatening to cause serious physical injury to any person] [or] [restraining or threatening to physically restrain another person] [or] [withholding from another person that person's government records, identifying information or personal property].

"Traffic" means to entice, recruit, harbor, provide, transport or otherwise obtain another person by deception, coercion or force.

SOURCE: A.R.S. § 13-1308 (statutory language as of August 9, 2017).

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

"Unlawfully obtaining labor or services" is defined in A.R.S. § 13-1306 (Statutory Definition Instruction 13.06).

"Sex trafficking" is defined in A.R.S. § 13-1307 (Statutory Definition Instruction 13.07).

"Prostitution is defined in A.R.S. § 13-3211(5).

"Sexually Explicit Performance" is defined in A.R.S. § 13-1307(C)(3)

"Forced labor or services" does not include ordinary household chores and reasonable disciplinary measures between a parent or legal guardian and the parent's or legal guardian's child. A.R.S. §13-1308(C)(1)(b).

13.10 – Abduction of a Child from a State Agency

The crime of abduction of a child from a state agency requires proof that the defendant, knowing or having reason to know that a child is entrusted by authority of law to the custody of a state agency,

[took, enticed or kept the child from the lawful custody of the state agency.]

[intentionally failed or refused to immediately return or impeded the immediate return of a child to the lawful custody of the state agency, including at the expiration of visitation or access.]

"State agency" means the department of child safety or the department of juvenile corrections.

SOURCE: A.R.S. § 13-1310 (statutory language as of August 27, 2019).

COMMENT: A.R.S. § 13-1310 created two separate offenses.

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:

1. The minor's parent, stepparent, adoptive parent, legal guardian, foster parent, grandparent, aunt, or uncle.
2. The minor's teacher.
3. An employee or volunteer at the minor's school who is eighteen years of age or older.
4. The minor's coach or instructor, whether the coach or instructor is an employee or volunteer.
5. The minor's clergyman or priest.
6. Any person who is eighteen years of age or older and worked or volunteered for a religious organization that hosted events or activities where the minor was in attendance.
7. Engaged in a sexual or romantic relationship with the minor's parent, adoptive parent, grandparent, aunt, uncle, legal guardian, foster parent, stepparent, step-grandparent, or sibling.
8. Related to the minor by blood or marriage within the third degree and is at least ten years older than the minor.
9. The minor's employer.
10. An employee of a group home or residential treatment facility where the minor resides or has previously resided.

SOURCE: A.R.S. 13-1401(A)(2) (effective September 29, 2021)

USE NOTE: For subsection (2) of this instruction, the term "teacher" means a certified teacher as defined in A.R.S. § 15-501 or any other 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. A.R.S. § 13-1401(A)(6).

USE NOTE: For subsection (7) of this instruction, 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).

USE NOTE: For subsection (j) of this instruction, the term "group home" means a child welfare agency that receives for care and maintenance a child who has been adjudicated dependent or a community residential setting as defined in A.R.S. § 36-551. A.R.S. § 13-1401(A)(2)(h).

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(B) (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 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).

14.04.01 – Sexual Abuse (Victim 15 or Older) (No Position of Trust)

The crime of sexual abuse requires proof that the defendant:

1. Intentionally or knowingly engaged in sexual contact with another person; *and*
2. Engaged in the act without the consent of the other person; *and*
3. Knew the act was without the consent of the other person.

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

14.04.02 – Sexual Abuse (Victim 15, 16 or 17) (Position of Trust)

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 other person was fifteen, sixteen, or seventeen years of age; *and*
3. The defendant was or had been in a position of trust.

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.

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

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

COMMENT: 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).

14.04.03 – Sexual Abuse (Victim Under 15)

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 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).

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:

a. The type of relationship,

b. The length of the relationship.

c. The frequency of the interaction between the two persons.

d. 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:
    i. while the person was in a state of undress or partial dress.
    ii. while the person was engaged in sexual intercourse or sexual contact.
    iii. while the person was urinating or defecating.
    iv. 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 15

15.01(1) – Definition of "Critical Public Service Facility"

"Critical public service facility" means:

(a) A structure or fenced yard that is posted with signage indicating it is a felony to trespass or signage indicating high voltage or high pressure and is used by a rail, bus, air or other mass transit provider, a public or private utility, any municipal corporation, city, town or other political subdivision that is organized under state law and that generates, transmits, distributes or otherwise provides natural gas, liquefied petroleum gas, electricity or a combustible substance for a delivery system that is not a retail-only facility, a telecommunications carrier or telephone company, a municipal provider, a law enforcement agency, a public or private fire department or an emergency medical service provider.

(b) A structure or fenced yard or any equipment or apparatus that is posted with signage indicating it is a felony to trespass or signage indicating high voltage or high pressure and is used to manufacture, extract, transport, distribute or store gas, including natural gas or liquefied petroleum gas, oil, electricity, water or hazardous materials, unless it is a retail-only facility.

15.01(2) – Definition of "Enter or Remain Unlawfully"

"Enter or remain unlawfully" means an act of a person who enters or remains on premises when such person's intent for so entering or remaining is not licensed, authorized or otherwise privileged except when the entry is to commit theft of merchandise displayed for sale during normal business hours, when the premises are open to the public and when the person does not enter any unauthorized areas of the premises.

15.01(3) – Definition of "Entry"

"Entry" means the intrusion of any part of any instrument or any part of a person's body inside the external boundaries of a structure or unit of real property.

15.01(4) – Definition of "Fenced Commercial Yard"

"Fenced commercial yard" means a unit of real property surrounded completely by either fences, walls, buildings, or similar barriers or any combination thereof, and used primarily for business operations or where livestock, produce or other commercial items are located.

USE NOTE: In *State v. Hinden*, 224 Ariz. 508 ¶ 10 (App. 2010) the court held that in order to sustain a conviction for third-degree burglary, the State must prove that the fenced yard "is being used for some business purpose at the time of the illegal entry."

15.01(6) – Definition of "Fenced Residential Yard"

"Fenced residential yard" means a unit of real property immediately surrounding or adjacent to a residential structure and enclosed by a fence, wall, building or similar barrier, or any combination thereof.

15.01(7) – Definition of "In the Course of Committing"

"In the course of committing" means any acts performed by an intruder from the moment of entry to and including flight from the scene of a crime.

15.01(8) – Definition of "Manipulation Key"

"Manipulation key" means a key, device or instrument, other than a key that is designed to operate a specific lock, that can be variably positioned and manipulated in a vehicle keyway to operate a lock or cylinder, including a wiggle key, jiggle key or rocker key.

15.01(9) – Definition of "Master Key"

"Master key" means a key that operates all the keyed locks or cylinders in a similar type or group of locks.

15.01(10) – Definition of "Nonresidential Structure"

"Nonresidential structure" means any structure other than a residential structure and includes a retail establishment.

15.01(11) – Definition of "Residential Structure"

"Residential structure" means any structure, movable or immovable, permanent or temporary, adapted for both human residence and lodging whether occupied or not.

15.01(12) – Definition of "Structure"

"Structure" means any vending machine, building, object, vehicle, railroad car or place with sides and a floor, separately securable from any other structure attached to it and used for lodging, business, transportation, recreation or storage.

15.01(13) – Definition of "Vending Machine"

"Vending machine" means a machine that dispenses merchandise or service through the means of currency, coin, token, credit card or other nonpersonal means of accepting payment for merchandise or service received.

SOURCE: A.R.S. § 13-1501 (statutory language as of September 18, 2003).

15.04– Criminal Trespass in the First Degree

The crime of criminal trespass in the first degree requires proof that the defendant:

[knowingly entered or remained unlawfully in or on a residential structure or in a fenced residential yard.]

[knowingly entered a residential yard and, without lawful authority, looked into the residential structure in reckless disregard of infringing on the inhabitant's right of privacy.]

[knowingly and unlawfully entered real property subject to a valid mineral claim or lease, with the intent to hold, work, take or explore for minerals.]

[knowingly entered or remained unlawfully on the property of another and burned, defaced, mutilated, or otherwise desecrated a religious symbol or other religious property of another without the express permission of the owner of the property.]

[knowingly entered or remained unlawfully in or on a critical public service facility.]

SOURCE: A.R.S. § 13-1504 (statutory language as of September 19, 2003).

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

"Enter or remain unlawfully," "residential structure," "fenced residential yard," and "critical public service facility" are defined in A.R.S. § 13-1501.

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

COMMENT: A storage room that was under the same roof as the living quarters was found to be a residential structure. *State v. Ekmanis*, 183 Ariz. 180, 181 (App. 1995) (burglary case). An almost-completed home was found not to be a residential structure. *See State v. Bass*, 184 Ariz. 543, 544-46 (App. 1995) (burglary case) (holding that an almost-completed log cabin was not a residential structure because it was not yet adapted for human residence and lodging; it had no certificate of occupancy, no water, no electricity and no doors). "[T]he entry into a lesser included structure of a commercial building may or may not be a burglary of a residential structure, depending upon the character of the use of the lesser included structure." *State v. Gardella*, 156 Ariz. 340, 342 (App. 1988) (finding that a hotel/motel laundry room was a nonresidential structure). A person cannot burglarize his or her own residence. *State v. Altamirano*, 166 Ariz. 432, 436-37 (App. 1990) (holding that there was no factual basis for attempted second-degree burglary where the defendant sexually abused his daughter in his own home).

15.05A1 – Possession of Burglary Tools

The crime of possession of burglary tools requires proof that the defendant:

1. possessed any explosive, tool, instrument, or other article adapted or commonly used for committing burglary; *and*
2. intended to use or permit the use of such an item in the commission of a burglary.

SOURCE: A.R.S. § 13-1505 (statutory language as of October 1, 1978).

15.05A2.1 – Possession of Master Key

The crime of possession of a master key requires proof that the defendant [bought] [sold] [transferred] [possessed] [used] a master key.

"Master key" means a key that operates all the keyed locks or cylinders in a similar type or group of locks.

SOURCE: A.R.S. §§ 13-1505(A)(2) and 13-1501(9) (statutory language as of September 18, 2003).

USE NOTE: Use bracketed language as appropriate to the facts.

15.05A2.2 – Possession of Manipulation Keys

The crime of possession of manipulation keys requires proof that the defendant [bought] [sold] [transferred] [possessed] [used] more than one manipulation key.

"Manipulation key" means a key, device or instrument, other than a key that is designed to operate a specific lock, that can be variably positioned and manipulated in a vehicle keyway to operate a lock or cylinder, including a wiggle key, jiggle key or rocker key.

SOURCE: A.R.S. §§ 13-1505(A)(2) and 13-1501(8) (statutory language as of September 18, 2003).

USE NOTE: Use bracketed language as appropriate to the fact of the case.

A.R.S. § 13-1505(B)(2) provides that it is not a violation of the statute to transfer, possess or use "no more than one manipulation key, unless the manipulation key is transferred, possessed or used with the intent to commit any theft or felony." Accordingly, use Statutory Criminal 15.05A2.2 if the allegation is that one manipulation key was possessed with the intent to commit any theft or felony.

15.05A2.3 – Possession of a Manipulation Key

The crime of possession of a manipulation key requires proof that the defendant, with the intent to commit any theft or felony, [bought] [sold] [transferred] [possessed] [used] a manipulation key.

"Manipulation key" means a key, device or instrument, other than a key that is designed to operate a specific lock, that can be variably positioned and manipulated in a vehicle keyway to operate a lock or cylinder, including a wiggle key, jiggle key or rocker key.

SOURCE: A.R.S. §§ 13-1505(A)(2) and 13-1501(8) (statutory language as of September 18, 2003).

USE NOTE: Use bracketed language as appropriate to the fact of the case.

A.R.S. § 13-1505(B)(2) provides that it is not a violation of the statute to transfer, possess or use "no more than one manipulation key, unless the manipulation key is transferred, possessed or used with the intent to commit any theft or felony."

15.06 – Burglary in the Third Degree

The crime of burglary in the third degree requires proof that the defendant:

1. [entered or remained unlawfully in or on a [nonresidential structure] [fenced commercial yard] [fenced residential yard]; *and*]

   [entered into any part of a motor vehicle by use of a [manipulation] [master] key; and]

2. did so with the intent to commit any [theft] [felony] therein.

SOURCE: A.R.S. § 13-1506 (statutory language as of September 19, 2003).

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

"Nonresidential structure," "fenced commercial yard," and "fenced residential yard" are defined in A.R.S. § 13-1501.

The court must instruct on the culpable mental state. "Knowingly" and "with the intent to" are defined in A.R.S. § 13-105. Statutory Criminal Instructions 1.0510(b), and 1.0510(a)(1) and 1.0510(a)(2).

COMMENT: An almost-completed home was found to be a nonresidential structure. *See State v. Bass*, 184 Ariz. 543, 544-46 (App. 1995) (holding that an almost-completed log cabin was a nonresidential structure because it was not yet adapted for human residence and lodging; it had no certificate of occupancy, no water, no electricity and no doors). "[T]he entry into a lesser included structure of a commercial building may or may not be a burglary of a residential structure, depending upon the character of the use of the lesser included structure." *State v. Gardella*, 156 Ariz. 340, 342 (App. 1988) (finding that a hotel/motel laundry room was a nonresidential structure).

15.07 – Burglary in the Second Degree

The crime of burglary in the second degree requires proof that the defendant:

1. entered or remained unlawfully in or on a residential structure; *and*
2. did so with the intent to commit any theft or felony therein.

SOURCE: A.R.S. § 13-1507 (statutory language as of 1981).

USE NOTE: "Residential structure" is defined in A.R.S. § 13-1501.

The court must instruct on the culpable mental state. "With the intent to" is defined in A.R.S. § 13-105. Statutory Criminal Instructions 1.0510(a)(1) and 1.0510(a)(2).

COMMENT: A storage room that was under the same roof as the living quarters was found to be a residential structure. *State v. Ekmanis*, 183 Ariz. 180, 181 (App. 1995). An almost-completed home was *not* found to be a residential structure. *See State v. Bass*, 184 Ariz. 543, 544-46 (App. 1995) (holding that an almost-completed log cabin was not a residential structure because it was not yet adapted for human residence and lodging; it had no certificate of occupancy, no water, no electricity and no doors). "[T]he entry into a lesser included structure of a commercial building may or may not be a burglary of a residential structure, depending upon the character of the use of the lesser included structure." *State v. Gardella*, 156 Ariz. 340, 342 (App. 1988) (finding that a hotel/motel laundry room was a nonresidential structure). A person cannot burglarize his or her own residence. *State v. Altamirano*, 166 Ariz. 432, 436-37 (App. 1990) (holding that there was no factual basis for attempted second-degree burglary where the defendant sexually abused his daughter in his own home).

"[W]hen the nature of the structure is in question, burglary in the third degree (nonresidential structure) is a lesser-included offense of burglary in the second degree (residential structure)." *State v. Bass*, 184 Ariz. at 545. "If there is a genuine factual question about whether the structure is residential, the jury should be instructed on both burglary in the second degree (residential structure) and burglary in the third degree (nonresidential structure). If the State fails to offer substantial evidence that the structure was residential, then the jury should be instructed on only the lesser-included offense of burglary in the third degree (nonresidential structure)." 184 Ariz. at 546.

15.08 – First-Degree Burglary

The crime of burglary in the first degree requires proof of the following:

1. The defendant [or an accomplice] entered or remained unlawfully in or on a [residential or nonresidential structure] [fenced commercial yard] [fenced residential yard]; *and*
2. The defendant [or an accomplice] intended to commit any theft or felony herein; and
3. At some time between the moment of entry through flight from the scene, the defendant [or an accomplice] knowingly possessed [explosives] [a deadly weapon] [a firearm] [a dangerous instrument].

SOURCE: A.R.S. §§ 13-1508 and 13-1501(5) (statutory language as of 1988).

USE NOTE: Use language in brackets as appropriate to the facts. This instruction should be followed with the basic definition(s) of residential and/or nonresidential burglary, Statutory Criminal Instruction(s) 15.06 and/or 15.07.

"Accomplice" is defined in Statutory Criminal Instruction 3.01; "deadly weapon" and "dangerous instrument" are defined in Statutory Definition Instructions 1.0515 and 1.0512.

"Possess" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0534).

"Enter or remain unlawfully," "entry," "fenced commercial yard," "fenced residential yard," "fenced yard," "in the course of committing," "nonresidential structure," "residential structure," and "structure" are defined in A.R.S. § 13-1501. *See* Statutory Instructions for definitions in Chapter 15.

If there is a genuine factual question about whether the structure is residential, the jury should be instructed on both burglary of a residential structure and burglary of a nonresidential structure. If the State fails to offer substantial evidence that the structure was residential, then the jury should be instructed on only the lesser-included offense of burglary of a nonresidential structure. *State v. Bass*, 184 Ariz. 543, 546 (App. 1995).

The class of felony is determined by the type of place burglarized. A burglary of a nonresidential structure or fenced commercial yard or fenced residential yard is a class 3 felony while a burglary of a residential structure is a class 2 felony. A.R.S. § 13-1508(B). If there is an issue regarding the character of the premises or if the instruction given to the jury included all the types of premises, it is recommended that the following be added to the standard "guilty/not guilty" verdict form:

> [Complete this portion of the verdict form only if you find the defendant guilty of burglary in the first degree.]
>
> We the jury find that the place burglarized was a (check only one):
>
> ___ Residential structure
>
> ___ Nonresidential structure
>
> ___ Fenced residential yard
>
> ___ Fenced commercial yard

COMMENT: In *State v. Eastlack*, 180 Ariz. 243, 257 (1994), *cert. denied*, 514 U.S. 118 (1995), the court held that a weapon or dangerous instrument obtained by a burglar during the burglary and held as "loot" does not by itself render the burglar "armed" within the meaning of the first degree burglary statute. That holding was based on the wording of the statute that required the state to prove that the defendant be "armed with . . . a deadly weapon." The statute was amended in 1988. The amendment replaced the "armed with" requirement with "knowingly possess." Accordingly, a weapon or dangerous instrument obtained by a burglar during the burglary and held as "loot" can support a conviction for first-degree burglary. *State v. Tabor*, 184 Ariz. 119 (App. 1995).

Possession of a dangerous instrument while remaining in the house where murder was committed justified armed burglary instruction, even if defendant did not possess dangerous instrument when entering or leaving the house. *State v. Salazar*, 173 Ariz. 399, 409, *cert. denied*, 509 U.S. 912 (1992).

CHAPTER 16

16.006 – Definition of "Tampering with Utility Property"

"Tampering with utility property" means any of the following if committed against property that is owned or operated by a utility for the purposes of transmission or distribution:

(a) rearranging, damaging, altering, interfering with or otherwise preventing the performance of a normal or customary function of utility property.

(b) connecting any wire, conduit or device to any utility property without authorization.

(c) defacing, puncturing, removing, reversing or altering any utility property.

(d) preventing any meter from properly measuring or registering.

(e) taking, receiving, using or converting to personal use or the use of another any utility service that has not been measured or authorized.

(f) diverting or changing the intended course or path of the utility service without the authorization or consent of the utility.

(g) causing, procuring, permitting, aiding or abetting any person to do any of the acts listed in this paragraph

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SOURCE: A.R.S. § 13-1601(6) (statutory language as September 13, 2013).

16.011 – Definition of "Damaging or Damage"

"Damaging" or "damage" means any physical or visual impairment of any surface.

SOURCE: A.R.S. §§ 13-1601(1) and 13-1701 (statutory language as of October 1, 1997).

16.012 – Definition of "Defacing"

"Defacing" means any unnecessary act of substantially marring any surface or place, by any means, or any act of putting up, affixing, fastening, printing, or painting any notice upon any structure, without permission from the owner.

SOURCE: A.R.S. § 13-1601(2).

16.013 – Definition of "Litter"

"Litter" includes any rubbish, refuse, waste material, offal, paper, glass, cans, bottles, organic or inorganic trash, debris, filthy or odoriferous objects, dead animals, or any foreign substance of whatever kind or description, including junked or abandoned vehicles, whether or not any of these items are of value.

SOURCE: A.R.S. § 13-1601(3).

16.014 – Definition of "Property of Another"

"Property of another" means property in which any person other than the defendant has an interest, including community property and other property in which the defendant also has an interest [and, for damage caused by theft of scrap metal, the property of other persons damaged directly or indirectly as a result of the acts of the defendant].

SOURCE: A.R.S. § 13-1601(4) (statutory language effective September 30, 2009).

USE NOTE: Use the bracketed language in cases involving theft of scrap metal.

16.015 – Definition of "Tamper"

"Tamper" means any act of interference.

SOURCE: A.R.S. § 13-1601(5).

16.016 – Definition of "Utility"

"Utility" means any enterprise, public or private, which provides gas, electric, steam, water, sewer or communications services, as well as any common carrier on land, rail, sea or air.

SOURCE: A.R.S. § 13-1601(6) (statutory language as of October 1, 1997).

16.02 – Criminal Damage

The crime of criminal damage requires proof that the defendant recklessly, and without express permission,

[defaced or damaged property of another person.]

[tampered with property of another person so as substantially to impair its function or value.]

[damaged the property of a utility.]

[parked a vehicle in such a manner as to deprive livestock of access to the only reasonably available water.]

[drew or inscribed a message, slogan, sign, or symbol that is made on any public or private building, structure, or surface, except the ground.]

[or]

The crime of criminal damage requires proof that the defendant without express permission, intentionally tampered with utility property.

SOURCE: A.R.S. § 13-1602(A) (statutory language as of September 13, 2013).

USE NOTE: The crime of criminal damage can be committed recklessly or intentionally. Use language in brackets as appropriate to the facts.

"Damaging," "defacing," "property of another," "tamper," "utility," and "tampering with utility property" are defined in A.R.S. § 13-1601.

The court must instruct on the culpable mental state. "Recklessly" or "intentionally" is defined in A.R.S. § 13-105.

In *State v. Moran*, 162 Ariz. 524 (App. 1989), the court held, that although not stated in the statute, "the absence of the property owner's permission, though unstated, is a necessary and implicit element of the crime." The court also held that this offense is not a crime of omission.

For sentencing for a reckless crime, it is necessary for the jury to determine the amount of the damage. *See* Statutory Criminal Instruction 16.041 for cases not involving a utility. Where the offense involves a utility, use Statutory Criminal Instructions 16.021 and/or 16.022.

16.021 – Criminal Damage to a Utility

If you find the defendant guilty of "criminal damage" and that the property damaged was owned by a utility, you must determine the dollar amount of the resulting property damage. Your finding must be set forth on the verdict form.

Source: A.R.S. § 13-1602(B)(2) (statutory language effective September 13, 2013).

16.022 – Criminal Damage to a Utility -– Verdict Form

We the jury, duly empanelled and sworn in the above entitled action, and upon our oaths, do find the defendant on the charge of "criminal damage" as follows (check only one):

_____ Not Guilty

_____ Guilty

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

We the jury find (check one or both):

_____ There was property damage to the utility.

_____ Defendant intentionally tampered with utility property and the damage caused an imminent safety hazard to any person.

[If you find that there was property damage to the utility, complete this portion of the verdict form.]

We the jury find that the amount of the property damage was (check only one):

_____ Less than $5,000.00

_____ $5,000.00 or more.

SOURCE: A.R.S. § 13-1602(B)(2) (statutory language effective September 13, 2013).

16.023 – Criminal Damage – Form of Verdict

We, the jury, duly impaneled and sworn in the above-entitled action, upon our oaths, do find the defendant,

_____ Not Guilty

_____ Guilty

of Criminal Damage.

If you find the defendant guilty, then please decide whether the total amount of damage caused by defendant's conduct is (check only one):

_____ less than $250.

or

_____ $250 or more but less than $2,000.

or

_____ $2,000 or more but less than $10,000.

or

_____ $10,000 or more.

SOURCE: A.R.S. §13-1602 (statutory language as of September 13, 2013).

COMMENT: The findings contained in the special interrogatories determine the class of the offense. The State has the burden of establishing damages and demonstrating the method used to calculate the amount. *State v. Brockell,* 187 Ariz. 226 (App. 1996).

16.04 – Aggravated Criminal Damage

The crime of aggravated criminal damage requires proof that the defendant intentionally or recklessly, and without express permission,

[defaced, damaged, or in any way changed the appearance of any building, structure, personal property, or place used for worship or any religious purpose.]

[defaced or damaged any building, structure, or place used as a school or as an educational facility.]

[defaced, damaged, or tampered with any cemetery, mortuary, or personal property of the cemetery, mortuary, or other facility used for the purpose of burial or memorializing the dead.]

[defaced, damaged or tampered with any utility or agricultural infrastructure of property, construction site or existing structure for the purpose of obtaining nonferrous metals.]

"Nonferrous metals" means those metals which will not normally attract a magnet including copper, brass and aluminum.

In determining the amount of damage to property, damages include the cost of repair or replacement of the property that was damaged.

SOURCE: A.R.S. §§ 13-1604(A) and (C) (statutory language as of May 8, 2007); 44-1641 (statutory language as of August 21, 1998).

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

The court must instruct on the culpable mental state. "Intentionally" and "recklessly" are defined in A.R.S. § 13-105.

"Damaging," "defacing," and "tamper" are defined in A.R.S. § 13-1601.

Permission normally would come from the owner but could also come from some person other than the owner who is authorized to grant permission, *e.g.,* a supervisor. *State v. Moran*, 162 Ariz. 524 (App. 1989).

For sentencing purposes, it is necessary for the jury to determine the amount of the damage. *See* Statutory Criminal Instruction 16.041.

16.041 – Aggravated Criminal Damage – Form of Verdict

We, the jury, duly impaneled and sworn in the above-entitled action, upon our oaths, do find the defendant,

_____ Not Guilty

_____ Guilty

of Aggravated Criminal Damage.

If you find the defendant guilty, then please decide whether the total amount of damage caused by defendant's conduct is (check only one):

_____ less than $1,500.

or

_____ $1,500 or more but less than $10,000.

or

_____ $10,000 or more.

SOURCE: A.R.S. § 13-1604 (statutory language as of 1994).

COMMENT: The findings contained in the special interrogatories determine the class of felony.

Aggravated criminal damage in an amount of $10,000 or more is a class 4 felony. A.R.S. § 13-1604(B)(1).

Aggravated criminal damage in an amount of $1,500 or more but less than $10,000 is a class 5 felony. A.R.S. § 13-1604(B)(2).

In all other cases aggravated criminal damage is a class 6 felony. A.R.S. § 13-1604(B)(3).

16.05 – Aggregation of Amounts for Criminal Damage

Amounts of damage caused in one scheme or course of conduct, whether to property of one or more persons, may be aggregated to determine the total amount of damage.

SOURCE: A.R.S. § 13-1605 (statutory language as of August 3, 1984).

USE NOTE: "Aggregated" may be replaced with "added together" if the latter term is more easily understood.

For sentencing purposes, it is necessary for the jury to determine the amount of the damage caused. *See* Statutory Criminal Instruction 16.041.

CHAPTER 17

17.01(1) –Definition of "Damage"

"Damage" means any physical or visual impairment of any surface.

17.01(2) – Definition of "Occupied Structure"

"Occupied structure" means any structure in which one or more human beings [was/were present] [was/were likely to be present] [was/were so near as to be in equivalent danger] at the time the [fire] [explosion] occurred. This term includes any dwelling house, whether occupied, unoccupied or vacant.

17.01(3) – Definition of "Property"

"Property" means anything other than a structure that has value, tangible or intangible, public or private, real or personal, including documents evidencing value or ownership.

17.01(4) – Definition of "Structure"

"Structure" means any [building] [object] [vehicle] [watercraft] [aircraft] [place with sides and a floor] used for [lodging] [business] [transportation] [recreation] [storage].

17.01(5) – Definition of "Wildland"

"Wildland" means any brush, covered land, cutover land, forest, grasslands or woods.

SOURCE: A.R.S. § 13-1701 (statutory language as of April 19, 1994).

USE NOTE: Use the language in brackets as appropriate.

17.02 – Reckless Burning

The crime of reckless burning requires proof that the defendant:

1. recklessly caused [a fire] [an explosion]; *and*
2. the [fire] [explosion] resulted in damage to [an occupied structure] [a structure] [wildland] [property].

SOURCE: A.R.S. § 13-1702 (statutory language as of April 19, 1994).

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

The court shall instruct on the culpable mental state.

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

"Damage," "occupied structure," "structure," "wildland," and "property" are defined in A.R.S. § 13-1701 (Statutory Definition Instructions 17.01(1) through 17.01(5)).

Reckless burning is a lesser-included offense of arson of an occupied structure, arson of a structure, arson of property and arson of an occupied jail or prison facility. *State v. Bay,* 150 Ariz. 112, 117 (1986).

17.03 – Arson of a Structure or Property

The crime of arson of [a structure] [property] requires proof that the defendant:

1. knowingly and unlawfully damaged [a structure] [property]; *and*
2. did so by knowingly causing a [fire] [explosion].

SOURCE: A.R.S. § 13-1703 (statutory language as of 1987).

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

The court shall instruct on the culpable mental state.

"Knowingly" and "unlawful" are in A.R.S. § 13-105 (Statutory Definition Instructions 1.0510(b) and 1.0541).

"Damage," "property," and "structure" are defined in A.R.S. § 13-1701 (Statutory Definition Instructions 17.01(1), 17.01(3) and 17.01(4)).

If the State has timely alleged that the crime was a dangerous offense, and if the fire under the circumstances of the particular case was readily capable of causing death or serious physical injury, the court should also include an instruction on "dangerous instrument" and provide a jury verdict form that includes a question on whether a dangerous instrument was used. *State v. Wilson*, 135 Ariz. 395, 395 (App. 1983).

If the offense involves arson of property, the court shall include a jury verdict form that requires the jury to value the property in order to determine if the offense is a misdemeanor ($100 or less), class 5 felony (more than $100 but not more than $1,000) or class 4 felony (more than $1,000).

COMMENT: Reckless burning is a lesser-included offense of arson of an occupied structure, arson of a structure, arson of property and arson of an occupied jail or prison facility. *See State v. Bay,* 150 Ariz. 112, 117 (1986).

A fire falls within the statutory definition of a "dangerous instrument," thereby allowing a jury to determine if it is a dangerous offense under A.R.S. § 13-704. *State v. Wilson*, 135 Ariz. 395, 395 (App. 1983).

A trash dumpster is a structure. *State v. Nichols,* 181 Ariz. 56, 58 (App. 1994).

17.04 – Arson of an Occupied Structure

The crime of arson of an occupied structure requires proof that the defendant:

1. knowingly and unlawfully damaged an occupied structure; *and*
2. did so by knowingly causing [a fire] [an explosion].

SOURCE: A.R.S. § 13-1704 (statutory language as of 1987).

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

The court shall instruct on the culpable mental state.

"Knowingly" and "unlawful" are defined in A.R.S. § 13-105 (Statutory Definition Instructions 1.0510(b) and 1.0541).

"Damage," "property," "occupied structure," and "structure" are defined in A.R.S. § 13-1701 (Statutory Definition Instructions 17.01(1) through 17.01((4)).

There is a split of authority on whether a separate jury finding of dangerousness is required for the crime of arson of an occupied structure. *See State v. Gatliff,* 209 Ariz. 362, 365 ¶¶ 16 & 17, 102 P.3d 981, 984 (App. 2004) (division one panel holding that fire is always a dangerous instrument in arson of an occupied structure, and, therefore, is an essential element of the crime). *But see State v. Wilson*, 135 Ariz. 395, 395, 661 P.2d 659, 659 (App. 1983) (division two panel holding that fire *may* be a dangerous instrument if under the circumstances of the particular case, it was readily capable of causing death or serious physical injury). Because the supreme court denied review in *Gatliff,* there remains a split of authority as to whether fire always is or may be a dangerous instrument. Therefore, until the supreme court resolves this conflict, whenever the State has timely alleged that the crime was a dangerous offense, and if the evidence shows that the fire was readily capable of causing death or serious physical injury, the better practice may be to include an instruction on "dangerous instrument" and provide a jury verdict form that includes a question on whether a dangerous instrument was used.

COMMENT: Reckless burning is a lesser-included offense of arson of an occupied structure, arson of a structure, arson of property and arson of an occupied jail or prison facility. *See State v. Bay,* 150 Ariz. 112, 117, 722 P.2d 280, 285 (1986).

A trash dumpster is a structure. *State v. Nichols,* 181 Ariz. 56, 58, 887 P.2d 586, 588 (App. 1994).

17.05 – Arson of an Occupied Jail or Prison Facility

The crime of arson of an occupied [jail] [prison facility] requires proof that:

1. The defendant knowingly caused a [fire] [explosion]; *and*
2. The [fire] [explosion] resulted in physical damage to a [jail] [prison facility].

SOURCE: A.R.S. § 13-1705 (statutory language as of 1989).

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

The court shall instruct on the culpable mental state.

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

"Damage" is defined in A.R.S. § 13-1701 (Statutory Definition Instruction 17.01(1)).

If the State has alleged timely that the crime was a dangerous offense, and if the fire under the circumstances of the particular case was readily capable of causing death or serious physical injury, the court should also include an instruction on "dangerous instrument" and provide a jury verdict form that includes a question on whether a dangerous instrument was used. *State v. Wilson*, 135 Ariz. 395, 395, 661 P.2d 659, 659 (App. 1983).

COMMENT: Reckless burning is a lesser-included offense of arson of an occupied structure, arson of a structure, arson of property and arson of an occupied jail or prison facility. *See State v. Bay,* 150 Ariz. 112, 117, 722 P.2d 280, 285 (1986).

A fire falls within the statutory definition of a "dangerous instrument," thereby allowing a jury to determine if it is a dangerous offense under A.R.S. § 13-704. *State v. Wilson*, 135 Ariz. 395, 395, 661 P.2d 659, 659 (App. 1983).

CHAPTER 18

18.01(1) – Definition of "Check"

"Check" means any check, draft or other negotiable or non-negotiable instrument of any kind.

18.01(2) – Definition of "Control" or "Exercise Control"

"Control" or "exercise control" means to act so as to exclude others from using their property except on the defendant's own terms.

18.01(3) – Definition of "Credit"

"Credit" means an express agreement with the drawee for the payment of a check.

18.01(4) – Definition of "Deprive"

"Deprive" means to:

1. withhold the property interest of another permanently; *or*
2. withhold the property interest of another for so long a time period that a substantial portion of its economic value or usefulness or enjoyment is lost; *or*
3. withhold the property interest of another with the intent to restore it only upon payment of any reward or other compensation; *or*
4. transfer or dispose of the property interest of another so that it is unlikely to be recovered.

18.01(5) – Definition of "Draw"

"Draw" means making, drawing, uttering, preparing, writing or delivering a check.

18.01(6) – Definition of "Funds"

"Funds" means money or credit.

18.01(7) – Definition of "Issue"

"Issue" means to deliver or cause to be delivered a check to a person who thereby acquires a right against the drawer with respect to the check. A person who draws a check with the intent that it be so delivered is deemed to have issued it if the delivery occurs.

18.01(8) – Definition of "Material Misrepresentation"

"Material misrepresentation" means a pretense, promise, representation or statement of present, past or future fact that is fraudulent and that, when used or communicated, is instrumental in causing the wrongful control or transfer of property or services. The pretense may be verbal or it may be a physical act.

18.01(9) – Definition of "Means of Transportation"

"Means of transportation" means any vehicle.

18.01(10) – Definition of "Obtain"

"Obtain" means to bring about or to receive the transfer of any interest in property, whether to a defendant or to another, or to secure the performance of a service or the possession of a trade secret.

18.01(11) – Definition of "Pass"

"Pass" means, for a payee, holder or bearer of a check that previously has been or purports to have been drawn and issued by another, to deliver a check, for a purpose other than collection, to a third person who by delivery acquires a right with respect to the check.

18.01(12) – Definition of "Property"

"Property" means any thing of value, tangible or intangible, including trade secrets.

18.01(13) – Definition of "Property of Another"

"Property of another" means property in which any person other than the defendant has an interest on which the defendant is not privileged to infringe, including property in which the defendant also has an interest, notwithstanding the fact that the other person might be precluded from civil recovery because the property was used in an unlawful transaction or was subject to forfeiture as contraband. Property in possession of the defendant is not deemed property of another person who has only a security interest in the property, even if legal title is in the creditor pursuant to a security agreement.

18.01(14) – Definition of "Services"

"Services" includes labor, professional services, transportation, cable television, computer or communication services, gas or electricity services, accommodations in hotels, restaurants or leased premises or elsewhere, admission to exhibitions and use of vehicles or other movable property.

18.01(15) – Definition of "Value"

"Value" means the fair market value of the property or services at the time of the theft. [The value of ferrous metal or nonferrous metal is the average fair market value of the metal in the local area together with the repair or replacement value of any property from which the metal was removed at the time of the theft.] [Written instruments that do not have a readily ascertainable market value have as their value either the face amount of indebtedness less the portion satisfied or the amount of economic loss involved in deprivation of the instrument, whichever is greater.] When property has an undeterminable value, you shall determine its value and, in reaching your decision, may consider all relevant evidence, including evidence of the property's value to its owner.

SOURCE: A.R.S. § 13-1801(A) (statutory language as of August 2, 2012).

18.01(15).01 – Definition of "Value of Ferrous or Nonferrous Metal"

"Value" means the fair market value of the property or services at the time of the theft. The value of ferrous metal or nonferrous metal is the average fair market value of the metal as scrap metal in the local area together with the repair or replacement value of any property from which the scrap metal was removed at the time of the theft. When property has an undeterminable value, you shall determine its value and, in reaching your decision, may consider all relevant evidence, including evidence of the property's value to its owner.

"Ferrous metals" are those metals that will attract a magnet. "Nonferrous metals" are those that will not normally attract a magnet including copper, brass and aluminum. "Scrap metal" means secondhand or castoff material, except used beverage containers, and includes insulated and uninsulated metallic cables.

SOURCE: A.R.S. § 13-1801(A) (statutory language as of September 30, 2009); A.R.S. § 44-1641.

18.01(16) – Definition of "Drawee"

"Drawee" means a person or business ordered in a check or draft to make payment.

18.01(17) – Definition of "Drawer"

"Drawer" means a person who signs or is identified in a check or draft as the person ordering payment.

SOURCE: A.R.S. § 47-3103 (statutory language as of July 17, 1993).

18.02.01 – Theft

The crime of theft requires proof that the defendant, without lawful authority, knowingly:

[controlled property of another with the intent to deprive the other person of such property.]

[converted for an unauthorized term or use services or property of another entrusted to the defendant or placed in the defendant's possession for a limited, authorized term or use.]

[obtained services or property of another by means of any material misrepresentation with intent to deprive the other person of such services or property.]

[came into control of lost, mislaid or misdelivered property of another under circumstances providing means of inquiry as to the true owner *and* appropriated such property to the defendant's own use or another's use without reasonable efforts to notify the true owner.]

[controlled property of another knowing or having reason to know that the property was stolen.]

[obtained services known to the defendant to be available only for compensation without paying or without an agreement to pay the compensation or diverted another's services to the defendant's own or another's benefit without authority to do so.]

[controlled the ferrous or nonferrous metal of another with the intent to deprive the other person of the metal.]

[controlled the ferrous or nonferrous metal of another knowing or having reason to know that the metal was stolen.]

[purchased within the scope of the ordinary course of business the ferrous or nonferrous metal of another person knowing that the metal was stolen.]

SOURCE: A.R.S. § 13-1802(A) (statutory language as of September 13, 2013).

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

In order to determine the value of the theft, the court shall use Statutory Criminal Instruction 18.027.

The court shall use a verdict form that provides findings as to value of the property or services taken, taking of a firearm, taking of property from the person of another, and taking a dog for the purpose of dog fighting. *See* A.R.S. § 13-1802(E) (Statutory Criminal Verdict Forms 18A1 and A2).

"In determining the classification of the offense, the state may aggregate in the indictment or information amounts taken in thefts committed pursuant to one scheme or course of conduct, whether the amounts were taken from one or several persons." A.R.S. § 13-1801(B). If the State has made this allegation, the court will need to fashion a verdict form based on the manner in which the state has alleged the offense or offenses. The committee was not able to fashion a standard verdict form for use in all cases. If the State alleges only one count based on a scheme or course of conduct without also charging each

individual theft in separate counts, the issues that will have to be decided are whether the jury is allowed to decide the value of the theft and, if so, how the value of the theft is determined if the State fails to prove the scheme or course of conduct.

If the defendant is charged with A.R.S. § 13-1802(A)(5), the court may instruct on the statutory permissible inference under A.R.S. § 13-2305 (Statutory Criminal Instruction 23.05).

If the evidence suggests that the theft occurred through the issuance of a bad check, the court may instruct on the statutory presumption under A.R.S. § 13-1808. *See* Statutory Criminal Instruction 18.08.2.

The court shall instruct on the culpable mental state.

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

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

"Control" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(2)).

"Deprive" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(4)).

"Material misrepresentation" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(8)).

"Obtain" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(10)).

"Property" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(12)).

"Property of another" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(13)).

"Services" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(14)).

"Unlawful" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0540).

COMMENT: *State v. Dixon*, 127 Ariz. 554 (App. 1981) held that a single act may result in a theft conviction under any one or combination of the subsections of A.R.S. § 13-1802, even though the *mens rea* for the subsections varies, and that the jury need not be unanimous as to which subsection was violated so long as they are unanimous on the question of whether the defendant's conduct constituted theft.

18.02.02 – Theft (Vulnerable Adult)

The crime of theft from a vulnerable adult requires proof that the defendant**,** without lawful authority:

1. knowingly took control, title, use or management of a vulnerable adult's property; *and*
2. at the time, was acting in a position of trust and confidence; *and*
3. acted with the intent to deprive the vulnerable-adult of the property.

Position of trust and confidence means that a person is any of the following:

1. a person who has assumed a duty to provide care the vulnerable-adult; *or*

2. a joint tenant or a tenant in common with a vulnerable adult; *or*

3. a person who is in a fiduciary relationship with a vulnerable adult including a de facto guardian or de facto conservator.

["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. Vulnerable adult includes an incapacitated person.]

["Incapacitated person" means any person who is impaired by reason of mental illness, mental deficiency, mental disorder, physical illness or disability, chronic use of drugs, chronic intoxication or other cause to the extent that the person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his/her person.]

["De facto guardian" means any person who takes possession of the person of a vulnerable adult, without right or lawful authority. A de facto guardian is subject to all of the responsibilities that attach to a legally appointed guardian.]

["De facto conservator" means any person who takes possession of the estate of a vulnerable adult, without right or lawful authority. A de facto conservator is subject to all of the responsibilities that attach to a legally appointed conservator or trustee.]

["Abuse" means:

1. Intentional infliction of physical harm; or

2. Injury caused by negligent acts or omissions; or

3. Unreasonable confinement; or

4. Sexual abuse or sexual assault.]

["Neglect" means a pattern of conduct without the person's informed consent resulting in deprivation of food, water, medication, medical services, shelter, cooling, heating or other services necessary to maintain minimum physical or mental health.]

["Exploitation" means the illegal or improper use of a vulnerable adult or his/her resources for another's profit or advantage.]

Source: A.R.S. § 13-1802(B) (statutory language as of September 30, 2009); § 46-456(I) (statutory language as of September 30, 2009); § 46-451 (statutory language as of September 30, 2009); § 14-5101 (statutory language as of July 17, 1994).

Use Note: Use the language in brackets as appropriate to the facts.

If the defendant is accused of taking control, title, use or management of the vulnerable adult's property, the Court should consider giving the inference instruction to the jury. See Statutory Criminal Instruction 18.02.02A.

In order to determine the value of the theft, the court shall use Statutory Criminal Instruction 18.027.

The court shall use a verdict form that provides findings as to value. (Statutory Verdict Forms 18A1 and A2).

In determining the classification of the offense, the state may aggregate in the indictment or information amounts taken in thefts committed pursuant to one scheme or course of conduct, whether the amounts were taken from one or several persons. A.R.S. § 13-1801(B). If the State has made this allegation, the court will need to fashion a verdict form based on the manner in which the State has alleged the offense or offenses. The Committee was not able to fashion a standard verdict form for use in all cases. If the State alleges only one count based on a scheme or course of conduct without also charging each individual theft in separate counts, the issues that will have to be decided are whether the jury is allowed to decide the value of the theft and, if so, how the value of the theft is determined if the State fails to prove the scheme or course of conduct.

If the evidence suggests that the theft occurred through the issuance of a bad check, the court may instruct on the statutory presumptions under A.R.S. 13-1808. *See* Statutory Criminal Instruction 18.08.2.

The court shall instruct on the culpable mental state.

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

"Intentionally or with the intent to" is defined in A.R.S. 13-105 (Statutory Definition Instruction 1.0510(a)(1)).

"Control" is defined in A.R.S. 13-1801 (Statutory Definition Instruction 18.01(2)).

"Deprive" is defined in A.R.S. 13-1801 (Statutory Definition Instruction 18.01(4)).

"Property" is defined in A.R.S. 13-1801 (Statutory Definition Instruction 18.01(12)).

"Property of another" is defined in A.R.S. 13-1801 (Statutory Definition Instruction 18.01(13)).

"Services" is defined in A.R.S. 13-1801 (Statutory Definition Instruction 18.01(14)).

"Vulnerable adult" is defined in A.R.S. § 46-451 (Statutory Definition Instruction § 46-451.09).

"Position of trust and confidence" is defined in A.R.S. § 46-456 (Statutory Non-Criminal Definition Instruction 46-456(4)).

Comment: It is not a violation of A.R.S. §13-1802(B) if the person is an agent acting within the scope of the agent's duties as or on behalf of a health care institution that is licensed under Title 36, Chapter 4 and that provides services to the vulnerable adult.

18.02.02A – Inference Relating to Theft from Vulnerable Adult (for Offenses Committed On or After September 30, 2009

The defendant has been accused of theft. The defendant's intent to deprive the vulnerable adult of property may be presumed if the defendant took [control] [title] [use] [management] of a vulnerable adult's property without adequate consideration to the vulnerable adult.

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

inference that the law permits you to make. Even with the inference, the State has the burden of proving each and every element of the offense of theft beyond a reasonable doubt before you can find the defendant guilty.

SOURCE: A.R.S. § 13-1802(B) (statutory language as of September 30, 2009).

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

"Property" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(12)).

COMMENT: A.R.S. § 13-1802(B) provides for a mandatory presumption. There are no cases pertaining to the presumption under A.R.S. § 13-1802(B), but mandatory presumptions are deemed to be unconstitutional, because they shift the burden of proof to the defendant. *State v. Mohr,* 150 Ariz. 564, 568-69 (App. 1986), *relying upon, Francis v. Franklin,* 471 U.S. 307 (1985). Therefore, it seems more appropriate to interpret the presumption in the statute as a permissive one, which would pass constitutional muster. *See, e.g., State v. Mohr,* 150 Ariz. 564, 568-69 (App. 1986) (holding that a statutory inference must be permissive to withstand constitutional due process and to avoid burden-shifting to the defendant).

Prior to September 30, 2009, this inference was not contained in the statute.

18.02.02B – Affirmative Defense to Theft from a Vulnerable Adult (for Offenses Committed On or After September 30, 2009

The defendant has been accused of theft. It is a defense to such charge if the defendant proves by a preponderance of the evidence that:

[the property was given as a gift consistent with a pattern of gift giving to the defendant that existed before the adult became vulnerable.]

[the property was given as a gift consistent with a pattern of gift giving to a class of individuals that existed before the adult became vulnerable.]

[the Superior Court of Arizona approved the transaction before the transaction occurred.]

Preponderance of the evidence means that the fact is more probably true than not true.

If you find that the defendant has proven this defense by preponderance of the evidence, you must find the defendant not guilty of this offense.

SOURCE: A.R.S. §13-1802(B) (statutory language as of September 30, 2009).

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

This affirmative defense is only available in prosecutions under A.R.S. 13-1802(B).

The court shall instruct on affirmative defense so as to inform the jury on the burden of proof.

Affirmative defense is defined in A.R.S. 13-205 (Statutory Definition Instruction 2.025).

Because the burden of proof for the defendant is preponderance of the evidence, the court shall use Standard Criminal Instruction 4(b), which discusses the different burdens of proof.

"Property" is defined in A.R.S. 13-1801 (Statutory Definition Instruction 18.01(12)).

COMMENT: Prior to September 30, 2009, this affirmative defense was not contained in the statute.

18.02.03 – Inference Relating to Actions for Theft of Ferrous or Nonferrous Metal

The defendant has been accused of theft of scrap metal. Unless explained to your satisfaction or there is proof that the defendant was either an automotive recycler or scrap metal dealer and acquired the scrap metal in the ordinary course of the defendant's business, [the defendant's awareness of the risk that the scrap metal was stolen / that the defendant participated in its theft in some way may be presumed if the scrap metal was recently stolen] [the defendant's awareness of the risk that the scrap metal was stolen may be presumed if the defendant sold the scrap metal at a price substantially below its fair market value].

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 inference that the law permits you to make. Even with the inference, the State has the burden of proving each and every element of the offense of theft beyond a reasonable doubt before you can find the defendant guilty.

SOURCE: A.R.S. § 13-1802(H) (statutory language as of September 30, 2009).

USE NOTE: Use bracketed language as appropriate to the facts of the case.

Should evidence be presented that the defendant was a "scrap metal dealer" or "automotive recycler," the court should consider including one or both definitions in the instruction. "Scrap metal dealer" is defined in A.R.S. § 44-1641 and "automotive recycler" is defined in A.R.S. § 28-4301.

COMMENT: A.R.S. § 13-1802(H) provides for a mandatory presumption. There are no cases pertaining to the presumption under A.R.S. § 13-1802, but mandatory presumptions are deemed to be unconstitutional, because they shift the burden of proof to the defendant. *State v. Mohr,* 150 Ariz. 564, 568-69 (App. 1986), *relying upon, Francis v. Franklin,* 471 U.S. 307 (1985). Therefore, it seems more appropriate to interpret the presumption in the statute as a permissive one, which would pass constitutional muster. *See, e.g., State v. Mohr,* 150 Ariz. 564, 568-69 (App. 1986) (holding that a statutory inference must be permissive to withstand constitutional due process and to avoid burden-shifting to the defendant).

18.02.04 – Inference Relating to Actions for Theft of Ferrous or Nonferrous Metal

The defendant has been accused of theft of scrap metal. Sale of scrap metal at a price substantially below its fair market value may give rise to an inference concerning the defendant's state of mind. That inference is that the defendant was aware of the risk that it had been stolen. This inference may be rebutted if the sale of the scrap metal is satisfactorily explained, or there is proof that the defendant was either an automotive recycler or scrap metal dealer and sold the scrap metal in the ordinary course of the defendant's business.

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 inference that the law permits you to make. Even with the inference, the State has the burden of proving each and every element of the offense of theft beyond a reasonable doubt before you can find the defendant guilty.

SOURCE: A.R.S. § 13-1802(J)(2) (statutory language as of September 30, 2009).

USE NOTE: Use bracketed language as appropriate to the facts of the case.

Should evidence be presented that the defendant was a "scrap metal dealer" or "automotive recycler," the court should consider including one or both definitions in the instruction. "Scrap metal dealer" is defined in A.R.S. § 44-1641 and "automotive recycler" is defined in A.R.S. § 28-4301.

Comment: A.R.S. § 13-1802(J)(2) provides that proof of certain facts "may give rise to an inference." There are no cases pertaining to the presumption under A.R.S. § 13-1802, but mandatory presumptions are deemed to be unconstitutional, because they shift the burden of proof to the defendant. *State v. Mohr,* 150 Ariz. 564, 568-69 (App. 1986), *relying upon, Francis v. Franklin,* 471 U.S. 307 (1985). Therefore, it seems more appropriate to interpret the presumption in the statute as a permissive one, which would pass constitutional muster. *See, e.g., State v. Mohr,* 150 Ariz. 564, 568-69 (App. 1986) (holding that a statutory inference must be permissive to withstand constitutional due process and to avoid burden-shifting to the defendant).

18.027 – Definition of Value in Theft Cases

If you decide that the defendant is guilty of theft, you must determine the fair market value of the [property/service] at the time the defendant obtained control of the [property/service] [the value of ferrous metal or nonferrous metal includes the amount of any damage to the property of another caused as a result of the theft of the metal.].

SOURCE: A.R.S. §§ 13-1801(14) and 13-1802(C) (statutory language as of August 2, 2012).

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

Value is defined by statute as the fair market value of the property or services at the time of the theft. A.R.S. § 13-1801(14). *State v. Salazar*, 160 Ariz. 570 (1989) holds that it is fundamental error to define fair market value as the highest price an item will bring. Retail or wholesale prices are admissible to fix the range of the fair market value. *Id.* The jury should fix the fair market value "from evidence presented." *Id.*

Theft can be committed by either taking property of services of another or controlling the property of another (at some point after it was originally taken) knowing or having reason to know that the property was stolen. A.R.S. § 13-1802(A). When a person is convicted of "controlling" stolen property knowing or having reason to know that the person obtained control of the property. *State v. Wolter*, 197 Ariz. 190 (2000).

18.028 – Verdict Form Instruction for Chapter 18 Offenses

If you decide that the defendant is guilty of [theft] [misappropriation of charter school monies] [shoplifting] [unlawful use of power of attorney], you must unanimously determine the value within one of the ranges on the verdict form of the [property/service] at the time the defendant [controlled] [obtained control of] [converted] the [(property) (service)].

[If you decide that the defendant is guilty of theft, you must unanimously determine if the property was (taken from the person of another) (a firearm) (an animal taken for the purpose of animal fighting) (a vehicle engine or transmission).]

SOURCE: A.R.S. §§ 13-1801(15) (statutory language as of July 18, 2000); 13-1802(E) (statutory language as of September 30, 2009); 13-1805(G) (statutory language as of September 21, 2006); 13-1815(B) (statutory language as of August 21, 1998); 13-1818 (statutory language as of July 18, 2000).

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

The court should use the definition of "value" as defined in A.R.S. § 13-1801(15). *See* Statutory Definition Instruction 18.01(15).

Value is defined by statute as the fair market value of the property or services at the time of the theft. A.R.S. § 13-1801(15). *State v. Salazar*, 160 Ariz. 570 (1989) holds that it is fundamental error to define fair market value as the highest price an item will bring. Retail or wholesale prices are admissible to fix the range of the fair market value. *Id.* The jury should fix the fair market value "from evidence presented." *Id*

18.03 – Unlawful Use of Means of Transportation

The crime of unlawful use of means of transportation requires proof that the defendant [knowingly took unauthorized control over another person's means of transportation] [knowingly was (transported/physically located) in a vehicle that the defendant knew or had reason to know was in the unlawful possession of someone other than the owner of the means of transportation].

SOURCE: A.R.S. § 13-1803 (statutory language as of August 6, 1999); *State v. Kamai,* 184 Ariz. 620, 622 (App. 1995).

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

The court shall instruct on the culpable mental state.

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

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

"Control" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(2)).

"Deprive" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(4)).

"Means of transportation" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(9)).

"Property" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(12)).

"Property of another" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(13)).

"Unlawful" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0540).

"Vehicle" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0541).

COMMENT: Unlawful use of means of transportation is a lesser included offense of theft of means of transportation under A.R.S. § 13-1814(A)(1). *State v. Kamai,* 184 Ariz. 620, 622 (App. 1995) (holding that the language of "without intent to permanently deprive" does not describe an element of the crime but simply distinguishes unlawful use from theft of means of transportation).

Mere unauthorized entry into a vehicle or other similar trespassory conduct is insufficient evidence to prove "control" and cannot support a conviction for unlawful use of means of transportation. *State v. Hoag,* 165 Ariz. 215, 219 (App. 1990) (evidence that defendant was seen in another's car pulling at a CB radio mounted under the dashboard may prove some crime, but it was not a violation of A.R.S. § 13-1803).

18.04.01 – Theft by Extortion

The crime of theft by extortion requires proof that the defendant knowingly [obtained] [sought to obtain] property or services by threatening to, in the future,

[cause physical injury to anyone.]

[cause physical injury to anyone by means of a deadly weapon or dangerous instrument.]

[cause death or serious physical injury to anyone]

[cause damage to property.]

[engage in conduct constituting an offense.]

[accuse anyone of a crime.]

[bring criminal charges against anyone.]

[take or withhold action as a public servant.]

[cause a public servant to take or withhold action.]

[cause anyone to part with any property.]

[take or withhold action regarding an alleged claim of easement or other right of access to an adjoining property if both of the following occur:

1. The claimant's property interest was the result of a tax lien purchase or foreclosure; and
2. The fair market value of the claimant's property was equal to or less than the amount paid by the claimant for the purchase of the tax lien or foreclosure, including taxes paid after the lien purchase and any costs and attorney fees paid in connection with the lien foreclosure.

"Fair market value" means the most probable price, as of the date of the alleged theft, in cash, or in terms equivalent to cash, or in other precisely revealed terms, after deduction of

prior liens and encumbrances with interest to the date of sale, for which the real property or interest therein would sell after reasonable exposure in the market under conditions requisite to fair sale, with the buyer and seller each acting prudently, knowledgeably and for self-interest, and assuming that neither is under duress.]

SOURCE: A.R.S. § 13-1804(A) (statutory language as of August 2, 2012); A.R.S. § 33-814(A) (statutory language as of September 30, 2009).

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

This instruction omits A.R.S. § 13-1804(A)(6), which makes it a crime to threaten to "expose a secret or an asserted fact, whether true or false, tending to subject anyone to hatred, contempt or ridicule or to impair a person's credit or business," because this subsection was declared unconstitutional in *State v. Weinstein,* 182 Ariz. 564, 568 (App. 1995) (holding that it encompasses protected speech and thus violates the First Amendment).

The court shall instruct on the culpable mental state.

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

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

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

"Deprive" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(4)).

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

"Property" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(12)).

"Property of another" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(13)).

"Public servant" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0538).

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

"Services" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(14)).

18.04.02 – Affirmative Defense to Theft by Extortion under A.R.S. § 13-1804(A)(5) or (7)

The defendant has been accused of theft by extortion for [accusing anyone of a crime] [bringing criminal charges against anyone] [taking or withholding action as a public servant] [causing a public servant to take or withhold action]. It is a defense to such charge if the defendant proves by a preponderance of the evidence that the property obtained by threat of the [accusation] [lawsuit] [invocation of official action] was lawfully claimed as:

[restitution or indemnification for harm done under circumstances to which the (accusation/exposure/lawsuit/official action) relates].

[compensation for property that was (lawfully obtained/for lawful services)].

"Preponderance of the evidence" means that the fact is more probably true than not true.

If you find that the defendant has proven this defense by preponderance of the evidence, you must find the defendant not guilty of this offense.

SOURCE: A.R.S. § 13-1804(B) (statutory language as of September 21, 1999).

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

This affirmative defense is only available in prosecutions under A.R.S. § 13-1804(A)(5) or (7).

Due to A.R.S. § 13-1804(A)(6) being declared unconstitutional in *State v. Weinstein,* 182 Ariz. 564, 568 (App. 1995) (holding that A(6) encompasses protected speech and thus violates the First Amendment), the court should not instruct the jury on that subsection, so there should be no need to assert the affirmative defense as to that subsection.

The court shall instruct on "affirmative defense" so as to inform the jury on the burden of proof.

"Affirmative defense" is defined in A.R.S. § 13-205 (Statutory Definition Instruction 2.025).

Because the burden of proof for the defendant is preponderance of the evidence, the court shall use Standard Criminal Instruction 4(b), which discusses the different burdens of proof.

"Obtain" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(10)).

"Property" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(12)).

18.05(1) – Definition of "Continuing Criminal Episode"

"Continuing criminal episode" means theft of property with a value of $1,500.00 or more if committed during at least three separate incidences within a period of ninety consecutive days.

SOURCE: A.R.S. § 13-1805 (statutory language effective September 30, 2009).

18.05.01 – Shoplifting

The crime of shoplifting requires proof that the defendant:

1. was in an establishment in which merchandise was displayed for sale; *and*
2. while in such establishment, knowingly obtained goods of another with the intent to deprive the other person of such goods by,

   [removing any of the goods from the immediate display or from any other place within the establishment without paying the purchase price.]

   [charging the purchase price of the goods to a fictitious person or any person without that person's authority.]

   [paying less than the purchase price of the goods by some trick or artifice such as altering, removing, substituting or otherwise disfiguring any label, price or marking.]

[transferring the goods from one container to another container.]

[concealment.]

SOURCE: A.R.S. § 13-1805(A) and (B) (statutory language as of September 19, 2007).

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

Use Statutory Criminal Instruction 18.05.03 for the statutory presumption related to shoplifting.

In order to determine the value of the theft, the court shall use Statutory Criminal Instruction 18.027.

"In determining the classification of the offense, the state may aggregate in the indictment or information amounts taken in thefts committed pursuant to one scheme or course of conduct, whether the amounts were taken from one or several persons." A.R.S. § 13-1801(B). If the State has made this allegation, the court will need to fashion a verdict form based on the manner in which the State has alleged the offense or offenses. The Committee was not able to fashion a standard verdict form for use in all cases. If the State alleges only one count based on a scheme or course of conduct without also charging each individual theft in separate counts, the issues that will have to be decided are whether the jury is allowed to decide the value of the theft and, if so, how the value of the theft is determined if the State fails to prove the scheme or course of conduct.

If the defendant has been charged with shoplifting with two or more prior burglary, shoplifting, robbery or theft offenses within the previous five years, or if committed prior to September 19, 2007, with shoplifting by bringing in a device to facilitate shoplifting, the court shall instead use Statutory Criminal Instruction 18.05.02.

The court shall use a verdict form that provides findings as to value of the property shoplifted, whether the defendant shoplifted a firearm or whether property was shoplifted during a continuing criminal episode. *See* A.R.S. § 13-1805(G) (Statutory Criminal Verdict Form 18B).

The court shall instruct on the culpable mental state.

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

"Intentionally" or "with the intent to" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 10510(a)(1)).

"Obtain" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(10)).

COMMENT: Shoplifting is not a lesser-included offense of theft. *State v. Embree,* 130 Ariz. 64, 66 (App. 1981).

A.R.S. § 13-1805(B) provides for a mandatory presumption. There are no cases pertaining to the presumption under A.R.S. § 13-1805, but mandatory presumptions are deemed to be unconstitutional, because they shift the burden of proof to the defendant. *State v. Mohr,* 150 Ariz. 564, 568-69 (App. 1986), *relying upon Francis v. Franklin,* 471 U.S. 307 (1985). Therefore, it seems more appropriate to interpret the presumption in the statute as a permissive one, which would pass constitutional muster. *See, e.g., State v. Mohr,* 150 Ariz. 564, 568-69 (App. 1986) (holding that a statutory inference must be permissive to withstand constitutional due process and to avoid burden-shifting to the defendant).

Prior to September 19, 2007, the use of an artifice, instrument, container, device or other article that was intended to facilitate shoplifting was an element of the class 4 felony offense of shoplifting. On September 19, 2007, the statute was amended to remove such use as an element and to include such use as a presumption of the defendant's necessary culpable mental state to commit the offense.

18.05.02A – Shoplifting [With an Artifice or Priors] (For Offenses Committed Prior to September 19, 2007 and After September 29, 2009)

The crime of shoplifting requires proof that the defendant:

1. was in an establishment in which merchandise was displayed for sale; *and*
2. while in the establishment, knowingly obtained goods of another with the intent to deprive the other person of such goods by:

   [removing any of the goods from the immediate display or from any other place within the establishment without paying the purchase price]

   [charging the purchase price of the goods to a fictitious person or any person without that person's authority]

   [paying less than the purchase price of the goods by some trick or artifice such as altering, removing, substituting or otherwise disfiguring any label, price or marking]

   [transferring the goods from one container to another container]

   [concealment]

and

3. [has previously committed or been convicted within the five-year period prior to this offense with two or more offenses involving (burglary/shoplifting/robbery/theft/organized retail theft).]

   [while in the course of shoplifting, entered the mercantile establishment with an artifice, instrument, container, device or other article that was intended to facilitate shoplifting.]

SOURCE: A.R.S. § 13-1805(A), (B) and (I) (statutory language as of September 21, 2006 and September 30, 2009).

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

Use Statutory Criminal Instruction 18.05.03 for the statutory presumption related to shoplifting.

If the defendant has been charged with shoplifting with no allegation of prior burglary, shoplifting, robbery or theft offenses and no allegation of shoplifting by bringing in a device to facilitate shoplifting, the court shall instead use Statutory Criminal Instruction 18.05.01.

The court shall use a verdict form that provides a finding of the prior convictions. *See* A.R.S. § 13-1805(I) (Statutory Verdict Form 18B).

The court shall instruct on the culpable mental state.

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

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

"Obtain" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(10)).

COMMENT: Shoplifting is not a lesser-included offense of theft. *State v. Embree,* 130 Ariz. 64, 66 (App. 1981).

A.R.S. § 13-1805(B) provides for a mandatory presumption. There are no cases pertaining to the presumption under A.R.S. § 13-1805, but mandatory presumptions are deemed to be unconstitutional, because they shift the burden of proof to the defendant. *State v. Mohr,* 150 Ariz. 564, 568-69 (App. 1986), *relying upon, Francis v. Franklin,* 471 U.S. 307 (1985). Therefore, it seems more appropriate to interpret the presumption in the statute as a permissive one, which would pass constitutional muster. *See, e.g., State v. Mohr,* 150 Ariz. 564, 568-69 (App. 1986) (holding that a statutory inference must be permissive to withstand constitutional due process and to avoid burden-shifting to the defendant).

Prior to September 19, 2007, the use of an artifice, instrument, container, device or other article that was intended to facilitate shoplifting was an element of the class 4 felony offense of shoplifting. On September 19, 2007, the statute was amended to remove such use as an element and to include such use as a presumption of the defendant's necessary culpable mental state to commit the offense.

18.05.03B – Inference Relating to Shoplifting (For Offenses Committed On or After September 19, 2007)

The defendant has been accused of shoplifting. The defendant's knowledge and intent to commit shoplifting may be presumed if the defendant:

[knowingly concealed on the defendant's person or on another person unpurchased merchandise of such mercantile establishment while within the mercantile establishment.]

[used an artifice, instrument, container, device or other artifice to facilitate the shoplifting.]

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 inference that the law permits you to make. Even with the inference, the State has the burden of proving each and every element of the offense of shoplifting beyond a reasonable doubt before you can find the defendant guilty.

SOURCE: A.R.S. § 13-1805(B) (statutory language as of September 19, 2007).

COMMENT: A.R.S. § 13-1805(B) provides for a mandatory presumption. There are no cases pertaining to the presumption under A.R.S. § 13-1805, but mandatory presumptions are deemed to be unconstitutional, because they shift the burden of proof to the defendant. *State v. Mohr,* 150 Ariz. 564, 568-69 (App. 1986), *relying upon, Francis v. Franklin,* 471 U.S. 307 (1985). Therefore, it seems more appropriate to interpret the presumption in the statute as a permissive one, which would pass constitutional muster. *See, e.g., State v. Mohr,* 150 Ariz. 564,

568-69 (App. 1986) (holding that a statutory inference must be permissive to withstand constitutional due process and to avoid burden-shifting to the defendant).

Prior to September 19, 2007, the use of an artifice, instrument, container, device or other article that was intended to facilitate shoplifting was an element of the class 4 felony offense of shoplifting. On September 19, 2007, the statute was amended to remove such use as an element and to include such use as a presumption of the defendant's necessary culpable mental state to commit the offense.

18.06.B – Unlawful Failure to Return Rented or Leased Property

The crime of issuing a bad check requires proof that the defendant:

The crime of Unlawful Failure to Return Rented or Leased Property requires proof that the defendant knowingly failed to:

1. Return the rented or leased [motor vehicle] [property] within 72 hours after the time provided for return in the rental agreement; and
2. Return the rented or leased [motor vehicle] [property] without good cause; and
3. Give notice to and obtain permission of the lessor of the rented or leased [motor vehicle] [property] to be late.

[If the (motor vehicle) (property) was not leased on a periodic tenancy basis, the person who rented out the (motor vehicle) (property) shall have included the following information, clearly written as part of the terms of the rental agreement:

1. The date and time the (motor vehicle) (property) is required to be returned.
2. The maximum penalties if the (motor vehicle) (property) is not returned within seventy-two hours of the date and time listed in paragraph 1.]

[If the (motor vehicle) (property) was leased on a periodic tenancy basis without a fixed expiration or return date, the lessor shall have included within the lease clear written notice that the lessee was required to return the (motor vehicle) (property) within seventy-two hours from the date and time of the failure to pay any periodic lease payment required by the lease.]

[It is an affirmative defense that the Defendant was physically incapacitated and unable to request or obtain permission of the lessor to retain the (motor vehicle) (property) or that the (motor vehicle) (property) itself was in such a condition, through no fault of Defendant, that it could not be returned to the lessor within such time.]

SOURCE: A.R.S. § 13-1806(B) (statutory language as of July 20, 2011).

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

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

For the offense to be a felony, the property rented or leased must be a motor vehicle.

If the affirmative defense under § 13-1806(D) is asserted, the Court shall instruct on Affirmative Defense (Statutory Criminal Instruction 2.025).

18.07.01 – Issuing a Bad Check

The crime of issuing a bad check requires proof that the defendant:

1. [issued] [passed] a check; *and*
2. knew that [he] [she] did not have sufficient funds in or on deposit with a [bank] [drawee] for the payment in full of such check as well as all other checks outstanding at the time of issuance of such check.

SOURCE: A.R.S. § 13-1807(A) (statutory language as of September 19, 2007).

USE NOTE: This offense is a felony only if the back check was $5,000.00 or more.

Use the language in brackets as appropriate to the facts.

The court may instruct on the statutory presumptions under A.R.S. § 13-1808 (Statutory Criminal Instruction 18.08.01).

If the defendant has asserted an affirmative defense under A.R.S. § 13-1807(B), the court shall use Statutory Criminal Instruction 18.07.02a, .02b or .02c, as appropriate to the facts.

The court shall instruct on the culpable mental state.

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

"Check" is defined in Statutory Definition Instruction 18.01(1).

"Draw" is defined in Statutory Definition Instruction 18.01(5).

"Funds" is defined in Statutory Definition Instruction 18.01(6).

"Issue" is defined in Statutory Definition Instruction 18.01(7).

"Pass" is defined in Statutory Definition Instruction 18.01(11).

"Drawee" is defined in Statutory Definition Instruction 18.01(16).

"Drawer" is defined in Statutory Definition Instruction 18.01(17).

18.07.02 – Affirmative Defenses to Theft by Issuing a Bad Check

The defendant has been accused of theft or property or services by issuing a bad check. It is a defense to such charge if the defendant proves by a preponderance of the evidence that

[before the check was drawn, the person to whom the check was payable or the holder of the check [knew] [had been expressly notified] [had reason to believe] that the defendant did not have sufficient funds [on deposit] [to the defendant's credit] with the [bank] [drawee] to ensure payment on presentation of such check.

or

[the check was postdated to a later date, and sufficient funds for payment in full on such check were on deposit with the [bank] [drawee] on such later date.]

or

[the insufficiency of funds resulted from an adjustment to the defendant's account by the [bank] [drawee], and the [bank] [drawee] did not give notice of such adjustment to the defendant.]

"Preponderance of the evidence" means that the fact is more probably true than not true.

If you find that the defendant has proven this defense by preponderance of the evidence, you must find the defendant not guilty of this offense.

SOURCE: A.R.S. § 13-1807(B) (statutory language as of September 19, 2007).

USE NOTE: The offense of issuing a bad check is a felony if the bad check was $5,000.00 or more.

Use the language in brackets as appropriate to the facts.

A.R.S. §§ 13-1808 (D), (E) and (F) provide the notice requirements for the bank or drawee. The initial decision on whether notice in the form required by the statute was given to the defendant of insufficient funds should be a matter determined by the court prior to the giving of jury instructions. If the court determines that notice was given in the form required by the statute, a jury determination may be required regarding the sufficiency of the notice. For this issue, the following notice instruction is recommended:

Notice to the defendant that a check was dishonored by a bank or drawee may be actual notice or notice in writing that was sent by registered or certified mail, return receipt requested or by regular mail that was supported by an affidavit of service by mailing. Written notice must have been addressed to the defendant at the defendant's address, which address can be taken from the check, the records of the (bank/drawee) or the records of the person to whom the check was issued or passed. Such written notice is presumed to have been received by the defendant no later than five days after it was sent.

The court may instruct on the statutory presumptions under A.R.S. § 13-1808 (Statutory Criminal Instruction 18.08.01).

The court shall instruct on "affirmative defense" so as to inform the jury on the burden of proof.

"Affirmative defense" is defined in A.R.S. § 13-205 (Statutory Definition Instruction 2.025).

Because the burden of proof for the defendant is preponderance of the evidence, the court shall use Standard Instruction 4(b), which discusses the different burdens of proof.

"Knowingly" is defined in Statutory Definition Instruction 1.0510(b).

"Check" is defined in Statutory Definition Instruction 18.01(1).

"Draw" is defined in Statutory Definition Instruction 18.01(5).

"Funds" is defined in Statutory Definition Instruction 18.01(6).

"Issue" is defined in Statutory Definition Instruction 18.01(7).

"Drawee" is defined in Statutory Definition Instruction 18.01(16).

"Drawer" is defined in Statutory Definition Instruction 18.01(17).

18.08.01 – Inference Relating to Issuing a Bad Check

The defendant has been accused of issuing a bad check. In your determination, the defendant's knowledge of insufficient funds may be inferred if:

[the defendant had no account with the [bank] [drawee] at the time the defendant issued the check.]

[the defendant had a closed account with the [bank] [drawee] at the time the defendant issued the check.]

[the (bank/drawee) had refused payment for lack of funds on presentation of the check within thirty days after the check was issued and the defendant failed to pay the (person to whom the check was payable/holder of the check) the full amount due on the check, together with reasonable costs, within twelve days after the defendant received notice of such refusal.

Notice to the defendant that a check was dishonored by a bank or drawee may be actual notice or notice in writing that was sent by registered or certified mail, return receipt requested or by regular mail that was supported by an affidavit of service by mailing. Written notice must have been addressed to the defendant at the defendant's address, which address can be taken from the check, the records of the (bank/drawee) or the records of the person to whom the check was issued or passed. Such written notice is presumed to have been received by the defendant no later than five days after it was sent.]

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

SOURCE: A.R.S. § 13-1808(A) (statutory language as of August 22, 2002).

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

A.R.S. §§ 13-1808(D), (E) and (F) provide the notice requirements for the bank or drawee. The initial decision on whether proper notice was given to the defendant of insufficient funds should be a matter determined by the court prior to the giving of jury instructions. If the court determines that proper notice was given, however, the jury should probably have the opportunity to determine if it believes the notice was proper. For this reason, the court should consider giving the bracketed paragraph of this instruction regarding notice to the jury.

The court shall instruct on the culpable mental state.

"Knowingly" is defined in Statutory Definition Instruction 1.0510(b).

"Check" is defined in Statutory Definition Instruction 18.01(1).

"Draw" is defined in Statutory Definition Instruction 18.01(5).

"Funds" is defined in Statutory Definition Instruction 18.01(6).

"Issue" is defined Statutory Definition Instruction 18.01(7).

"Drawee" is defined in Statutory Definition Instruction 18.01(16).

"Drawer" is defined in Statutory Definition Instruction 18.01(17).

COMMENT: There are no cases pertaining to the rebuttable presumption under A.R.S. § 13-1808(A)(2). Nonetheless, it is important to caution the jury that the presumption is not mandatory and that it must look at all the facts and circumstances of the case in deciding whether the presumption should be applied. *See, e.g., State v. Mohr,* 150 Ariz. 564, 568-69 (App. 1986) (holding that a statutory inference must be permissive to satisfy constitutional due process and to avoid burden-shifting to the defendant).

18.08.02 – Inferences Relating to Theft of Property or Services by Issuing a Bad Check

The defendant has been accused of the crime of theft based on the allegations that the defendant obtained property or services by issuing or passing a bad check. In your determination, the defendant's intent to [deprive the owner of property] [avoid payment for service] may be inferred if:

[the defendant had no account with the [bank] [drawee] at the time the defendant issued the check.]

[the defendant had a closed account with the [bank] [drawee] at the time the defendant issued the check.]

[the (bank/drawee) had refused payment for lack of funds on presentation of the check within thirty days after the check was issued and the defendant failed to pay the (person to whom the check was payable/holder of the check) the full amount due on the check, together with reasonable costs, within twelve days after the defendant received notice of such refusal.

Notice to the defendant that a check was dishonored by a bank or drawee may be actual notice or notice in writing that was sent by registered or certified mail, return receipt requested or by regular mail that was supported by an affidavit of service by mailing. Written notice must have been addressed to the defendant at the defendant's address, which address can be taken from the check, the records of the (bank/drawee) or the records of the person to whom the check was issued or passed. Such written notice is presumed to have been received by the defendant no later than five days after it was sent.]

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

SOURCE: A.R.S. § 13-1808(B) and (D) (statutory language as of August 22, 2002).

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

A.R.S. §§ 13-1808 (D), (E) and (F) provide the notice requirements for the bank or drawee. The initial decision on whether proper notice was given to the defendant of insufficient funds should be a matter determined by the court prior to the giving of jury instructions. If the court determines that proper notice was given, however, the jury should

probably have the opportunity to determine if it believes the notice was proper. For this reason, the court should consider giving the bracketed paragraph of this Instruction regarding notice to the jury.

The court shall instruct on the culpable mental state.

"Intentionally" or "with the intent to" is defined in Statutory Definition Instruction 1.0510(a)(1).

"Check" is defined in Statutory Definition Instruction 18.01(1)).

"Deprive is defined in Statutory Definition Instruction 18.01(4).

"Draw" is defined in Statutory Definition Instruction 18.01(5).

"Funds" is defined Statutory Definition Instruction 18.01(6).

"Issue" is defined in Statutory Definition Instruction 18.01(7).

"Pass" is defined in Statutory Definition Instruction 18.01(11).

"Services" is defined Statutory Definition Instruction 18.01(14).

"Drawee" is defined in Statutory Definition Instruction 18.01(16).

"Drawer" is defined in Statutory Definition Instruction 18.01(17).

COMMENT: There are no cases pertaining to the rebuttable presumption under A.R.S. § 13-1808(A)(2). Nonetheless, it is important to caution the jury that the presumption is not mandatory and that it must look at all the facts and circumstances of the case in deciding whether the presumption should be applied. *See, e.g., State v. Mohr,* 150 Ariz. 564, 568-69 (App. 1986) (holding that a statutory inference must be permissive to satisfy constitutional due process and to avoid burden-shifting to the defendant).

18.13 – Unlawful Failure to Return a Motor Vehicle Subject to a Security Interest

The crime of unlawful failure to return a motor vehicle subject to a security interest requires proof that:

1. the defendant failed to make a payment on the lien for more than ninety days; *and*
2. the secured creditor sent a notice to the defendant in writing, by certified mail return receipt requested, that the defendant was ninety days late in making a payment and was in default. The notice must have included the following:
    a. a statement stating: "You are now in default on loan agreement # _____. If you fail to return the (year of vehicle, make, model) within thirty days, you will be subject to criminal prosecution;" *and*
    b. the business address and hours of operation for return of the vehicle; *and*
    c. the maximum penalties for unlawful failure to return a motor vehicle subject to a security interest; *and*
3. the defendant failed to cure the default within thirty days; *and*
4. the defendant, with the intent to hinder or prevent enforcement of the secured creditor's security interest, knowingly failed to:

[return the motor vehicle to the secured creditor.]

[allow the secured creditor to take possession of the motor vehicle.]

SOURCE: A.R.S. § 13-1813 (statutory language as of August 21, 1998).

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

The court shall instruct on the culpable mental state.

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

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

"Unlawful" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0540).

"Vehicle" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0541).

COMMENT: A.R.S. § 13-1813(B) requires that the original contract creating the security interest contain (1) a statement that it is unlawful to fail to return a motor vehicle subject to a security interest within 30 days after receiving the default notice; (2) a statement that notice of default will be mailed to the address on the loan agreement and that it is the defendant's responsibility to keep the address current; and (3) the maximum penalties for the offense. Because the determination of whether the contract is sufficient to support the offense will be made prior to the jury's instructions, there is no reason to include this requirement in the instruction.

18.13.01 – Affirmative Defense to Unlawful Failure to Return a Motor Vehicle Subject to a Security Interest

The defendant has been accused of unlawful failure to return a motor vehicle subject to a security interest. It is a defense to this charge if the defendant proves by a preponderance of the evidence that:

[the defendant was physically incapacitated and unable to request or obtain permission of the secured creditor to retain the motor vehicle.]

[the motor vehicle itself was in a condition, through no fault of the defendant, that it could not be returned to the secured creditor within the specified time.]

[the defendant had a security interest in the vehicle based upon a lawful right of rejection or a justifiable revocation of acceptance of the vehicle.]

SOURCE: A.R.S. §§ 13-1813(C) (statutory language as of August 21, 1998); 47-2711(C) (statutory language as of 1984).

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

The court shall instruct on "affirmative defense" so as to inform the jury on the burden of proof.

"Affirmative defense" is defined in A.R.S. § 13-205 (Statutory Definition Instruction 2.025).

Because the burden of proof for the defendant is preponderance of the evidence, the court shall use Standard Criminal Instruction 5b(2), which discusses the different burdens of proof.

"Unlawful" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0540).

"Vehicle" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0536).

COMMENT: A.R.S. § 13-1813(C)(3) specifically refers to a security interest pursuant to A.R.S. § 47-2711(C). Thus, to avoid citing to a statutory reference in a jury instruction, the third set of bracketed defenses is taken from A.R.S. § 47-2711(C), which pertains to a buyer's remedies upon rightful rejection or justifiable revocation of goods under the Uniform Commercial Code.

18.14 – Theft of Means of Transportation

The crime of theft of means of transportation requires proof that the defendant, without lawful authority, knowingly:

[controlled another person's means of transportation with the intent to permanently deprive the person of the means of transportation.]

[converted for an unauthorized term or use another person's means of transportation that was entrusted to or placed in the defendant's possession for a limited, authorized term or use.]

[obtained another person's means of transportation by means of any material misrepresentation with intent to permanently deprive the person of the means of transportation.]

[came into control of another person's means of transportation that was lost or misdelivered under circumstances providing means of inquiry as to the true owner and appropriated the means of transportation to the defendant's own or another's use without reasonable efforts to notify the true owner.]

[controlled another person's means of transportation knowing or having reason to know that the property was stolen.]

SOURCE: A.R.S. § 13-1813 (statutory language as of September 19, 2007).

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

If the defendant is charged with A.R.S. § 13-1814(A)(5), the court may instruct on the statutory permissible inference under A.R.S. § 13-2305 (Statutory Criminal Instruction 23.05).

The court shall instruct on the culpable mental state.

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

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

"Control" is defined in Statutory Definition Instruction 18.01(2).

"Deprive" is defined in Statutory Definition Instruction 18.01(4).

"Means of transportation" is defined in Statutory Definition Instruction 18.01(9).

"Property" is defined in Statutory Definition Instruction 18.01(12).

"Property of another" is defined Statutory Definition Instruction 18.01(13).

"Possess" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0530).

"Possession" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0535).

"Unlawful" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0540).

"Vehicle" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0536).

COMMENT: *State v. Dixon*, 127 Ariz. 554 (App. 1981) held that a single act may result in a theft conviction under any one or combination of the subsections of A.R.S. § 13-1802, even though the *mens rea* for the subsections varies, and that the jury need not be unanimous as to which subsection was violated so long as they are unanimous on the question of whether the defendant's conduct constituted theft. Because the subsections of A.R.S. § 13-1814 track those of A.R.S. § 13-1802, the same rationale should apply.

18.15 – Unlawful Use of Power of Attorney

The crime of unlawful use of power of attorney requires proof that the defendant:

1. held a power of attorney pursuant to law as an agent for another person; *and*
2. [used] [managed] the assets or property of the other person with the intent to unlawfully deprive the other person of such assets or property.

SOURCE: A.R.S. §§ 13-1815 (statutory language as of August 21, 1998); 14-5501 (statutory language as of 1998).

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

The court shall use a verdict form that provides findings as to value (Statutory Verdict Form 18A).

The court shall instruct on the culpable mental state.

"Intentionally" or "with the intent to" is defined in A.R.S. § 13-105 (Statutory Definition 1.0510(a)(1)).

"Deprive" is defined in Statutory Definition Instruction 18.01(4).

"Property" is defined in Statutory Definition Instruction 18.01(12).

"Property of another" is defined in Statutory Definition Instruction 18.01(13).

"Unlawful" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0540).

COMMENT: In order to violate this statute, the power of attorney must be created pursuant to A.R.S. § 14-5501.

18.16(1) – Definition of "Merchant"

"Merchant" means a person who offers for sale or exchange at least six like items of new and unused personal property in this state.

SOURCE: A.R.S. § 13-1816(F) (statutory language as of July 18, 2000).

USE NOTE: This definition should only be used in conjunction with A.R.S. § 13-1816(C).

18.16.01 – Unlawful Manufacture or Sale of a Theft Detection Shielding Device

The crime of unlawful manufacture or sale of a theft detection shielding device requires proof that the defendant knowingly [manufactured] [sold] [offered for sale] [distributed] in any way a [laminated] [coated] bag or device unique to shielding and marketed for shielding that was intended to shield merchandise from detection by an electronic or magnetic theft alarm sensor.

SOURCE: A.R.S. § 13-1816(A) (statutory language as of July 18, 2000).

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

The court shall instruct on the culpable mental state.

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

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

"Unlawful" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0540).

18.16.02 – Unlawful Possession of a Theft Detection Shielding Device

The crime of unlawful possession of a theft detection shielding device requires proof that the defendant, with the intent to commit [theft] [shoplifting], knowingly possessed any [laminated] [coated] bag or device unique to shielding and marketed for shielding that was intended to shield merchandise from detection by an electronic or magnetic theft alarm sensor.

SOURCE: A.R.S. § 13-1816(B) (statutory language as of July 18, 2000).

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

The court shall use the theft or shoplifting Instruction(s) as appropriate to the facts.

The court shall instruct on the culpable mental state.

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

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

"Possess" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0530)).

"Possession" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0535).

"Unlawful" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0540).

18.16.03 – Unlawful Possession of a Theft Detection Device Remover

The crime of unlawful possession of a theft detection device remover requires proof that the defendant:

1. knowingly possessed any tool or device that was designed to allow the removal of any theft detection device from any merchandise; *and*
2. intended to use such tool or device to remove any theft detection device from any merchandise without the permission of the merchant or person who [owned] [held] the merchandise.

SOURCE: A.R.S. § 13-1816(C) (statutory language as of July 18, 2000).

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

The court shall instruct on the culpable mental state.

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

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

"Possess" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0530).

"Possession" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0535).

"Unlawful" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0540).

"Merchant" is defined in Statutory Definition Instruction 18.16(1).

18.16.04 – Unlawful Removal of a Theft Detection Device

The crime of unlawful removal of a theft detection device requires proof that the defendant intentionally removed a theft detection device from merchandise before purchasing that merchandise.

SOURCE: A.R.S. § 13-1816(D) (statutory language as of July 18, 2000).

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

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

"Unlawful" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0540).

18.17 – Unlawful Possession, Use or Alteration of a Retail Sales Receipt or Universal Product Code Label

The crime of unlawful [possession] [use] [alteration] of a [retail sales receipt] [universal product code label] requires proof that the defendant intentionally [cheated] [defrauded] a merchant by:

[possessing at least fifteen fraudulent (retail sales receipts/universal product code labels).]

[possessing a device that manufactures fraudulent (retail sales receipts/universal product code labels).]

[(possessing/uttering/transferring/making/altering/counterfeiting/reproducing) a (retail sales receipt/universal product code label).]

SOURCE: A.R.S. § 13-1817 (statutory language as of July 18, 2000).

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

The court shall instruct on the culpable mental state.

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

"Possess" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0530).

"Possession" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0535).

"Unlawful" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0540).

"Merchant" is defined in Statutory Definition Instruction 18.16(1).

18.18 – Misappropriation of Charter School Monies

The crime of misappropriation of charter school monies requires proof that the defendant, without lawful authority and with intent to defraud, converted monies provided by the State of Arizona under a charter school contract in a manner that did not further the purposes of the charter and was not reasonably related to the business of the charter school.

SOURCE: A.R.S. § 13-1818 (statutory language as of July 18, 2000).

USE NOTE: The court shall use a verdict form that provides findings as to value (Statutory Verdict Form 18C).

"In determining the classification of the offense, the state may aggregate in the indictment or information amounts taken in thefts committed pursuant to one scheme or course of conduct, whether the amounts were taken from one or several persons." A.R.S. § 13-1801(B). If the State has made this allegation, the court will need to fashion a verdict form based on the manner in which the state has alleged the offense or offenses. The Committee was not able to fashion a standard verdict form for use in all cases. If the State alleges only one count based on a scheme or course of conduct without also charging each individual theft in separate counts, the issues that will have to be decided are whether the jury is allowed to decide the value of the theft and, if so, how the value of the theft is determined if the State fails to prove the scheme or course of conduct.

The court shall instruct on the culpable mental state.

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

"Unlawful" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0540).

18.19 – Organized Retail Theft

[The crime of "organized retail theft" requires proof that the defendant, with the intent to resell or trade the merchandise for money or for other value, acting alone or in conjunction with another person, removed merchandise from a retail establishment without paying the purchase price.]

[The crime of "organized retail theft" requires proof that the defendant, acting alone or in conjunction with another person, used an artifice, instrument, container, device or other article to facilitate the removal of merchandise from a retail establishment with the intent to deprive the owner of the merchandise and without paying the purchase price.]

SOURCE: A.R.S. § 13-1819 (statutory language effective September 30, 2009).

"Organized retail theft requires a simple, completed theft of goods, with additional requirements of intent to resell or use of an artifice or device; at its core, it is common law larceny. *See* 50 AM. JUR. 2D *Larceny* § 1 (2014). At common law, larceny requires intent to deprive. *Id.* We therefore conclude the offense of organized retail theft necessarily involves intent to deprive." *State v. Veloz*, 236 Ariz. 532 ¶ 11 (App. 2015), *review denied* July 30, 2015).

18.20 – Theft of Trade Secrets

The crime of theft of trade secrets requires proof that defendant intended to deprive or withhold the exclusive control of a trade secret from its owner, or, with the intent to make any use of a trade secret, did one of the following:

1. Took, transmitted, exhibited, conveyed, altered, destroyed, concealed or used a trade secret without the permission of the owner.
2. Made or caused to be made a copy of a trade secret without the permission of the owner.
3. Received, purchased or possessed a trade secret, knowing that the trade secret has been obtained by means described in paragraph 1 or 2.

It is not a defense to the crime of theft of trade secrets that the person charged, returned, or intended to return the trade secret that was stolen, copied or obtained from another.

"Trade secrets" means information, without regard to form, including a formula, pattern, compilation, program, device, method, technique, plan, drawing, design or process that both:

1. Derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use.
2. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

SOURCE: A.R.S. § 13-1820) (statutory language as of July 24, 2014).

USE NOTE: Use statutory definition instruction defining "intentionally."

Verdict Form 18A1 – (Theft & Unlawful Use of Power of Attorney) – For All Offenses Occurring Prior to September 21, 2006

IN THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF _____

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

On the charge of [theft] [unlawful use of power of attorney], we, the jury, duly impaneled and sworn in the above-entitled cause, unanimously find the defendant (defendant's name)

_____ Not Guilty

_____ Guilty

Complete the following portion of the verdict form only if you find the defendant "guilty" of [theft] [unlawful use of power of attorney].

[We, the jury, duly impaneled and sworn in the above-entitled cause, further unanimously find that the [property] [services] [assets] had a value of:

_____ $100,000.00 or More

_____ $25,000.00 or More, But Less than $100,000.00

_____ $3,000.00 or More, But Less than $25,000.00

_____ $2,000.00 or More, But Less than $3,000.00

_____ $1,000.00 or More, But Less than $2,000.00

_____ $250.00 or More, But Less than $1,000.00

_____ Less than $250.00]

[We, the jury, duly impaneled and sworn in the above-entitled cause, further unanimously find that the allegation that the property was taken from the person of another (check only one):

_____ was proven

_____ was not proven

[We, the jury, duly impaneled and sworn in the above-entitled cause, further unanimously find that the allegation that the property was a firearm (check only one):

_____ was proven

_____ was not proven

[We, the jury, duly impaneled and sworn in the above-entitled cause, further unanimously find that the allegation that the property was a dog taken for the purpose of dog fighting (check only one):

_____ was proven

_____ was not proven

SOURCE: A.R.S. §§ 13-1802(E) (statutory language as of statutory language as of July 18, 2000); 13-1815(B) (statutory language as of August 21, 1998).

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

Use this verdict form when the defendant is charged with any theft offense under A.R.S. § 13-1802 or with unlawful use of power of attorney under A.R.S. § 13-1815 in order to determine the class of felony if the crime occurred before September 21, 2006. Otherwise, use Statutory Criminal Verdict Form 18A for crimes charged on or after September 21, 2006.

"Firearm" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0519).

COMMENT: A.R.S. § 13-1815(B) provides that a violation of A.R.S. § 13-1815 carries the same classifications as theft pursuant to A.R.S. § 13-1802.

Verdict Form 18A2 – (Theft & Unlawful Use of Power of Attorney) – For All Offenses Occurring On or After September 21, 2006

IN THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF _____

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

On the charge of [theft] [unlawful use of power of attorney], we, the jury, duly impaneled and sworn in the above-entitled cause, unanimously find the defendant (defendant's name)

_____ Not Guilty

_____ Guilty

Complete the following portion of the verdict form only if you find the defendant "guilty" of [theft] [unlawful use of power of attorney].

[We, the jury, duly impaneled and sworn in the above-entitled cause, further unanimously find that the [property] [services] [assets] had a value of:

_____ $100,000.00 or More

_____ $25,000.00 or More, But Less than $100,000.00

_____ $4,000.00 or More, But Less than $25,000.00

_____ $3,000.00 or More, But Less than $4,000.00

_____ $2,000.00 or More, But Less than $3,000.00

_____ $1,000.00 or More, But Less than $2,000.00

_____ Less than $1,000.00]

[We, the jury, duly impaneled and sworn in the above-entitled cause, further unanimously find that the allegation that the property was taken from the person of another (check only one):

_____ was proven

_____ was not proven

[We, the jury, duly impaneled and sworn in the above-entitled cause, further unanimously find that the allegation that the property was a firearm (check only one);

_____ was proven

_____ was not proven

[We, the jury, duly impaneled and sworn in the above-entitled cause, further unanimously find that the allegation that the property was a dog taken for the purpose of dog fighting (check only one):

_____ was proven

_____ was not proven

[We, the jury, duly impaneled and sworn in the above-entitled cause, further unanimously find that the allegation that the property was a vehicle engine or transmission (check only one):

_____ was proven

_____ was not proven

SOURCE: A.R.S. §§ 13-1802(E) (statutory language as of September 21, 2006); 13-1815(B) (statutory language as of August 21, 1998).

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

Use this verdict form when the defendant is charged with any theft offense under A.R.S. § 13-1802 or with unlawful use of power of attorney under A.R.S. § 13-1815 in order to determine the class of felony if the crime occurred on or after September 21, 2006. Otherwise, use Statutory Criminal Verdict Form 18A for crimes charged before September 21, 2006.

"Firearm" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0519).

"Vehicle" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 10541).

COMMENT: A.R.S. § 13-1815(B) provides that a violation of A.R.S. § 13-1815 carries the same classifications as theft pursuant to A.R.S. § 13-1802.

If the property was taken from another, was a firearm or was a dog taken for the purpose of dogfighting, the theft is a class 6 felony. If the property was a vehicle engine or transmission, the theft is a class 4 felony, regardless of value. A.R.S. § 13-1802(E).

Verdict Form 18B1 – (Shoplifting) – For All Offenses Occurring Prior to September 21, 2006

IN THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF _____

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

On the charge of shoplifting, we, the jury, duly impaneled and sworn in the above-entitled cause, unanimously find the defendant (defendant's name)

_____ Not Guilty

_____ Guilty

Complete the following portion of the verdict form only if you find the defendant "guilty" of shoplifting.

[We, the jury, duly impaneled and sworn in the above-entitled cause, further unanimously find that the (property/services) had a value of:

_____ More than $2,000.00

_____ More than $250.00, But Less than $2,000.00

_____ $250.00 or Less]

[We, the jury, duly impaneled and sworn in the above-entitled cause, further find that the allegation that the shoplifting occurred during a continuing criminal episode (check only one):

_____ was proven

_____ was not proven

[We, the jury, duly impaneled and sworn in the above-entitled cause, further find that the allegation that the property was a firearm (check only one):

_____ was proven

_____ was not proven

SOURCE: A.R.S. § 13-1805(G) (statutory language as of September 19, 2007).

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

Use this verdict form when the defendant is charged with shoplifting under A.R.S. § 13-1805 to determine the class of felony if the crime occurred before September 21, 2006.

Otherwise, use Statutory Criminal Verdict Form 18B2 for crimes charged after September 21, 2006 and before September 17, 2007 or use Statutory Verdict Form 18B3 for crimes charged after September 17, 2007.

"Firearm" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0519).

"Continuing criminal episode" is defined in A.R.S. § 13-1805(G).

Verdict Form 18B2 – (Shoplifting) – For All Offenses Occurring On or After September 21, 2006 and Prior to September 19, 2007

IN THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF _____

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

On the charge of shoplifting, we, the jury, duly impaneled and sworn in the above-entitled cause, unanimously find the defendant (defendant's name)

_____ Not Guilty

_____ Guilty

Complete the following portion of the verdict form only if you find the defendant "guilty" of shoplifting.

[We, the jury, duly impaneled and sworn in the above-entitled cause, further unanimously find that the (property/services) had a value of:

_____ $2,000.00 or More

_____ $1,000.00 or More, But Less than $2,000.00

_____ Less than $1,000.00]

[We, the jury, duly impaneled and sworn in the above-entitled cause, further find that the allegation that the shoplifting occurred during a continuing criminal episode (check only one):

_____ was proven

_____ was not proven

[We, the jury, duly impaneled and sworn in the above-entitled cause, further find that the allegation that the property was a firearm (check only one):

_____ was proven

_____ was not proven

SOURCE: A.R.S. § 13-1805(G) (statutory language as of September 21, 2006).

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

Use this verdict form when the defendant is charged with shoplifting under A.R.S. § 13-1805 to determine the class of felony if the crime was charged on or after September 21, 2006. Otherwise, use Statutory Criminal Verdict Form 18B1 for crimes charged before September 21, 2006 or use Statutory Criminal Verdict Form 18B3 for crimes charged after September 17, 2007.

"Firearm" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0519).

"Continuing criminal episode" is defined in A.R.S. § 13-1805(G).

Verdict Form 18B3 – (Shoplifting) – For All Offenses Occurring On or After September 19, 2007

IN THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF _____

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

On the charge of shoplifting, we, the jury, duly impaneled and sworn in the above-entitled cause, unanimously find the defendant (defendant's name)

_____ Not Guilty

_____ Guilty

Complete the following portion of the verdict form only if you find the defendant "guilty" of shoplifting.

[We, the jury, duly impaneled and sworn in the above-entitled cause, further unanimously find that the (property/services) had a value of:

_____ $2,000.00 or More

_____ $1,000.00 or More, But Less than $2,000.00

_____ Less than $1,000.00]

[We, the jury, duly impaneled and sworn in the above-entitled cause, further find that the allegation that the shoplifting occurred during a continuing criminal episode (check only one):

_____ was proven

_____ was not proven

[We, the jury, duly impaneled and sworn in the above-entitled cause, further find that the allegation that the shoplifting was done to promote, further, or assist any criminal street gang or criminal syndicate (check only one):

_____ was proven

_____ was not proven

[We, the jury, duly impaneled and sworn in the above-entitled cause, further find that the allegation that the property was a firearm (check only one):

_____ was proven

_____ was not proven

SOURCE: A.R.S. § 13-1805(G) (statutory language as of September 19, 2007).

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

"Criminal street gang" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.059).

"Criminal syndicate" is defined in A.R.S. § 13-2301 (Statutory Definition Instruction 23.01.C.07)

Use this verdict form when the defendant is charged with shoplifting under A.R.S. § 13-1805 to determine the class of felony if the crime was charged on or after September 19, 2007. Otherwise, use Statutory Criminal Verdict Form 18B1 for crimes charged before September 21, 2006 or use Statutory Verdict Form 18B2 for crimes charged after September 19, 2007.

"Firearm" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0519).

"Continuing criminal episode" is defined in A.R.S. § 13-1805(G).

COMMENT: Effective September 19, 2007, the definition of "continuing criminal episode" was amended to require a value and a longer time period. Additionally, a provision was added making shoplifting done to promote, further, or assist a criminal street gang or criminal syndicate a class 5 felony.

Verdict Form 18C – (Misappropriation of Charter School Monies)

IN THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF _____

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

On the charge of misappropriation of charter school monies, we, the jury, duly impaneled and sworn in the above-entitled cause, unanimously find the defendant (defendant's name)

_____ Not Guilty

_____ Guilty

Complete the following portion of the verdict form only if you find the defendant "guilty" of misappropriation of charter school monies.

We, the jury, duly impaneled and sworn in the above-entitled cause, further unanimously find that the charter school monies had a value of:

_____ Less than $25,000.00

_____ $25,000.00 or More

SOURCE: A.R.S. § 13-1818 (statutory language as of July 18, 2000).

USE NOTE: Use this verdict form when the defendant is charged with misappropriation of charter school monies under A.R.S. § 13-1818 to determine the class of felony.

CHAPTER 19

19.02 – Robbery

The crime of robbery requires proof of the following:

1. The defendant took property of another person; *and*
2. The taking was from the other person's person or immediate presence; *and*
3. The taking was against the other person's will; *and*
4. The defendant used or threatened to use force against any person with the intent to force surrender of the property or to prevent resistance to taking or keeping the property.

SOURCE: A.R.S. § 13-1902 (statutory language as of October 1, 1978).

USE NOTE: "Force" is defined in A.R.S. § 13-1901(1) as "any physical act directed against a person as a means of gaining control of property."

"Property of another" is defined in A.R.S. § 13-1801(13) (Statutory Definition Instruction 18.01(13)).

"Threat" is defined in A.R.S. § 13-1901(4) as "a verbal or physical menace of imminent physical injury to a person."

The court should instruct on the culpable mental state.

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

19.03 – Aggravated Robbery

The crime of aggravated robbery requires proof of the following:

1. The defendant took property of another person; *and*
2. The taking was from the other person's person or immediate presence; *and*
3. The taking was against the other person's will; *and*
4. The defendant used or threatened to use force against any person with the intent to force surrender of the property or to prevent resistance to taking or keeping the property; *and*
5. The defendant, in the course of committing the robbery, was aided by an accomplice actually present at the scene.

SOURCE: A.R.S. § 13-1903 (statutory language as of October 1, 1978).

USE NOTE: "Force" is defined in A.R.S. § 13-1901(1) as "any physical act directed against a person as a means of gaining control of property."

"In the course of committing" is defined in A.R.S. § 13-1901(2) as "any of the defendant's acts beginning with the initiation and extending through the flight from a robbery."

"Property of another" is defined in A.R.S. § 13-1801(13) (Statutory Definition Instruction 18.01(13)).

"Threat" is defined in A.R.S. § 13-1901(4) as "a verbal or physical menace of imminent physical injury to a person."

The court should instruct on the culpable mental state.

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

The court should instruct on the definition of "accomplice." "Accomplice" is defined in A.R.S. § 13-301 (Statutory Definition Instruction 3.01).

19.04 – Armed Robbery

The crime of armed robbery requires proof of the following:

1. The defendant took property of another person; *and*
2. The taking was from the other person's person or immediate presence; *and*
3. The taking was against the other person's will; *and*
4. The defendant used or threatened to use force against any person with the intent to force surrender of the property or to prevent resistance to taking or keeping the property; *and*
5. The defendant or an accomplice, in the course of committing the robbery, [was armed with a (deadly weapon) (simulated deadly weapon) (firearm)] [or] [used or threatened to use a (deadly weapon) (simulated deadly weapon) (dangerous instrument)].

SOURCE: A.R.S. § 13-1904 (statutory language as of 1983).

USE NOTE: "Force" is defined in A.R.S. § 13-1901(1) as "any physical act directed against a person as a means of gaining control of property."

"In the course of committing" is defined in A.R.S. § 13-1901(2) as "any of the defendant's acts beginning with the initiation and extending through the flight from a robbery."

"Property of another" is defined in A.R.S. § 13-1801(13) (Statutory Definition Instruction 18.01(13)).

"Threat" is defined in A.R.S. § 13-1901(4) as "a verbal or physical menace of imminent physical injury to a person."

The court should instruct on the culpable mental state.

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

COMMENT: "The A.R.S. § 13-1904(A)(1) elements of 'armed with a deadly weapon' or 'armed with a simulated weapon' are satisfied" if the "instrument was within the immediate

possession or available for use" by the defendant or an accomplice. *State v. Garza Rodriguez*, 164 Ariz. 107, 111 (1990); *State v. Spratt*, 126 Ariz. 184, 186 (App. 1980). The weapon need not be displayed by the defendant or seen by the victim to satisfy those elements, but it must be actually present at the time of the offense. *Garza Rodriguez*, *supra*. The "mere verbal threat to use a deadly weapon" where the defendant does not possess or have within his or her immediate control "a deadly weapon, dangerous instrument or simulated weapon, does not satisfy the statutory requirement for a charge of armed robbery." *Garza Rodriguez*, 164 Ariz. at 112. A "simulated deadly weapon" can be a hand held under clothing giving the appearance of a handgun. *State v. Bousley*, 171 Ariz. 166, 168 (1992); *State v. Ellison*, 169 Ariz. 424, 427, *approved,* 171 Ariz. 166, 168 (1992). A "simulated deadly weapon" can be a nasal inhaler used to simulate the barrel of a gun pressed to the victim's body. *State v. Felix*, 153 Ariz. 417, 419 (App. 1986).

CHAPTER 20

20.02 – Forgery

The crime of forgery requires proof that the defendant, with the intent to defraud, [falsely made, completed or altered a written instrument] [knowingly possessed a forged instrument] [offered or presented, whether accepted or not, a forged instrument or one containing false information].

["Written instrument" means:

(a) any paper, document or other instrument that contains written or printed matter or its equivalent; *or*

(b) any token, stamp, seal, badge, trademark, graphical image, access device or other evidence or symbol of value, right, privilege or identification.]

["Forged instrument" means a written instrument that has been falsely made, completed or altered.]

["Falsely alters a written instrument" means to change a complete or incomplete written instrument, without the permission of anyone entitled to grant it, by means of counterfeiting, washing, erasure, obliteration, deletion, insertion of new matter, connecting together different parts of the whole of more than one genuine instrument or transposition of matter or in any other manner, so that the altered instrument falsely appears or purports to be in all respects an authentic creation of its ostensible maker or authorized by the maker.]

["Falsely completes a written instrument" means to transform an incomplete written instrument into a complete one by adding, inserting or changing matter without the permission of anyone entitled to grant it, so that the complete written instrument falsely

["Falsely makes a written instrument" means to make or draw a complete or incomplete written instrument that purports to be an authentic creation of its ostensible maker but that is not either because the ostensible maker is fictitious, or because, if real, the ostensible maker did not authorize the making or drawing of the written instrument.]

["Incomplete written instrument" means a written instrument that contains some matter by way of content or authentication but that requires additional matter to render it a complete written instrument.]

SOURCE: A.R.S. §§ 13-2001(5), (6), (7), (8)**,** (9) and (12) (statutory language as of August 25, 2004); 13-2002 (statutory language as of July 18, 2000).

USE NOTE: Use the bracketed language as appropriate to the particular facts of the case.

The court shall instruct on the culpable mental state.

"Intentional" 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)).

COMMENT: For easier comprehension by the jury, the court may want to use the term "apparent" instead of the word "ostensible" in the instruction.

20.02.C – Forgery in Connection with a Drop House – Deleted

Users are advised that in *United States v. State of Arizona,* 119 F. Supp. 3d 955 (2014), the court held that federal law preempts Arizona law governing human smuggling.

20.03 – Criminal Possession of a Forgery Device

The crime of criminal possession of a forgery device requires proof that the defendant

[made or possessed with knowledge of its character and with the intent to commit fraud any plate, die, or other device, apparatus, equipment, software, access device, article, material, good, property or supply specifically designed or adapted for use in forging written instruments.]

[made or possessed any device, apparatus, equipment, software, access device, article, material, good, property or supply adaptable for use in forging written instruments with the intent to use it or to aid or permit another to use it for purposes of forgery.]

["Written instrument" means:

(a) any paper, document or other instrument that contains written or printed matter or its equivalent; *or*

(b) any token, stamp, seal, badge, trademark, graphical image, access device or other evidence or symbol of value, right, privilege or identification.]

SOURCE: A.R.S. §§ 13-2001(12) and 13-2003 (statutory language as of August 25, 2004).

USE NOTE: Use the bracketed language as appropriate to the particular facts of the case.

The court shall instruct on the culpable mental state.

"Intentional" 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)).

20.04 – Criminal Simulation

The crime of criminal simulation requires proof that the defendant, with the intent to defraud, [made] [altered] [presented or offered, whether accepted or not,] any object so that it appeared to have an antiquity, rarity, source, authorship or value that it did not in fact possess.

SOURCE: A.R.S. § 13-2004 (statutory language as of October 1, 1978).

USE NOTE: Use the bracketed language as appropriate to the facts of the case.

The court shall instruct on the culpable mental state.

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

COMMENT: In *State v. Rea*, 145 Ariz. 298, 300 (App. 1985), the court wrote that:

> [T]he criminal simulation statute was designed to address "the problems of forged art treasures or the sale of faked antiques or rare natural objects." Given that history, we hold that "object" in A.R.S. § 13-2004 does not include "written instrument" as defined in A.R.S. § 13-2001 and as used in A.R.S. § 13-2002. Section 13-2004 thus defines an offense different from forgery and cannot be a lesser-included offense within it.

20.06 – Criminal Impersonation

The crime of criminal impersonation requires proof that the defendant,

[assumed a false identity with the intent to defraud another.]

[pretended to be a representative of some person or organization with the intent to defraud.]

[pretended to be, or assumed a false identity of, an employee or a representative of some person or organization with the intent to induce another person to provide or allow access to property.]

SOURCE: A.R.S. § 13-2006 (statutory language as of August 21, 1998).

USE NOTE: Use the bracketed language that is appropriate to the facts of the case.

The court shall instruct on the culpable mental state.

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

20.08 – Taking the Identity of a Person or Entity

The crime of unlawful taking of another [(person's) (entity's)] identity requires proof that the defendant knowingly [(took) (purchased) (manufactured) (recorded) (possessed) (used)] any personal identifying information, or entity identifying information of another [(person) (entity)] without the consent of that other [(person) (entity)] whether the [(person) (entity)] is real or fictitious, with the intent to obtain or use the other [(person's) (entity's)] identity for any unlawful purpose or to cause loss to the [(person) (entity)], whether or not the other [(person) (entity)] suffered any economic loss as a result of the offense.

["Personal identifying information" means any written document or electronic data that does or purports to provide information concerning a name, signature, electronic identifier or screen name, electronic mail signature, address or account, biometric identifier, driver or professional license number, access device, residence or mailing address, telephone number, employer, student or military identification number, social security number, tax identification number, employment information, citizenship status or alien identification number, personal identification number, photograph, birth date, savings, checking or other financial account number, credit card, charge card or debit card number, mother's maiden name, fingerprint or retinal image, the image of an iris or deoxyribonucleic acid or genetic information.]

["Entity identifying information" includes, if the entity is a person other than a human being, any written document or electronic data that does or purports to provide information concerning the entity's name, address, telephone number, employer identification number, account number or electronic serial number, the identifying number of the entity's depository account or any other information or data that is unique to, assigned to or belongs to the entity and that is intended to be used to access services, funds or benefits of any kind that the entity owns or to which the entity is entitled.]

SOURCE: A.R.S. §§ 13-2001(4) and (10); 13-2008 (statutory language as of August 12, 2005).

USE NOTE: Use the bracketed language as appropriate to the particular facts of the case.

The court shall instruct on the culpable mental state.

"Intentional" 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)).

This section does not apply to a violation of A.R.S. § 4-241 (using a fake identification) by a person who is under twenty-one years of age. *See* A.R.S. § 13-2008(D).

20.08.A – Taking the Identity of a Person or Entity

The crime of unlawful taking of another [(person's) (entity's)] identity requires proof that the defendant knowingly [(took) (purchased) (manufactured) (recorded) (possessed) (used)] any personal identifying information, or entity identifying information of another [(person) (entity)] without the consent of that other [(person) (entity)] whether the [(person) (entity)] is real or fictitious, and with the intent to obtain or use the other [(person's) (entity's)] identity for any unlawful purpose or to cause loss to the [(person) (entity)], whether or not the other [(person) (entity)] suffered any economic loss as a result of the offense**,** or with the intent to obtain or continue employment.

["Personal identifying information" means any written document or electronic data that does or purports to provide information concerning a name, signature, electronic identifier or screen name, electronic mail signature, address or account, biometric identifier, driver or professional license number, access device, residence or mailing address, telephone number, employer, student or military identification number, social security number, tax identification number, employment information, citizenship status or alien identification number, personal identification number, photograph, birth date, savings, checking or other financial account number, credit card, charge card or debit card number, mother's maiden name, fingerprint or retinal image, the image of an iris or deoxyribonucleic acid or genetic information.]

["Entity identifying information" includes, if the entity is a person other than a human being, any written document or electronic data that does or purports to provide information concerning the entity's name, address, telephone number, employer identification number, account number or electronic serial number, the identifying number of the entity's depository account or any other information or data that is unique to, assigned to or belongs to the entity and that is intended to be used to access services, funds or benefits of any kind that the entity owns or to which the entity is entitled.]

SOURCE: A.R.S. §§ 13-2008(A) (statutory language as of May 1, 2008); 13-2001(4) and (10) (statutory language as of August 12, 2005).

USE NOTE: Use the bracketed language as appropriate to the particular facts of the case.

The court shall instruct on the culpable mental state.

"Intentional" 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)).

This section does not apply to a violation of A.R.S. § 4-241 (using a fake identification) by a person who is under twenty-one years of age. *See* A.R.S. § 13-2008(D).

20.08.B – Knowingly Accepting the Identity of Another Person

The crime of knowingly accepting the identity of another person requires proof that the defendant, in hiring an employee, knowingly:

1. accepted any personal identifying information of another person from an individual and knew that the individual was not the actual person identified by that information; *and*
2. used that identity information for the purpose of determining whether the individual who presented that identity information had the legal right or authorization to work in the United States under federal law.

"Personal identifying information" means any written document or electronic data that does or purports to provide information concerning a name, signature, electronic identifier or screen name, electronic mail signature, address or account, biometric identifier, driver or professional license number, access device, residence or mailing address, telephone number, employer, student or military identification number, social security number, tax identification number, employment information, citizenship status or alien identification number, personal identification number, photograph, birth date, savings, checking or other financial account number, credit card, charge card or debit card number, mother's maiden name, fingerprint or retinal image, the image of an iris or deoxyribonucleic acid or genetic information.

SOURCE: A.R.S. §§ 13-2008(B) (statutory language as of May 1, 2008); 13-2001(10) (statutory language as of August 12, 2005).

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)).

20.09.A – Aggravated Taking of the Identity of a Person or Entity

The crime of aggravated taking of another's identity requires proof that the defendant:

1. knowingly [took], [purchased], [manufactured], [recorded], [possessed] [used] any [personal] [entity] identifying information, of another [person] [entity]; *and*

2. The identifying information was for three or more [persons] [entities], real or fictitious, without the consent of those [persons] [entities], with the intent to [obtain] [use] those [persons'] [entities'] identities for any unlawful purpose or to cause loss to those [persons] [entities], even though those [persons] [entities] suffered no actual economic loss as a result of the offense.

or

1. knowingly [took], [purchased], [manufactured], [recorded], [possessed] [used] any [personal] [entity] identifying information, of another [person] [entity]; *and*
2. The identifying information was for [a person] [an entity], including real or fictitious, without the consent of that other [person] [entity], with the intent to [obtain] [use] the other [person's] [entity's] identity for any unlawful purpose and caused any [person] [entity] to suffer an economic loss of three thousand dollars or more.

or

[knowingly [took], [purchased], [manufactured], [recorded], [possessed] [used] any [personal] [entity] identifying information, of another person, real or fictitious, with the intent to obtain employment.]

["Personal identifying information" means any written document or electronic data that does or purports to provide information concerning a name, signature, electronic identifier or screen name, electronic mail signature, address or account, biometric identifier, driver or professional license number, access device, residence or mailing address, telephone number, employer, student or military identification number, social security number, tax identification number, employment information, citizenship status or alien identification number, personal identification number, photograph, birth date, savings, checking or other financial account number, credit card, charge card or debit card number, mother's maiden name, fingerprint or retinal image, the image of an iris or deoxyribonucleic acid or genetic information.]

["Entity identifying information" includes, if the entity is a person other than a human being, any written document or electronic data that does or purports to provide information concerning the entity's name, address, telephone number, employer identification number, account number or electronic serial number, the identifying number of the entity's depository account or any other information or data that is unique to, assigned to or belongs to the entity and that is intended to be used to access services, funds or benefits of any kind that the entity owns or to which the entity is entitled.]

[If the defendant possessed three or more identities out of the regular course of business, you may infer that the possession was for an unlawful purpose.

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

In considering whether the alleged unlawful conduct has been satisfactorily explained, you are reminded that in the exercise of constitutional rights, a defendant need not testify. The alleged unlawful conduct may be satisfactorily explained through other circumstances and other evidence, independent of any testimony by a defendant.]

SOURCE: A.R.S. §§ 13-2001(4) and (10) (statutory language as of July 24, 2014); 13-2009 (statutory language as of September 19, 2007).

USE NOTE: Use the bracketed language that is appropriate for the case.

A.R.S. § 13-2009 "aggravates" the offense set forth in § 13-2008 by adding the element that either the defendant took three or more identities or a victim suffered three thousand dollars ($3,000.00) or more in economic loss. Additionally, if the defendant had the personal identifying information or entity identifying information of three or more persons or entities, the statute raises an inference that the possession of the information "out of the regular course of business" was for an unlawful purpose.

The court should provide a special verdict to the jury in order to determine whether there are three or more persons or entities whose identity was taken or whether any person or entity suffered an economic loss of three thousand dollars ($3,000.00) or more.

The court shall instruct on the culpable mental state.

"Intentional" 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)).

This section does not apply to a violation of A.R.S. § 4-241 (using a fake identification) by a person who is under twenty-one years of age. *See* A.R.S. § 13-2009(C).

COMMENT: Permissive presumptions allow triers of fact to freely disregard the presumption and are constitutional, if reasonable, because they do not shift the burden of proof or the burden of persuasion. This is so because a permissive presumption is nothing more than an inference. It allows the trier of fact to infer the presumed fact from proof of the basic facts, but places no burden of any kind on the defendant. *State v. Spoon*, 137 Ariz. 105, 109 (App. 1983). The court should also be aware that, "[a] statute that shifts the burden of persuasion on an element of the offense to a criminal defendant violates due process." *Sandstrom v Montana,* 442 U.S. 510, 523-24 (1979).

It is important to caution the jury that the inference is not mandatory and that the jury must look at all the facts and circumstances of the case in deciding whether the presumption should be applied. *State v. Mohr,* 150 Ariz. 564, 568-69 (App. 1986) (recommending that the language as contained in this instruction is preferable, because it expressly tells the jury that it is not compelled to draw the inference).

The use of the term "may give rise to an inference," which is contained in the text of this instruction, was specifically approved in *State v. Mohr,* 150 Ariz. at 569.

The paragraph pertaining to the defendant's constitutional right not to testify was specifically approved *verbatim* in *State v. Mohr,* 150 Ariz. at 568 (citing to *Barnes v. United States*, 412 U.S. 837, 843 (1973)).

20.09.B – Knowingly Accepting the Identity of Another Person

The crime of knowingly accepting the identity of another person requires proof that defendant, in hiring an employee, knowingly did both of the following:

1. Accepted any personal identifying information of another person from an individual and knew that the individual is not the actual person identified by that information.
2. Used that identity information for the purpose of determining whether the individual who presented that identity information had the legal right or authorization under federal law to work in the United States [as described and determined under the processes and procedures under 8 U.S.C. § 1324a.]

SOURCE: A.R.S. §§ 13-2009 (statutory language as of July 24, 2014).

USE NOTE: Use statutory definition instruction defining "knowingly."

This section does not apply to a violation of A.R.S. § 4-241 (using a fake identification) by a person who is under twenty-one years of age. *See* A.R.S. § 13-2009(C).

20.10 – Trafficking in the Identity of Another Person or Entity

The crime of trafficking in the identity of another [(person) (entity)] requires proof that the defendant knowingly:

1. [(sold) (transferred) (transmitted)] any [(personal) (entity)] identifying information of another [(person) (entity)], including a real or fictitious [(person) (entity)], without the consent of the other [(person) (entity)]; *and*
2. [for any unlawful purpose.]

   [to cause loss to the other [(person) (entity)] whether or not the other [(person) (entity)] actually suffered any economic loss.]

   [to allow another person to obtain or continue employment.]

["Personal identifying information" means any written document or electronic data that does or purports to provide information concerning a name, signature, electronic identifier or screen name, electronic mail signature, address or account, biometric identifier, driver or professional license number, access device, residence or mailing address, telephone number, employer, student or military identification number, social security number, tax identification number, employment information, citizenship status or alien identification number, personal identification number, photograph, birth date, savings, checking or other financial account number, credit card, charge card or debit card number, mother's maiden name, fingerprint or retinal image, the image of an iris or deoxyribonucleic acid or genetic information.]

["Entity identifying information" includes, if the entity is a person other than a human being, any written document or electronic data that does or purports to provide information concerning the entity's name, address, telephone number, employer identification number, account number or electronic serial number, the identifying number of the entity's depository account or any other information or data that is unique to, assigned to or belongs to the entity and that is intended to be used to access services, funds or benefits of any kind that the entity owns or to which the entity is entitled.]

SOURCE: A.R.S. §§ 13-2010 (statutory language as of May 1, 2008); 13-2001(4) and (10) (statutory language as of August 12, 2005).

USE NOTE: Use the bracketed language that is appropriate for the case.

The court shall instruct on the culpable mental state.

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

This section does not apply to a violation of A.R.S. § 4-241 (using a fake identification) by a person who is under 21 years of age. *See* A.R.S. § 13-2010(B).

CHAPTER 21

21.01.01 – Definition of "Cancelled or Revoked Credit Card"

"Cancelled or revoked credit card" means a credit card that is no longer valid because permission to use it has been suspended, revoked or terminated by the issuer of the credit card by written notice sent by certified or registered mail addressed to the person to whom the credit card was issued at such person's last known address.

If there is evidence that written notice has been deposited as certified or registered matter in the United States mail addressed to the person to whom the credit card was issued at such person's last known address, you may infer that the cardholder received such written notice.

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

SOURCE: A.R.S. § 13-2101(1) (statutory language as of August 25, 2004).

USE NOTE: "Credit card" is defined in A.R.S. § 13-2101(3) (Statutory Definition Instruction 21.01.03).

"Issuer" is defined in A.R.S. § 13-2101(6) (Statutory Definition Instruction 21.01.06).

Whenever the law allows the drawing of an inference, the court must instruct the jury on rebuttable presumptions (inferences), which is included in this instruction. *See State v. Mohr,* 150 Ariz. 564, 568-69 (App. 1986) (holding that a statutory inference must be permissive to satisfy constitutional due process and to avoid burden-shifting to the defendant); *State v. Forrester,* 134 Ariz. 444, 451 (App. 1982) (holding that mandatory presumptions are unconstitutional).

21.01.02 – Definition of "Cardholder"

"Cardholder" means any person who is [named on the face of a credit card to whom or for whose benefit the credit card is issued by an issuer] [in possession of a credit card with the consent of the person to whom the credit card was issued].

SOURCE: A.R.S. § 13-2101(2) (statutory language as of August 25, 2004).

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

"Credit card" is defined in A.R.S. § 13-2101(3) (Statutory Definition Instruction 21.01.03).

"Issuer" is defined in A.R.S. § 13-2101(6) (Statutory Definition Instruction 21.01.06).

"Possess" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0534).

21.01.03 – Definition of "Credit Card"

"Credit card" means:

[any instrument or device, whether known as a credit card, charge card, credit plate, courtesy card or identification card or by any other name, that is issued with or without fee by an issuer for the use of the cardholder in obtaining money, goods, services or anything else of value, either on credit or in possession or in consideration of an undertaking or guaranty by the issuer of the payment of a check drawn by the cardholder, on a promise to pay in part or in full therefor at a future time. The indebtedness, whether all or any part thereof, that is represented by the promise to make deferred payment may be secured or unsecured.]

[a debit card, electronic benefit transfer card or other access instrument or device, other than a check that is signed by the account holder or other authorized signatory on the deposit account, that draws funds from a deposit account in order to obtain money, goods, services or anything else of value.]

[a stored value card, smart card or other instrument or device that enables a person to obtain money, goods, services or anything else of value through the use of value stored on the card, instrument or device.]

[the number that is assigned any such card, instrument or device defined above even if the physical card, instrument or device is not used or presented.]

SOURCE: A.R.S. § 13-2101(3) (statutory language as of August 25, 2004).

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

"Cardholder" is defined in A.R.S. § 13-2101(2) (Statutory Definition Instruction 21.01.02).

"Issuer" is defined in A.R.S. § 13-2101(6) (Statutory Definition Instruction 21.01.06).

"Obtain" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(10)).

"Possess" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0534).

"Services" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(14)).

"Value" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(15)).

21.01.04 – Definition of "Expired Credit Card"

"Expired credit card" means a credit card that is no longer valid because the date shown on the credit card has expired.

SOURCE: A.R.S. § 13-2101(4) (statutory language as of August 25, 2004).

USE NOTE:

"Credit card" is defined in A.R.S. § 13-2101(3) (Statutory Definition Instruction 21.01.03).

21.01.05 –Definition of "Incomplete Credit Card"

"Incomplete credit card" means a credit card that has not been stamped, embossed, imprinted or written with matter that the issuer requires to appear on a credit card before it can be used by a cardholder. A credit card is not considered incomplete under this definition if only the signature of the cardholder is missing.

SOURCE: A.R.S. § 13-2101(5) (statutory language as of August 25, 2004).

USE NOTE:

"Cardholder" is defined in A.R.S. § 13-2101(2) (Statutory Definition Instruction 21.01.02).

"Credit card" is defined in A.R.S. § 13-2101(3) (Statutory Definition Instruction 21.01.03).

"Issuer" is defined in A.R.S. § 13-2101(6) (Statutory Definition Instruction 21.01.06).

COMMENT: The statute uses the word "matter." Depending on the facts of the case, substituting the actual item missing may make the instruction clearer to the jury.

21.01.06 – Definition of "Issuer"

"Issuer" means any business organization, state agency or financial institution, or its duly authorized agent, that issues a credit card.

SOURCE: A.R.S. § 13-2101(6) (statutory language as of August 25, 2004).

USE NOTE:

"Credit card" is defined in A.R.S. § 13-2101(3) (Statutory Definition Instruction 21.01.03).

21.01.07 – Definition of "Merchant"

"Merchant" means a person who is authorized under a written contract with a participating party to furnish money, goods, services or anything else of value on presentation of a credit card by a cardholder.

SOURCE: A.R.S. § 13-2101(7) (statutory language as of August 25, 2004).

USE NOTE:

"Cardholder" is defined in A.R.S. § 13-2101(2) (Statutory Definition Instruction 21.01.02).

"Credit card" is defined in A.R.S. § 13-2101(3) (Statutory Definition Instruction 21.01.03).

"Participating party" is defined in A.R.S. § 13-2101(8) (Statutory Definition Instruction 21.01.08).

"Person" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0530).

"Services" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(14)).

"Value" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(15)).

21.01.08 – Definition of "Participating Party"

"Participating party" means:

1. a business organization or financial institution that is obligated or permitted by contract to acquire, by electronic transmission or other means from a merchant, a sales slip or sales draft or instrument for the payment of money showing a credit card transaction; *and*
2. from whom an issuer is obligated or permitted by contract to acquire, by electronic transmission or other means, such sales slip, sales draft or instrument for the payment of money showing a credit card transaction.

SOURCE: A.R.S. § 13-2101(8) (statutory language as of August 25, 2004).

USE NOTE:

"Credit card" is defined in A.R.S. § 13-2101(3) (Statutory Definition Instruction 21.01.03).

"Issuer" is defined in A.R.S. § 13-2101(6) (Statutory Definition Instruction 21.01.06).

"Merchant" is defined in A.R.S. § 13-2101(7) (Statutory Definition Instruction 21.01.07).

21.01.09 – Definition of "Receives" or "Receiving"

"Receives" or "receiving" means acquiring possession or control of a credit card or accepting a credit card as security for a loan.

SOURCE: A.R.S. § 13-2101(9) (statutory language as of August 25, 2004).

USE NOTE:

"Control" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(2)).

"Credit card" is defined in A.R.S. § 13-2101(3) (Statutory Definition Instruction 21.01.03).

"Possess" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0534).

21.01.10 – Definition of "Reencoder"

"Reencoder" means an electronic device that places encoded information from the magnetic strip or stripe of a credit card onto the magnetic strip or stripe of another credit card.

SOURCE: A.R.S. § 13-2101(10) (statutory language as of August 25, 2004).

USE NOTE:

"Credit card" is defined in A.R.S. § 13-2101(3) (Statutory Definition Instruction 21.01.03).

21.01.11 – Definition of "Scanning Device"

"Scanning device" means an electronic device used to access, read, scan, obtain, memorize, transmit or store, temporarily or permanently, information encoded on a strip or stripe of a credit card.

SOURCE: A.R.S. § 13-2101(11) (statutory language as of August 25, 2004).

USE NOTE:

"Credit card" is defined in A.R.S. § 13-2101(3) (Statutory Definition Instruction 21.01.03).

"Obtain" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(10)).

21.02 – Theft of a Credit Card or Obtaining a Credit Card by Fraudulent Means

The crime of theft of a credit card or obtaining a credit card by fraudulent means requires proof that the defendant:

[controlled a credit card without the cardholder's or issuer's consent with the intent to deprive the other person of such property.]

[controlled a credit card without the cardholder's or issuer's consent and converted for an unauthorized term or use services or property of another entrusted to the defendant or placed in the defendant's possession for a limited, authorized term or use.]

[controlled a credit card without the cardholder's or issuer's consent and obtained services or property of another by means of any material misrepresentation with intent to deprive the other person of such services or property.]

[controlled a credit card without the cardholder's or issuer's consent that was lost, mislaid or misdelivered under circumstances providing means of inquiry as to the true owner *and* appropriated such credit card to the defendant's own use or another's use without reasonable efforts to notify the true owner.]

[controlled a credit card without the cardholder's or issuer's consent knowing or have reason to know that the credit card was stolen.]

[controlled a credit card without the cardholder's or issuer's consent and obtained services known to the defendant to be available only for compensation without paying or an agreement to pay the compensation or diverted another's services to the defendant's own or another's benefit without authority to do so.]

[controlled a credit card without the cardholder's or issuer's consent and knowingly obtained/sought to obtain property or services with the use of the credit card by means of a threat to do in the future the following:

(cause physical injury to anyone)

(cause physical injury to anyone by means of a deadly weapon or dangerous instrument)

(cause damage to property)

(engage in conduct constituting an offense)

(accuse anyone of a crime)

(bring criminal charges against anyone)

(take or withhold action as a public servant)

(cause a public servant to take or withhold action)

(cause anyone to part with any property)]

(sold) (transferred) (conveyed) a credit card with the intent to defraud]

[with the intent to defraud, obtained possession, care, custody or control over a credit card as security for debt]

SOURCE: A.R.S. §§ 13-2102 (statutory language as of August 25, 2004); 13-1802(A) (statutory language as of September 21, 2006); 13-1804(A) (statutory language as of September 21, 1999).

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

The court shall instruct on the culpable mental state.

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

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

"Cardholder" is defined in A.R.S. § 13-2101 (Statutory Definition Instruction 21.01.02).

"Control" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(2)).

"Credit card" is defined in A.R.S. § 13-2101 (Statutory Definition Instruction 21.01.03).

"Damage" is defined in A.R.S. § 13-1701 (Statutory Definition Instruction 17.01(1)).

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

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

"Deprive" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(4)).

"Issuer" is defined in A.R.S. § 13-2101 (Statutory Criminal Instruction 21.01.06).

"Material misrepresentation" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(8)).

"Obtain" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(10)).

"Person" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0530).

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

"Possess" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0534).

"Property" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(12)).

"Property of another" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(13)).

"Public servant" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0538.

"Services" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(14)).

"Unlawful" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0540).

This instruction incorporates the elements of A.R.S. §§ 13-1802 and 13-1804, as required by A.R.S. § 13-2102(A)(1).

It is recommended that the court not instruct on A.R.S. § 13-1804(A)(6), which makes it a crime to threaten to "expose a secret or an asserted fact, whether true or false, tending to subject anyone to hatred, contempt or ridicule or to impair a person's credit or business," because this subsection was declared unconstitutional in *State v. Weinstein,* 182 Ariz. 564, 568 (App. 1995). That subsection has not been included in this instruction.

Because A.R.S. § 13-2102 includes conduct prescribed by A.R.S. § 13-1804, and because A.R.S. § 13-1804 provides for an affirmative defense as to violations of A.R.S. § 13-1804(A)(5) and (7), the court should give a comparable affirmative defense instruction if the defense raises such a defense to a similar violation under A.R.S. § 13-2102. *See* Statutory Criminal Instruction 21.02-1.

21.02-1 – Affirmative Defense to Theft of a Credit Card or Obtaining a Credit Card by Fraudulent Means under A.R.S. § 13-2102(A)(1), Incorporating A.R.S. §§ 13-1804(A)(5) or (7) and 13-1804(B)

The defendant has been accused of theft of a credit card by extortion for [accusing anyone of a crime] [bringing criminal charges against anyone] [taking or withholding action as a public servant] [causing a public servant to take or withhold action]. It is a defense to such charge if the defendant proves by a preponderance of the evidence that the property obtained by threat of the [accusation] [exposure] [lawsuit] [invocation of official action] was lawfully claimed as:

[restitution or indemnification for harm done under circumstances to which the (accusation/exposure/lawsuit/official action) relates].

[compensation for property that was (lawfully obtained/for lawful services)].

If you find that the defendant has proven this defense by a preponderance of the evidence, you must find the defendant not guilty of this offense.

"Preponderance of the evidence" means that the fact is more probably true than not true.

SOURCE: A.R.S. §§ 13-2102 (statutory language as of August 25, 2004); 13-1804(B) (statutory language as of September 21, 1999).

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

This affirmative defense is only available in prosecutions only under A.R.S. § 13-2102 that incorporate A.R.S. § 13-1804(A)(5) or (7).

Due to A.R.S. § 13-1804(A)(6) being declared unconstitutional in *State v. Weinstein,* 182 Ariz. 564, 568 (App. 1995) (holding that (A)(6) encompasses protected speech and thus violates the First Amendment), the court should not instruct the jury on that subsection, so there should be no need to assert the affirmative defense as to that subsection.

The court shall instruct on "affirmative defense" so as to inform the jury on the burden of proof.

"Affirmative defense" is defined in A.R.S. § 13-205 (Statutory Criminal Instruction 2.025).

Because the burden of proof for the defendant is preponderance of the evidence, the court shall use Standard Instruction 4(b), which discusses the different burdens of proof.

"Credit card" is defined in A.R.S. § 13-2101 (Statutory Criminal Instruction 21.01.03).

"Obtain" is defined in A.R.S. § 13-1801 (Statutory Criminal Instruction 18.01(10)).

"Property" is defined in A.R.S. § 13-1801 (Statutory Criminal l Instruction 18.01(12)).

21.03 – Receipt of Anything of Value Obtained by Fraudulent Use of a Credit Card

The crime of receipt of anything of value obtained by fraudulent use of a credit card requires proof that the defendant:

[bought] [received] [attempted to buy] [attempted to receive] money, goods or services or any other thing of value obtained by the fraudulent use of a credit card; *and*

knew or believed that such money, goods or services or any other thing of value was obtained by the fraudulent use of a credit card.

You must determine the value of all money, goods, services or other things of value obtained or attempted to be obtained. [You may total or aggregate the amount obtained from one or more persons if the amounts obtained were pursuant to one scheme or course of conduct.] You must set forth your finding of value on the verdict form. This will become clearer when you review the verdict form. The State has the burden of proving the value beyond a reasonable doubt.

SOURCE: A.R.S. § 13-2103 (statutory language as of July 21, 1997).

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

The court shall instruct on the offense of fraudulent use of a credit card (Statutory Criminal Instruction 21.05).

The court shall instruct on the culpable mental state.

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

"Attempt" is defined in A.R.S. § 13-1001 (Statutory Definition Instruction 10.01).

"Credit card" is defined in A.R.S. § 13-2101 (Statutory Definition Instruction 21.01.03).

"Obtain" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(10)).

"Receives" or "receiving" is defined in A.R.S. § 13-2101 (Statutory Definition Instruction 21.01.09).

"Services" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(14)).

"Value" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(15)).

The court should submit a verdict form as to value, because the classes of offenses are different based on the value of the money, goods, services or any other thing of value. *See* Verdict Form 21.03A.

COMMENT: A.R.S. § 13-2103(B) provides that amounts obtained by fraudulent use of a credit card pursuant to one course or scheme of conduct, whether from one or several persons, may be aggregated in determining the classification of offense.

21.04 – Forgery of Credit Card

The crime of forgery of credit card requires proof that the defendant, with intent to defraud,

[altered a credit card.]

[falsely made, manufactured or fabricated an instrument or device purporting to be a credit card without the issuer's express authorization to do so.]

[caused to falsely make, manufacture or fabricate an instrument or device purporting to be a credit card without the issuer's express authorization to do so.]

[falsely embossed or altered a credit card or an instrument or device purporting to be a credit card.]

[uttered a falsely made, embossed or altered credit card or an instrument or device purporting to be a credit card.]

[being other than the cardholder, signed the name of an actual or fictitious person to a credit card or an instrument for the payment of money that evidences a credit card transaction.]

SOURCE: A.R.S. § 13-2104 (statutory language as of July 21, 1997).

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

The court shall instruct on the culpable mental state.

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

"Cardholder" is defined in A.R.S. § 13-2101 (Statutory Definition Instruction 21.01.02).

"Credit card" is defined in A.R.S. § 13-2101 (Statutory Definition Instruction 21.01.03).

"Issuer" is defined in A.R.S. § 13-2101 (Statutory Definition Instruction 21.01.06).

COMMENT: Under the predecessor statutes, it was not double punishment to be convicted of both possession of a stolen credit card with intent to defraud and credit card forgery. *State v. Taylor,* 27 Ariz 140, 141 (App. 1976).

The statute uses the word "utters." The court may wish to consider using a more commonly understood word to enhance the jury's understanding of the instruction. In *State v. Singh*, 4 Ariz. 273 (App. 1966), the court wrote:

> We are concerned with the question of uttering, publishing, passing or attempting to pass the forged documents. Uttering has been defined as follows:
>
> 'To utter and publish a forged instrument is to offer to pass it to another with intent to prejudice, damage, or defraud, declaring or asserting directly or indirectly by words or actions that it is good.' *Crawford v. State*, 164 Neb. 231, 82 N.W.2d 1 (1957).
>
> 'Uttering' is a term of art used to distinguish the actual forgery from the passing or publishing, and as used in the law of forgery is synonymous with publishing:
>
> The words 'utter' or 'publish', as used in the law of forgery, are synonymous, and they mean to make any use, or to attempt any use of an instrument, document or writing, whereby or in connection with which a person asserts or represents to another, directly or indirectly, expressly or impliedly, by words or conduct, that the instrument, document or writing is genuine. *People v. Larue*, 28 Cal. App. 2d 748, 83 P.2d 725, 728.

See also State v. Culver, 103 Ariz. 505, 507 (1968) ("To utter means to pass or attempt to pass.")

21.05 – Fraudulent Use of Credit Card

The crime of fraudulent use of credit card requires proof that the defendant, with intent to defraud:

[used a (credit card or credit card number obtained or retained in violation of law) (credit card or credit card number that the defendant knew was forged, expired, cancelled or revoked), for the purpose of obtaining or attempting to obtain money, goods, services or any other thing of value.]

[obtained or attempted to obtain money, goods, services or any other thing of value by representing, without the consent of the cardholder, that he/she was the holder of the credit card.]

[obtained or attempted to obtain money, goods, services or any other thing of value by representing that he/she was the holder of a credit card, which, in fact, had not been issued.]

You must determine the value of all money, goods, services or other things of value obtained or attempted to be obtained by the defendant within a consecutive six-month period. You must set forth your finding of value on the verdict form. This will become clearer when you review the verdict form. The State has the burden of proving the value beyond a reasonable doubt.

SOURCE: A.R.S. § 13-2105 (statutory language as of July 21, 1997).

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

The court shall instruct on the culpable mental state.

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

"Attempt" is defined in A.R.S. § 13-1001 (Statutory Definition Instruction 10.01).

"Cardholder" is defined in A.R.S. § 13-2101 (Statutory Definition Instruction 21.01.02).

"Credit card" is defined in A.R.S. § 13-2101 (Statutory Definition Instruction 21.01.03).

"Expired credit card" is defined in A.R.S. § 13-2101 (Statutory Definition Instruction 21.01.04).

"Issuer" is defined in A.R.S. § 13-2101 (Statutory Definition Instruction 21.01.06).

"Obtain" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(10)).

"Services" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(14)).

"Value" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(15)).

The court must submit a verdict form as to value, because the classes of the offenses are different based on the value of the money, goods, services or any other thing of value within a consecutive six-month period. *See* Verdict Form 21.05A.

21.06 – Possession of Machinery, Plate or Other Contrivance

The crime of possession of machinery, plate or other contrivance requires proof that the defendant:

1. possessed, with intent to defraud, any machinery, plate or any other contrivance designed to reproduce an instrument or device purporting to be the credit card of an issuer who has not consented to the preparation of such credit card; and
2. knew the character of the machinery, plate or contrivance he/she possessed.

SOURCE: A.R.S. § 13-2106(A)(2) (statutory language as of October 1, 1978).

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

"Intentionally" or "with the intent to" is defined in A.R.S. § 13-105 (Statutory Criminal Instruction 1.0510(a)(1)).

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

"Attempt" is defined in A.R.S. § 13-1001 (Statutory Definition Instruction 10.01).

"Credit card" is defined in A.R.S. § 13-2101 (Statutory Definition Instruction 21.01.03).

"Issuer" is defined in A.R.S. § 13-2101 (Statutory Definition Instruction 21.01.06).

"Possess" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0534).

This instruction is taken only from A.R.S. § 13-2106(A)(2), because a violation is a class 6 felony, while a violation of A.R.S. § 13-2106(A)(1) is a class 1 misdemeanor.

COMMENT: Because of the complex wording of the statute, the court may wish to consider using simpler wording to enhance the jury's understanding of the instruction. A suggested alternate instruction is:

> The crime of possession of machinery, plate or other contrivance requires proof that the defendant:
>
> 1. possessed, with intent to defraud, any thing designed to reproduce an item appearing to be a credit card without the consent of the issuer; *and*
> 2. knew the purpose of the items that he/she possessed.

21.07 – False Statement as to Financial Condition or Identity

The crime of false statement as to financial condition or identity requires proof that the defendant,

1. for the purpose of procuring the issuance of a credit card, made or caused to be made, either directly or indirectly, any false statement in writing as to a material fact, knowing it to be false; *and*
2. intended that such statement be relied on regarding [the identity of the defendant or any other person, firm or corporation] [the financial condition of the defendant or any other person, firm or corporation].

SOURCE: A.R.S. § 13-2107 (statutory language as of July 21, 1997).

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

The court shall instruct on the culpable mental state.

"Intentionally" or "with the intent to" 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)).

"Credit card" is defined in A.R.S. § 13-2101 (Statutory Definition Instruction 21.01.03).

"Issuer" is defined in A.R.S. § 13-2101 (Statutory Definition Instruction 21.01.06).

"Material" is defined in A.R.S. § 13-2701 (Statutory Definition Instruction 27.01(1)).

"Person" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0530).

"Statement" is defined in A.R.S. § 13-2701 (Statutory Definition Instruction 27.01(2)).

21.08 – Fraud by Person Authorized to Provide Goods or Services

The crime of fraud by person authorized to provide goods or services requires proof that the defendant knowingly:

[furnished money, goods, services or any other thing of value upon presentation of a credit card the defendant knew was obtained or retained through theft by fraudulent means;]

[furnished money, goods, services or any other thing of value upon presentation of a credit card that the defendant knew was forged, expired, cancelled or revoked;]

[failed to furnish money, goods, services or any other thing of value that the defendant represented in writing to the issuer or a participating party that the defendant had furnished, and the defendant received payment for such;]

and

[the payment received by the defendant for all money, goods, services and any other things of value] [the difference between the value of all money, goods, services and any other things of value actually furnished by the defendant and the payment or payments received by the defendant based upon the defendant's representations] exceeded $100.00 in any consecutive six-month period.

SOURCE: A.R.S. § 13-2108 (statutory language as of October 1, 1978).

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

The court shall instruct on the culpable mental state.

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

"Cancelled or revoked credit card" is defined in A.R.S. § 13-2101 (Statutory Definition Instruction 21.01.01).

"Credit card" is defined in A.R.S. § 13-2101 (Statutory Definition Instruction 21.01.03).

"Expired credit card" is defined in A.R.S. § 13-2101 (Statutory Definition Instruction 21.01.04).

"Issuer" is defined in A.R.S. § 13-2101 (Statutory Definition Instruction 21.01.06).

"Participating party" is defined in A.R.S. § 13-2101 (Statutory Definition Instruction 21.01.08).

"Person" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0530).

"Receives" or "receiving" is defined in A.R.S. § 13-2101 (Statutory Definition Instruction 21.01.09).

"Services" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(14)).

"Value" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(15)).

The last bracketed paragraph was included, because the offense is a felony only if the value exceeded $100 in any consecutive six-month period. A.R.S. § 13-2108(C) and (D).

21.09-1 – Credit Card Transaction Record Theft (Defendant-Merchant)

The crime of credit card transaction record theft requires proof that the defendant:

1. was a merchant; *and*
2. acting with the intent to defraud, knowingly presented for payment to a participating party a credit card transaction record of a sale that was not made by the defendant.

You must determine the value of the theft or thefts. [In determining the value, you may total or aggregate the amount taken from one or more persons in credit card transaction record theft that was committed pursuant to one scheme or course of conduct.] Your finding must be set forth on the verdict form. This will become clearer when you review the verdict form. The State has the burden of proving the value beyond a reasonable doubt.

SOURCE: A.R.S. § 13-2109(A)(1) (statutory language as of July 13, 1995).

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

The bracketed language should only be used if the indictment or information has alleged a scheme or course of conduct.

"Intentionally" or "with the intent to" 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)).

"Credit card" is defined in A.R.S. § 13-2101 (Statutory Definition Instruction 21.01.03).

"Merchant" is defined in A.R.S. § 13-2101 (Statutory Definition Instruction 21.01.07).

"Participating party" is defined in A.R.S. § 13-2101 (Statutory Definition Instruction 21.01.08).

The court must submit a verdict form as to value, because the classes of offenses are different based on the value of the credit card transaction record theft. *See* Verdict Form 21.09A. "In order to determine the classification of the offense, the state may aggregate in the indictment or information amounts that were taken from one or more persons in credit card transaction record theft that was committed pursuant to one scheme or course of conduct." A.R.S. § 13-2109(B). If the state has made this allegation, the court will need to fashion a verdict form based on the manner in which the state has alleged the offense or offenses. The committee was not able to fashion a standard verdict form for use in all cases. If the state alleges only one count based on a scheme or course of conduct without also charging each individual theft in separate counts, the issues that will have to be decided are whether the jury is allowed to decide the value of the theft and, if so, how the value of the theft is determined if the state fails to prove the scheme or course of conduct.

21.09-2 – Credit Card Transaction Record Theft (Defendant Not a Merchant)

The crime of credit card transaction record theft requires proof that the defendant:

1. knowingly commanded, encouraged, requested or solicited a merchant to present for payment to the participating party a credit card transaction record of a sale that was not made by the merchant; *and*

2. did not have the participating party's authorization.

You must determine the value of the theft or thefts. [In determining the value, you may total or aggregate the amount taken from one or more persons in credit card transaction record theft that was committed pursuant to one scheme or course of conduct.] Your finding must be set forth on the verdict form. This will become clearer when you review the verdict form. The State has the burden of proving the value beyond a reasonable doubt.

SOURCE: A.R.S. § 13-2109(A)(2) (statutory language as of July 13, 1995).

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

The bracketed language should only be used if the indictment or information has alleged a scheme or course of conduct.

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

"Credit card" is defined in A.R.S. § 13-2101 (Statutory Definition Instruction 21.01.03).

"Merchant" is defined in A.R.S. § 13-2101 (Statutory Definition Instruction 21.01.07).

"Participating party" is defined in A.R.S. § 13-2101 (Statutory Definition Instruction 21.01.08).

The court should submit a verdict form as to value, because the classes of offenses are different based on the value of the credit card transaction record theft. *See* Verdict Form 21.09A. "In order to determine the classification of the offense, the state may aggregate in the indictment or information amounts that were taken from one or more persons in credit card transaction record theft that was committed pursuant to one scheme or course of conduct." A.R.S. § 13-2109(B). If the State has made this allegation, the court will need to fashion a verdict form based on the manner in which the State has alleged the offense or offenses. The Committee was not able to fashion a standard verdict form for use in all cases. If the State alleges only one count based on a scheme or course of conduct without also charging each individual theft in separate counts, the issues that will have to be decided are whether the jury is allowed to decide the value of the theft and, if so, how the value of the theft is determined if the State fails to prove the scheme or course of conduct.

21.10-1 – Unlawful Use of Scanning Device or Reencoder

The crime of unlawful use of scanning device or reencoder requires proof that the defendant:

1. with the intent to defraud a cardholder, issuer or merchant, used a [scanning device] [reencoder] to [scan] [reencode] information from a credit card; *and*
2. did not have the permission of the cardholder of such credit card to [scan] [reencode] such information.

SOURCE: A.R.S. § 13-2110(A) (statutory language as of August 25, 2004).

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

The court shall instruct on the culpable mental state.

"Intentionally" or "with the intent to" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 10510(a)(1)).

"Cardholder" is defined in A.R.S. § 13-2101 (Statutory Definition Instruction 21.01.02).

"Credit card" is defined in A.R.S. § 13-2101 (Statutory Definition Instruction 21.01.03).

"Issuer" is defined in A.R.S. § 13-2101 (Statutory Definition Instruction 21.01.06).

"Merchant" is defined in A.R.S. § 13-2101 (Statutory Definition l Instruction 21.01.07).

"Reencoder" is defined in A.R.S. § 13-2101 (Statutory Definition Instruction 21.01.10).

"Scanning device" is defined in A.R.S. § 13-2101 (Statutory Definition Instruction 21.01.11).

21.10-2 – Unlawful Possession of Scanning Device or Reencoder

The crime of unlawful possession of a scanning device or reencoder requires proof that the defendant, intentionally or knowingly [made] [possessed], with the intent to commit fraud, any device, apparatus, equipment, software, article, material, good, property or supply that is specifically designed or adapted for use as or in a [scanning device] [reencoder].

SOURCE: A.R.S. § 13-2110(B) (statutory language as of August 25, 2004).

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

The court shall instruct on the culpable mental state.

"Intentionally" or "with the intent to" 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)).

"Possess" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0534).

"Reencoder" is defined in A.R.S. § 13-2101 (Statutory Definition Instruction 21.01.10).

"Scanning device" is defined in A.R.S. § 13-2101 (Statutory Definition Instruction 21.01.11).

This offense does not apply to peace officers or prosecutors in the performance of their duties. A.R.S. § 13-2110(C).

Verdict Form 21.03A – Receipt of Anything of Value Obtained by Fraudulent Use of a Credit Card)

IN THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF _____

The State Of Arizona, **Plaintiff,** **vs.** **John Doe,** **Defendant.**	**Case No. CR _____**

On the charge of receipt of anything of value obtained by fraudulent use of a credit card, we, the jury, duly impaneled and sworn in the above-entitled cause, find the defendant (defendant's name)

_____ Not Guilty

_____ Guilty

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

We, the jury, duly impaneled and sworn in the above-entitled cause, further find that the money, goods, services or any other thing of value had a value of:

_____ $1,000 or More

_____ $250 or More, But Less than $1,00

_____ Less than $250

_____ Unable to agree

SOURCE: A.R.S. § 13-2103(B) (statutory language as of July 21, 1997).

USE NOTE: Use this verdict form when the defendant is charged with receipt of anything of value obtained by fraudulent use of a credit card under A.R.S. § 13-2103 in order to determine the class of offense. If the receipt of anything of value obtained by fraudulent use of a credit card was less than $250.00, the offense is a class 1 misdemeanor.

Verdict Form 21.05A – Fraudulent Use of a Credit Card

IN THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF _____

The State Of Arizona, **Plaintiff,** **vs.** **John Doe,** **Defendant.**	**Case No. CR _____**

On the charge of fraudulent use of a credit card, we, the jury, duly impaneled and sworn in the above-entitled cause, find the defendant (defendant's name)

_____ Not Guilty

_____ Guilty

Complete the next section of the verdict form if you find the defendant "guilty" of the offense.]

We, the jury, duly impaneled and sworn in the above-entitled cause, further find that the money, goods, services or any other thing of value had a value of:

_____ $1,000 or more in any consecutive six-month period

_____ $250 or more, but less than $1,000 in any consecutive six- month period

_____ Less than $250

_____ $_____, but not in any consecutive six-month period

_____ Unable to agree

SOURCE: A.R.S. § 13-2105(B) (statutory language as of July 21, 1997.

USE NOTE: Use this verdict form when the defendant is charged with fraudulent use of a credit card under A.R.S. § 13-2105 in order to determine the class of felony. If the money, goods, services or any other thing of value was less than $250.00 or did not occur in a consecutive six-month period, the offense is a class 1 misdemeanor.

Verdict Form 21.09A – (Credit Card Transaction Record Theft – No Scheme or Course of Conduct Alleged)

IN THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF _____

The State of Arizona, **Plaintiff,** **vs.** **John Doe,** **Defendant.**	**Case No. CR _____**

On the charge of credit card transaction record theft, we, the jury, duly impaneled and sworn in the above-entitled cause, find the defendant (defendant's name)

_____ Not Guilty

_____ Guilty

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

We, the jury, duly impaneled and sworn in the above-entitled cause, further find that the theft had a value of:

[_____$100,000 or more]

[_____$25,000 or more but less than $100,000]

[_____$3,000 or more but less than $25,000]

[_____$2,000 or more but less than $3,000]

[_____$1,000 or more but less than $2,000]

[_____$500 or more but less than $1,000]

[_____Less than $500]

_____Unable to agree

SOURCE: A.R.S. § 13-2105(B) (statutory language as of July 21, 1997.

USE NOTE: Use this verdict form when the defendant is charged with credit card transaction record theft under A.R.S. § 13-2109 in order to determine the class of felony. If the value was less than $500, the offense is a class 1 misdemeanor. A.R.S. § 13-2109(D) provides for mandatory prison upon a finding that the theft(s) involved at least $100,000.

Use the language in brackets as appropriate to the facts.

"Value" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(15)).

CHAPTER 22

22.04 – Defrauding Secured Creditors

The crime of defrauding secured creditors requires proof that the defendant:

1. knowingly [destroyed, removed, concealed, encumbered, converted, sold, obtained, transferred, controlled or otherwise dealt with] property subject to a security interest; *and*
2. acted with the intent to hinder or prevent the enforcement of that interest.

["Control" means to act so as to exclude others from using their property except on the defendant's own terms.]

"Security interest" means an interest in personal property or fixtures that secures payment or performance of an obligation.

SOURCE: A.R.S. §§ 13-2204 and 13-2201(3) (statutory language as of January 19, 1984 and July 21, 1997).

USE NOTE: The definition of "security interest" refers to Title 47, Chapter 9, A.R.S. § 47-9101 *et seq*.

Use bracketed language as appropriate to the facts.

The court shall instruct on the culpable mental state.

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

A.R.S. 13-2204(B) directs the court to use the definition of "control" in A.R.S. § 13-1801 (Statutory Criminal Instruction 18.01(2)).

22.05 – Defrauding Judgment Creditors

The crime of defrauding judgment creditors requires proof that the defendant [secreted, assigned, conveyed or otherwise disposed of] the defendant's property with the intent to defraud a judgment creditor or to prevent that property from being subjected to payment of a judgment.

A "judgment creditor" is a person or entity that has obtained a judgment for payment of money or order of support against the defendant that is due and unpaid.

SOURCE: A.R.S. § 13-2205 (statutory language as of October 1, 1978).

USE NOTE: Use bracketed language as appropriate to the facts.

COMMENT: "Judgment creditor" is not defined in A.R.S. § 13-2205. The instruction includes a definition from A.R.S. §§ 12-1570(4) and 12-1598(8).

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)).

22.06 – Fraud in Insolvency

The crime of fraud in insolvency requires proof that when proceedings were or were about to be instituted for the appointment of a trustee, receiver or other person entitled to administer property for the benefit of creditors or when any other assignment, composition or liquidation for the benefit of creditors had been or was about to be made, the defendant

[destroyed, removed, concealed, encumbered, transferred or otherwise harmed or reduced the value of the property with intent to defeat or obstruct the operation of any law relating to the administration of property for the benefit of creditors.]

[knowingly falsified any writing or record relating to the property.]

[knowingly misrepresented or refused to disclose to a receiver or other person entitled to administer property for the benefit of creditors the existence, amount or location of the property or any other information which the defendant could be legally required to furnish to such administration.]

[obtained any substantial part of or interest in the debtor's estate with intent to defraud any creditor.]

SOURCE: A.R.S. § 13-2206 (statutory language as of October 1, 1978).

USE NOTE: Use bracketed language as appropriate to the facts.

The court shall instruct on the culpable mental state.

"Intentional" 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)).

Chapter 22 does not contain a definition of "debtor." "Debtor" is defined in A.R.S. § 44-1001 as "a person who is liable on a claim." A.R.S. § 20-1603 defines "debtor" as "a borrower of money or a person possessing a commitment for a loan of certain funds or a purchaser or lessee of goods, services, property, rights or privileges for which payment is arranged through a credit transaction."

Chapter 22 does not contain a definition of "creditor." A.R.S. § 44-1001 defines "creditor" as "a person who has a claim." A.R.S. § 20-1603 defines "creditor" as "the lender of money or vendor or lessor of goods, services, property, rights or privileges, including a lessor under a lease intended as a security, where payment is arranged through a credit transaction. "Creditor" means also any successor to the right, title or interest of any such lender, vendor or lessor or an affiliate, associate or subsidiary of any of them or any director, officer or employee of any of them or any other person in any way associated with any of them."

22.07 – Receiving Deposits in an Insolvent Financial Institution

The crime of receiving deposits in an insolvent financial institution requires proof that the defendant, as an officer, manager or other person participating in the direction of a financial institution, received or permitted the receipt of a deposit, premium payment or investment in the institution in excess of the amount insured by the federal deposit insurance

corporation, the federal savings and loan insurance corporation or the national credit union administration, knowing that the institution was insolvent.

[It is a defense to prosecution under this section that the person making the deposit, premium payment or investment was fully informed of the financial condition of the institution.]

"Financial institution" means a bank, insurance company, credit union, savings and loan association, investment trust or other organization held out to the public as a place of deposit for funds or medium of savings or collective investment.

"Insolvent" means that, for any reason, a financial institution is unable to pay its obligations in the ordinary or usual course of business or the present fair salable value of its assets is less than the amount that will be required to pay its probable liabilities on its existing debts as they become absolute and matured.

SOURCE: A.R.S. §§ 13-2207, 13-2201(3) and (4) (statutory language as of January 19, 1984 and July 6, 1988.)

USE NOTE: "Funds" means money or credit. A.R.S. § 13-1801(A)(6).

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 bracketed language as appropriate to the facts of the case. The affirmative defense instruction is in Statutory Criminal Instruction 2.025.

CHAPTER 23

23.01.A.01 – Definition of "Collect an Extension of Credit"

"Collect an extension of credit" means to induce in any way any person to make repayment of that extension.

23.01.A.02 – Definition of "Creditor"

"Creditor" means any person making an extension of credit or any person claiming by, under or through any person making an extension of credit.

23.01.A.03 – Definition of "Debtor"

"Debtor" means any person to whom an extension of credit is made or any person who guarantees the repayment of an extension of credit, or in any manner undertakes to indemnify the creditor against loss resulting from the failure of any person to whom an extension is made to repay the extension.

23.01.A.04 – Definition of "Extend Credit"

"Extend credit" means to make or renew any loan or to enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or shall be deferred.

23.01.A.05 – Definition of "Extortionate Extension of Credit"

"Extortionate extension of credit" means any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time the extension is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person or the reputation or property of any person.

23.01.A.06 – Definition of "Extortionate Means"

"Extortionate means" means the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person or the reputation or property of any person.

23.01.A.07 – Definition of "Repayment of Any Extension of Credit"

"Repayment of any extension of credit" means the repayment, satisfaction or discharge in whole or in part of any debt or claim, acknowledged or disputed, valid or invalid, resulting from or in connection with that extension of credit.

SOURCE: A.R.S. § 13-2301(statutory language as of January 1, 2006).

USE NOTE: The definitions are to be used for the purposes of §§ 13-2302, 13-2303 and 13-2304.

23.01.B.01 – Definition of "Dealer in Property"

"Dealer in property" means a person who buys and sells property as a business.

23.01.B.02 – Definition of "Stolen Property"

"Stolen property" means "property of another" that has been the subject of any unlawful taking. "Property of another" means property in which any person other than the defendant has an interest on which the defendant is not privileged to infringe, including property in which the defendant also has an interest [notwithstanding the fact that the other person might be precluded from civil recovery because the property was used in an unlawful transaction or was subject to forfeiture as contraband]. [Property in possession of the defendant is not deemed property of another person who has only a security interest in the property, even if legal title is in the creditor pursuant to a security agreement.]

23.01.B.03 – Definition of "Traffic"

"Traffic" means to sell, transfer, distribute, dispense or otherwise dispose of stolen property to another person, or to buy, receive, possess or obtain control of stolen property, with the intent to sell, transfer, distribute, dispense or otherwise dispose of the property to another person.

SOURCE: A.R.S. §§ 13-2301 (statutory language as of January 1, 2006) and 13-1801 (statutory language as of July 18, 2000).

USE NOTE: The definitions are to be used for the purposes of §§ 13-2305, 13-2306 and 13-2307.

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

23.01.C.01 – Definition of "Animal Activity"

"Animal activity" means a commercial enterprise that uses animals for food, clothing or fiber production, agriculture or biotechnology.

23.01.C.02 – Definition of "Animal Facility"

"Animal facility" means a building or premises where a commercial activity in which the use of animals is essential takes place, including a zoo, rodeo, circus, amusement park, hunting preserve and horse and dog event.

23.01.C.03 – Definition of "Animal or Ecological Terrorism"

"Animal or ecological terrorism" means any commission of the offense of "illegally conducting an enterprise" that involves all of the following:

1. At least three persons acted in concert; *and*
2. The offense involved the intentional or knowing infliction of property damage; *and*
3. The damage exceeded ten thousand dollars to the property; *and*
4. The property was used by a person for the operation of a [lawfully conducted animal activity] [commercial enterprise that is engaged in a lawfully operated animal facility or research facility]; *and*
5. [A deadly weapon or dangerous instrument was used] [Serious physical injury was intentionally or knowingly inflicted on a person engaged in a lawfully conducted animal activity or participating in a lawfully conducted animal facility or research facility].

23.01.C.04 – Definition of "Biological Agent"

"Biological agent" means any microorganism, virus, infectious substance or biological product that may be engineered through biotechnology or any naturally occurring or bioengineered component of any microorganism, virus, infectious substance or biological product and that is capable of causing [death, disease or physical injury in a human, animal, plant or other living organism] [the deterioration or contamination of air, food, water, equipment, supplies or material of any kind].

23.01.C.05 – Definition of "Combination"

"Combination" means persons who collaborate in carrying on or furthering the activities or purposes of a criminal syndicate even though such persons may not know each other's identity, membership in the combination changes from time to time or one or more members may stand in a wholesaler-retailer or other arm's length relationship with others as to activities or dealings between or among themselves in an illicit operation.

23.01.C.06 – Definition of "Communication Service Provider"

"Communication service provider" means any person who is engaged in providing a service that allows its users to send or receive oral, wire or electronic communications or computer services.

23.01.C.07 – Definition of "Criminal Syndicate"

"Criminal syndicate" means any combination of persons or enterprises engaging, or having the purpose of engaging, on a continuing basis in conduct that violates any one or more provisions of any felony statute of this state.

23.01.C.08 – Definition of "Explosive Agent"

"Explosive agent" means an ["explosive"] [flammable fuels in amounts over fifty gallons] [fire accelerants in amounts over fifty gallons].

["Explosive agent" excludes (fireworks*) (firearms) (a propellant actuated device) (propellant actuated industrial tool) (a device that is commercially manufactured primarily for the purpose of illumination) (a rocket having a propellant charge of less than four ounces).]

["Explosive" means any dynamite, nitroglycerin, black powder or other similar explosive material including plastic explosives. The term "explosive" does not include ammunition or ammunition components such as primers, percussion caps, smokeless powder, black powder and black powder substitutes used for hand loading purposes.]

23.01.C.09 – Definition of "Material Support or Resources"

"Material support or resources" includes money or other financial securities, financial services, lodging, sustenance, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, disguises and other physical assets but does not include medical assistance, legal assistance or religious materials.

23.01.C.10 – Definition of "Public Establishment"

"Public establishment" means [a structure that is owned, leased or operated by this state or a political subdivision of this state] [a health care institution].**

23.01.C.11 – Definition of "Research Facility"

"Research facility" means a laboratory, institution, medical care facility, government facility, public or private educational institution or nature preserve at which a scientific test, experiment or investigation involving the use of animals is lawfully carried out, conducted or attempted.

23.01.C.12 – Definition of "Terrorism"

"Terrorism" means any felony, including any completed or preparatory offense that involves the use of a deadly weapon or a weapon of mass destruction or the intentional or knowing infliction of serious physical injury with the intent to either:

(a) influence the policy or affect the conduct of this state or any of the political subdivisions, agencies or instrumentalities of this state.

(b) cause substantial damage to or substantial interruption of public communications, communication service providers, public transportation, common carriers, public utilities, public establishments or other public services.

23.01.C.13 – Definition of "Toxin"

"Toxin" means the toxic material of plants, animals, microorganisms, viruses, fungi or infectious substances or a recombinant molecule, whatever its origin or method of reproduction, including:

(a) any poisonous substance or biological product that may be engineered through biotechnology and that is produced by a living organism.

(b) any poisonous isomer or biological product, homolog or derivative of such substance.

23.01.C.14 – Definition of "Vector"

"Vector" means a living organism or molecule, including a recombinant molecule or biological product that may be engineered through biotechnology, that is capable of carrying a biological agent or toxin to a host.

23.01.C.15 – Definition of "Weapon of Mass Destruction"

"Weapon of mass destruction" means:

(a) any device or object that is designed or that the person intends to use to cause multiple deaths or serious physical injuries through the use of an explosive agent or the release, dissemination or impact of a toxin, biological agent, poisonous chemical, or its precursor, or any vector.

(b) except as authorized and used in accordance with a license, registration or exemption by the radiation regulatory agency any device or object that is designed or that the person intends to use to release radiation or radioactivity at a level that is dangerous to human life.

SOURCE: A.R.S. §§ 13-2301(statutory language as of January 1, 2006), 13-3101 (statutory language as of September 21, 2006) and 13-3001 (statutory language as of August 22, 2002).

USE NOTE: Use the bracketed language as appropriate to the facts of the case.

"Fireworks" is defined in A.R.S. § 36-1601.

"Health care institution" is defined in A.R.S. § 36-401.

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

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

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

23.01.D.01 – Definition of "Control"

"Control," in relation to an enterprise, means the possession of sufficient means to permit substantial direction over the affairs of an enterprise and, in relation to property, means to acquire or possess.

23.01.D.02 – Definition of "Enterprise"

"Enterprise" means any corporation, partnership, association, labor union or other legal entity or any group of persons associated in fact although not a legal entity.

23.01.D.03 – Definition of "Financial Institution"

"Financial institution" means any business under the jurisdiction of the department of financial institutions or a banking or securities regulatory agency of the United States, a business coming within the definition of a bank, financial agency or financial institution or a business under the jurisdiction of the securities division of the corporation commission, the state real estate department or the department of insurance.

23.01.D.04 – Definition of "Racketeering"

"Racketeering" means any act, including any preparatory or completed offense, that is chargeable or indictable under the laws of the state or country in which the act occurred [and, if the act occurred in a state or country other than this state, that would be chargeable or indictable under the laws of this state if the act had occurred in this state], and that would be punishable by imprisonment for more than one year under the laws of this state [and, if the act occurred in a state or country other than this state, under the laws of the state or country in which the act occurred, regardless of whether the act is charged or indicted], and the act involves

[terrorism, animal terrorism or ecological terrorism that results or is intended to result in a risk of serious physical injury or death.]

[any of the following acts if committed for financial gain:

(i) Homicide.

(ii) Robbery.

(iii) Kidnapping.

(iv) Forgery.

(v) Theft.

(vi) Bribery.

(vii) Gambling.

(viii) Usury.

(ix) Extortion.

(x) Extortionate extensions of credit.

(xi) Prohibited drugs, marijuana or other prohibited chemicals or substances.

(xii) Trafficking in explosives, weapons or stolen property.

(xiii) Participating in a criminal syndicate.

(xiv) Obstructing or hindering criminal investigations or prosecutions.

(xv) Asserting false claims including, but not limited to, false claims asserted through fraud or arson.

(xvi) Intentional or reckless false statements or publications concerning land for sale or lease or sale of subdivided lands or sale and mortgaging of unsubdivided lands.

(xvii) Resale of realty with intent to defraud.

(xviii) Intentional or reckless fraud in the purchase or sale of securities.

(xix) Intentional or reckless sale of unregistered securities or real property securities.

(xx) A scheme or artifice to defraud.

(xxi) Obscenity.

(xxii) Sexual exploitation of a minor.

(xxiii) Prostitution.

(xxiv) Restraint of trade or commerce [in violation of A.R.S. § 34-252].

(xxv) Terrorism.

(xxvi) Money laundering.

(xxvii) Obscene or indecent telephone communications to minors for commercial purposes.

(xxviii) Counterfeiting marks [as proscribed in A.R.S. § 44-1453].

(xxix) Animal terrorism or ecological terrorism.

(xxx) Smuggling of human beings.]

(xxxi) child prostitution.

(xxxii) sex trafficking.

(xxxiii) trafficking of persons for forced labor or services.]

(xxxiv) manufacturing, selling or distributing misbranded drugs [in violation of A.R.S. § 13-3406(A)(9)].

23.01.D.05 – Definition of "Records"

"Records" means any book, paper, writing, computer program, data, image or information that is collected, recorded, preserved or maintained in any form of storage medium.

SOURCE: A.R.S. § 13-2301(statutory language as of July 3, 2015).

USE NOTE: The definitions are to be used for the purposes of §§ 13-2312, 13-2313, 13-2304 and 13-2315.

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

23.01.E.01 – Definition of "Access"

"Access" means to instruct, communicate with, store data in, retrieve data from or otherwise make use of any resources of a computer, computer system or network.

23.01.E.02 – Definition of "Access Device"

"Access device" means any card, token, code, account number, electronic serial number, mobile or personal identification number, password, encryption key, biometric identifier or other means of account access, including a canceled or revoked access device, that can be used alone or in conjunction with another access device to obtain money, goods, services, computer or network access or any other thing of value or that can be used to initiate a transfer of any thing of value.

23.01.E.03 – Definition of "Computer"

"Computer" means an electronic device that performs logic, arithmetic or memory functions by the manipulations of electronic or magnetic impulses and includes all input, output, processing, storage, software or communication facilities that are connected or related to such a device in a system or network.

23.01.E.04 – Definition of "Computer Contaminant"

"Computer contaminant" means any set of computer instructions that is designed to modify, damage, destroy, record or transmit information within a computer, computer system or network without the intent or permission of the owner of the information, computer system or network. Computer contaminant includes a group of computer instructions, such as viruses or worms, that is self-replicating or self-propagating and that is designed to contaminate other computer programs or computer data, to consume computer resources, to modify, destroy, record or transmit data or in some other fashion to usurp the normal operation of the computer, computer system or network.

23.01.E.05 – Definition of "Computer Program"

"Computer program" means a series of instructions or statements, in a form acceptable to a computer that permits the functioning of a computer system in a manner designed to provide appropriate product from the computer system.

23.01.E.06 – Definition of "Computer Software"

"Computer software" means a set of computer programs, procedures and associated documentation concerned with the operation of a computer system.

23.01.E.07 – Definition of "Computer System"

"Computer system" means a set of related, connected or unconnected computer equipment, devices and software, including storage, media and peripheral devices

23.01.E.08 – Definition of "Critical Infrastructure Resource"

"Critical infrastructure resource" means any computer or communications system or network that is involved in providing services necessary to ensure or protect the public health, safety or welfare, including services that are provided by any of the following:

(a) medical personnel and institutions.

(b) emergency services agencies.

(c) public and private utilities, including water, power, communications and transportation services.

(d) fire departments, districts or volunteer organizations.

(e) law enforcement agencies.

(f) financial institutions.

(g) public educational institutions.

(h) government agencies.

23.01.E.09 – Definition of "False or Fraudulent Pretense"

"False or fraudulent pretense" means the unauthorized use of an access device or the use of an access device to exceed authorized access.

23.01.E.10 – Definition of "Financial Instrument"

"Financial instrument" means any [check] [draft] [money order] [certificate of deposit] [letter of credit] [bill of exchange] [credit card] [marketable security] [any written instrument] that is transferable for value.

["Written instrument" means:

(a) any paper, document or other instrument that contains written or printed matter or its equivalent; *or*

(b) any token, stamp, seal, badge, trademark, graphical image, access device or other evidence or symbol of value, right, privilege or identification.]

23.01.E.11 – Definition of "Network"

"Network" includes a complex of interconnected computer or communication systems of any type.

23.01.E.12 – Definition of "Property"

"Property" means financial instruments, information, including electronically produced data, computer software and programs in either machine or human readable form, and anything of value, tangible or intangible.

23.01.E.13 – Definition of "Proprietary or Confidential Computer Security Information"

"Proprietary or confidential computer security information" means information about a particular computer, computer system or network that relates to its access devices, security practices, methods and systems, architecture, communications facilities, encryption methods and system vulnerabilities and that is not made available to the public by its owner or operator.

23.01.E.14 – Definition of "Services"

"Services" includes computer time, data processing, storage functions and all types of communication functions.

SOURCE: A.R.S. §§ 13-2301 (statutory language as of January 1, 2006) and 13-2001 (statutory language as of August 25, 2004).

USE NOTE: The definitions are to be used for the purposes of §§ 13-2316, 13-2316.01 and 13-2316.02.

23.05 – Permissible Inferences Relating to Theft under A.R.S. §§ 13-1802(A)(5) and 13-1814(A)(5)

The defendant has been accused of [theft] [theft of means of transportation] by controlling [property of another] [another person's means of transportation] knowing or having reason to know that the property was stolen.

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

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

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

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

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

SOURCE: A.R.S. §§ 13-1802(C) (statutory language as of September 21, 2006); 13-1814(B) (statutory language as of December 28, 1998); 13-2305 (statutory language as of 1987); *State v. Mohr,* 150 Ariz. 564, 568-69 (App. 1986).

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

The last paragraph is bracketed and should only be given if requested by the defendant.

It is important to caution the jury that the inference is not mandatory and that the jury must look at all the facts and circumstances of the case in deciding whether the presumption should be applied. *State v. Mohr,* 150 Ariz. 564, 568-69 (App. 1986) (recommending that the language as contained in this instruction is preferable, because it expressly tells the jury that it is not compelled to draw the inference).

The use of the term "may give rise to an inference," which is contained in the text of this instruction, was specifically approved in *State v. Mohr,* 150 Ariz. at 569.

The bracketed paragraph pertaining to the defendant's constitutional right not to testify was specifically approved *verbatim* in *State v. Mohr,* 150 Ariz. at 568 (citing to *Barnes v. United States*, 412 U.S. 837, 843 (1973)).

The court shall instruct on the culpable mental state.

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

"Control" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(2)).

"Issue" is defined in A.R.S. § 13-1801 (Statutory Criminal Instruction 18.01(7)).

"Means of transportation" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(9)).

"Property" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(12)).

"Property of another" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(13)).

"Value" is defined in A.R.S. § 13-1801 (Statutory Definition Instruction 18.01(15)).

"Possess" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0534).

"Possession" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0535).

"Vehicle" is defined in A.R.S. § 13-105 (Statutory Criminal Instruction 1.0541).

COMMENT: In *State v. Mohr,* 150 Ariz. 564, 567 (App. 1986), the court of appeals, while noting that the statute speaks of inferences, not presumptions, held that an instruction not worded in a manner consistent with the text of this instruction created an unconstitutional mandatory presumption. The use of the instruction as worded above maintains the permissive feature of the inference and satisfies due process. *Id.* at 568.

An instruction that allows for a permissible inference under A.R.S. § 13-2305 does not amount to a comment on the evidence. *State v. Dixon,* 127 Ariz. 554, 560 (App. 1981).

23.06 – Possession of Altered Property

The crime of possession of altered property requires proof that the defendant:

1. was a "dealer in property"; *and*

2. recklessly possessed property the permanent identifying features of which, including serial numbers or labels, had been removed or in any fashion altered.

"Dealer in property" means a person who buys and sells property as a business.

It is a defense to a prosecution under this section that the defendant had lawfully obtained a special serial number or lawfully possessed the usual indicia of ownership in addition to mere possession or had obtained the consent of the manufacturer of the property.

SOURCE: A.R.S. § 13-2306 (statutory language as of October 1, 1997).

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

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

"Possess" and "possession" are defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0534 and 1.0535).

The affirmative defense instruction is Statutory Criminal Instruction 2.025.

23.07.01 – Trafficking in Stolen Property in the Second Degree

The crime of trafficking in stolen property in the second degree requires proof that the defendant:

1. trafficked in the property of another; *and*

2. was reckless concerning whether the property had been stolen.

"Traffic" means to sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person, or to buy, receive, possess, or obtain control of stolen property, with the intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person.

"Stolen property" means property of another that has been the subject of any unlawful taking.

"Property of another" means property in which any person other than the defendant has an interest on which the defendant is not privileged to infringe.

"Property" means anything of value, tangible or intangible, including trade secrets.

"Control" or "exercise control" means to act so as to exclude others from using their property except on the defendant's own terms.

SOURCE: A.R.S. §§ 13-2307(A) (statutory language as of October 1, 1978); 13-2301 (statutory language as of January 1, 2006); 13-1801 (statutory language as of September 30, 2009).

USE NOTE: The inference(s) in A.R.S. § 13-2305 (Statutory Criminal Instruction 23.05) should be given when appropriate.

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)).

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

COMMENT: The court of appeals in *State v. Noriega,* 144 Ariz. 258, 259 (App. 1984), held that a jury instruction on trafficking in stolen property in the second degree needs to include a reckless culpable mental state in regard to whether the property had been stolen.

23.07.02 – Trafficking in Stolen Property in the First Degree

The crime of trafficking in stolen property in the first degree requires proof of the following:

1. the defendant knowingly [initiated] [organized] [planned] [financed] [directed] [managed] [supervised] the theft of the property of another; *and*
2. the defendant knowingly [initiated] [organized] [planned] [financed] [directed] [managed] [supervised] the trafficking in the same property; *and*
3. the defendant knew such property was stolen.

"Traffic" means to sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person, or to buy, receive, possess, or obtain control of stolen property, with the intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person.

"Stolen property" means property of another that has been the subject of any unlawful taking.

"Property of another" means property in which any person other than the defendant has an interest on which the defendant is not privileged to infringe.

"Property" means anything of value, tangible or intangible, including trade secrets.

"Control" or "exercise control" means to act so as to exclude others from using their property except on the defendant's own terms.

SOURCE: A.R.S. §§ 13-2307(B) (statutory language as of October 1, 1978); 13-2301 (statutory language as of January 1, 2006); 13-1801 (statutory language as of September 30, 2009).

USE NOTE: Use the bracketed language as appropriate to the facts of the case.

The inference(s) in A.R.S. § 13-2305 (Statutory Criminal Instruction 23.05) should be given when appropriate.

The court shall instruct on the culpable mental state.

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

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

COMMENT: Trafficking in the second degree is a lesser included offense of trafficking in the first degree. *State v. DiGiulio,* 172 Ariz. 156 (App. 1992). Because the jury instruction omitted reference to "the theft," the court found that the instruction lacked the element that the defendant must participate in the theft of the property. *Id.* at 161.

23.08.A – Participating in a Criminal Syndicate

The crime of participating in a criminal syndicate requires proof that the defendant

[intentionally organized, managed, directed, supervised or financed a criminal syndicate with the intent to promote or further the criminal objectives of the syndicate.]

[knowingly incited or induced others to engage in violence or intimidation to promote or further the criminal objectives of a criminal syndicate.]

[furnished advice or direction in the conduct, financing or management of a criminal syndicate's affairs with the intent to promote or further the criminal objectives of a criminal syndicate.]

[intentionally promoted or furthered the criminal objectives of a criminal syndicate by inducing or committing any act or omission by a public servant in violation of his official duty.]

"Criminal syndicate" means any combination of persons or enterprises that engaged, or had the purpose of engaging, on a continuing basis in conduct that violated any one or more provisions of any felony statute of this state.

"Combination" means persons who collaborate in carrying on or furthering the activities or purposes of a criminal syndicate even though such persons may not know each other's identity, membership in the combination changes from time to time or one or more members may stand in a wholesaler-retailer or other arm's length relationship with others as to activities or dealings between or among themselves in an illicit operation.

"Enterprise" includes any corporation, association, labor union or other legal entity.

SOURCE: A.R.S. §§ 13-2308 (statutory language as of September 19, 2007); 13-2301 (statutory language as of January 1, 2006); 13-105 (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)).

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

"Public servant" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0538).

Comment: The statute provides that "a person shall not be convicted" of any offense in § 13-2308(A) "on the basis of accountability as an accomplice unless he participates in violating" 13-2308(A) "in one of the ways specified." A.R.S. § 13-2308(B).

If the defendant has been charged under A.R.S. § 13-2308(A)(5), use Statutory Criminal Instruction 23.08.A.5.

23.08.A.5 – Involving a Minor in Participating in a Criminal Syndicate

The crime of involving a minor in participating in a criminal syndicate requires proof that the defendant [hired] [engaged] [used] a minor for the purpose of [completing] [preparing to complete] any of the following:

[intentionally organizing, managing, directing, supervising or financing a criminal syndicate with the intent to promote or further the criminal objectives of the syndicate.]

[knowingly inciting or inducing others to engage in violence or intimidation to promote or further the criminal objectives of a criminal syndicate.]

[furnishing advice or direction in the conduct, financing or management of a criminal syndicate's affairs with the intent to promote or further the criminal objectives of a criminal syndicate.]

[intentionally promoting or furthering the criminal objectives of a criminal syndicate by inducing or committing any act or omission by a public servant in violation of his official duty.]

"Criminal syndicate" means any combination of persons or enterprises that engaged, or had the purpose of engaging, on a continuing basis in conduct that violated any one or more provisions of any felony statute of this state.

"Combination" means persons who collaborate in carrying on or furthering the activities or purposes of a criminal syndicate even though such persons may not know each other's identity, membership in the combination changes from time to time or one or more members may stand in a wholesaler-retailer or other arm's length relationship with others as to activities or dealings between or among themselves in an illicit operation.

"Enterprise" includes any corporation, association, labor union or other legal entity.

SOURCE: A.R.S. §§ 13-2308(A)(5) (statutory language as of September 19, 2007); 13-2301 (statutory language as of January 1, 2006); 13-105 (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)).

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

"Public servant" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0538).

COMMENT: The statute provides that "a person shall not be convicted" of any offense in § 13-2308(A) "on the basis of accountability as an accomplice unless he participates in violating" 13-2308(A) "in one of the ways specified." A.R.S. § 13-2308(B).

23.08.C – Assisting a Criminal Syndicate

The crime of assisting a criminal syndicate requires proof that the defendant committed [*fill in the felony offense whether completed or preparatory*] with the intent to promote or further the criminal objectives of a criminal syndicate.

"Criminal syndicate" means any combination of persons or enterprises that engaged, or had the purpose of engaging, on a continuing basis in conduct that violated any one or more provisions of any felony statute of this state.

"Enterprise" includes any corporation, association, labor union or other legal entity.

SOURCE: A.R.S. §§ 13-2308(C) (statutory language as of September 19, 2007); 13-2301 (statutory language as of January 1, 2006); 13-105 (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 (Statutory Definition Instruction 1.0510(a)(1)).

23.08.01 – Terrorism

The crime of terrorism requires proof that the defendant intentionally or knowingly:

[engaged in an act of terrorism.]

[organized, managed, directed, supervised or financed an act of terrorism.]

[solicited, incited or induced others to promote or further an act of terrorism.]

[[without lawful authority] [when exceeding lawful authority], manufactured, sold, delivered, displayed, used, made accessible to others, possessed or exercised control over a weapon of mass destruction knowing or having reason to know that the device or object involved was a weapon of mass destruction.]

[made property available to another, by transaction, transportation or otherwise, knowing or having reason to know that the property was intended to facilitate an act of terrorism.]

[provided advice, assistance or direction in the conduct, financing or management of an act of terrorism knowing or having reason to know that an act of terrorism had occurred or may have resulted by:

(a) harboring or concealing any person or property.

(b) warning any person of impending discovery, apprehension, prosecution or conviction. This subdivision does not apply to a warning that is given in connection with an effort to bring another person into compliance with the law.

(c) providing any person with material support or resources or any other means of avoiding discovery, apprehension, prosecution or conviction. "Material support or resources" includes money or other financial securities, financial services, lodging, sustenance, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, disguises and other physical assets but does not include medical assistance, legal assistance or religious materials.

(d) concealing or disguising the nature, location, source, ownership or control of material support or resources.

(e) preventing or obstructing by means of force, deception or intimidation anyone from performing an act that might aid in the discovery, apprehension, prosecution or conviction of any person or that might aid in the prevention of an act of terrorism.

(f) suppressing by any act of concealment, alteration or destruction any physical evidence that might aid in the discovery, apprehension, prosecution or conviction of any person or that might aid in the prevention of an act of terrorism.

(g) concealing the identity of any person.]

[provided advice, assistance or direction in the conduct, financing or management of a terrorist organization]

"Terrorism" means any felony, including any completed or preparatory offense, that involved the use of a deadly weapon or a weapon of mass destruction or the intentional or knowing infliction of serious physical injury with the intent to:

(a) influence the policy or affect the conduct of this state or any of the political subdivisions, agencies or instrumentalities of this state, or

(b) cause substantial damage to or substantial interruption of public communications, communication service providers, public transportation, common carriers, public utilities, public establishments or other public services.

(c) Intimidate or coerce a civilian population and further the goals, desires, aims, public pronouncements, manifestos or political objectives of any terrorist organization.

"Terrorist organization" means any organization that is designated by the United States Department of State as a Foreign Terrorist Organization under Section 219 of the Immigration and Nationality Act (8 United States Code section 1189).

"Weapon of mass destruction" means:

(a) any device or object that was/is designed or that the person intended to use to cause multiple deaths or serious physical injuries through the use of an explosive agent or the release, dissemination or impact of a toxin, biological agent, poisonous chemical, or its precursor, or any vector.

(b) except as authorized and used in accordance with a license, registration or exemption by the radiation regulatory agency, any device or object that was designed or that the person intended to use to release radiation or radioactivity at a level that was dangerous to human life.

"Explosive agent" means an ["explosive"] [flammable fuels in amounts over fifty gallons] [fire accelerants in amounts over fifty gallons].

["Explosive agent" excludes (fireworks) (firearms) (a propellant actuated device) (propellant actuated industrial tool) (a device that is commercially manufactured primarily for the purpose of illumination) (a rocket having a propellant charge of less than four ounces).]

"Vector" means a living organism or molecule, including a recombinant molecule or biological product engineered through biotechnology that was/is capable of carrying a biological agent or toxin to a host.

"Biological agent" means any microorganism, virus, infectious substance or biological product that may be engineered through biotechnology or any naturally occurring or bioengineered component of any microorganism, virus, infectious substance or biological product and that was/is capable of causing [death, disease or physical injury in a human, animal, plant or other living organism] [the deterioration or contamination of air, food, water, equipment, supplies or material of any kind].

"Toxin" means the toxic material of plants, animals, microorganisms, viruses, fungi or infectious substances or a recombinant molecule, whatever its origin or method of reproduction, including:

(a) any poisonous substance or biological product engineered through biotechnology and that was/is produced by a living organism.

(b) any poisonous isomer or biological product, homolog or derivative of such substance.

["Communication service provider" means any person who is engaged in providing a service that allows its users to send or receive oral, wire or electronic communications or computer services.]

["Public establishment" means [a structure that is owned, leased or operated by this state or a political subdivision of this state] [a health care institution].]

SOURCE: A.R.S. §§ 13-2308.01 (statutory language as of August 9, 2017) and 13-3001 (statutory language as of August 22, 2002).

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

Use bracketed language as appropriate to the case.

"Intentionally" and "knowingly" are defined in A.R.S. § 13-105 (Statutory Definition Instructions 1.0510(a)(1) and 1.0510(b)).

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

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

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

If the jury finds one aggravating circumstance listed in A.R.S. § 13-702(C), the court may impose a life sentence. A.R.S. § 13-2308.01(C). If an aggravating circumstance is alleged, use the Aggravating Circumstance instructions.

COMMENT: The statute further provides that this section does not apply to any person who is permitted or licensed pursuant to Title 30, chapter 4 and 10 Code of Federal Regulations part 30, or is a member or employee of the armed forces of the United States, a federal or state governmental agency or any political subdivision of a state, a charitable, scientific or educational institution or a private entity provided: (1) the person is engaged in lawful activity within the scope of the person's employment and the person is otherwise duly authorized or licensed to manufacture, possess, sell, deliver, display, use, exercise control over or make accessible to others any weapon of mass destruction or to otherwise engage in any activity described in this paragraph, and (2) the person is in compliance with all applicable federal and state laws in doing so.

23.08.01.A.4 – Terrorism

This instruction has been incorporated into Statutory Criminal 23.08.01.

23.08.02.A – Making a Terrorist Threat

The crime of Making a Terrorist Threat requires proof that the defendant:

1. Threatened to commit an act of terrorism; and
2. Communicated the threat to any other person.

SOURCE: A.R.S. § 13-2308.02(A) (effective August 9, 2017).

USE NOTE: The statute, A.R.S. §13-2308.02(A), was written without prescribing a culpable mental state. *See* A.R.S. § 13-202(B); *State v. Williams,* 144 Ariz. 487 (1985).

A.R.S. § 13-2308.02(C) provides that it is not a defense to a prosecution under this section that the person did not have the intent or capability of committing the act of terrorism.

"Terrorism" means any felony, including any completed or preparatory offense, that involves the use of a deadly weapon or a weapon of mass destruction or the intentional or knowing infliction of serious physical injury with the intent to do any of the following:

(a) Influence the policy or affect the conduct of this state or any of the political subdivisions, agencies or instrumentalities of this state.

(b) Cause substantial damage to or substantial interruption of public communications, communication service providers, public transportation, common carriers, public utilities, public establishments or other public services.

(c) Intimidate or coerce a civilian population and further the goals, desires, aims, public pronouncements, manifestos or political objectives of any terrorist organization.

A.R.S. §13-2301(C)(12).

23.08.02.B – False Reporting of Terrorism

The crime of False Reporting of Terrorism requires proof that the defendant knowingly:

1. Made a false report of an act of terrorism; and
2. Communicated the false report to any other person.

SOURCE: A.R.S. § 13-2308.02(B) (effective August 9, 2017).

USE NOTE: A.R.S. § 13-2308.02(C) provides that it is not a defense to a prosecution under this section that the person did not have the intent or capability of committing the act of terrorism.

"Terrorism" means any felony, including any completed or preparatory offense, that involves the use of a deadly weapon or a weapon of mass destruction or the intentional or knowing infliction of serious physical injury with the intent to do any of the following:

(a) Influence the policy or affect the conduct of this state or any of the political subdivisions, agencies or instrumentalities of this state.

(b) Cause substantial damage to or substantial interruption of public communications, communication service providers, public transportation, common carriers, public utilities, public establishments or other public services.

(c) Intimidate or coerce a civilian population and further the goals, desires, aims, public pronouncements, manifestos or political objectives of any terrorist organization.

A.R.S. §13-2301(C)(12).

23.08.03 – Unlawful Use of Infectious Biological substance or Radiological Agent

The crime of Unlawful Use of Infectious Biological Substance or Radiological Agent requires proof that the defendant:

[intentionally caused injury to another person by means of [an infectious biological substance] [a radiological agent]]

[intentionally or knowingly possessed [an infectious biological substance] [a radiological agent] with the intent to injure another person]

[intentionally or knowingly manufactured, sold, gave, distributed, or used [an infectious biological substance] [a radiological agent] with the intent to injure another person]

[intentionally or knowingly destroyed, damaged, attempted to destroy, or attempted to damage any facility, equipment, or material involved in the sale, manufacture, storage, or

distribution of [an infectious biological substance] [a radiological agent] with the intent to injure another person by the release of the [substance][agent]]

[intentionally or knowingly gave, sent, placed in a public or private place [a simulated infectious biological substance] [a simulated radiological agent] with the intent to terrify, intimidate, threaten, or harass]

[intentionally or knowingly transported any radiological isotope or agent for the purpose of committing [INSERT ANOTHER ACT IN VIOLATION OF THIS SECTION]]

[intentionally or knowingly adulterated or misbranded any radiological isotope]

[intentionally or knowingly manufactured, held, sold or offered to sell any radiological isotope that is adulterated or misbranded]

[intentionally or knowingly altered, mutilated, destroyed, obliterated or removed any part of the labeling of a radiological isotope]

[intentionally or knowingly engaged in any other act with respect to a radiological isotope if the act was done when the article was possessed, transferred, transported or held for sale and resulted in the article being adulterated or misbranded]

"Infectious biological substance" includes any bacteria, virus, fungus, protozoa, prion, toxin or material found in nature that is capable of causing death or serious physical injury, but does not include human immunodeficiency virus, syphilis or hepatitis.

"Radiological agent" includes any substance that is able to release radiation at levels that are capable of causing death or serious bodily injury or at any level if used with the intent to terrify, intimidate, threaten or harass.

SOURCE: A.R.S. § 13-2308.03 (effective August 9, 2017).

USE NOTE: Use bracketed language as appropriate to the facts of the case.

A.R.S. § 13-2308.03(B)(4) provides that the placing or sending of a simulated infectious biological substance or radiological agent without written notice attached to the substance or agent in a conspicuous place that the substance or agent has been rendered inert and is possessed for a curio or relic collection, display or other similar purpose is prima facie evidence of an intent to terrify, intimidate, threaten or harass.

A.R.S. § 13-2308.03(C) provides that the possession of an infectious biological substance or a radiological agent, unless satisfactorily explained, may give rise to an inference that the person who is in possession of the substance or agent is aware of the risk that the substance or agent may be used to commit an act in violation of this section.

A.R.S. § 13-2308.03(D) provides that this section does not apply to any person who is permitted or licensed pursuant to title 30, chapter 4 and 10 code of federal regulations part 30, a member or employee of the armed forces of the United States, a federal or state governmental agency or any political subdivision of a state, a charitable, scientific or educational institution or a private entity if both of the following apply:

1. the person is engaged in lawful activity within the scope of the person's employment and the person is otherwise duly authorized or licensed to manufacture, possess, sell, deliver, display, use, exercise control over or make accessible to others any weapon

of mass destruction, infectious biological substance or radiological agent or to otherwise engage in any activity described in this paragraph.

2. the person is in compliance with all applicable federal and state laws in doing so.

23.09 – Bribery of a Sports Participant

The crime of bribery of a sports participant requires proof that:

1. The defendant knowingly [gave] [promised] [offered] to any "sports participant" any benefit; *and*
2. The defendant's conduct was done with the intent to influence that person to [lose] [try to lose] [cause to be lost] [limit that person's or that person's team's margin of victory or defeat].

   or

2. The defendant's conduct was done with the intent to affect the [referee's] [other official's] decisions or the performance of the [referee's] [other official's] duties in any way, in a "sports event" in which the [referee] [other official] took part or was expected to take part or had any duty or connection with the "sporting event."

"Sports participant" means [insert the name of the participant from the list in the Use Note alleged to have been bribed].

"Sports event" means [insert the name of the event from the list in the Use Note in question.]

SOURCE: A.R.S. § 13-2309 (statutory language as of October 1, 1978).

USE NOTE: Use bracketed language as appropriate to the facts of the case.

The court shall instruct on the culpable mental state.

"Intentionally" and "knowingly" are defined in A.R.S. § 13-105 (Statutory Definition Instructions 1.0510(a)(1) and 1.0510(b)).

"Sports event" is a baseball, football, hockey or basketball game, boxing, tennis, horse race, dog race, or polo match, or any professional or amateur sport, or game.

"Sports participant" is professional or amateur baseball, football, hockey, polo, tennis, horse race, dog race or basketball player or boxer or any player or referee or other official who participated or expected to participate in any professional or amateur game or sport, or to any manager, coach or trainer of any team or participant or prospective participant in any such game, contest or sport.

Instruction 23.10 – Fraudulent Schemes and Artifices

The crime of fraudulent schemes and artifices requires proof that the defendant knowingly:

1. Used false or fraudulent pretenses, representations, promises or material omissions; *and*

2. acted pursuant to a scheme or artifice to defraud; *and*

3. as a result, obtained any benefit.

[The State must prove that the scheme or artifice to defraud was intended to defraud, meaning it was intended to mislead another person for the purpose of gaining some benefit.]

Reliance on the part of any person is not required to prove this offense.

SOURCE: A.R.S. §§ 13-2310 (statutory language as of August 3, 2018); 13-105 (statutory language as of January 1, 2009).

USE NOTE: Use the bracketed language as appropriate to the facts of the case.

The court shall instruct on the culpable mental state.

"Benefit" and "Knowingly" are defined in A.R.S. § 13-105 (Statutory Definition Instructions 1.053 and1.0510(b)).

If the offense involved a benefit of $100,000.00 or more or the manufacture, sale or marketing of opioids, the defendant is not eligible for suspension of sentence, probation, pardon or release from prison except pursuant to A.R.S. § 31-233(A) or (B), until the sentence has been served, the defendant is eligible for release pursuant to A.R.S. § 41-1604.07 or the sentence is commuted. A.R.S. § 13-2310(C). The jury must decide the value of the benefit and/or whether the offense involved the manufacturer, sale or marketing of opioids.

COMMENT: "[A] 'scheme' is a 'plan,' while an 'artifice' is an 'evil or artful strategy.' Thus, a 'scheme or artifice' is some 'plan, device, or trick' to perpetrate a fraud." *Ness v. Western Sec. Life Ins. Co.,* 174 Ariz. 497, 503 (App. 1992) (citing *State v. Haas,* 138 Ariz. 413 (1983)).

The bracketed language is not in the statute and is based on *State v. Bridgeforth*, 156 Ariz. 60 (1988).

23.11 – Willful Concealment

The crime of willful concealment requires proof that the defendant, pursuant to a scheme or artifice to defraud, in a matter related to the business conducted by any department or agency of this State or any political subdivision, knowingly [falsified, concealed or covered up a material fact by any trick, scheme or device] [made or used any false writing or document knowing such writing or document contained any false, fictitious or fraudulent statement or entry].

SOURCE: A.R.S. § 13-2311 (statutory language as of April 23, 1980).

USE NOTE: Use bracketed language as appropriate to the facts of the case.

The court shall instruct on the culpable mental state.

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

For the purpose of this instruction, "agency" includes a public agency as defined by A.R.S. § 38-502, paragraph 6. It is recommended that the name of the appropriate agency be substituted for "agency" in the instruction.

COMMENT: "[A] 'scheme' is a 'plan,' while an 'artifice' is an 'evil or artful strategy.' Thus, a 'scheme or artifice' is some 'plan, device, or trick' to perpetrate a fraud." *Ness v. Western Sec. Life Ins. Co.,* 174 Ariz. 497, 503 (App. 1992) (citing *State v. Haas,* 138 Ariz. 413 (1983)).

23.12A– Illegal Control of an Enterprise

The crime of illegal control of an enterprise requires proof that the defendant, through "racketeering" or its proceeds, acquired or maintained, by investment or otherwise, "control" of any "enterprise."

"Racketeering" means any act, including any preparatory or completed offense, that is chargeable or indictable under the laws of the state or country in which the act occurred [and, if the act occurred in a state or country other than this state, that would be chargeable or indictable under the laws of this state if the act had occurred in this state], and that would be punishable by imprisonment for more than one year under the laws of this state [and, if the act occurred in a state or country other than this state, under the laws of the state or country in which the act occurred, regardless of whether the act is charged or indicted], and the act involves [terrorism, animal terrorism or ecological terrorism that results or is intended to result in a risk of serious physical injury or death.] [any of the following acts if committed for financial gain (insert crime from A.R.S. § 13-2301(D)(4)).]

"Control," in relation to an enterprise, means the possession of sufficient means to permit substantial direction over the affairs of an enterprise and, in relation to property, means to acquire or possess.

"Enterprise" means any corporation, partnership, association, labor union or other legal entity or any group of persons associated in fact although not a legal entity.

SOURCE: A.R.S. § 13-2312(A) (statutory language as of January 1, 1994).

USE NOTE: Use bracketed language appropriate to the facts of the case.

23.12B– Illegally Conducting an Enterprise

The crime of illegally conducting an enterprise requires proof that the defendant was employed by or associated with an "enterprise" and the defendant [conducted the enterprise's affairs through "racketeering"] [participated directly or indirectly in the conduct of the enterprise knowing that the enterprise was being conducted through "racketeering"].

"Racketeering" means any act, including any preparatory or completed offense, that is chargeable or indictable under the laws of the state or country in which the act occurred [and, if the act occurred in a state or country other than this state, that would be chargeable or indictable under the laws of this state if the act had occurred in this state], and that would be punishable by imprisonment for more than one year under the laws of this state [and, if the act occurred in a state or country other than this state, under the laws of the state or country in which the act occurred, regardless of whether the act is charged or indicted], and the act involves [terrorism, animal terrorism or ecological terrorism that results or is intended to result in a risk of serious physical injury or death.] [any of the following acts if committed for financial gain (insert crime from A.R.S. § 13-2301(D)(4)).]

"Enterprise" means any corporation, partnership, association, labor union or other legal entity or any group of persons associated in fact although not a legal entity.

SOURCE: A.R.S. § 13-2312(B) (statutory language as January 1, 1994).

USE NOTE: Use bracketed language appropriate to the facts of the case.

23.12C(1) – Illegal Control of an Enterprise Utilizing a Minor

The crime of illegal control of an enterprise utilizing a minor requires proof that the defendant, through "racketeering" or its proceeds, acquired or maintained, by investment or otherwise, "control" of any "enterprise" and the defendant hired, engaged, or used a person under the age of eighteen for any conduct preparatory to or in completion of the offense.

"Racketeering" means any act, including any preparatory or completed offense, that is chargeable or indictable under the laws of the state or country in which the act occurred [and, if the act occurred in a state or country other than this state, that would be chargeable or indictable under the laws of this state if the act had occurred in this state], and that would be punishable by imprisonment for more than one year under the laws of this state [and, if the act occurred in a state or country other than this state, under the laws of the state or country in which the act occurred, regardless of whether the act is charged or indicted], and the act involves [terrorism, animal terrorism or ecological terrorism that results or is intended to result in a risk of serious physical injury or death.] [any of the following acts if committed for financial gain (insert crime from A.R.S. § 13-2301(D)(4)).]

"Enterprise" means any corporation, partnership, association, labor union or other legal entity or any group of persons associated in fact although not a legal entity.

SOURCE: A.R.S. § 13-2312(C) (statutory language as of January 1, 1994).

USE NOTE: Use bracketed language appropriate to the facts of the case.

23.12C(2) – Illegally Conducting an Enterprise Utilizing a Minor

The crime of illegally conducting an enterprise utilizing a minor requires proof that the defendant was employed by or associated with an "enterprise" and the defendant [conducted the enterprise's affairs through "racketeering"] [participated directly or indirectly in the conduct of the enterprise knowing that the enterprise was being conducted through "racketeering"] and the defendant hired, engaged, or used a person under the age of eighteen for any conduct preparatory or in completion of the offense.

"Racketeering" means any act, including any preparatory or completed offense, that is chargeable or indictable under the laws of the state or country in which the act occurred [and, if the act occurred in a state or country other than this state, that would be chargeable or indictable under the laws of this state if the act had occurred in this state], and that would be punishable by imprisonment for more than one year under the laws of this state [and, if the act occurred in a state or country other than this state, under the laws of the state or country in which the act occurred, regardless of whether the act is charged or indicted], and

the act involves [terrorism, animal terrorism or ecological terrorism that results or is intended to result in a risk of serious physical injury or death.] [any of the following acts if committed for financial gain (insert crime from A.R.S. § 13-2301(D)(4)).]

"Enterprise" means any corporation, partnership, association, labor union or other legal entity or any group of persons associated in fact although not a legal entity.

SOURCE: A.R.S. § 13-2312(C) (statutory language as of January 1, 1994).

USE NOTE: Use bracketed language appropriate to the facts of the case.

23.16.A.1 – Computer Tampering

The crime of computer tampering requires proof that:

1. The defendant [accessed] [altered] [damaged] [destroyed] a [computer] [computer system] [network] [any part of a computer] [any part of a computer system] [any part of a network]; *and*
2. The defendant's conduct was [without authority] [in excess of defendant's authorization of use]; *and*
3. The defendant acted with the intent [to devise or execute any scheme or artifice to defraud or deceive] [to control property or services by means of false or fraudulent pretenses, representations or promises].

["Access" means to instruct, communicate with, store data in, retrieve data from or otherwise make use of any resources of a computer, computer system or network.]

["Computer" means an electronic device that performs logic, arithmetic or memory functions by the manipulations of electronic or magnetic impulses and includes all input, output, processing, storage, software or communication facilities that are connected or related to such a device in a system or network.]

["Computer system" means a set of related, connected or unconnected computer equipment, devices and software, including storage, media and peripheral devices.]

["False or fraudulent pretense" means the unauthorized use of an access device or the use of an access device to exceed authorized access. "Access device" means any card, token, code, account number, electronic serial number, mobile or personal identification number, password, encryption key, biometric identifier or other means of account access, including a canceled or revoked access device, that can be used alone or in conjunction with another access device to obtain money, goods, services, computer or network access or any other thing of value or that can be used to initiate a transfer of any thing of value.]

["Network" includes a complex of interconnected computer or communication systems of any type.]

["Property" means financial instruments, information, including electronically produced data, computer software and programs in either machine or human readable form, and anything of value, tangible or intangible.]

["Services" includes computer time, data processing, storage functions and all types of communication functions.]

SOURCE: A.R.S. § 13-2316(A)(1) (statutory language as of July 18, 2000); definitions from A.R.S. § 13-2301(E) (statutory language as of January 1, 2006).

USE NOTE: Use bracketed language as appropriate to the facts of the case.

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)).

23.16.A.2 – Computer Tampering

The crime of computer tampering requires proof that the defendant, without authority or in excess of defendant's authorization of use, knowingly [altered] [damaged] [deleted] [destroyed] any computer [program] [data].

"Computer" means an electronic device that performs logic, arithmetic or memory functions by the manipulations of electronic or magnetic impulses and includes all input, output, processing, storage, software or communication facilities that are connected or related to such a device in a system or network.

"Computer system" means a set of related, connected or unconnected computer equipment, devices and software, including storage, media and peripheral devices.

"Network" includes a complex of interconnected computer or communication systems of any type.

["Computer program" means a series of instructions or statements, in a form acceptable to a computer, that permits the functioning of a computer system in a manner designed to provide appropriate products from the computer system.]

SOURCE: A.R.S. § 13-2316(A)(2) (statutory language as of July 18, 2000); definitions from A.R.S. § 13-2301(E) (statutory language as of January 1, 2006).

USE NOTE: Use bracketed language as appropriate to the facts of the case.

The court shall instruct on the culpable mental state.

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

The class of felony for this offense increases if the tampering was with a "critical infrastructure resource." *See* A.R.S. § 13-2316(E). If this allegation is made, the court will need to include Statutory Criminal Instruction 23.16.E in the jury instructions and use the verdict form set forth in the Use Note of that instruction.

23.16.A.3 – Computer Tampering

The crime of computer tampering requires proof that the defendant, [without authority] [in excess of defendant's authorization of use], knowingly introduced a computer contaminant into any [computer] [computer system] [network].

"Computer contaminant" means any set of computer instructions that is designed to modify, damage, destroy, record or transmit information within a computer, computer system or network without the intent or permission of the owner of the information, computer system or network. Computer contaminant includes a group of computer instructions, such as viruses or worms, that is self-replicating or self-propagating and that is designed to contaminate other computer programs or computer data, to consume computer resources, to modify, destroy, record or transmit data or in some other fashion to usurp the normal operation of the computer, computer system or network.

"Computer" means an electronic device that performs logic, arithmetic or memory functions by the manipulations of electronic or magnetic impulses and includes all input, output, processing, storage, software or communication facilities that are connected or related to such a device in a system or network.

"Computer system" means a set of related, connected or unconnected computer equipment, devices and software, including storage, media and peripheral devices.

"Network" includes a complex of interconnected computer or communication systems of any type.

SOURCE: A.R.S. § 13-2316(A)(3) (statutory language as of July 18, 2000); definitions from A.R.S. § 13-2301(E) (statutory language as of January 1, 2006).

USE NOTE: Use bracketed language as appropriate to the facts of the case.

The court shall instruct on the culpable mental state.

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

The class of felony for this offense increases if the tampering was with a "critical infrastructure resource." *See* A.R.S. § 13-2316(E). If this allegation is made, the court will need to include Statutory Criminal Instruction 23.16.E in the jury instructions and use the verdict form set forth in the Use Note of that instruction.

23.16.A.4 – Computer Tampering

The crime of computer tampering requires proof that the defendant, [without authority] [in excess of defendant's authorization of use], recklessly disrupted or caused the disruption of [computer] [computer system] [network] services to any authorized user of a computer, computer system or network.

or

The crime of computer tampering requires proof that the defendant, [without authority] [in excess of defendant's authorization of use], recklessly denied or caused the denial of [computer] [network] services to any authorized user of a computer, computer system or network.

"Computer" means an electronic device that performs logic, arithmetic or memory functions by the manipulations of electronic or magnetic impulses and includes all input, output, processing, storage, software or communication facilities that are connected or related to such a device in a system or network.

"Computer system" means a set of related, connected or unconnected computer equipment, devices and software, including storage, media and peripheral devices.

"Network" includes a complex of interconnected computer or communication systems of any type.

"Services" includes computer time, data processing, storage functions and all types of communication functions.

SOURCE: A.R.S. § 13-2316(A)(4) (statutory language as of July 18, 2000); definitions from A.R.S. § 13-2301(E) (statutory language as of January 1, 2006).

USE NOTE: Use bracketed language as appropriate to the facts of the case.

The court shall instruct on the culpable mental state.

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

The class of felony for this offense increases if the tampering was with a "critical infrastructure resource." *See* A.R.S. § 13-2316(E). If this allegation is made, the court will need to include Statutory Criminal Instruction 23.16.E in the jury instructions and use the verdict form set forth in the Use Note of that instruction.

23.16.A.5 – Computer Tampering

The crime of computer tampering requires proof that:

1. The defendant recklessly used a [computer] [computer system] [network] to engage in a [scheme] [course of conduct]; *and*
2. The defendant's conduct was [without authority] [in excess of defendant's authorization of use]; *and*
3. The [scheme] [conduct] was directed at another person; *and*
4. The [scheme] [conduct] seriously [alarmed] [tormented] [threatened] [terrorized] the person; *and*
5. The defendant's conduct caused both a reasonable person to suffer substantial emotional distress and served no legitimate purpose.

"Computer" means an electronic device that performs logic, arithmetic or memory functions by the manipulations of electronic or magnetic impulses and includes all input, output, processing, storage, software or communication facilities that are connected or related to such a device in a system or network.

"Computer system" means a set of related, connected or unconnected computer equipment, devices and software, including storage, media and peripheral devices.

"Network" includes a complex of interconnected computer or communication systems of any type.

SOURCE: A.R.S. § 13-2316(A)(5) (statutory language as of July 18, 2000); definitions from A.R.S. § 13-2301(E) (statutory language as of January 1, 2006).

USE NOTE: Use bracketed language as appropriate to the facts of the case.

The court shall instruct on the culpable mental state.

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

23.16.A.7 – Computer Tampering

The crime of computer tampering requires proof that the defendant, [without authority] [in excess of defendant's authorization of use], knowingly obtained [any information that was required by law to be kept confidential] [any records that were not public records] by accessing a [computer] [computer system] [network] that was operated by [the State of Arizona] [a political subdivision of the State of Arizona] [a medical institution].

"Access" means to instruct, communicate with, store data in, retrieve data from or otherwise make use of any resources of a computer, computer system or network.

"Computer" means an electronic device that performs logic, arithmetic or memory functions by the manipulations of electronic or magnetic impulses and includes all input, output, processing, storage, software or communication facilities that are connected or related to such a device in a system or network.

"Computer system" means a set of related, connected or unconnected computer equipment, devices and software, including storage, media and peripheral devices.

"Network" includes a complex of interconnected computer or communication systems of any type.

SOURCE: A.R.S. § 13-2316(A)(7) (statutory language as of July 18, 2000); definitions from A.R.S. § 13-2301(E) (statutory language as of January 1, 2006).

USE NOTE: Use bracketed language as appropriate to the facts of the case.

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: In *State v. Young*, 223 Ariz. 447 (App. 2010), the court discussed the elements of this particular offense. Regarding the issue of "authority," the court wrote at ¶ 15:

> Accordingly, the issue of authority for purposes of A.R.S. § 13-2316(A)(7) turns on whether a person has authority to obtain the *information or records* that are the object of the offense-not on whether the person has authority to access the computer.

The court also addressed the meaning of the phrases "information that is required by law to be kept confidential" and "any records that are not public records." As to the first phrase, the court noted that it "is easily understood" and information within that category must be "protected by state or federal law." *See* ¶¶ 20 and 21. Regarding the meaning of the phrase "any records that are not public records," the court gave the phrase its plain meaning and concluded that only "records that are not subject to the public records law: information that must be kept confidential by law and private records" fall within that category. *See* ¶ 25.

23.16.A.8 – Computer Tampering

The crime of computer tampering requires proof that the defendant, [without authority] [in excess of defendant's authorization of use], knowingly accessed a [computer] [computer system] [network].

or

The crime of computer tampering requires proof that the defendant, [without authority] [in excess of defendant's authorization of use], knowingly accessed any [computer software] [program] [data] that was contained in a [computer] [computer system] [network].

"Access" means to instruct, communicate with, store data in, retrieve data from or otherwise make use of any resources of a computer, computer system or network.

"Computer" means an electronic device that performs logic, arithmetic or memory functions by the manipulations of electronic or magnetic impulses and includes all input, output, processing, storage, software or communication facilities that are connected or related to such a device in a system or network.

"Computer program" means a series of instructions or statements, in a form acceptable to a computer, that permits the functioning of a computer system in a manner designed to provide appropriate products from the computer system.

"Computer software" means a set of computer programs, procedures and associated documentation concerned with the operation of a computer system.

"Computer system" means a set of related, connected or unconnected computer equipment, devices and software, including storage, media and peripheral devices.

"Network" includes a complex of interconnected computer or communication systems of any type.

SOURCE: A.R.S. § 13-2316(A)(8) (statutory language as of July 18, 2000); definitions from A.R.S. § 13-2301(E) (statutory language as of January 1, 2006).

USE NOTE: Use bracketed language as appropriate to the facts of the case.

The court shall instruct on the culpable mental state.

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

23.16.E – Critical Infrastructure Instruction

If you find the defendant "guilty" of computer tampering, you then must determine whether the computer, computer system or network involved was a "critical infrastructure resource." The State has the burden of proving this issue beyond a reasonable doubt.

"Critical infrastructure resource" means any computer or communications system or network that was involved in providing services necessary to ensure or protect the public health, safety or welfare, including services that were provided by [insert the name of the entity that provided the services; see the Use Note for the entity types listed in the statute].

Your decision on this issue must be unanimous. You are to set forth your finding about this issue on the verdict form.

SOURCE: A.R.S. §§ 13-2316 (statutory language as of July 18, 2000) and 13-2301 (statutory language as of January 1, 2006).

USE NOTE: This instruction should be used if the defendant is charged with computer tampering under A.R.S. § 13-2316(A)(2), (3) or (4). If the involved computer or network was a "critical infrastructure resource," the offense is a class 2 felony; otherwise, it is a class 4 felony. *See* A.R.S. § 13-2316(E).

The following types of entities are listed in the statute as critical infrastructure resource service providers:

(a) Medical personnel and institutions.

(b) Emergency services agencies.

(c) Public and private utilities, including water, power, communications and transportation services.

(d) Fire departments, districts or volunteer organizations.

(e) Law enforcement agencies.

(f) Financial institutions.

(g) Public educational institutions.

(h) Government agencies.

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 computer tampering.]
>
> We the jury find the allegation that the computer, computer system or network involved was a critical infrastructure resource (check only one):
>
> _____ Was proven.
>
> _____ Was not proven.

23.16.01 – Unlawful Possession of an Access Device

The crime of unlawful possession of an access device requires proof that:

1. The defendant knowingly [possessed] [trafficked in] [published] [controlled] an access device; *and*
2. The conduct of the defendant was without the consent of the [issuer] [owner] [authorized user]; *and*
3. The defendant intended to [use] [distribute] that access device.

"Access device" means any card, token, code, account number, electronic serial number, mobile or personal identification number, password, encryption key, biometric identifier or other means of account access, including a canceled or revoked access device, that can be used alone or in conjunction with another access device to obtain money, goods, services, computer or network access or any other thing of value or that can be used to initiate a transfer of any thing of value.

"Access" means to instruct, communicate with, store data in, retrieve data from or otherwise make use of any resources of a computer, computer system or network.

"Computer" means an electronic device that performs logic, arithmetic or memory functions by the manipulations of electronic or magnetic impulses and includes all input, output, processing, storage, software or communication facilities that are connected or related to such a device in a system or network.

[If you find the defendant guilty of this offense, you then must decide the number of access devices that the defendant possessed. The State has the burden of proving the number beyond a reasonable doubt. Your decision on this issue must be unanimous and must be set forth on the verdict form.]

SOURCE: A.R.S. §§ 13-2316.01 (statutory language as of July 18, 2000) and 13-2301 (statutory language as of January 1, 2006).

USE NOTE: Use bracketed language as appropriate to the facts of the case.

The court shall instruct on the culpable mental state.

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

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

The statute provides for an inference that the person intended to use or distribute the devices if the defendant possessed, trafficked in, published or controlled five or more access devices without the consent of the issuer, owner or authorized user. *See* A.R.S. § 13-2316.01(B) and Statutory Criminal Instruction 23.16.01(b).

In order to determine the class of the felony offense, the jury must determine the number of access devices the defendant possessed. 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 unlawful possession of an access device.]
>
> We the jury find that the defendant unlawfully possessed (check only one):
>
> _____ One hundred or more access devices
>
> _____ Five or more but fewer than one hundred access devices
>
> _____ Fewer than five access devices

23.16.01(B) – Permissible Inference

Unless satisfactorily explained, you may infer that the defendant intended to use or distribute the access devices if the defendant possessed, trafficked, published or controlled five or more access devices without the consent of the issuer, owner or authorized user.

You are free to accept or reject this inference as triers of fact. You must determine whether the facts and circumstances shown by the evidence in this case warrant any inference that the law permits you to make. Even with the inference, the State has the

burden of proving each and every element of the charged offense beyond a reasonable doubt.

[In considering whether the possession, trafficking, publishing or control of the access devices has been satisfactorily explained, you are reminded that in the exercise of constitutional rights, a defendant need not testify. The alleged unlawful conduct may be satisfactorily explained through other circumstances and other evidence, independent of any testimony by a defendant.]

SOURCE: A.R.S. § 13-2316.01(B) (statutory language as of July 18, 2000).

USE NOTE: The last paragraph is bracketed and should only be given if requested by the defendant.

It is important to caution the jury that the inference is not mandatory and that the jury must look at all the facts and circumstances of the case in deciding whether the inference should be applied. *State v. Mohr,* 150 Ariz. 564, 568-69 (App. 1986) (recommending that the language as contained in this instruction is preferable, because it expressly tells the jury that it is not compelled to draw the inference).

The use of the term "may give rise to an inference," which is contained in the text of this instruction, was specifically approved in *State v. Mohr,* 150 Ariz. at 569.

The bracketed paragraph pertaining to the defendant's constitutional right not to testify was specifically approved *verbatim* in *State v. Mohr,* 150 Ariz. at 568 (citing to *Barnes v. United States*, 412 U.S. 837, 843 (1973)).

23.16.02 – Unauthorized Release of Proprietary or Confidential Computer Security Information

The crime of unauthorized release of proprietary or confidential computer security information requires proof that:

1. The defendant [communicated] [released] [published] proprietary or confidential computer security information, security-related measures, algorithms or encryption devices relating to a particular computer, computer system or network; *and*
2. The [communication] [release] [publication] was without the authorization of the [computer's] [computer system's] [network's] owner or operator.

"Proprietary or confidential computer security information" means information about a particular computer, computer system or network that relates to its access devices, security practices, methods and systems, architecture, communications facilities, encryption methods and system vulnerabilities and that is not made available to the public by its owner or operator.

["Computer" means an electronic device that performs logic, arithmetic or memory functions by the manipulations of electronic or magnetic impulses and includes all input, output, processing, storage, software or communication facilities that are connected or related to such a device in a system or network.]

["Computer system" means a set of related, connected or unconnected computer equipment, devices and software, including storage, media and peripheral devices.]

["Network" includes a complex of interconnected computer or communication systems of any type.]

SOURCE: A.R.S. §§ 13-2316.02 (statutory language as of July 18, 2000) and 13-2301 (statutory language as of January 1, 2006).

USE NOTE: Use the bracketed language as appropriate to the facts of the case.

If the unauthorized release of proprietary or confidential computer security information relates to a "critical infrastructure resource," the offense is a class 4 felony; otherwise, it is a class 6 felony. *See* A.R.S. § 13-2316.02(D). If this allegation is made, use Statutory Criminal Instruction 23.16.02.D.

A.R.S. § 13-2316.02(B) exempts the following from this section:

1. The release by publishers, vendors, users and researchers of warnings or information about security measures or defects in software, hardware or encryption products if the release of the warnings or information is not specific to a particular owner's or operator's computer, computer system or network.
2. The release of security information among the authorized users of a computer, computer system or network or the notification to the owner or operator of a computer, computer system or network of a perceived security threat.
3. The release of security information in connection with the research, development and testing of security-related measures, products or devices if the release of the security information is not specific to a particular owner's or operator's computer, computer system or network.

COMMENT: A.R.S. § 13-2316.01(C) directs the court, at the end of a trial or grand jury hearing, to preserve pursuant to A.R.S. § 44-405, any proprietary computer security information admitted as evidence. The court must "preserve the secrecy" of the information "by reasonable means" by such means as "sealing the records of the action or ordering a person involved in the litigation not to disclose an alleged trade secret without prior court approval." A.R.S. § 44-405.

23.16.02.D – Critical Infrastructure Instruction

If you find the defendant "guilty" of unauthorized release of proprietary or confidential computer security information, you then must determine whether the computer, computer system or network involved was a "critical infrastructure resource." The State has the burden of proving this issue beyond a reasonable doubt.

"Critical infrastructure resource" means any computer or communications system or network that was involved in providing services necessary to ensure or protect the public health, safety or welfare, including services that were provided by [insert the name of the entity that provided the services; see the Use Note for the entity types listed in the statute].

Your decision on this issue must be unanimous. You are to set forth your finding about this issue on the verdict form.

SOURCE: A.R.S. §§ 13-2316.02 (statutory language as of July 18, 2000) and 13-2301 (statutory language as of January 1, 2006).

USE NOTE: This instruction should be used if the defendant is charged with unauthorized release of proprietary or confidential computer security information under A.R.S. § 13-2316.02. If the unauthorized release of proprietary or confidential computer security information involved a "critical infrastructure resource," the offense is a class 4 felony; otherwise, it is a class 6 felony. *See* A.R.S. § 13-2316.02(D).

The following types of entities are listed in the statute as critical infrastructure resource service providers:

(a) Medical personnel and institutions.

(b) Emergency services agencies.

(c) Public and private utilities, including water, power, communications and transportation services.

(d) Fire departments, districts or volunteer organizations.

(e) Law enforcement agencies.

(f) Financial institutions.

(g) Public educational institutions.

(h) Government agencies.

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 computer tampering.]

We the jury find the allegation that the computer, computer system or network involved was a critical infrastructure resource (check only one):

_____ Was proven.

_____ Was not proven.

23.17.A – Money Laundering in the First Degree

The crime of money laundering in the first degree requires proof that the defendant:

1. committed money laundering in the second degree; *and*
2. [knowingly initiated, organized, planned, financed, directed, managed, supervised or was in the business of money laundering.] [The money laundering was committed in the course of or for the purpose of facilitating terrorism or murder.]

SOURCE: A.R.S. § 13-2317 (statutory language as of August 25, 2004).

USE NOTE: Use the bracketed language appropriate to the facts of the case.

The court shall instruct on the culpable mental state.

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

Statutory Criminal Instruction 23.17.B sets forth the instruction on money laundering in the second degree.

Statutory Criminal Instruction 23.08.01 sets for the instruction on terrorism.

See Chapter 11 instructions for the homicide instructions.

23.17.B – Money Laundering in the Second Degree

The crime of money laundering in the second degree requires proof that the defendant

[acquired or maintained an interest in, transacted, transferred, transported, received or concealed the existence or nature of racketeering proceeds knowing or having reason to know that they were the proceeds of an offense.]

[made property available to another by transaction, transportation or otherwise knowing that it was intended to be used to facilitate racketeering.]

[conducted a transaction knowing or having reason to know that the property involved was the proceeds of an offense and with the intent to conceal or disguise the nature, location, source, ownership or control of the property or the intent to facilitate racketeering.]

[intentionally or knowingly made a false statement, misrepresentation or false certification or made a false entry or omitted a material entry in any application, financial statement, account record, customer receipt, report or other document that is filed or required to be maintained or filed under Arizona law (*see* title 6, chapter 12 for these requirements).]

[intentionally or knowingly evaded or attempted to evade any legally required reporting requirement, by causing any financial institution, money transmitter, trade or business to fail to file the report, by failing to file a required report or record or by any other means.]

[intentionally or knowingly provided any false information or failed to disclose information that caused any licensee, authorized delegate, money transmitter, trade or business to either:

(a) fail to file any report or record that is required under Arizona law (*see* A.R.S. § 6-1241 for these requirements).

(b) file such a report or record that contains a material omission or misstatement of fact.]

[intentionally or knowingly falsified, concealed, covered up or misrepresented or attempted to falsify, conceal, cover up or misrepresent the identity of any person in connection with any transaction with a financial institution or money transmitter.]

[, in connection with a transaction with a financial institution or money transmitter, intentionally or knowingly made, used, offered or presented or attempted to make, use, offer or present, whether accepted or not, a forged instrument, a falsely altered or completed written instrument or a written instrument that contained any materially false personal identifying information.]

[(if the person was a money transmitter, a person engaged in a trade or business or any employee of a money transmitter or a person engaged in a trade or business) intentionally or knowingly accepted false personal identifying information from any person or otherwise knowingly incorporated false personal identifying information into any report or record that is required by Arizona law (*see* A.R.S. § 6-1241 for these requirements).]

[intentionally conducted, controlled, managed, supervised, directed or owned all or part of a money transmitting business for which a license is required by Arizona law (see title 6, chapter 12) unless the business was licensed pursuant to Arizona law (*see* title 6, chapter 12) and complied with the money transmitting business registration requirements under federal law (*see* 31 U.S.C. § 5330 for these requirements).]

SOURCE: A.R.S. § 13-2317 (statutory language as of August 25, 2004).

USE NOTE: Use the bracketed language appropriate to the facts of the case.

The court shall instruct on the culpable mental state.

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

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

A.R.S. § 13-2317(F) and (G) set forth definitions applicable to money laundering. Include those definitions appropriate to the facts of the case.

The reporting requirements can be found in A.R.S. § 6-1241 and 31 Code of Federal Regulations part 103 sets forth prohibited methods of structuring transactions.

23.17.C – Money Laundering in the Third Degree

The crime of money laundering in the third degree requires proof that the defendant:

[, in the course of any transaction transmitting money, intentionally or knowingly conferred or agreed to confer anything of value on a money transmitter or any employee of a money transmitter that was intended to influence or reward any person for failing to comply with any reporting requirement under Arizona law (*see* title 6, chapter 12 for the reporting requirements).]

[intentionally or knowingly engaged in the business of receiving money for transmission or transmitting money, as an employee or otherwise, and received anything of value upon an agreement or understanding that it was intended to influence or benefit the person for failing to comply with any requirement under Arizona law (*see* title 6, chapter 12 for the reporting requirements).]

SOURCE: A.R.S. § 13-2317 (statutory language as of August 25, 2004).

USE NOTE: Use the bracketed language appropriate to the facts of the case.

The court shall instruct on the culpable mental state.

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

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

A.R.S. §§ 13-2317(F) and (G) set forth definitions applicable to money laundering. Include those definitions appropriate to the facts of the case.

23.19.01 – Smuggling of Human Beings – Deleted

Users are advised that in *United States v. State of Arizona,* 119 F. Supp. 3d 955 (2014), the court held that federal law preempts Arizona law governing human smuggling.

23.19.02 – Additional Finding Regarding Human Smuggling – Deleted

Users are advised that in *United States v. State of Arizona,* 119 F. Supp. 3d 955 (2014), the court held that federal law preempts Arizona law governing human smuggling.

23.20.01 – Residential Mortgage Fraud

(based on A.R.S. § 13-2320(A)(1))

The crime of residential mortgage fraud requires proof that:

1. The defendant, with the intent to defraud, knowingly made a [deliberate misstatement] [misrepresentation] [material omission]; *and*
2. The [deliberate misstatement] [misrepresentation] [material omission] was made during the mortgage lending process; *and*
3. The [deliberate misstatement] [misrepresentation] [material omission] was relied upon by a [mortgage lender] [borrower] [party to the mortgage lending process].

***or* (based on A.R.S. § 13-2320(A)(2))**

1. The defendant, with the intent to defraud, knowingly [used] [facilitated the use of] a [deliberate misstatement] [misrepresentation] [material omission]; *and*
2. The [deliberate misstatement] [misrepresentation] [material omission] occurred during the mortgage lending process; *and*
3. The [deliberate misstatement] [misrepresentation] [material omission] was relied upon by a [mortgage lender] [borrower] [party to the mortgage lending process].

***or* (based on A.R.S. § 13-2320(A)(3))**

1. The defendant received [any proceeds] [other monies] in connection with a residential mortgage loan; *and*
2. The defendant knew that the [proceeds] [other monies] resulted from the [making] [use] [facilitation of the use] of a [deliberate misstatement] [misrepresentation] [material omission] that occurred during the mortgage lending process; *and*
3. The defendant knew that the [deliberate misstatement] [misrepresentation] [material omission] was relied upon by a [mortgage lender] [borrower] [party to the mortgage lending process].

***or* (based on A.R.S. § 13-2320(A)(4))**

1. The defendant, with the intent to defraud, [filed] [caused to be filed] with the office of the county recorder of any county of this state any residential mortgage loan document; *and*
2. The defendant knew that the document contained a [deliberate misstatement] [misrepresentation] [material omission].

"Mortgage lending process" means the process through which a person seeks or obtains a residential mortgage loan including solicitation, application, origination, negotiation of terms, third-party provider services, underwriting, signing, closing and funding of the loan.

"Residential mortgage loan" means a loan or agreement to extend credit to a person that is secured by a deed to secure debt, security deed, mortgage, security interest, deed of trust or other document representing a security interest or lien on any interest in one to four family residential property and includes the renewal or refinancing of any loan.

SOURCE: A.R.S. § 13-2320 (statutory language as of September 19, 2007).

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

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

"Intentionally" and "knowingly" are defined in A.R.S. § 13-105 (Statutory Definition Instructions 1.0510(a)(1) and 1.0510(b)).

If the State has alleged that the defendant engaged in or conspired to engage or participate in a "pattern of residential mortgage fraud," use Statutory Criminal Instruction 23.20.02 and the verdict form addition set forth in the Use Note.

COMMENT: A reliance element was not included in the instruction for A.R.S. § 13-2320(A)(4). The legislature included a reliance element in (A)(1) and (A)(2), but not in (A)(4). An argument can be made that A.R.S. § 13-2320(C) imposes a reliance element in (A)(4). The trial judge will need to decide the issue if raised.

23.20.02 – Pattern of Residential Mortgage Fraud

If you find the defendant guilty of "residential mortgage fraud," you must then decide whether the defendant has engaged in a pattern of residential mortgage fraud.

In order to find that the defendant engaged in a "pattern of residential mortgage fraud," the State must prove beyond a reasonable doubt that:

1. The defendant has been found guilty of one or more counts of "residential mortgage fraud;" *and*
2. The "residential mortgage fraud" involved two or more residential properties; *and*
3. The "residential mortgage fraud" had the same or similar [intents] [results] [accomplices] [victims] [methods of commission].

or

4. The "residential mortgage fraud" was otherwise interrelated by distinguishing characteristics.

Your decision on this issue must be unanimous. Your decision must be reflected on the verdict form.

SOURCE: A.R.S. § 13-2320 (statutory language as of September 19, 2007).

USE NOTE: If 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 residential mortgage fraud.]
>
> We the jury, duly empanelled and sworn, find on the allegation that the defendant engaged in a pattern of residential mortgage fraud, as follows (check only one):
>
> ____ Proven.
>
> ____ Not Proven.

23.21.A – Participating in a Criminal Street Gang

The crime of participating in a criminal street gang requires proof that the defendant

[intentionally organized, managed, directed, supervised or financed a criminal street gang with the intent to promote or further the criminal objectives of the criminal street gang.]

[knowingly incited or induced others to engage in violence or intimidation to promote or further the criminal objectives of a criminal street gang.]

[furnished advice or direction in the conduct, financing or management of a criminal street gang's affairs with the intent to promote or further the criminal objectives of a criminal street gang.]

[intentionally promoted or furthered the criminal objectives of a criminal street gang by inducing or committing any act or omission by a public servant in violation of the public servant's official duty.]

"Criminal street gang" means an ongoing formal or informal association of persons whose members or associates individually or collectively engaged in the commission, attempted commission, facilitation or solicitation of any felony act and that had at least one individual who was a criminal street gang member.

"Criminal street gang member" means an individual to whom two of the following seven criteria that indicate criminal street gang membership apply:

(a) Self-proclamation.

(b) Witness testimony or official statement.

(c) Written or electronic correspondence.

(d) Paraphernalia or photographs.

(e) Tattoos.

(f) Clothing or colors.

(g) Any other indicia of street gang membership.

SOURCE: A.R.S. §§ 13-2321 (statutory language as of September 19, 2007) and 13-105 (statutory language as of September 21, 2006).

USE NOTE: A.R.S. § 13-2321(E) provides that "use of a common name or common identifying sign or symbol shall be admissible and may be considered in proving the existence of a criminal street gang or membership in a criminal street gang."

"Public servant" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0538).

23.21.B – Assisting a Criminal Street Gang

The crime of assisting a criminal street gang requires proof that the defendant committed [*fill in the felony offense whether completed or preparatory*] for the benefit of, at the direction of or in association with any criminal street gang.

"Criminal street gang" means an ongoing formal or informal association of persons whose members or associates individually or collectively engaged in the commission, attempted commission, facilitation or solicitation of any felony act and that had at least one individual who was a criminal street gang member.

"Criminal street gang member" means an individual to whom two of the following seven criteria that indicate criminal street gang membership apply:

(a) Self-proclamation.

(b) Witness testimony or official statement.

(c) Written or electronic correspondence.

(d) Paraphernalia or photographs.

(e) Tattoos.

(f) Clothing or colors.

(g) Any other indicia of street gang membership.

SOURCE: A.R.S. §§ 13-2321(B) (statutory language as of September 19, 2007) and 13-105 (statutory language as of September 21, 2006).

USE NOTE: A.R.S. § 13-2321(E) provides that "use of a common name or common identifying sign or symbol shall be admissible and may be considered in proving the existence of a criminal street gang or membership in a criminal street gang."

23.22 – Unlawful Transaction Involving Drop Houses – Deleted

Users are advised that in *United States v. State of Arizona,* 119 F. Supp. 3d 955 (2014), the court held that federal law preempts Arizona law governing human smuggling.

CHAPTER 24

24.01 – Dissemination of Personal Information on the World Wide Web

The crime of dissemination of personal information on the worldwide web requires proof that:

1. The defendant knowingly made available on the world wide web the personal information of a [peace officer] [justice] [judge] [commissioner] [public defender] [prosecutor]; [employee of the department of child safety who has direct contact with families in the course of employment]; *and*
2. The dissemination of the personal information poses an imminent and serious threat to the [peace officer's,] [justice's,] [judge's,] [commissioner's,] [public defender's] [prosecutor's] [department of child safety employee's] safety or the safety of that person's immediate family; *and*
3. The threat was reasonably apparent to the defendant to be serious and imminent.

"Personal information" means a [peace officer's] [justice's] [judge's] [commissioner's] [public defender's] [prosecutor's] home address, home telephone number, pager number, personal photograph, directions to the person's home or photographs of the person's home or vehicle.

["Commissioner" means a commissioner of the superior court.]

["Immediate family" means a peace officer's, justice's, judge's, commissioner's, public defender's or prosecutor's spouse, child or parent and any other adult who lives in the same residence as the person.]

["Judge" means a judge of the United States district court, the United States court of appeals, the United States magistrate court, the United States bankruptcy court, the Arizona court of appeals, the superior court or a municipal court.]

["Justice" means a justice of the United States or Arizona supreme court or a justice of the peace.]

["Prosecutor" means a county attorney, a municipal prosecutor, the attorney general or a United States attorney and includes an assistant or deputy United States attorney, county attorney, municipal prosecutor or attorney general.]

["Public defender" means 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.]

SOURCE: A.R.S. § 13-2401 (statutory language as of July 3, 2015).

USE NOTE: Use bracketed language as needed based on the evidence presented at trial.

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

COMMENT: A.R.S. § 13-2401(B) provides that "it is not a violation of this section if an employee of a county recorder, county treasurer or county assessor publishes personal

information, in good faith, on the web site of the county recorder, county treasurer or county assessor in the ordinary course of carrying out public functions."

24.05 – Compounding

The crime of compounding requires proof that the defendant knowingly accepted or agreed to accept any financial benefit in exchange for:

1. refraining from seeking prosecution of [insert name of the criminal offense as alleged in the indictment or information]; *or*
2. refraining from reporting to law enforcement authorities the commission or suspected commission of [insert name of the criminal offense as alleged in the indictment or information] or information relating to the criminal offense.

SOURCE: A.R.S. § 13-2405 (statutory language as of October 1, 1978).

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

COMMENT: The court must instruct on the predicate (compounded) offense to allow the jury to decide if the State has proven the charge.

24.06 – Impersonating a Public Servant

The crime of impersonating a public servant requires proof of the following:

1. The defendant pretended to be a public servant; and
2. The defendant engaged in any conduct with the intent to induce another to submit to his pretended official authority or to rely upon his pretended official acts.

[It is not a defense that the office the person pretended to hold did not in fact exist or that the pretended office did not in fact possess authority claimed for it.]

SOURCE: A.R.S. § 13-2406 (statutory language as of September 13, 2013).

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

The court shall instruct on the culpable mental state.

Use Statutory Definition Instructions 1.0510(a)(1) and 1.0510(a)(2) defining "intent" and "intent – inference."

Use Statutory Definition Instruction 1.0538 defining "public servant."

COMMENT: A.R.S. § 13-2411(D) provides that "'Public servant' includes a notary public."

24.07 – Tampering With a Public Record

The crime of tampering with a public record requires proof that, with the intent to defraud or deceive, the defendant knowingly:

[made or completed a written instrument which purported to be a public record or a true copy thereof, knowing the instrument had been falsely made.]

[altered an entry or made a false entry in a written instrument that was a public record or a true copy of a public record.]

[with the intent that it be taken as genuine, presented or used a written instrument that was, or purported to be, a public record or copy, knowing that it had been falsely made, completed or altered, or that a false entry had been made.]

[recorded, registered or filed, or offered for recordation, registration or filing in a governmental office or agency a written statement that had been falsely made, completed or altered or in which a false entry had been made or that contained a false statement or false information.]

[destroyed, mutilated, concealed, removed or otherwise impaired the availability of any public record.]

[refused to deliver a public record in such person's possession upon proper request of a public servant entitled to receive such record for examination or other purposes.]

"Public record" means all official books, papers, written instruments or records created, issued, received or kept by any governmental office or agency or required by law to be kept by others for the information of the government.

SOURCE: A.R.S. § 13-2407 (statutory language as of October 1, 1978).

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

Use Statutory Definition Instructions 1.0510(a)(1) and 1.0510(a)(2) defining "intent" and "intent – inference."

24.08 – Securing the Proceeds of an Offense

The crime of securing the proceeds of an offense requires proof that the defendant, with intent to assist another in profiting or benefiting from the commission of [insert the name of the criminal offense as alleged in the indictment or information], aided that other person in securing the proceeds of that criminal offense.

SOURCE: A.R.S. § 13-2408 (statutory language as of October 1, 1978).

USE NOTE: Use Statutory Definition Instructions 1.0510(a)(1) and 1.0510(a)(2) defining "intent" and "intent – inference."

COMMENT: The court must instruct on the predicate (compounded) offense to allow the jury to decide if the State has proven the charge.

24.09 – Obstructing Criminal Investigations or Prosecutions

The crime of obstructing criminal investigations or prosecutions requires proof that the defendant knowingly:

[attempted by means of (bribery), (misrepresentation), (intimidation) or (force), or (threats of force) to obstruct, delay or prevent the communication of information or testimony relating to a violation of any criminal statute to a peace officer, magistrate, prosecutor or grand jury.]

[injured another person or property on account of the giving by the other person or by any other person of any information or testimony relating to a violation of any criminal statute to a peace officer, magistrate, prosecutor or grand jury.]

SOURCE: A.R.S. § 13-2409 (statutory language as of 1984).

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

24.11 – Impersonating a Peace Officer

The crime of impersonating a peace officer requires proof that:

1. The defendant pretended to be a peace officer; *and*
2. The defendant engaged in any conduct with the intent to induce another to submit to the defendant's pretended authority or to rely upon the defendant's pretended acts. [*and*]
3. [The crime of (insert name of one of the enumerated crimes) was committed by the defendant while impersonating a peace officer.]

[It is not a defense that the law enforcement agency the person pretended to represent did not in fact exist, or that the law enforcement agency the person pretended to represent did not in fact possess the authority claimed for it.]

SOURCE: A.R.S. § 13-2411(statutory language as of August 12, 2005).

USE NOTE: Use Statutory Definition Instructions 1.0510(a)(1) and 1.0510(a)(2) defining "intent" and "intent – inference."

Use element three if the state alleges that the defendant committed one of the 26 enumerated crimes in this statute while impersonating a peace officer.

COMMENT: A.R.S. § 13-2411(D) provides that "'peace officer' has the same meaning prescribed in section 1-215 and includes any federal law enforcement officer or agent who has the power to make arrests pursuant to federal law." A.R.S. § 1-215(28) provides that "'peace officers' means sheriffs of counties, constables, marshals, policemen of cities and towns, commissioned personnel of the department of public safety, peace officers who are appointed by a multicounty water conservation district and who have received a certificate from the Arizona peace officer standards and training board, police officers who are appointed by community college district governing boards and who have received a certificate from the Arizona peace officer standards and training board, police officers who are appointed by the Arizona board of regents and who have received a certificate from the Arizona peace officer standards and training board and police officers who are appointed by the governing body of a public airport pursuant to section 28-8426 and who have received a certificate from the Arizona peace officer standards and training board."

CHAPTER 25

25.01.1 – Definition of "Contraband"

"Contraband" means any dangerous drug, narcotic drug, marijuana, intoxicating liquor of any kind, deadly weapon, dangerous instrument, explosive or other article whose use or possession would endanger the safety, security or preservation of order in a correctional facility or a juvenile secure care facility, or of any person within a correctional or juvenile secure care facility.

SOURCE: A.R.S. § 13-2501(1) (statutory language as of August 9, 2001).

USE NOTE: If it becomes an issue, the court may need to define the particular type of facility in question.

25.01.2 – Definition of "Correctional Facility"

"Correctional facility" means any place used for the confinement or control of a person:

1. charged with or convicted of an offense; *or*
2. held for extradition; *or*
3. pursuant to an order of court for law enforcement purposes.

Lawful transportation or movement incident to correctional facility confinement is within the control of a correctional facility. However, being within the control of a correctional facility does not include release on parole, on community supervision, on probation or by other lawful authority upon the condition of subsequent personal appearance at a designated place and time.

SOURCE: A.R.S. § 13-2501(2) (statutory language as of August 9, 2001).

25.01.3 – Definition of "Custody"

"Custody" means the imposition of actual or constructive restraint pursuant to an on-site arrest or court order but does not include detention in a correctional facility, juvenile detention center or state hospital.

SOURCE: A.R.S. § 13-2501(3) (statutory language as of August 9, 2001).

25.01.4 – Definition of "Escape"

"Escape" means:

1. departure from custody; *or*
2. departure from a juvenile secure care facility; *or*

3. departure from a juvenile detention facility; *or*
4. departure from an adult correctional facility

in which a person is held or detained with knowledge that such departure is not permitted; *or*

5. failure to return to custody or detention following a temporary leave granted for a specific purpose or for a limited period.

SOURCE: A.R.S. § 13-2501(4) (statutory language as of August 9, 2001).

25.02 – Escape in the Third Degree

The crime of escape in the third degree requires proof that the defendant:

1. was [arrested for] [charged with] [found guilty of] a misdemeanor or petty offense; *and*
2. knowingly escaped or attempted to escape from custody.

SOURCE: A.R.S. § 13-2502 (statutory language as of 1983).

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)).

"Custody" and "escape" are defined in A.R.S. § 13-2501 (Statutory Definition Instructions 25.01.3 and 25.01.4).

25.03 – Escape in the Second Degree

The crime of escape in the second degree requires proof that the defendant:

[knowingly escaped or attempted to escape from an adult correctional facility/a juvenile detention facility/a juvenile secure care facility.]

[knowingly escaped or attempted to escape from custody as a result of being arrested for/charged with/or found guilty of/a felony.]

[knowingly escaped or attempted to escape from the Arizona State Hospital if the person was committed to the hospital for treatment as a sexually violent person.]

SOURCE: A.R.S. § 13-2503 (statutory language as of August 2, 2012).

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

The court shall instruct on the culpable mental state.

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

"Correctional facility," "custody" and "escape" are defined in A.R.S. § 13-2501 (Statutory Definition Instructions 25.01.2, 25.01.3 and 25.01.4).

Sexually violent persons are defined in Title 36, Chapter 37.

25.04 – Escape in the First Degree

The crime of escape in the first degree requires proof that:

1. The defendant knowingly escaped, or attempted to escape, from custody/an adult correctional facility/a juvenile secure care facility/a juvenile detention facility; *and*
2. The escape, or attempt to escape, involved the defendant's use or threatened use of physical force/a deadly weapon/a dangerous instrument /against another person.

SOURCE: A.R.S. § 13-2504 (statutory language as of July 21, 1997).

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

The court shall instruct on the culpable mental state.

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

"Correctional facility," custody" and "escape" are defined in A.R.S. § 13-2501 (Statutory Criminal Instructions 25.01.2, 25.01.3 and 25.01.4).

25.05 – Promoting Prison Contraband

The crime of promoting prison contraband requires proof that the defendant knowingly:

[took contraband into a correctional facility or the grounds of such facility.]

[conveyed contraband to any person confined in a correctional facility.]

[made, obtained, or possessed contraband while being confined in a correctional facility.]

[made, obtained, or possessed contraband while being lawfully transported or moved incident to correctional facility confinement.]

[with reasonable grounds to believe there was a violation, or attempted violation, of promoting secure care facility contraband, failed to immediately report the violation, or attempted violation, to the official in charge of the facility or to a peace officer.]

SOURCE: A.R.S. § 13-2505 (statutory language as of 1992).

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

A violation based on the duty to report is a class 5 felony. With regard to all other bases for violations, the classification of the offense depends on the nature of the contraband. *See* A.R.S. § 13-2505(C). If the class 2 and class 5 are charged together or if the evidence presented at trial shows different types of contraband supporting both the class 2 and class 5 offenses, then the court should use a separate finding on the verdict form such as:

(Complete this portion of the verdict form only if you find the defendant guilty of promoting prison contraband. You must find each specific item unanimously and beyond a reasonable doubt.)

We, the jury, find that the contraband was (check all that apply):

_____ deadly weapon

_____ dangerous instrument

_____ explosive

_____ dangerous drug

_____ narcotic drug

_____ marijuana

_____ other contraband

Include only those items that apply on the verdict form. This type of separate finding should be used if there are multiple items of contraband even if all fall within the class 2 offense. If this type of finding is included on the verdict form, the court will need to include definitions for "deadly weapon," "dangerous instrument," "explosive," "dangerous drug," "narcotic drug" and "marijuana." A separate finding would not be needed if only one item of contraband is alleged or shown at trial.

There are two circumstances to which the statute does not apply set forth in A.R.S. § 13-2505(E).

The court shall instruct on the culpable mental state.

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

"Contraband" and "correctional facility" are defined in A.R.S. § 13-2501 (Statutory Definition Instructions 25.01.1 and 25.01.2).

25.07 – Failure to Appear in the First Degree

The crime of failure to appear in the first degree requires proof that the defendant:

1. was required by law to appear in connection with any felony; *and*
2. knowingly failed to appear as required, regardless of the disposition of the charge requiring the appearance.

SOURCE: A.R.S. § 13-2507 (statutory language as of July 21, 1997).

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)).

25.08 – Resisting Arrest

The crime of resisting arrest requires proof that:

1. A peace officer, acting under official authority, sought to arrest either the defendant or some other person; *and*
2. The defendant knew, or had reason to know, that the person seeking to make the arrest was a peace officer acting under color of such peace officer's official authority; *and*
3. The defendant intentionally prevented, or attempted to prevent, the peace officer from making the arrest; *and*

4. The means used by the defendant to prevent the arrest involved either the use or threat to use physical force or any other substantial risk of physical injury to either the peace officer or another.

[Whether the attempted arrest was legally justified is irrelevant.]

SOURCE: A.R.S. § 13-2508 (statutory language as of April 23, 1980).

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

"Intentionally" and "knowingly" are defined in A.R.S. § 13-105 (Statutory Definition Instructions 1.0510(a)(1) and 1.0510(b)).

COMMENT: In *State v. Cagle*, 228 Ariz. 374, 377-78 ¶¶ 11, 13 (App. 2011), the court held that the statute requires proof of intent only to prevent the arrest and does not require proof of intent to create a substantial risk of physical injury.

Case law protects on-duty peace officers dressed in uniform because the uniform identifies the peace officer. It is less clear that this instruction should be used when the evidence involves an off-duty peace officer without a uniform. *See generally State v. Zavala*, 136 Ariz. 389 (App. 1982); *State v. Davis*, 119 Ariz. 529 (App. 1978). Generally, this instruction would not be warranted under a lesser-included offense analysis when the crime of disorderly conduct (A.R.S. § 13-2904) is charged. Resisting arrest may be committed without committing disorderly conduct. *State v. Diaz*, 135 Ariz. 496 (App. 1983).

Lawfulness of the arrest is not an issue. *See State v. Jurden*, 239 Ariz. 526, 530 ¶ 18 (2016). However, the use of excessive force by the peace officer may be a defense. *See* A.R.S. § 13-404(B)(2); use Statutory Criminal Instruction 4.04.01.

There may be a need to define "arrest." *See* A.R.S. §§ 13-3881 and 13-3888; *State v. Stroud*, 209 Ariz. 410 (2005).

The resisting arrest statute describes an event-directed unit of prosecution; therefore, the defendant should be charged with one count for a single, continuous act of resisting arrest. *State v. Jurden*, 239 Ariz. 526 (2016).

25.08(A)(3) – Resisting Arrest (Passive Resistance)

The crime of resisting arrest requires proof that:

1. A peace officer, acting under official authority, sought to arrest either the defendant or some other person; *and*

2. The defendant knew, or had reason to know, that the person seeking to make the arrest was a peace officer acting under color of such peace officer's official authority; *and*

3. The defendant intentionally prevented, or attempted to prevent, the peace officer from making the arrest by engaging in passive resistance.

"Passive resistance" means a nonviolent physical act or failure to act that is intended to impede, hinder or delay the effecting of an arrest.

SOURCE: A.R.S. § 13-2805 (statutory language as of August 2, 2012).

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

"Intentionally" and "knowingly" are defined in A.R.S. § 13-105 (Statutory Definition Instructions 1.0510(a)(1) and 1.0510(b)).

25.081 – Defense to Resisting Arrest

Mere argument with or criticism of a peace officer is not sufficient grounds, without more, to find a person guilty of resisting arrest.

SOURCE: *State v. Tages*, 10 Ariz. App. 127 (1969); *State v. Snodgrass*, 121 Ariz. 409 (App. 1979); S*tate v. Snodgrass*, 117 Ariz. 107 (App. 1977).

USE NOTE: In the appropriate circumstances, the failure to give a limiting instruction is reversible error. *State v. Tages*, 10 Ariz. App. 127 (1969). This instruction is required in order to avoid a constitutionally impermissible construction. *Id.* It is required only when there is a factual question whether the conduct had exceeded "merely remonstrating" against the peace officer. *Id.*

25.12 – Hindering Prosecution in the First Degree

The crime of hindering prosecution in the first degree requires proof that the defendant:

1. intended to hinder the [apprehension/prosecution/conviction/punishment] of another for any felony; *and*
2. rendered assistance to the other person.

SOURCE: A.R.S. § 13-2510 (statutory language as of September 19, 2007).

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

The court shall instruct on the culpable mental state.

"Intentionally or with intent to" is defined in A.R.S. § 13-105 (Statutory Definition Instructions 1.0510(a)(1).

"Rendered assistance to another person" is defined in A.R.S. § 13-2510. The appropriate definitions from that statute must be included with this instruction.

This offense is a class 5 felony. If the hindered prosecution involved terrorism or murder, or if the hindering was committed with the intent to promote, further or assist a criminal street gang, the offense is a class 3 felony. Therefore, if any of those facts are alleged, the court will need to instruct the jury on the issue and include a finding on the verdict form. The following sample instruction is offered as a guide:

> Should you find the defendant "guilty" of hindering prosecution in the first degree, you must decide whether the offense was committed with the intent to promote, further or assist a criminal street gang. The state has the burden of proving this allegation beyond a reasonable doubt.

"Intent" has the same meaning as set forth previously in these instructions.

"Criminal street gang" means an ongoing formal or informal association of persons whose members or associates individually or collectively engage in the commission, attempted commission, facilitation or solicitation of any felony act and who has at least one individual who is a criminal street gang member.

"Criminal street gang member" means an individual to whom two of the following seven criteria apply indicating criminal street gang membership:

(a) Self-proclamation.

(b) Witness testimony or official statement.

(c) Written or electronic correspondence.

(d) Paraphernalia or photographs.

(e) Tattoos.

(f) Clothing or colors.

(g) Any other indicia of street gang membership.

Your finding on this issue must be set forth on the verdict form.

The following addition to the standard "guilty / not guilty" verdict form is offered as a guide:

[Complete this portion of the verdict form only if you find the defendant "guilty" of hindering prosecution in the first degree.]

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

___ The offense was committed with the intent to promote, further or assist a criminal street gang.

___ The offense was not committed with the intent to promote, further or assist a criminal street gang.

25.14 – Promoting Secure Care Facility Contraband

The crime of promoting secure care facility contraband requires proof that the defendant knowingly:

[took contraband onto the grounds of or into a secure care facility under the jurisdiction of the department of juvenile corrections.] *or*

[conveyed contraband to any person confined in a secure care facility under the jurisdiction of the department of juvenile corrections.] *or*

[made, obtained or possessed contraband while in a secure care facility under the jurisdiction of the department of juvenile corrections.]

[with reasonable grounds to believe there was a violation, or attempted violation, of promoting secure care facility contraband, failed to immediately report the violation, or attempted violation, to the official in charge of the facility or to a peace officer.]

SOURCE: A.R.S. § 13-2514 (statutory language as of August 9, 2001).

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

A violation based on the duty to report is a class 5 felony. With regard to all other bases for violations, the classification of the offense depends on the nature of the contraband. *See* A.R.S. § 13-2514(C). If the class 2 and class 5 are charged together or if the evidence presented at trial shows different types of contraband supporting both the class 2 and class 5 offenses, then the court should use a separate finding on the verdict form such as:

(Complete this portion of the verdict form only if you find the defendant guilty of promoting prison contraband. You must find each specific item unanimously and beyond a reasonable doubt.)

We, the jury, find that the contraband was (check all that apply):

_____ deadly weapon

_____ dangerous instrument

_____ explosive

_____ dangerous drug

_____ narcotic drug

_____ marijuana

_____ other contraband

Include only those items that apply on the verdict form. This type of separate finding should be used if there are multiple items of contraband even if all fall within the class 2 offense. If this type of finding is included on the verdict form, the court will need to include definitions for "deadly weapon", "dangerous instrument", "explosive", "dangerous drug", "narcotic drug" and "marijuana." A separate finding would not be needed if only one item of contraband is alleged or shown at trial.

The court shall instruct on the culpable mental state.

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

"Contraband" and "correctional facility" are defined in A.R.S. § 13-2501 (Statutory Definition Instructions 25.01.1 and 25.01.2).

A.R.S. § 13-2514(B) contains an exception "for information protected under attorney client privilege" regarding the obligation to report a violation of this section.

CHAPTER 26

26.01(1) – Definition of "Employee"

"Employee" includes a person employed by an enterprise or an agent or fiduciary of a principal.

26.01(2) – Definition of "Employer"

"Employer" includes an enterprise or principal.

26.01(3) – Definition of "Party Officer"

"Party officer" means a person who holds any position or office in a political party, whether by election, appointment or otherwise.

SOURCE: A.R.S. § 13-2601 (statutory language as of 1979).

USE NOTE: If instructions 26.01(1) or (2) are used, the court should also instruct on the definition of "enterprise" as defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0517).

26.02 – Bribery of a Public Servant or Party Officer

The crime of bribery of a [public servant] [party officer] requires proof that the defendant:

1. acted with corrupt intent; *and*
2. [offered, conferred, or agreed to confer any benefit upon a (public servant) (party officer) with the intent to influence (his) (her) (their) vote, opinion, judgment, exercise of discretion or other action in the person's official capacity as a (public servant) (party officer)];

   [While a (public servant) (party officer), the defendant solicited, accepted or agreed to accept any benefit upon an agreement or understanding that defendant's vote, opinion, judgment, exercise of discretion or other action as a (public servant) (party officer) may thereby be influenced].

[It is no defense to a prosecution that the person sought to be influenced was not qualified to act in the desired way because such person had not yet assumed office, lacked jurisdiction or for any other reason.]

SOURCE: A.R.S. § 13-2602(A) (statutory language as of 1982).

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

"Benefit" and "public servant" are defined in A.R.S. § 13-105 (Statutory Definition Instructions 1.053 and 1.0538).

"Party officer" is defined in A.R.S. § 13-2601 (Statutory Definition Instruction 26.01(3)).

"Corrupt intent" is not defined in title 13. However, in *State v. Walker*, 185 Ariz. 228, 242 (App. 1995), the court of appeals approved the trial court's use of the "intent" instruction combined with a definition of "corruptly" taken from A.R.S. § 1-215. The trial court instruction stated, "Corrupt in the context of the charge of bribery means dishonest and being open to bribery or using a position of trust for dishonest gain." *Ibid.*

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

26.03 – Trading in Public Office

The crime of trading in public office requires proof that the defendant:

1. acted with corrupt intent; *and*
2. [offered, conferred, or agreed to confer any benefit to a (public servant) (party officer) with an agreement or understanding that the defendant will or may be appointed to a public office or designated or nominated as a candidate for public office.]

   [While a (public servant) (party officer), the defendant solicited, accepted, or agreed to accept any benefit from another with an agreement or understanding that that person will or may be appointed to a public office or designated or nominated as a candidate for public office.]

SOURCE: A.R.S. § 13-2603 (statutory language as of October 1, 1978).

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

"Benefit" and "public servant" are defined in A.R.S. § 13-105 (Statutory Definition Instructions 1.053 and 1.0538).

"Party officer" is defined in A.R.S. § 13-2601 (Statutory Definition Instruction 26.01(3)).

"Corrupt intent" is not defined in title 13. However, in *State v. Walker*, 185 Ariz. 228, 242 (App. 1995), the court of appeals approved the trial court's use of the "intent" instruction combined with a definition of "corruptly" found in A.R.S. § 1-215. "Corrupt in the context of the charge of bribery means dishonest and being open to bribery or using a position of trust for dishonest gain." *Id.*

26.05 – Commercial Bribery Defined

The crime of commercial bribery requires proof that the defendant:

1. acted with corrupt intent; *and*

[2. conferred any benefit on an employee without the consent of the employee's employer so that such benefit would influence the conduct of the employee in relation to the employer's commercial affairs; *and*

3. the conduct of the employee caused economic loss to the employer.]

or

[2. while an employee of (his) (her) employer, accepted any benefit from another person

so that such benefit would influence the defendant's conduct in relation to the employer's commercial affairs; *and*

3. the conduct of the defendant caused economic loss to the employer or principal.]

SOURCE: A.R.S. § 13-2605 (statutory language as of 1979).

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

"Benefit" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.053).

"Employee" and "employer" are defined in A.R.S. § 13-2601 (Statutory Definition Instructions 26.01(1) and 26.01(2).

"Corrupt intent" is not defined in title 13. However, in *State v. Walker*, 185 Ariz. 228, 242 (App. 1995), the court of appeals approved the trial court's use of the "intent" instruction combined with a definition of "corruptly" taken from A.R.S. § 1-215. The trial court instruction stated, "Corrupt in the context of the charge of bribery means dishonest and being open to bribery or using a position of trust for dishonest gain." *Id.*

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

26.05 – Commercial Bribery – Form of Verdict

We, the jury, do find that the value of the benefit was (check only one):

_____ (1) more than $1,000

_____ (2) not less than $100 and not more than $1,000

_____ (3) less than $100

SOURCE: A.R.S. § 13-2605(B) (statutory language as of 1979).

USE NOTE: This form of verdict is necessary to establish the class of the offense for sentencing purposes.

26.06 – Offer To Exert Improper Influence on Public Officer or Employee for Consideration

The crime of offering to exert improper influence on a public officer or employee for consideration requires proof that the defendant:

1. intentionally or knowingly obtained, or sought to obtain, any benefit from another person; *and*
2. claimed or represented that the defendant could or would improperly influence the action of a public servant.

SOURCE: A.R.S. § 13-2606 (statutory language as of April 30, 1980).

USE NOTE: "Benefit," "intentionally," "knowingly" and "public servant" are defined in A.R.S. § 13-105 (Statutory Definition Instructions 1.053, 1.0510(a)(1), 1.0510(b) and 1.0538).

CHAPTER 27

27.01(1) – Definition of "Material"

"Material" means that which could have affected the course or outcome of any proceeding or transaction.

SOURCE: A.R.S. § 13-2701(1) (statutory language as of 1984).

COMMENT: The statute provides that the issue of materiality is a question of law. Therefore**,** the trial court should make the initial determination of materiality. If the court finds the statement to be material, then the jury makes an independent determination. *Franzi v. Superior Court in and for Pima County*, 139 Ariz. 556, 562 (1984).

27.01(2) – Definition of "Statement"

"Statement" means any representation of fact including a representation of opinion, belief, or other state of mind where such representation clearly relates to a state of mind apart from or in addition to any facts which are the subject of the representation.

SOURCE: A.R.S. § 13-2701(2) (statutory language as of 1984).

27.01(3) – Definition of "Sworn Statement"

"Sworn statement" means any statement knowingly given under oath or affirmation attesting to the truth of what is stated, including a notarized statement, whether or not given in connection with an official proceeding.

SOURCE: A.R.S. § 13-2701(3) (statutory language as of 1984).

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)).

27.02(A) – Perjury

The crime of perjury requires proof that the defendant:

1. made a false [sworn statement] [unsworn declaration, certificate, verification or statement that the person subscribed to be true under penalty of perjury]; *and*
2. believed the statement to be false when it was made; *and*
3. the statement was made regarding a material issue.

SOURCE: A.R.S. § 13-2702 (statutory language as of July 20, 1996).

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

"Material" is defined in A.R.S. § 13-2701 (Statutory Definition Instruction 27.01(1)).

"Statement" is defined in A.R.S. § 13-2701 (Statutory Definition Instruction 27.01(2)).

"Sworn statement" is defined in A.R.S. § 13-2071 (Statutory Definition Instruction 27.01(3)).

COMMENT: It is not necessary for the State to prove that a grand jury's investigation was actually impeded by false testimony that gave rise to the perjury prosecution, just that it could have been. *State v. Fodor,* 179 Ariz. 442, 453-54 (App. 1994). If the answer is literally true, it cannot constitute perjury, even if the defendant intended to mislead the questioner at the time the defendant made the statement. 179 Ariz. at 452.

27.02(B) – Perjury by Inconsistent Statements

The crime of perjury requires proof that:

1. the defendant made inconsistent statements; *and*
2. the statements were material; *and*
3. the defendant made the statements under oath; *and*
4. the defendant made the statements believing one of them to be false; *and*
5. one of the statements made was false.

SOURCE: A.R.S. §§ 13-2702 (statutory language as of July 20, 1996); 13-2705 (statutory language as of October 1, 1978).

USE NOTE: "Statement" is defined in A.R.S. § 13-2701 (Statutory Definition Instruction 27.01(2)).

"Material" is defined in A.R.S. § 13-2701 (Statutory Definition Instruction 27.01(1)).

COMMENT: Materiality is an element of perjury by inconsistent statements. *State v. Krug*, 96 Ariz. 225, 227 (1964).

27.03 – False Swearing

The crime of false swearing requires proof that the defendant:

1. made a false sworn statement; *and*
2. believed the statement to be false when it was made.

SOURCE: A.R.S. § 13-2703 (statutory language as of October 1, 1978).

USE NOTE: "Statement" is defined in A.R.S. § 13-2701 (Statutory Definition Instruction 27.01(2)).

"Sworn statement" is defined in A.R.S. § 13-2701 (Statutory Definition Instruction 27.01(3)).

27.06 – Limitation on Defenses

It is not a defense to a prosecution for [false swearing] [perjury] when:

1. the statement was inadmissible under the rules of evidence; *or*
2. the oath or affirmation was taken or administered in an irregular manner; *or*
3. the defendant mistakenly believed the false statement to be immaterial.

SOURCE: A.R.S. § 13-2706(A) (statutory language as of October 1, 1978).

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

CHAPTER 28

28.01(1) – Definition of "Juror"

"Juror" means any person who is a member of any impaneled jury or grand jury and includes any person who has been drawn or summoned to attend as a prospective juror.

SOURCE: A.R.S. § 13-2801(1) (statutory language as of October 1, 1978).

28.01(2) – Definition of "Official Proceeding"

"Official proceeding" means a proceeding heard before any legislative, judicial, administrative or other governmental agency, or before any official authorized to hear evidence under oath.

SOURCE: A.R.S. § 13-2801(2) (statutory language as of October 1, 1978).

COMMENT: Fee arbitration before a state bar committee is an "official proceeding." *State v. Self*, 135 Ariz. 374 (App. 1983).

28.01(3) – Definition of "Physical Evidence"

"Physical evidence" means any article, object, document, record or other thing of physical substance.

SOURCE: A.R.S. § 13-2801(3) (statutory language as of October 1, 1978).

28.01(4) – Definition of "Testimony"

"Testimony" means oral or written statements, documents or any other material that may be offered by a witness in an official proceeding.

SOURCE: A.R.S. § 13-2801(4) (statutory language as of October 1, 1978).

28.01(5) – Definition of "Threat"

"Threat" means a communication or act to do in the future any of the following:

1. cause physical injury to anyone by means of a deadly weapon or dangerous instrument; *or*
2. cause physical injury to anyone except as provided in paragraph 1; *or*
3. cause damage to property; *or*

4. engage in other conduct constituting an offense; *or*
5. accuse anyone of a crime or bring criminal charges against anyone; *or*
6. take or withhold action as a public servant or cause a public servant to take or withhold action; *or*
7. cause anyone to part with any property.

SOURCE: A.R.S. §§ 13-2801(5) (statutory language as of October 1, 1978) and 13-1804(A) (statutory language as of August 6, 1999).

USE NOTE: Paragraph 6 of A.R.S. § 13-1804(A) provides:

> Expose a secret or an asserted fact, whether true or false, tending to subject anyone to hatred, contempt or ridicule or to impair the person's credit or business.

This provision has been held unconstitutional. *State v. Weinstein*, 182 Ariz. 564, 568 (App. 1995). Therefore, the Committee did not include paragraph 6 in this instruction.

28.02 – Influencing a Witness

The crime of influencing a witness requires proof that the defendant:

1. [threatened] [offered, conferred or agreed to confer any benefit to] a witness or a person the defendant believed may be called as a witness in any official proceeding; *and*
2. intended to [influence the testimony of that person] [induce that person to avoid legal process summoning (him) (her) to testify] [induce that person to be absent from any official proceeding to which that person had been legally summoned].

SOURCE: A.R.S. § 13-2802 (statutory language as of October 1, 1978).

USE NOTE: Use Statutory Criminal Instructions 1.0510(a)(1) and 1.0510(a)(2) defining "intent" and "intent – inference."

Use Statutory Definition Instruction 28.01(3) for the definition of "official proceeding."

Use Statutory Definition Instruction 28.01(5) for the definition of "threat."

"Benefit" is defined in A.R.S. § 13-105(3) as "anything of value or advantage, present or prospective."

Use the language in brackets as appropriate to the facts.

28.03 – Receiving a Bribe by a Witness

The crime of receiving a bribe by a witness requires proof that the defendant:

1. was a witness in an official proceeding or believed that [he] [she] may be called as a witness in such a proceeding; *and*

2. knowingly solicited, accepted or agreed to accept any benefit with an understanding or agreement that [testimony would be thereby influenced] [the defendant would attempt to avoid legal process summoning the defendant to testify] [the defendant would be absent from any official proceeding to which the defendant had been legally summoned].

SOURCE: A.R.S. § 13-2803 (statutory language as of October 1, 1978).

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

Use Statutory Definition Instruction 28.01(2) for the definition of "official proceeding."

"Benefit" is defined in A.R.S. § 13-105(3) as "anything of value or advantage, present or prospective."

"Solicit" is defined in A.R.S. § 13-1002.

Use the language in brackets as appropriate to the facts.

28.04 – Tampering with a Witness

The crime of tampering with a witness requires proof that the defendant knowingly communicated, directly or indirectly, with a witness in any official proceeding or a person the defendant believed may be called as a witness to [unlawfully withhold any testimony] [testify falsely] [be absent from any official proceeding to which that person had been legally summoned] [evade a summons or subpoena].

SOURCE: A.R.S. § 13-2804 (statutory language as of July 24, 2014).

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

Use Statutory Definition Instruction 28.01(2) for the definition of "official proceeding."

Use the language in brackets as appropriate to the facts.

28.05 – Influencing a Juror

The crime of influencing a juror requires proof that the defendant:

1. threatened a juror or offered, conferred or agreed to confer a benefit upon a juror; *and*
2. intended to influence the juror's vote, opinion, decision or other action as a juror.

SOURCE: A.R.S. § 13-2805 (statutory language as of October 1, 1978).

USE NOTE: Use Statutory Definition Instructions 1.0510(a)(1) and 1.0510(a)(2) defining "intent" and "intent – inference."

Use Statutory Definition Instruction 28.01(1) for the definition of "juror."

"Benefit" is defined in A.R.S. § 13-105(3) as "anything of value or advantage, present or prospective."

28.06 – Receiving a Bribe by a Juror

The crime of receiving a bribe by a juror requires proof that the defendant:

1. was a juror; *and*
2. knowingly solicited, accepted, or agreed to accept, any benefit; *and*
3. understood or agreed that the defendant's vote, opinion, decision or other action as a juror may be influenced.

SOURCE: A.R.S. § 13-2806 (statutory language as of October 1, 1978).

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

Use Statutory Criminal Instruction 28.01(1) for the definition of "juror."

"Benefit" is defined in A.R.S. § 13-105(3) as "anything of value or advantage, present or prospective."

"Solicit" is defined in A.R.S. § 13-1002.

28.07 – Jury Tampering

The crime of jury tampering requires proof that the defendant:

1. other than as a part of the normal proceedings of a case, directly or indirectly communicated with a juror; *and*
2. intended to influence the juror's vote, opinion, decision or other action in the case.

SOURCE: A.R.S. § 13-2807 (statutory language as of October 1, 1978).

USE NOTE: Use Statutory Definition Instructions 1.0510(a)(1) and 1.0510(a)(2) defining "intent" and "intent – inference."

Use Statutory Definition Instruction 28.01(1) for the definition of "juror."

28.08 – Misconduct by a Juror

The crime of misconduct by a juror requires proof that the defendant, while a juror, in relation to an action or proceeding pending or about to be brought before the defendant as a juror, knowingly [allowed an unauthorized communication to be made to the defendant] [made a promise or agreement to decide for or against any party to a proceeding other than as a part of a jury deliberation].

SOURCE: A.R.S. § 13-2808 (statutory language as of October 1, 1978).

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

Use Statutory Definition Instruction 28.01(1) for the definition of "juror."

Use language in brackets as appropriate to the facts.

28.09 – Tampering with Physical Evidence

The crime of tampering with physical evidence requires proof that the defendant:

1. [destroyed, mutilated, altered, concealed or removed physical evidence with the intent to impair its verity or availability] [knowingly made, produced or offered any false physical evidence] [prevented the production of physical evidence by an act of force, intimidation or deception of any person]; *and*
2. Intended that such physical evidence be used, introduced, rejected or unavailable in an official proceeding which was pending or which the defendant knew was about to be instituted.

It is not a defense to a crime of tampering with physical evidence that the evidence in question was inadmissible in court proceedings.

SOURCE: A.R.S. § 13-2809 (statutory language as of October 1, 1978).

USE NOTE: Use Statutory Definition Instructions 1.0510(a)(1) and 1.0510(a)(2) defining "intent" and "intent – inference."

Use Statutory Definition Instruction 28.01(2) for the definition of "official proceeding."

Use Statutory Definition Instruction 28.01(3) for the definition of "physical evidence."

COMMENT: Presenting an altered check along with false testimony regarding the check in a fee arbitration proceeding before the State Bar Committee on Arbitration of Fee Disputes was sufficient for a conviction for tampering with physical evidence in official proceeding. *State v. Self* , 135 Ariz. 374 (App. 1983).

"Verity" as used in element one may need clarification. Depending on the type of evidence in question, the court may wish to consider using "genuineness," "truthfulness," or "legitimacy."

28.10 – Interfering with Judicial Proceedings

The crime of interfering with judicial proceedings requires proof that the defendant knowingly disobeyed or resisted the lawful order, process, or other mandate of a court.

SOURCE: A.R.S. § 13-2810 (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 Definition Instruction 1.0510(b)).

COMMENT: A defendant charged with Interfering with Judicial Proceedings is not entitled to a jury trial. *Ottaway v. Smith*, 210 Ariz. 490 (App. 2005). This instruction is intended for use where a defendant is charged with a felony for which a conviction for Interfering with Judicial Proceedings is a necessary predicate.

CHAPTER 29

29.03 – Riot

The crime of riot requires proof that the defendant, while acting together with two or more other persons, recklessly [used force or violence] [threatened to use force or violence, if such threat was accompanied by immediate power of execution], which disturbed the public peace.

"Public" means affecting or likely to affect a substantial group of persons.

SOURCE: A.R.S. § 13-2903 (statutory language as of October 1, 1978).

USE NOTE: Use bracketed language as appropriate to the case.

The court shall instruct on the culpable mental state.

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

29.04 – Disorderly Conduct

The crime of disorderly conduct requires proof that the defendant knowingly or intentionally disturbed the peace or quiet of a [neighborhood] [family] [person] by recklessly [handling] [displaying] [discharging] a [deadly weapon] [dangerous instrument].

["Deadly weapon" means anything designed for lethal use, including a firearm.]

["Dangerous instrument" means anything that under the circumstances in which it is used, attempted to be used or threatened to be used is capable of creating a substantial risk of causing death or serious physical injury.]

["Firearm" means any loaded or unloaded handgun, pistol, revolver, rifle, shotgun or other weapon which will or is designed to or may readily be converted to expel a projectile by the action of expanding gases, except that it does not include a firearm in permanently inoperable condition.]

SOURCE: A.R.S. § 13-2904 (statutory language as of April 19, 1994).

USE NOTE: Use the bracketed language as appropriate to the facts.

If evidence has been raised that the offense of disorderly conduct is a lesser-included offense of another offense, the court should give an instruction on lesser-included offenses. (Standard Criminal Instruction 22).

The court shall instruct on the culpable mental state.

"Intentionally" or "with intent to" 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).)

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

COMMENT: Disorderly conduct under A.R.S. § 13-2904(A)(6) is a lesser-included offense of intentional aggravated assault with a deadly weapon or dangerous instrument. *State v. Angle,* 149 Ariz. 478, 479, 720 P.2d 79, 80 (1986).

Resisting arrest is not a lesser-included offense of disorderly conduct. *State v. Diaz,* 135 Ariz. 496, 497, 662 P.2d 461, 462 (App. 1983).

Disorderly conduct is not a lesser-included offense of obstructing justice. *State v. O'Kelley,* 117 Ariz. 34, 37, 570 P.2d 805, 808 (App. 1977).

Disorderly conduct is not a lesser-included offense of drive-by shooting. *State v. Torres-Mercado,* 191 Ariz. 279, 282, 955 P.2d 35, 38 (App. 1997).

29.07 – False Reporting

The crime of false reporting requires proof that the defendant [initiated] [circulated] a report of a [bombing] [fire] [offense] [emergency] knowing that the report was false and intending that the report would:

[cause action of any sort by [an official] [a volunteer agency] organized to deal with emergencies.]

[place a person in fear of imminent serious physical injury.]

[(prevent) (interrupt) the occupation of any [building] [room] [place of assembly] [public place] [means of transportation.]

[and

The defendant has a prior conviction of false reporting.]

["Public" means affecting or likely to affect a substantial group of persons.]

["Public agency" means this state, any city, county, municipal corporation or district, any Arizona federally recognized Native American tribe or any other public authority that is located in whole or in part in this state and that provides police, fire fighting, medical or other emergency services.]

SOURCE: A.R.S. § 13-2907 (statutory language as of August 12, 2005).

USE NOTE: Use bracketed language as appropriate to the case.

If the defendant has no prior conviction for false reporting, but is charged with more than one count of false reporting, the instruction need not include the element of the prior conviction.

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)).

29.10 – Cruelty to Animals

The crime of [cruelty to animals] [interference with a working or service animal] requires proof that the defendant:

[intentionally, knowingly or recklessly subjected any animal under the defendant's custody or control to cruel neglect or abandonment.]

[intentionally, knowingly or recklessly failed to provide medical attention necessary to prevent protracted suffering to any animal under the defendant's custody or control.]

[intentionally, knowingly or recklessly inflicted unnecessary physical injury to any animal.]

[recklessly subjected any animal to cruel mistreatment.]

[intentionally, knowingly or recklessly killed any animal under the custody or control of another person without either legal privilege or consent of the owner.]

[recklessly interfered with, killed, or harmed a working or service animal without either legal privilege or consent of the owner.]

[intentionally, knowingly or recklessly left an animal unattended and confined in a motor vehicle under circumstances likely to result in physical injury to or death to the animal.]

[intentionally or knowingly subjected any animal under the defendant's custody or control to cruel neglect or abandonment that resulted in serious physical injury to the animal.]

[intentionally or knowingly subjected any animal to cruel mistreatment.]

[intentionally or knowingly interfered with, killed, or harmed a working or service animal without either legal privilege or consent of the owner.]

[intentionally or knowingly allowed any dog that was under the defendant's custody or control to interfere with, kill or cause physical injury to a service animal.]

[recklessly allowed any dog that was under the defendant's custody or control to interfere with, kill or cause physical injury to a service animal.]

[intentionally or knowingly obtained or exerted unauthorized control over a service animal with the intent to deprive the service animal handler of the service animal.]

[intentionally or knowingly subjected a domestic animal to cruel mistreatment.]

[intentionally or knowingly killed a domestic animal without legal privilege or the owner's consent.]

"Animal" means a mammal, bird, reptile or amphibian.

["Cruel mistreatment" means to torture or otherwise inflict unnecessary serious physical injury upon an animal or to kill an animal in a manner that caused protracted suffering to the animal.]

["Cruel neglect" means to fail to provide an animal with necessary food, water or shelter.]

["Handler" means a law enforcement officer or any other person who has successfully completed a course of training prescribed by the person's agency or the service animal

owner and who used a specially trained animal under the direction of the person's agency or the service animal owner.]

["Service animal" means an animal that has completed a formal training program that assists its owner in one or more daily living tasks that are associated with a productive lifestyle and that is trained to not pose a danger to the health and safety of the general public.]

["Working animal" means a horse or dog that is used by a law enforcement agency that is specially trained for law enforcement work and that is under the control of a handler.]

SOURCE: A.R.S. § 13-2910 (statutory language as of August 27, 2019).

USE NOTE: Use the 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 Instruction 1.0510(a)(1)).

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

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

COMMENT: A specific defense exists under A.R.S. § 13-2910(B). The defense relates to the use of poisons in an attempt to protect people, livestock, and poultry or to control wild or domestic rodents on the property.

29.10.01 – Animal Fighting

The crime of animal fighting requires proof that the defendant knowingly:

[owned, possessed, kept or trained any animal with the intent that such animal engage in an exhibition of fighting with another animal.]

[for amusement or gain, caused any animal to fight with another animal, or caused any animals to injure each other.]

[permitted (insert specific act from either bracketed paragraph above) to be done on any premises under the defendant's charge or control.]

"Animal" means a mammal, bird, reptile or amphibian.

SOURCE: A.R.S. § 13-2910.01 (statutory language as of September 30, 2009).

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

The court shall instruct on the culpable mental state.

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

For cock fighting, *see* Criminal Jury Instruction 29.10.03.

This statute does not apply to prohibit or restrict activities permitted by or pursuant to Title 3 nor to animals that are trained to protect livestock predation and engage in actions to protect livestock.

29.10.02 – Presence at Animal Fight

The crime of presence at an animal fight requires proof that the defendant knowingly was present at any place or building where preparations were being made for an exhibition of the fighting of animals, or was present at such exhibition.

"Animal" means a mammal, bird, reptile or amphibian.

SOURCE: A.R.S. § 13-2910.02 (statutory language as of September 30, 2009).

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 instruction is consistent with the statute. As written, the statute appears to create a strict liability offense for anyone present in a location where preparations are being made for an animal fight even though the person has no knowledge of those preparations. The same issue arises with A.R.S. § 13-2910.04, presence at cockfight.

29.10.03 – Cockfighting

The crime of cockfighting requires proof that the defendant knowingly

[owned, possessed, kept or trained any cock with the intent that such cock engage in an exhibition of fighting with another cock.]

[for amusement or gain, caused any cock to fight with another cock or caused any cocks to injure each other.]

[permitted (list specific act from either paragraph above) to be done on any premises under the defendant's charge or control.]

"Cock" means any male chicken, including game fowl except for wild birds.

SOURCE: A.R.S. § 13-2910.03 (statutory language as of November 23, 1998) and A.R.S. § 17-101 (statutory language as of September 21, 2006).

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

The court shall instruct on the culpable mental state.

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

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

COMMENT: The statute exempts "wildlife" as defined in A.R.S. § 17-101. The only applicable exception is wild birds.

29.10.06 – Defense to Cruelty to Animals and Bird Fighting

It is a defense to [cruelty to animals] [dog fighting] presence at [dog fight] [cockfighting] that the activity charged involved the possession, training, exhibition or use of a bird or

animal in the otherwise lawful sports of falconry, animal hunting, rodeos, ranching, or the training or use of hunting dogs.

SOURCE: A.R.S. § 13-2910.06 (statutory language as of November 23, 1998).

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

29.11 – Interference with or Disruption of an Educational Institution

The crime of interference with or disruption of an educational institution requires proof that the defendant:

[intentionally, knowingly or recklessly interfered with or disrupted the normal operations of an educational institution by threatening to cause physical injury to any employee or student of an educational institution or any person on the property of an educational institution.]

[intentionally, knowingly or recklessly interfered with or disrupted the normal operations of an educational institution by threatening to cause damage to any educational institution, the property of any educational institution or the property of any employee or student of an educational institution.]

[intentionally or knowingly entered or remained on the property of any educational institution for the purpose of interfering with the lawful use of the property or in any manner as to deny or interfere with the lawful use of the property by others.]

[intentionally or knowingly refused to obey a lawful order by the chief administrative officer of an educational institution, or an officer or employee designated by the chief administrative officer to maintain order, for the defendant to leave the property of an educational institution if the officer or employee had reasonable grounds to believe:

1. any person or persons was/were committing any act that interfered with or disrupted the lawful use of the property by others at the educational institution; *or*
2. any person entered on the property of an educational institution for the purpose of committing any act that interfered with or disrupted the lawful use of the property by others at the educational institution.]

"Educational institution" means any university, college, community college, high school or common school in this state.

"Governing board" means the body, whether appointed or elected, that has the responsibility for the maintenance and government of an educational institution.

"Interference with or disruption of" includes any act that might reasonably lead to the evacuation or closure of any property of the educational institution or the postponement, cancellation or suspension of any class or other school activity. An actual evacuation, closure, postponement, cancellation or suspension is not required for the act to be considered an interference or disruption.

"Property of an educational institution" means all land, buildings, and other facilities that are owned, operated or controlled by the governing board of an educational institution and that are devoted to educational purposes.

SOURCE: A.R.S. § 13-2911 (statutory language as of August 22, 2002).

USE NOTE: Use the 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 Instruction 1.0510(a)(1)).

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

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

COMMENT: To commit the offense under A.R.S. § 13-2911(A)(1), the prohibited act does not need to be directed at a specific individual, educational institution or property of an educational institution. A.R.S. § 13-2911(B).

29.12 – Unlawful Introduction of Disease or Parasite

The crime of unlawful introduction of [disease] [parasite] requires proof that the defendant:

1. knowingly introduced into the State of Arizona; *and*
2. a [disease] [parasite] of [animals] [poultry]; *and*
3. that constitutes a threat to [the livestock or poultry industry in Arizona] [human health] [human life].

It is a defense to this crime if the disease or parasite is introduced as part of any research conducted by the government or an educational institution.

SOURCE: A.R.S. § 13-2912 (statutory language as of August 22, 2002.)

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

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 chapter does not define disease or parasite of animals or poultry.

The phrase "livestock or poultry industry in Arizona" is unclear. It may refer to the livestock industry and the poultry industry, but industry is not stated in the plural, so it may refer only to individual livestock and to poultry in the sense of a threat to the business or industry of raising and processing poultry.

29.21B – Harassment of a Public Officer or Employee

The crime of harassment of a public [officer] [employee] requires proof that:

1. the defendant, with the intent to harass, filed a nonconsensual lien; *and*
2. the nonconsensual lien was filed against a public [officer] [employee]; *and*

3. the lien was not accompanied by an (order) (judgment) from a court of competent jurisdiction authorizing the filing of the lien.]

[The lien was not issued by (a governmental entity) (a political subdivision) (an agency) pursuant to its statutory authority.]

[The lien was not issued by (a validly licensed utility) (a validly licensed water delivery company) (a mechanics' lien claimant) (an entity created under covenants, conditions, restrictions or declaration affecting real property)].

"Harassment" means conduct directed at a specific person that would cause a reasonable person to be seriously alarmed, annoyed or harassed and the conduct in fact seriously alarms, annoys or harasses the person.

SOURCE: A.R.S. § 13-2921 (statutory language of as August 21, 1998).

USE NOTE: Use bracketed language as appropriate to the facts of the case.

The court shall instruct on the culpable mental state.

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

29.21.01 – Aggravated Harassment

The crime of aggravated harassment requires proof that the defendant, [with intent to harass] [knowing that the defendant was harassing another person]:

1. [anonymously or otherwise communicated or caused a communication with another person by verbal, electronic, mechanical, telegraphic, telephonic or written means in a manner that harassed;]

   [continued to follow another person in or about a public place for no legitimate purpose after being asked to desist;]

   [repeatedly committed an act or acts that harassed another person;]

   [surveilled or caused another person to surveil a person for no legitimate purpose;]

   [on more than one occasion made a false report to a law enforcement, credit or social service agency;]

   [interfered with the delivery of any public or regulated utility to a person;]

and

2. [The harassment was done after a court had issued an (order of protection) (injunction against harassment) against the defendant in the harassment victim's favor and the (order of protection) (injunction against harassment) had been served and was still valid;]

   [The defendant has been previously convicted of the offense of (*insert previous conviction of domestic violence here*);]

and

3. The victim of the previously convicted offense was the same person alleged to have been harassed in this case.

"Harassment" means conduct directed at a specific person which would cause a reasonable person to be seriously alarmed, annoyed or harassed and the conduct in fact seriously alarms, annoys or harasses the person.

["Convicted" means a person who was convicted of an offense including domestic violence, or who was adjudicated delinquent for conduct that would constitute a historical prior felony conviction if the juvenile had been tried as an adult for the offense of domestic violence.]

SOURCE: A.R.S. §§ 13-2921.01(A) and (B) (statutory language as of August 25, 2004); 13-2921 (statutory language as of August 21, 1998).

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

The court shall instruct on the culpable mental state.

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

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

29.22A – Unlawful Interference with Emergency Public Safety Land Mobile Radio Frequency Transmissions

The crime of unlawful interference with emergency public safety land mobile radio frequency transmission requires proof that the defendant recklessly [interrupted] [impeded] [directly interfered] with an emergency communication over a public safety land mobile radio frequency communications network or system created for emergency communications.

"Emergency" means a situation in which a person is or is reasonably believed by the person transmitting the communication to be in imminent danger of serious physical injury or in which property is or is reasonably believed by the person transmitting the communication to be in imminent danger of damage or destruction.

"Public safety land mobile radio frequency" means a frequency designated as such by federal law.

"Public safety land mobile radio frequency communications network or system" means those radio services and emergency communications systems that are designated as such by federal law.

SOURCE: A.R.S. § 13-2922 (statutory language as of May 19, 1998).

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

The court shall instruct on the culpable mental state.

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

29.23 – Stalking

The crime of stalking requires proof that the defendant:

1. knowingly or intentionally engaged in a course of conduct that was directed toward another person; *and*

[2. that conduct caused the victim to:

[suffer emotional distress or reasonably fear that the victim's property will be damaged or destroyed]

[suffer emotional distress or reasonably fear that the victim will be physically injured]

[suffer emotional distress or reasonably fear that the victim's family member will be physically injured]

[suffer emotional distress or reasonably fear that the victim's domestic animal or livestock will be physically injured]

[suffer emotional distress or reasonably fear that a person with whom the victim has or has previously had a romantic or sexual relationship will be physically injured]

[suffer emotional distress or reasonably fear that a person who regularly resides in the victim's household or has resided in the victim's household within the six months before the last conduct occurred will be physically injured]

[reasonably fear death]

[reasonably fear the death of the victim's family member]

[reasonably fear the death of the victim's domestic animal]

[reasonably fear the death of the victim's livestock]

[reasonably fear the death of a person with whom the victim has or has previously had a romantic or sexual relationship]

[reasonably fear the death of a person who regularly resides in the victim's household or has resided in the victim's household within the six months before the last conduct occurred].

"Course of conduct" means directly or indirectly, in person or through one or more third persons or by any other means, to do any of the following

A. Maintain visual or physical proximity to a specific person or directing verbal, written or other threats, whether express or implied, to a specific person on two or more occasions over a period of time, however short.

B. Use any electronic, digital or global positioning system device to surveil a specific person or a specific person's internet or wireless activity continuously for twelve hours or more or on two or more occasions over a period of time, however short, without authorization.

C. Communicate, or cause to be communicated, words, images or language by or through the use of electronic mail or an electronic communication that is directed at a specific person without authorization and without a legitimate purpose on more than one occasion.

Course of conduct does not include constitutionally protected activity or other activity authorized by law, the other person, the other person's authorized representative or if the other person is a minor, the minor's parent or guardian.

"Emotional distress" means significant mental suffering or distress that may, but does not have to, require medical or other professional treatment or counseling.

SOURCE: A.R.S. § 13-2923 (statutory language as of August 6, 2016.)

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

The court shall instruct on the culpable mental state.

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

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

29.25 – Hoax

The crime of hoax requires proof that the defendant knowingly or intentionally engaged in conduct that:

1. was likely to impart the false impression that an act of terrorism [was taking place] [would take place]; *and*
2. [would reasonably be expected to cause] [Caused] an emergency response by a governmental agency.

"Terrorism" means any felony that involves the use of a deadly weapon or a weapon of mass destruction or the intentional or knowing infliction of serious physical injury with the intent to [(influence policy or affect the conduct of the state or any of the political subdivisions, agencies or instrumentalities of this state) (cause substantial interruption of public communications, communication service providers, public transportation, common carriers, public utilities, public establishments, or other public services)].

SOURCE: A.R.S. § 13-2925 (statutory language as of August 22, 2002) and 13-2301 (statutory language as of January 1, 2006).

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

The court shall instruct on the culpable mental state.

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

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

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

"Serious physical injury" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0534).

"Weapon of mass destruction" is defined in A.R.S. § 13-2301 (Statutory Definition Instruction 23.01.C.15).

29.26 – Abandonment or Concealment of a Dead Body

The crime of abandonment or concealment of a dead body requires proof that the defendant:

1. knowingly moved [a dead human body] [parts of a dead human body]; *and*

2. the move was with the intent to [(abandon) (conceal)] [(the dead human body) (parts of a dead human body)].

SOURCE: A.R.S. § 13-2926 (statutory language as of August 12, 2005.)

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

The court shall instruct on the culpable mental state.

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

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

COMMENT: Under A.R.S. § 36-325, the person responsible for the remains has seven days to submit the death certificate for registration to a local registrar.

CHAPTER 30

30.05.A – Interception of Communications; Installation of Pen Register or Trap and Trace Device

The crime of intercepting wire, electronic and oral communications requires proof that the defendant intentionally:

[intercepted a wire or electronic communication to which (he) (she) was not a party, or aided, authorized, employed, procured or permitted another to so do, without the consent of either a sender or receiver thereof.] *or*

[intercepted a conversation or discussion at which (he) (she) was not present, or aided, authorized, employed, procured or permitted another to so do, without the consent of a party to such conversation or discussion.] *or*

[intercepted the deliberations of a jury or aided, authorized, employed, procured or permitted another to so do.]

"Intercept" means the listening to or other acquisition of the contents of any wire, electronic or oral communication through the use of any electronic, mechanical or other device.

["Electronic communication" means any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature that is transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system but that does not include any wire or oral communication, any communication made through a tone-only paging device or any communication from a tracking device.]

["Wire communication" means any aural transfer that is made in whole or in part through the use of facilities for the transmission of communications by the aid of any wire, cable or other like connection between the point of origin and the point of reception, including the use of a connection in a switching station, and that is furnished or operated by any person who is engaged in providing or operating the facilities for the transmission of communications.

"Aural transfer" means a communication containing the human voice at any point between and including the point of origin and the point of reception.]

SOURCE: A.R.S. §§ 13-3001 and 13-3005(A) (statutory language as of July 1, 1988).

USE NOTE: Use Statutory Definition Instructions 1.0510(a)(1) and 1.0510(a)(2) defining "intent" and "intent – inference."

30.05.B – Installation of a Pen Register or Trap and Trace Device

The crime of installation of a [pen register] [trap and trace device] requires proof that the defendant intentionally and without lawful authority [installed] [used] a [pen register] [trap and trace device] on the telephone lines or communications facilities of another person which were utilized for wire or electronic communication.

["Pen register" means a device or process that records or decodes electronic or other impulses that identify the numbers dialed or otherwise transmitted on the telephone line or communication facility to which the device is attached or the dialing, routing, addressing or signaling information that is transmitted by an instrument or facility from which a wire or electronic communication is transmitted but does not include the contents of any communication, except when used in connection with a court order. A pen register does not include a publicly available device or process that is otherwise lawful.]

["Trap and trace device" means a device or process that captures the incoming electronic or other impulses that identify the originating number of an instrument or device from which a wire or electronic communication was transmitted or the dialing, routing, addressing and signaling information that is reasonably likely to identify the source of a wire or electronic communication but does not include the content of any communication, except when used in connection with a court order. A trap and trace device does not include a publicly available device or process that is otherwise lawful.]

"Electronic communication" means any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature that is transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system but that does not include any wire or oral communication, any communication made through a tone-only paging device or any communication from a tracking device.

"Wire communication" means any aural transfer that is made in whole or in part through the use of facilities for the transmission of communications by the aid of any wire, cable or other like connection between the point of origin and the point of reception, including the use of a connection in a switching station, and that is furnished or operated by any person who is engaged in providing or operating the facilities for the transmission of communications.

"Aural transfer" means a communication containing the human voice at any point between and including the point of origin and the point of reception.

SOURCE: A.R.S. §§ 13-3001 and 13-3005(B) (statutory language as of July 1, 1988).

USE NOTE: Use Statutory Definition Instructions 1.0510(a)(1) and 1.0510(a)(2) defining "intent" and "intent – inference."

30.06 – Divulging Communication Service Information

The crime of divulging communication service information requires proof that:

[the defendant, intentionally and without lawful authority, obtained any knowledge of the contents of a wire or electronic communication by connivance with a communication service provider or its officer or employee.] *or*

[the defendant is a communications service provider, officer or employee of a communications service provider and intentionally divulged to anyone but the person for whom it was intended, except with the permission of the sender or the person for whom it was intended, the contents or the nature of a wire or electronic communication entrusted to the communications service provider for transmission or delivery.]

"Communication service provider" means any person who is engaged in providing a service that allows its users to send or receive oral, wire or electronic communications or computer services.

"Electronic communication" means any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature that is transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system but that does not include any wire or oral communication, any communication made through a tone-only paging device or any communication from a tracking device.

"Wire communication" means any aural transfer that is made in whole or in part through the use of facilities for the transmission of communications by the aid of any wire, cable or other like connection between the point of origin and the point of reception, including the use of a connection in a switching station, and that is furnished or operated by any person who is engaged in providing or operating the facilities for the transmission of communications.

"Aural transfer" means a communication containing the human voice at any point between and including the point of origin and the point of reception.

SOURCE: A.R.S. §§ 13-3001 and 13-3006 (statutory language as of July 1, 1988).

USE NOTE: Use Statutory Definition Instructions 1.0510(a)(1) and 1.0510(a)(2) defining "intent" and "intent – inference."

30.08 – Possession of an Interception Device

The crime of possession of an interception device requires proof that the defendant:

1. had in [his] [her] possession or control any device, contrivance, machine or apparatus designed or primarily useful for the interception of wire, electronic or oral communications; *and*
2. possessed or controlled the device with the intent to unlawfully use or employ or allow the device, contrivance, machine or apparatus to be used or employed for the interception of wire, electronic or oral communications, or having reason to know the device, contrivance, machine or apparatus was intended to be so used.

"Electronic communication" means any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature that is transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system but that does not include any wire or oral communication, any communication made through a tone-only paging device or any communication from a tracking device.

"Oral communication" means a spoken communication that is uttered by a person who exhibits an expectation that the communication is not subject to interception under circumstances justifying the expectation but does not include any electronic communication.

"Wire communication" means any aural transfer that is made in whole or in part through the use of facilities for the transmission of communications by the aid of any wire, cable or other like connection between the point of origin and the point of reception, including the use of a connection in a switching station, and that is furnished or operated by

any person who is engaged in providing or operating the facilities for the transmission of communications.

"Aural transfer" means a communication containing the human voice at any point between and including the point of origin and the point of reception.

SOURCE: A.R.S. §§ 13-3001 and 13-3008 (statutory language as of July 18, 2000).

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

Use Statutory Definition Instructions 1.0510(a)(1) and 1.0510(a)(2) defining "intent" and "intent – inference."

30.19.A – Surreptitious Recording

The crime of surreptitious [recording] [viewing] requires proof that the defendant knowingly [photographed, videotaped, filmed, digitally recorded or by any other means used a device to secretly view or record] [secretly viewed, with or without a device,] another person without that person's consent:

[1. While the person was in a restroom, bathroom, locker room, bedroom or other location where the person had a reasonable expectation of privacy; *and*

2. The person was urinating, defecating, dressing, undressing, nude or involved in sexual intercourse or sexual contact.]

[1. When the viewing was 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; *and*

2. The person's body part was not otherwise visible to the public.]

SOURCE: A.R.S. § 13-3019(A) (statutory language as of September 21, 2006).

USE NOTE: Use bracketed language as appropriate. The first bracketed option is based on A.R.S. § 13-3019(A)(1) and the second is based on A.R.S. § 13-3019(A)(2).

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

A.R.S. § 13-3019(G) provides that "sexual contact" and "sexual intercourse" have the same meanings prescribed in § 13-1401.

If a device was not used to commit the offense, the felony classification is reduced except if the violation is a second or subsequent violation. A.R.S. § 13-3019(E).

30.19.B – Disclosure of Surreptitious Recording

The crime of disclosure of surreptitious recording requires proof that the defendant knowingly [disclosed] [displayed] [distributed] [published] a [photograph] [videotape] [film] [digital recording] which the defendant knew was secretly recorded of another person without that person's consent while the person was either:

1. in a restroom, bathroom, locker room, bedroom or other location where the person had a reasonable expectation of privacy; *or*
2. urinating, defecating, dressing, undressing, nude or involved in sexual intercourse or sexual contact.

SOURCE: A.R.S. § 13-3019(B) (statutory language as of July 18, 2000).

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

A.R.S. § 13-3019(E) provides that "sexual contact" and "sexual intercourse" have the same meanings prescribed in section 13-1401.

COMMENT: Although the statute is not clear, the committee is of the opinion that the defendant must know that the recording was secretly recorded. *See United States v. X-Citement Video, Inc.,* 513 U.S. 64, 72 (1994) holding that the mental state of knowingly "should apply to each of the statutory elements that criminalize otherwise innocent conduct."

CHAPTER 31

31.01.01 – Definition of "Deadly Weapon"

"Deadly weapon" means anything that is designed for lethal use. The term includes a firearm.

31.01.02 – Definition of "Deface"

"Deface" means to remove, alter, or destroy the manufacturer's serial number.

31.01.03 – Definition of "Explosive"

"Explosive" means any dynamite, nitroglycerin, black powder or other similar explosive material including plastic explosives. The term "explosive" does not include ammunition or ammunition components such as primers, percussion caps, smokeless powder, black powder and black powder substitutes used for hand loading purposes.

31.01.04 – Definition of "Firearm"

"Firearm" means any loaded or unloaded handgun, pistol, revolver, rifle, shotgun or other weapon that will expel, is designed to expel or may readily be converted to expel a projectile by the action of an explosive. Firearm does not include a firearm in permanently inoperable condition.

31.01.05 – Definition of "Improvised Explosive Device"

"Improvised explosive device" means a device that incorporates explosives or destructive lethal, noxious, pyrotechnic or incendiary chemicals and that is designed to destroy, disfigure, terrify or harass.

31.01.06 – Definition of "Occupied Structure"

"Occupied structure" means any building, object, vehicle, watercraft, aircraft or place with sides and a floor that is separately securable from any other structure attached to it, that is used for lodging, business, transportation, recreation or storage and in which one or more human beings either is or is likely to be present or so near as to be in equivalent danger at the time the discharge of a firearm occurs. Occupied structure includes any dwelling house, whether occupied, unoccupied or vacant.

31.01.07 – Definition of "Prohibited Possessor"

"Prohibited possessor" means any person who:

[pursuant to court order has been found to constitute a danger to himself/herself or to others or have persistent or acute disabilities or grave disabilities and whose right to possess a firearm has not been restored pursuant to Arizona law.]

[has been convicted within or without the State of Arizona of a felony or who has been adjudicated delinquent for a felony [and whose civil right to possess or carry a gun or firearm has not been restored.]]

[is at the time of possession serving a term of imprisonment in any correctional or detention facility.]

[is at the time of possession serving a term of probation pursuant to a conviction for a domestic violence offense or a felony offense, parole, community supervision, work furlough, home arrest or release on any other basis or who is serving a term of probation or parole pursuant to the interstate compact.]

[is a prohibited possessor under federal law for shipping or transporting any firearm or ammunition in interstate or foreign commerce, or possessing any firearm or ammunition in or affecting commerce, or receiving any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, while being an alien illegally or unlawfully in the United States or having been admitted to the United States under a non-immigrant visa of the Immigration and Nationality Act.]

[has been found incompetent and subsequently has not been found competent.]

[is found guilty except insane.]

You may consider this evidence only as to whether the defendant is a prohibited possessor. [You must not consider this evidence for any other purpose.]

USE NOTE: Language within the bracketed portion of paragraph 2 should only be given when the defendant has produced evidence demonstrating that his or her right to possess or carry a firearm has been restored. *See* Statutory Criminal Instruction 31.02, Affirmative Defense to Misconduct Involving Weapons under A.R.S. § 13-3101(A)(6)(b).

Language within the bracketed portion of the last paragraph should only be given when appropriate. If, however, a defendant's prohibited possessor status can be considered for another reason, such as prior conviction that can be considered under Evidence Rule 609, the bracketed language should be omitted.

31.01.08 – Definition of "Prohibited Weapon"

"Prohibited weapon" means:

[an item that is a (bomb) (grenade) (rocket having a propellant charge of more than four ounces) (mine) *and* that is explosive, incendiary or poison gas]

[a device that is designed, made or adapted to muffle the report of a firearm.]

[a firearm that is capable of shooting more than one shot automatically, without manual reloading, by a single function of the trigger.]

[a rifle with a barrel length of less than sixteen inches.]

[a shotgun with a barrel length of less than eighteen inches.]

[any firearm that is made from a rifle or a shotgun and that, as modified, has an overall length of less than twenty-six inches.]

[a breakable container that contains a flammable liquid with a flashpoint of one hundred fifty degrees Fahrenheit or less and that has a wick or similar device capable of being ignited.]

[a chemical or combination of chemicals, compounds or materials, including dry ice, that is (possessed) (manufactured) for the purpose of generating a gas to cause a mechanical failure, rupture or bursting.]

[a chemical or combination of chemicals, compounds or materials, including dry ice, that is (possessed) (manufactured) for the purpose of generating an (explosion) (detonation) of the chemical or combination of chemicals compounds or materials.]

[an improvised explosive device.]

[any combination of parts or materials that is designed and intended for use in making or converting a device into an item that is (list prohibited weapon from A.R.S. § 13-3101(A)(8)(a)(i), (v) or (vii).]

The term "prohibited weapon" does not include any fireworks that are imported, distributed or used in compliance with state laws or local ordinances, any propellant, propellant actuated devices or propellant actuated industrial tools that are manufactured, imported or distributed for their intended purposes or a device that is commercially manufactured primarily for the purpose of illumination.

[The term "prohibited weapon" does not include any firearms or devices that are possessed, manufactured or transferred in compliance with federal law.]

SOURCE: A.R.S. § 13-3101 (statutory language as of August 27, 2019).

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

The determination of whether a firearm is permanently inoperable under A.R.S. § 13-3101(A)(4) is a question of fact. *State v. Young*, 192 Ariz. 303, 306-307 (App. 1998) (noting that a disassembled or broken weapon may constitute a firearm if it can be made operable with reasonable preparation, including the addition of a readily replaceable part or the accomplishment of a quickly-effected repair).

Neither operability nor knowledge of operability of a firearm is an element of the offense; rather, permanent inoperability is an affirmative defense. *State v. Young*, 192 Ariz. 303, 307 (App. 1998).

If the State has alleged that the prohibited possessor has a felony conviction, the defendant has the burden of proof and the burden of persuasion to show by a preponderance of the evidence that the defendant's civil rights to possess or carry a gun or firearm has been restored. *State v. Kelly,* 210 Ariz. 460, 464-65 (App. 2005).

If the State has alleged that the prohibited possessor has been found to constitute a danger to himself/herself or others, the court should ensure that the finding was made under A.R.S. § 36-540.

If the State alleged that the prohibited possessor was a prohibited possessor as defined under federal law (18 U.S.C. § 922(g)(5)) pursuant to A.R.S. § 13-3101(A)(6)(e) prior to

September 26, 2008, the court should insure that the federal finding was not made under 18 U.S.C. § 922(y) (pertaining to aliens admitted under non-immigrant visas). When the offense occurred on or between August 24, 2004 and September 25, 2008, the State must prove all of the provisions of 18 U.S.C. § 922(g)(5), including the requirement that any firearm or ammunition allegedly possessed by the defendant must have an interstate or foreign commerce nexus. *State ex rel. Thomas v. Contes*, 216 Ariz. 525, 530, ¶ 16 (App. 2007).

For alleged violations of A.R.S. § 13-3101(A)(6)(e) [recodified as A.R.S. § 13-3101(A)(7)(e)] occurring on or after September 26, 2008, the Committee was unable to find a definition of "undocumented alien" in either federal or state statutes or case law. The following definition of "alien" is taken from 8 U.S.C. §101(a)(3), which the court may choose to use in its instruction: "The term "alien" means any person not a citizen or national of the United States." The term "undocumented" appears to be the commonly understood meaning of the word. The categories of "nonimmigrant aliens" can be found in 8 U.S.C. §1101(a)(15)(A)–(V).

In a prosecution alleging the possession of a sawed-off rifle or sawed-off shotgun under A.R.S. § 13-3101(A)(7)(d) [now codified as A.R.S. § 13-3101(A)(8)(a)(iv)], the State must prove that the defendant knew that he or she possessed a sawed-off or short-barreled shotgun or rifle, but the State does not have to prove that the defendant knew the specific barrel or overall length that made it a statutorily prohibited weapon. *State v. Young*, 192 Ariz. 303, 311-12 (App. 1998).

The State is not required to prove the non-registration of a prohibited weapon by the United States Treasury Department, which is instead an affirmative defense to be proved by the defense. *State v. Berryman,* 178 Ariz. 617, 621 (App. 1994) (holding that the failure of the police to test the weapon or to determine registration did not call for a *Willits* instruction, because the burden of showing such is on the defendant).

In regard to a prohibited possessor under A.R.S. § 13-3101(A)(67)(d) who was at the time of possession serving a term of probation, parole, etc., as defined in Statutory Criminal Definition Instruction 31.01.06**7**, the offense is based upon the defendant being on probation, etc., at the time of the possession, regardless of whether the underlying conviction was vacated after the time of possession. *State v. Mangum*, 214 Ariz. 165, 169, ¶ 13 (App. 2007) (holding that the subsequent invalidation of the underlying conviction is irrelevant and shall be precluded from evidence, argument and jury instructions.)

The last bracketed paragraph in 31.01.08 applies only to A.R.S. § 13-3101(A)(8)(a)(i), (ii), (iii) and (iv).

COMMENT: The reference to Arizona law in the first bracketed item in 31.01.07 is A.R.S. § 13-924 regarding the restoration of right to possess a firearm by mentally ill persons.

A flare gun is not a prohibited weapon. *In Re Robert A.*, 199 Ariz. 485, 487 (App. 2001) (holding that a flare gun falls within the exception in A.R.S. § 13-3101(A)(7) [now codified as A.R.S. § 13-3101(A)(8)(b)(ii)] regarding propellant actuated devices commercially manufactured for the purpose of illumination).

Effective September 29, 2019, it is no longer a criminal offense to possess a nunchaku. The offense of misconduct involving prohibited weapons does not apply to a nunchaku under A.R.S. § 13-3101(8)(a)(v) (prior to amendment of statute effective September 29, 2019) if the nunchaku is possessed for the purposes of preparing for, conducting or

participating in lawful exhibition, demonstrations, contests or athletic events involving the use of such weapon. A.R.S. § 13-3102(H) (prior to amendment of statute effective September 29, 2019).

From August 25, 2004 to September 25, 2008, A.R.S. § 13-3101(A)(6)(e) provided that one was a prohibited possessor if that person was considered a prohibited possessor under federal law (18 U.S.C. § 922(g)(5)) As of September 26, 2008, A.R.S. §3-3101(A)(6)(e) was recodified as A.R.S. § 13-3101(A)(7)(e)] and rewritten to remove that definition and replaced with the requirement that the person was "an undocumented alien or a nonimmigrant alien traveling with or without documentation in this state for business or pleasure or who is studying in this state and who maintains a foreign residence abroad," with certain exceptions.

Therefore, in regard to A.R.S. § 13-3101(A)(6)(e), the following comments apply to any offenses that occurred on or between August 25, 2004 and September 25, 2008:

With respect to Statutory Criminal Definition Instruction 31.01.06, A.R.S. § 13-3101(A)(6)(e) provides that a person who would be a prohibited possessor under 18 U.S.C. § 922(g)(5), is also a prohibited possessor under Arizona law unless the person is exempted by a provision in 18 U.S.C. § 922(y). *See State ex rel. Thomas v. Contes*, 216 Ariz. 525, 530 ¶ 16 (App. 2007) (holding that the plain language of §13-3101(A)(6)(e) adopts all of 18 U.S.C. §922(g)(5), including the necessity to show a nexus to interstate or foreign commerce).

While A.R.S. § 13-3101(A)(6)(e) refers to the relevant federal statute by its U.S.C. number, Statutory Criminal Definitional Instruction 31.01.06 has included the text of the federal statute to make it more "jury friendly." The statutory language of A.R.S. § 13-3101(A)(6)(e) does not require that a defendant be previously convicted of a violation of 18 U.S.C. § 922(g)(5) in order to be a prohibited possessor, only that the State prove a defendant is in violation of the provisions of such federal statute. However, the trial court should be aware that a federal preemption argument could be asserted in regard to the element of proving a defendant's immigration status in the absence of a prior federal conviction. The United States Supreme Court in *DeCanas v. Bica,* 424 U.S. 351, 354-58 (1975) held that a state statute could not regulate immigration, would be preempted if Congress demonstrated a manifest intent to occupy the field and could not conflict with federal law. In *State v. Hernandez-Mercado*, 124 Wash. 2d 368, 379-81 (1994), the Washington Supreme Court, relying upon *DeCanas,* affirmed a conviction under a similar, but less specific, state firearms possession statute of a defendant who pled guilty to not being a citizen and who had not been previously convicted of a federal alienage offense. The court in *Hernandez-Mercado* held that the statute was not preempted by the Immigration and Nationality Act (8 U.S.C. § 1101 *et seq.*) and the federal firearms laws (18 U.S.C. §§ 921-930), and did not violate the Equal Protection Clause. Nonetheless, an Arizona appellate court has not ruled on this issue. Absent further appellate clarification, there is the possibility that a state court jury would be held to be preempted from finding a violation of federal law absent a prior federal conviction of 18 U.S.C. § 922(g)(5). If the preemption argument is accepted by the trial court, the following instruction is suggested:

"Prohibited possessor" means any person who is a prohibited possessor under federal law for a conviction in federal court of shipping or transporting any firearm or ammunition in interstate or foreign commerce, or possessing any firearm or ammunition in or affecting commerce, or receiving any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, while being an alien illegally or unlawfully in the United

States or having been admitted to the United States under a non-immigrant visa of the Immigration and Nationality Act.

In regard to A.R.S. § 13-3101(A)(7)(e), the following comment applies to any offenses that occurred on or after September 26, 2008:

As of September 26, 2008, the legislature expanded the definition of prohibited possessor under A.R.S. § 13-3101(A)(7)(e) from its previous limitation of a federal prohibited possessor under 18 U.S.C. § 922(g)(5) to include all undocumented aliens and nonimmigrant aliens, subject to certain enumerated exceptions. Therefore, as of September 26, 2008, a prohibited possessor under the statute is no longer limited to the requirements of 18 U.S.C. § 922(g)(5).

31.01.09 – Definition of "Trafficking"

"Trafficking" means to sell, transfer, distribute, dispense or otherwise dispose of a weapon explosive to another person, or to buy, receive, possess or obtain control of a weapon or explosive with the intent to sell, transfer, distribute, dispense or otherwise dispose of the weapon or explosive to another person.

SOURCE: A.R.S. § 13-3101 (statutory language as of August 2, 2012).

31.02.01 – Definition of "Public Establishment"

"Public establishment" means a structure, vehicle or craft that is owned, leased or operated by the State of Arizona or a political subdivision of the State of Arizona.

31.02.02 – Definition of "Public Event"

"Public event" means a specifically named or sponsored event of limited duration either conducted by a public entity or conducted by a private entity with a permit or license granted by a public entity. Public event does not include an unsponsored gathering of people in a public place.

31.02.03 – Definition of "School"

"School" means a public or nonpublic kindergarten program, common school or high school.

31.02.04 – Definition of "School Grounds"

"School grounds" means in, or on the grounds of, a school.

SOURCE: A.R.S. § 13-3102(K) (statutory language as of September 21, 2006).

31.07 – Unlawful Discharge of Firearms

The crime of unlawful discharge of a firearm requires proof that the defendant, with criminal negligence, discharged a firearm within or into the limits of a municipality.

SOURCE: A.R.S. §13-3107 (statutory language as of July 20, 2011).

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

"Criminal negligence" is defined in A.R.S. § 13-105 (Statutory Criminal Instruction 1.0510(d)).

"Firearm" is defined in A.R.S. § 13-3101 (Statutory Criminal Instruction 31.01.04).

"Municipality" is defined in A.R.S. §13-3107 (Statutory Criminal Instruction 31.07.01).

This offense shall not apply if the firearm is discharged:

1. as allowed by Chapter 4;
2. on a properly supervised range;
3. To lawfully take wildlife during an open season established by the Arizona Game and Fish Commission and subject to the limitations prescribed by Title 17 and Arizona Game and Fish Commission rules and orders. This paragraph does not prevent a city, town or county from adopting an ordinance or rule restricting the discharge of a firearm within one-fourth mile of an occupied structure. For purposes of this paragraph, "take" has the same meaning prescribed in section 17-101.
4. for the control of nuisance wildlife by permit from the Arizona Game & fish Department or the U.S. Fish & Wildlife Service;
5. by special permit of the chief of police of the municipality;
6. as required by an animal control officer in the performance of official duties;
7. using blanks;
8. more than one mile from any occupied structure as defined in §13-3101; or
9. in self-defense or defense of another person against an animal attack if a reasonable person would believe that deadly physical force against the animal is necessary and reasonable under the circumstances to protect oneself or the other person.

A.R.S. § 13-3107(C).

COMMENT: In a case brought under the predecessor to this statute, A.R.S. §§ 13-917 and 917.01, the Arizona Supreme Court held that the intent to do bodily harm was not an element of the statute. *State v. Andrews,* 106 Ariz. 372, 377 (1970).

31.07.01 – Definition of "Municipality"

"Municipality" means any city or town and includes any property that is fully enclosed within the city or town.

31.07.02 – Definition of "Properly Supervised Range"

"Properly supervised range" means a range that is operated:

1. by a club affiliated with the national rifle association of America, the amateur trapshooting association, the national skeet association or any other nationally recognized shooting organization, or by any public or private school, *or*
2. with the approval of any agency of the federal government, the State of Arizona, a county or a city within which the range is located; *or*
3. with adult supervision for shooting air or carbon dioxide gas operated guns, or for shooting in underground ranges on private or public property.

SOURCE: A.R.S. § 13-3107(D) (statutory language as of July 18, 2000).

31.16.01 – Definition of "Body Armor"

"Body armor" means any clothing or equipment designed in whole or in part to minimize the risk of injury from a deadly weapon.

SOURCE: A.R.S. § 13-3116(C) (statutory language as of August 6, 1999).

USE NOTE: "Deadly weapon" is defined in A.R.S. § 13-3101(A)(1) (Statutory Definition Instruction 31.01.01).

31.17.01 – Definition of "Authorized Remote Stun Gun"

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

1. an electrical discharge that is less than one hundred thousand volts and less than nine joules of energy per pulse; *and*
2. a serial or identification number on all projectiles that are discharged from the remote stun gun; *and*
3. an identification and tracking system that, on deployment of remote electrodes, disperses coded material that is traceable to the purchaser through records that are kept by the manufacturer on all remote stun guns and all individual cartridges sold; *and*
4. a training program that is offered by the manufacturer.

SOURCE: A.R.S. § 13-3117(E)(1) (statutory language as of August 12, 2005).

31.17.02 – Definition of "Remote Stun Gun"

"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.

SOURCE: A.R.S. § 13-3117(A)(2) (statutory language as of August 12, 2005).

31.023 – Misconduct Involving Weapons (Prohibited Weapon)

The crime of misconduct involving weapons requires proof that:

1. the defendant knowingly [manufactured] [possessed] [transported] [sold] [transferred] a weapon; *and*
2. the weapon is a prohibited weapon.

SOURCE: A.R.S. § 13-3102(A)(3) (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)).

"Prohibited weapon" is defined in A.R.S. § 13-3101 (Statutory Definition Instruction 31.01.07).

"Possession" is defined in A.R.S. § 13-105(31) (Statutory Definition Instruction 1.0531).

In *State v. Young*, 192 Ariz. 303, 311-12 (App. 1998), a case alleging a violation of A.R.S. § 13-3102, the court rejected the defendant's argument that the State had to prove that he knew the specific characteristics of the weapon that made it prohibited, i.e., the length of his sawed-off or short-barreled shotgun was under the legal limit, but the court, relying upon a line of federal cases, required the State to prove a less rigorous scienter requirement that the defendant knew that the weapon was sawed-off or short-barreled. The court in *Young* specifically held that A.R.S. § 13-3102(A)(3) is not a strict liability crime and that the inclusion of this less rigorous scienter requirement provides some level of knowledge to remove it from being a strict liability crime. The court and counsel may wish to consider adding language to the instruction when the prohibited weapon involves a short-barreled or sawed-off shotgun.

In *State v. Kerr*, 142 Ariz. 426, 433 (App. 1984), the court held that the definition of "possession" in A.R.S. § 13-105 is a correct instruction to give under A.R.S. § 13-3102(A)(3), but it noted that constructive possession (defendant was merely in the home of a registered firearm owner) was not sufficient to violate this subsection. *Cf. State v. Coley,* 158 Ariz. 471, 471-72 (App. 1988) (noting that *Kerr* was correct as to A.R.S. § 13-3102(A)(3), but that the giving of an instruction on constructive possession was not error in regard to a violation of A.R.S. § 13-3102(A)(4), which pertains to possession by a prohibited possessor rather than possession of a prohibited weapon).

The State is not required to prove the nonregistration of a prohibited weapon by the United States Treasury Department, which is instead an affirmative defense to be proved by the defense. *State v. Berryman,* 178 Ariz. 617, 621 (App. 1994) (holding that the failure of the police to test the weapon or to determine registration did not call for a *Willits* instruction, because the burden of showing such is on the defendant).

This offense shall not apply to:

1. A peace officer or anyone summoned by a peace officer to assist and while actually assisting in the performance of official duties;
2. A member of the U.S. military forces or national guard in the performance of official duties;
3. A warden, deputy warden or correctional officer of the Arizona Department of Corrections; *or*
4. A person specifically licensed, authorized or permitted pursuant to an Arizona state or federal statute.

A.R.S. § 13-3102(C).

This offense shall not apply to:

1. The possessing, transporting, selling or transferring weapons by a museum as part of its collection or an educational institution for educational purposes or by an authorized employee of such museum or institution if:
   a. Such museum or institution is operated by the United States or the State of Arizona or a political subdivision of the State of Arizona or by an organization under federal law as a recipient of a charitable contribution; *and*
   b. Reasonable precautions were taken with respect to theft or issue of such material.
2. The regular and lawful transporting as merchandise.
3. Acquisition by a person by operation of law such as by gift, devise or descent or in a fiduciary capacity as a recipient of the property or former property of an insolvent, incapacitated or deceased person.

A.R.S. § 13-3102(D).

This offense does not apply to the merchandise of an authorized manufacturer of or dealer in prohibited weapons, when such material is intended to be manufactured, possessed, transported, sold or transferred solely for or to a dealer, a regularly constituted or appointed state, county or municipal police department or police officer, detention facility, the military service of any state or the United States, a museum or educational institution or a person specifically licensed or permitted pursuant to federal or state law. A.R.S. § 13-3102(E).

This offense does not apply to a nunchaku under A.R.S. § 13-3101(A)(7)(e) if the nunchaku is possessed for the purposes of preparing for, conducting or participating in lawful exhibition, demonstrations, contests or athletic events involving the use of such weapon. A.R.S. § 13-3102(H).

COMMENT: A flare gun is not a prohibited weapon. *In Re Robert A.*, 199 Ariz. 485, 487 (App. 2001) (holding that a flare gun falls within the exception in A.R.S. § 13-3101(A)(7)

regarding propellant actuated devices commercially manufactured for the purpose of illumination).

The fact that there is a valid registration in the name of another is not a defense to actual possession under A.R.S. § 13-3102. *State v. Kerr,* 142 Ariz. 426, 434 (App. 1984).

31.023-A – Misconduct Involving Weapons (Prohibited Weapon)

The crime of misconduct involving weapons requires proof that:

1. the defendant knowingly [manufactured] [possessed] [transported] [sold] [transferred] a weapon; *and*
2. the weapon is a prohibited weapon.

SOURCE: A.R.S. § 13-3102(A)(3) (statutory language as of September 26, 2008).

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

Use this instruction in all prohibited weapon cases except those involving dry ice. If the offense involves dry ice, use Statutory Criminal Instruction 31.023-B.

The court shall instruct on the culpable mental state.

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

"Prohibited weapon" is defined in A.R.S. § 13-3101 (Statutory Criminal Instruction 31.01.08).

"Possession" is defined in A.R.S. § 13-105(31) (Statutory Criminal Instruction 1.05(31)).

In *State v. Young*, 192 Ariz. 303, 311-12 (App. 1998), a case alleging a violation of A.R.S. § 13-3102, the court rejected the defendant's argument that the state had to prove that he knew the specific characteristics of the weapon that made it prohibited, i.e., the length of his sawed-off or short-barreled shotgun was under the legal limit, but the court, relying upon a line of federal cases, required the State to prove a less rigorous scienter requirement that the defendant knew that the weapon was sawed-off or short-barreled. The court in *Young* specifically held that A.R.S. § 13-3102(A)(3) is not a strict liability crime and that the inclusion of this less rigorous scienter requirement provides some level of knowledge to remove it from being a strict liability crime. The court and counsel may wish to consider adding language to the instruction when the prohibited weapon involves a short-barreled or sawed-off shotgun.

In *State v. Kerr,* 142 Ariz. 426, 433 (App. 1984), the court held that the definition of "possession" in A.R.S. § 13-105 is a correct instruction to give under A.R.S. § 13-3102(A)(3), but it noted that constructive possession (defendant was merely in the home of a registered firearm owner) was not sufficient to violate this subsection. *Cf. State v. Coley,* 158 Ariz. 471, 471-72 (App. 1988) (noting that *Kerr* was correct as to A.R.S. § 13-3102(A)(3), but that the giving of an instruction on constructive possession was not error in regard to a violation of A.R.S. § 13-3102(A)(4), which pertains to possession by a prohibited possessor rather than possession of a prohibited weapon).

The State is not required to prove the nonregistration of a prohibited weapon by the United States Treasury Department, which is instead an affirmative defense to be proved by

the defense. *State v. Berryman,* 178 Ariz. 617, 621 (App. 1994) (holding that the failure of the police to test the weapon or to determine registration did not call for a *Willits* instruction, because the burden of showing such is on the defendant).

This offense shall not apply to:

1. a peace officer or anyone summoned by a peace officer to assist and while actually assisting in the performance of official duties;
2. a member of the U.S. military forces or national guard in the performance of official duties;
3. a warden, deputy warden or correctional officer of the Arizona Department of Corrections; *or*
4. a person specifically licensed, authorized or permitted pursuant to an Arizona state or federal statute.

A.R.S. § 13-3102(C).

This offense shall not apply to:

1. the possessing, transporting, selling or transferring weapons by a museum as part of its collection or an educational institution for educational purposes or by an authorized employee of such museum or institution if:
   a. Such museum or institution is operated by the United States or the State of Arizona or a political subdivision of the State of Arizona or by an organization under federal law as a recipient of a charitable contribution; and
   b. Reasonable precautions were taken with respect to theft or issue of such material.
2. the regular and lawful transporting as merchandise.
3. acquisition by a person by operation of law such as by gift, devise or descent or in a fiduciary capacity as a recipient of the property or former property of an insolvent, incapacitated or deceased person.

A.R.S. § 13-3102(D).

This offense does not apply to the merchandise of an authorized manufacturer of or dealer in prohibited weapons, when such material is intended to be manufactured, possessed, transported, sold or transferred solely for or to a dealer, a regularly constituted or appointed state, county or municipal police department or police officer, detention facility, the military service of any State or the U.S., a museum or educational institution or a person specifically licensed or permitted pursuant to federal or state law. A.R.S. § 13-3102(E).

This offense does not apply to a nunchaku under A.R.S. § 13-3101(A)(7)(e) [now codified as A.R.S. § 13-3101(A)(8)(a)(v)] if the nunchaku is possessed for the purposes of preparing for, conducting or participating in lawful exhibition, demonstrations, contests or athletic events involving the use of such weapon. A.R.S. § 13-3102(H).

COMMENT: A flare gun is not a prohibited weapon. *In Re Robert A.*, 199 Ariz. 485, 487 (App. 2001) (holding that a flare gun falls within the exception in A.R.S. § 13-3101(A)(7) [now codified as A.R.S. § 13-3101(A)(8)(b)(ii)] regarding propellant actuated devices commercially manufactured for the purpose of illumination).

The fact that there is a valid registration in the name of another is not a defense to actual possession under A.R.S. § 13-3102. *State v. Kerr,* 142 Ariz. 426, 434 (App. 1984).

31.023-B – Misconduct Involving Weapons (Prohibited Weapon Involving Dry Ice)

The crime of misconduct involving weapons requires proof that:

1. the defendant knowingly [manufactured] [possessed] [transported] [sold] [transferred] a weapon; and
2. the weapon is a prohibited weapon; and

[3. the defendant knowingly possessed the dry ice with the intent to cause (injury to) (death) of another person.]

[3. the defendant knowingly possessed the dry ice with the intent to cause damage to the property of another person.]

SOURCE: A.R.S. § 13-3102(A)(3) (statutory language as of July 31, 2009).

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

Use this instruction if the offense involves dry ice. In all other prohibited weapon cases, except those involving dry ice, use Statutory Criminal 31.023-A.

The court shall instruct on the culpable mental state.

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

"Intentionally" or "with intent to" is defined in A.R.S. § 13-105.

"Prohibited weapon" is defined in A.R.S. § 13-3101. Statutory Criminal Instruction 31.01.08.

"Possession" is defined in A.R.S. § 13-105(31). Statutory Criminal Instruction 1.05(31).

This offense shall not apply to:

1. A peace officer or anyone summoned by a peace officer to assist and while actually assisting in the performance of official duties;
2. A member of the U.S. military forces or national guard in the performance of official duties;
3. A warden, deputy warden, community correctional officer, detention officer, special investigator or correctional officer of the Arizona Department of Corrections or the department of juvenile corrections; or
4. A person specifically licensed, authorized or permitted pursuant to an Arizona state or federal statute.

A.R.S. § 13-3102(C).

This offense shall not apply to:

1. The possessing, transporting, selling or transferring weapons by a museum as part of its collection or an educational institution for educational purposes or by an authorized employee of such museum or institution if:

a. Such museum or institution is operated by the United States or the State of Arizona or a political subdivision of the State of Arizona or by an organization under federal law as a recipient of a charitable contribution; and

b. Reasonable precautions were taken with respect to theft or issue of such material.

2. The regular and lawful transporting as merchandise.

3. Acquisition by a person by operation of law such as by gift, devise or descent or in a fiduciary capacity as a recipient of the property or former property of an insolvent, incapacitated or deceased person.

A.R.S. § 13-3102(D).

This offense does not apply to the merchandise of an authorized manufacturer of or dealer in prohibited weapons, when such material is intended to be manufactured, possessed, transported, sold or transferred solely for or to a dealer, a regularly constituted or appointed state, county or municipal police department or police officer, detention facility, the military service of any State or the U.S., a museum or educational institution or a person specifically licensed or permitted pursuant to federal or state law. A.R.S. § 13-3102(E).

COMMENT: The fact that there is a valid registration in the name of another is not a defense to actual possession under A.R.S. § 13-3102. *State v. Kerr,* 142 Ariz. 426, 434 (App. 1984).

31.024 – Misconduct Involving Weapons (Prohibited Possessor)

The crime of misconduct involving weapons requires proof that the defendant:

1. knowingly possessed a [deadly] [prohibited] weapon; *and*

2. was a prohibited possessor at the time of possession of the weapon.

SOURCE: A.R.S. § 13-3102(A)(4) (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)).

"Deadly weapon" is defined in A.R.S. § 13-3101 (Statutory Definition Instruction 31.01.01).

"Prohibited possessor" is defined in A.R.S. § 13-3101 (Statutory Definition Instruction 31.01.06).

"Prohibited weapon" is defined in A.R.S. § 13-3101 (Statutory Definition Instruction 31.01.07).

"Possession" is defined in A.R.S. § 13-105(31) (Statutory Criminal Instruction 1.0531).

If the State has established that the prohibited possessor has a felony conviction, the defendant has the burden of proof and the burden of persuasion to show by a preponderance of the evidence that the defendant's civil rights to possess or carry a gun or firearm has been restored. *State v. Kelly,* 210 Ariz. 460, 464-65 (App. 2005).

In *State v. Coley,* 158 Ariz. 471, 471-72 (App. 1988), the court held that the giving of an instruction on constructive possession was not error in regard to a violation of A.R.S. § 13-3102(A)(4).

If the State has established that the prohibited possessor has been found to constitute a danger to himself/herself or others, the court should insure that the finding was made under A.R.S. § 36-540.

If the State has established that the defendant is a prohibited possessor under federal law, the Court should insure that the federal finding was not made under 18 U.S.C. § 922(y) (pertaining to aliens admitted under non-immigrant visas).

If the State established that the prohibited possessor was a prohibited possessor as defined under federal law (18 U.S.C. § 922(g)(5)) pursuant to A.R.S. § 13-3101(A)(6)(e) prior to September 26, 2008, the court should insure that the federal finding was not made under 18 U.S.C. § 922(y) (pertaining to aliens admitted under non-immigrant visas). When the offense occurred on or between August 24, 2004 and September 25, 2008, the State must prove all of the provisions of 18 U.S.C. § 922(g)(5), including the requirement that any firearm or ammunition allegedly possessed by the defendant must have an interstate or foreign commerce nexus. *State ex rel. Thomas v. Contes*, 216 Ariz. 525, 530 ¶ 16 (App. 2007).

For alleged violations of A.R.S. § 13-3101(A)(6)(e) [now codified as A.R.S. § 13-3101(A)(7)(e)] occurring on or after September 26, 2008, the Committee was unable to find a definition of "undocumented alien" in either federal or state statutes or case law. The following definition of "alien" is taken from 8 U.S.C. § 101(a)(3), which the court may choose to use in its instruction: "The term 'alien' means any person not a citizen or national of the United States." The term "undocumented" appears to be the commonly understood meaning of the word. The categories of "nonimmigrant aliens" can be found in 8 U.S.C. § 1101(a)(15)(A)-(V).

COMMENT: The fact that there is a valid registration in the name of another is not a defense to actual possession under A.R.S. § 13-3102. *State v. Kerr,* 142 Ariz. 426, 43 (App. 1984).

From August 25, 2004 to September 25, 2008, A.R.S. § 13-3101(A)(6)(e) provided that one was a prohibited possessor if that person was considered a prohibited possessor under federal law (18 U.S.C. § 922(g)(5)) As of September 26, 2008, A.R.S. § 13-3101(A)(6)(e) was recodified as A.R.S. § 13-3101(A)(7)(e) and rewritten to remove that definition and replaced with the requirement that the person was "an undocumented alien or a nonimmigrant alien traveling with or without documentation in this state for business or pleasure or who is studying in this state and who maintains a foreign residence abroad," with certain exceptions.

Therefore, in regard to A.R.S. § 13-3101(A)(6)(e), the following comments apply to any offenses that occurred on or between August 25, 2004 and September 25, 2008:

> With respect to Statutory Criminal Definitional Instruction 31.01.06, A.R.S. § 13-3101(A)(6)(e) provides that a person who would be a prohibited possessor under 18 U.S.C. § 922(g)(5), is also a prohibited possessor under Arizona law unless the person is exempted by a provision in 18 U.S.C. § 922(y). *See State ex rel. Thomas v. Contes*, 216 Ariz. 525, 530 ¶ 16 (App. 2007) (holding that the plain language of § 13-3101(A)(6)(e) adopts all of 18 U.S.C. § 922(g)(5), including the necessity to show a nexus to interstate or foreign commerce).

In regard to A.R.S. § 13-3101(A)(7)(e), the following comment applies to any offenses that occurred on or after September 26, 2008:

> As of September 26, 2008, the legislature expanded the definition of prohibited possessor under A.R.S. § 13-3101(A)(7)(e) [previously codified as A.R.S. § 13-3101(A)(6)(e)] from its previous limitation of a federal prohibited possessor under 18 U.S.C. § 922(g)(5) to include all undocumented aliens and nonimmigrant aliens, subject to certain enumerated exceptions. Therefore, as of September 26, 2008, a prohibited possessor under the statute is no longer limited to the requirements of 18 U.S.C. § 922(g)(5).

31.025 – Misconduct Involving Weapons (Selling or Transferring Deadly Weapon to Prohibited Possessor)

The crime of misconduct involving weapons requires proof that:

1. the defendant knowingly [sold] [transferred] a deadly weapon to another person; *and*
2. the other person was a prohibited possessor.
3. the defendant knew the other person was a prohibited possessor.

SOURCE: A.R.S. § 13-3102(A)(5) (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 Criminal Instruction 1.0510(b)).

"Deadly weapon" is defined in A.R.S. § 13-3101 (Statutory Definition Instruction 31.01.01).

"Prohibited possessor" is defined in A.R.S. § 13-3101 (Statutory Definition Instruction 31.01.06).

If the State has alleged that the prohibited possessor has a felony conviction, the defendant has the burden of proof and the burden of persuasion to show by a preponderance of the evidence that the defendant's civil rights to possess or carry a gun or firearm has been restored. *State v. Kelly,* 210 Ariz. 460, 464-65 (App. 2005).

If the State has alleged that the prohibited possessor has been found to constitute a danger to himself/herself or others, the court should insure that the finding was made under A.R.S. § 36-540.

If the State has alleged that the prohibited possessor is a prohibited possessor under federal law, the court should insure that the federal finding was not made under 18 U.S.C. § 922(y) (pertaining to aliens admitted under nonimmigrant visas).

31.026 – Misconduct Involving Weapons (Defacing a Deadly Weapon)

The crime of misconduct involving weapons requires proof that the defendant knowingly defaced a deadly weapon.

SOURCE: A.R.S. § 13-3102(A)(6) (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)).

"Deadly weapon" is defined in A.R.S. § 13-3101 (Statutory Definition Instruction 31.01.01).

"Deface" is defined in A.R.S. § 13-3101 (Statutory Definition Instruction 31.01.02).

31.027 – Misconduct Involving Weapons (Possessing a Defaced Deadly Weapon)

The crime of misconduct involving weapons requires proof that the defendant knowingly possessed a defaced deadly weapon, knowing that the deadly weapon was defaced.

SOURCE: A.R.S. § 13-3102(A)(7) (statutory language as of July 13, 2009).

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)).

"Deadly weapon" is defined in A.R.S. § 13-3101 (Statutory Definition Instruction 31.01.01).

"Deface" is defined in A.R.S. § 13-3101 (Statutory Definition Instruction 31.01.02).

"Possession" is defined in A.R.S. § 13-105(31) (Statutory Definition Instruction 1.0531).

This offense shall not apply to:

1. A peace officer or anyone summoned by a peace officer to assist and while actually assisting in the performance of official duties;
2. A member of the U.S. military forces or national guard in the performance of official duties;
3. A warden, deputy warden, community correctional officer, detention officer, special investigator or correctional officer of the Arizona Department of Corrections or the department of juvenile corrections; *or*
4. A person specifically licensed, authorized or permitted pursuant to an Arizona state or federal statute.

A.R.S. § 13-3102(C).

This offense shall not apply to:

1. The possessing, transporting, selling or transferring weapons by a museum as part of its collection or an educational institution for educational purposes or by an authorized employee of such museum or institution if:
   a. Such museum or institution is operated by the United States or the State of Arizona or a political subdivision of the State of Arizona or by an organization under federal law as a recipient of a charitable contribution; *and*

b. Reasonable precautions were taken with respect to theft or issue of such material.

2. The regular and lawful transporting as merchandise.

3. Acquisition by a person by operation of law such as by gift, devise or descent or in a fiduciary capacity as a recipient of the property or former property of an insolvent, incapacitated or deceased person.

A.R.S. § 13-3102(D).

COMMENT: The fact that there is a valid registration in the name of another is not a defense to actual possession under A.R.S. § 13-3102. *State v. Kerr,* 142 Ariz. 426, 434 (App. 1984).

31.028 – Misconduct Involving Weapons (Use or Possession of Deadly Weapon during Commission of Drug Offense)

The crime of misconduct involving weapons during the commission of a felony drug offense requires proof that the defendant:

1. committed the offense of (felony offense under chapter 34); *and*

2. during the commission of such offense, knowingly possessed a deadly weapon that the defendant [used] [intended to use or could have used] to further the offense of (felony offense under chapter 34).

[The offense of (insert the name of the felony drug offense under chapter 34) requires proof that (insert the elements for the felony drug offense under chapter 34).]

SOURCE: A.R.S. § 13-3102(A)(8) (statutory language as of September 21, 2006); *State v. Petrak,* 198 Ariz. 260, 266 (App. 2000).

USE NOTE: This instruction must be used in place of an instruction that merely tracks the statutory language. In *State v. Petrak,* 198 Ariz. 260 (App. 2000), the court of appeals held that the statutory language requires nothing more than, "a temporal nexus between possession of the weapon and commission of the offense," which could lead to a person being convicted of this offense if the drugs were found in a defendant's house while a deadly weapon might be found in the defendant's car, completely unrelated to the drug offense. *Id.* at 264, 8 P.3d at 1178. The court of appeals, while conceding that a conviction for such unrelated possessions may have been intended by the legislature, expressed a concern that such a strict interpretation of the statute might not withstand an overbreadth challenge. *Id.* at 265, 8 P.3d at 1179. The court of appeals held that the trial court must instruct the jury that it was required to find that, "the weapon was used or available for use or was intended to further the drug offense." *Id.* at 266, 8 P.3d at 1180. Factors tending to establish the necessary nexus between the weapon and the drug offense include the spatial proximity and accessibility of the weapon to the defendant and to the site of the drug offense. *Id.*

The court shall instruct on the culpable mental state.

Use the bracketed language if the defendant has not been charged with the drug offense.

"Intentionally" and "knowingly" are defined in A.R.S. § 13-105 (Statutory Definition Instructions 1.0510(a)(1) and 1.0510(b)).

"Deadly weapon" is defined in A.R.S. § 13-3101 (Statutory Definition Instruction 31.01.01).

"Possession" is defined in A.R.S. § 13-105(31) (Statutory Definition Instruction 1.0531).

Use language in brackets as appropriate to the facts.

COMMENT: The fact that there is a valid registration in the name of another is not a defense to actual possession under A.R.S. § 13-3102. *State v. Kerr,* 142 Ariz. 426, 434 (App. 1984).

31.029 – Misconduct Involving Weapons (Discharging Firearm at Occupied Structure)

The crime of misconduct involving weapons requires proof that the defendant knowingly discharged a firearm at an occupied structure in order to [assist] [promote] [further] the interests of a [criminal street gang] [criminal syndicate] [racketeering enterprise].

SOURCE: A.R.S. § 13-3102(A)(9) (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)).

"Firearm" is defined in A.R.S. § 13-3101 (Statutory Definition Instruction 31.01.04).

"Occupied structure" is defined in A.R.S. § 13-3101 (Statutory Definition Instruction 31.01.05).

"Criminal street gang" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.057).

"Criminal syndicate" is defined in A.R.S. § 13-2301 (Statutory Definition Instruction 23.01.C.07).

"Racketeering" is defined in A.R.S. § 13-2301 (Statutory Definition Instruction 23.01.D.04).

"Enterprise" is defined in A.R.S. § 13-2301 (Statutory Definition Instruction 23.01.D.02).

31.0212 – Misconduct Involving Weapons (Possessing Deadly Weapon on School Grounds Felony Allegation)

The crime of misconduct involving weapons requires proof that:

1. the defendant knowingly possessed a deadly weapon on school grounds; *and*
2. the possession of such deadly weapon on school grounds occurred in connection with conduct that violated (offense under A.R.S. §§ 13-2308(A)(5), 13-2312(C), 13-3409 or 13-3411).

SOURCE: A.R.S. § 13-3102(A)(12) (statutory language as of June 13, 2009).

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)).

"Deadly weapon" is defined in A.R.S. § 13-3101 (Statutory Definition Instruction 31.01.01).

"School grounds" is defined in A.R.S. § 13-3102 (Statutory Definition Instruction 31.02.04).

Use language in parentheses as applicable to facts of case.

This offense is a misdemeanor unless the violation occurs in connection with conduct which violates A.R.S. §§ 13-2308(A)(5), 13-2312(C), 13-3409 or 13-3411. In such cases, the court should provide a special verdict form that specifies that this crime occurred in connection with conduct that violates one of the above offenses. If the predicate offense is not charged, the court will need to instruct the jury on the elements of the offense.

This offense shall not apply to:

1. A peace officer or anyone summoned by a peace officer to assist and while actually assisting in the performance of official duties;
2. A member of the U.S. military forces or national guard in the performance of official duties;
3. A warden, deputy warden, community correctional officer, detention officer, special investigator or correctional officer of the Arizona Department of Corrections or the department of juvenile corrections; *or*
4. A person specifically licensed, authorized or permitted pursuant to an Arizona state or federal statute.

A.R.S. § 13-3102(C).

This offense shall not apply to the possession of a:

1. Firearm that is not loaded and that is carried within a vehicle under the control of an adult provided that if the adult leaves the vehicle, the firearm shall not be visible from the outside of the vehicle and the vehicle shall be locked.
2. Firearm for use on school grounds in a program approved by a school.

A.R.S. § 13-3102(I).

31.0213 – Misconduct Involving Weapons (Carrying Deadly Weapon in Nuclear or Hydroelectric Plant)

The crime of misconduct involving weapons requires proof that the defendant knowingly and without legal authorization:

1. entered a [nuclear] [hydroelectric] generating station; *and*
2. carried a deadly weapon [on his/her person] [within the immediate control of any person].

SOURCE: A.R.S. § 13-3102(A)(13) (statutory language as of June 13, 2009).

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)).

"Deadly weapon" is defined in A.R.S. § 13-3101 (Statutory Definition Instruction 31.01.01).

This offense shall not apply to:

1. A peace officer or anyone summoned by a peace officer to assist and while actually assisting in the performance of official duties;
2. A member of the U.S. military forces or national guard in the performance of official duties;
3. A warden, deputy warden, community correctional officer, detention officer, special investigator or correctional officer of the Arizona Department of Corrections or the department of juvenile corrections; *or*
4. A person specifically licensed, authorized or permitted pursuant to an Arizona state or federal statute.

A.R.S. § 13-3102(C).

31.0214 – Misconduct Involving Weapons (Supplying Firearm to Another Person Who Will Commit Felony)

The crime of misconduct involving weapons requires proof that the defendant knowingly [supplied] [sold] [gave possession or control of] a firearm to another person knowing or having reason to know that the other person would use the firearm in the commission of a felony.

SOURCE: A.R.S. § 13-3102(A)(14) (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)).

"Firearm" is defined in A.R.S. § 13-3101 (Statutory Definition Instruction 31.01.04).

"Felony" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0516).

31.0215 – Misconduct Involving Weapons (Using Deadly Weapon in Terrorism Act)

The crime of misconduct involving weapons requires proof that the defendant knowingly:

1. [(used) (possessed) (exercised control of) a deadly weapon in furtherance of any act of terrorism.]
2. possessed or exercised control over a deadly weapon knowing or having reason to know that it would be used to facilitate any act of terrorism.]

"Terrorism" means any felony, including any completed or preparatory offense, that involves the use of a deadly weapon or a weapon of mass destruction or the intentional or knowing infliction of serious physical injury with the intent to either:

(a) influence the policy or affect the conduct of this state or any of the political subdivisions, agencies or instrumentalities of this state.

(b) cause substantial damage to or substantial interruption of public communications, communication service providers, public transportation, common carriers, public utilities, public establishments or other public services.

SOURCE: A.R.S. §§ 13-3102(A)(15), 13-2301 (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)).

"Deadly weapon" is defined in A.R.S. § 13-3101 (Statutory Definition Instruction 31.01.01).

"Terrorism" is defined in A.R.S. § 13-2301 (Statutory Definition Instruction 23.01.C.12).

"Facilitation" is defined in A.R.S. § 13-1004 (Statutory Definition Instruction 10.04).

"Possession" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0531).

"Preparatory offenses" are defined in A.R.S. § 13-1001 *et seq*.

31.0216 – Misconduct Involving Weapons (To Further a Criminal Street Gang)

The crime of misconduct involving weapons requires proof that the defendant knowingly:

1. Trafficked [weapons] [explosives]; and
2. The trafficking was for financial gain to [assist] [promote] [further the interests] of a [criminal street gang] [criminal syndicate] [racketeering enterprise].

SOURCE: A.R.S. §§ 13-3102(a)(16) (statutory language as of August 2, 2012).

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)).

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

"Criminal street gang" is defined in A.R.S. § 13-105 (statutory definition instruction 1.057).

"Criminal street gang member" is defined in A.R.S. § 13-105 (statutory definition instruction 1.058).

"Criminal syndicate" is defined in A.R.S. § 13-2301(C) (statutory definition instruction 23.01.C.07).

"Racketeering" is defined in A.R.S. § 13-2301(D) (statutory definition instruction 23.01.D.04).

"Enterprise" is defined in A.R.S. § 13-2301(D) (statutory definition instruction 23.01.D.02).

31.02(A)(4) –Affirmative Defense to Misconduct Involving Weapons Under A.R.S. § 13-3101(A)(4)

The defendant has been accused of misconduct involving weapons [allege violation pertaining to a firearm].

It is a defense to such charge if the defendant proves by a preponderance of the evidence that the firearm was in a permanently inoperable condition at the time of the offense.

SOURCE: A.R.S. §§ 13-3101 (statutory language as of August 25, 2004); 13-3102 (statutory language as of September 21, 2006).

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

The court shall instruct on "affirmative defense" so as to inform the jury on the burden of proof.

"Affirmative defense" is defined in A.R.S. § 13-205 (Statutory Definition Instruction 2.025).

Because the burden of proof for the defendant is preponderance of the evidence, the court shall use Standard Criminal Instruction 5b(2), which discusses the different burdens of proof.

The determination of whether a firearm is permanently inoperable under A.R.S. § 13-3101(A)(4) is a question of fact. *State v. Young*, 192 Ariz. 303, 306-307 (App. 1998) (noting that a disassembled or broken weapon may constitute a firearm if it can be made operable with reasonable preparation, including the addition of a readily replaceable part or the accomplishment of a quickly-effected repair).

Neither operability nor knowledge of operability of a firearm is an element of the offense; rather, permanent inoperability is an affirmative defense. *State v. Young*, 192 Ariz. 303, 307 (App. 1998).

31.02(A)(6) –Affirmative Defense to Misconduct Involving Weapons under A.R.S. § 13-3101(A)(6)(b)

The defendant has been accused of misconduct involving weapons by being a prohibited possessor due to a [felony conviction] [delinquency adjudication].

It is a defense to such charge if the defendant proves by a preponderance of the evidence that the defendant's civil rights to possess or carry a gun or firearm had been restored at the time of the offense.

SOURCE: A.R.S. §§ 13-3101 (statutory language as of August 25, 2004); 13-3102 (statutory language as of September 21, 2006).

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

The court shall instruct on "affirmative defense" so as to inform the jury on the burden of proof.

"Affirmative defense" is defined in A.R.S. § 13-205 (Statutory Definition Instruction 2.025).

Because the burden of proof for the defendant is preponderance of the evidence, the court shall use Standard Criminal Instruction 5b(2), which discusses the different burdens of proof.

If the State has alleged that the prohibited possessor has a felony conviction, the defendant has the burden of proof and the burden of persuasion to show by a preponderance of the evidence that the defendant's civil rights to possess or carry a gun or firearm has been restored. *State v. Kelly,* 210 Ariz. 460, 464-65 (App. 2005).

31.02(A)(7) –Affirmative Defense to Misconduct Involving Weapons under A.R.S. § 13-3101(A)(7)(a), (b), (c) or (d)

The defendant has been accused of misconduct involving weapons [allege violation pertaining to a prohibited weapon under § 13-3101(A)(7)(a), (b), (c) or (d)].

It is a defense to such charge if the defendant proves by a preponderance of the evidence that, at the time of the offense:

[the weapon or firearm alleged to be a prohibited weapon was registered in the national firearms registry and transfer records of the United States Treasury Department.]

[the firearm alleged to be a prohibited weapon had been classified as a curio or relic by the United States Treasury Department.]

SOURCE: A.R.S. §§ 13-3101 (statutory language as of August 25, 2004); 13-3102 (statutory language as of September 21, 2006).

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

The court shall instruct on "affirmative defense" so as to inform the jury on the burden of proof.

"Affirmative defense" is defined in A.R.S. § 13-205 (Statutory Definition Instruction 2.025).

Because the burden of proof for the defendant is preponderance of the evidence, the court shall use Standard Criminal Instruction 5b(2), which discusses the different burdens of proof.

The State is not required to prove the nonregistration of a prohibited weapon by the United States Treasury Department, which is instead an affirmative defense to be proved by the defense. *State v. Berryman,* 178 Ariz. 617, 621 (App. 1994) (holding that the failure of the police to test the weapon or to determine registration did not call for a *Willits* instruction, because the burden of showing such is on the defendant).

31.04 – Depositing Explosives

The crime of depositing explosives requires proof that the defendant, with the intent to physically endanger, injure, intimidate or terrify any person, knowingly deposited any

explosive on, in or near any vehicle, building or place where persons inhabit, frequent or assemble.

SOURCE: A.R.S. § 13-3104 (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 Definition Instruction 1.0510(b)).

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

"Explosive" is defined in A.R.S. § 13-3101 (Statutory Definition Instruction 31.01.03).

"Vehicle" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0536).

31.07 – Unlawful Discharge of Firearms

The crime of unlawful discharge of a firearm requires proof that the defendant, with criminal negligence, discharged a firearm within or into the limits of a municipality.

SOURCE: A.R.S. § 13-3107 (statutory language as of July 18, 2000).

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

"Criminal negligence" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0510(d)).

"Firearm" is defined in A.R.S. § 13-3101 (Statutory Definition Instruction 31.01.04).

"Municipality" is defined in A.R.S. § 13-3107 (Statutory Criminal Instruction 31.07.01).

This offense shall not apply if the firearm is discharged:

1. as allowed by Chapter 4;
2. on a properly supervised range;
3. in an area recommended as a hunting area by the Arizona Game & Fish Department, approved and posted as required by the chief of police, but any such area may be closed when deemed unsafe by the chief of police or the director of the Game and Fish Department;
4. for the control of nuisance wildlife by permit from the Arizona Game and Fish Department or the U.S. Fish and Wildlife Service;
5. by special permit of the chief of police of the municipality;
6. as required by an animal control officer in the performance of official duties;
7. using blanks;
8. more than one mile from any occupied structure as defined in § 13-3101; *or*
9. in self-defense or defense of another person against an animal attack if a reasonable person would believe that deadly physical force against the animal is necessary and reasonable under the circumstances to protect oneself or the other person.

A.R.S. § 13-3107(C).

COMMENT: In a case brought under the predecessor to this statute, A.R.S. §§ 13-917 and 13-917.01, the Arizona Supreme Court held that the intent to do bodily harm was not an element of the statute. *State v. Andrews,* 106 Ariz. 372, 377 (1970).

31.09 – Sale or Gift of Firearm to Minor

The crime of sale or gift of firearm to minor requires proof that the defendant, without written consent of the minor's parent or legal guardian, [sold] [gave] to a minor [a firearm] [ammunition] [a toy pistol by which dangerous and explosive substances may be discharged].

SOURCE: A.R.S. § 13-3109 (statutory language as of July 17, 1994).

USE NOTE: "Firearm" is defined in A.R.S. § 13-3101 (Statutory Definition Instruction 31.01.04).

"Explosive" is defined in A.R.S. § 13-3101 (Statutory Definition Instruction 31.01.03).

"Minor" is defined in A.R.S. § 1-215(22) as "a person under the age of eighteen years."

COMMENT: This offense does not provide for a culpable mental state.

The statute contains two exceptions. It is not a crime if the act involved a temporary transfer of firearms or ammunition by firearms safety instructors, hunter safety instructors, competition coaches or their assistants if the minor's parent or legal guardian gave consent for the minor to participate in activities such as firearms or hunting safety courses, firearms competition or firearms training. It is not a crime if the defendant accompanied minors, with the consent of the minor's parent or legal guardian, temporarily transferred firearms, ammunition to one or more of such minors for the purpose of engaging in hunting, formal or informal target shooting activities.

31.10 – Misconduct Involving Simulated Explosive Devices

The crime of misconduct involving simulated explosive devices requires proof that the defendant, with the intent to [terrify] [intimidate] [threaten] [harass]:

[intentionally (gave) (sent) a simulated explosive device to another person].

[intentionally placed a simulated explosive device in a private or public place].

"Simulated explosive device" means a simulation of an improvised explosive device that a reasonable person would believe is an improvised explosive device.

"Improvised explosive device" means a device that incorporates explosives or destructive lethal, noxious, pyrotechnic or incendiary chemicals and that is designed to destroy, disfigure, terrify or harass.

SOURCE: A.R.S. § 13-3110 (statutory language as of September 26, 2008).

USE NOTE: Statutory Criminal Instruction 31.10.01, the statutory presumption related to misconduct involving weapons (simulated explosive devices), should be given with this instruction.

Use language in brackets as appropriate to the facts.

The court shall instruct on the culpable mental state.

"Intentionally" or "with intent to" is defined in A.R.S. § 13-105.

COMMENT: A.R.S. § 13-3110(B) provides for a mandatory presumption (the statute uses the phrase "*prima facie* evidence," which appears to convey the same meaning as a mandatory presumption).There are no cases pertaining to this presumption or prima facie evidence, but mandatory presumptions are deemed to be unconstitutional, because they shift the burden of proof to the defendant. *State v. Herrera,* 176 Ariz. 21, 30-31 (1993); *State v. Mohr,* 150 Ariz. 564, 568-69 (App. 1986), *relying upon Francis v. Franklin,* 471 U.S. 307 (1985). Therefore, it seems more appropriate to interpret the presumption in the statute as a permissive one, which would pass constitutional muster. *See, e.g., State v. Mohr,* 150 Ariz. 564, 568-69 (App. 1986) (holding that a statutory inference must be permissive to withstand constitutional due process and to avoid burden-shifting to the defendant).

31.10.01 – Interference on Placing or Sending a Simulated Explosive Device

The defendant has been accused of misconduct involving simulated explosive device. The defendant's intent to [terrify] [intimidate] [threaten] [harass] may be inferred if the defendant [placed] [sent] the simulated explosive device without attaching a written notice to the device in a conspicuous place that the device had been rendered inert and was possessed for the purpose of curio or relic collection, display or other similar purpose.

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

SOURCE: A.R.S. § 13-3110(B) (statutory language as of September 26, 2008).

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

Use this instruction in conjunction with Statutory Criminal Instruction 31.10.

COMMENT: A.R.S. § 13-3110(B) provides for a mandatory presumption by stating that the placing or sending of a device without certain written disclosures creates *prima facie* evidence of an element of the crime. *See Norton v. Superior Court ex rel. Woods,* 171 Ariz. 155, 157 (App. 1992) (holding that inclusion of similar language in A.R.S. §12-2458(B) unconstitutionally shifted the State's burden of proof by establishing a mandatory, though rebuttable presumption). *Accord, State v. Herrera,* 176 Ariz. 21, 30-31 (1993); *In the Matter of 1986 Chevrolet Corvette,* 183 Ariz. 637, 639 (1994); *Barlage v. Valentine,* 210 Ariz. 270, 277 ¶ 27 (App. 2005). Mandatory presumptions are deemed to be unconstitutional, because they shift the burden of proof to the defendant. *Norton v. Superior Court ex rel. Woods, supra; State v. Mohr,* 150 Ariz. 564, 568-69 (App. 1986), *relying upon Francis v. Franklin,* 471 U.S. 307 (1985). Therefore, it

seems more appropriate to interpret the presumption in the statute as a permissive one, which would pass constitutional muster. *See, e.g., State v. Mohr,* 150 Ariz. 564, 568-69 (App. 1986) (holding that a statutory inference must be permissive to withstand constitutional due process and to avoid burden-shifting to the defendant).

31.11 – Minors Prohibited From Carrying or Possessing Firearms

The crime of a minor prohibited from carrying or possessing a firearm requires proof that the defendant:

1. was under eighteen years of age; *and*
2. was an unemancipated person; *and*
3. was not accompanied by a [parent] [grandparent] [guardian] [certified hunter safety instructor acting with the consent of the defendant's parent or guardian] [certified firearms safety instructor acting with the consent of the defendant's parent or guardian]; *and*
4. knowingly carried or possessed [on the defendant's person] [within the defendant's immediate control] [in or on a means of transportation] a firearm [in any place that was open to the public] [on a street] [on a highway] [on any private property owned or leased by the defendant] [on any private property owned or leased by the defendant's parent, grandparent or guardian].

SOURCE: A.R.S. § 13-3111 (statutory language as of September 21, 2006).

USE NOTE: The previous version of the statute was declared unconstitutional because it was limited to counties with a population over 500,000. *See In Re Cesar R.*, 197 Ariz. 437, 440 (App. 1999). The legislature amended the statute and deleted the population provision.

The court shall instruct on the culpable mental state.

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

"Firearm" is defined in A.R.S. § 13-3101 (Statutory Definition Instruction 31.01.04).

"Means of transportation" is defined in A.R.S. § 13-1801 (Statutory Criminal Instruction 18.01(9)).

"Emancipation" is defined in A.R.S. § 12-2451.

The statute contains exceptions. It is not a crime if the defendant was fourteen, fifteen, sixteen or seventeen and was engaged in:

A. lawful hunting or shooting events or marksmanship practice at established ranges or other areas where the discharge of a firearm is not prohibited; *or*

B. lawful transportation of an unloaded firearm for the purpose of lawful hunting; *or*

C. lawful transportation of an unloaded firearm between the hours of 5:00 a.m. and 10:00 p.m. for the purpose of shooting events or marksmanship practice at established ranges or other areas where the discharge of a firearm is not prohibited; *or*

D. activities requiring the use of a firearm that are related to the production of crops, livestock, poultry, livestock products, poultry products or ratites or in the production or storage of agricultural commodities.

31.13.01 – Possession of Firearm by Adjudicated Delinquent

The crime of possession of a firearm by an adjudicated delinquent requires proof that the defendant:

1. was previously adjudicated delinquent for an offense that would be a felony if committed by an adult; *and*
2. [possessed] [used] [carried] a firearm within ten years from the date of [the adjudication] [the defendant's release or escape from custody].

SOURCE: A.R.S. § 13-3113 (statutory language as of September 21, 2006).

USE NOTE: This instruction is used for a first offense and subsequent offense unless certain circumstances apply. If those circumstances apply, the court will use Statutory Criminal Instruction 31.13.02.

"Firearm" is defined in A.R.S. § 13-3101 (Statutory Criminal Instruction 31.01.04).

COMMENT: This offense does not provide for a culpable mental state. A first offense is a class 5 felony. A subsequent offense under certain circumstances is a class 4 felony.

31.13.02 – Subsequent Possession of Firearm by Adjudicated Delinquent

The crime of subsequent possession of a firearm by an adjudicated delinquent requires proof that the defendant:

1. was previously adjudicated delinquent for an offense that if committed as an adult would constitute the offense[s] of:

   [burglary in the first degree]

   [burglary in the second degree]

   [arson]

   [any felony offense involving the use or threatening exhibition of a deadly weapon or dangerous instrument]

   [a serious offense];

   and

2. [possessed] [used] [carried] a firearm within ten years from the date of [the adjudication] [the defendant's release or escape from custody];

   and

3. has been previously [adjudicated] [convicted] of the crime of possession of a firearm by an adjudicated delinquent.

SOURCE: A.R.S. § 13-3113 (statutory language as of September 21, 2006).

USE NOTE: This instruction shall be used for second or subsequent offenses if the defendant has had a prior adjudication for one of the predicate offenses listed in the statute. If the defendant is accused of a first or a subsequent offense where the defendant has not had a prior adjudication for one of the predicate offenses, the court shall use Criminal Statutory Instruction 31.13.01.

"Firearm" is defined in A.R.S. § 13-3101 (Statutory Definition Instruction 31.01.04).

"Burglary in the first degree" is defined in A.R.S. § 13-1508 (Statutory Definition Instruction 15.08).

"Burglary in the second degree" is defined in A.R.S. § 13-1507 (Statutory Definition Instruction 15.07).

"Arson" is defined in A.R.S. §§ 13-1702, -1703, -1704, and -1705 (Statutory Criminal Instructions 17.02 through 17.05).

"Felony" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0516).

"Serious offense" is defined in A.R.S. § 13-706.

COMMENT: This offense does not provide for a culpable mental state. A first offense is a class 5 felony. A subsequent offense under certain circumstances is a class 4 felony.

31.16 – Misconduct Involving Body Armor

The crime of misconduct involving body armor requires proof that the defendant knowingly wore or otherwise used body armor during the commission of any felony offense.

SOURCE: A.R.S. § 13-3116 (statutory language as of August 6, 1999).

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)).

"Body armor" is defined in A.R.S. § 13-3116 (Statutory Definition Instruction 31.16.01).

"Firearm" is defined in A.R.S. § 13-3101 (Statutory Definition Instruction 31.01.04).

"Felony" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0516).

31.17 – Misconduct Involving Remote Stun Gun

The crime of misconduct involving remote stun gun requires proof that the defendant knowingly used or threatened to use a remote stun gun or an authorized remote stun gun against a law enforcement officer who is engaged in the performance of the officer's official duties.

SOURCE: A.R.S. § 13-3117 (statutory language as of August 12, 2005).

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)).

"Authorized remote stun gun" is defined in A.R.S. § 13-3117 (Statutory Definition Instruction 31.17.01).

"Remote stun gun" is defined in A.R.S. § 13-3117 (Statutory Definition Instruction 31.17.02).

COMMENT: This offense does not preclude the prosecution of a person for the use of a remote sun gun or authorized remote stun gun during the commission of a criminal offense. A.R.S. § 13-3117(B).

This offense does not preclude a justification defense under chapter 4 of title 13. A.R.S. § 13-3117(B).

31.22 – Misconduct Involving Remote Stun Gun

The crime of Unlawful Use of Electronic Firearm Tracking Technology requires proof that the defendant [required a person to use electronic firearm tracking technology] [required a person to be subjected to electronic firearm tracking technology] [disclosed any identifiable information about another person for the purpose of using electronic firearm tracking technology] [disclosed any identifiable information about another person's firearm for the purpose of using electronic firearm tracking technology].

"Electronic firearm tracking technology" means a platform, system or device or a group of systems or devices that uses a shared ledger, distributed ledger or block chain technology or any other similar form of technology or electronic database for the purpose of storing information in a decentralized or centralized way, that is not owned or controlled by any single person or entity and that is used to locate or control the use of a firearm. electronic firearm tracking technology does not include a law enforcement database, including the adult probation enterprise tracking system, the juvenile online tracking system, the justice web interface, the Arizona Criminal Justice Information System, the national crime information center, the national integrated ballistic information network and a local records management system that is used to manage or process stolen, lost, found, stored or evidentiary firearms.

SOURCE: A.R.S. § 13-3122 (effective August 9, 2017).

USE NOTE: The statute, A.R.S. §13-3122, was written without expressly prescribing a culpable mental state. *See* A.R.S. §13-202(B).

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

A.R.S. § 13-3122(B) provides that this section does not apply to any of the following:

1. A criminal justice employee (defined in A.R.S. § 13-3122(D)(1)) who obtains a search warrant.

2. A pawnbroker or an employee of a pawnshop, secondhand dealer or auction house while the pawnbroker or employee uses electronic firearm tracking technology to report information to the sheriff or the sheriff's designee pursuant to section 44-1625 or a similar reporting requirement.

3. A probation, parole or surveillance officer who supervises a person who is serving a term of probation, community supervision or parole.

4. The owner of a firearm if the owner consents in writing to the use of electronic firearm tracking technology on that owner's firearm.

31.129 – Taking Prohibited Articles into Jail or onto Jail Grounds

The crime of taking prohibited articles into a jail or onto jail grounds requires proof that the defendant, unauthorized by law, knowingly took [an intoxicating liquor] [a firearm] [a weapon] [explosives] [marijuana] [a narcotic drug] [a dangerous drug] into [a jail] [the grounds belonging to a jail].

SOURCE: A.R.S. § 31-129 (statutory language as of August 3, 2018).

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

Use language in brackets as appropriate to the facts.

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

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 33

33.01.01 – Definition of "Amusement Gambling"

"Amusement gambling" means gambling involving a device, game or contest that is played for entertainment if all of the following apply:

1. The player or players actively participate in the game or contest or with the device; *and*
2. The outcome is not in the control to any material degree of any person other than the player or players; *and*
3. The prizes are not offered as a lure to separate the player or players from their money; *and*
4. Any of the following:

[No benefit is given to the player or players other than an immediate and unrecorded right to replay that is not exchangeable for value.]

[The gambling is an athletic event and no person other than the player or players derives a profit or chance of a profit from the money paid to gamble by the player or players.]

[The gambling is an intellectual contest or event, the money paid to gamble is part of an established purchase price for a product, no increment has been added to the price in connection with the gambling event and no drawing or lottery is held to determine the winner or winners.]

[Skill and not chance is clearly the predominant factor in the game and the odds of winning the game based upon chance cannot be altered, provided the game complies with any licensing or regulatory requirements by the jurisdiction in which it is operated, no benefit for a single win is given to the player or players other than a merchandise prize which has a wholesale fair market value of less than ten (10) dollars or coupons which are redeemable only at the place of play and only for a merchandise prize which has a fair market value of less than ten (10) dollars and, regardless of the number of wins, no aggregate of coupons may be redeemed for a merchandise prize with a wholesale fair market value of greater than five hundred fifty (550) dollars.]

SOURCE: A.R.S. § 13-3301(1) (statutory language as of July 3, 2015).

USE NOTE: "Gambling" is defined in A.R.S. § 13-3301(4) (Statutory Criminal Instruction 33.01.04).

"Player" is defined in A.R.S. § 13-3301(5) (Statutory Criminal Instruction 33.01.05).

COMMENT: The statutory language requiring that "the outcome is not in the *control to any material degree* of any person other than the player or players" is not unconstitutionally vague. *State v. Takacs*, 169 Ariz. 392, 396-97 (App. 1991) (emphasis added).

33.01.02 – Definition of "Conducted as a Business"

"Conducted as a business" means gambling that is engaged in with the object of gain, benefit or advantage, either direct or indirect, realized or unrealized, but not when incidental to a *bona fide* social relationship.

SOURCE: A.R.S. § 13-3301(2) (statutory language as of November 25, 2002).

USE NOTE: "Gambling" is defined in A.R.S. § 13-3301(4) (Statutory Criminal Instruction 33.01.04).

The statutory phrase "conducted as a business" is not unconstitutionally vague. *State v. Takacs*, 169 Ariz. 392, 397 (App. 1991).

"*Bona fide*" means "in or with good faith; honestly, openly, and sincerely; without deceit or fraud." *Baseline Liquors v. Circle K Corp.,* 129 Ariz. 215, 220-21 (App. 1981).

33.01.03 – Definition of "Crane Game"

"Crane game" means an amusement machine which is operated by player controlled buttons, control sticks or other means, or a combination of the buttons or controls, which is activated by coin insertion into the machine and where the player attempts to successfully retrieve prizes with a mechanical or electromechanical claw or device by positioning the claw or device over a prize.

SOURCE: A.R.S. § 13-3301(3) (statutory language as of November 25, 2002).

USE NOTE: "Player" is defined in A.R.S. § 13-3301(5) (Statutory Criminal Instruction 33.01.05).

33.01.04 – Definition of "Gambling" or Gamble"

"Gambling" or "gamble" means one act of risking or giving something of value for the opportunity to obtain a benefit from a game or contest of chance or skill or a future contingent event but does not include *bona fide* business transactions which are valid under the law of contracts including contracts for the purchase or sale at a future date of securities or commodities, contracts of indemnity or guarantee and life, health or accident insurance.

SOURCE: A.R.S. § 13-3301(4) (statutory language as of November 25, 2002).

USE NOTE: "*Bona fide*" means "genuine," "made in good faith," "without fraud or deceit." BLACK'S LAW DICTIONARY, 8th Ed. (2004).

33.01.05 – Definition of "Player"

"Player" means a natural person who participates in gambling.

SOURCE: A.R.S. § 13-3301(5) (statutory language as of November 25, 2002).

USE NOTE: "Gambling" is defined in A.R.S. § 13-3301(4) (Statutory Criminal Instruction 33.01.04).

33.01.06 – Definition of "Regulated Gambling"

"Regulated Gambling" means

[gambling conducted in accordance with a tribal-state gambling compact or otherwise in accordance with the requirements of the Indian Gaming Regulatory Act.]

[gambling to which all of the following apply:

1. It is operated and controlled in accordance with a statute, rule or order of this state or of the United States; *and*
2. All federal, state or local taxes, fees and charges in lieu of taxes have been paid by the authorized person or entity on any activity arising out of or in connection with the gambling; *and*
3. If conducted by an "IRS federal tax-exempt organization," the organization's records are open to public inspection; *and*
4. No player is under 21 years of age.]

SOURCE: A.R.S. § 13-3301(6) (statutory language as of November 25, 2002).

USE NOTE: For cases prior to June 1, 2003, the age limit for regulated gambling under A.R.S. § 13-3301(7) bars any player from being below the age of "majority," as opposed to the current age limit of 21.

"Gambling" is defined in A.R.S. § 13-3301(4) (Statutory Criminal Instruction 33.01.04).

"Player" is defined in A.R.S. § 13-3301(5) (Statutory Criminal Instruction 33.01.05).

An "IRS federal tax-exempt organization" is defined in A.R.S. § 43-1201.

33.01.07 – Definition of "Social Gambling"

"Social gambling" means:

1. Gambling that is not conducted as a business; *and*
2. The players compete on equal terms, which means that no player enjoys an advantage over any other player in a gamble under the conditions or rules of the game or contest; *and*
3. No player receives, or becomes entitled to receive, any benefit, directly or indirectly, other than the player's winnings from the gamble; *and*
4. No other person receives or becomes entitled to receive any benefit, directly or indirectly, from the gambling activity, including benefits of proprietorship, management or unequal advantage or odds in a series of gambles; *and*

5. No player is under 21 years of age.

SOURCE: A.R.S. § 13-3301(7) (statutory language as of November 25, 2002).

USE NOTE: For cases prior to June 1, 2003, the age limit for social gambling under A.R.S. § 13-3301(7) bars any player from being below the age of "majority," as opposed to the current age limit of 21.

"Gambling" is defined in A.R.S. § 13-3301(4) (Statutory Criminal Instruction 33.01.04).

"Player" is defined in A.R.S. § 13-3301(5) (Statutory Criminal Instruction 33.01.05).

"Conducted as a business" is defined at A.R.S. § 13-3301(2) (Statutory Criminal Instruction 33.01.02).

The statutory language "compete on equal terms with each other in a gamble" did not render the statute unconstitutionally vague. *State v. Takacs*, 169 Ariz. 392, 398 (App. 1991).

33.021 – Exclusions

The following conduct is not unlawful:

1 Amusement gambling;

2. Social gambling;

3. Regulated gambling if the gambling is conducted in accordance with the statutes, rules or orders governing the gambling;

4. Gambling conducted at state, county or district fairs that complies with any of the following:

[No benefit is given to the player or players other than an immediate and unrecorded right to replay that is not exchangeable for value.]

[The gambling is an athletic event and no person other than the player or players derives a profit or chance of a profit from the money paid to gamble by the player or players.]

[The gambling is an intellectual contest or event, the money paid to gamble is part of an established purchase price for a product, no increment has been added to the price in connection with the gambling event and no drawing or lottery is held to determine the winner or winners.]

[Skill and not chance is clearly the predominant factor in the game and the odds of winning the game based upon chance cannot be altered, provided the game complies with any licensing or regulatory requirements by the jurisdiction in which it is operated, no benefit for a single win is given to the player or players other than a merchandise prize which has a wholesale fair market value of less than four dollars and, regardless of the number of wins, no aggregate of coupons may be redeemed for a merchandise prize with a wholesale fair market value of greater than thirty-five dollars.]

SOURCE: A.R.S. § 13-3302(A) (statutory language as of April 17, 2006).

USE NOTE: "Benefit" is defined at A.R.S. § 13-105 (Statutory Definition Instruction 1.053).

The definition of "amusement gambling" appears at A.R.S. § 13-3301(1) (Statutory Criminal Instruction 33.01.01).

"Social gambling" is defined at A.R.S. § 13-3301(7) (Statutory Criminal Instruction 33.01.07).

The definition of "regulated gambling" appears at A.R.S. § 13-3301(6) (Statutory Criminal Instruction 33.01.06).

"Gambling" is defined in A.R.S. § 13-3301(4) (Statutory Criminal Instruction 33.01.04).

"Player" is defined in A.R.S. § 13-3301(5) (Statutory Criminal Instruction 33.01.05).

33.021.1 – Tax Exempt Exclusions

As described below, an organization that has qualified as a tax-exempt organization under Section 501 of the Internal Revenue Code may conduct a raffle, subject to the following restrictions:

1. The nonprofit organization maintained this status and no member, director, officer, employee, or agent of the nonprofit organization received any direct or indirect pecuniary benefit other than being able to participate in the raffle on a basis equal to all other participants.
2. The nonprofit organization has been in existence continuously in this state for a five year period immediately before conducting the raffle.
3. No person except a *bona fide* local member of the sponsoring organization participated directly or indirectly in the management, sales, or operation of the raffle.

[A tax-exempt organization is qualified if its make-up consists generally of any of the following:

a. (labor, agricultural or horticultural organizations, other than cooperative organizations);
b. (fraternal beneficiary societies, orders or organizations);
c. (corporations organized and operated exclusively for religious, charitable, scientific, literary or educational purposes or for the prevention of cruelty to children or animals);
d. (business leagues, chambers of commerce, real estate boards or boards of trade, not organized for profit);
e. (civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare);
f. (clubs organized and operated exclusively for pleasure, recreation and other non-profitable purposes);
g. (teachers' or public employees' retirement fund organizations); *or*
h. (religious or apostolic organizations or corporations)].

SOURCE: A.R.S. §§ 13-3302(B) (statutory language as of April 17, 2006); 43-1201 (statutory language as of July 21, 1997.)

USE NOTE: "*Bona fide*" means "genuine," "made in good faith," "without fraud or deceit." BLACK'S LAW DICTIONARY, 8th Ed. (2004).

COMMENT: A state, county or local historical society designated by this state or a county, city or town to conduct a raffle may conduct such a raffle, subject to the provisions contained in A.R.S. § 13-3302(C)(1)-(3).

33.03 – Promotion of Gambling

The crime of promotion of gambling requires proof that the defendant knowingly [conducted, organized, managed, directed, supervised or financed gambling for a benefit] [furnished advice or assistance for the conduct, organization, management, direction, supervision or financing of gambling for a benefit].

SOURCE: A.R.S. § 13-3303(A) (statutory language as of August 18, 1987).

USE NOTE: This offense does not include amusement, regulated or social gambling. *See* A.R.S. § 13-3303(A).

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

"Benefit" is defined at A.R.S. § 13-105 (Statutory Definition Instruction 1.053).

"Gambling" is defined at A.R.S. § 13-3301(4) (Statutory Definition Instruction 33.01.04).

CHAPTER 34

34.021 – Possession of Peyote

The crime of possession of peyote requires proof that:

1. the defendant knowingly possessed peyote; *and*
2. the substance was in fact peyote

SOURCE: A.R.S. § 13-3402(A) (statutory language as of September 1, 1981).

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)).

"Peyote" is defined in A.R.S. § 13-3401.

COMMENT: In *State v. Cheramie*, 218 Ariz. 447 ¶ 22 (2008), the Arizona Supreme Court held that possession of dangerous drugs is a lesser-included offense of transportation for sale of a dangerous drug. In so holding, the court overruled a holding in *State v. Moreno*, 92 Ariz. 116 (1962) that created the element of "usable quantity" for possession of a narcotic drug. The *Cheramie* court ruled that:

> "A 'usable quantity' is neither an element of the possession offense nor necessary to sustain a conviction for it. Rather, it is simply evidence from which a factfinder may infer intent. Because *Moreno* and its progeny were decided under a statute that imposed no mental state, proof of a 'usable quantity' helped to ensure that defendants were convicted only after knowingly committing a proscribed act. The statute now expressly requires a knowing mental state, and establishing a 'usable quantity' remains an effective way, in a case involving such a small amount that one might question whether the defendant knew of the presence of drugs, to show that the defendant 'knowingly' committed the acts described in A.R.S. § 13-3407."

Cheramie, *supra*, 218 Ariz. at 451.

34.022 – Sale or Transfer of Peyote

The crime of [sale] [transfer] of peyote requires proof that:

1. the defendant knowingly [sold] [transferred] peyote; *and*
2. the substance that was in fact peyote.

SOURCE: A.R.S. § 13-3402(A) (statutory language as of September 1, 1981).

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

The court shall instruct on the culpable mental state.

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

"Peyote," "sale," and "transfer" are defined in A.R.S. § 13-3401.

34.023 – Offer to Sell or Transfer Peyote

The crime of [offering to sell] [offering to transfer] peyote requires proof that the defendant knowingly [offered to sell] [offered to transfer] peyote.

SOURCE: A.R.S. § 13-3402(A) (statutory language as of September 1, 1981).

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

The court shall instruct on the culpable mental state.

"Peyote," "sale," "sell," and "transfer" are defined in A.R.S. § 13-3401.

COMMENT: There is no "usable amount" requirement for this offense. *See State v. Rodarte*, 173 Ariz. 331, 332 (App. 1992).

34.024 – Defense to Peyote Offenses

It is a defense to a charge of [possession] [sale] [transfer] [offer to sell] [offer to transfer] peyote when the peyote is being used or is intended for use:

1. in connection with a bona fide practice of a religious belief; *and*
2. as an integral part of a religious exercise; *and*
3. in a manner not dangerous to public health, safety, or morals.

SOURCE: A.R.S. § 13-3402(B) (statutory language as of September 1, 1981).

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

34.03(A1) – Unlawful Use of Vapor-Releasing Substance

The crime of unlawful use of a vapor-releasing substance containing a toxic substance requires proof that the defendant knowingly [breathed] [inhaled] [drank] a vapor-releasing substance containing a toxic substance.

A vapor-releasing substance containing a toxic substance includes [insert name of substance or substances involved in the case].

SOURCE: A.R.S. § 13-3403(A)(1) (statutory language as of September 15, 1989).

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 language in brackets as appropriate to the facts.

"Vapor-releasing substance containing a toxic substance" is defined in A.R.S. § 13-3401 (38) as "paint or varnish dispensed by the use of aerosol spray, or any glue, which releases

vapors or fumes containing acetone, volatile acetates, benzene, butyl alcohol, ethyl alcohol, ethylene dichloride, isopropyl alcohol, methyl alcohol, methyl ethyl ketone, pentachlorophenol, petroleum ether, toluene, volatile ketones, isophorone, chloroform, methylene chloride, mesityl oxide, xylene, cumene, ethylbenzene, trichloroethylene, mibk, miak, mek or diacetone alcohol or isobutyl nitrite."

COMMENT: The offense is titled "possession" of a vapor-releasing substance. However, the offense is committed by unlawful use, not solely possession.

34.03(A2) – Sale, Transfer, Offer to Sell or Offer to Transfer a Vapor-Releasing Substance

The crime of [sale of] [transfer of] [offer to sell] [offer to transfer] a vapor-releasing substance containing a toxic substance requires proof that the defendant knowingly:

1. [sold] [transferred] [offered to sell] [offered to transfer] a vapor-releasing substance; *and*
2. The substance contained a toxic substance; *and*
3. The [sale] [transfer] [offer to sell] [offer to transfer] was to a person under eighteen years of age.

SOURCE: A.R.S. § 13-3403(A)(2) (statutory language as of September 15, 1989).

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

The court shall instruct on the culpable mental state.

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

"Sale" or "sell" means an exchange for anything of value or advantage, present or prospective. A.R.S. § 13-3401(32).

"Transfer" means furnish, deliver or give away. A.R.S. § 13-3401(37).

"Vapor-releasing substance containing a toxic substance" is defined in A.R.S. § 13-3401(38) as "paint or varnish dispensed by the use of aerosol spray, or any glue, which releases vapors or fumes containing acetone, volatile acetates, benzene, butyl alcohol, ethyl alcohol, ethylene dichloride, isopropyl alcohol, methyl alcohol, methyl ethyl ketone, pentachlorophenol, petroleum ether, toluene, volatile ketones, isophorone, chloroform, methylene chloride, mesityl oxide, xylene, cumene, ethylbenzene, trichloroethylene, mibk, miak, mek or diacetone alcohol or isobutyl nitrite."

COMMENT: There is no "usable amount" requirement for this offense. *See State v. Rodarte*, 173 Ariz. 331, 332 (App. 1992).

34.03(A3) – Unauthorized Sale, Transfer, Offer to Sell or Offer to Transfer a Vapor-Releasing Substance

The crime of unauthorized [sale] [transfer] [offer to sell] [offer to transfer] of a vapor-releasing substance containing a toxic substance requires proof that:

1. The defendant knowingly [sold] [transferred] [offered to sell] [offered to transfer] a vapor-releasing substance; *and*
2. The defendant knew the substance was a vapor-releasing substance containing a toxic substance; *and*
3. At the time of the [sale] [transfer] [offer to sell] [offer to transfer], the defendant was not employed by or engaged in operating a licensed commercial establishment at a fixed location regularly offering vapor-releasing substances containing toxic substances for sale; *and*
4. The [sale] [transfer] [offered to sell] [offer to transfer] was not made in course of employment or operation.

SOURCE: A.R.S. § 13-3403(A)(3) (statutory language as of September 15, 1989).

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

The court shall instruct on the culpable mental state.

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

"Sale" or "sell" means an exchange for anything of value or advantage, present or prospective. A.R.S. § 13-3401(32).

"Transfer" means furnish, deliver or give away. A.R.S. § 13-3401(37).

"Vapor-releasing substance containing a toxic substance" is defined in A.R.S. § 13-3401(38) as "paint or varnish dispensed by the use of aerosol spray, or any glue, which releases vapors or fumes containing acetone, volatile acetates, benzene, butyl alcohol, ethyl alcohol, ethylene dichloride, isopropyl alcohol, methyl alcohol, methyl ethyl ketone, pentachlorophenol, petroleum ether, toluene, volatile ketones, isophorone, chloroform, methylene chloride, mesityl oxide, xylene, cumene, ethylbenzene, trichloroethylene, mibk, miak, mek or diacetone alcohol or isobutyl nitrite."

34.03(B) – Failure to Keep Records of Vapor-Releasing Glue

The crime of failure to maintain records of the [sale/transfer] of a vapor-releasing glue containing a toxic substance requires proof that the defendant:

1. [sold] [transferred] a vapor-releasing glue containing a toxic substance; *and*
2. failed to do any one of the following:

   [Require identification of the purchaser.]

   [Record the name of the glue.]

   [Record the date and hour of delivery.]

   [Record the intended use of the glue.]

   [Record the signature and address of the purchaser.]

   [Record the signature of the seller or deliverer.]

   [Keep the record for three years.]

   [Make the record available to board inspectors and peace officers.]

SOURCE: A.R.S. § 13-3403(B) (statutory language as of 1989).

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

The court shall instruct on the culpable mental state.

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

"Sale" and "transfer" are defined in A.R.S. § 13-3401.

34.03(C) – Availability of Vapor-Releasing Glue Containing a Toxic Substance

The crime of failure to keep vapor-releasing glue containing a toxic substance in a place unavailable to customers requires proof that the defendant:

1. was an operator of a commercial establishment selling vapor-releasing glues; *and*
2. failed to keep vapor-releasing glue containing a toxic substance in a place unavailable to customers without the assistance of the operator or an employee of the establishment.

SOURCE: A.R.S. § 13-3403(C) (statutory language as of September 15, 1989).

USE NOTE: "Vapor-releasing substance containing a toxic substance" is defined in A.R.S. § 13-3401(38) as "paint or varnish dispensed by the use of aerosol spray, or any glue, which releases vapors or fumes containing acetone, volatile acetates, benzene, butyl alcohol, ethyl alcohol, ethylene dichloride, isopropyl alcohol, methyl alcohol, methyl ethyl ketone, pentachlorophenol, petroleum ether, toluene, volatile ketones, isophorone, chloroform, methylene chloride, mesityl oxide, xylene, cumene, ethylbenzene, trichloroethylene, mibk, miak, mek or diacetone alcohol or isobutyl nitrite."

34.03(D) – Sign Needed for Vapor-Releasing Substance

The crime of failure to post a warning sign for vapor-releasing substances containing a toxic substance requires proof that the defendant:

1. was an operator of a commercial establishment selling vapor-releasing paints and varnishes containing a toxic substance dispensed by the use of any aerosol spray device; *and*
2. failed to conspicuously display an easily legible sign not smaller than eleven by fourteen inches stating: "Warning: inhalation of vapors can be dangerous."

SOURCE: A.R.S. § 13-3403(D) (statutory language as of September 15, 1989).

USE NOTE: "Vapor-releasing substance containing a toxic substance" is defined in A.R.S. § 13-3401(38) as "paint or varnish dispensed by the use of aerosol spray, or any glue, which releases vapors or fumes containing acetone, volatile acetates, benzene, butyl alcohol, ethyl alcohol, ethylene dichloride, isopropyl alcohol, methyl alcohol, methyl ethyl ketone, pentachlorophenol, petroleum ether, toluene, volatile ketones, isophorone, chloroform,

methylene chloride, mesityl oxide, xylene, cumene, ethylbenzene, trichloroethylene, mibk, miak, mek or diacetone alcohol or isobutyl nitrite."

34.039 – Defense to Vapor-Releasing Substance

It is a defense to a charge of [sale] [transfer] of a vapor-releasing substance containing a toxic substance that:

1. the transfer is from a parent to a child or a guardian to a ward; *or*
2. the [sale] transfer] is made for manufacturing or industrial purposes.

SOURCE: A.R.S. § 13-3403(E) (statutory language as of 1989).

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

"Sale, transfer and vapor-releasing substance containing a toxic substance" are defined in A.R.S. § 13-3401.

34.03.01 – Sale of Delivery of Nitrous Oxide to a Minor

The crime of sale or delivery of nitrous oxide to a minor requires proof that the defendant knowingly [sold] [gave] [delivered] to a person under eighteen years of age any container exclusively containing nitrous oxide.

[It is a defense if the person under eighteen years of age is delivering or accepting delivery in the person's capacity as an employee.]

SOURCE: A.R.S. § 13-3403.01 (statutory language as of April 18, 2001).

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

The court shall instruct on the culpable mental state.

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

"Sale" or "sell" means an exchange for anything of value or advantage, present or prospective. A.R.S. § 13-3401(32).

34.04(A) – Failure to Report the Sale, Transfer or Furnishing of a Precursor or Regulated Chemical

The crime of failure to report the [sale] [transfer] [furnishing] of a precursor chemical or regulated chemical requires proof that the defendant:

1. was a [manufacturer] [wholesaler] [person] who sold, transferred or furnished a precursor chemical or regulated chemical to any person in this state; *and*
2. [knowingly failed to report all transactions to the department of public safety.]

   [knowingly failed to maintain a record required by state law.]

[knowingly furnished false information or omitted any material information in any report or record submitted to the department of public safety.]

[knowingly caused another person to furnish false information or to omit any material information in any report or record submitted to the department of public safety.]

[knowingly participated in any wholesale or retail transaction, or series of transactions, that is structured by a person with the intent to avoid the filing by any party to the transaction of any report to the department of public safety.]

SOURCE: A.R.S. §§ 13-3405(A) and (P) (statutory language as of October 1, 1999).

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

The court shall instruct on the culpable mental state.

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

A.R.S. § 13-3401(26) defines "precursor chemical I" as "any material, compound, mixture or preparation which contains any quantity of the following substances and their salts, optical isomers or salts of optical isomers:

(a) N-acetylanthranilic acid.

(b) Anthranilic acid.

(c) Ephedrine.

(d) Ergotamine.

(e) Isosafrole.

(f) Lysergic acid.

(g) Methylamine.

(h) N-ethylephedrine.

(i) N-ethylpseudoephedrine.

(j) N-methylephedrine.

(k) N-methylpseudoephedrine.

(l) Norephedrine.

(m) (-)-Norpseudoephedrine.

(n) Phenylacetic acid.

(o) Phenylpropanolamine.

(p) Piperidine.

(q) Pseudoephedrine."

A.R.S. § 13-3401(27) defines "precursor chemical II" as "any material, compound, mixture or preparation which contains any quantity of the following substances and their salts, optical isomers or salts of optical isomers:

(a) 4-cyano-2-dimethylamino-4, 4-diphenyl butane.

(b) 4-cyano-1-methyl-4-phenylpiperidine.

(c) Chlorephedrine.

(d) Chlorpseudoephedrine.

(e) Ethyl-4-phenylpiperidine-4-carboxylate.

(f) 2-methyl-3-morpholino-1, 1-diphenylpropane-carboxylic acid.

(g) 1-methyl-4-phenylpiperidine-4-carboxylic acid.

(h) N-formyl amphetamine.

(i) N-formyl methamphetamine.

(j) Phenyl-2-propanone.

(k) 1-piperidinocyclohexane carbonitrile.

(l) 1-pyrrolidinocyclohexane carbonitrile."

A.R.S. § 13-3401(30) defines "regulated chemical" as "the following substances in bulk form that are not a useful part of an otherwise lawful product:

(a) Acetic anhydride.

(b) Hypophosphorous acid.

(c) Iodine.

(d) Sodium acetate.

(e) Red phosphorus.

(f) Gamma butyrolactone (GBL).

(g) 1, 4-butanediol.

(h) Butyrolactone.

(i) 1, 2 butanolide.

(j) 2-oxanalone.

(k) Tetrahydro-2-furanone.

(l) Dihydro-2(3H)-furanone.

(m) Tetramethylene glycol."

A.R.S. § 13-3401(17) defines "manufacture" as "produce, prepare, propagate, compound, mix or process, directly or indirectly, by extraction from substances of natural origin or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis. Manufacture includes any packaging or repackaging or labeling or relabeling of containers. Manufacture does not include any producing, preparing, propagating, compounding, mixing, processing, packaging or labeling done in conformity with applicable state and local laws and rules by a licensed practitioner incident to and in the course of his licensed practice."

A.R.S. § 13-3401(18) defines "manufacturer" as "a person who manufactures a narcotic or dangerous drug or other substance controlled by this chapter."

"Sale" or "sell" means an exchange for anything of value or advantage, present or prospective. A.R.S. § 13-3401(32).

A.R.S. § 13-3401(40) defines "wholesaler" as "a person who in the usual course of business lawfully supplies narcotic drugs, dangerous drugs, precursor chemicals or regulated chemicals that he himself has not produced or prepared, but not to a person for the purpose of consumption by the person, whether or not the wholesaler has a permit that is issued pursuant to title 32, chapter 18. Wholesaler includes a person who sells, delivers or dispenses a precursor chemical in an amount or under circumstances that would require registration as a distributor of precursor chemicals under the federal act."

34.04(C) – Failure to Report the Sale, Transfer or Furnishing of a Precursor or Regulated Chemical

The crime of failure to report the [sale] [transfer] [furnishing] of a precursor chemical or regulated chemical requires proof that the defendant:

1. was a [manufacturer] [wholesaler] [retailer] [person] who sold, transferred or furnished a precursor chemical or regulated chemical to a person in this state; *and*
2. [knowingly failed to report the transaction to the department of public safety;

   [knowingly failed to maintain a record required by state law; *and*]

   [knowingly furnished false information or omitted any material information in any report or record to the department of public safety; *and*]

   [knowingly caused another person to furnish false information or to omit any material information in any report or record to the department of public safety; *and*]

   [knowingly participated in any wholesale or retail transaction or series of transactions that is structured by a person with the intent to avoid the filing by any party to the transaction of any report to the department of public safety; *and*]
3. The report was not submitted within twenty-one days before delivery of the substance.

SOURCE: A.R.S. §§ 13-3404(C) and (P) (statutory language as of October 1, 1999).

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

The court shall instruct on the culpable mental state.

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

"Precursor chemical I and II," "regulated chemical," "manufacturer" and "wholesaler" are defined in A.R.S. § 13-3401. The definitions are contained in the Use Note for Statutory Criminal Instruction 34.04(A).

A.R.S. § 13-3401(31) defines "retailer" as either "a person other than a practitioner who sells any precursor chemical or regulated chemical to another person for purposes of consumption and not resale, whether or not the person possesses a permit issued pursuant to title 32, chapter 18" or "a person other than a manufacturer or wholesaler who purchases, receives or acquires more than twenty-four grams of a precursor chemical."

A.R.S. § 13-3404(C) does allow for the submission of reports on a monthly basis with respect to repeated and regular transactions when: (1) there is a pattern of regular supply of

the substance between the supplier and recipient; and (2) the recipient has an established record of utilization of the substance for lawful purposes.

34.04(D) – Failure to Report the Receipt of a Precursor or Regulated Chemical from Outside the State

The crime of failure to report the receipt of a precursor chemical or regulated chemical received from outside of this state requires proof that the defendant:

1. was a [manufacturer] [wholesaler] [retailer] [person] who received a precursor chemical or regulated chemical; *and*
2. The chemical was received from a source outside of this state; *and*
3. [knowingly failed to report the transaction to the department of public safety.]

   [knowingly failed to maintain a record required by state law.]

   [knowingly furnished false information or omitted any material information in any report or record submitted to the department of public safety.]

   [knowingly caused another person to furnish false information or to omit any material information in any report or record submitted to the department of public safety.]

   [knowingly participated in any wholesale or retail transaction or series of transactions that is structured by a person with the intent to avoid the filing by any party to the transaction of any report submitted to the department of public safety.]

SOURCE: A.R.S. §§ 13-3404(D) and (P) (statutory language as of October 1, 1999).

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

The court shall instruct on the culpable mental state.

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

"Precursor chemical I and II," "regulated chemical," "manufacturer" and "wholesaler" are defined in A.R.S. § 13-3401. The definitions are contained in the Use Note for Statutory Criminal Instructions 34.04(A) and 34.04(C).

34.04(F) – Failure to Report the Suspicious Sale, Transfer or Furnishing of a Precursor or Regulated Chemical

The crime of failure to report the suspicious [sale] [transfer] [furnishing] of a precursor chemical or regulated chemical requires proof that:

1. The defendant was a [manufacturer] [wholesaler] [retailer] [person] who sold, transferred or furnished a precursor chemical or regulated chemical to a person in this state; *and*
2. The transaction was of a suspicious nature; *and*
3. [The defendant knowingly failed to report the transaction to the department of public safety.]

[The defendant knowingly failed to maintain a record required by state law.]

[The defendant knowingly furnished false information or omitted any material information in any report or record to the department of public safety.]

[The defendant knowingly caused another person to furnish false information or to omit any material information in any report or record to the department of public safety.]

[The defendant knowingly participated in any wholesale or retail transaction or series of transactions that is structured by a person with the intent to avoid the filing by any party to the transaction of any report to the department of public safety.]

[The defendant knowingly participated in any wholesale or retail transaction or series of transactions that is structured by a person with the intent to avoid the filing by any party to the transaction of any report to the department of public safety.]

SOURCE: A.R.S. §§ 13-3404(F) and (P) (statutory language as of October 1, 1999).

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

The court shall instruct on the culpable mental state.

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

"Precursor chemical I and II," "regulated chemical," "manufacturer" and "wholesaler" are defined in A.R.S. § 13-3401. The definitions are contained in the Use Note for Statutory Criminal Instruction 34.04(A) and 34.04(C).

34.04(G) – Failure to Report the Theft, Disappearance or Loss of a Precursor or Regulated Chemical

The crime of failure to report the theft, disappearance or loss of a precursor chemical or regulated chemical requires proof that the defendant discovered the [theft] [disappearance] [loss] [excessive or unusual loss] of any precursor chemical or regulated chemical and knowingly:

[failed to report in writing the [theft] [loss] to the department of public safety within three days of such discovery.]

[failed to maintain a record required by state law.]

[furnished false information or omitted any material information regarding the [theft] [loss] in any written report or record to the department of public safety.]

[caused another person to furnish false information or to omit any material information regarding the [theft] [loss] in any written report or record to the department of public safety.]

[participated in any wholesale or retail transaction or series of transactions that is structured by a person with the intent to avoid the filing by any party to the transaction of any report to the department of public safety.]

SOURCE: A.R.S. §§ 13-3404(G) and (P) (statutory language as of October 1, 1999).

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

The court shall instruct on the culpable mental state.

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

"Precursor chemical I and II," "regulated chemical," "manufacturer" and "wholesaler" are defined in A.R.S. § 13-3401. The definitions are contained in the Use Note for Statutory Criminal Instructions 34.04(A) and 34.04(C).

34.04(H) – Failure to Maintain Records of a Precursor or Regulated Chemical

The crime of failure to maintain records of a precursor or regulated chemical requires proof that the defendant:

1. was a [manufacturer] [wholesaler] [retailer] [other person]; *and*
2. knowingly failed to maintain a record of transactions for less than two years involving the sale, transfer or furnishing of precursor chemicals or regulated chemicals to any person in this state.

SOURCE: A.R.S. §§ 13-3404(H) and (P) (statutory language as of October 1, 1999).

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

The court shall instruct on the culpable mental state.

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

"Precursor chemical I and II," "regulated chemical," "manufacturer" and "wholesaler" are defined in A.R.S. § 13-3401. The definitions are contained in the Use Note for Statutory Criminal Instructions 34.04(A) and 34.04(C).

34.04.01(A) – Possession or Sale of Precursor Chemicals

The crime of [possession] [sale] of precursor chemicals requires proof that the defendant:

[knowingly possessed a precursor chemical II.]

[knowingly possessed more than twenty-four grams of pseudoephedrine, (-)-norpseudoephedrine or phenylpropanolamine without a license or permit issued pursuant to state law.]

[knowingly purchased more than three packages, not exceeding nine grams of pseudoephedrine, (-)-norpseudoephedrine or phenylpropanolamine without a valid prescription order, license or permit issued pursuant to state law.]

[knowingly possessed any ephedrine that was uncombined or that was the sole active ingredient of a product or more than twenty-four grams of ephedrine that was combined with another active ingredient in any ephedrine product without a license or permit issued pursuant to state law.]

[knowingly purchased any ephedrine that was uncombined or that was the sole active ingredient of a product or more than three packages, not exceeding nine grams of

ephedrine that was combined with another active ingredient in any ephedrine product, without a license or permit issued pursuant to state law.]

[sold, transferred, or otherwise furnished any precursor chemical, regulated chemical or other substance or equipment with knowledge that the recipient would use the precursor chemical, regulated chemical, substance or equipment to unlawfully manufacture a dangerous drug or narcotic drug.]

[as a manufacturer, wholesaler or retailer, knowingly possessed any precursor chemical or regulated chemical from which the label, the national drug control number or the manufacturer's lot number has been removed, altered or obliterated.]

[knowingly sold, transferred or otherwise furnished more than nine grams of any precursor chemical without a license or permit issued pursuant to state law.]

[sold, transferred or furnished ephedrine, pseudoephedrine, (-)-norpseudoephedrine or phenylpropanolamine in a total amount of more than nine grams in a single transaction in this state to a recipient who did not possess a valid and current permit issued pursuant to state law.]

[sold, transferred or otherwise furnished a precursor chemical in violation

of any rule of the Arizona State Board of Pharmacy or the department of public safety.]

[as a wholesaler or retailer purchased or otherwise acquired or received a precursor chemical from any person who did not possess a valid and current permit issued pursuant to state law.]

[knowingly participated in any transaction or series of transactions that were structured by any person with the intent to avoid or circumvent the prohibitions or limits on sales established by state law.]

SOURCE: A.R.S. § 13-3404.01(A) (statutory language as of August 12, 2005).

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

The court shall instruct on the culpable mental state.

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

"Precursor chemical I and II," "regulated chemical," "manufacturer" and "wholesaler" are defined in A.R.S. § 13-3401. The definitions are contained in the Use Note for Statutory Criminal Instructions 34.04(A) and 34.04(C).

"Prescription order" means either: (a) an order to a pharmacist for drugs or devices issued and signed by a duly licensed medical practitioner in the authorized course of the practitioner's professional practice; or (b) an order transmitted to a pharmacist through word of mouth, telephone or other means of communication directed by that medical practitioner. A.R.S. § 32-1901.

"Sale" or "sell" means an exchange for anything of value or advantage, present or prospective. A.R.S. § 13-3401(32).

"Transfer" means furnish, deliver or give away. A.R.S. § 13-3401(37).

34.04.01(B) – Sale or Transfer or Furnishing of a Precursor Chemical by a Retailer

The crime of [sale] [transfer] [furnishing] of a precursor chemical by a retailer requires proof that:

1. The defendant was a retailer who knowingly [sold] [transferred] [furnished] a precursor chemical; *and*
2. [The transaction did not occur in the normal course of business at a location allowed by a valid permit.]

   [The defendant did not have a valid and current permit issued by the Arizona State Board of Pharmacy.]

   [The defendant's Arizona State Board of Pharmacy valid permit was not prominently displayed at the premises where the transaction occurred.]

SOURCE: A.R.S. § 13-3404.01(B) (statutory language as of August 12, 2005).

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

The court shall instruct on the culpable mental state.

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

"Precursor chemical I and II," "regulated chemical," "manufacturer" and "wholesaler" are defined in A.R.S. § 13-3401. The definitions are contained in the Use Note for Statutory Criminal Instructions 34.04(A) and 34.04(C).

34.04.01(C) – Sale of a Precursor Chemical by a Retailer

The crime of sale of a precursor chemical by a retailer requires proof that the defendant was a retailer who sold more than a total of three packages exceeding nine grams of ephedrine, pseudoephedrine, (-)-norpseudoephedrine or phenylpropanolamine in a single transaction to a person without a valid prescription order.

"Prescription order" means either: (a) an order to a pharmacist for drugs or devices issued and signed by a duly licensed medical practitioner in the authorized course of the practitioner's professional practice; or (b) an order transmitted to a pharmacist through word of mouth, telephone or other means of communication directed by that medical practitioner.

SOURCE: A.R.S. §§ 13-3404.01(C) and 32-1901 (statutory language as of August 12, 2005).

USE NOTE: "Precursor chemical I and II" and "retailer" are defined in A.R.S. § 13-3401. The definitions are set forth in the Use Notes for Statutory Criminal Instructions 34.04(A) and 34.04(C).

34.04.01(D) – Sale or Transfer or Furnishing of Precursor Chemicals by a Wholesaler

The crime of [sale] [transfer] [furnishing] of precursor chemicals by a wholesaler requires proof that:

1. The defendant was a wholesaler who [sold] [transferred] [furnished] a precursor chemical to any person; *and*
2. [The defendant did not have a valid and current permit issued pursuant to state law.]

   [The recipient was not a pharmacy, practitioner or person or entity who had a permit issued pursuant to state law.]

   [The transaction involved payment in cash or money orders in an amount of more than one thousand dollars.]

SOURCE: A.R.S. § 13-3404.01(D) (statutory language as of August 12, 2005).

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

The court usually must instruct on the culpable mental state. No culpable mental state is included in the statute so one was not included in the instruction.

"Precursor chemical I and II" and "wholesaler" are defined in A.R.S. § 13-3401. The definitions are set forth in the Use Note for Statutory Criminal Instruction 34.04(A).

A.R.S. § 13-3401(24) defines "pharmacy" as "a licensed business where drugs are compounded or dispensed by a licensed pharmacist."

A.R.S. § 13-3401(25) defines "practitioner" as "a person licensed to prescribe and administer drugs."

34.04.01(E) – Sale or Transfer or Furnishing of Precursor Chemicals by a Manufacturer

The crime of [sale] [transfer] [furnishing] of precursor chemicals by a manufacturer requires proof that:

1. The defendant was a manufacturer who [sold] [transferred] [furnished] a precursor chemical to any person; *and*
2. [The recipient was not a pharmacy, practitioner or person or entity who had a license or permit issued pursuant to state law.]

   [The transaction involved payment in cash or money orders in an amount of more than one thousand dollars.]

SOURCE: A.R.S. § 13-3404.01(E) (statutory language as of August 12, 2005).

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

"Dangerous drug" and "narcotic drugs" are defined in A.R.S. § 13-3401.

"Precursor chemical I and II," regulated chemical," "manufacturer," "manufacture," "retailer" and "wholesaler" are defined in A.R.S. § 13-3401. The definitions are set forth in the Use Note for Statutory Criminal Instructions 34.04(A) and 34.04(C).

34.051 – Possession or Use of Marijuana

The crime of [possession] [use] of marijuana requires proof that:

1. The defendant knowingly [possessed] [used] marijuana; *and*
2. The substance was in fact marijuana.

SOURCE: A.R.S. §§ 13-3405(A)(1) and (3) (statutory language as of July 20, 1996); *State v. Murray,* 162 Ariz. 211 (App. 1989).

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

The court shall instruct on the culpable mental state.

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

"Marijuana" and "produce" are defined in A.R.S. § 13-3401.

The class of the felony is determined by the amount of marijuana defendant possessed or used. A.R.S. § 13-3405(B). Therefore, it is suggested that the following verdict form be used:

> We the jury duly empaneled and upon our oaths do find the defendant on the charge of possession or use of marijuana as follows:
>
> _____ Not Guilty
>
> _____ Guilty
>
> (Complete the next portion of this verdict form only if you find the defendant guilty of possession or use of marijuana.)
>
> We the jury find that the amount of marijuana the defendant possessed or used was (check only one):
>
> _____ Less than two pounds.
>
> _____ Two pounds but less than four pounds.
>
> _____ Four pounds or more.

COMMENT: In *State v. Cheramie*, 218 Ariz. 447, ¶ 22 (2008), the Arizona Supreme Court held that possession of dangerous drugs is a lesser-included offense of transportation for sale of a dangerous drug. In so holding, the court overruled a holding in *State v. Moreno*, 92 Ariz. 116 (1962) that created the element of "usable quantity" for possession of a narcotic drug. The *Cheramie* court ruled that:

> "A 'usable quantity' is neither an element of the possession offense nor necessary to sustain a conviction for it. Rather, it is simply evidence from which a factfinder may infer intent. Because *Moreno* and its progeny were decided under a statute that imposed no mental state, proof of a 'usable quantity' helped to ensure that defendants were convicted only after

> knowingly committing a proscribed act. The statute now expressly requires a knowing mental state, and establishing a 'usable quantity' remains an effective way, in a case involving such a small amount that one might question whether the defendant knew of the presence of drugs, to show that the defendant 'knowingly' committed the acts described in A.R.S. § 13-3407."

Cheramie, *supra*, 218 Ariz. at 451.

34.052 – Possession of Marijuana for Sale

The crime of possession of marijuana for sale requires proof that:

1. The defendant knowingly possessed marijuana; *and*
2. The substance was in fact marijuana; *and*
3. The possession must be for the purpose of sale. "Sale" means an exchange for anything of value or advantage, present or prospective.

SOURCE: A.R.S. §§ 13-3405(A)(2), 13-3401 (statutory language as of July 20, 1996).

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).

"Marijuana" and "sale" are defined in A.R.S. § 13-3401.

The class of the felony is determined by the amount of marijuana defendant possessed for sale. A.R.S. § 13-3405(B). Therefore, it is suggested that the following verdict form be used:

> We the jury duly empaneled and upon our oaths do find the defendant on the charge of possession of marijuana for sale as follows:
>
> _____ Not Guilty
>
> _____ Guilty
>
> (Complete the next portion of this verdict form only if you find the defendant guilty of possession of marijuana for sale.)
>
> We the jury find that the amount of marijuana the defendant possessed for sale was (check only one):
>
> _____ Less than two pounds.
>
> _____ Two pounds but not more than four pounds.
>
> _____ More than four pounds.

COMMENT: COMMENT: In *State v. Cheramie*, 218 Ariz. 447 ¶ 22 (2008), the Arizona Supreme Court held that possession of dangerous drugs is a lesser-included offense of transportation for sale of a dangerous drug. In so holding, the court overruled a holding in *State v. Moreno*, 92 Ariz. 116 (1962) that created the element of "usable quantity" for possession of a narcotic drug. The *Cheramie* court ruled that:

> "A 'usable quantity' is neither an element of the possession offense nor necessary to sustain a conviction for it. Rather, it is simply evidence from which a factfinder may infer intent. Because *Moreno* and its progeny were decided under a statute that imposed no mental state, proof of a 'usable quantity' helped to ensure that defendants were convicted only after knowingly committing a proscribed act. The statute now expressly requires a knowing mental state, and establishing a 'usable quantity' remains an effective way, in a case involving such a small amount that one might question whether the defendant knew of the presence of drugs, to show that the defendant 'knowingly' committed the acts described in A.R.S. § 13-3407."

Cheramie, *supra*, 218 Ariz. at 451.

34.053 – Production of Marijuana

The crime of production of marijuana requires proof that:

1. The defendant knowingly [grew] [planted] [cultivated] [harvested] [dried] [processed] [prepared for sale] marijuana; *and*
2. The substance was in fact marijuana.

SOURCE: A.R.S. §§ 13-3405(A)(1) and (3) (statutory language as of July 20, 1996).

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

The court shall instruct on the culpable mental state.

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

"Marijuana" and "sale" are defined in A.R.S. § 13-3401.

The class of the felony is determined by the amount of marijuana defendant produced. A.R.S. § 13-3405(B). Therefore, it is suggested that the following verdict form be used:

> We the jury duly empaneled and upon our oaths do find the defendant on the charge of production of marijuana as follows:
>
> _____ Not Guilty
>
> _____ Guilty
>
> (Complete the next portion of this verdict form only if you find the defendant guilty of production of marijuana.)
>
> We the jury find that the amount of marijuana the defendant possessed or used was (check only one):
>
> _____ Less than two pounds.
>
> _____ Two pounds but not more than four pounds.
>
> _____ More than four pounds.

COMMENT: There is no "usable amount" requirement for this offense. *See State v. Rodarte*, 173 Ariz. 331, 332 (App. 1992).

34.0541 – Selling, Transporting, Importing, Transferring of Marijuana for Sale

The crime of [transporting marijuana for sale] [importing marijuana into this state] [selling marijuana] [transferring marijuana] requires proof that:

1. The defendant knowingly [transported marijuana for sale] [imported marijuana into this state] [sold marijuana] [transferred marijuana]; *and*
2. The substance was in fact marijuana.

SOURCE: A.R.S. § 13-3405(A)(4) (statutory language as of July 20, 1996).

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

The court shall instruct on the culpable mental state.

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

"Marijuana," "sale," and "transfer" are defined in A.R.S. § 13-3401.

COMMENT: There is no "usable amount" requirement for this offense. *See State v. Rodarte*, 173 Ariz. 331, 332 (App. 1992).

The class of the felony is determined by the amount of marijuana involved in the offense. A.R.S. § 13-3405(B). Therefore, it is suggested that the following verdict form be used:

> We the jury duly empaneled and upon our oaths do find the defendant on the charge of [transporting marijuana for sale] [importing marijuana into this state for sale] [selling marijuana] [transferring marijuana] as follows:
>
> _____ Not Guilty
>
> _____ Guilty
>
> (Complete the next portion of this verdict form only if you find the defendant guilty of the offense charged.)
>
> We the jury find that the amount of marijuana the defendant [transported for sale] [imported into this state for sale] [sold] [transferred] was (check only one):
>
> _____ Less than two pounds.
>
> _____ Two pounds or more.

34.0542 – Offering to Transport, Import, or Transfer Marijuana

The crime of [offering to transport for sale] [offering to import into this state] [offering to sell] [offering to transfer] marijuana requires proof that the defendant knowingly offered to [transport for sale] [import into this state] [sell] [transfer] any marijuana.

SOURCE: A.R.S. § 13-3405(A)(4) (statutory language as of July 20, 1996).

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

The court shall instruct on the culpable mental state.

"Marijuana" and "transfer" are defined in A.R.S. § 13-3401.

The class of the felony is determined by the amount of marijuana involved in the offense. A.R.S. § 13-3405(B). Therefore, it is suggested that the following verdict form be used:

> We the jury duly empaneled and upon our oaths do find the defendant on the charge of [offering to transport for sale] [offering to import into this state] [offering to sell] [offering to transfer] marijuana requires proof that the defendant knowingly offered to [transport for sale] [import into this state] [sell] [transfer] as follows:
>
> _____ Not Guilty
>
> _____ Guilty
>
> (Complete the next portion of this verdict form only if you find the defendant guilty of the offense charged.)
>
> We the jury find that the amount of marijuana involved] was (check only one):
>
> _____ Less than two pounds.
>
> _____ Two pounds or more.

COMMENT: There is no "usable amount" requirement for this offense. *See State v. Rodarte*, 173 Ariz. 331, 332 (App. 1992).

34.061 – Possession/Use of a [Misbranded] [Prescription-Only] Drug

The crime of [possession] [use] of a [misbranded] [prescription-only] drug requires proof that:

1. The defendant knowingly [possessed] [used] a prescription-only drug; *and*
2. The substance was in fact a [misbranded] [prescription-only] drug; *and*
3. The defendant did not obtain a valid prescription for the [misbranded] [prescription-only] drug from a lawfully licensed prescriber.

SOURCE: A.R.S. § 13-3406(A)(1) (statutory language as of July 3, 2015).

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

The court shall instruct on the culpable mental state.

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

"Misbranded drug is defined in A.R.S. 32-1967.

"Prescription-only drug" is defined in A.R.S. § 13-3401(28) as not including a dangerous drug or narcotic drug, but:

> "(a) Any drug which because of its toxicity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not generally recognized among experts, qualified by scientific

> training and experience to evaluate its safety and efficacy, as safe for use except by or under the supervision of a medical practitioner.
>
> (b) Any drug that is limited by an approved new drug application under the federal act or section 32-1962 to use under the supervision of a medical practitioner.
>
> (c) Every potentially harmful drug, the labeling of which does not bear or contain full and adequate directions for use by the consumer.
>
> (d) Any drug required by the federal act to bear on its label the legend 'Caution: Federal law prohibits dispensing without prescription' or 'RX only'."

Use the definition that is appropriate to the facts of the case.

COMMENT: In *State v. Cheramie*, 218 Ariz. 447 ¶ 22 (2008), the Arizona Supreme Court held that possession of dangerous drugs is a lesser-included offense of transportation for sale of a dangerous drug. In so holding, the court overruled a holding in *State v. Moreno*, 92 Ariz. 116 (1962) that created the element of "usable quantity" for possession of a narcotic drug. The *Cheramie* court ruled that:

> "A 'usable quantity' is neither an element of the possession offense nor necessary to sustain a conviction for it. Rather, it is simply evidence from which a factfinder may infer intent. Because *Moreno* and its progeny were decided under a statute that imposed no mental state, proof of a 'usable quantity' helped to ensure that defendants were convicted only after knowingly committing a proscribed act. The statute now expressly requires a knowing mental state, and establishing a 'usable quantity' remains an effective way, in a case involving such a small amount that one might question whether the defendant knew of the presence of drugs, to show that the defendant 'knowingly' committed the acts described in A.R.S. § 13-3407."

Cheramie, *supra*, 218 Ariz. at 451.

34.062 – Possession of Prescription-Only Drug for Sale

The crime of possession of a prescription-only drug for sale requires proof that:

1. The defendant knowingly possessed a prescription-only drug; *and*
2. The substance was in fact a prescription-only drug; *and*
3. The defendant did not possess a lawful license or permit to possess the prescription-only drug; *and*
4. The possession was for purpose of sale.

"Sale" means an exchange for anything of value or advantage, present or prospective.

SOURCE: A.R.S. §§ 13-3406(A)(2) and 13-3401 (statutory language as of January 1, 2006).

Use Note: Use language in brackets as appropriate to the facts.

The court shall instruct on the culpable mental state.

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

"Prescription-only drugs" is defined in A.R.S. § 13-3401. The definition is contained in the Use Note for Statutory Criminal Instruction 34.061.

COMMENT: In *State v. Cheramie*, 218 Ariz. 447 ¶ 22 (2008), the Arizona Supreme Court held that possession of dangerous drugs is a lesser-included offense of transportation for sale of a dangerous drug. In so holding, the court overruled a holding in *State v. Moreno*, 92 Ariz. 116 (1962) that created the element of "usable quantity" for possession of a narcotic drug. The *Cheramie* court ruled that:

> "A 'usable quantity' is neither an element of the possession offense nor necessary to sustain a conviction for it. Rather, it is simply evidence from which a factfinder may infer intent. Because *Moreno* and its progeny were decided under a statute that imposed no mental state, proof of a 'usable quantity' helped to ensure that defendants were convicted only after knowingly committing a proscribed act. The statute now expressly requires a knowing mental state, and establishing a 'usable quantity' remains an effective way, in a case involving such a small amount that one might question whether the defendant knew of the presence of drugs, to show that the defendant 'knowingly' committed the acts described in A.R.S. § 13-3407."

Cheramie, *supra*, 218 Ariz. at 451.

34.063 – Possession of Equipment and Chemicals to Manufacture Prescription-Only Drug

The crime of possession of equipment and chemicals for the manufacture of a prescription-only drug requires proof that the defendant knowingly possessed equipment and chemicals for the purpose of manufacturing a prescription-only drug without a valid license or permit.

"Manufacture" means produce, prepare, propagate, compound, mix or process, directly or indirectly, by extraction from substances of natural origin or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis. Manufacture includes any packaging or repackaging or labeling or relabeling of containers. Manufacture does not include any producing, preparing, propagating, compounding, mixing, processing, packaging or labeling done in conformity with applicable state and local laws and rules by a licensed practitioner incident to and in the course of his licensed practice.

SOURCE: A.R.S. §§ 13-3406(A)(3) (statutory language as of August 9, 2001) and 13-3401(17) (statutory language as of January 1, 2006).

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)).

"Prescription-only drugs" is defined in A.R.S. § 13-3401. The definition is contained in the Use Note for Statutory Criminal Instruction 34.061.

34.067(1) – Sale, Transfer, or Importation of a Prescription-Only Drug

The crime of [transport for sale] [import into this state] [sale] [transfer] of a prescription-only drug requires proof that:

1. The defendant knowingly, and without lawful authorization, [transported for sale] [imported into this state] [sold] [transferred] a prescription-only drug; *and*
2. The substance was in fact a prescription-only drug.

SOURCE: A.R.S. § 13-3406(A)(7) (statutory language as of January 1, 2006).

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

The court shall instruct on the culpable mental state.

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

"Prescription-only drug" is defined in A.R.S. § 13-3401. The definition is contained in the Use Note for Statutory Criminal Instruction 34.061.

A.R.S. § 13-3401(32) defines "sale" or "sell" as "an exchange for anything of value or advantage, present or prospective."

A.R.S. § 13-3401(37) defines "transfer" as "furnish, deliver or give away."

COMMENT: There is no "usable amount" requirement for this offense. *See State v. Rodarte*, 173 Ariz. 331, 332 (App. 1992).

34.067(2) – Offer to Sell, Offer to Transfer, Offer to Import a Prescription-Only Drug

The crime of [offering to sell] [offering to transfer] [offering to transport for sale] [offering to import into this state] a prescription-only drug requires proof that the defendant knowingly, and without lawful authorization, [offered to sell] [offered to transfer] [offered to transport for sale] [offered to import into this state] a prescription-only drug.

SOURCE: A.R.S. § 13-3406(A)(7) (statutory language as of January 1, 2006).

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

The court shall instruct on the culpable mental state.

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

"Prescription-only drug" is defined in A.R.S. § 13-3401. The definition is contained in the Use Note for Statutory Criminal Instruction 34.061.

A.R.S. § 13-3401(32) defines "sale" or "sell" as "an exchange for anything of value or advantage, present or prospective."

A.R.S. § 13-3401(37) defines "transfer" as "furnish, deliver or give away."

COMMENT: There is no "usable amount" requirement for this offense. *See State v. Rodarte*, 173 Ariz. 331, 332 (App. 1992).

34.071 – Possession of Dangerous Drug

The crime of [possession/use] of a [dangerous drug] requires proof of the following:

1. The defendant knowingly [possessed/used] a [dangerous drug] *and*
2. The substance was in fact a dangerous drug.

SOURCE: A.R.S. §§ 13-3407(A)(1) and (3) (statutory language as of August 9, 2001).

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

"Dangerous drugs" is defined in A.R.S. § 13-3401.

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

COMMENT: In *State v. Cheramie*, 218 Ariz. 447, ¶22, 189 P.3d 374 (2008), the Arizona Supreme Court held that possession of dangerous drugs is a lesser-included offense of transportation for sale of a dangerous drug. In so holding, the court overruled a holding in *State v. Moreno*, 92 Ariz. 116, 374 P.2d 872 (1962) that created the element of "usable quantity" for possession of a narcotic drug. The *Cheramie* court ruled that:

> "A 'usable quantity' is neither an element of the possession offense nor necessary to sustain a conviction for it. Rather, it is simply evidence from which a factfinder may infer intent. Because *Moreno* and its progeny were decided under a statute that imposed no mental state, proof of a 'usable quantity' helped to ensure that defendants were convicted only after knowingly committing a proscribed act. The statute now expressly requires a knowing mental state, and establishing a 'usable quantity' remains an effective way, in a case involving such a small amount that one might question whether the defendant knew of the presence of drugs, to show that the defendant 'knowingly' committed the acts described in A.R.S. § 13-3407."

Cheramie, *supra*, 218 Ariz. at 451.

34.07.01 – Manufacturing Methamphetamine Causing Injury to a Person under Fifteen

The crime of manufacturing methamphetamine under any circumstances causing injury to a person under fifteen years of age requires proof that:

1. The defendant knowingly manufactured methamphetamine; *and*
2. The manufacture was under any circumstances that caused physical injury to a person; *and*
3. The person was under fifteen years of age.

"Manufacture" means produce, prepare, propagate, compound, mix or process, directly or indirectly, by extraction from substances of natural origin or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis. Manufacture includes any packaging or repackaging or labeling or relabeling of containers. Manufacture

does not include any producing, preparing, propagating, compounding, mixing, processing, packaging or labeling done in conformity with applicable state and local laws and rules by a licensed practitioner incident to and in the course of his licensed practice.

SOURCE: A.R.S. §§ 13-3407.01 (statutory language as of August 15, 2005) and 13-3401(17) (statutory language as of January 1, 2006).

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

"Knowingly" and "physical injury" are defined in A.R.S. § 13-105 (Statutory Definition Instructions 1.0510(b) and 1.0533).

34.072 – Possession of Dangerous Drug for Sale

The crime of possession of a dangerous drug for sale requires proof of the following:

1. The defendant knowingly possessed a dangerous drug; *and*
2. The substance was in fact a dangerous drug; *and*
3. The possession must be for purposes of sale. "Sale" means an exchange for anything of value or advantage, present or prospective.

SOURCE: A.R.S. § 13-3407(A)(2) (statutory language as of August 9, 2001).

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

"Dangerous drug" and "sale" are defined in A.R.S. § 13-3401.

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

COMMENT: In *State v. Cheramie*, 218 Ariz. 447 ¶ 22 (2008), the Arizona Supreme Court held that possession of dangerous drugs is a lesser-included offense of transportation for sale of a dangerous drug. In so holding, the court overruled a holding in *State v. Moreno*, 92 Ariz. 116 (1962) that created the element of "usable quantity" for possession of a narcotic drug. The *Cheramie* court ruled that:

> "A 'usable quantity' is neither an element of the possession offense nor necessary to sustain a conviction for it. Rather, it is simply evidence from which a factfinder may infer intent. Because *Moreno* and its progeny were decided under a statute that imposed no mental state, proof of a 'usable quantity' helped to ensure that defendants were convicted only after knowingly committing a proscribed act. The statute now expressly requires a knowing mental state, and establishing a 'usable quantity' remains an effective way, in a case involving such a small amount that one might question whether the defendant knew of the presence of drugs, to show that the defendant 'knowingly' committed the acts described in A.R.S. § 13-3407."

Cheramie, *supra*, 218 Ariz. at 451.

34.076 – Obtaining Dangerous Drug by Fraud

The crime of [obtaining] [procuring the administration of] a dangerous drug by fraud, deceit, misrepresentation, or subterfuge requires proof of the following:

1. The defendant knowingly [obtained] [procured the administration of] a dangerous drug; *and*
2. The substance was in fact a dangerous drug; *and*
3. The defendant [obtained] [procured the administration of] a dangerous drug by fraud, deceit, misrepresentation, or subterfuge.

SOURCE: A.R.S. § 13-3407(A)(6) (statutory language as of August 9, 2001).

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

The court shall instruct on the culpable mental state.

"Dangerous drug" is defined in A.R.S. § 13-3401.

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

34.0771 – Selling, Transporting, Importing, Transferring of Dangerous Drug for Sale

The crime of [transporting dangerous drugs for sale] [importing dangerous drugs into this state] [selling dangerous drugs] [transferring dangerous drugs] requires proof of the following:

1. The defendant knowingly [transported dangerous drugs for sale] [imported dangerous drugs into this state] [sold dangerous drugs] [transferred dangerous drugs]; *and*
2. The substance was in fact a dangerous drug.

SOURCE: A.R.S. § 13-3407(A)(7) (statutory language as of August 9, 2001).

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

The court shall instruct on the culpable mental state.

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

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

COMMENT: There is no "usable amount" requirement for this offense. *State v. Espinosa*, 101 Ariz. 474 (1966). Based on the ruling in *State v. Rodarte*, 173 Ariz. 331 (App. 1992), "usable amount" is a necessary element only for possession and possession for sale cases.

34.0772 – Offering to Transport, Import, or Transfer Dangerous Drugs

The crime of [offering to transport for sale] [offering to import into this state] [offering to sell] [offering to transfer] dangerous drugs requires proof that the defendant knowingly offered to [transport for sale] [import into this state] [sell] [transfer] any dangerous drugs.

SOURCE: A.R.S. § 13-3407(A)(7) (statutory language as of August 9, 2001).

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

The court shall instruct on the culpable mental state.

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

"Dangerous drug", "sale" and "transfer" are defined in A.R.S. § 13-3401.

34.081 – Possession or Use of a Narcotic Drug

The crime of [possession] or [use] of a narcotic drug requires proof of the following:

1. The defendant knowingly [possessed] or [used] a narcotic drug; *and*
2. The substance was in fact a narcotic drug.

SOURCE: A.R.S. § 13-3408(A)(1) (statutory language as of July 20, 1996).

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

The court shall instruct on the culpable mental state.

"Narcotic drug" is defined in A.R.S. § 13-3401.

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

COMMENT: In *State v. Cheramie*, 218 Ariz. 447 ¶ 22 (2008), the Arizona Supreme Court held that possession of dangerous drugs is a lesser-included offense of transportation for sale of a dangerous drug. In so holding, the court overruled a holding in *State v. Moreno*, 92 Ariz. 116 (1962) that created the element of "usable quantity" for possession of a narcotic drug. The *Cheramie* court ruled that:

> "A 'usable quantity' is neither an element of the possession offense nor necessary to sustain a conviction for it. Rather, it is simply evidence from which a factfinder may infer intent. Because *Moreno* and its progeny were decided under a statute that imposed no mental state, proof of a 'usable quantity' helped to ensure that defendants were convicted only after knowingly committing a proscribed act. The statute now expressly requires a knowing mental state, and establishing a 'usable quantity' remains an effective way, in a case involving such a small amount that one might question whether the defendant knew of the presence of drugs, to show that the defendant 'knowingly' committed the acts described in A.R.S. § 13-3407."

Cheramie, *supra*, 218 Ariz. at 451.

34.082 – Possession of Narcotic Drug for Sale

The crime of possession of a narcotic drug for sale requires proof of the following:

1. The defendant knowingly possessed a narcotic drug; *and*
2. The substance was in fact a narcotic drug; *and*
3. The possession must be for purposes of sale. "Sale" means an exchange for anything of value or advantage, present or prospective.

SOURCE: A.R.S. 13-3408(A)(2) (statutory language as of July 20, 1996).

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)).

"Narcotic drugs" and "sale" are defined in A.R.S. 13-3401.

COMMENT: In *State v. Cheramie*, 218 Ariz. 447 ¶ 22 (2008), the Arizona Supreme Court held that possession of dangerous drugs is a lesser-included offense of transportation for sale of a dangerous drug. In so holding, the court overruled a holding in *State v. Moreno*, 92 Ariz. 116 (1962) that created the element of "usable quantity" for possession of a narcotic drug. The *Cheramie* court ruled that:

> "A 'usable quantity' is neither an element of the possession offense nor necessary to sustain a conviction for it. Rather, it is simply evidence from which a factfinder may infer intent. Because *Moreno* and its progeny were decided under a statute that imposed no mental state, proof of a 'usable quantity' helped to ensure that defendants were convicted only after knowingly committing a proscribed act. The statute now expressly requires a knowing mental state, and establishing a 'usable quantity' remains an effective way, in a case involving such a small amount that one might question whether the defendant knew of the presence of drugs, to show that the defendant 'knowingly' committed the acts described in A.R.S. § 13-3407."

Cheramie, *supra*, 218 Ariz. at 451.

34.086 – Obtaining Narcotics by Fraud

The crime of [obtaining] [procuring the administration of] a narcotic drug by fraud requires proof of the following:

1. The defendant [obtained] [procured the administration of] a narcotic drug; *and*
2. The defendant knew that the substance was a narcotic drug; *and*
3. The defendant [obtained] [procured the administration of] the narcotic drug by fraud, deceit, misrepresentation, or subterfuge.

SOURCE: A.R.S. § 13-3408(A)(6) (statutory language as of July 20, 1996).

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

The court shall instruct on the culpable mental state.

"Narcotic drug" is defined in A.R.S. § 13-3401.

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

34.0871 – Transporting or Importing Narcotics for Sale, Selling, Transferring Narcotic Drugs

The crime of [transporting narcotic drugs for sale] [importing narcotic drugs into this state] [selling narcotic drugs] [transferring narcotic drugs] requires proof of the following:

1. The defendant knowingly [transported a narcotic drug for sale] [imported a narcotic drug into this state] [sold a narcotic drug] [transferred a narcotic drug]; *and*
2. The substance was in fact a narcotic drug.

SOURCE: A.R.S. § 13-3408(A)(7) (statutory language as of July 20, 1996).

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

The court shall instruct on the culpable mental state.

"Narcotic drug" is defined in A.R.S. § 13-3401.

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

COMMENT: There is no "usable amount" requirement for this offense. *State v. Espinosa,* 101 Ariz. 474 (1966). Based on the ruling in *State v. Rodarte,* 173 Ariz. 331 (App. 1992), "usable amount" is a necessary element only for possession and possession for sale cases.

34.0872 – Offering to Transport, Import, Sell, Transfer Narcotics

The crime of [offering to transport for sale] [offering to import into this state] [offering to sell] [offering to transfer] a narcotic drug requires proof that the defendant knowingly offered to [transport for sale] [import into this state] [sell] [transfer] a narcotic drug.

SOURCE: A.R.S. § 13-3408(A)(7) (statutory language as of July 20, 1996).

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

The court shall instruct on the culpable mental state.

"Narcotic drug" is defined in A.R.S. § 13-3401.

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

34.091 – Involving or Using Minors in Drug Offenses

The crime of involving or using minors in drug offenses requires proof that:

1. The defendant knowingly [hired] [employed] [used] a person to engage in conduct, completed or preparatory, to commit [insert applicable offense from A.R.S. §§ 13-3404 through 3408]; *and*
2. The defendant knew that the person [hired] [employed] [used] was under the age of eighteen years.

SOURCE: A.R.S. § 13-3409(A)(1) (statutory language as of August 21, 1998).

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

The court shall instruct on the culpable mental state.

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

If appropriate, the court should provide a special verdict form for the jury to decide the minor was under the age of fifteen. The statute mandates a sentence pursuant to A.R.S. § 13-705 in such a case.

34.092 – Involving or Using Minors in Drug Offenses

The crime of involving or using minors in drug offenses requires proof that:

1. The defendant knowingly [sold] [transferred] [offered to sell] [offered to transfer] a prohibited substance [insert applicable prohibited substance from A.R.S. §§ 13-3404 through 3408] to a person; *and*
2. The defendant knew that the person to whom the prohibited substance was [sold] [transferred] [offered] was under the age of eighteen years.

SOURCE: A.R.S. § 13-3409(A)(2) (statutory language as of August 21, 1998).

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

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

A.R.S. § 13-3401(32) defines "sale" or "sell" as "an exchange for anything of value or advantage, present or prospective."

A.R.S. § 13-3401(37) defines "transfer" as "furnish, deliver or give away."

If appropriate, the court should provide a special verdict form for the jury to decide the minor was under the age of fifteen. The statute mandates a sentence pursuant to A.R.S. § 13-705 in such a case.

34.111 – Sale or Transfer of Drugs in a Drug Free School Zone

The crime of [sale / transfer] of [marijuana / peyote / dangerous drugs / narcotic drugs] in a drug free school zone requires proof that the defendant was intentionally present in a drug free school zone to [sell / transfer] [marijuana / peyote / dangerous drugs / narcotic drugs].

"Drug free school zone" means the area within three hundred feet of a school or its accompanying grounds, any public property within one thousand feet of a school or its accompanying grounds, a school bus stop or any school bus or bus contracted to transport pupils to any school.

"School" means any public or nonpublic kindergarten program, common school or high school.

SOURCE: A.R.S. § 13-3411(A)(1) (statutory language as of August 6, 1999).

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. *See* Statutory Criminal Instruction 1.0510(a)(1).

"Dangerous drugs and narcotic drugs" are defined in A.R.S. § 13-3401.

A.R.S. § 13-3401(32) defines "sale" or "sell" as "an exchange for anything of value or advantage, present or prospective."

A.R.S. § 13-3401(37) defines "transfer" as "furnish, deliver or give away."

34.112 – Possession or Use of Drugs in a Drug Free School Zone

The crime of [possessing/using] of [marijuana/peyote/dangerous drugs/narcotic drugs] in a drug free school zone requires proof that:

1. The defendant was in a drug free school zone; *and*
2. The defendant knowingly [possessed/used] [marijuana/peyote/dangerous drugs/ narcotic drugs]; *and*
3. The substance was [marijuana/peyote/a dangerous drug/a narcotic drug].

"Drug free school zone" means the area within three hundred feet of a school or its accompanying grounds, any public property within one thousand feet of a school or its accompanying grounds, a school bus stop or any school bus or bus contracted to transport pupils to any school.

"School" means any public or nonpublic kindergarten program, common school or high school.

SOURCE: A.R.S. § 13-3411(A)(2) (statutory language as of August 6, 1999).

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

The court shall instruct on the culpable mental state.

"Knowingly," "possess" and "possession" are defined in A.R.S. § 13-105 (Statutory Criminal Instructions 1.0510(b), 1.0534 and 1.0535).

"Dangerous drugs" and "narcotic drugs" are defined in A.R.S. § 13-3401.

COMMENT: In *State v. Cheramie*, 218 Ariz. 447 ¶ 22 (2008), the Arizona Supreme Court held that possession of dangerous drugs is a lesser-included offense of transportation for sale of a

dangerous drug. In so holding, the court overruled a holding in *State v. Moreno*, 92 Ariz. 116 (1962) that created the element of "usable quantity" for possession of a narcotic drug. The *Cheramie* court ruled that:

> "A 'usable quantity' is neither an element of the possession offense nor necessary to sustain a conviction for it. Rather, it is simply evidence from which a factfinder may infer intent. Because *Moreno* and its progeny were decided under a statute that imposed no mental state, proof of a 'usable quantity' helped to ensure that defendants were convicted only after knowingly committing a proscribed act. The statute now expressly requires a knowing mental state, and establishing a 'usable quantity' remains an effective way, in a case involving such a small amount that one might question whether the defendant knew of the presence of drugs, to show that the defendant 'knowingly' committed the acts described in A.R.S. § 13-3407."

Cheramie, *supra*, 214 Ariz. at 451.

34.113 – Manufacture of Dangerous Drugs in a Drug Free School Zone

This crime requires proof that the defendant manufactured dangerous drugs in a drug free school zone.

"Drug free school zone" means the area within three hundred feet of a school or its accompanying grounds, any public property within one thousand feet of a school or its accompanying grounds, a school bus stop or any school bus or bus contracted to transport pupils to any school.

"School" means any public or nonpublic kindergarten program, common school or high school.

"Manufacture" means produce, prepare, propagate, compound, mix or process, directly or indirectly, by extraction from substances of natural origin or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis. Manufacture includes any packaging or repackaging or labeling or relabeling of containers. Manufacture does not include any producing, preparing, propagating, compounding, mixing, processing, packaging or labeling done in conformity with applicable state and local laws and rules by a licensed practitioner incident to and in the course of his licensed practice.

SOURCE: A.R.S. §§ 13-3411(A)(3) (statutory language as of August 6, 1999) and 13-3401(17) (statutory language as of January 1, 2006).

USE NOTE: "Dangerous drug" is defined in A.R.S. § 13-3401.

34.15 – Possession of Drug Paraphernalia

The crime of possession of drug paraphernalia requires proof of the following:

1. The defendant used, or possessed with the intent to use, drug paraphernalia to [plant] [propagate] [cultivate] [grow] [harvest] [manufacture] [compound] [convert]

[produce] [process] [prepare] [test] [analyze] [pack] [repack] [store] [contain] [conceal] [inject] [ingest] [inhale] or otherwise introduce (name of drug) into the human body; *and*

2. The item was drug paraphernalia.

"Drug paraphernalia" means all equipment, products and materials of any kind which are used, intended for use or designed for use in [planting] [propagating] [cultivating] [growing] [harvesting] [manufacturing] [compounding] [converting] [producing] [processing] [preparing] [testing] [analyzing] [packaging] [repackaging] [storing] [containing] [concealing] [injecting] [ingesting] [inhaling] or otherwise introducing (name of drug) into the human body.

SOURCE: A.R.S. § 13-3415 (statutory language as of July 20, 1996).

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

The court shall instruct on the culpable mental state.

"With the intent to" is defined in A.R.S. § 13-105 (Statutory Criminal Instruction 1.0510(a)(1)).

Additional specific descriptions of drug paraphernalia can be found in A.R.S. § 13-3415(F)(2)(a–*l*) to fit the particular facts of a case. If relevant items are listed in the statute, that particular language should be inserted following the last sentence in the paragraph defining drug paraphernalia. For example, in a case involving a film container in which a drug was found, it would read, "It includes containers and other objects used, intended for use or designed for use in storing or concealing drugs." A.R.S. § 13-3415(F)(2)(j).

34.17 – Use of Wire Communication or Electronic Communication in [Drug Related] [Organized Crime Related] Transaction

The crime of Use of Wire Communication or Electronic Communication in a [Drug Related] [Organized Crime Related] Transaction requires proof that the defendant used any wire communication or electronic communication to [facilitate] [conspire to commit]:

[LIST NAME OF CHAPTER 23 OR 34 OFFENSE]

[The use of the wire communication or electronic communication was deemed to have been committed at the place where the transmission[s] originated or at the place where the [transmission was] [transmissions were] received.] {See use note regarding *Willoughby* below.}

["Wire communication" means any aural transfer that is made in whole or in part through the use of facilities for the transmission of communications by the aid of any wire, cable or other like connection between the point of origin and the point of reception, including the use of a connection in a switching station, and that is furnished or operated by any person who is engaged in providing or operating the facilities for the transmission of communications.

A wire communication includes the use of a telephone, including but not limited to a cellular telephone.

"Aural transfer" means a communication containing the human voice at any point between and including the point of origin and the point of reception.]

["Electronic communication" means any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature that is transmitted by wire, radio, electro-magnetic, photoelectronic or photooptical system but that does not include any of the following:

1. Any wire or oral communication.
2. Any communication made through a tone-only paging device.
3. Any communication from a tracking device.

An electronic communication includes the use of digital display paging devices and facsimile (fax) machines.

"Oral communication" means a spoken communication that is uttered by a person who exhibits an expectation that the communication is not subject to interception under circumstances justifying the expectation but does not include any electronic communication.]

SOURCE: A.R.S. §§ 13-3417 (statutory language as of July 18, 2000); 13-3001 (statutory language as of august 22, 2002).

USE NOTE: The court shall instruct on the culpable mental state. The mental states are not included here, because they could vary depending on whether facilitation or conspiracy is alleged and depending on the elements of the underlying Chapter 23 or 34 offense.

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

In *State v. Willoughby*, 181 Ariz. 530, 538 (1995), the court noted that "in the very rare case in which jurisdiction is legitimately in issue because of contradicting jurisdictional facts, Arizona's territorial jurisdiction must be established beyond a reasonable doubt by the jury."

The court will need to instruct on the elements of the underlying Chapter 23 or 34 offense.

"Conspiracy" is defined in A.R.S. § 13-1003 (Statutory Definition Instruction 10.031, *et seq.*).

"Facilitation" is defined in A.R.S. § 13-1004 (Statutory Definition Instruction 10.04).

The Committee has changed the title of the offense from that listed in the statute, because the statute's title refers only to drug related transactions, while the statute itself includes both drug and organized crime transactions.

COMMENT: The offense is a class 4 felony, unless the jury finds that the defendant facilitated a class 5 or 6 felony, which reduces the felony class to that of the facilitated statute. There is no need to propose a special verdict form, because the court can make such finding based on the standard verdict forms that would be used.

In discussing the terms "wire communication," "oral communication" and "electronic communication," the Ninth Circuit has stated:

> The definitions of wire communication and oral communication are not mutually exclusive. Accordingly, different aspects of the same communication might be differently characterized. For example, a person who overhears one end of a telephone conversation by listening in on the oral utterances of one of the parties is intercepting an oral communication.

> If the eavesdropper instead taps into the telephone wire, he is intercepting a wire communication.

In Re United States for an Order Authorizing Roving Interception of Oral Communications, 349 F.3d 1132, 1138 & n.12 (9th Cir. 2003) (also holding that despite the apparent wireless nature of cellular phones, communications using cellular phones are considered wire communications under the federal statute [which is virtually identical to A.R.S. § 13-3417], because cellular telephones use wire and cable connections when connecting call).

Digital display paging devices and facsimile (fax) machines are "electronic communications." *Brown v. Waddell,* 50 F.3d 285, 293 (4th Cir. 1995). *Accord, United States v. Forest*, 355 F.3d 942, 949 (6th Cir. 2004), *cert. denied,* 543 U.S. 856 (2004), *cert. granted and judgment vacated on other grounds sub nom. Garner v. United States,* 543 U.S. 1100 (2005).

34.21.01 – Using Building for Sale, Manufacture or Distribution of Dangerous or Narcotic Drugs

The crime of Using a Building for [Sale] [Manufacture] [Distribution] of [Dangerous] [Narcotic] Drugs requires proof that the defendant [leased] [occupied] a building and intentionally used the building for the purpose of unlawfully [selling] [manufacturing] [distributing] any [dangerous] [narcotic] drug.

"Building" means any part of a building or structure, including a room, space or enclosure that may be entered through the same outside entrance.

SOURCE: A.R.S. § 13-3421(A) (statutory language as of July 17, 1993).

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

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

"Unlawful" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0540).

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

The Committee has changed the title of the offense from that listed in the statute, because the statute's title omits "distribution," while the statute itself includes "distribution" as an element of the crime.

34.21.02 – Fortification of a Building

The crime of Fortification of a Building requires proof that the defendant [leased] [occupied] a building and, with the intent to suppress law enforcement entry, knowingly [fortified] [allowed to be fortified] the building for the purpose of unlawfully [selling] [manufacturing] [distributing] any [dangerous] [narcotic] drug.

"Building" means any part of a building or structure, including a room, space or enclosure that may be entered through the same outside entrance.

"Fortified" means the use of steel doors, wooden planking, cross bars, alarm systems, dogs or other means to prevent or impede entry into a building or structure.

SOURCE: A.R.S. § 13-3421(B) (statutory language as of July 17, 1993).

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

"Intentionally" and "knowingly" are defined in A.R.S. § 13-105 (Statutory Criminal Instructions 1.0510(a)(1) and 1.0510(b)).

"Unlawful" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0540).

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

CHAPTER 34.1

34.53 – Manufacture or Distribution of Imitation Controlled Substance

The crime of manufacture or distribution of an imitation controlled substance requires proof that the defendant [manufactured] [distributed] [possessed with intent to distribute] an imitation controlled substance.

[It is no defense that the defendant believed the imitation controlled substance to be a legitimate controlled substance.]

SOURCE: A.R.S. §§ 13-3453 (statutory language as of July 24, 1982) and 13-3401(17) (statutory language as of January 1, 2006).

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

A.R.S. § 13-3451(3) defines "distribute" as "the actual, constructive or attempted transfer, delivery or sale of, or dispensing to another of, an imitation controlled substance, imitation prescription-only drug or imitation over-the-counter drug."

A.R.S. § 13-3451(4) defines "imitation controlled substance" as "a drug, substance or immediate precursor which does or does not contain a controlled substance that by texture, consistency or color or dosage unit appearance as evidenced by color, shape, size or markings, apart from any other representations, packaging or advertisements, would lead a reasonable person to believe that the substance is a controlled substance but it is a counterfeit preparation."

A.R.S. § 13-3451(7) defines "manufacture" as "the production, preparation, compounding, processing, encapsulating, packaging or repackaging, or labeling or relabeling of an imitation controlled substance, imitation prescription-only drug or imitation over-the-counter drug."

A special verdict form may be needed if there is an allegation that the defendant was eighteen years of age or older and distributed or intended to distribute the imitation substance to a person under the age of eighteen. If proven, this changes the classification of the offense. A.R.S. § 13-3453(D).

34.54 – Manufacture or Distribution of Imitation Prescription-Only Drug

The crime of manufacture or distribution of an imitation prescription-only drug requires proof that the defendant [manufactured] [distributed] [possessed with intent to distribute] an imitation prescription-only drug.

[It is no defense to this crime that the defendant believed the imitation prescription-only drug to be a legitimate prescription-only drug.]

SOURCE: A.R.S. § 13-3454 (statutory language as of July 24, 1982).

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

A.R.S. § 13-3451(3) defines "distribute" as "the actual, constructive or attempted transfer, delivery or sale of, or dispensing to another of, an imitation controlled substance, imitation prescription-only drug or imitation over-the-counter drug."

A.R.S. § 13-3451(6) defines "imitation prescription-only drug" as "a drug, substance or immediate precursor which does or does not contain a prescription-only drug as defined by section 32-1901 that by texture, consistency or color or dosage unit appearance as evidenced by color, shape, size or markings, apart from any other representations, packaging or advertisements, would lead a reasonable person to believe that the substance is a prescription-only drug but it is a counterfeit preparation."

A.R.S. § 13-3451(7) defines "manufacture" as "the production, preparation, compounding, processing, encapsulating, packaging or repackaging, or labeling or relabeling of an imitation controlled substance, imitation prescription-only drug or imitation over-the-counter drug."

A special verdict form may be needed if there is an allegation that the defendant was eighteen years of age or older and distributed or intended to distribute the imitation substance to a person under the age of eighteen. If proven, this changes the classification of the offense. A.R.S. § 13-3454(D).

34.55 – Manufacture or Distribution of Imitation Over-the-Counter Drug

The crime of manufacture or distribution of imitation over-the-counter drug requires proof that the defendant [manufactured] [distributed] [possessed with intent to distribute] an imitation over-the-counter drug.

[It is no defense that the defendant believed the imitation over-the-counter drug to be a legitimate over-the-counter drug.]

SOURCE: A.R.S. § 13-3455 (statutory language as of July 24, 1982).

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 Criminal Instruction 1.0510(a)(1)).

A.R.S. § 13-3451(3) defines "distribute" as "the actual, constructive or attempted transfer, delivery or sale of, or dispensing to another of, an imitation controlled substance, imitation prescription-only drug or imitation over-the-counter drug."

A.R.S. § 13-3451(5) defines "imitation over-the-counter drug" as "an imitation of a nonprescription drug as defined in section 32-1901 that by texture, consistency or color or dosage unit appearance as evidenced by color, shape, size or markings, apart from any other representations, packaging or advertisements, would lead a reasonable person to believe that the substance is an over-the-counter drug."

A.R.S. § 13-3451(7) defines "manufacture" as "the production, preparation, compounding, processing, encapsulating, packaging or repackaging, or labeling or relabeling

of an imitation controlled substance, imitation prescription-only drug or imitation over-the-counter drug."

A special verdict form may be needed if there is an allegation that the defendant was eighteen years of age or older and distributed or intended to distribute the imitation substance to a person under the age of eighteen. If proven, this changes the classification of the offense. A.R.S. § 13-3455(D).

CHAPTER 35

35.01(1) – Definition of "Harmful to Minors"

"Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual activity, sexual conduct, sexual excitement, or sadomasochistic abuse, when both:

(a) To the average adult applying contemporary state standards with respect to what is suitable for minors, it both:

(i) Appeals to the prurient interest, when taken as a whole. In order for an item as a whole to be found or intended to have an appeal to the prurient interest, it is not necessary that the item be successful in arousing or exciting any particular form of prurient interest either in the hypothetical average person, in a member of its intended and probable recipient group or in the trier of fact.

(ii) Portrays the description or representation in a patently offensive way.

(b) Taken as a whole does not have serious literary, artistic, political, or scientific value for minors.

35.01(2) – Definition of "Item"

"Item" means any material or performance which depicts or describes sexual activity and includes any book, leaflet, pamphlet, magazine, booklet, picture, drawing, photograph, film, negative, slide, motion picture, figure, object, article, novelty device, recording, transcription, live or recorded telephone message or other similar items whether tangible or intangible and including any performance, exhibition, transmission or dissemination of any of the above. An item also includes a live performance or exhibition, which depicts sexual activity to the public or an audience of one or more persons. An item is obscene when all of the following apply:

(a) The average person, applying contemporary state standards, would find that the item, taken as a whole, appeals to the prurient interest. In order for an item as a whole to be found or intended to have an appeal to the prurient interest, it is not necessary that the item be successful in arousing or exciting any particular form of prurient interest either in the hypothetical average person, in a member of its intended and probable recipient group or in the trier of fact.

(b) The average person, applying contemporary state standards, would find that the item depicts or describes, in a patently offensive way, sexual activity as that term is described in this section.

(c) The item, taken as a whole, lacks serious literary, artistic, political or scientific value.

35.01(3) – Definition of "Knowledge of the Character"

"Knowledge of the character" means having general knowledge or awareness, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of that which is reasonably susceptible to examination by the defendant both:

(a) That the item contains, depicts or describes nudity, sexual activity, sexual conduct, sexual excitement or sadomasochistic abuse, whichever is applicable, whether or not there is actual knowledge of the specific contents thereof. This knowledge can be proven by direct or circumstantial evidence, or both.

(b) If relevant to a prosecution for violating §§ 13-3506, 13-3506.01 or 13-3507, the age of the minor, provided that an honest mistake shall constitute an excuse from liability under this chapter if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.

35.01(4) – Definition of "Nudity"

"Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

35.01(5) – Definition of "Sadomasochistic Abuse"

"Sadomasochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed, for the purpose or in the context of sexual gratification or abuse.

35.01(6) – Sexual Activity

"Sexual activity" means:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representations or descriptions of masturbation, excretory functions, sadomasochistic abuse and lewd exhibition of the genitals.

35.01(7) – Definition of "Sexual Conduct"

"Sexual conduct" means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person is a female, breast.

USE NOTE: The definition of "sexual conduct" in Chapter 35 should be used only for offenses in Chapter 35 and not Chapter 35.1 offenses because Chapter 35.1 has its own definition of "sexual conduct." *See State v. Yegan*, 223 Ariz. 213 (App. 2009).

35.01(8) – Definition of "Sexual Excitement"

"Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

35.01(9) – Definition of "Ultimate Sexual Acts"

"Ultimate sexual acts" means [vaginal sexual intercourse] [anal sexual intercourse] [fellatio] [cunnilingus] [bestiality] [sodomy]. A sexual act is simulated when it depicts explicit sexual activity which gives the appearance of consummation of ultimate sexual acts.

35.01(10) – Definition of "Prurient"

"Prurient" means an unwholesome, morbid, degrading, or shameful interest in sex."

SOURCE: A.R.S. § 13-3501 (statutory language as of August 9, 2001); *State v. Bauer*, 159 Ariz. 443, 446 (App. 1988) (for definition of "prurient.")

USE NOTE: The definitions contain words, such as "flagellation," "fettered," "fellatio," and "cunnilingus" for example, that may not be familiar to the average juror. To prevent jurors from violating the admonition by consulting a dictionary on their own and to make the instructions more understandable, the court may wish to consider substituting a dictionary definition for these uncommon terms after consulting with the parties. The trial court has broad discretion in assisting jurors so long as the rights of the parties are not prejudiced. *State v. Patterson*, 203 Ariz. 513 (App. 2002).

"Sexual intercourse" is defined in A.R.S. § 13-1401(3) (Statutory Definition Instruction 14.01.03).

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

The legislature has used "contemporary state standard" as the test. The United States Supreme Court has used "community standard" as part of the test in determining whether the material is protected by the First Amendment. For example, *see Ashcroft v. American Civil Liberties Union*, 535 U.S. 564 (2002) and *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004). In *State v. Lichon***,** 163 Ariz. 186, 190 (App. 1989), the court discussed how a juror is entitled to determine the standard. The court wrote:

> In *Hamling v. United States,* 418 U.S. 87, 104-05, 94 S. Ct. 2887, 2901, 41 L. Ed. 2d 590, 613 (1974), the United States Supreme Court held that a juror could draw upon "his own knowledge of the views of the average person in the community or vicinage from which he comes" in determining what the community standard is. *Id.,* 418 U.S. at 104, 94 S. Ct. at 2901. The court in

> *Hamling* was dealing with the question of whether the standard should be nationwide, and was not called upon to consider how a jury should assess a statewide standard. Based upon the general proposition quoted from *Hamling* and upon our supreme court's decision in *State v. Bartanen,* 121 Ariz. 454, *cert. denied,* 444 U.S. 884, 100 S. Ct. 174, 62 L. Ed. 2d 113 (1979), in which it was noted that as a practical matter jurors, in considering the state standard, would resort to their knowledge of how people in their own communities felt on the issue, we believe that a juror may consider, as *a* factor, the views of the average person in the juror's community in arriving at an assessment of the statewide standard.

35.02 – Production, Publication, Sale, Possession, or Presentation of Obscene Items

The crime of [production] [publication] [sale] [possession] [presentation] of obscene items requires proof that the defendant, with knowledge of the character of the item involved, knowingly:

[printed, copied, manufactured, prepared, produced, or reproduced any obscene item for purposes of sale or commercial distribution.]

[published, sold, rented, lent, transported or transmitted in intrastate commerce, imported, sent or caused to be sent into this state for sale or commercial distribution, or commercially distributed or exhibited any obscene item, or offered to do any such things.]

[possessed any obscene item with the intent to sell, rent, lend, transport, or commercially distribute.]

[presented or participated in presenting the live, recorded or exhibited performance of any obscene item to the public or an audience for consideration or commercial purpose.]

SOURCE: A.R.S. § 13-3502 (statutory language as of 1986).

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

The court shall instruct on the culpable mental state.

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

"Item," "knowledge of the character," "nudity," "sexual activity," "sexual conduct," "sexual excitement," "sadomasochistic abuse" are defined in A.R.S. § 13-3501 (Statutory Criminal Instructions 35.01(2) through 35.01(8).

"Prurient" is defined in Statutory Criminal Instruction 35.01(10).

35.04 – Coercing Acceptance of Obscene Articles or Publications

The crime of coercing acceptance of obscene articles or publications requires proof that the defendant:

[as a condition to any sale, allocation, consignment or delivery for resale of any paper, magazine, book, periodical, or publication, required that the purchaser or consignee receive for resale any other item, article, book or other publication which is obscene.]

[denied or threatened to deny any franchise or imposed or threatened to impose any penalty, financial or otherwise, by reason of the failure or refusal of any person to accept such items, articles, books, or publications, or by reason of the return thereof.]

SOURCE: A.R.S. § 13-3504 (statutory language as of October 1, 1978).

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

The definition of "obscene" is contained within the definition of "item" in Statutory Criminal Instruction 35.01(2).

35.06 – Furnishing Harmful Items to Minors

The crime of furnishing harmful items to minors requires proof that the defendant, with knowledge of the character of the item involved, recklessly [furnished] [presented] [provided] [made available] [gave] [lent] [showed] [advertised] [distributed] to minors any item that is harmful to minors.

SOURCE: A.R.S. § 13-3506 (statutory language as of August 9, 2001).

USE NOTE: This section does not apply to the transmission or sending of items over the internet. A.R.S. § 13-3506(B).

Use language in brackets as appropriate to the facts.

The court shall instruct on the culpable mental state.

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

"Knowledge of the character" is defined in Statutory Criminal Instruction 35.01(3).

"Harmful to minors," "item," "nudity," "sexual activity," "sexual conduct," "sexual excitement," "sadomasochistic abuse" are defined in A.R.S. § 13-3501 (Statutory Criminal Instruction 35.01(1) through 35.01(8)).

"'Prurient' is defined in Statutory Criminal Instruction 35.01(10).

35.061 – Furnishing Harmful Items to Minors (Internet Activity) – Deleted

Users are advised that a permanent injunction was entered against enforcement of A.R.S. 13-3506.01 in *American Civil Liberties Union v. Goddard,* No. CIV.00-505 TUC ACM, 2004 WL 3770439 (D. Ariz. Apr. 23, 2004)

35.07 – Public Display of Explicit Sexual Materials

The crime of public display of explicit sexual materials requires proof that the defendant knowingly [placed explicit material upon public display] [failed to take prompt action to

remove a display of explicit sexual materials from property in (his) (her) possession or under (his) (her) control after learning of its existence].

"Explicit sexual material" means any drawing, photograph, film negative, motion picture, figure, object, novelty device, recording, transcription or any book, leaflet, pamphlet, magazine, booklet or other item, the cover or contents of which depicts human genitalia or depicts or verbally describes nudity, sexual activity, sexual conduct, sexual excitement or sadomasochistic abuse in a way which is harmful to minors. Explicit sexual material does not include any depiction or description which, taken in context, possesses serious educational value for minors or which possesses serious literary, artistic, political or scientific value.

"Public display" means the placing of material on or in a billboard, viewing screen, theater marquee, newsstand, display rack, vending machine, window, showcase, display case or similar place so that the explicit sexual material is easily visible or readily accessible from a public thoroughfare, from the property of others, or in any place where minors are invited as part of the general public.

SOURCE: A.R.S. § 13-3507 (statutory language as of 1986).

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

The court shall instruct on the culpable mental state.

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

"Harmful to minors," "item," "nudity," "sexual activity," sexual conduct," "sexual excitement," and "sadomasochistic abuse" are defined in A.R.S. § 13-3501 (Statutory Criminal Instruction 35.01(1) through 35.01(8)).

"Prurient" is defined in Statutory Criminal Instruction 35.01(10).

35.09 – Duty to Report

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

1. was asked to record, film, photograph, develop or duplicate any visual or print medium depicting sexual activity, whether or not the defendant was compensated; *and*
2. knowingly failed to immediately report, or cause a report to be made, of such request to a municipal or county peace officer.

SOURCE: A.R.S. § 13-3509 (statutory language as of 1986).

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)).

"Peace officer" is defined in A.R.S. § 13-105 (Statutory Criminal Instruction 1.0529).

"Sexual activity" is defined in A.R.S. § 13-3501 (Statutory Criminal Instruction 35.01(6).

35.12 – Obscene or Indecent Telephone Communications to Minors for Commercial Purposes

The crime of obscene or indecent telephone communications to minors for commercial purposes requires proof that the defendant knowingly made by means of a telephone, directly or by way of a recording device, any obscene or indecent communication for commercial purposes to any person under the age of eighteen years.

The communication is unlawful regardless of whether the maker of the communication placed the call.

SOURCE: A.R.S. § 13-3512 (statutory language as of June 6, 1988).

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

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

The definition of "obscene" is contained within the definition of "item" in Statutory Criminal Instruction 35.01(2).

35.13 – Sale or Distribution of Material Harmful to Minors through Vending Machines

The crime of sale or distribution of material harmful to minors through vending machines requires proof that the defendant knowingly [displayed] [sold] [offered to sell] in any [coin-operated] [slug-operated] [mechanically-controlled] [electronically-controlled] vending machine that was located in a public place, other than a public place from which minors are excluded, any material that is harmful to minors.

SOURCE: A.R.S. § 13-3513 (statutory language as of July 21, 1997).

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

The court shall instruct on the culpable mental state.

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

"Harmful to minors," "item," "internet," "internet web site," "nudity," "sexual activity," "sexual conduct," "sexual excitement" and "sadomasochistic abuse" are defined in A.R.S. § 13-3501 (Statutory Criminal Instruction 35.01(1) through 35.01(8)).

"Minor" means a person under the age of eighteen years. A.R.S. § 1-215.

35.131 – Defenses to Sale or Distribution of Material Harmful to Minors through Vending Machines

It is a defense to sale or distribution of material harmful to minors through vending machines that the defendant has taken reasonable steps to ascertain that the person is eighteen years of age or older and has taken either of the following measures to restrict access to the material that is harmful to minors:

1. Required the person receiving the material that is harmful to minors to use an authorized access or identification card to use the vending machine and has established a procedure to immediately cancel the card of any person after receiving notice that the card has been lost, stolen or used by persons under eighteen years of age or that the card is no longer desired; *or*
2. Required the person receiving the material that is harmful to minors to use a token in order to use the vending machine.

SOURCE: A.R.S. § 13-3513(B) (statutory language as of July 21, 1997).

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CHAPTER 35.1

35.51(1) – Definition of "Advertising"

"Advertising" or "advertisement" means any message in any medium that offers or solicits any person to engage in sexual conduct in this state.

35.51(2) – Definition of "Communication Service Provider"

"Communication service provider" means any person who is engaged in providing a service that allows its users to send or receive oral, wire or electronic communications or computer services.

35.51(3) – Definition of "Computer"

"Computer" means an electronic device that performs logic, arithmetic or memory functions by the manipulations of electronic or magnetic impulses and includes all input, output, processing, storage, software or communication facilities that are connected or related to such a device in a system or network.

35.51(4) – Definition of "Computer System"

"Computer system" means a set of related, connected or unconnected computer equipment, devices and software, including storage, media and peripheral devices.

35.51(5) – Definition of "Exploitive Exhibition"

"Exploitive exhibition" means the actual or simulated exhibition of the genitals or pubic or rectal areas of any person for the purpose of sexual stimulation of the viewer.

35.51(6) – Definition of "Minor"

"Minor" means a person or persons who were under eighteen years of age at the time a visual depiction was created, adapted or modified.

35.51(7) – Definition of "Network"

"Network" includes a complex of interconnected computer or communication systems of any type.

35.51(8) – Definition of "Producing"

"Producing" means financing, directing, manufacturing, issuing, publishing or advertising for pecuniary gain.

35.51(9) – Definition of "Remote Computing Service"

"Remote computing service" means providing to the public any computer storage or processing services by means of an electronic communication system.

35.51(10) – Definition of "Sexual Conduct"

"Sexual conduct" means actual or simulated:

(a) Sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, whether between persons of the same or opposite sex.

(b) Penetration of the vagina or rectum by any object except when done as part of a recognized medical procedure.

(c) Sexual bestiality.

(d) Masturbation, for the purpose of sexual stimulation of the viewer.

(e) Sadomasochistic abuse for the purpose of sexual stimulation of the viewer.

(f) Defecation or urination for the purpose of sexual stimulation of the viewer.

35.51(11) – Definition of "Simulated"

"Simulated" means any depicting of the genitals or rectal areas that gives the appearance of sexual conduct or incipient sexual conduct.

35.51(12) – Definition of "Visual Depiction"

"Visual depiction" includes each visual image that is contained in an undeveloped film, videotape or photograph or data stored in any form and that is capable of conversion into a visual image.

SOURCE: A.R.S. §§ 13-3551 (statutory language as of July 24, 2014), 13-2301 and 13-3001 (statutory language as of August 22, 2002).

USE NOTE: Refer to Chapters 14 and 35 for additional definitions.

35.52 – Commercial Sexual Exploitation of a Minor

The crime of commercial sexual exploitation of a minor requires proof that the defendant knowingly:

[used, employed, persuaded, enticed, induced, or coerced a minor to engage in or assist others to engage in exploitive exhibition or other sexual conduct for the purpose of producing any visual depiction or live act depicting such conduct.]

[used, employed, persuaded, enticed, induced, or coerced a minor to expose the genitals or anus or the areola or nipple of the female breast for financial or commercial gain.]

[permitted a minor under the person's custody or control to engage in or assist others to engage in exploitive exhibition or other sexual conduct for the purpose of producing any visual depiction or live act depicting such conduct.]

[transported or financed the transportation of any minor through or across this state with the intent that the minor engage in prostitution, exploitive exhibition or other sexual conduct for the purpose of producing a visual depiction or live act depicting such conduct.]

[used an advertisement for prostitution that contains visual depiction of a minor.]

SOURCE: A.R.S. § 13-3552 (statutory language as of July 24, 2014).

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

"Used an advertisement for prostitution that contains visual depiction of a minor" does not apply to an act that is prohibited by A.R.S. § 13-3555 or to websites or internet service providers that host advertisements created and published by third parties and do not participate in the creating or publishing the advertisements.

"Exploitive exhibition," "minor," "producing," "sexual conduct," "simulated" and "visual depiction" are defined in A.R.S. § 13-3551 (Statutory Criminal Instructions 35.51(4) *et seq.*).

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), *vacated in part on other grounds*, 176 Ariz. 114 (1993) (rejecting the notion "that the distance traveled is immaterial" and noting that 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 violating this statute in general 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.

The Committee thus recommends that the following verdict form be added:

> If and only if you find that [insert name of defendant] is guilty of the crime of Commercial Sexual Exploitation of a Minor, then and only then, you must answer the following question by the checking the appropriate box:
>
> We the jury, duly sworn and impaneled and upon our oaths, do find that the minor is under fifteen years of age:
>
> _____ Proven beyond a reasonable doubt.
>
> _____ Not proven.

35.53 – Sexual Exploitation of a Minor

The crime of sexual exploitation of a minor requires proof that the defendant knowingly:

[(recorded) (filmed) (photographed) (developed) (duplicated) any visual depiction in which a minor was engaged in exploitive exhibition or other sexual conduct.]

[(distributed) (transported) (exhibited) (received) (sold) (purchased) (electronically transmitted) (possessed) (exchanged) any visual depiction in which a minor was engaged in exploitive exhibition or other sexual conduct.]

SOURCE: A.R.S. § 13-3553 (statutory language as of August 9, 2001).

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

The court shall instruct on the culpable mental states.

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

"Exploitive exhibition," "minor," "producing," "sexual conduct," "simulated" and "visual depiction" are defined in A.R.S. § 13-3551 (Statutory Criminal Instructions 35.51(4) *et seq.*).

COMMENT: 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 violating this statute in general 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.

The Committee thus recommends that the following verdict form be added:

> If and only if you find that [insert name of defendant] is guilty of the crime of Sexual Exploitation of a Minor, then and only then, you must answer the following question by the checking the appropriate box:
>
> We the jury, duly sworn and impaneled and upon our oaths, do find that the minor is under fifteen years of age (check only one):
>
> _____ Proven beyond a reasonable doubt.
>
> _____ Not proven.

35.54 – Luring a Minor for Sexual Exploitation

The crime of luring a minor for sexual exploitation requires proof that the defendant:

1. offered or solicited sexual conduct with another person; *and*
2. knew or had reason to know that the other person was a minor.

[It is not a defense that the other person was an adult posing as a minor.]

SOURCE: A.R.S. § 13-3554 (statutory language as of June 13, 2007).

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

"Knowingly" and "peace officer" are defined in A.R.S. § 13-105 (Statutory Criminal Instructions 1.0510(b)(1) and 1.0529).

"Minor," "sexual conduct" and "simulated" are defined in A.R.S. § 13-3551 (Statutory Criminal Instructions 35.51(5), 35.51(9) and 35.51(10)).

COMMENT: The statute previously provided that it was not a defense if the other person was a police officer posing as a minor. *See Mejak v. Granville*, 212 Ariz. 555 (2006), where the court held that the crime of "luring a minor" for sexual conduct was not committed where the "minor" was an adult, non-police officer posing as a minor, but the defendant could be held responsible for an attempt. The statute was amended to encompass any adult, not just a police officer, posing as a minor. A.R.S. § 13-3554(B). The amendment provides that "it is not a defense to this crime that the other person was not a minor."

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 violating this statute in general 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.

The Committee thus recommends that the following verdict form be added:

> If and only if you find that [insert name of defendant] is guilty of the crime of Luring a Minor for Sexual Exploitation, then and only then, you must answer the following question by the checking the appropriate box (check only one):
>
> We the jury, duly sworn and impaneled and upon our oaths, do find that the minor is under fifteen years of age:
>
> _____ Proven beyond a reasonable doubt.
>
> _____ Not proven.

35.56 – Permissible Inference

Users are advised that the permissible inference section in A.R.S. § 13-3556 was struck down as overbroad in *State v. Hazlett,* 205 Ariz. 523 (App. 2003).

35.58 – Admitting Minors to Public Displays of Sexual Conduct

The crime of admitting minors to public displays of sexual conduct requires proof that the defendant:

1. was an [owner] [operator] [employee] of a business establishment where persons, in the course of their employment, exposed their genitals, anus, areola or nipple of the female breast; *and*
2. admitted a child under the age of eighteen to the establishment.

An (owner) (operator) (employee) is deemed to have knowledge of the person's age if the (owner) (operator) (employee) admitted a person to the establishment without evidence of the person's age by:

1. an unexpired driver license issued by any state or Canada if the license includes a picture of the licensee; *or*

2. a nonoperating identification license issued by the State of Arizona or an equivalent form of identification license issued by any state or Canada if the license includes a picture of the person and the person's date of birth; *or*
3. an armed forces identification card; *or*
4. a valid unexpired passport or border crossing identification card which is issued by a government or voter card issued by the government of Mexico and which contains a photograph of the person and the person's date of birth.

SOURCE: A.R.S. §§ 13-3558 (statutory language as of July 18, 2000) and 4-241 (statutory language as of August 12, 2005).

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

35.59 – Defense to Sexual Exploitation of a Minor

It is a defense to the crime of sexual exploitation of a minor that on discovery of the unsolicited suspected visual depictions involving the sexual exploitation of a minor the defendant in good faith reported the discovery of the material.

SOURCE: A.R.S. § 13-3559 (statutory language as of July 18, 2000).

USE NOTE: The statute provides that this is an "affirmative" defense.

COMMENT: The statute is unclear regarding to whom the report must be made in order to avoid criminal liability.

35.60 – Aggravated Luring a Minor for Sexual Exploitation

The crime of "aggravated luring a minor for sexual exploitation" requires proof that the defendant:

1. used an electronic communication device to transmit at least one visual depiction of material that was harmful to minors for the purpose of initiating or engaging in communication with a recipient who the defendant knew or had reason to know was a minor; *and*
2. knew the character and content of the material transmitted; *and*
3. by means of the communication, offered or solicited sexual conduct with the minor. The offer or solicitation may have occurred before, contemporaneously with, after or as an integrated part of the transmission of the visual depiction.

An "electronic communication device" means any electronic device that is capable of transmitting visual depictions and includes a computer, computer system, computer network, cellular telephone or wireless telephone.

"Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual activity, sexual conduct, sexual excitement, or sadomasochistic abuse, when both:

a. to the average adult applying contemporary state standards with respect to what is suitable for minors, it both:

   i. appeals to the prurient interest, when taken as a whole. In order for an item as a whole to be found or intended to have an appeal to the prurient interest, it is not necessary that the item be successful in arousing or exciting any particular form of prurient interest either in the hypothetical average person, in a member of its intended and probable recipient group or in the trier of fact.

   ii. portrays the description or representation in a patently offensive way.

b. taken as a whole does not have serious literary, artistic, political, or scientific value for minors.

"Knowledge of the character" means having general knowledge or awareness, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of that which is reasonably susceptible to examination by the defendant that the item contains, depicts or describes [nudity] [sexual activity] [sexual conduct] [sexual excitement] [sadomasochistic abuse], whether or not there is actual knowledge of the specific contents thereof. This knowledge can be proven by direct or circumstantial evidence, or both.

["Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.]

["Sadomasochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed, for the purpose or in the context of sexual gratification or abuse.]

["Sexual activity" means patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated or patently offensive representations or descriptions of masturbation, excretory functions, sadomasochistic abuse and lewd exhibition of the genitals.]

["Sexual conduct" means actual or simulated:

(a) Sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, whether between persons of the same or opposite sex.

(b) Penetration of the vagina or rectum by any object except when done as part of a recognized medical procedure.

(c) Sexual bestiality.

(d) Masturbation, for the purpose of sexual stimulation of the viewer.

(e) Sadomasochistic abuse for the purpose of sexual stimulation of the viewer.

(f) Defecation or urination for the purpose of sexual stimulation of the viewer.]

['Sexual excitement' means the condition of human male or female genitals when in a state of sexual stimulation or arousal.]

["Ultimate sexual acts" means sexual intercourse, vaginal or anal, fellatio, cunnilingus, bestiality or sodomy. A sexual act is simulated when it depicts explicit sexual activity which gives the appearance of consummation of ultimate sexual acts.]

SOURCE: A.R.S. §§ 13-3560 (statutory language as of September 26, 2008); 13-3501 (statutory language as of August 9, 2001).

USE NOTE: Use bracketed language as appropriate to the case.

The court shall instruct on the culpable mental state. Use Statutory Criminal Instruction 1.0510(b) defining "knowingly."

If needed, use definition of "computer" in Statutory Criminal Instruction 23.01.E.05 or "computer network" in Statutory Criminal Instruction 23.01.E.11. "Cellular telephone" and "wireless telephone" are defined in A.R.S. § 13-4801.

It is not a defense that the recipient was not a minor.

If the minor is under the age of fifteen, the offense is punishable pursuant to A.R.S. § 13-705 as a dangerous crime against children. Therefore, pursuant to *Blakely v. Washington*, 542 U.S. 296 (2004), and its progeny, the trial judge should instruct the jury to determine the minor's age. The following verdict form is suggested:

> We the jury, duly empanelled and sworn in the above entitled action, and upon our oaths, do find the Defendant, [insert defendant's name], on the charge of 'aggravated luring a minor for sexual exploitation' as follows (check only one):
>
> ____ Not Guilty
>
> ____ Guilty

[Complete this portion of the verdict form only if you find the defendant "guilty" of "aggravated luring a minor for sexual exploitation."]

> We the jury find that on the date of the offense, the recipient was (check only one):
>
> ____ under fifteen years of age.
>
> ____ was at least fifteen years of age, but under eighteen years of age.
>
> Signed: _____
>
> Foreman (Juror # _____)
>
> Foreman (please print name): _____

COMMENT: The statute previously provided that it was not a defense if the other person was a police officer posing as a minor. *See Mejak v. Granville*, 212 Ariz. 555 (2006), where the court held that the crime of 'luring a minor' for sexual conduct was not committed where the "minor" was an adult, non-police officer posing as a minor, but the defendant could be held responsible for an attempt. The statute was amended to encompass any adult, not just a police officer, posing as a minor. A.R.S. § 13-3554(B). The amendment provides that "it is not a defense to this crime that the other person was not a minor."

35.61 – Unlawful Age Misrepresentation

The crime of "unlawful age misrepresentation" requires proof that

1. The defendant was at least eighteen years of age; *and*

2. The defendant used an electronic communication device to knowingly misrepresent the defendant's age for the purpose of committing [insert name of sexual offense listed in § 13-3821(A)] involving the recipient; *and*
3. The defendant knew or had reason to know that the recipient was a minor.

An "electronic communication device" means any electronic device that is capable of transmitting visual depictions and includes a computer, computer system, computer network, cellular telephone or wireless telephone.

SOURCE: A.R.S. § 13-3561 (statutory language as of December 31, 2008).

USE NOTE: Use bracketed language as appropriate to the facts of the case.

The court shall instruct on the culpable mental state. Use Statutory Criminal Instruction 1.0510(b) defining "knowingly."

If needed, use definition of "computer" in Statutory Criminal Instruction 23.01.E.05 or "computer network" in Statutory Criminal Instruction 23.01.E.11. "Cellular telephone" and "wireless telephone" are defined in A.R.S. § 13-4801.

It is not a defense that the recipient was not a minor.

If the minor is under the age of fifteen, the offense is punishable pursuant to A.R.S. § 13-705 as a dangerous crime against children. Therefore, it may be necessary for the jury to make a finding regarding the age of the recipient. The following verdict form is suggested:

> We the jury, duly empanelled and sworn in the above entitled action, and upon our oaths, do find the Defendant, [insert defendant's name], on the charge of 'unlawful age misrepresentation' as follows (check only one):
>
> ____ Not Guilty
>
> ____ Guilty

[Complete this portion of the verdict form only if you find the defendant "guilty" of "unlawful age misrepresentation."]

> We the jury find that on the date of the offense, the recipient was (check only one):
>
> ____ under fifteen years of age.
>
> ____ was at least fifteen years of age, but under eighteen years of age.

Signed: _____

Foreman (Juror # _____)

Foreman (please print name): _____

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.

CHAPTER 37

37.01(A)(1) – Unlawful Use of Food Stamps

The crime of unlawful use of food stamps requires proof that the defendant:

1. knowingly [(used) (transferred) (acquired) (possessed) (redeemed)] food stamps; *and*
2. did so by means of a [(false statement or representation) (material omission) (failure to disclose a change in circumstances) (fraudulent device)]; *and*
3. knew that the [(use) (transfer) (acquisition) (possession) (redemption)] of the food stamps was not authorized.

"Food stamps" means food stamp coupons or electronically transferred food stamp supplemental nutrition assistance program benefits.

SOURCE: A.R.S. § 13-3701(A)(1) (statutory language as of August 6, 2016).

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

The court shall instruct on the culpable mental state.

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

"Possess" is defined in A.R.S. § 13-105 (Statutory Criminal Instruction 1.0534).

The verdict must include a value finding in order to determine the class of the offense. Therefore, the following section should be included in the standard "guilty/not guilty" verdict form:

> [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 defendant received the following: (check only one)
>
> _____ More than $100
>
> _____ $100 or less

37.01(A)(2) – Unlawful Use of Counterfeit Food Stamps

The crime of unlawful use of counterfeit food stamps requires proof that the defendant knowingly:

[(counterfeited) (altered)] (food stamps) (electronic benefit transfer cards)].

or

[(used) (transferred) (acquired) (possessed)] [(counterfeited) (altered)] [(food stamps) (electronic benefit transfer cards)] that the defendant knew were [altered] [counterfeited].

"Food stamps" means food stamp coupons or electronically transferred food stamp program benefits.

SOURCE: A.R.S. § 13-3701(A)(2) (statutory language as of July 21, 1997).

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

The court shall instruct on the culpable mental state.

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

"Possess" is defined in A.R.S. § 13-105 (Statutory Criminal Instruction 1.0534).

COMMENT: The Committee added the nonstatutory phrase "that the defendant knew were altered or counterfeited" to clarify that this is not a strict liability offense.

37.01(A)(3) – Unlawful Appropriation of Food Stamps

The crime of unlawful appropriation of food stamps requires proof that the defendant:

1. [was entrusted with] [gained possession of] food stamps by virtue of the defendant's position as a public employee; *and*
2. knowingly appropriated the food stamps.

"Food stamps" means food stamp coupons or electronically transferred food stamp program benefits.

SOURCE: A.R.S. § 13-3701(A)(3) (statutory language as of July 21, 1997.)

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

The court shall instruct on the culpable mental state.

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

"Possession" is defined in A.R.S. § 13-105 (Statutory Criminal Instruction 1.0535).

37.01(A)(4) – Unlawful Use of Food Stamps

The crime of unlawful use of food stamps requires proof that the defendant knowingly bought, sold, transferred, acquired or redeemed food stamps, or eligible food purchased with food stamps, in exchange for cash or consideration other than eligible food.

"Food stamps" means food stamp coupons or electronically transferred supplemental nutrition assistance program benefits.

SOURCE: A.R.S. § 13-3701(A)(4) (Statutory language as of August 6, 2016).

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)).

"Unlawful" is defined in A.R.S. § 13-105 (Statutory Criminal Instruction 1.0540).

37.02.01 – Unlawful Excavating

The crime of unlawful excavating requires proof that, without obtaining a permit to do so, the defendant:

1. knowingly excavated in or on [(any historic or prehistoric ruin) (a burial ground) (an archaeological or vertebrate paleontological site) (a site with fossilized footprints) (a site with man-made inscriptions or any other archaeological, paleontological or historical feature)]; *and*
2. the excavation site was on lands owned or controlled by the State of Arizona or one of its agencies.

SOURCE: A.R.S. § 1-3702.01(A) (statutory language as of July 25, 1981).

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

The court shall instruct on the culpable mental state.

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

A.R.S. § 41-842 states the permit requirements.

A.R.S. § 41-841 describes the types of proscribed excavations. There is an exception for "a duly authorized agent of an institution or corporation" listed in § 41-842.

37.04(A)(1) and (2) – Adding Poison to Food, Drink or Medicine

The crime of adding poison to food, drink or medicine requires proof that the defendant, with the intent to harm another human being, knowingly [introduced] [added] [mingled] any [poison] [bacterium] [virus] [chemical compound] with any [(spring) (well) (reservoir of water) (food) (drink) (medicine)] to be [(taken by a human being) (applied to the body)].

SOURCE: A.R.S. § 13-3704(A)(1) and (2) (statutory language as of August 22, 2002).

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

The court shall instruct on the culpable mental state.

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

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

37.04(A)(3) – Adding Harmful Substance to Food, Drink or Medicine

The crime of adding a harmful substance to food drink or medicine requires proof that the defendant, with the intent to harm another human being, knowingly placed a [(needle) (razor) (any harmful object or substance)] in any [(food) (water) (medicine)] and the [(food) (water) (medicine)] was to be taken by a human being.

SOURCE: A.R.S. § 13-3704(A)(3) (statutory language as of August 22, 2002).

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

The court shall instruct on the culpable mental state.

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

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

37.05(A)(1) and (2) – Unlawful Manufacturing or Distribution of Sounds or Images from Recording Devices

The crime of unlawful manufacturing or distribution of sounds or images from recording devices requires proof that the defendant knowingly [manufactured an article] [distributed an article knowing that the sounds on the article have been transferred] without the owner's consent and the article was based on a recording first fixed in a phonorecord before February 15, 1972.

"Article" means any phonograph record, disc, compact disc, tape, audio or video cassette, wire film or other tangible medium that can record original or duplicate sounds or images in whole or part.

"Phonorecord" means a material object containing sound recordings from which the sounds can be perceived, reproduced or otherwise communicated by any means. It does not include sounds that accompany a motion picture or other audiovisual work. It does include the material object in which the sound is first fixed.

SOURCE: A.R.S. §§ 13-3705(A)(1) and (2); 13-3705(C); 13-3705(G)(1) and (6) (statutory language as of September 27, 1990).

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

The court shall instruct on the culpable mental state.

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

"Distributing" is defined in A.R.S. § 13-3705(G)(2) (Statutory Criminal Instruction 37.05.02).

"Manufacturing" is defined in A.R.S. § 13-3705(G)(4) (Statutory Criminal Instruction 37.05.04).

"Owner" is defined in A.R.S. § 13-3705(G)(5) (Statutory Criminal Instruction 37.05.05).

Subsection A, paragraphs 1 and 2 of the statute only apply to recordings first fixed in a phonorecord before February 15, 1972. *See* A.R.S. § 13-3705(C).

There is an exception for radio and television broadcasting contained in A.R.S. § 13-3705(B).

37.05(A)(3) and (4) – Unlawfully Manufacturing or Distributing Transferred Sounds or Images Without Name of the Manufacturer

The crime of unlawfully manufacturing or distributing a transferred sound or image without the name of the manufacturer requires proof that the defendant knowingly [(distributed) (manufactured)] [(an article that has sounds or images transferred to it) (the outside packaging for an article)] that does not bear the manufacturer's true name and address in a prominent place on the outside box, cover or jacket.

SOURCE: A.R.S. § 13-3705(A) (3) and (4) (statutory language as of September 27, 1990).

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

The court shall instruct on the culpable mental state.

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

"Distributing" is defined in A.R.S. § 13-3705(G)(2) (Statutory Criminal Instruction 37.05.02).

"Manufacturing" is defined in A.R.S. § 13-3705(G)(4) (Statutory Criminal Instruction 37.05.04).

There is an exception for radio and television broadcasting contained in A.R.S. § 13-3705(B).

37.05(A)(5) – Unlawfully Transferring a Performance

The crime of unlawfully transferring a performance requires proof that the defendant, with intent to gain commercial advantage or personal financial gain, knowingly [transferred] [caused to be transferred] any performance, whether live before an audience or transmitted by wire or through the air by radio or television, to an article without the owner's consent to the transfer.

"Article" means any phonograph record, disc, compact disc, tape, audio or video cassette, wire film or other tangible medium that can record original or duplicate sounds or images in whole or part.

SOURCE: A.R.S. § 13-3705(A)(5) and (G)(1) (statutory language as of September 27, 1990).

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

The court shall instruct on the culpable mental state.

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

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

"Owner" is defined in A.R.S. § 13-3705(G)(5) (Statutory Criminal Instruction 37.05.05).

There is an exception for radio and television broadcasting contained in A.R.S. § 13-3705(B).

37.05(A)(6) – Unlawfully Distributing a Recorded Performance

The crime of unlawfully distributing a recorded performance requires proof that the defendant:

1. knowingly distributed an article; *and*
2. knew that article contained a performance, whether live before an audience or transmitted by wire or through the air by radio or television, that was transferred without the consent of the owner.

"Article" means any phonograph record, disc, compact disc, tape, audio or video cassette, wire film or other tangible medium that can record original or duplicate sounds or images in whole or part.

SOURCE: A.R.S. § 13-3705(A)(6) (statutory language as of September 27, 1990).

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

The court shall instruct on the culpable mental state.

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

The classification of the offense is determined by the number of recordings copied or sold. Therefore, the court should include as part of the standard "guilty/not guilty" verdict form, the interrogatory set forth below and use the sound recording or audiovisual recording portions as applicable to the case:

[Complete this portion of the verdict form only if you have found the defendant "guilty" of the charged offense.]

We, the jury, do find beyond a reasonable doubt that the offense involves:

_____ one thousand or more articles containing sound recordings.

_____ one hundred or more but less than one thousand articles containing sound recordings.

_____ less than one hundred articles containing sound recordings.

_____ one hundred or more audiovisual recordings.

_____ ten or more but less than one hundred audiovisual recordings.

_____ less than ten audiovisual recordings.

"Distributing" is defined in A.R.S. § 13-3705(G)(2) (Statutory Criminal Instruction 37.05.02).

"Owner" is defined in A.R.S. § 13-3705(G)(5) (Statutory Criminal Instruction 37.05.05).

There is an exception for radio and television broadcasting contained in A.R.S. § 13-3705(B).

37.05(B) – Defense to Offenses Under A.R.S. § 13-3705(A)

A person is not guilty of [insert name of offense charged under § 13-3705(A)] if the person:

1. was engaged in radio or television broadcasting; *and*
2. [transferred] [caused to be transferred] any sounds, other than a motion picture soundtrack, intended for, or in connection with, the broadcast transmission or related uses, or for archival purposes.

The defendant must prove this defense by a preponderance of the evidence. If you find that the defendant has proved this defense, you must find the defendant "not guilty" of the charged offense.

SOURCE: A.R.S. § 13-3705(B) (statutory language as of September 27, 1990).

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

37.05.01 – Article

"Article" means any phonograph record, disc, compact disc, tape, audio or video cassette, wire film or other tangible medium that can record original or duplicate sounds or images in whole or part.

37.05.02 – Distributing

"Distributing" means the actual, constructive or attempted sale, rental, delivery, possession, transportation, exhibition or advertisement of an article with intent to obtain commercial advantage or personal financial gain or to promote the sale of any goods.

37.05.04 – Manufacturing

"Manufacturing" means transferring or causing to be transferred any sounds or images recorded on one article to another article with the intent to distribute the article.

37.05.05 – Owner

"Owner" means the person who owns the original or master audio, video, or audiovisual recording from which the transferred recorded sounds are directly or indirectly derived, or who owns the rights to record or authorize the vending of a live performance.

37.05.06 – Phonorecord

"Phonorecord" means a material object containing sound recordings from which the sounds can be perceived, reproduced or otherwise communicated by any means. It does not include sounds that accompany a motion picture or other audiovisual work. It does include the material object in which the sound is first fixed.

SOURCE: A.R.S. § 13-3705(G) (statutory language as of September 27, 1990).

USE NOTE: The definition for "fixation of sounds" in A.R.S. § 13-3705(3) was not included because the term is not used in any of the felony offense instructions.

37.07(A)(1) – Telecommunication Fraud

The crime of telecommunications fraud requires proof that the defendant, with the intent to defraud another of the lawful charge for telecommunication service, obtained or attempted to obtain telecommunications service by:

[charging] [attempting to charge] [to an existing electronic mail address, telephone or credit card number without the authority of the lawful holder, subscriber or person to whom issued] [or] [to a nonexistent, counterfeit, revoked or canceled credit card number].

or

[any method of code calling.]

or

[installing, rearranging or tampering with any facility or equipment.]

or

[use of any fraudulent means, method, trick or device.]

["Credit card number" means the card number on a credit card, telephone calling card or access device that is issued to a person by any supplier of telecommunications service and that permits the person to whom the card or access device has been issued to obtain telecommunication service.]

"Telecommunication service" includes electronic communication services, subscription computer services, telephone and telegraph services and all other services that transmit information by wire, radio, cellular, wireless transmission or similar means.

SOURCE: A.R.S. § 13-3707(A)(1) and (E) (statutory language as of July 18, 2000).

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

The court shall instruct on the culpable mental state.

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

37.07(A)(2) – Telecommunication Fraud

The crime of telecommunication fraud requires proof that the defendant, with the intent that fraud be used or employed to evade a lawful telecommunication service charge, sold, rented, loaned, gave, transferred or disclosed, or attempted to transfer or disclose, or offered or advertized for sale or rent [the number or code of an existing, canceled, revoked or nonexistent telephone or credit card number, or an electronic mail address] [the numbering or coding system used to issue telephone or credit card numbers, or account identification codes].

"Credit card number" means the card number on a credit card, telephone calling card or access device that is issued to a person by any supplier of telecommunications service and that permits the person to whom the card or access device has been issued to obtain telecommunication service.

"Telecommunication service" includes electronic communication services, subscription computer services, telephone and telegraph services and all other services that transmit information by wire, radio, cellular, wireless transmission or similar means.

SOURCE: A.R.S. § 13-3707(A)(2) and (E) (statutory language as of July 18, 2000).

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

The court shall instruct on the culpable mental state.

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

37.07(A)(3) – Telecommunication Fraud

The crime of telecommunication fraud requires proof that the defendant knowingly made, constructed, manufactured, fabricated, erected, assembled or possessed any software, instrument, apparatus, equipment or device, or any part thereof, that is designed or adapted or that can be used to [obtain a telecommunication service by fraud in violation of (list specific provisions of A.R.S. § 13-3707(A) (1) that were allegedly violated)] [conceal the existence, place of origin or destination of a telecommunication from the provider or other lawful authority in order to obtain telecommunication service by fraud in violation of (list specific provisions of A.R.S. § 13-3707(A) (1) that were allegedly violated)].

"Telecommunication service" includes electronic communication services, subscription computer services, telephone and telegraph services and all other services that transmit information by wire, radio, cellular, wireless transmission or similar means that originates or terminates or both originates and terminates in this state.

SOURCE: A.R.S. § 13-3707(A)(3) and (C) (statutory language as of July 18, 2000).

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

The court shall instruct on the culpable mental state.

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

This subsection criminalizes making software, equipment or devices used to obtain telecommunication service by fraud "in violation of this subsection." Therefore, the particular subsections that the accused allegedly violated should be included where the parentheses indicate.

Telecommunication services are obtained by fraud if the person charges or attempts to charge the service to an account without the authority of the accountholder, charges or attempts to charge the service to a nonexistent or invalid account, uses any method of code calling, installs or tampers with a facility or equipment, or uses any other fraudulent means, method, trick or device.

There are two exceptions to this crime listed in A.R.S. § 13-3707(B).

37.07(A)(4) – Telecommunication Fraud

The crime of telecommunication fraud requires proof that the defendant knowingly sold, rented, loaned, gave, transferred, disclosed, or attempted to transfer or disclose to another, or offered or advertised for sale or rent, any

[software, instrument, apparatus, equipment or device that may be used to obtain telecommunication service by fraud (list specific subsection of A.R.S. § 13-3707(A)(1) that the accused allegedly violated) or that may be used to conceal the existence, place of origin or destination of a telecommunication from the provider or other lawful authority in order to obtain the telecommunication service by fraud (list specific subsection of A.R.S. § 13-3707(A)(1) involved)] *or*

[plans, specifications or instructions to make software or equipment, or any part thereof, with the intent to use it to obtain a telecommunication by (list specific subsection of A.R.S. § 13-3707(A)(1) involved) or with the intent to use it to conceal the existence or location of a telecommunication from the supplier or other lawful authority in order to obtain the service by (list specific subsection of A.R.S. § 13-3707(A)(1) involved)] *or*

[plans, specifications or instructions intending them for use to make software or equipment that is designed to obtain telecommunication service by fraud in violation of (list specific subsection of A.R.S. § 13-3707(A)(1) involved) or that may be used to conceal the existence or location of a telecommunication from the supplier or other lawful authority in order to obtain the service by (list specific subsection of A.R.S. § 13-3707(A)(3) involved)].

"Telecommunication service" includes electronic communication services, subscription computer services, telephone and telegraph services and all other services that transmit information by wire, radio, cellular, wireless transmission or similar means that originates or terminates or both originates and terminates in this state.

SOURCE: A.R.S. § 13-3707(A)(4) and (E)(2) (statutory language as of July 18, 2000).

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

The court shall instruct on the culpable mental state.

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

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

Section B of the statute exempts certain individuals from a violation of subsection (A)(3).

This subsection of the statute proscribes giving items or plans to others that allow them to obtain telecommunication services or conceal the existence or whereabouts of a telecommunication service from any lawful authority "by fraud in violation of this subsection." The fraudulent means appear in subsection (A)(1).

Telecommunication services are obtained by fraud if the person charges or attempts to charge the service to an account without the authority of the accountholder, charges or attempts to charge the service to a nonexistent or invalid account, uses any method of code

calling, installs or tampers with a facility or equipment, or uses any other fraudulent means, method, trick or device.

Whether A.R.S. § 13-3707(4)(b) and (c) state separate crimes is unclear. There is a question whether A.R.S. § 13-3707(4)(c) actually states a crime because the "such software" language in (c) is vague. If the "such software" language implies a reference back to 4(a) and (b), then it would state a crime.

37.09 – Manufacture, Sale, or Distribution of Unauthorized Decoding Device

The crime of manufacturing, distributing or selling unauthorized decoding devices requires proof that the defendant:

1. (manufactured) (distributed) (sold) (rented) (loaned) (offered for sale, rent or use) (advertised for sale, rent or use); *and*
2. any device that the defendant intended for another person to use to obtain services that are provided over or by a licensed cable television system; *and*
3. without payment for those services.

"Device" includes any component or combination of components capable of converting a scrambled or coded cable television signal to a signal usable on a standard television receiver.

SOURCE: A.R.S. § 13-3709(B) and (F) (statutory language as of July 21, 1997).

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

The court shall instruct on the culpable mental state.

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

Subsection (C) contains a rebuttable inference regarding intent. *See* Statutory Criminal Instruction 37.09(C).

37.09(C) – Rebuttable Inference of Intent

Unless satisfactorily explained, you may infer that the defendant intended that the device be used by another person to obtain services from a licensed cable television system without payment if, while advertising, selling, renting or lending, the person states that the recipient of the device will be able to obtain cable television or other services without paying for them.

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

[In considering whether the alleged unlawful conduct has been satisfactorily explained, you are reminded that in the exercise of constitutional rights, a defendant need not testify.

The alleged unlawful conduct may be satisfactorily explained through other circumstances and other evidence, independent of any testimony by a defendant.]

SOURCE: A.R.S. § 13-3707(C) (statutory language as of July 21, 1997).

USE NOTE: The last paragraph is bracketed and should only be given if requested by the defendant.

It is important to caution the jury that the inference is not mandatory and that the jury must look at all the facts and circumstances of the case in deciding whether the inference should be applied. *State v. Mohr,* 150 Ariz. 564, 568-69 (App. 1986) (recommending that the language as contained in this instruction is preferable, because it expressly tells the jury that it is not compelled to draw the inference).

The use of the term "may give rise to an inference," which is contained in the text of this instruction, was specifically approved in *State v. Mohr,* 150 Ariz. at 569.

The bracketed paragraph pertaining to the defendant's constitutional right not to testify was specifically approved *verbatim* in *State v. Mohr,* 150 Ariz. at 568 (citing to *Barnes v. United States*, 412 U.S. 837, 843 (1973)).

37.13(A) – Consideration for Medical Referral

The crime of consideration for medical referral requires proof that the defendant knowingly offered, delivered, received or accepted any type of rebate, refund, commission, preference or other consideration as compensation for referring a patient, client or customer to any individual, pharmacy, laboratory, clinic or health-care institution that provides medical or health-related services.

SOURCE: A.R.S. § 13-3713(A) (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 Criminal Instruction 1.0510(b)).

It is a defense if the payments are from a medical researcher to a licensed physician in connection with identifying and monitoring patients for a clinical trial regulated by the United States Food and Drug Administration.

The verdict must include a value finding in order to determine the felony class. Therefore, the following section should be included in the standard "guilty/not guilty" verdict form:

> [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 defendant received the following: (check only one)
>
> _____ $1,000 or more
>
> _____ More than $100 but less than $1,000
>
> _____ $100 or less

37.13(B) – Fraudulently Obtaining Medical or Health Coverage

The crime of fraudulently obtaining medical or health coverage requires proof that the defendant knowingly:

1. sought health care through [the Arizona Health Care Cost Containment System] [a county authorized health care system]; *and*
2. [presented false information or misrepresented or concealed a material fact on an application for medical or health coverage] [failed to notify the county of residence of a change in a condition] that would have resulted in the termination of eligibility, or would have changed the eligibility status, for medical or health coverage.

SOURCE: A.R.S. § 13-3713(B) (statutory language as of August 25, 2004).

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

Use the bracketed language as appropriate to the facts.

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

The medical or health care coverage that is fraudulently obtained must be under the AHCCCS provisions found in Title 36, Chapter 29 or a county health care system under A.R.S. § 11-291.

37.13(C) – Fraudulently Obtaining Medical or Health Care Coverage by Use of False Identification

The crime of fraudulently obtaining medical or health care coverage by use of false identification requires proof that the defendant:

1. knowingly obtained or attempted to obtain medical or health-care coverage pursuant [to the Arizona Health Care Cost Containment System] [to a county authorized health care system]; *and*
2. by using any identification [that was not authorized by the Arizona Health Care Cost Containment System.] [that was authorized by the Arizona Health Care Cost Containment System, but was or would have been fraudulently obtained].

SOURCE: A.R.S. § 13-3713(C) (statutory language as of August 25, 2004).

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

Use the bracketed language as appropriate to the facts.

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

The verdict must include a value finding in order to determine the class of the offense. Therefore, the following section should be included in the standard "guilty/not guilty" verdict form:

> [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 defendant received the following: (check only one)

_____ $1,000 or more

_____ More than $100 but less than $1,000

_____ $100 or less

The medical or health care coverage that is fraudulently obtained must be under the AHCCCS provisions found in Title 36, Chapter 29 or a county health care system under A.R.S. § 11-291.

37.13(D) – Counterfeiting or Altering Identification for the Purposes of Fraudulently Obtaining Medical or Health Care Coverage

The crime of counterfeiting or altering identification for the purposes of fraudulently obtaining medical or health-care coverage requires proof that the defendant knowingly counterfeited or altered any means of identification or used, transferred, acquired or possessed counterfeited or altered identification for the purposes of fraudulently obtaining medical or health-care coverage provided pursuant [to the Arizona Health Care Cost Containment System.] [to a county authorized health care system.]

SOURCE: A.R.S. § 13-3713(D) (statutory language as of August 25, 2004).

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

The court shall instruct on the culpable mental state.

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

The medical or health care coverage that is fraudulently obtained must be under the AHCCCS provisions found in Title 36, Chapter 29 or a county health care system under A.R.S. § 11-291.

37.13(E) – Furnishing Identification for the Purposes of Fraudulently Obtaining Medical or Health Care Coverage

The crime of furnishing identification for the purpose of fraudulently obtaining medical or health coverage requires proof that the defendant, who was lawfully entitled to medical or health-care coverage, knowingly furnished, gave or loaned the defendant's means of identification to any person for the purposes of fraudulently obtaining medical or health-care coverage provided pursuant [to the Arizona Health Care Cost Containment System.] [to a county authorized health care system.]

SOURCE: A.R.S. § 13-3713(E) (statutory language as of August 25, 2004).

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

Use the bracketed language as appropriate to the facts.

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

The medical or health care coverage that is fraudulently obtained must be under the AHCCCS provisions found in Title 36, Chapter 29 or a county health care system under A.R.S. § 11-291.

37.14 – Aggravated or Multiple Insurance Code Violations

The crime of aggravated or multiple insurance code violations requires proof that:

1. [the defendant's license was suspended or revoked at the time of the act;] [The defendant was convicted of violating a provision of the insurance code and had no license when the defendant performed the act;] *and*
2. the defendant knowingly performed any transaction that required a license under the insurance code.

SOURCE: A.R.S. § 13-3714 (statutory language as of October 1, 2001).

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

The court shall instruct on the culpable mental state.

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

This statute specifically limits the offense to transactions that require a license under Title 20, Chapter 2, articles 3, 3.1, 3.2, 3.3 and 3.4 of Arizona Revised Statutes.

The statute also specifically limits the offenses to persons who have been convicted of violating a provision of Title 20, Chapter 2, articles 3, 3.1, 3.2, 3.3 or 3.4.

The statute is unclear whether the defendant must know of the license suspension when the defendant undertakes the insurance transaction.

37.16 – Failure to Give Notice of Dangerous-Crimes-Against-Children Conviction

The crime of failure to give notice of a dangerous-crime-against-children conviction requires proof that the defendant:

1. was convicted of committing a dangerous crime against children or child abuse; *and*
2. failed to give notice of that fact when applying for employment or volunteering for service with any business institution or organization that sponsors any activity in which adults supervise children.

Business institutions or organizations include schools, preschools, child-care providers and youth organizations.

SOURCE: A.R.S. § 13-3716 (statutory language as of July 18, 2000).

USE NOTE: The conviction must be one that is defined in A.R.S. §§ 13-705, 13 3623(A) or (B).

37.19 – Fraudulently Obtaining Wireless Telecommunications Services or Devices; Manufacturing, Distributing and Selling Unauthorized Decoding Devices

The crime of [manufacturing] [distributing] [selling] unauthorized decoding devices requires proof that the defendant:

1. [(manufactured) (distributed) (sold) (rented) (loaned) (offered) (advertised for sale, rent or use)]; *and*
2. any device that the defendant intended for another person to use to obtain services from a wireless telecommunications [(service) (device)] without payment for those services.

["Wireless telecommunications device" means an instrument, device, machine or equipment that is capable of transmitting or receiving telephonic, electronic, or radio communications or any part of such an instrument device, machine or equipment.

It includes computer circuits, computer chips, electronic mechanisms or other components that are capable of facilitating the transmission or reception of telephonic, electronic or radio communications.]

["Wireless telecommunications service" includes any service that is provided for a charge or compensation to facilitate the origination, transmission, emission or reception of signs, signals, data, writings, images and sounds or intelligence of any nature by wireless telephone equipment, including cellular telephone, wire, radio electromagnetic, photoelectronic or photo-optical system.]

SOURCE: A.R.S. § 13-3719 (statutory language as of July 21, 1997).

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

The court shall instruct on the culpable mental state.

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

There is a rebuttal inference set forth in A.R.S. § 13-3719. *See* Statutory Criminal Instruction 37.19(C).

37.19(C) – Rebuttable Inference Regarding A.R.S. § 13-3719

Proof that the person [(advertising) (selling) (renting) (lending)] the device stated that it would enable the user to obtain wireless telecommunication [(services) (devices)] without payment permits you to infer, unless satisfactorily explained, that the device would be used by another to obtain wireless telecommunications [(services) (devices)] without payment.

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

[In considering whether the alleged unlawful conduct has been satisfactorily explained, you are reminded that in the exercise of constitutional rights, a defendant need not testify. The alleged unlawful conduct may be satisfactorily explained through other circumstances and other evidence, independent of any testimony by a defendant.]

SOURCE: A.R.S. § 13-3719 (statutory language as of July 21, 1997).

USE NOTE: The last paragraph is bracketed and should only be given if requested by the defendant.

It is important to caution the jury that the inference is not mandatory and that the jury must look at all the facts and circumstances of the case in deciding whether the presumption should be applied. *State v. Mohr,* 150 Ariz. 564, 568-69 (App. 1986) (recommending that the language as contained in this instruction is preferable, because it expressly tells the jury that it is not compelled to draw the inference).

The use of the term "may give rise to an inference," which is contained in the text of this instruction, was specifically approved in *State v. Mohr,* 150 Ariz. at 569.

The bracketed paragraph pertaining to the defendant's constitutional right not to testify was specifically approved *verbatim* in *State v. Mohr,* 150 Ariz. at 568 (citing to *Barnes v. United States*, 412 U.S. 837, 843 (1973)).

37.21(A)(1) – Unlawfully Applying Tattoos, Brands, Scarifications and Piercings to Minors

The crime of unlawfully applying tattoos, brands, scarifications, and piercings requires proof that the defendant intentionally tattooed, pierced, branded, scarified, implanted or mutilated the body of a person who is under 18 years old without the physical presence of the parent or legal guardian of the minor who requested the procedure.

SOURCE: A.R.S. § 13-3721(A)(1) (statutory language as of August 6, 1999).

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

The court shall instruct on the culpable mental state.

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

The definitions for these procedures are set out in A.R.S. § 13-3721(E). *See* Statutory Criminal Instruction 37.21(E).

37.21(A)(2) – Use of Unsterilized Needle to Tattoo or Pierce

The crime of using an unsterilized needle to tattoo or pierce requires proof that the defendant tattooed or pierced another's body [using a needle or any substance that will leave color under the skin more than once] [using a needle that has not been sterilized with equipment approved for use in state-licensed medical facilities].

SOURCE: A.R.S. § 13-3721(A)(2) (statutory language as of August 6, 1999).

USE NOTE: A.R.S. § 36-401 *et seq.* governs sterilization procedures for state-licensed medical facilities.

The definitions of these procedures are set forth in A.R.S. § 13-3721(E). *See* Statutory Criminal Instruction 37.21(E).

37.21(A)(3) – Using an Unauthorized Location to Tattoo, Brand, Scarify, Implant, Mutilate or Pierce

The crime of using an unauthorized location to tattoo, brand, scarify, implant, mutilate or pierce requires proof that the defendant engaged in the tattooing, branding, scarifying, implanting, mutilating or body piercing out of a home, or a tent, trailer, trunk or other impermanent structure.

SOURCE: A.R.S. § 13-3721(A)(3) (statutory language as of August 6, 1999).

USE NOTE: The definitions of these procedures are set forth in A.R.S. § 13-3721(E). *See* Statutory Criminal Instruction 37.21(E).

37.21(A)(4) – Administering Anesthesia without a License

The crime of administering anesthesia without a license requires proof that the defendant administered anesthesia without a license during the course of any procedure that involves branding, scarifying, tattooing, implanting, mutilating or piercing another person's body.

SOURCE: A.R.S. § 13-3721(A)(4) (statutory language as of August 6,1999).

USE NOTE: A.R.S. § 32-101 *et seq.* governs persons who are licensed to administer anesthesia and licensed health-care providers.

37.21(B) – Exception

A person does not violate this section [by piercing the ear of a minor who has written or verbal permission from the minor's parent or legal guardian] [by performing a procedure prescribed by a licensed health care provider].

SOURCE: A.R.S. § 13-3721(B) (statutory language as of August 6, 1999).

USE NOTE: Use bracketed language as applicable.

37.21(C) – Defense

It is a defense to the charge of [(tattooing) (piercing) (branding) (scarifying) (implanting) (mutilating)] a minor that the person performing the procedure asked for age identification and relied on its accuracy in good faith.

SOURCE: A.R.S. § 13-3721(C) (statutory language as of August 6, 1999).

USE NOTE: Use bracketed language as applicable.

37.21(E) – Definitions

"Implant," "mutilate," "brand," "scarify" or "pierce" means to mark the skin or other body part with any indelible design, letter, scroll, figure, symbol, or other mark that is placed on or under the skin or body part with an instrument and that cannot be removed without surgery. It also means any design, letter, scroll, figure, symbol or other mark done by scarring on or under the skin or other body part. Implant does not include cosmetic implants.

"Tattoo" means to mark the skin using a needle or other instrument with any indelible design, letter, scroll, figure, symbol, or any other mark on or under the skin or other body part that will leave color under the skin and that cannot be removed, repaired or reconstructed without surgery. It also means any design, letter, scroll, figure, symbol or other mark done by scarring upon or under the skin.

SOURCE: A.R.S. § 13-3721(E) (statutory language as of August 6, 1999).

COMMENT: The definition in the statute for piercing, mutilating, and implanting does not appear to include ear and other piercings, such as tongue studs, or navel, lip and eyebrow rings, even though the statute creates an exception for ear piercings for minors.

37.24 – Obtaining Utility Services by Fraud

The crime of obtaining utility services by fraud requires proof that the defendant intentionally:

[connected or reconnected to property that a utility owned or used to provide utility service without the utility's consent or authorization.]

[prevented a utility meter or other utility measuring device from accurately measuring the service charges.]

[tampered with property that a utility owned or used.]

[without the utility's consent or authorization, used, received or diverted utility services knowing or having reason to know that the diversion, tampering or connection was unlawful.]

[used any means to divert utility services or caused them to be diverted.]

["Divert" means to change the intended course or path of electricity, gas or water without the authorization or consent of the utility.]

["Reconnection" means the restoration of utility service to a customer or person after service has been legally disconnected by the utility.]

["Tamper" means to rearrange, damage, alter, interfere with or otherwise prevent the performance of a normal or customary function, including any of the following:

(a) Connecting any wire, conduit or device to any service, distribution or transmission line that is owned or used by a utility.

(b) Defacing, puncturing, removing, reversing or altering any meter or any connections to secure unauthorized or unmeasured utility service.

(c) Preventing any meter from properly measuring or registering.

(d) Knowingly taking, receiving, using or converting to personal use or the use of another person any utility service without authorization or consent.

(e) Causing, procuring, permitting, aiding or abetting any person to do any of the acts listed in this paragraph.]

["Utility" means any public service corporation, agricultural improvement district or other person that is engaged in the generation, transmission or delivery of electricity, water or natural gas, including this state or any political subdivision of this state.]

["Utility service" means the provision of services or commodities by the utility for compensation.]

SOURCE: A.R.S. § 13-3724(A)(1)–(5) and (E) (statutory language as of August 25, 2004).

USE NOTE: Use the bracketed language that is appropriate to the facts.

The court shall instruct on the culpable mental state.

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

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

37.24(B) – Rebuttable Inference

Unless satisfactorily explained, you may infer that the defendant intentionally violated this section if any of the following occurred:

1. An instrument, apparatus or device that was installed to obtain utility service without paying full charge was found attached to the meter or other utility service measuring device on the premises controlled by the defendant who [used] [received] the utility service.
2. A meter was altered, tampered with, or bypassed resulting in no measurement or an inaccurate measurement of utility services.
3. The defendant was an occupant of the premises or had an access to the service's delivery system to the premises and received a benefit from tampered or bypassed equipment.

You are free to accept or reject this inference as triers of fact. You must determine whether the facts and circumstances shown by the evidence in this case warrant any inference that the law permits you to make. Even with the inference, the State has the

burden of proving each and every element of the charged offense beyond a reasonable doubt.

[In considering whether the alleged unlawful conduct has been satisfactorily explained, you are reminded that in the exercise of constitutional rights, a defendant need not testify. The alleged unlawful conduct may be satisfactorily explained through other circumstances and other evidence, independent of any testimony by a defendant.]

SOURCE: A.R.S. § 13-3724(B) (statutory language as of August 25, 2004).

USE NOTE: Use the bracketed language that is appropriate to the facts.

The last paragraph is bracketed and should only be given if requested by the defendant.

It is important to caution the jury that the inference is not mandatory and that the jury must look at all the facts and circumstances of the case in deciding whether the presumption should be applied. *State v. Mohr,* 150 Ariz. 564, 568-69 (App. 1986) (recommending that the language as contained in this instruction is preferable, because it expressly tells the jury that it is not compelled to draw the inference).

The use of the term "may give rise to an inference," which is contained in the text of this instruction, was specifically approved in *State v. Mohr,* 150 Ariz. at 569.

The bracketed paragraph pertaining to the defendant's constitutional right not to testify was specifically approved *verbatim* in *State v. Mohr,* 150 Ariz. at 568 (citing to *Barnes v. United States*, 412 U.S. 837, 843 (1973)).

37.25 – Interference with Monitoring Devices

The crime of interference with monitoring devices requires proof that the [defendant, having been required to be on electronic monitoring or global position system monitoring, removed or bypassed any device or equipment that was necessary for the electronic monitoring or global position system monitoring] [defendant assisted any person who was required to be on electronic monitoring or global position system monitoring in removing or bypassing any device or equipment that was necessary for the electronic monitoring or global position system monitoring].

SOURCE: A.R.S. § 13-3725 (statutory language as of June 21, 2006).

COMMENT: The statute does not specify who must require the monitoring device nor does the statute set forth any mental state.

CHAPTER 38

38.21 – Failure to Register as Sex Offender

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

1. has been convicted of [list violation or attempted violation enumerated in § 13-3821(A)(1–20)]; *and*
2. knew or should have known of the requirement to register; *and*
3. failed to register with the sheriff within 10 days [after the conviction][after entering and remaining in (insert name) County].

SOURCE: A.R.S. § 13-3821 (statutory language as of September 26, 2008).

USE NOTE: Also applies to crimes "committed in another jurisdiction that if committed in this state would be a violation or attempted violation of any of the following offenses or an offense that was in effect before September 1, 1978 and that, if committed on or after September 1, 1978, has the same elements of an offense listed in this section." A.R.S. § 13-3821(A).

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

COMMENT: In *State v. Garcia*, 156 Ariz. 381, 384 (App. 1987), the court held that the defendant had to have "actual knowledge of the need to register" or "proof of the probability that he had knowledge of the requirement" to be convicted of this offense. The committee interpreted this holding to require that the defendant "knew or should have known" of the requirement to register.

38.22 – Failure to Notify Change of Address or Change of Name

The crime of failure to notify change of address or change of name requires proof that the defendant:

1. is required to register; *and*
2. [moved] [changed his/her name]; *and*
3. failed to notify in writing [and in person] the Sheriff of [insert name of county where the defendant was registered] County within seventy-two hours of [moving] [changing his/her name].

SOURCE: A.R.S. § 13-3822 (statutory language as of August 9, 2001).

USE NOTE: The notice must be in person and in writing if moving within a county or changing name. The notice need only be in writing if moving outside the county. A.R.S. § 13-3822(B). The seventy-two-hour time limit excludes weekends and legal holidays if moving within a county or changing name and arguably does not if moving outside a county. A.R.S. § 13-3822(A).

Use bracketed language appropriate to the facts of the case.

38.81 – Arrest; How Made; Force and Restraint

An arrest is made by actual restraint of the person to be arrested, or by such person's submission to the custody of the person making the arrest. No unnecessary or unreasonable force shall be used in making an arrest, and the person arrested shall not be subjected to any greater restraint than necessary for the person's detention.

SOURCE: A.R.S. § 13-3881 (statutory language as of October 1, 1978).

USE NOTE: This instruction is included for use only where there is an issue of whether the defendant was justified in using or threatening physical force against a police officer while resisting an arrest based on a claim of use of unreasonable or unnecessary force by the officer.

While a defendant is entitled to a justification defense if there is the slightest evidence to support it, *State v. Lujan*, 136 Ariz. 102, 104 (1983), a trial judge need not give requested instructions that are inapplicable. *State v. O'Kelley,* 117 Ariz. 34, 36 (App. 1977) (holding that trial court correctly refused to give instruction on unreasonable force when there was no evidence of unnecessary or unreasonable force at time of arrest).

Evidence of force by an officer that occurs after an arrest does not entitle a defendant to this instruction, because this instruction pertains only to unnecessary or unreasonable force at the time of making the arrest. *State v. O'Kelley,* 117 Ariz. 34, 36 (App. 1977).

COMMENT: The trial court should not confuse the procedure of arrest under A.R.S. § 13-3881 with "effecting an arrest" in regard to the offense of resisting arrest under A.R.S. § 13-2508. *See State v. Mitchell,* 204 Ariz. 216, 218-19 (App. 2003) (noting that § 13-3881 primarily defines *how* an arrest is made, while § 13-2508 defines *when* an arrest is effected; § 13-3881 describes the actual restraint or submission, while "effecting an arrest" under § 13-2508 connotes successful, effective restraint or submission).

Police are permitted to draw their weapons during an investigative stop when they have reasonable basis to fear for their safety, which alone does not convert an investigative *Terry* stop into an arrest. *In Re Roy L.,* 197 Ariz. 441, 445 (App. 2000).

38.87 – Method of Arrest by Officer by Virtue of a Warrant

When making an arrest based on a warrant, the officer was required to inform the defendant of the reason for the arrest and that a warrant had been issued for the defendant's arrest unless:

1. the defendant fled or forcibly resisted before the officer had the opportunity to inform the defendant; *or*
2. the giving of such information would have imperiled the arrest.

The warrant did not have to be in the officer's possession at the time of the arrest.

SOURCE: A.R.S. § 13-3887 (statutory language as of October 1, 1978).

USE NOTE: This instruction is included for use only where there is an issue of whether the

defendant was justified in using or threatening physical force against a police officer while resisting an arrest based on a claim of use of unreasonable or unnecessary force by the officer.

COMMENT: Evidence of force by an officer that occurs after an arrest does not entitle a defendant to this instruction, because this instruction pertains only to unnecessary or unreasonable force at the time of making the arrest. *State v. O'Kelley,* 117 Ariz. 34, 36 (App. 1977).

38.88 – Method of Arrest by Officer Without a Warrant

When making an arrest without a warrant, the officer was required to inform the defendant of the officer's authority and the reason for the arrest unless:

1. the defendant was engaged in the commission of a criminal offense; *or*
2. the defendant was pursued immediately after the commission of a criminal offense; *or*
3. the defendant was pursued immediately after an escape; *or*
4. the defendant fled or forcibly resisted before the officer had the opportunity to inform the defendant; *or*
5. the giving of such information would have imperiled the arrest.

SOURCE: A.R.S. § 13-3888 (statutory language as of October 1, 1978).

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

This instruction is included for use only where there is an issue of whether the defendant was justified in using or threatening physical force against a police officer while resisting an arrest based on a claim of use of unreasonable or unnecessary force by the officer.

COMMENT: Evidence of force by an officer that occurs after an arrest does not entitle a defendant to this instruction, because this instruction pertains only to unnecessary or unreasonable force at the time of making the arrest. *State v. O'Kelley,* 117 Ariz. 34, 36 (App. 1977).

CHAPTER 43

43.4702 – Conducting A Chop Shop

The crime of conducting a chop shop requires proof that the defendant knowingly [owned or operated a chop shop] [transported a motor vehicle or motor vehicle part to or from a chop shop] [sold or transferred to or purchased or received from a chop shop a motor vehicle or motor vehicle part] [removed, destroyed, defaced or otherwise altered a vehicle identification number with the intent to misrepresent or prevent the identification of the motor vehicle or motor vehicle part] [bought, sold, transferred or possessed a motor vehicle or motor vehicle part knowing that the motor vehicle identification number that was placed on the motor vehicle or motor vehicle part by the manufacturer had been removed, destroyed, defaced or otherwise altered].

"Chop shop" means any building, lot or other premises in which one or more persons altered, destroyed, disassembled, dismantled, reassembled or stored at least one motor vehicle or watercraft or two or more motor vehicle or watercraft parts from at least one vehicle or watercraft that the person or persons knew were obtained by theft, fraud or conspiracy to defraud with the intent to:

(a) alter, counterfeit, deface, destroy, disguise, falsify, forge, obliterate or remove the identity of the motor vehicles or motor vehicle parts, including the vehicle identification number for the purpose of misrepresenting or preventing the identification of the motor vehicles or motor vehicle parts; *or*

(b) sell or dispose of the motor vehicles or motor vehicle parts.

["Motor vehicle" means any self-propelled vehicle.]

"Vehicle identification number" means the number that the manufacturer or the United States or a state department of transportation assigns to a motor vehicle for the purpose of identifying the motor vehicle or a major component part of the motor vehicle. Vehicle identification number includes any combination of numbers or letters.

["Unidentifiable" or "preventing identification" means that specially trained investigative personnel who are experienced in motor vehicle theft investigative procedures and motor vehicle identification examination techniques could not establish the uniqueness of a motor vehicle or motor vehicle part.]

["Watercraft" means any boat designed to be propelled by machinery, oars, paddles or wind action upon a sail for navigation on the water.]

SOURCE: A.R.S. §§ 13-4701 (statutory language as of September 21, 2006), 13-4702 (statutory language as of July 13, 1995) and 5-301(16) defining "watercraft" (statutory language as of July 17, 1994).

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

The court shall instruct on the culpable mental state.

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

Use Statutory Criminal Instructions 1.0510(a)(1) and 1.0510(a)(2) defining "intent" and "intent – inference."

"Unidentifiable" is defined in A.R.S. § 13-4701(3), but the word is not used in the statute. The committee has added "preventing identification" in an effort to tie the definition to the wording of the statute. If the degree of alteration becomes an issue, this definition should be included in the instruction.

CHAPTER 44

44.4802 – Possession or Sale of Cloned Cellular or Wireless Telephones

The crime of possession or sale of cloned cellular or wireless telephones requires proof that the defendant knowingly [possessed a cloned cellular or wireless telephone] [possessed an instrument that was capable of acquiring electronic serial number and mobile identification number combinations with the intent to clone a cellular or wireless telephone] [sold a cloned cellular or wireless telephone].

"Cellular telephone" means a communication device that contains an electronic serial number and the operation of which depends on the transmission of that electronic serial number together with the mobile identification number in the form of radio signals through cell sites and mobile switching stations.

"Cloned cellular or wireless telephone" means a cellular or wireless telephone in which the manufacturer's electronic serial number has been altered.

"Wireless telephone" means a communication device that transmits radio, satellite or other mobile telephone communication.

["Acquire" means to electronically capture, record, reveal or otherwise access by means of any instrument, device or equipment a cellular or wireless telephone's electronic serial number or mobile identification number without the consent of the communication service provider.

"Electronic serial number" means the unique numerical algorithm that the manufacturer programs into the microchip of each wireless telephone.

"Mobile identification number" means the cellular or wireless telephone number that the cellular or wireless telephone carrier assigns to the wireless telephone.]

SOURCE: A.R.S. §§ 13-4801 and 13-4802 (statutory language as of August 21, 1998).

USE NOTE: Use bracketed language as appropriate.

The court shall instruct on the culpable mental state.

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

COMMENT: Although the terms were not used by the legislature in establishing the elements of the crime, there are definitions for "cloning paraphernalia" and "communication service provider" in the definition section for this chapter. *See* A.R.S. § 13-4801.

CHAPTER 45

45.4902 – Criminal Trespass on Commercial Nuclear Generating Station

The crime of criminal trespass on a commercial nuclear generating station requires proof that the defendant knowingly [entered or remained unlawfully in or on a commercial nuclear generating station] [entered or remained unlawfully within a structure or fenced yard of a commercial nuclear generating station].

"Commercial nuclear generating station" means an electric power generating facility that is owned by a public service corporation, a municipal corporation or a consortium of public service corporations or municipal corporations and that produces electricity by means of a nuclear reactor. The generating station includes the property on which the facility is located.

"Enter" means the intrusion of any part of any instrument or any part of the defendant's body inside of a commercial nuclear generating station or a structure or fenced yard of a commercial nuclear generating station.

"Entering or remaining unlawfully" means an act by the defendant who entered or remained in or on a commercial nuclear generating station or a structure or fenced yard of a commercial nuclear generating station if the defendant's intent for entering or remaining was not licensed, authorized or otherwise privileged.

["Structure or fenced yard" means any structure, fenced yard, wall, building or other similar barrier or any combination of structures, fenced yards, walls, buildings or other barriers that surrounds a commercial nuclear generating station and that is posted with signage indicating it is a felony to trespass.]

SOURCE: A.R.S. §§ 13-4901 and 13-4902 (statutory language as of August 12, 2005).

USE NOTE: Use bracketed language as appropriate.

The court shall instruct on the culpable mental state.

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

45.4903 – Justification Defense – Armed Nuclear Security Guard

The defendant while performing the duties of an armed nuclear security guard was justified in using physical force against another person at a commercial nuclear generating station or structure or fenced yard of a commercial nuclear generating station if the defendant reasonably believed that such force was necessary to prevent or terminate the commission or attempted commission of [criminal damage] [misconduct involving weapons] [criminal trespass on a commercial nuclear generating station].

The defendant while performing the duties of an armed nuclear security guard was justified in using physical force up to and including deadly physical force against another person at a commercial nuclear generating station or structure or fenced yard of a

commercial nuclear generating station if the defendant reasonably believed that such force was necessary to:

1. prevent the [commission of manslaughter] [second or first degree murder] [aggravated assault] [kidnapping] [burglary in the second degree] [burglary in the first degree] [arson of a structure or property] [arson of an occupied structure] [armed robbery] [an act of terrorism]; *or*

2. defend [himself] [herself] or a third person from the use or imminent use of deadly physical force.

The defendant while performing the duties of an armed nuclear security guard was justified in threatening to use physical or deadly physical force if and to the extent a reasonable armed nuclear security guard would have believed it necessary to protect [himself] [herself] or others against another person's potential use of physical force or deadly physical force. You must measure the defendant's belief against what a reasonable armed nuclear security guard in the situation would have believed.

A person is justified in threatening or using deadly physical force only while the apparent danger continues, and it ends when the apparent danger ends. The force used may not be greater than reasonably necessary to defend against the apparent danger.

"Armed nuclear security guard" means a security guard who works at a commercial nuclear generating station, who is employed as part of the security plan approved by the nuclear regulatory commission and who meets the requirements mandated by the nuclear regulatory commission for carrying a firearm.

"Commercial nuclear generating station" means an electric power generating facility that is owned by a public service corporation, a municipal corporation or a consortium of public service corporations or municipal corporations and that produces electricity by means of a nuclear reactor. The generating station includes the property on which the facility is located.

"Structure or fenced yard" means any structure, fenced yard, wall, building or other similar barrier or any combination of structures, fenced yards, walls, buildings or other barriers that surrounds a commercial nuclear generating station and that is posted with signage indicating it is a felony to trespass.

SOURCE: A.R.S. §§ 13-4901 and 13-4903 (statutory language as of August 12, 2005).

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

The Arizona Supreme Court has required that an instruction under A.R.S. §§ 13-404 and 13-405 must include a reference to the reasonable person standard. *State v. Grannis,* 183 Ariz. 52, 60-61 (1995). Because the threatening of deadly physical force by an armed nuclear security guard in A.R.S. § 13-4903 requires a reasonable person standard, the direction given in *Grannis* will likely apply in that situation, notwithstanding that A.R.S. § 13-4903(B) provides that this justification defense controls over A.R.S. §§ 13-404 and 13-405.

COMMENT: This justification defense controls over those set forth in A.R.S. § 13-403, 13-404, 13-405, 13-406, 13-408, 13-409, 13-410 and 13-411. *See* A.R.S. § 13-4903(B).

The court should note that there is a different standard used in the statute for "threatening" the use of force by an armed nuclear security guard as opposed to the actual use of force by the armed nuclear security guard. Threatening deadly physical force appears to require an objective "reasonable armed nuclear security guard" standard. The actual use of force, however, appears to be based on a subjective standard of what the defendant armed nuclear security guard reasonably believed was necessary. There is no statutory definition of "reasonable armed nuclear security guard," and the Committee was unable to locate any criminal cases providing such a definition. However, as an analogy to police officers, the reader is directed to the following two cases that discuss reasonable police conduct: *State v. Superior Court,* 185 Ariz. 47 (App. 1996); *State v. Fortier,* 113 Ariz. 332 (1976).

The legislature's 2006 amendments to the justification defenses set forth in Chapter 4 of Title 13 did not include this defense. *See* Senate Bill 1145, Chapter 199, 47th Legislature, 2nd Regular Session, 2006. Therefore, the trial court will need to decide whether this defense is an "affirmative defense" with the defendant having the burden of proof or whether the state must prove beyond a reasonable doubt that the defendant security guard did not act with justification.

CHAPTER 46

46.5002 – Criminal Trespass on a Military Reservation or Facility

The crime of criminal trespass on a military reservation or facility requires proof that the defendant knowingly entered or remained unlawfully within a structure or fenced yard of a military reservation or facility.

"Enter" means the intrusion of any part of any instrument or any part of a person's body inside of a military reservation or facility or a structure or fenced yard of a military reservation or facility.

"Entering or remaining unlawfully" means an act by a person who enters or remains in or on a military reservation or facility or a structure or fenced yard of a military reservation or facility if that person's intent for entering or remaining is not authorized or otherwise privileged.

"Military reservation or facility" means any land or facility that is owned or leased by or designated to the Arizona National Guard.

"Structure or fenced yard" means any structure, fenced yard, wall, building or other similar barrier or any combination of structures, fenced yards, walls, buildings or other barriers that surrounds a military reservation or facility and that is posted with signage indicating it is a felony to trespass.

SOURCE: A.R.S. §§ 13-5002 and 13-5001 (statutory language as of July 7, 2008).

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)).

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; *and*
5. The defendant knew or should have known that 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).

COMMENT: *State v. Nelson,* 251 Ariz. 420 (App. 2021) requires that the jury must be instructed that the defendant knew or should have known an ignition-interlock restriction was in effect at the time of the offense.

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; *and*
5. The defendant knew or should have known that 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).

COMMENT: *State v. Nelson,* 251 Ariz. 420 (App. 2021) requires that the jury must be instructed that the defendant knew or should have known an ignition-interlock restriction was in effect at the time of the offense.

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; and
4. The defendant knew or should have known that 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).

COMMENT: *State v. Nelson,* 251 Ariz. 420 (App. 2021) requires that the jury must be instructed that the defendant knew or should have known an ignition-interlock restriction was in effect at the time of the offense.

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 but less than 0.20] [0.20 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; *and*
5. The defendant knew or should have known that 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).

COMMENT: *State v. Nelson,* 251 Ariz. 420 (App. 2021) requires that the jury must be instructed that the defendant knew or should have known an ignition-interlock restriction was in effect at the time of the offense.

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).

TITLE 5
WATERCRAFT OFFENSE INSTRUCTIONS

5.395(A)(1)-APC – Actual Physical Control Defined

In determining whether the defendant was in actual physical control of the motorized watercraft, you should consider the totality of the circumstances shown by the evidence and whether the defendant's current or imminent control of the motorized watercraft presented a real danger to [himself] [herself] or others at the time alleged.

SOURCE: *State v. Zaragoza,* 221 Ariz. 49 (2009).

USE NOTE: There is no definition of "actual physical control" in Title 5. The court may wish to consider including a list of factors similar to those in the approved instruction from *Zaragoza* which included:

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.

5.395(A)(1) – Operating or Actual Physical Control of a Motorized Watercraft While Under the Influence

The crime of operating or actual physical control of a motorized watercraft while under the influence requires proof that:

1. The defendant [operated] [was in actual physical control of] a motorized watercraft within this state; *and*
2. The motorized watercraft was underway; *and*
3. 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 [operating] [being in actual physical control]; *and*
4. The defendant's ability to operate a motorized watercraft 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. § 5-395(A)(1) (statutory language as of January 1, 2009).

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

A.R.S. § 5-301 Definitions: (Statutory language as of July 17, 1994). These definitions apply to all Title 5 instructions.

1. "Commercial motorized watercraft" means a motorized watercraft that carries passengers or property for a valuable consideration that is paid to the owner, charterer, operator or agent or to any other person interested in the watercraft.
2. "Commission" means the Arizona game and fish commission.
3. "Department" means the Arizona game and fish department.
4. "Motorboat" means any watercraft that is not more than sixty-five feet in length and that is propelled by machinery whether or not such machinery is the principal source of propulsion.
5. "Motorized watercraft" means any watercraft that is propelled by machinery whether or not the machinery is the principal source of propulsion.
6. "Operate" means to operate or be in actual physical control of a watercraft while on public waters.
7. "Operator" means a person who operates or is in actual physical control of a watercraft while on public waters.
8. "Person" includes any individual, firm, corporation, partnership or association, and any agent, assignee, trustee, executor, receiver or representative thereof.
9. "Public waters" means any body of water which is publicly owned or which the public is permitted to use without permission of the owner upon which a motorized watercraft can be navigated, including that part of waters common to interstate boundaries which is within the boundaries of this state.

10. "Revocation" means invalidating the certificate of number, numbers and annual validation decals issued by the department to a watercraft and prohibiting the operation of the watercraft on the waters of this state during a period of noncompliance with this chapter.
11. "Sailboard" means any board of less than fifteen feet in length which is designed to be propelled by wind action upon a sail for navigation on the water by a person operating the board.
12. "Special anchorage area" means an area set aside and under the control of a federal, state or local governmental agency, or by a duly authorized marina operator or concessionaire for the mooring, anchoring or docking of watercraft.
13. "Underway" means that a watercraft on public waters is not at anchor, is not made fast to the shore or is not aground.
14. "Undocumented watercraft" means any watercraft which does not have and is not required to have a valid marine document as a watercraft of the United States.
15. "Wakeless speed" means a speed that does not cause the watercraft to create a wake, but in no case in excess of five miles per hour.
16. "Watercraft" means any boat designed to be propelled by machinery, oars, paddles or wind action upon a sail for navigation on the water, or as may be defined by rule of the commission.
17. "Waterway" means any body of water, public or private, upon which a watercraft can be navigated**.**

5.395(A)(2) – Operating or Actual Physical Control of a Motorized Watercraft With an Alcohol Concentration of 0.08 or More Within Two Hours of Operating

The crime of operating or actual physical control of a motorized watercraft with an alcohol concentration of 0.08 or more within two hours of operating requires proof that:

1. The defendant [operated] [was in actual physical control of] a motorized watercraft within this state; *and*
2. The motorized watercraft was underway; *and*
3. The defendant had an alcohol concentration of 0.08 or more within two hours of [operating] [being in actual physical control of] the motorized watercraft; *and*
4. The alcohol concentration resulted from alcohol consumed either before or while [operating] [being in actual physical control of] the motorized watercraft.

SOURCE: A.R.S. § 5-395(A)(2) (statutory language as of January 1, 2009).

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

Refer to the Use Note in Instruction 5.395(A)(1) for needed definitions.

5.395(A)(3) – Operating or Actual Physical Control of a Motorized Watercraft While There Is a Drug in the Defendant's Body

The crime of operating or actual physical control of a motorized watercraft while there is a drug in the defendant's body requires proof that:

1. The defendant [operated] [was in actual physical control of] a motorized watercraft within this state; *and*
2. The motorized watercraft was underway; *and*
3. The defendant had in [his] [her] body [(name of drug)] [a metabolite of (name of drug)] at the time of [operating] [being in actual physical control of] the motorized watercraft.

SOURCE: A.R.S. § 5-395(A)(3) (statutory language as of January 1, 2009).

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

Refer to the Use Note in Instruction 5.395(A)(1) for needed definitions.

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 as 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. § 5-395(C). The statutory defense applies to only A.R.S. § 5-395(A)(3) (statutory language as of September 30, 2009).

5.395(A)(4) – Operating or Actual Physical Control of a Commercial Motorized Watercraft With an Alcohol Concentration of 0.04 or More

The crime of operating or actual physical control of a commercial motorized watercraft with an alcohol concentration of 0.04 or more requires proof that:

1. The defendant [operated] [was in actual physical control of] a motorized watercraft within this state; *and*
2. The motorized watercraft was underway; *and*
3. The motorized watercraft is a commercial motorized watercraft; *and*
4. The defendant had an alcohol concentration of 0.04 or more.

SOURCE: A.R.S. § 5-395(A)(4)(statutory language as of January 1, 2009).

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

Refer to the Use Note in Instruction 5.395(A)(1) for needed definitions.

5.395(C) – Affirmative Defense to Operating 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 operating 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 operating 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 by the defendant not guilty of the offense of operating or actual physical control while there is a drug in the defendant's body.

SOURCE: A.R.S. § 5-395(C) (statutory language as of August 6, 2016); Statutory Criminal 2.025.

USE NOTE: This is a defense to § 5-395 (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 who is authorized to prescribe the drug.

Proof of "a preponderance of the evidence" means that a fact is more probably true than not true.

5.395(F) – 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. § 5-395(F) and (G) (statutory language as of January 1, 2009).

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.

5.397(A)(1) & (2) – Operating or Actual Physical Control of a Motorized Watercraft While Under the Extreme Influence of Intoxicating Liquor

The crime of operating or actual physical control of a motorized watercraft while under the extreme influence of intoxicating liquor requires proof that:

1. The defendant [operated] [was in actual physical control of] a motorized watercraft in this state; *and*
2. The motorized watercraft was underway; *and*
3. The defendant had an alcohol concentration of [0.15 or more but less than 0.20] [0.20 or more] within two hours of [operating] [being in actual physical control of] the motorized watercraft; *and*
4. The alcohol concentration resulted from alcohol consumed either before or while [operating] [being in actual physical control of] the motorized watercraft.

SOURCE: A.R.S. § 5-397(A)(1) and (2) (statutory language as of January 1, 2009).

USE NOTE: The user is advised that this instruction applies to one or the other sections of A.R.S. § 5-397(A)(1) the 0.15 or more but less than 0.20 and A.R.S. § 5-397 (A)(2) the 0.20 or more within two hours. Use language in brackets as appropriate to the facts.

Refer to the Use Note in Instruction 5.395(A)(1) for needed definitions.

5.396(A)(1)-1 – Aggravated Operating or Actual Physical Control of a Motorized Watercraft While Under the Influence – Three or More Convictions Within Eighty-Four Months

The crime of aggravated operating or actual physical control of a motorized watercraft while under the influence with three or more prior convictions within eighty-four months requires proof that:

1. The defendant [operated] [was in actual physical control of] a motorized watercraft in this state; *and*
2. The motorized watercraft was underway; *and*
3. 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 [operating] [being in actual physical control]; *and*

4. The defendant's ability to operate a motorized watercraft 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].
5. The defendant had been convicted three or more times of operating a motorized watercraft while under the influence; *and*
6. The dates of the offenses giving rise to the prior convictions were within eighty-four months of the date of the current offense.

SOURCE: A.R.S. §§ 5-395, 5-396(A)(1) and 5-397 (statutory language as of January 1, 2009).

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

A.R.S. § 5-396(B) provides that the dates of commission of the offenses are the determining factors in applying this eighty-four-month provision.

Refer to the Use Note in Instruction 5.395(A)(1) for needed definitions.

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).

5.396(A)(1)-2 – Aggravated Operating or Actual Physical Control of a Motorized Watercraft With an Alcohol Concentration of 0.08 or More Within Two Hours of Operating – Three Convictions Within Eighty-Four Months

The crime of aggravated operating or actual physical control of a motorized watercraft with an alcohol concentration of 0.08 or more within two hours of operating with three prior convictions requires proof that:

1. The defendant [operated] [was in actual physical control of] a motorized watercraft in this state; *and*
2. The motorized watercraft was underway; *and*
3. The defendant had an alcohol concentration of 0.08 or more within two hours of [operating] [being in actual physical control of] the motorized watercraft; *and*
4. The alcohol concentration resulted from alcohol consumed either before or while [operating] [being in actual physical control of] the motorized watercraft; *and*
5. The defendant had been convicted three or more times of operating a motorized watercraft while under the influence; *and*

6. The dates of the offenses giving rise to the prior convictions were within eighty-four months of the date of the current offense.

SOURCE: A.R.S. §§ 5-396(A)(1) and 5-395(A)(2) (statutory language as of January 1, 2009).

A.R.S. § 5-396(B) provides that the dates of commission of the offenses are the determining factors in applying this eighty-four-month provision.

USE NOTE: Use bracketed language as appropriate to the case.

Refer to the Use Note in Instruction 5.395(A)(1) for needed definitions.

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).

5.396(A)(1)-3 – Aggravated Operating or Actual Physical Control of a Motorized Watercraft While There Is a Drug in the Defendant's Body – Three or More Convictions Within Eighty-Four Months

The crime of aggravated operating or actual physical control of a motorized watercraft while there is a drug in the defendant's body with three prior convictions within eighty-four months requires proof that:

1. The defendant [operated] [was in actual physical control of] a motorized watercraft in this state; *and*
2. The motorized watercraft was underway; *and*
3. The defendant had in [his] [her] body [(name of drug)] [a metabolite of (name of drug)] at the time of [operating] [being in actual physical control of] the motorized watercraft; *and*
4. The defendant had been convicted three or more times of operating a motorized watercraft while under the influence; *and*
5. The prior convictions were committed within eighty-four months of the date of the current offense.

SOURCE: A.R.S. §§ 5-396(A)(1) and 5-395(A)(3) (statutory language as of January 1, 2009).

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

A.R.S. § 5-396(B) provides that the dates of commission of the offenses are the determining factors in applying this sixty-month provision.

Refer to the Use Note in Instruction 5.395(A)(1) for needed definitions.

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).

5.396(A)(2)(a)-1 – Aggravated Operating or Actual Physical Control of a Motorized Watercraft While Under the Influence While There Is a Person Under the Age of Fifteen Years Aboard the Motorized Watercraft

The crime of aggravated operating or being actual physical control of a motorized watercraft while under the influence while there is a person under the age of fifteen years in the motorized watercraft requires proof that:

1. The defendant [operated] [was in actual physical control of] a motorized watercraft in this state; *and*
2. The motorized watercraft was underway; *and*
3. 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 [operating] [being in actual physical control]; *and*
4. The defendant's ability to drive a motorized watercraft 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*
5. A person under fifteen years of age was aboard the motorized watercraft at the time of the offense, and
6. The defendant recklessly endangered the person who is under fifteen years of age with a substantial risk of physical injury.

SOURCE: A.R.S. §§ 5-395(A)(1) and 5-396(A)(2)(a) (statutory language as of January 1, 2009).

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

Refer to the Use Note in Instruction 5.395(A)(1) for needed definitions.

The court must instruct on the culpable mental state. See Standard Criminal Instruction 1.0510(c) for the definition of "recklessly."

COMMENT: *Peterson v. Jacobson*, 2 Ariz. 593 (App. 1966) (crime of reckless driving and that of driving while intoxicated are separate and distinct offenses and are established by different evidence).

5.396(A)(2)(a)-2 – Aggravated Operating or Actual Physical Control of a Motorized Watercraft With an Alcohol Concentration of 0.08 or More Within Two Hours of Operating While There Is a Person Under the Age of Fifteen Years Aboard the Motorized Watercraft

The crime of aggravated operating or actual physical control of a motorized watercraft with an alcohol concentration of 0.08 or more within two hours of operating while there is a person under the age of fifteen years abroad the motorized watercraft requires proof that:

1. The defendant [operated] [was in actual physical control of] a motorized watercraft in this state; *and*
2. The motorized watercraft was underway; *and*
3. The defendant had an alcohol concentration of 0.08 or more within two hours of [operating] [being in actual physical control of] the motorized watercraft; *and*
4. The alcohol concentration resulted from alcohol consumed either before or while [operating] [being in actual physical control of] the motorized watercraft; *and*
5. A person under fifteen years of age was aboard the motorized watercraft at the time of the offense, and
6. The defendant recklessly endangered the person who is under fifteen years of age with a substantial risk of physical injury.

SOURCE: A.R.S. §§ 5-395(A)(2) and 5-396(A)(2)(a) (statutory language as of January 1, 2009).

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

Refer to the Use Note in Instruction 5.395(A)(1) for needed definitions.

The court must instruct on the culpable mental state. See Standard Criminal Instruction 1.0510(c) for the definition of "recklessly."

5.396(A)(2)(a)-3 – Aggravated Operating or Actual Physical Control of a Motorized Watercraft Under the Influence of Intoxicating Liquor or Drugs While There Is a Person Under Fifteen Aboard The Motorized Watercraft

The crime of aggravated operating or actual physical control while there is a person under the age of fifteen years aboard the motorized watercraft requires proof that:

1. The defendant [operated] [was in actual physical control of] a motorized watercraft in this state; *and*
2. The motorized watercraft was underway; *and*
3. The defendant had in [his] [her] body [(name of drug)] [a metabolite of (name of drug)] at the time of [operating] [being in actual physical control of] the motorized watercraft; *and*

4. A person under fifteen years of age was aboard the motorized watercraft at the time of the offense, *and*
5. The defendant recklessly endangered the person under fifteen years of age with a substantial risk of physical injury.

SOURCE: A.R.S. §§ 5.395(A)(3) and 5-396(A)(2)(a) (statutory language as of January 1, 2009).

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

Refer to the Use Note in Instruction 5.395(A)(1) for needed definitions.

The court must instruct on the culpable mental state. See Standard Criminal Instruction 1.0510(c) for the definition of "recklessly."

COMMENT: For Reckless Boating with Minor: *Peterson v. Jacobson*, 2 Ariz. 593 (App. 1966) (crime of reckless driving and that of driving while intoxicated are separate and distinct offenses and are established by different evidence.

5.396(A)(2)(b)-1 – Aggravated Operating or Actual Physical Control of a Motorized Watercraft While Under the Influence While There Is a Person Under the Age of Fifteen Years Aboard The Motorized Watercraft With One Prior

The crime of aggravated operating or being actual physical control of a motorized watercraft while under the influence while there is a person under the age of fifteen years abroad the motorized watercraft with one prior requires proof that:

1. The defendant [operated] [was in actual physical control of] a motorized watercraft in this state; *and*
2. The motorized watercraft was underway; *and*
3. 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 [operating] [being in actual physical control]; *and*
4. The defendant's ability to drive a motorized watercraft 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*
5. A person under fifteen years of age was aboard the motorized watercraft at the time of the offense, *and*
6. The defendant has a prior conviction for a violation of A.R.S. § 5-395; *and*
7. The date of the offense giving rise to the prior conviction was within eighty-four months of the date of the current offense.

SOURCE: A.R.S. §§ 5-395(A)(1) and 5-396(A)(2)(b) (statutory language as of January 1, 2009).

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

5.396(A)(2)(b)-2 – Aggravated Operating or Actual Physical Control a Motorized Watercraft With an Alcohol Concentration of 0.08 or More Within Two Hours of Operating While There Is a Person Under the Age of Fifteen Years Aboard the Motorized Watercraft With One Prior

The crime of aggravated operating or actual physical control of a motorized watercraft with an alcohol concentration of 0.08 or more within two hours of operating while there is a person under the age of fifteen years aboard the motorized watercraft with one prior conviction requires proof that:

1. The defendant [operated] [was in actual physical control of] a motorized watercraft in this state; *and*
2. The motorized watercraft was underway; *and*
3. The defendant had an alcohol concentration of 0.08 or more within two hours of [operating] [being in actual physical control of] the motorized watercraft; *and*
4. The alcohol concentration resulted from alcohol consumed either before or while [operating] [being in actual physical control of] the motorized watercraft; *and*
5. A person under fifteen years of age was aboard the motorized watercraft at the time of the offense, *and*
6. The defendant has a prior conviction for a violation of A.R.S. § 5-395; *and*
7. The date of the offense giving rise to the prior conviction was within eighty-four months of the date of the current offense.

SOURCE: A.R.S. §§ 5-395(A)(2) and 5-396(A)(2)(b) (statutory language as of January 1, 2009).

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

Refer to the Use Note in Instruction 5.395(A)(1) for needed definitions.

5.396(A)(2)(b)-3 – Aggravated Operating or Actual Physical Control of a Motorized Watercraft Under the Influence of Intoxicating Liquor or Drugs While There Is a Person Under Fifteen Aboard – With One Prior

The crime of aggravated operating or actual physical control of a motorized watercraft while there is a person under the age of fifteen years aboard the motorized watercraft with one prior violation of A.R.S. § 5-395 requires proof that:

1. The defendant [operated] [was in actual physical control of] a motorized watercraft in this state; *and*
2. The motorized watercraft was underway; *and*

3. The defendant had in [his] [her] body [(name of drug)] [a metabolite of (name of drug)] at the time of [operating] [being in actual physical control of] the motorized watercraft; *and*
4. A person under fifteen years of age was aboard the motorized watercraft at the time of the offense, and
5. The defendant has a prior conviction for a violation of A.R.S. § 5-395; *and*
6. The date of the offense giving rise to the prior conviction was within eighty-four months of the date of the current offense.

SOURCE: A.R.S. §§ 5-395(A)(3) and 5-396(A)(2)(b) (statutory language as of January 1, 2009).

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

Under the current statute, the prior may only be for a violation of A.R.S. § 5-395; not an A.R.S. § 5-396 violation.

Refer to the Use Note in Instruction 5.395(A)(1) for needed definitions.

5.396(A)(2)(c) – Aggravated Operating or Actual Physical Control of a Motorized Watercraft While Under the Extreme Influence While There Is a Person Under the Age of Fifteen Years in the Motorized Watercraft

The crime of aggravated operating or actual physical control of a motorized watercraft while under the extreme influence while there is a person under the age of fifteen years aboard the motorized watercraft requires requires proof that:

1. The defendant [operated] [was in actual physical control of] a motorized watercraft in this state; *and*
2. The motorized watercraft was underway; *and*
3. The defendant had an alcohol concentration of [0.15 or more but less than 0.20] [0.20 or more] within two hours of [operating] [being in actual physical control of] the motorized watercraft; *and*
4. The alcohol concentration resulted from alcohol consumed either before or while [operating] [being in actual physical control of] the motorized watercraft; *and*
5. A person under fifteen years of age was aboard the motorized watercraft at the time of the offense.

SOURCE: A.R.S. §§ 5-396(A)(2)(c) and 5-397 (statutory language as of January 1, 2009).

USE NOTE: The user is advised that this instruction applies to one or the other sections of A.R.S. § 5-397(A)(1) the 0.15 or more but less than 0.20 and A.R.S. § 5-397 (A)(2) the 0.20 or more within two hours. Use language in brackets as appropriate to the facts.

"A person who is convicted under subsection A, paragraph 2, subdivision (c) of this section shall serve at least the minimum term of incarceration required pursuant to § 5-397." A.R.S. § 5-396(F).

Refer to the Use Note in Instruction 5.395(A)(1) for needed definitions.

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.

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).

TITLE 14

14.5101.01 – Definition of Incapacitated Person

"Incapacitated person" means any person who is impaired by reason of mental illness, mental deficiency, mental disorder, physical illness or disability, chronic use of drugs, chronic intoxication or other cause, except minority, to the extent that the person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his or her person.

SOURCE: A.R.S. § 14-5101(1) (statutory language as of July 17, 1994).

USE NOTE: The term "incapacitated person" is included within the definition of "vulnerable adult" as defined in A.R.S. § 46-451 (Statutory Criminal Instruction 46-451.09).

TITLE 25

25.500(1) – Definition of "Support"

"Support" means the provision of maintenance or subsistence and includes medical insurance coverage and uncovered medical costs for the child, arrearages, interest on arrearages, past support, interest on past support and reimbursement for expended public assistance. [If the defendant's obligations were ordered in a Title IV-D case under the Social Security Act, the term also includes spousal maintenance that was included in the same order that directed child support.]

SOURCE: A.R.S. § 25-500(9) (statutory language as of July 18, 2000).

Use the language in brackets as appropriate to the facts.

The additional definition of support in the statute pertaining to spousal maintenance in social security cases should be used cautiously to ensure that the spousal maintenance order involves support for the child. Otherwise, the bracketed language would have no relevance to the criminal offense of failure of parent to provide support for a child.

25.500(2) – Definition of "Arrearage"

"Arrearage" means the total unpaid support owed, including child support, past support, spousal maintenance and interest.

SOURCE: A.R.S. § 25-500(1) (statutory language as of July 18, 2000).

25.511 – Failure of Parent to Provide for a Child

The crime of failure of a parent to provide for a child requires proof that the defendant:

1. was a parent of a minor child; and
2. knowingly failed to furnish reasonable support for such minor child.

In determining whether the defendant failed to furnish reasonable support, you shall consider all assets, earnings and entitlements of the defendant, and whether the defendant made all reasonable efforts to obtain the necessary funds.

Inability to furnish support is not a defense to this offense if the defendant voluntarily remained idle, voluntarily decreased [his] [her] income or voluntarily incurred other financial obligations.

[If there has been evidence of the defendant's previous employment or the defendant's lack of a physical or mental disability precluding employment, you may infer that the defendant is capable of full-time employment at least at the federal adult minimum wage. You are not required to make this inference. You must determine whether the facts and circumstances shown by the evidence in this case warrant any inference which the law

permits you to make. You are reminded that the State has the burden of proving each and every element of the offense of shoplifting beyond a reasonable doubt.]

SOURCE: A.R.S. § 25-511 (statutory language as of August 6, 1999).

USE NOTE: Use the language in brackets as appropriate to the facts. Do not use the bracketed language if the defendant was a non-custodial parent who was under the age of 18 years and still attending high school at the time of the offense.

The court shall instruct on the culpable mental state.

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

"Support" is defined in A.R.S. § 25-500 (Title 25 Statutory Definition Instruction 25-500(1)).

COMMENT: The statute provides for an affirmative defense that the defendant complied with a valid court order that was in effect at the time of the offense that set forth an amount of support for the minor child or provided that the defendant was unable to furnish reasonable support. A.R.S. § 25-511(B).

The statute also provides an exception that should have been ruled on by the Court prior to trial or during a Rule 20 proceeding. This exception allows the Court to determine whether the defendant, the defendant's parents or a legal guardian is not obligated to contribute to the child's support if maternity or paternity was the result of the parent's sexual contact with a person who has been found guilty of sexual conduct with a minor under A.R.S. § 13-1405 or sexual assault under A.R.S. § 13-1406. A.R.S. §§ 25-511(A) and 25-500(F).

TITLE 35

35.301 – Misuse of Public Monies

The crime of misuse of public monies requires proof that the defendant was a [public officer] [justice of the peace] [constable] [person] charged with the receipt, safekeeping, transfer or disbursement of public money, and the defendant:

[without authority of law, appropriated public money, or any portion thereof, to the defendant's own use, or to the use of another.]

[knowingly loaned public money, or any portion thereof.]

[knowingly failed to keep public money in the defendant's possession until disbursed or paid out by authority of law.]

[without authority of law knowingly deposited public money, or any portion thereof, in a bank, or with a banker or other person, except on special deposit for safekeeping.]

[knowingly kept a false account, or made a false entry or erasure in an account of, or relating to public money.]

[(altered) (falsified) (concealed) (destroyed) (obliterated) an account of, or relating to public money with an intent to defraud or deceive.]

[knowingly refused or omitted to pay over, on demand, public monies in the defendant's hands, upon presentation of a draft, order or warrant drawn upon such monies by competent authority.]

[knowingly omitted or refused to transfer public money when a transfer was required by law.]

[knowingly transferred public money when not authorized or directed by law.]

[knowingly omitted or refused to pay over to an officer or person authorized by law to receive public money, any public money received by the defendant when a duty was imposed by law to pay over the public money.]

"Public money" includes bonds and evidence of indebtedness, and money belonging to, received or held by, state, county, district, city or town officers in their official capacity.

SOURCE: A.R.S. §§ 35-301 (statutory language as of April 23, 1980); 35-302 (statutory language as of April 23, 1980).

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

The court shall instruct on the culpable mental state.

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

"Intentionally" or "with intent to" is defined in A.R.S. § 13-105 (Statutory Criminal 1.0510(a)(1)).

COMMENT: The actual statutory caption for this offense is "Duties and liabilities of custodian of public monies." However, this statute is commonly referred to as "Misuse of

Public Monies." Because that is a more accurate description of the offense, the Committee used the latter title for the instruction.

There is no statute of limitations for a crime involving misuse of public monies. A.R.S. § 13-107.

There is no definition of "public officer" in Title 35. There is a definition of "public officer" in A.R.S. § 38-101, which states that the definition applies to Title 38. For this reason, the Committee believed it was not appropriate to incorporate this definition in this instruction.

TITLE 38

38.101 – Definition of "Officer" or "Public Officer"

"Officer" or "public officer" means the incumbent of any office, member of any board or commission, or the deputy or assistant exercising the powers and duties of the officer, other than clerks or mere employees of the officer.

SOURCE: A.R.S. § 38-101 (statutory language as of 1939).

38.421 – Stealing, Destroying, Altering or Secreting Public Record

The crime of stealing, destroying, altering or secreting public record requires proof that the defendant:

1. [was not a public officer; *and*]
2. [was a public officer having custody of any (record/map/book/paper or proceeding of any court), which was (filed or deposited in any public office/placed in the defendant's hands for any purpose); *and*]
3. knowingly and without lawful authority [commits theft of] [destroys] [mutilates] [defaces] [alters] [falsifies] [removes] [secretes] [permits another person to (list one or more of foregoing acts)] all or any part of any (record/map/book/paper or proceeding of any court), which was (filed or deposited in any public office/placed in the defendant's hands for any purpose).

SOURCE: A.R.S. § 38-421 (statutory language as of October 1, 1978).

USE NOTE: Use the language in brackets as appropriate to the facts. Use only one paragraph 1 depending on whether the defendant was a public officer.

The court shall instruct on the culpable mental state.

"Knowingly" is defined in A.R.S. § 13-105 (Statutory Criminal Instruction 1.056(b)).

"Unlawful" is defined in A.R.S. § 13-105 (Statutory Criminal Instruction 1.0540).

"Theft" is defined in A.R.S. § 13-1802 (Statutory Criminal Instruction 18.02-1). "Officer" or "Public officer" is defined in A.R.S. § 38-101 (Statutory Title 38 Non-Criminal Instruction 38-1.01).

The instruction must include a finding of whether the defendant is or is not a public officer, because it affects the class of felony. A.R.S. § 38-421.

COMMENT: There is no statute of limitations for a crime involving falsification of public records. A.R.S. § 13-107; *State v. Fogel,* 16 Ariz. App. 246, 248-49 (1972).

If the defendant is a public officer, the offense is a class 4 felony, while a nonpublic officer's violation of this statute is a class 6 felony. A.R.S. § 38-421.

TITLE 39

39.161 – Presentment of False Instrument for Filing

The crime of presentment of false instrument for filing requires proof of the following:

1. the defendant [acknowledged] [certified] [notarized] [procured] [offered] to [file] [register] [record] an instrument in a public office; *and*
2. the defendant knew that the instrument was [false] [forged]; *and*
3. the instrument, if genuine, could be [filed] [registered] [recorded] under the law.

SOURCE: A.R.S. § 39-161 (statutory language as of April 23, 1980).

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

The court shall instruct on the culpable mental state.

"Knowingly" is defined in A.R.S. § 13-105 (Statutory Criminal Instruction 1.056(b)).

"Instrument" includes "written instrument," which is defined in A.R.S. § 13-2001. *See* A.R.S. § 39-161.

COMMENT: Unlike the crime of forgery, intent to defraud is not an element of this crime. *State v. Edgar,* 124 Ariz. 472, 474 (1979).

While there is no statute of limitations for a crime involving falsification of public records, the usual statute of limitations for a felony applies to the offense of presentment of false instrument for filing. *State v. Fogel,* 16 Ariz. 246, 248-49 (App. 1972).

TITLE 41

41.1661 – Definition of "Correctional Officer"

"Correctional officer" is defined as a person, other than an elected official, who is employed by the State of Arizona or a county, city or town in Arizona and who is responsible for the supervision, protection, care, custody or control of inmates in a state, county or municipal correctional institution, including counselors, but excluding secretarial, clerical and professionally trained personnel.

SOURCE: A.R.S. § 41-1661 (statutory language as of June 26, 1997).

44.1453.B.1 – Use of Counterfeit Marks with One Prior Conviction

The crime of "use of counterfeit marks with one prior conviction" requires proof that the defendant:

1. knowingly, and with the intent to [sell] [distribute], [used/displayed/advertised/distributed/offered for sale/sold/possessed] any [item that bore a counterfeit mark] [service that was identified by a counterfeit mark]; *and*
2. was previously convicted of "use of counterfeit marks."

[A person who knowingly has possession, custody or control of at least twenty-six items that bear a counterfeit mark is presumed to possess the items with the intent to sell or distribute the items. You are free to accept or reject this inference as triers of fact. You must determine whether the facts and circumstances shown by the evidence in this case warrant any inference that the law permits you to make. Even with the inference, the State has the burden of proving each and every element of the offense beyond a reasonable doubt before you can find the defendant guilty.]

A "counterfeit mark" means any unauthorized reproduction or copy of intellectual property or intellectual property that is affixed to any item that is knowingly sold, offered for sale, manufactured or distributed or to any identifying services offered or rendered without the authority of the intellectual property owner. "Intellectual property" means any trademark, service mark, trade name, label, term, device, design or word that is adopted or used by a person to identify that person's goods or services.

["Service mark" means any word, name, symbol or device or any combination of these items that is adopted and used by a person to identify services provided or sold by that person and to distinguish the services from services provided or sold by others.]

["Trademark" means any word, name, symbol or device or any combination of these items that is adopted and used by a person to identify goods made or sold by that person and to distinguish the goods from goods made or sold by others.]

["Item" includes any component that is designed, marketed or otherwise intended to be used on or in connection with any goods or services or any component of a finished product.]

SOURCE: A.R.S. §§ 44-1453(A), (B)(1), (E) and (M) (statutory language as of September 26, 2008); 44-1441 (statutory language as of August 21, 1998).

USE NOTE: Use bracketed language as appropriate to the facts of the case.

The court shall instruct on the culpable mental state.

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

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

COMMENT: A.R.S. § 44-1453(E) provides for a mandatory presumption. There are no cases pertaining to the presumption, but mandatory presumptions are deemed to be

unconstitutional, because they shift the burden of proof to the defendant. *State v. Mohr,* 150 Ariz. 564, 568-69 (App. 1986), *relying upon Francis v. Franklin,* 471 U.S. 307 (1985). Therefore, it seems more appropriate to interpret the presumption in the statute as a permissive one, which would pass constitutional muster. *See, e.g., State v. Mohr,* 150 Ariz. 564, 568-69 (App. 1986) (holding that a statutory inference must be permissive to withstand constitutional due process and to avoid burden-shifting to the defendant).

44.1453.B.2 – Use of Counterfeit Marks

The crime of "use of counterfeit marks" requires proof that:

1. The defendant knowingly, and with the intent to [sell] [distribute], [used/displayed/advertised/ distributed/offered for sale/sold/possessed] any [item that bore a counterfeit mark] [service that was identified by a counterfeit mark]; *and*
2. [The offense involved more than one hundred but fewer than one thousand items that bore the counterfeit mark.]

   [The total retail value of all of the [items that bore] [services that were identified by] a counterfeit mark was more than one thousand dollars but less than ten thousand dollars.]

   [A person who knowingly has possession, custody or control of at least twenty-six items that bear a counterfeit mark is presumed to possess the items with the intent to sell or distribute the items. You are free to accept or reject this inference as triers of fact. You must determine whether the facts and circumstances shown by the evidence in this case warrant any inference that the law permits you to make. Even with the inference, the State has the burden of proving each and every element of the offense beyond a reasonable doubt before you can find the defendant guilty.]

A "counterfeit mark" means any unauthorized reproduction or copy of intellectual property or intellectual property that is affixed to any item that is knowingly sold, offered for sale, manufactured or distributed or to any identifying services offered or rendered without the authority of the intellectual property owner. "Intellectual property" means any trademark, service mark, trade name, label, term, device, design or word that is adopted or used by a person to identify that person's goods or services.

["Service mark" means any word, name, symbol or device or any combination of these items that is adopted and used by a person to identify services provided or sold by that person and to distinguish the services from services provided or sold by others.]

["Trademark" means any word, name, symbol or device or any combination of these items that is adopted and used by a person to identify goods made or sold by that person and to distinguish the goods from goods made or sold by others.]

["Item" includes any component that is designed, marketed or otherwise intended to be used on or in connection with any goods or services or any component of a finished product.]

[In determining the total quantity of items, you are to consider all items that the defendant manufactured, used, displayed, advertised, distributed, offered for sale, sold or possessed and that bore a counterfeit mark.]

[For items that bear a counterfeit mark and that are components of a finished product, "retail value" means the manufacturer's suggested retail price of the finished product on or in which the component would be utilized. For all other items that bear a counterfeit mark or services that are identified by a counterfeit mark, "retail value" means the manufacturer's suggested retail price for those items or services. The "total retail value" is the retail value of all items or services that the defendant manufactured, used, displayed, advertised, distributed, offered for sale, sold or possessed and that bore a counterfeit mark or that were identified by a counterfeit mark.]

SOURCE: A.R.S. §§ 44-1453(A), (B)(2), (L) and (M) (statutory language as of July 3, 2015); 44-1441 (statutory language as of August 21, 1998).

USE NOTE: Use bracketed language as appropriate to the facts of the case.

The court shall instruct on the culpable mental state.

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

"Intentionally" or "with the intent to" is defined in A.R.S. § 13-105 (Statutory Criminal Instruction 1.0510(a)(1)).

COMMENT: A.R.S. § 44-1453(E) provides for a mandatory presumption. There are no cases pertaining to the presumption, but mandatory presumptions are deemed to be unconstitutional, because they shift the burden of proof to the defendant. *State v. Mohr,* 150 Ariz. 564, 568-69 (App. 1986), *relying upon Francis v. Franklin,* 471 U.S. 307 (1985). Therefore, it seems more appropriate to interpret the presumption in the statute as a permissive one, which would pass constitutional muster. *See, e.g., State v. Mohr,* 150 Ariz. 564, 568-69 (App. 1986) (holding that a statutory inference must be permissive to withstand constitutional due process and to avoid burden-shifting to the defendant).

44.1453.D.1 – Use of Counterfeit Marks With Two Prior Convictions

The crime of "use of counterfeit marks with two prior convictions" requires proof that the defendant:

1. knowingly, and with the intent to [sell] [distribute], [used/displayed/advertised/distributed/offered for sale/sold/possessed] any [item that bore a counterfeit mark] [service that was identified by a counterfeit mark]; *and*
2. was previously convicted two or more times of "use of counterfeit marks."

[A person who knowingly has possession, custody or control of at least twenty-six items that bear a counterfeit mark is presumed to possess the items with the intent to sell or distribute the items. You are free to accept or reject this inference as triers of fact. You must determine whether the facts and circumstances shown by the evidence in this case warrant any inference that the law permits you to make. Even with the inference, the State has the burden of proving each and every element of the offense beyond a reasonable doubt before you can find the defendant guilty.]

A "counterfeit mark" means any unauthorized reproduction or copy of intellectual property or intellectual property that is affixed to any item that is knowingly sold, offered for sale, manufactured or distributed or to any identifying services offered or rendered without

the authority of the intellectual property owner. "Intellectual property" means any trademark, service mark, trade name, label, term, device, design or word that is adopted or used by a person to identify that person's goods or services.

["Service mark" means any word, name, symbol or device or any combination of these items that is adopted and used by a person to identify services provided or sold by that person and to distinguish the services from services provided or sold by others.]

["Trademark" means any word, name, symbol or device or any combination of these items that is adopted and used by a person to identify goods made or sold by that person and to distinguish the goods from goods made or sold by others.]

["Item" includes any component that is designed, marketed or otherwise intended to be used on or in connection with any goods or services or any component of a finished product.]

SOURCE: A.R.S. §§ 44-1453(A), (D)(1) and (M) (statutory language as of September 26, 2008); 44-1441 (statutory language as of August 21, 1998).

USE NOTE: Use bracketed language as appropriate to the facts of the case.

The court shall instruct on the culpable mental state.

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

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

COMMENT: A.R.S. § 44-1453(E) provides for a mandatory presumption. There are no cases pertaining to the presumption, but mandatory presumptions are deemed to be unconstitutional, because they shift the burden of proof to the defendant. *State v. Mohr,* 150 Ariz. 564, 568-69 (App. 1986), *relying upon Francis v. Franklin,* 471 U.S. 307 (1985). Therefore, it seems more appropriate to interpret the presumption in the statute as a permissive one, which would pass constitutional muster. *See, e.g., State v. Mohr,* 150 Ariz. 564, 568-69 (App. 1986) (holding that a statutory inference must be permissive to withstand constitutional due process and to avoid burden-shifting to the defendant).

44.1453.D.2 – Use of Counterfeit Marks

The crime of "use of counterfeit marks" requires proof that:

1. The defendant knowingly, and with the intent to [sell] [distribute], [used/displayed/advertised/distributed/offered for sale/sold/possessed] any [item that bore a counterfeit mark] [service that was identified by a counterfeit mark]; *and*

2. [The offense involved one thousand or more items that bore the counterfeit mark.]

   [The total retail value of all of the [items that bore] [services that were identified by] a counterfeit mark was ten thousand dollars or more.]

   [A person who knowingly has possession, custody or control of at least twenty-six items that bear a counterfeit mark is presumed to possess the items with the intent to sell or distribute the items. You are free to accept or reject this inference as triers of fact. You must determine whether the facts and circumstances shown by the

evidence in this case warrant any inference that the law permits you to make. Even with the inference, the State has the burden of proving each and every element of the offense beyond a reasonable doubt before you can find the defendant guilty.]

A "counterfeit mark" means any unauthorized reproduction or copy of intellectual property or intellectual property that is affixed to any item that is knowingly sold, offered for sale, manufactured or distributed or to any identifying services offered or rendered without the authority of the intellectual property owner. "Intellectual property" means any trademark, service mark, trade name, label, term, device, design or word that is adopted or used by a person to identify that person's goods or services.

["Service mark" means any word, name, symbol or device or any combination of these items that is adopted and used by a person to identify services provided or sold by that person and to distinguish the services from services provided or sold by others.]

["Trademark" means any word, name, symbol or device or any combination of these items that is adopted and used by a person to identify goods made or sold by that person and to distinguish the goods from goods made or sold by others.]

["Item" includes any component that is designed, marketed or otherwise intended to be used on or in connection with any goods or services or any component of a finished product.]

[In determining the total quantity of items, you are to consider all items that the defendant manufactured, used, displayed, advertised, distributed, offered for sale, sold or possessed and that bore a counterfeit mark.]

[For items that bear a counterfeit mark and that are components of a finished product, "retail value" means the manufacturer's suggested retail price of the finished product on or in which the component would be utilized. For all other items that bear a counterfeit mark or services that are identified by a counterfeit mark, "retail value" means the manufacturer's suggested retail price for those items or services. The "total retail value" is the retail value of all items or services that the defendant manufactured, used, displayed, advertised, distributed, offered for sale, sold or possessed and that bore a counterfeit mark or that were identified by a counterfeit mark.]

SOURCE: A.R.S. §§ 44-1453(A), (D)(2), (L) and (M) (statutory language as of July 3, 2015); 44-1441 (statutory language as of August 21, 1998).

USE NOTE: Use bracketed language as appropriate to the facts of the case.

The court shall instruct on the culpable mental state.

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

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

COMMENT: A.R.S. § 44-1453(E) provides for a mandatory presumption. There are no cases pertaining to the presumption, but mandatory presumptions are deemed to be unconstitutional, because they shift the burden of proof to the defendant. *State v. Mohr,* 150 Ariz. 564, 568-69 (App. 1986), *relying upon Francis v. Franklin,* 471 U.S. 307 (1985). Therefore, it seems more appropriate to interpret the presumption in the statute as a permissive one, which would pass constitutional muster. *See, e.g., State v. Mohr,* 150 Ariz. 564, 568-69 (App.

1986) (holding that a statutory inference must be permissive to withstand constitutional due process and to avoid burden-shifting to the defendant).

44.1453.C – Manufacturing or Producing Items of Services with Counterfeit Marks

The crime of "manufacturing or producing items or services with counterfeit marks" requires proof that the defendant, with the intent to sell or distribute, knowingly [manufactured] [produced] any [item that bore a counterfeit mark] [service that was identified by a counterfeit mark].

[A person who knowingly has possession, custody or control of at least twenty-six items that bear a counterfeit mark is presumed to possess the items with the intent to sell or distribute the items. You are free to accept or reject this inference as triers of fact. You must determine whether the facts and circumstances shown by the evidence in this case warrant any inference that the law permits you to make. Even with the inference, the State has the burden of proving each and every element of the offense beyond a reasonable doubt before you can find the defendant guilty.]

A "counterfeit mark" means any unauthorized reproduction or copy of intellectual property or intellectual property that is affixed to any item that is knowingly sold, offered for sale, manufactured or distributed or to any identifying services offered or rendered without the authority of the intellectual property owner. "Intellectual property" means any trademark, service mark, trade name, label, term, device, design or word that is adopted or used by a person to identify that person's goods or services.

["Service mark" means any word, name, symbol or device or any combination of these items that is adopted and used by a person to identify services provided or sold by that person and to distinguish the services from services provided or sold by others.]

["Trademark" means any word, name, symbol or device or any combination of these items that is adopted and used by a person to identify goods made or sold by that person and to distinguish the goods from goods made or sold by others.]

["Item" includes any component that is designed, marketed or otherwise intended to be used on or in connection with any goods or services or any component of a finished product.]

SOURCE: A.R.S. §§ 44-1453(C) and (M) (statutory language as of September 26, 2008); 44-1441 (statutory language as of August 21, 1998).

USE NOTE: Use bracketed language as appropriate to the facts of the case.

The court shall instruct on the culpable mental state.

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

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

Comment: A.R.S. § 44-1453(E) provides for a mandatory presumption. There are no cases pertaining to the presumption, but mandatory presumptions are deemed to be

unconstitutional, because they shift the burden of proof to the defendant. *State v. Mohr,* 150 Ariz. 564, 568-69 (App. 1986), *relying upon Francis v. Franklin,* 471 U.S. 307 (1985). Therefore, it seems more appropriate to interpret the presumption in the statute as a permissive one, which would pass constitutional muster. *See, e.g., State v. Mohr,* 150 Ariz. 564, 568-69 (App. 1986) (holding that a statutory inference must be permissive to withstand constitutional due process and to avoid burden-shifting to the defendant).

44.1455 – Use of Unauthorized Copy of Computer Software

The crime of "use of unauthorized copy of computer software" requires proof that:

1. The defendant knowingly used, other than for personal, noncommercial use, an unauthorized copy of computer software; *and*
2. The computer software when used [depicted] [incorporated] [displayed] [caused to be depicted, incorporated or displayed] a trademark or service mark that had been registered in Arizona for computer software.

["Service mark" means any word, name, symbol or device or any combination of these items that is adopted and used by a person to identify services provided or sold by that person and to distinguish the services from services provided or sold by others.]

["Trademark" means any word, name, symbol or device or any combination of these items that is adopted and used by a person to identify goods made or sold by that person and to distinguish the goods from goods made or sold by others.]

SOURCE: A.R.S. §§ 44-1455 and 44-1441 (statutory language as of August 21, 1998).

USE NOTE: Use bracketed language as appropriate to the facts of the case.

The court shall instruct on the culpable mental state.

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

TITLE 46

46.451.01 – Definition of "Abuse"

"Abuse" means:

1. Intentional infliction of physical harm; or
2. Injury caused by negligent acts or omissions; or
3. Unreasonable confinement; or
4. Sexual abuse or sexual assault.

SOURCE: A.R.S. § 46-451(A)(1) (statutory language as of September 30, 2009).

46.451.02 – Definition of "De Facto Conservator"

"De facto conservator" means any person who takes possession of the estate of a vulnerable adult, without right or lawful authority. A de facto conservator is subject to all of the responsibilities that attach to a legally appointed conservator or trustee.

SOURCE: A.R.S. § 46-451(A)(2) (statutory language as of September 30, 2009).

USE NOTE: "Vulnerable adult" is defined in A.R.S. § 46-451 (Statutory Definition Instruction 46-451.09).

46.451.03 – Definition of "De Facto Guardian"

"De facto guardian" means any person who takes possession of the person of a vulnerable adult, without right or lawful authority. A de facto guardian is subject to all of the responsibilities that attach to a legally appointed guardian.

SOURCE: A.R.S. §46-451(A)(3) (statutory language as of September 30, 2009).

USE NOTE: "Vulnerable adult" is defined in A.R.S. § 46-451 (Statutory Definition Instruction 46-451.09).

46.451.04 – Definition of "Exploitation"

"Exploitation" means the illegal or improper use of a vulnerable adult or the vulnerable adult's resources for another's profit or advantage.

SOURCE: A.R.S. § 46-451(A)(4) (statutory language as of September 30, 2009).

46.451.05 – Definition of "Informed Consent"

"Informed consent" means any of the following:

1. A written expression by the person that the person fully understands the potential risks and benefits of the withdrawal of food, water, medication, medical services, shelter, cooling, heating or other services necessary to maintain minimum physical or mental health and that the person desires that the service be withdrawn; or
2. Consent to withdraw food, water, medication, medical services, shelter, cooling, heating or other services necessary to maintain minimum physical or mental health as permitted by an order of a court of competent jurisdiction; or
3. A declaration made pursuant to law regarding living wills and/or health care directives; or
4. Consent by another person under a durable power of attorney relating to health care services to withdraw food, water, medication, medical services, shelter, cooling, heating or other services necessary to maintain minimum physical or mental health.

SOURCE: A.R.S. § 46-451(A)(5) (statutory language as of September 30, 2009).

USE NOTE: The reference to subsection (A)(3) on living wills and health care directives is found in Title 36, Chapter 32 of the Arizona Revised Statutes.

46.451.06 – Definition of "Neglect"

"Neglect" means a pattern of conduct without the person's informed consent resulting in deprivation of food, water, medication, medical services, shelter, cooling, heating or other services necessary to maintain minimum physical or mental health.

SOURCE: A.R.S. § 46-451(A)(6) (statutory language as of September 30, 2009).

46.451.09 – Definition of "Vulnerable Adult"

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

SOURCE: A.R.S. 46-451(A)(9) (statutory language as of September 30, 2009).

USE NOTE: Incapacitated person is defined in A.R.S. § 14-5101 (Statutory Definition Instruction 14-5101).

46.455 – Endangerment of a Vulnerable Adult

The crime of "endangerment of a vulnerable adult" requires proof that:

1. The defendant was [employed] [a de facto guardian] [a de facto conservator] [appointed by a court] to provide care to a vulnerable adult
2. The defendant caused or permitted [the life of the vulnerable adult to be endangered] [the health of the vulnerable adult to be injured or endangered] by neglect.

["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. "Vulnerable adult" includes an incapacitated person.]

["Incapacitated person" means person who is impaired by reason of mental illness, mental deficiency, mental disorder, physical illness or disability, chronic use of drugs, chronic intoxication or other cause to the extent that the person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his/her person.]

["De facto guardian" means any person who takes possession of the person of a vulnerable adult, without right or lawful authority. A de facto guardian is subject to all of the responsibilities that attach to a legally appointed guardian.]

["De facto conservator" means any person who takes possession of the estate of a vulnerable adult, without right or lawful authority. A de facto conservator is subject to all of the responsibilities that attach to a legally appointed conservator or trustee.]

["Abuse" means:

1. Intentional infliction of physical harm; or
2. Injury caused by negligent acts or omissions; or
3. Unreasonable confinement; or
4. Sexual abuse or sexual assault.]

["Neglect" means a pattern of conduct without the person's informed consent resulting in deprivation of food, water, medication, medical services, shelter, cooling, heating or other services necessary to maintain minimum physical or mental health.]

["Exploitation" means the illegal or improper use of a vulnerable adult or his/her resources for another's profit or advantage.]

SOURCE: A.R.S. § 46-455 (statutory language effective September 30, 2009).

USE NOTE: Use bracketed language as appropriate to the facts of the case.

46-456.04 – Definition of "Position of Trust and Confidence"

"Position of trust and confidence" means that a person is any of the following:

1. a person who has assumed a duty to provide care to the vulnerable adult; *or*
2. a joint tenant or a tenant in common with a vulnerable adult; *or*

3. a person who is in a fiduciary relationship with a vulnerable adult including a de facto guardian or de facto conservator.

SOURCE: A.R.S. 46-456(I) (statutory language as of September 30, 2009).

"Vulnerable adult" is defined in A.R.S. § 46-451 (Statutory Definition Instruction 46-451.09).

NON-CAPITAL AGGRAVATING CIRCUMSTANCES INSTRUCTIONS

In the first phase of this trial you have returned a verdict of guilty. Now we are about to begin the second phase of the trial. The State has alleged aggravating circumstances in this case. Under Arizona law, the jury must decide whether the aggravating circumstances exist. The law requires the State to prove these specific aggravating circumstances to you beyond a reasonable doubt. Based on that allegation, we are now beginning an Aggravating Circumstance hearing.

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 an aggravating circumstance beyond a reasonable doubt. If you conclude that the State has not met its burden of proof beyond a reasonable doubt, then you must find the alleged aggravating circumstance not proven. 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.

It is your duty as a juror to decide this case by applying these jury instructions to the facts as you determine them. You must follow these jury instructions. You may also rely on the jury instructions that were read and given to you earlier. They are the rules you should use to decide this case.

It is your duty to determine what the facts are in the case by determining what actually happened. Determine the facts only from the evidence produced in court. When I say "evidence," I mean the testimony of witnesses and exhibits introduced in court during the earlier trial, as well as any testimony or exhibits introduced at the Aggravation Circumstance hearing. You should not guess about any fact. You must not be influenced by sympathy or prejudice. You must not be concerned with any opinion that you feel that I have about the facts. You, as jurors, are the sole judges of what happened.

You must consider all these instructions. Do not pick out one instruction or part of one and ignore the others. As you determine the facts, however, you may find that some instructions no longer apply. You must then consider the instructions that do apply, together with the facts as you have determined them.

The lawyers will again talk to you about the law and the evidence. What the lawyers say is not evidence, but it may help you to understand the law and the evidence.

You must decide whether the State has proven an alleged aggravating circumstance by determining what the facts in the case are and applying these jury instructions. You must not consider the possible punishment in reaching a decision. Punishment is left to the judge.

You are to determine what the facts in the case are from the evidence produced in court during the trial or the Aggravating Circumstance hearing. If the Court sustained an objection to a lawyer's question, you must disregard it and any answer given. Any testimony stricken from the court record must not be considered.

Evidence may be direct or circumstantial. The law makes no distinction between direct and circumstantial evidence. It is for you to determine the importance to be given to the evidence, regardless of whether it is direct or circumstantial.

In considering the evidence, you must decide whether to believe the witnesses and their testimony. As you do this, you should consider the testimony in light of all the other evidence in the case. This means you may consider such things as the witnesses' ability and opportunity to observe, their manner and memory while testifying, any motive or prejudice they might have, and any inconsistent statements they may have made.

The State has the burden of proving any aggravating circumstance beyond a reasonable doubt. In civil cases, it is only necessary to prove that a fact is more likely true than not or that its truth is highly probable. In criminal cases such as this, the State's proof must be more powerful than that. It must be 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 the alleged aggravating circumstance is proven, you must find that the alleged aggravating circumstance exists. 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 not proven.

The State has alleged the following aggravating circumstances:

1._____

2._____

3._____

Each aggravating circumstance is a separate and distinct allegation. You must decide each aggravating circumstance separately on the evidence with the law applicable to it, uninfluenced by your decision on any other aggravating circumstance. You may find that the State has proved beyond a reasonable doubt, all, some, or none of the aggravating circumstances. Your finding for each aggravating circumstance must be stated on the interrogatory.

All of you must agree before you may find an aggravating circumstance "proven beyond a reasonable doubt" or "not proven". Your foreperson will be in charge during your deliberations and will sign the verdict form.

You will be given a verdict form on which to indicate your decision. It reads as follows:

IN THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF _____

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

We, the jury, duly impaneled and sworn in the above-entitled cause, do find upon our oaths, the following:

Proven	Not Proven	Aggravating circumstance(s).
		1. The victim, John Smith, is 65 or more years of age.
		2. The offense involved presence of an accomplice.
		3. The offense involved the infliction of serious physical injury to the victim, Jane Smith.

_____
FOREPERSON

USE NOTE: The verdict form must note each alleged aggravating circumstance. In multiple defendant trials, a separate verdict form must be prepared for each defendant. In multiple victim cases, it may be necessary to make a specific reference to a victim for a particular aggravating circumstance.

Some words and phrases describing an aggravating circumstance may need to be defined for the jury. Definitions may be found in the Statutory Criminal Instructions, Capital Case Definitions, A.R.S. § 13-105, or various chapters for Titles 1, 13, 14, 28, 38, and 41 offenses.

If a dangerous offense has been alleged as an aggravating circumstance, the Court should give Criminal Instruction 7.04.

If a dangerous crime against a child has been alleged as an aggravating circumstance, the Court should give Criminal Instruction 7.05.

If the defendant's release status has been alleged as an aggravating circumstance, the Court should give Criminal Instruction 7.08-C and/or 7.08-D.

COMMENT: In *State ex rel. Smith v. Conn [Tinnell, Real Party in Interest]*, 209 Ariz. 195 ¶¶ 10–15 (App. 2004), the court held that the allegation of aggravating circumstances need not be included in the charging document. Rather, the State may allege aggravating circumstances by filing a timely notice under Rule 16.1(b), Ariz. R. Crim. P. *See also State v. Aleman*, 210 Ariz. 232, 239 ¶ 23, fn. 7 (App. 2005) ("We reject this argument and note that our supreme court has concluded that even in capital cases, the indictment need not specify aggravating factors in support of the death penalty."); *State v. Nichols,* 201 Ariz. 234, 238 ¶ 15 (App.2001).

In *State v. Martinez,* 210 Ariz. 578 (2005), the Arizona Supreme Court held that the Sixth Amendment guarantee of a right to jury trial, as applied to Arizona's general felony sentencing scheme, does not require that a sentencing judge consider only those aggravating factors found by a jury beyond a reasonable doubt in determining whether to impose an aggravated sentence, but that the judge may find and consider additional aggravating factors once a single aggravating factor has been found by the jury, is inherent in the jury's verdict, or has been admitted by the defendant. *See also State v. Molina*, 211 Ariz. 130 ¶ 16 (App. 2005) ("[S]o long as one aggravating factor is either in compliance with or exempt from the dictates of *Blakely,* 'the Sixth Amendment permits the sentencing judge to find and consider additional factors relevant to the imposition of a sentence up to the maximum prescribed in that statute.'" [Citation omitted.]).

The Committee felt the word "circumstance" should be used over "factor" because the statute uses the word "circumstance." Also, it is consistent with the terminology used in the Capital Instructions.

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 (2010) (holding that juries should not be instructed to consider failure to report the crime in determining if the defendant was a major participant, but that factor may be relevant in determining if a defendant acted with reckless indifference, (citing *State v. Lacy*, 187 Ariz. 340, 351-52 (1996) (holding that, "reckless indifference may be implicit when one 'knowingly engag[es] in criminal activities known to carry a grave risk of death.' [*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 (1996) (discussing "major participant" factors); *State v. Styers*, 177 Ariz. 104, 114 (1993) (discussing "major participant" factors); *State v. Salazar*, 173 Ariz. 399, 412-13 (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 (1990) (discussing "major participant" factors).

The burden of proof for this finding is beyond a reasonable doubt. *State v. Tison*, 160 Ariz. 501, 502 (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 (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 (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 (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 (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 (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.

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 (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 (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 (1995); Standard Criminal Instruction 5b(1).

USE NOTE: A reasonable doubt instruction must be given at the close of a case, even if it has been previously mentioned in the judge's preliminary instructions. *State v. Romanosky*, 176 Ariz. 118, 121 n.1 (1993); *State v. Marquez*, 135 Ariz. 316 (App. 1983). 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 (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 (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 (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 (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, ¶ 7 (2007); *State v. Roque*, 213 Ariz. 193, 216-17 (2006) (refusing to "look beyond the language of the [foreign] statutes" to the complaint describing the defendant's conduct in determining whether prior California robbery conviction constituted a "serious offense" under A.R.S. § 13-751(F)(2)); *State v. Schaaf,* 169 Ariz. 323, 334 (1991) (reviewing Nevada attempted murder statute to determine if that crime involved violence and holding that sentencing courts "may consider only the statute that the defendant [was] charged with violating; it may not consider other evidence").

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

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

Capital Case 1.6(b) – 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 (2006) (mere presence of a third person insufficient to prove aggravator; intent to kill third person precludes finding the aggravator); *State v. Carreon*, 210 Ariz. 54, 67 (2005) (using "specific third person" language); *State v. McMurtrey,* 151 Ariz. 105, 108 (1986) (holding that the (F)(3) circumstance does not apply when the person in the zone of danger is the intended victim of the murder).

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

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

Whether the (F)(3) circumstance should be presented to the jury may be the subject of motions that 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 (2005) (where the court also stated that, "the superior court properly instructed the jury on this aggravating factor" where the (F)(5) instruction included the language, "[a] finding of pecuniary gain may be based on tangible evidence or *strong* circumstantial evidence," and the court was reviewing whether a misstatement of the law regarding the (F)(5) circumstance by the prosecutor should cause a reversal (emphasis added)); *State v. Carreon*, 210 Ariz. 54, 67 (2005) (holding that, "[t]he finding of pecuniary gain may be based on tangible evidence or strong circumstantial evidence."); *State v. Moody,* 208 Ariz. 424, 471 (2004) (holding that the expectation of pecuniary gain must be a, "motive, cause or impetus for the murder, and not merely a result of the murder[,]" and that the State is required to, "establish the connection between the murder and the motive through direct or strong circumstantial evidence."); *State v. Armstrong*, 208 Ariz. 360, 363 n.2 (2004) (rejecting "but for" requirement, *i.e.*, receipt of item(s) of pecuniary value need not be the *only* cause of the murder); *State v. Sansing*, 200 Ariz. 347, 353, 356 (2001) (holding that to prove the (F)(5) circumstance, the State must prove, "a connection between a pecuniary motive and the killing itself; the expectation of pecuniary gain must be a motive for the murder[,]" "[w]e reserve the death penalty for murders committed during a robbery or burglary for those cases in which the facts clearly indicate a connection between a pecuniary motive and the killing itself[,]" and that, "[t]he murder, which occurred at least an hour after the victim's arrival, did not facilitate the defendant's ability to secure pecuniary gain, particularly in light of the fact that he bound the victim almost as soon as she entered his home."); *State v. Medina*, 193 Ariz. 504, 513 (1999) (holding

that the State failed to prove the (F)(5) circumstance, even though Medina said prior to the murder that he intended to steal the victim's car and radio, and he then beat and kicked the victim and repeatedly drove over the victim with his (Medina's) car); *State v. Greene*, 192 Ariz. 431, 439 (1998) (regarding the (F)(5) circumstance, "[w]e have held that when one comes to rob, the accused expects pecuniary gain and this desire infects all other conduct.").

USE 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; *see also State v. Garza,* 216 Ariz. 56, 67, ¶ 52 (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 (2008) (defining gratuitous violence to include that State must also show that the defendant continued to inflict violence after he knew or should have known that a fatal action had occurred); *State v. Wallace*, 219 Ariz. 1 (2008); *State v. Tucker*, 215 Ariz. 298 (2007); *State v. Andriano*, 215 Ariz. 497 (2007); *State v. Velazquez*, 216 Ariz. 300 (2007); *State v. Anderson*, 210 Ariz. 327, 352 n.19 (2005) (defining gratuitous violence and using "clearly beyond" language); *State v. Carlson*, 202 Ariz. 570, 581-83 (2002) (especial cruelty); *State v. Canez*, 202 Ariz. 133, 161 (2002) (holding that re especial cruelty, defendant knew or should have known that victim would consciously suffer); *State v. Medina*, 193 Ariz. 504, 513 (1999) (disjunctive); *State v. Doerr*, 193 Ariz. 56, 67-68 (1999) (relishing); *State v. Miles*, 186 Ariz. 10, 18-19 (1996) (holding that a finding of especially cruel, heinous or depraved, "is a single (F)(6) factor, and the trial judge erred when he characterized them as two separate (F)(6) factors."); *State v. Murray*, 184 Ariz. 9, 37 (1995) (especial cruelty); *State v. Ross*, 180 Ariz. 598, 605-06 (1994) (witness elimination/extraordinary circumstances language); *State v. Richmond*, 180 Ariz. 573, 580 (1994) (mutilation); *State v. King*, 180 Ariz. 268, 284-85 (1994) (witness elimination alone insufficient); *State v. Milke*, 177 Ariz. 118, 124-26 (1993) (holding that proof of parent/child relationship, along with victim being helpless and murder being senseless, satisfied especially heinous or depraved circumstance); *State v. Styers*, 177 Ariz. 104, 115 (1993) (holding the same where defendant was child's full-time caregiver for several months before the murder and therefore had a special relationship with the child); *State v. Amaya-Ruiz*, 166 Ariz. 152, 178 (1990) (gratuitous violence); *State v. Beaty*, 158 Ariz. 232, 242 (1988) (individual definitions of especially heinous or depraved).

USE 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 (1985). In other words, the murder must have been committed in such a way as to, "set [the] Defendant's' acts apart from the norm of first degree murder." *State v. Brookover*, 124 Ariz. 38, 41 (1979).

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

Gratuitous Violence

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

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

Relished the Murder

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

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

Witness Elimination

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

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 (1997) (defining "senseless" and discussing that ordinarily this finding, even when coupled with "helplessness," is insufficient to satisfy "heinous or depraved"); *State v. Miles*, 186 Ariz. 10, 18-19 (1996) (defining "helplessness").

Child Victim and Parental or Special Relationship

"Full-time" and "caregiver" are bracketed in this factor. In *State v. Styers*, 177 Ariz. 104 (1993), the defendant was the full-time caregiver for the victim for four months. The committee believed that the opinion was subject to different interpretations as to whether this factor is limited to a full-time caregiver or whether it could be applied also to 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 (1984) (using "mental distress"); *State v. Murdaugh*, 209 Ariz. 19, 30 (2004) (using "mental anguish"). The instruction uses "pain" in place of "distress" or "anguish" because "pain" is neutral and permits counsel to argue both "distress" and "anguish." *See State v. Anderson (II)*, 210 Ariz. 327, 354, 360 n. 18 (2005) and *Carlson*, *supra* (using "pain").

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

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

Capital Case 1.6(e) – Definition 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 (2003) (requiring all 3 subfactors of time, space and motivation); *State v. Rogovich*, 188 Ariz. 38, 45 (1997); *State v. Lavers*, 168 Ariz. 376, 393 (1991).

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 (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 (1999); *State v. Beaty*, 158 Ariz. 232, 242 (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 (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 (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 (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 (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 (2007); *State v. Ellison*, 213 Ariz. 116, 140 (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 (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 (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 (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 (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 (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 (2005); *State v. Nordstrom*, 230 Ariz. 110 (2012). *But see State v. Hampton*, 213 Ariz. 167 (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 (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).

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 (1994) (substance/alcohol abuse); *State v. McMurtrey I*, 136 Ariz. 93, 101-02 (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 (2000) (age of nineteen and "low average" intelligence sufficient to prove

mitigation); *State v. Trostle*, 191 Ariz. 4, 21 (1997) (age of 20 sufficient to prove mitigation where defendant was, "immature and easily influenced," and was a, "follower, easily manipulated and pushed to do what others with stronger willpower wanted him to do."); *State v. Jackson*, 186 Ariz. 20, 31 (1996) ("In addition to youth, we consider defendant's level of intelligence, maturity, involvement in the crime, and past experience.").

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 (1985).

Capital Case Verdict Form 2

ARIZONA SUPERIOR COURT
_____ COUNTY

THE STATE OF ARIZONA, PLAINTIFF,	**Case No._____**
vs.	**VERDICT**
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."

