28.1383(A)(4)-1 – Aggravated Driving or Actual Physical Control While Subject to an Interlock Device and Under the Influence

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

1. The defendant [drove] [was in actual physical control of] a vehicle in this state; *and*
2. The defendant was under the influence of [intoxicating liquor] [any drug] [a vapor releasing substance containing a toxic substance] [any combination of liquor, drugsor vapor releasing substances] at the time of [driving] [being in actual physical control]; *and*
3. The defendant was impaired to the slightest degree by reason of being under the influence of [intoxicating liquor] [any drug] [a vapor releasing substance containing a toxic substance] [any combination of liquor, drugs or vapor releasing substances];*and*
4. The defendant had been ordered to equip any motor vehicle operated by the defendant with a certified ignition interlock device; *and*
5. The defendant knew or should have known that the defendant had been ordered to equip any motor vehicle operated by the defendant with a certified ignition interlock device.

SOURCE: A.R.S. §§ 28-1383(A)(4) and 28-1381(A)(1) (statutory language as of January 1,2012).

USE NOTE: The State must prove that the defendant knew or should have known that the defendant had been ordered to equip any motor vehicle operated by the defendant with a certified ignition interlock device. *State v. Nelson*, --- P.3d ---, 2021 WL 2460632 (App. 2021). The knowledge of the ignition interlock restriction may be presumed if the notice of ignition interlock restriction was mailed to the last known address pursuant to A.R.S. §§ 28-448 and 28-3318. This permissive presumption may be rebutted by presenting some evidence that the defendant did not know that there was an ignition interlock restriction in place. *Cf. State v. Jennings*, 150 Ariz. 90, 94, 722 P.2d 258, 262 (1986) (referencing cases involving license suspension or revocation).

28.1383(A)(4)-2 – Aggravated Driving or Actual Physical Control While Subject to an Interlock Device and an Alcohol Concentration of 0.08 or More Within Two Hours of Driving

The crime of aggravated driving or actual physical control while subject to an interlock device and an alcohol concentration of 0.08 or more within two hours of driving requires proof that:

1. The defendant [drove] [was in actual physical control of] a vehicle in this state; *and*
2. The defendant had an alcohol concentration of 0.08 or more within two hours of

[driving][being in actual physical control of] the vehicle; *and*

3. The alcohol concentration resulted from alcohol consumed either before or while [driving] [being in actual physical control of] the vehicle; *and*
4. The defendant had been ordered to equip any motor vehicle operated by the defendant with a certified ignition interlock device; *and*
5. The defendant knew or should have known that the defendant had been ordered to equip any motor vehicle operated by the defendant with a certified ignition interlock device.

SOURCE: A.R.S. §§ 28-1383(A)(4) and 28-1381(A)(2) (statutory language as of January 1, 2012).

USE NOTE: The State must prove that the defendant knew or should have known that the defendant had been ordered to equip any motor vehicle operated by the defendant with a certified ignition interlock device. *State v. Nelson*, --- P.3d ---, 2021 WL 2460632 (App. 2021). The knowledge of the ignition interlock restriction may be presumed if the notice of ignition interlock restriction was mailed to the last known address pursuant to A.R.S. §§ 28-448 and 28-3318. This permissive presumption may be rebutted by presenting some evidence that the defendant did not know that there was an ignition interlock restriction in place. *Cf. State v. Jennings*, 150 Ariz. 90, 94, 722 P.2d 258, 262 (1986) (referencing cases involving license suspension or revocation).

28.1383(A)(4)-3 – Aggravated Driving or Actual Physical Control While Subject to an Interlock Device and There Is a Drug in the Defendant's Body

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

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

SOURCE: A.R.S. §§ 28-1383(4) and 28-1381(A)(3) (statutory language as of January 1, 2012).

USE NOTE: The State must prove that the defendant knew or should have known that the license was suspended or revoked. *State v. Nelson*, --- P.3d ---, 2021 WL 2460632 (App. 2021). The knowledge of suspension or revocation may be presumed if the notice of suspension or revocation was mailed to the last known address pursuant to A.R.S. §§ 28-448 and 28-3318. This permissive presumption may be rebutted by presenting some evidence that the defendant did

not know that there was an ignition interlock restriction in place. *Cf. State v. Jennings*, 150 Ariz. 90, 94, 722 P.2d 258, 262 (1986) (referencing cases involving license suspension or revocation).

The crime of driving or actual physical control while under the extreme influence of

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

intoxicating liquor while subject to an interlock device requires proof that:

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

SOURCE: A.R.S. §§ 28-1383(A)(4) and 28-1382 (statutory language as of January 1, 2012).

USE NOTE: The State must prove that the defendant knew or should have known that the defendant had been ordered to equip any motor vehicle operated by the defendant with a certified ignition interlock device. *State v. Nelson*, --- P.3d ---, 2021 WL 2460632 (App. 2021). The knowledge of the ignition interlock restriction may be presumed if the notice of ignition interlock restriction was mailed to the last known address pursuant to A.R.S. §§ 28-448 and 28-3318. This permissive presumption may be rebutted by presenting some evidence that the defendant did not know that there was an ignition interlock restriction in place. *Cf. State v. Jennings*, 150 Ariz. 90, 94, 722 P.2d 258, 262 (1986) (referencing cases involving license suspension or revocation).

Standard Criminal 42 – Lost, Destroyed, or Unpreserved Evidence

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

SOURCE: *State v. Willits*, 96 Ariz. 184, 187, 393 P.2d 274, 277-78 (1964); *State v. Eagle*, 196 Ariz. 27, 31, 992 P.2d 1122, 1126 (App. 1998) and *State v. Tucker*, 157 Ariz. 433, 443, 759 P.2d 579, 589 (1988); *State v. Glissendorf*, 235 Ariz. 147, ¶¶ 7-19, 329 P.3d 1049 (2014).

USE NOTE: "A *Willits* instruction is appropriate when the State destroys or loses evidence potentially helpful to the defendant." *State v. Murray*, 184 Ariz. 9, 33, 906 P.2d 542, 566 (1995) (quoting *State v. Lopez*, 163 Ariz. 108, 113, 786 P.2d 959, 964 (1990)). However, the destruction or nonretention of evidence does not automatically entitle a defendant to a *Willits* instruction. *Id.* A *Willits* instruction is not given merely because a more exhaustive investigation could have been made. To merit the instruction, a defendant must show "(1) that the State failed to preserve material and reasonably accessible evidence having a tendency to exonerate [the defendant], and (2) that this failure resulted in prejudice." *Murray, id.* (citing *State v. Henry*, 176 Ariz. 569, 863 P.2d 861 (1993)).

COMMENT: The instruction restores the language of *Willits,* which stated that the jury "may infer" that the evidence was unfavorable to the State. The 1996 Revised Instruction changed that permissive inference to a mandatory one (jury "should assume"). In *Eagle*, *supra*, 196 Ariz. at 31, 992 P.2d at 1126, the Arizona Court of Appeals noted that the 1996 Revised Instruction's language did not follow the permissive inference language of *Willits*.

In *State v. Glissendorf*, 235 Ariz. 147, ¶¶ 7-19, 329 P.3d 1049 (2014), the Arizona Supreme Court explained that the standard for giving a *Willits* instruction requires only that the lost evidence would have been "potentially helpful" or "potentially useful" to the defense. The court, at ¶¶ 17-18, specifically held that an entire line of cases from Division One of the Court of Appeals applied an erroneous standard for giving a *Willits* instruction.

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

3.03B– **Accomplice Liability Based on Result - NEW**

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

1. The person solicits or commands another person to engage in the conduct causing the result; *or*

2. The person aids, counsels, agrees to aid or attempts to aid another person in planning or engaging in the conduct causing such result.

SOURCE: A.R.S. § 13-303(B).

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

11.03A3 – **Manslaughter by Aiding Suicide**

The crime of manslaughter by aiding suicide requires proof that the defendant intentionally provided the physical means that another person used to die by suicide, with the knowledge that the person indented to die by suicide.

SOURCE: A.R.S. § 13-1103(A)(3) (statutory language as of March 17, 2021).

USE NOTE: Use Statutory Definition Instructions 1.0510(a)(1) and 1.0510(a)(2) defining "intent" and "intent – inference."

COMMENT: Manslaughter by aiding suicide is not a lesser-included offense of first-degree murder. *State v. Khoshbin*, 166 Ariz. 570, 804 P.2d 103 (App. 1990).

11.03B– **Manslaughter by Advising or Encouraging Suicide of Minor NEW**

The crime of manslaughter by advising or encouraging suicide of a minor requires proof that the defendant is at least eighteen years of age and intentionally provided advice or encouragement that a minor uses to die by suicide with knowledge that the minor intends to die by suicide.

SOURCE: A.R.S. § 13-1103(A)(3) (statutory language as of March 17, 2021).

USE NOTE: Use Statutory Definition Instructions 1.0510(a)(1) and 1.0510(a)(2) defining "intent" and "intent – inference."

Attempted Second-Degree Murder – NEW – Table to next meeting – oral argument secheduled for November.

The crime of attempted second-degree murder requires proof that the defendant:

1. Intentionally engaged in conduct that would have been second-degree murder if the circumstances relating to the crime were as the defendant believed them to be; or

2. Intentionally [committed] [failed to commit] any act that was a step in the course of conduct that the defendant [planned would end] [believed would end] in the commission of second-degree murder; or

3. Engaged in conduct intended to aid another person to commit second-degree murder in a manner that would make the defendant an accomplice, had the crime been committed or attempted by another person.

The crime of second-degree murder requires that the defendant intentionally or knowingly caused the death of [another person] [unborn child].

SOURCE: A.R.S. §§ 13-1001, 13-1104; *State v. Felix*, 237 Ariz. 280 (App. 2015); *State v. Ontiveros*, 206 Ariz. 539 (App. 2003), *State v. Curry*, 187 Ariz. 623 (App. 1996).

USE NOTE: Use Statutory Definition Instructions 1.0510(a)(1), 1.0510(a)(2), 1.0510(b), and 1.0510.01 defining "intentionally," "intent – inference," "knowingly," and "included mental state – knowingly."

COMMENT: There is no crime of attempted second-degree murder if the defendant only knows that his or her action would cause serious physical injury rather than death. *See State v. Ontiveros*, 206 Ariz. 539, 542 (App. 2003); *see also State v. Felix*, 237 Ariz. 280, ¶ 14 (App. 2015). For this reason, this instruction should be used for the crime of attempted second-degree murder instead of Instructions 10.01 and 11.04.

28.1383(A)(4)-1 – Aggravated Driving or Actual Physical Control While Subject to an Interlock Device and Under the Influence

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

1. The defendant [drove] [was in actual physical control of] a vehicle in this state; *and*

2. The defendant was under the influence of [intoxicating liquor] [any drug] [a vapor releasing substance containing a toxic substance] [any combination of liquor, drugs or vapor releasing substances] at the time of [driving] [being in actual physical control]; *and*

3. The defendant was impaired to the slightest degree by reason of being under the influence of [intoxicating liquor] [any drug] [a vapor releasing substance containing a toxic substance] [any combination of liquor, drugs or vapor releasing substances];

and

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

5. The defendant knew or should have known that the ignition interlock restriction was in effect at the time the defendant [drove] [was in actual physical control of] a vehicle in this state.

SOURCE: A.R.S. §§ 28-1383(A)(4) and 28-1381(A)(1) (statutory language as of January 1, 2012).

COMMENT: *State v. Nelson*, 251 Ariz. 420 (App. 2021) requires that the jury must be instructed that the defendant knew or should have known an ignition-interlock restriction was in effect at the time of the offense.

28.1383(A)(4)-2 – Aggravated Driving or Actual Physical Control While Subject to an Interlock Device and an Alcohol Concentration of 0.08 or More Within Two Hours of Driving

The crime of aggravated driving or actual physical control while subject to an interlock device and an alcohol concentration of 0.08 or more within two hours of driving requires proof that:

1. The defendant [drove] [was in actual physical control of] a vehicle in this state; *and*

2. The defendant had an alcohol concentration of 0.08 or more within two hours of [driving][being in actual physical control of] the vehicle; *and*

3. The alcohol concentration resulted from alcohol consumed either before or while [driving] [being in actual physical control of] the vehicle;
and

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

5. The defendant knew or should have known that the ignition interlock restriction was in effect at the time the defendant [drove] [was in actual physical control of] a vehicle in this state.

SOURCE: A.R.S. §§ 28-1383(A)(4) and 28-1381(A)(2) (statutory language as of January 1, 2012).

COMMENT: *State v. Nelson*, 251 Ariz. 420 (App. 2021) requires that the jury must be instructed that the defendant knew or should have known an ignition-interlock restriction was in effect at the time of the offense.

28.1383(A)(4)-3 – Aggravated Driving or Actual Physical Control While Subject to an Interlock Device and There Is a Drug in the Defendant's Body

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

1. The defendant [drove] [was in actual physical control of] a vehicle in this state; *and*

2. The defendant had in [his][her] body [(name of drug)] [a metabolite of (name of drug)] at the time of [driving] [being in actual physical control of] the vehicle; *and*

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

4. The defendant knew or should have known that the ignition interlock restriction was in effect at the time the defendant [drove] [was in actual physical control of] a vehicle in this state.

SOURCE: A.R.S. §§ 28-1383(A)(4) and 28-1381(A)(3) (statutory language as of January 1, 2012).

COMMENT: *State v. Nelson*, 251 Ariz. 420 (App. 2021) requires that the jury must be instructed that the defendant knew or should have known an ignition-interlock restriction was in effect at the time of the offense.

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

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

1. The defendant [drove] [was in actual physical control of] a vehicle in this state; *and*

2. The defendant had an alcohol concentration of [0.15 or more but less than 0.20] [0.20 or more] within two hours of [driving][being in actual physical control of] the vehicle; *and*

3. The alcohol concentration resulted from alcohol consumed either before or while [driving] [being in actual physical control of] the vehicle;
and

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

5. The defendant knew or should have known that the ignition interlock restriction was in effect at the time the defendant [drove] [was in actual physical control of] a vehicle in this state.

SOURCE: A.R.S. §§ 28-1383(A)(4) and 28-1382 (statutory language as of January 1, 2012).

COMMENT: *State v. Nelson*, 251 Ariz. 420 (App. 2021) requires that the jury must be instructed that the defendant knew or should have known an ignition-interlock restriction was in effect at the time of the offense.