

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 three 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; *and*
3. The officer in the law enforcement vehicle while in pursuit used a red or red and blue light; *and*
4. The officer in the law enforcement vehicle, as reasonably necessary, used an audible siren.

An act was done willfully if it was done knowingly.

SOURCE: A.R.S. §§ 28-622.01 and 28-624(C) (statutory language as of October 1, 1997); *State v. Gendron*, 166 Ariz. 562, 565, 804 P.2d 95, 98 (App. 1990), *vacated in part on other grounds*, 168 Ariz. 153, 812 P.2d 626 (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, 29 P.3d 287, 288-89 (App. 2001).

USE NOTE: The court must instruct on the culpable mental state. “Knowingly” is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.056(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 stop at the scene or as close as possible and immediately return; *and*
3. 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, 1997).

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.

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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, 623 P.2d 853, 857 (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, 909 P.2d 445, 447 (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, 26 P.3d 1134 (2001).

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. [Circumstantial evidence may be used to prove such knowledge.]

SOURCE: *State v. Porras*, 125 Ariz. 490, 493, 610 P.2d 1051, 1054 (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, 623 P.2d 853, 857 (App. 1981).

Use the bracketed language if appropriate.

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;

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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 2002).

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 section 13-105 and who fails to stop or to comply with the requirements of section 28-663 is guilty of a class 4 felony, except that if a driver caused the accident the driver is guilty of a class 3 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 section 13-105 and who fails to stop or to comply with the requirements of section 28-663 is guilty of a class 6 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 stop at the scene or as close as possible and immediately return; *and*
3. 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, 1997).

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, 909 P.2d 445, 447 (App. 1995) (holding that statute applied when passenger

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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, 26 P.3d 1134 (2001).

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.

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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, 479 P.2d 685 (1971); *McNutt v. Superior Court of Arizona*, 133 Ariz. 7, 648 P.2d 122 (1982); *State v. Holland*, 147 Ariz. 453, 711 P.2d 592 (1985); *Kunzler v. Pima County Superior Court*, 154 Ariz. 568, 744 P.2d 669 (1987); *Kunzler v. Miller*, 154 Ariz. 570, 744 P.2d 671 (1987); and *Hively v. Superior Court*, 154 Ariz. 572, 744 P.2d 673 (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, 775 P.2d 1140, 1144, 1145 (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 in the on position;
3. where the ignition key was located;

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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 in its totality and weigh its credibility in determining whether the defendant was simply using the vehicle as a stationery shelter or actually posed a threat to the public by the exercise of present or imminent control over it while impaired.

SOURCE: *State v. Love*, 182 Ariz. 324, 897 P.2d 626 (1995); *State b. Rivera*, 207 Ariz. 69, 72, n.3, 83 P.3d 69, 72 (App. 2004).

USE NOTE: The trial court should decide whether to use the bracketed language after hearing argument from counsel and based on the evidence in the case. If the list of factors is used, it should be tailored to those factors supported by the evidence.

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's ability to drive a vehicle 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 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

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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, 898 P.2d 474 (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, 898 P.2d 474 (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, 898 P.2d 474 (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, 31 P.3d 140 (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(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

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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-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, 909 P.2d 476, 478 (App. 1995); *State v. Parker*, 236 Ariz. 474, 666 P.2d 1083 (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, 898 P.2d 474 (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]

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- or vapor releasing substances] at the time of [driving] [being in actual physical control]; *and*
3. The defendant's ability to drive a vehicle 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 [driver 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 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, 898 P.2d 474 (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. Agee*, 181 Ariz. 58, 61, 887 P.2d 588, 591 (App. 1994); *State v. Rivera*, 177 Ariz. 476, 479, 858 P.2d 1059, 1062 (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, 722 P.2d 258, 262 (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, 986 P.2d 239, 241 (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

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a lesser-included offense unless the charging document establishes that the driving occurred on a public highway. *State v. Brown*, 195 Ariz. 206, 209, 986 P.2d 239, 242 (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, 19 P.3d 1255, 1257 (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 [driver’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 September 19, 2007); *State v. LeBlanc*, 186 Ariz. 437, 924 P.2d 441 (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, 898 P.2d 474 (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 [driver’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 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. 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, 898 P.2d 474 (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. Agee*, 181 Ariz. 58, 61, 887 P.2d 588, 591 (App. 1994); *State v. Rivera*, 177 Ariz. 476, 479, 858 P.2d 1059, 1062 (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, 722 P.2d 258, 262 (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,

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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, 986 P.2d 239, 241 (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, 986 P.2d 239, 242 (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, 19 P.3d 1255, 1257 (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 [driver 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 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. 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

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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, 898 P.2d 474 (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. Agee*, 181 Ariz. 58, 61, 887 P.2d 588, 591 (App. 1994); *State v. Rivera*, 177 Ariz. 476, 479, 858 P.2d 1059, 1062 (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, 722 P.2d 258, 262 (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, 986 P.2d 239, 241 (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, 986 P.2d 239, 242 (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, 19 P.3d 1255, 1257 (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 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.

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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, 898 P.2d 474 (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, 21 P.3d 845, 849 (2001), *overruling State v. Reagan*, 103 Ariz. 287, 440 P.2d 907 (1968), and *State v. Renaud*, 108 Ariz. 417, 499 P.2d 712 (1972).

<p>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</p>

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).

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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, 898 P.2d 474 (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, 21 P.3d 845, 849 (2001), *overruling State v. Reagan*, 103 Ariz. 287, 440 P.2d 907 (1968), and *State v. Renaud*, 108 Ariz. 417, 499 P.2d 712 (1972).

<p>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</p>

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, 898

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P.2d 474 (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, 21 P.3d 845, 849 (2001), *overruling State v. Reagan*, 103 Ariz. 287, 440 P.2d 907 (1968), and *State v. Renaud*, 108 Ariz. 417, 499 P.2d 712 (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’s ability to drive a vehicle 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.

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, 898 P.2d 474 (1995)

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(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, 898 P.2d 474 (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.

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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, 898 P.2d 474 (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) – Aggravated Driving or Actual Physical Control while Subject to an Interlock Device and Refusal to Submit to Chemical Test

The crime of aggravated driving or actual physical control while subject to an interlock device and refusal to submit to chemical test requires proof that the defendant:

1. was under arrest for driving while under the influence; *and*
2. had been ordered to equip any motor vehicle operated by the defendant with a certified ignition interlock device; *and*
3. refused to 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.

SOURCE: A.R.S. § 28-1383(A)(4) (statutory language as of September 19, 2007).

28.1383(A)(4)(b)-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's ability to drive a vehicle 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*

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4. The defendant had been ordered to equip any motor vehicle operated by the defendant with a certified ignition interlock device.

SOURCE: A.R.S. §§ 28-1383(A)(4)(b) and 28-1381(A)(1) (statutory language as of September 19, 2007).

<p>28.1383(A)(4)(b)-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</p>
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The crime of aggravated driving or actual physical control while subject to an interlock device and an alcohol concentration of 0.08 or more within two hours of driving requires proof that:

1. The defendant [drove] [was in actual physical control of] a vehicle in this state; *and*
2. The defendant had an alcohol concentration of 0.08 or more within two hours of [driving][being in actual physical control of] the vehicle; *and*
3. The alcohol concentration resulted from alcohol consumed either before or while [driving] [being in actual physical control of] the vehicle; *and*
4. The defendant had been ordered to equip any motor vehicle operated by the defendant with a certified ignition interlock device.

SOURCE: A.R.S. §§ 28-1383(A)(4)(b) and 28-1381(A)(2) (statutory language as of September 19, 2007).

<p>28.1383(A)(4)(b)-3 – Aggravated Driving or Actual Physical Control while Subject to an Interlock Device and There Is a Drug in the Defendant’s Body</p>

The crime of aggravated driving or actual physical control while subject to an interlock device and there is a drug in the defendant’s body requires proof that:

1. The defendant [drove] [was in actual physical control of] a vehicle in this state; *and*
2. The defendant had in [his] [her] body [(name of drug)] [a metabolite of (name of drug)] at the time of [driving] [being in actual physical control of] the vehicle; *and*
3. The defendant had been ordered to equip any motor vehicle operated by the defendant with a certified ignition interlock device.

SOURCE: A.R.S. §§ 28-1383(4)(b) and 28-1381(A)(3) (statutory language as of September 19, 2007).

28.1383(A)(4)(b)-4 – Aggravated Driving or Actual Physical Control while Under the Extreme Influence of Intoxicating Liquor while Subject to an Interlock Device

The crime of driving or actual physical control while under the extreme influence of intoxicating liquor while subject to an interlock device requires proof that:

1. The defendant [drove] [was in actual physical control of] a vehicle in this state; *and*
2. The defendant had an alcohol concentration of 0.15 or more within two hours of [driving] [being in actual physical control of] the vehicle; *and*
3. The alcohol concentration resulted from alcohol consumed either before or while [driving] [being in actual physical control of] the vehicle; *and*
4. The defendant had been ordered to equip any motor vehicle operated by the defendant with a certified ignition interlock device.

SOURCE: A.R.S. §§ 28-1383(A)(4)(b) and 28-1382 (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, 887 P.2d 588, 591 (App. 1994); *State v. Rivera*, 177 Ariz. 476, 479, 858 P.2d 1059, 1062 (App. 1994). The knowledge of

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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, 722 P.2d 258, 262 (1986).

COMMENT: In *Lee v. State*, 218 Ariz. 235, ¶ 8, 182 P.3d 1169 (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.

