

**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.

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. Lacy*, 187 Ariz. 340, 351-52, 929 P.2d 1288, 1299-1300 (1996) (holding that, “reckless indifference may be implicit when one ‘knowingly engag[es] in criminal activities known to carry a grave risk of death.’ [Tison], 481

## CAPITAL CASE JURY INSTRUCTIONS

U.S. at 157[.]” “[i]n almost every felony murder case . . . there is a failure by the defendant to stop and render aid or call for help. There must be something more if the concept of ‘reckless indifference’ is to provide any meaningful guidance for determining which defendant should suffer the ultimate penalty[.]” and that the defendants’ culpability ultimately rested on the fact that the defendants, “subjectively appreciated that their acts were likely to result in the taking of innocent life. [*Tison*] at 152.”); *State v. Dickens*, 187 Ariz. 1, 23, 926 P.2d 468, 490 (1996) (discussing “major participant” factors); *State v. Styers*, 177 Ariz. 104, 114, 865 P.2d 765, 775 (1993) (discussing “major participant” factors); *State v. Salazar*, 173 Ariz. 399, 412-13, 844 P.2d 566, 579-80 (1992) (holding that the death penalty may be imposed if the defendant was a major participant in the predicate felony and acted with reckless disregard for human life); *State v. Robinson*, 165 Ariz. 51, 62, 796 P.2d 853, 864 (1990) (discussing “major participant” factors).

The burden of proof for this finding is beyond a reasonable doubt. *State v. Tison*, 160 Ariz. 501, 502, 774 P.2d 805, 806 (1989).

**USE NOTE:** This instruction should be given during the eligibility phase in a felony murder case where accomplices were involved in the killing. Because the State has the burden of proving the *Enmund/Tison* finding, and pursuant to A.R.S. § 13-703.01(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, § 13-703.01(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. Trial judges will need to make this “timing” decision based on the length and complexity of the anticipated eligibility phase regarding aggravating circumstances unless/until further guidance is provided by the legislature or the Arizona Supreme Court.

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

REVISED ARIZONA JURY INSTRUCTIONS – CRIMINAL, 3D

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 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

CAPITAL CASE JURY INSTRUCTIONS

*Option Three*

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. § 13-703(F); *State v. Carlson*, 202 Ariz. 570, 582-83, 48 P.3d 1180, 1192-93 (2002) (“There is no vicarious liability for cruelty in capital cases absent a plan intended or reasonably certain to cause suffering. The plan must be such that suffering before death must be inherently and reasonably certain to occur, not just an untoward event.” Mere foreseeability, which is all that is required to establish accomplice guilt, cannot serve as a “benchmark for death in capital cases [as it] would not permit the aggravators to serve their constitutional purpose of narrowing the class of first-degree murderers who can be sentenced to death.”); *State v. Anderson (II)*, 210 Ariz. 327, 353-54, 111 P.3d 369, 395-96 (2005) (stating that the Eighth Amendment does not forbid applying an aggravating circumstance to a defendant who was, “present and actively participated in the ... murder[],”

## REVISED ARIZONA JURY INSTRUCTIONS – CRIMINAL, 3D

where the defendant hit the victim with a lantern, but the accomplice administered the fatal blow with a cinderblock that was handed to him by the defendant); *State v. Dickens*, 187 Ariz. 1, 24-25, 926 P.2d 468, 491-92 (1996) (affirming conviction where defendant planned the murder, provided transportation and a gun to the actual killer known to the defendant to be violent, selected the two robbery victims, issued instructions to leave no witnesses, remained present at the scene, and knew that one victim would watch the execution of the other and that, as a result, the killing would be cruel); *cf. State v. Walton*, 159 Ariz. 571, 587, 769 P.2d 1017, 1033 (1989) (disapproving portion of cruelty finding where defendant shot victim once in head, believed him to be dead, and did not intend victim to wander desert blind for 5 days before dying; however, cruelty finding was approved on the ground of victim's mental suffering prior to being shot).

**USE NOTE:** This instruction should only be given where (1) evidence shows that there was an accomplice involved; and (2) an aggravating circumstance is charged that requires the jury to assess the defendant's mental state. In a case involving accomplices, the instruction is not appropriate where the only charged aggravating circumstances are (F)(1), (2) and/or (7), but may be appropriate, for example, when the aggravating circumstance of (F)(3) "zone of danger," (F)(4) "murder for hire," (F)(5) "pecuniary gain," (F)(6) "cruelty" or "heinous/depraved" ("relishing"), (F)(8) "multiple homicides," (F)(11) "promoting a criminal street gang," (F)(12) "witness elimination," or (F)(13) "cold calculated murder" is charged.

This instruction should not be confused with the *Enmund/Tison* accomplice liability rule, which permits a defendant convicted of felony murder to become eligible for the death penalty when an accomplice actually killed the victim if, at a minimum, the defendant was a major participant in the underlying felony and demonstrated a reckless indifference to human life. The *Enmund/Tison* accomplice liability theory is distinct from the application of aggravating circumstances at the sentencing phase. *See Carlson*, 202 Ariz. at 582 n.7, 48 P.3d at 1192 n.7.

## CAPITAL CASE JURY INSTRUCTIONS

### ELIGIBILITY PHASE

#### Capital Case 1.1 – Nature of the Hearing

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 either 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.

“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. §§ 13-703(A), -703.01(A), (C)–(F), (H); *Simmons v. South Carolina*, 512 U.S. 154, 166-67 & n.7 (1994) (life penalty instruction).

**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. § 13-703(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.”

#### 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.

## REVISED ARIZONA JURY INSTRUCTIONS – CRIMINAL, 3D

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. §§ 13-703(D), -703.01(D); 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

## CAPITAL CASE JURY INSTRUCTIONS

decision not to testify or produce evidence is not evidence of the existence of any aggravating circumstance.

---

**SOURCE:** A.R.S. § 13-703(B).

### Capital Case 1.5 – Definition of Proof Beyond a Reasonable Doubt

The State has the burden of proving any alleged aggravating circumstance beyond a reasonable doubt. This means that the State must prove each element of each alleged aggravating circumstance beyond a reasonable doubt.

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

---

**SOURCE:** *State v. Portillo*, 182 Ariz. 592, 596, 898 P.2d 970, 974 (1995); Standard Criminal Instruction 5b(1).

**USE NOTE:** A reasonable doubt instruction must be given at the close of a case, even if it has been previously mentioned in the judge's preliminary instructions. *State v. Romanosky*, 176 Ariz. 118, 121 n.1, 859 P.2d 741, 744 n.1 (1993); *State v. Marquez*, 135 Ariz. 316, 660 P.2d 1243 (App. 1983). The Committee recommends that the court use Capital Case Instruction 1.5 and not deviate from *Portillo*.

### Capital Case 1.6 – Aggravating Circumstances

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;]

REVISED ARIZONA JURY INSTRUCTIONS – CRIMINAL, 3D

[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.]

## CAPITAL CASE JURY INSTRUCTIONS

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. §§ 13-703(F), -703.01(E); *Zant v. Stephens*, 462 U.S. 862, 877 (1983) (purpose of aggravating circumstances); *State v. Tucker*, 205 Ariz. 157, 169, 68 P.3d 110, 122 (2003) (same).

**USE NOTE:** The trial judge should list only the aggravating circumstance(s) of which the defendant was notified prior to trial.

Use bracketed material as applicable.

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

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

The statutory language of A.R.S. § 13-703(F)(9) has been altered to reflect the holding in *Roper v. Simmons*, 125 S. Ct. 1183, 1198 (2005) (“[T]he death penalty cannot be imposed upon juvenile offenders[.]”)

<p><b>Capital Case 1.6(a)(1) – Definition of “Serious Offense” (for offenses occurring on or after 7/17/93)</b></p>
---

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.]

REVISED ARIZONA JURY INSTRUCTIONS – CRIMINAL, 3D

- [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. §§ 13-703(F)(2), (I) (statutory language as of August 12, 2005), -703.01(A), (C), (P) (statutory language as of August 1, 2002); *State v. Jones*, 197 Ariz. 290, 310-11, 4 P.3d 345, 365-66 (2000).

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

For first-degree murder offenses occurring before July 17, 1993, see Capital Case Instruction 1.6(a)(2).

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.

## CAPITAL CASE JURY INSTRUCTIONS

Regarding the “serious offense” finding, the court must be sure that the fact finder in the prior case found beyond a reasonable doubt that the defendant had committed every element that would be required to prove the Arizona offense. *State v. Ault*, 157 Ariz. 516, 521, 759 P.2d 1320, 1325 (1988) (non-capital case involving California prior convictions that resulted from a jury trial).

If the prior conviction is from a foreign jurisdiction, the court must first conclude that the elements of the foreign prior conviction include every element that would be required to prove an enumerated Arizona offense, before the allegation may go to the jury. *State v. Crawford*, 214 Ariz. 129, 131, 149 P.3d 753, 755, ¶ 7 (2007); *State v. Roque*, 213 Ariz. 193, 216-17, 141 P.3d 368, 391-92 (2006) (refusing to “look beyond the language of the [foreign] statutes” to the complaint describing the defendant’s conduct in determining whether prior California robbery conviction constituted a “serious offense” under A.R.S. § 13-703(F)(2)); *State v. Schaaf*, 169 Ariz. 323, 334, 819 P.2d 909, 920 (1991) (reviewing Nevada attempted murder statute to determine if that crime involved violence and holding that sentencing courts “may consider only the statute that the defendant [was] charged with violating; it may not consider other evidence”).

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

**COMMENT:** For crimes committed prior to July 17, 1993, the statutory language for the (F)(2) factor was different. It stated that the (F)(2) factor applied to a prior “felony in the United States involving the use or threat of violence on another person.” Under the prior interpretation of the factor, courts were to look at the statutory definition of the prior crime, and not its specific factual basis, and determine whether the prior conviction satisfied (F)(2). *State v. Richmond*, 180 Ariz. 573, 578, 886 P.2d 1329, 1334 (1994). “If, under the statutory definition, the defendant could have committed and been convicted of the crime without using or threatening violence, the prior conviction may not qualify as a statutory aggravating circumstance under § 13-703(F)(2).” *State v. Walden*, 183 Ariz. 595, 616-17, 905 P.2d 974, 995-96 (1995); *State v. Romanosky*, 162 Ariz. 217, 228, 782 P.2d 693, 704 (1989). “Violence” was defined as the exertion of any physical force with the intent to injure or abuse. *State v. Fierro*, 166 Ariz. 539, 549, 804 P.2d 72, 82 (1990).

### Capital Case 1.6(b) – Definition of “Grave Risk of Death to Another”

The “grave risk of death to another” aggravating circumstance is proven if the defendant’s act of committing murder placed a [“third person”] [bystander] in the “zone of danger.” This circumstance applies if the State proves that:

1. during the course of the murder, the defendant knowingly engaged in conduct that created a real and substantial likelihood that a specific [third person] [bystander] might suffer fatal injury; *and*
2. the defendant knew of the [third person’s] [bystander’s] presence, although the defendant did not have to know the [third person’s] [bystander’s] identity; *and*
3. the [third person] [bystander] was not an intended victim of the defendant.

## REVISED ARIZONA JURY INSTRUCTIONS – CRIMINAL, 3D

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. § 13-703(F)(3) (statutory language as of October 1, 1978); *State v. Johnson*, 212 Ariz. 425, 431, 133 P.3d 735, 741 (2006) (mere presence of a third person insufficient to prove aggravator; intent to kill third person precludes finding the aggravator); *State v. Carreon*, 210 Ariz. 54, 67, 107 P.3d 900, 913 (2005) (using “specific third person” language); *State v. McMurtrey*, 151 Ariz. 105, 108, 726 P.2d 202, 205 (1986) (holding that the (F)(3) circumstance does not apply when the person in the zone of danger is the intended victim of the murder).

**USE NOTE:** This instruction shall be given only if the State alleges the (F)(3) circumstance.

This circumstance is not proven simply where bystanders are present or the defendant points a gun at another to facilitate escape. *See e.g., State v. Wood*, 180 Ariz. 53, 69, 881 P.2d 1158, 1174 (1994) (holding that, “the general rule is that mere presence of bystanders or pointing a gun at another to facilitate escape does not bring a murderous act within A.R.S. §13-703(F)(3) . . . . Our inquiry is whether, during the course of the killing, the defendant knowingly engaged in conduct that created a real and substantial likelihood that a specific third person might suffer fatal injury.”); *compare State v. Doss*, 116 Ariz. 156, 158, 163, 568 P.2d 1054, 1056, 1061 (1977) (finding (F)(3) circumstance where victim was shot and killed in a crowded college gymnasium and another student standing nearby was wounded; the relevant inquiry was knowledge of the victim’s presence, not the victim’s identity), with *State v. Smith*, 146 Ariz. 491, 502, 707 P.2d 289, 300 (1985) (holding that defendant did not place convenience store manager or other store customers in danger when he shot directly and purposefully at cashier, even though the other persons could have sustained injury during the armed robbery, because shooting was not “random and indiscriminate”).

This circumstance is not proven where persons are present in another room, but not actually placed in danger. *See Carreon*, 210 Ariz. at 67, 107 P.3d at 913 (reversing the (F)(3) circumstance finding where the shots fired during the murderous attack were aimed in the opposite direction from the bedroom of the children in the apartment; thus, “none of the bullets fired during that attack placed the boys in danger.”).

Whether the (F)(3) circumstance should be presented to the jury may be the subject of motions that will need to be ruled on by the court under the Arizona Rules of Criminal Procedure, Rules 13.5(c) and Rules 16.1(b) 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).

“Knowingly” is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.056(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 JURY INSTRUCTIONS

### 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. § 13-703(F)(5) (statutory language as of October 1, 1978); “[A] conviction for felony murder predicated on robbery or armed robbery does not automatically prove the (F)(5) aggravator.” *State v. Anderson (II)*, 210 Ariz. 327, 341-42, 111 P.3d 369, 383-84 (2005) (where the court also stated that, “the superior court properly instructed the jury on this aggravating factor” where the (F)(5) instruction included the language, “[a] finding of pecuniary gain may be based on tangible evidence or *strong* circumstantial evidence,” and the court was reviewing whether a misstatement of the law regarding the (F)(5) circumstance by the prosecutor should cause a reversal (emphasis added)); *State v. Carreon*, 210 Ariz. 54, 67, 107 P.3d 900, 913 (2005) (holding that, “[t]he finding of pecuniary gain may be based on tangible evidence or strong circumstantial evidence.”); *State v. Moody*, 208 Ariz. 424, 471, 94 P.3d 1119, 1166 (2004) (holding that the expectation of pecuniary gain must be a, “motive, cause or impetus for the murder, and not merely a result of the murder[.]” and that the State is required to, “establish the connection between the murder and the motive through direct or strong circumstantial evidence.”); *State v. Armstrong*, 208 Ariz. 360, 363 n.2, 93 P.3d 1076, 1079 n.2 (2004) (rejecting “but for” requirement, *i.e.*, receipt of item(s) of pecuniary value need not be the *only* cause of the murder); *State v. Sansing*, 200 Ariz. 347, 353, 356, 26 P.3d 1118, 1124, 1127 (2001) (holding that to prove the (F)(5) circumstance, the State must prove, “a connection between a pecuniary motive and the killing itself; the expectation of pecuniary gain must be a motive for the murder[.]” “[w]e reserve the death penalty for murders committed during a robbery or burglary for those cases in which the facts clearly indicate a connection between a pecuniary motive and the killing itself[.]” and that, “[t]he murder, which occurred at least an hour after the victim's arrival, did not facilitate the defendant's

## REVISED ARIZONA JURY INSTRUCTIONS – CRIMINAL, 3D

ability to secure pecuniary gain, particularly in light of the fact that he bound the victim almost as soon as she entered his home.”); *State v. Medina*, 193 Ariz. 504, 513, 975 P.2d 94, 103 (1999) (holding that the State failed to prove the (F)(5) circumstance, even though Medina said prior to the murder that he intended to steal the victim’s car and radio, and he then beat and kicked the victim and repeatedly drove over the victim with his (Medina’s) car); *State v. Greene*, 192 Ariz. 431, 439, 967 P.2d 106, 114 (1998) (regarding the (F)(5) circumstance, “[w]e have held that when one comes to rob, the accused expects pecuniary gain and this desire infects all other conduct.”).

**USE NOTE:** 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.

## CAPITAL CASE JURY INSTRUCTIONS

A finding of pecuniary value may be based on tangible evidence or strong circumstantial evidence. While pecuniary gain need not be the exclusive cause of the murder, you may not find that the pecuniary gain aggravating circumstance exists merely because the person was killed and at the same time the defendant made a financial gain.

*Anderson (II)*, 210 Ariz. at 341-42, 111 P.3d at 383-84; *see also State v. Garza*, 216 Ariz. 56, 67, ¶ 52, 163 P.3d 1006, 1017 (2007).

### **Capital Case 1.6(d) – Definition of “Especially Cruel, Heinous or Depraved”**

Concerning this aggravating circumstance, all first-degree murders are to some extent heinous, cruel 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

The defendant “inflicted gratuitous violence” if the defendant used violence clearly beyond what was necessary to kill the victim.

### 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. § 13-703(F)(6) (statutory language as of October 1, 1978); *State v. Tucker*, 215 Ariz. 298, 160 P.3d 177 (2007); *State v. Andriano*, 215 Ariz. 497, 161 P.3d 540 (2007); *State v. Velazquez*, 216 Ariz. 300, 166 P.3d 91 (2007); *State v. Anderson (II)*, 210 Ariz. 327, 352 n.19, 111 P.3d 369, 394 n.19 (2005) (defining gratuitous violence and using “clearly beyond” language); *State v. Carlson*, 202 Ariz. 570, 581-83, 48 P.3d 1180, 1191-93 (2002) (especial cruelty); *State v. Canez*, 202 Ariz. 133, 161, 42 P.3d 564, 592 (2002) (holding that re. especial cruelty, defendant knew or should have known that victim would consciously suffer); *State v. Medina*, 193 Ariz. 504, 513, 975 P.2d 94, 103 (1999) (disjunctive); *State v. Doerr*, 193 Ariz. 56, 67-68, 969 P.2d 1168, 1179-80 (1999) (relishing); *State v. Miles*, 186 Ariz. 10, 18-19, 918 P.2d 1028, 1036-37 (1996) (holding that a finding of especially cruel, heinous or depraved, “is a single (F)(6) factor, and the trial judge erred when he characterized them as two separate (F)(6) factors.”); *State v. Murray*, 184 Ariz. 9, 37, 906 P.2d 542, 570 (1995) (especial cruelty); *State v. Ross*, 180 Ariz. 598, 605-06, 886 P.2d 1354, 1361 (1994) (witness elimination/extraordinary circumstances language); *State v. Richmond*, 180 Ariz. 573, 580, 886 P.2d 1329, 1336 (1994) (mutilation); *State v. King*, 180 Ariz. 268, 284-85, 883 P.2d 1024, 1040-41 (1994) (witness elimination alone insufficient); *State v. Milke*, 177 Ariz. 118, 124-26, 865 P.2d 779, 785-87 (1993) (holding that proof of parent/child relationship, along with victim being helpless and murder being senseless, satisfied especially heinous or depraved

## CAPITAL CASE JURY INSTRUCTIONS

circumstance); *State v. Styers*, 177 Ariz. 104, 115, 865 P.2d 765, 776 (1993) (holding the same where defendant was child's full-time caregiver for several months before the murder and therefore had a special relationship with the child); *State v. Amaya-Ruiz*, 166 Ariz. 152, 178, 800 P.2d 1260, 1286 (1990) (gratuitous violence); *State v. Beaty*, 158 Ariz. 232, 242, 762 P.2d 519, 529 (1988) (individual definitions of especially heinous or depraved).

**USE NOTE:** This instruction shall be given only if the State alleges the (F)(6) circumstance. The jury should only be instructed on the theory or theories that the State is pursuing.

“Especially” means unusually great or significant. See MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1997), 396 (defining “especially”). All first-degree murders are to some extent heinous, cruel or depraved; therefore, to be especially cruel, heinous or depraved, a murder must be more heinous, cruel or depraved than usual. *State v. Smith*, 146 Ariz. 491, 503, 707 P.2d 289, 301 (1985). In other words, the murder must have been committed in such a way as to, “set [the] Defendant's' acts apart from the norm of first degree murder.” *State v. Brookover*, 124 Ariz. 38, 41, 601 P.2d 1322, 1325 (1979).

The language of “a murder is especially cruel when there has been the infliction of pain and suffering in an especially wanton and insensitive or vindictive manner” as used in defining “especially cruel” in the *Anderson II* instruction was deemed “not require[d]” in *State v. Tucker*, 215 Ariz. 298, ¶ 29-33, 160 P.3d 177 (2007). See also *State v. Andriano*, 215 Ariz. 497, 161 P.3d 540 (2007) and *State v. Velazquez*, 216 Ariz. 300, 166 P.3d 91 (2007) in which instructions were approved without the bracketed language.

### Relished the Murder

The language in the instruction is taken from *State v. Johnson*, *supra*, where the Arizona Supreme Court “commended” this instruction to the trial courts.

The defendant's statements about the murder made after the killing may be admissible to show that the defendant savored the murder at the time of the killing. See *State v. Hampton*, 213 Ariz. 167, 140 P.3d 950 (2006).

### Witness Elimination

The Committee has not included “witness elimination” as a possible finding supporting the “especially heinous” or “especially depraved” finding. See *e.g.*, *State v. Barreras*, 181 Ariz. 516, 522, 892 P.2d 852, 858 (1995) (discussing the 3-optioned test for “witness elimination”). For murders committed on or after August 12, 2005, witness elimination is a “stand alone” aggravating circumstance under A.R.S. § 13-703(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*

## REVISED ARIZONA JURY INSTRUCTIONS – CRIMINAL, 3D

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

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

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

### Senselessness and Helplessness

The Arizona Supreme Court has held that “senselessness” and “helplessness” may be considered in determining “especially heinous or depraved,” but those findings, individually or together, are not enough to prove this prong, unless the State also proves at least one of the four factors listed in the instruction listed under the heading “Especially Heinous or Depraved.” All murders are “senseless” because of their brutality and finality. Yet not all are senseless as the term is used to distinguish those first-degree murders that warrant a death sentence from those that do not. Rather, a “senseless” murder is one that is unnecessary to achieve the defendant’s objective. “Helplessness” means that the victim is unable to resist. *See, e.g., State v. Schackart*, 190 Ariz. 238, 250, 947 P.2d 315, 327 (1997) (defining “senseless” and discussing that ordinarily this finding, even when coupled with “helplessness,” is insufficient to satisfy “heinous or depraved”); *State v. Miles*, 186 Ariz. 10, 18-19, 918 P.2d 1028, 1036-37 (1996) (defining “helplessness”).

### Child Victim and Parental or Special Relationship

“Full-time” and “caregiver” are bracketed in this factor. In *State v. Styers*, 177 Ariz. 104, 865 P.2d 765 (1993), the defendant was the full-time caregiver for the victim for four months. The Committee believed that the opinion was subject to different interpretations as to whether this factor is limited to a full-time caregiver or whether it could be applied also to a caregiver or other person who has an established relationship of trust with the child, but is not the child’s full-time caregiver.

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

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

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

One, relishing the murder. In order to relish a murder the defendant must show by his words or actions that he savored the murder. These words

## CAPITAL CASE JURY INSTRUCTIONS

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", "[h]einous", or "depraved" are to be considered separately, but proof of any one of these factors is sufficient to establish this aggravating circumstance.

Cruelty involves the infliction of physical pain and/or mental anguish on a victim before death. A crime is committed in an especially cruel manner when a Defendant either intended or knew that the manner in which the crime is committed would cause the victim to experience physical pain and/or mental anguish before death. The victim must be conscious for at least some portion of the time when the pain and/or anguish was inflicted.

Some cases defining especially cruel have included the phrase "mental anguish" and others have included the phrase "mental distress." See, e.g., *State v. Carriger*, 143 Ariz. 142, 160, 692 P.2d 991, 1009 (1984) (using "mental distress"); *State v. Murdaugh*, 209 Ariz. 19, 30,

## REVISED ARIZONA JURY INSTRUCTIONS – CRIMINAL, 3D

97 P.3d 844, 855 (2004) (using “mental anguish”). The instruction uses “pain” in place of “distress” or “anguish” because “pain” is neutral and permits counsel to argue both “distress” and “anguish.” See *State v. Anderson (II)*, 210 Ariz. 327, 354, 360 n. 18, 111 P.3d 369, 396, 402 n. 18 (2005) and *Carlson, supra* (using “pain”).

“Extreme” as an adjective describing mental anguish or physical pain is not included in the “especially cruel” definition because in *State v. Andriano, supra*, ¶ 67, the Arizona Supreme Court held that it is not required. See also *State v. Hampton, supra*. In *State v. Ellison*, 213 Ariz. 116, 140 P.3d 899, ¶ 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, 892 P.2d at 857. Caution should be exercised in expanding the factors. See *State v. Hampton, supra*, at ¶ 42 (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. § 13-703(F)(8); see, e.g., *State v. Dann*, 206 Ariz. 371, 373, 79 P.3d 58, 60 (2003) (requiring all 3 subfactors of time, space and motivation); *State v. Rogovich*, 188 Ariz. 38, 45, 932 P.2d 794, 801 (1997); *State v. Lavers*, 168 Ariz. 376, 393, 814 P.2d 333, 350 (1991).

**USE NOTE:** This instruction shall be given only if the State alleges the (F)(8) circumstance. Use applicable bracketed material.

**CAPITAL CASE JURY INSTRUCTIONS**

<b>Capital Case Verdict Form 1</b>
------------------------------------

**ARIZONA SUPERIOR COURT**

\_\_\_\_\_ COUNTY

**THE STATE OF ARIZONA,**  
**PLAINTIFF,**  
 vs.  
**JOHN DOE,**  
**DEFENDANT.**

Case No. \_\_\_\_\_

We, the jury, empanelled 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].
<input type="checkbox"/>	<input type="checkbox"/>	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.
<input type="checkbox"/>	<input type="checkbox"/>	The Defendant was previously convicted of a serious offense, either preparatory or completed.
<input type="checkbox"/>	<input type="checkbox"/>	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.
<input type="checkbox"/>	<input type="checkbox"/>	The Defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.
<input type="checkbox"/>	<input type="checkbox"/>	The Defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.
<input type="checkbox"/>	<input type="checkbox"/>	The Defendant committed the offense in an especially cruel, heinous or depraved manner.

REVISED ARIZONA JURY INSTRUCTIONS – CRIMINAL, 3D

		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.  <i>or</i> 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.

**CAPITAL CASE JURY INSTRUCTIONS**

[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 empanelled 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 empanelled 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. §§ 13-703(F), -703.01(E).

**USE NOTE:** The verdict form shall include only the theory or theories that the State is pursuing. Use the bracketed material only if the State is pursuing the (F)(6) circumstance.

If aggravation findings are made as to more than one victim, separate verdict forms shall be used for each victim.

The especially cruel finding is separate from the especially heinous or depraved finding because cruelty has been defined, analyzed and reviewed separately from heinousness or depravity. *See, e.g., State v. Medina*, 193 Ariz. 504, 513, 975 P.2d 94, 103 (1999); *State v. Beaty*, 158 Ariz. 232, 242, 762 P.2d 519, 529 (1988).

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

**PENALTY PHASE**

**Capital Case 2.1 – Nature of Hearing and Duties of Jury**

Members of the jury, at this phase of the sentencing hearing, you will determine whether the defendant will be sentenced to life imprisonment or death.

The law that applies is stated in these instructions and it is your duty to follow all of them whether you agree with them or not. You must not single out certain instructions and disregard others.

You must not be influenced at any point in these proceedings by conjecture, passion, prejudice, public opinion or public feeling. You are not to be swayed by mere sympathy not related to the evidence presented during the penalty phase.

You must not be influenced by your personal feelings of bias or prejudice for or against the defendant or any person involved in this case on the basis of anyone’s race, color, religion, national ancestry, gender or sexual orientation.

Both the State and the defendant have a right to expect that you will consider all the evidence, follow the law, exercise your discretion conscientiously and reach a just verdict.

I do not mean to indicate any opinion on the evidence or what your verdict should be by any ruling or remark I have made or may make during this penalty phase. I am not allowed to express my feelings in this case, and if I have shown any you must disregard them. You and you alone are the triers of fact.

---

**SOURCE:** Preliminary Criminal Instruction 1 and Standard Criminal Instruction 1 (non-capital) (2005); CALJIC 8.84.1 (modified); *California v. Brown*, 479 U.S. 538, 542-43 (1987) (“We think a reasonable juror would . . . understand the instruction not to rely on ‘mere sympathy’ as a directive to ignore only the sort of sympathy that would be totally divorced from the evidence adduced during the penalty phase.”)

**Capital Case 2.2 – Evidence**

You are to apply the law to the evidence and in this way decide whether the defendant will be sentenced to life imprisonment or death.

The evidence you shall consider consists of the testimony [and exhibits] the court admitted in evidence during the trial of this case, during the first part of the sentencing hearing, and during the second part of the sentencing hearing.

It is the duty of the court to rule on the admissibility of evidence. You shall not concern yourselves with the reasons for these rulings. You shall disregard questions [and exhibits] that were withdrawn or to which objections were sustained.

Evidence that was admitted for a limited purpose shall not be considered for any other purpose.

You shall disregard testimony [and exhibits] that the court has not admitted, or the court has stricken.

## CAPITAL CASE JURY INSTRUCTIONS

[The lawyers may stipulate certain facts exist. This means that both sides agree those facts exist and are part of the 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. §§ 13-703(C), -703.01(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. You must disregard any jury instruction given to you at any other phase of this trial the conflicts with this principle.

## REVISED ARIZONA JURY INSTRUCTIONS – CRIMINAL, 3D

[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. § 13-703(G); *State v. Pandelli*, 215 Ariz. 114, 126, ¶ 33, 161 P.3d 557, 569 (2007) (the defendant need not prove that the mitigating circumstances were the direct cause of the offense); *Smith v. Texas*, 125 S. Ct. 400, 404 (2004); *Tennard v. Dretke*, 124 S. Ct. 2562, 2570 (2004); *McCleskey v. Kemp*, 481 U.S. 279, 305-06 (1987); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (holding that capital sentencers must be allowed to consider, “as a mitigating factor, any aspect of the defendant’s character or record and circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”); *Coker v. Georgia*, 433 U.S. 584, 590-91 (1977) (Mitigating circumstances are “circumstances which do not justify or excuse the offense, but which, in fairness or mercy, may be considered as extenuating or reducing the degree of moral culpability.”).

**USE NOTE:** Use bracketed material as applicable. The defendant shall provide the court with a list of mitigating circumstances, but the defense is not required to list the circumstances.

### Capital Case 2.4 – Duty to Consult with One Another

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a just verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and change your opinion if you become convinced that it is wrong. However, you should not change your honest belief concerning the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

---

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

**USE NOTE:** In *State v. Andriano*, 215 Ariz. 497, ¶¶ 59-60, 161 P.3d 540 (2007), an instruction based on Rule 22.4, Arizona Rules of Criminal Procedure, that included a “duty to deliberate” was given as an impasse instruction. The Arizona Supreme Court approved use of the instruction in that context.

### Capital Case 2.5 – Victim Impact Information

A relative of the victim made a statement relating to personal characteristics and uniqueness of the victim and the impact of the murder on the victim’s family. You may

## CAPITAL CASE JURY INSTRUCTIONS

consider this information to the extent that it rebuts mitigation. You may not consider the information as a new aggravating circumstance.

---

**SOURCE:** *State v. Tucker*, 215 Ariz. 298, ¶ 92, 160 P.3d 177 (2007); *State v. Ellison*, 213 Ariz. 116, 140, 140 P.3d 899, 923 (2006).

### Capital Case 2.6 – Mitigation Assessment and the Sentence Burden of Proof

[The State may not rely upon a single fact or an aspect of the offense to establish more than one aggravating circumstance. Therefore, if you have found that two or more of the aggravating circumstances were proved beyond a reasonable doubt by a single fact or aspect of the offense, you are to consider that fact or aspect of the offense only once. In other words, you shall not consider twice any fact or aspect of the offense.]

While all twelve of you had to unanimously agree that the State proved beyond a reasonable doubt the existence of a statutory aggravating circumstance, you do not need to unanimously agree on a particular mitigating circumstance. Each one of you must decide individually whether any mitigating circumstance exists.

The defendant bears the burden of proving the existence of any mitigating circumstance 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 how compelling or persuasive the totality of the mitigating

## REVISED ARIZONA JURY INSTRUCTIONS – CRIMINAL, 3D

factors is when compared against the totality of the aggravating factors and 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 of the case, the severity of the aggravating factors, and the quality of the mitigating factors found by each juror.

If you unanimously find that the defendant should be sentenced to life imprisonment, your foreperson shall sign the verdict form indicating your decision. If you unanimously find that the defendant should be sentenced to death, your foreperson shall sign the verdict form indicating your decision. If you cannot unanimously agree on the appropriate sentence, your foreperson shall tell the judge.

---

**SOURCE:** A.R.S. §§ 13-703(C), (E), -703.01(G); *e.g.*, *State v. Scott*, 177 Ariz. 131, 144, 856 P.2d 792, 805 (1993) (holding that if one fact is used to establish two aggravating circumstances, that fact may not be considered twice when assessing aggravating and mitigating circumstances); *State v. Granville (Baldwin)*, 211 Ariz. 468, 471-73, 123 P.3d 662, 665-67 (2005) (holding that: (1) A.R.S. § 13-703(E) does not create a “presumption of death,” and that, “a jury may return a verdict of life in prison even if the defendant decides to present no mitigation evidence at all.” ¶ 12; (2) “Even if a juror believes that the aggravating and mitigating factors are equally balanced, A.R.S. § 13-703(E) does not require the juror to impose the death penalty. Rather, each juror may vote for a sentence of death – or against it – as each sees fit in light of the aggravating factors found by the jury and the mitigating evidence found by each juror. The finding of an aggravating factor simply renders the defendant eligible for the death penalty; it does not require that he receive it.” n.3; (3) The phrase “sufficiently substantial to call for leniency” means that, “the mitigation must be of such quality or value that it is adequate, in the opinion of an individual juror, to persuade that juror to vote for a sentence of life in prison.” ¶ 18; (4) “[T]he determination whether mitigation is sufficiently substantial to warrant leniency . . . is a sentencing decision to be made by each juror based upon the juror’s assessment of the quality and significance of the mitigating evidence that the juror has found to exist. . . . [A] juror may not vote to impose the death penalty unless he or she finds, in the juror’s individual opinion, that ‘there are no mitigating circumstances sufficiently substantial to call for leniency.’ A.R.S. § 13-703(E). In other words, each juror must determine whether, in that juror’s individual assessment, the mitigation is of such quality or value that it warrants leniency.” ¶ 21.

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

## CAPITAL CASE JURY INSTRUCTIONS

### **FOREWORD TO THE COURT INTRODUCTION TO STATUTORY MITIGATING CIRCUMSTANCE INSTRUCTIONS (NOT TO BE READ TO THE JURY)**

These instructions are presented to aid the court in giving a legally correct instruction if the court decides to give an instruction on a specific statutory mitigating circumstance when requested by counsel. *See* A.R.S. § 13-703(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. § 13-703(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. § 13-703(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 prevented the defendant from appreciating 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. § 13-703(G)(1) (statutory language as of August 1, 2002); *State v. Gallegos*, 178 Ariz. 1, 17-19, 870 P.2d 1097, 1113-15 (1994) (substance/alcohol abuse); *State v. McMurtrey I*, 136 Ariz. 93, 101-02, 664 P.2d 637, 645-46 (1983) (character/personality disorder).

**USE NOTE:** Use bracketed language as appropriate.

## CAPITAL CASE JURY INSTRUCTIONS

### 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. § 13-703(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. § 13-703(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.

## REVISED ARIZONA JURY INSTRUCTIONS – CRIMINAL, 3D

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. § 13-703(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. § 13-703(G)(5) (statutory language as of August 1, 2002); *State v. Poyson*, 198 Ariz. 70, 81, 7 P.3d 79, 90 (2000) (age of nineteen and “low average” intelligence sufficient

**CAPITAL CASE JURY INSTRUCTIONS**

to prove mitigation); *State v. Trostle*, 191 Ariz. 4, 21, 951 P.2d 869, 886 (1997) (age of 20 sufficient to prove mitigation where defendant was, “immature and easily influenced,” and was a, “follower, easily manipulated and pushed to do what others with stronger willpower wanted him to do.”); *State v. Jackson*, 186 Ariz. 20, 31, 918 P.2d 1038, 1049 (1996) (“In addition to youth, we consider defendant’s level of intelligence, maturity, involvement in the crime, and past experience.”).

**USE NOTE:** *Roper v. Simmons*, 125 S. Ct. 1183, 1198 (2005) (“[T]he death penalty cannot be imposed upon juvenile offenders[.]”).

The “age” mitigating circumstance is not limited to youthful/minor offenders. It may also be considered as mitigation for elderly defendants. *State v. Nash*, 143 Ariz. 392, 406, 694 P.2d 222, 236 (1985).

**Capital Case Verdict Form 2**

**ARIZONA SUPERIOR COURT**

\_\_\_\_\_ COUNTY

**THE STATE OF ARIZONA,  
PLAINTIFF,**

**vs.**

**JOHN DOE,  
DEFENDANT.**

Case No. \_\_\_\_\_

**VERDICT**

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.

**REVISED ARIZONA JURY INSTRUCTIONS – CRIMINAL, 3D**

**USE NOTE:** Regarding hung juries at the penalty phase, the proper procedure is specified in A.R.S. § 13-703.01(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.



