12.04 – Aggravated Assault – General

The crime of aggravated assault requires proof of the following:

1. The defendant committed an assault, *and*

2. The assault was aggravated by at least one of the following factors:

– The defendant knew or had reason to know that the person assaulted was a [code enforcement officer] [state park ranger] [municipal park ranger] [constable] [firefighter] [fire investigator] [fire inspector] [emergency medical technician] [paramedic] [prosecutor] [public defender] [judicial officer] [while engaged in the execution of any official duties] [if the assault results from the execution of his/her official duties];

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

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

The definition of public defender includes court-appointed counsel. *State v. Wilson*, --- P.3d ---, 2020 WL 6336018 (App. 2020).

14.03.A.1 Public Sexual Indecency - NEW

The crime of public sexual indecency requires proof of the following:

1. The defendant intentionally or knowingly engaged in an act of [sexual contact] [oral sexual contact] [sexual intercourse] [bestiality]; *and*
2. Another person was present; *and*
3. The defendant was reckless about whether such other person, as a reasonable person, would be offended or alarmed by the act.

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

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

The court shall instruct on the culpable mental state.

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

Use Statutory Definition Instructions 1.0510(c) defining "reckless."

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

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

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

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

"Bestiality" is defined in A.R.S. § 13-1401 (Statutory Definition Instruction 14.11.01)

24.06 Impersonating a Public Servant - NEW

The crime of impersonating a public servant requires proof of the following:

1. The defendant pretended to be a public servant; *and*
2. The defendant engaged in any conduct with the intent to induce another to submit to his pretended official authority or to rely upon his pretended official acts.

[It is not a defense that the office the person pretended to hold did not in fact exist or that the pretended office did not in fact possess the authority claimed for it.]

SOURCE: A.R.S. § 13-2406 (statutory language as of September 13, 2013).

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

The court shall instruct on the culpable mental state.

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

Use Statutory Definition Instruction 1.0538 defining "public servant."

COMMENT: A.R.S. § 13-2411(D) provides that "'public servant' includes a notary public."

32.14.A Prostitution - NEW

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

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

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

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

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

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

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

36.19 Child Neglect - NEW

The crime of child neglect requires proof of the following:

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

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

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

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

36.13 Contributing to the Delinquency of a Minor - NEW

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

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

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

28.693 Reckless Driving - NEW

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

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

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

Use Statutory Definition Instructions 1.0510(c) defining "reckless disregard."

28.8280 Careless or Reckless Aircraft Operation - NEW

The crime of careless or reckless aircraft operation requires proof that the defendant operated an aircraft in the air, on the ground or on the water in a careless or reckless manner that endangers the life or property of another.

"Aircraft" includes a model aircraft and civil unmanned aircraft.

SOURCE: A.R.S. § 28-8280 (statutory language as of August 6, 2016).

USE NOTE: In determining whether the operation was careless or reckless, the court shall consider the standards for safe operation of aircraft prescribed by federal statutes or regulations governing aeronautics.

No Arizona appellate court has determined whether the misdemeanor offense of Careless or Reckless Aircraft Operation is a jury eligible offense.

28.8282 (A)(1) Prohibited Operation - NEW

The crime of prohibited operation requires proof of the following:

1. The defendant [operated] [was in actual physical control of] an aircraft in this state; *and*
2. Under the influence of [intoxicating liquor][narcotic][other drugs] [marijuana].

SOURCE: A.R.S. § 28-8282(A)(1) (statutory language as of October 1, 1997).

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

28.8282 (A)(2) Prohibited Operation - NEW

The crime of prohibited operation by the reason of disability requires proof of the following:

1. The defendant [operated] [was in actual physical control of] an aircraft in this state; *and*
2. By reason of mental or physical disability, was incapable of operating an aircraft under the circumstances.

_____

SOURCE: A.R.S. § 28-8282(A)(2) (statutory language as of October 1, 1997).

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

28.8282 (C)(1) Prohibited Operation - NEW

The crime of prohibited operation requires proof of the following:

1. The defendant [operated] [was in actual physical control of] an aircraft in this state; *and*
2. There was 0.04 percent or more by weight of alcohol in the person's blood.

_____

SOURCE: A.R.S. § 28-8282(C)(1) (statutory language as of October 1, 1997).

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

28.8282 (C)(2) Prohibited Operation - NEW

The crime of prohibited operation requires proof of the following:

1. The defendant [operated] [was in actual physical control of] an aircraft in this state; *and*
2. The [operation] [physical control] occurred within eight hours after consuming [intoxicating liquor][narcotic][habit-forming drugs] [marijuana].

_____

SOURCE: A.R.S. § 28-8282(C)(2) (statutory language as of October 1, 1997).

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

Date: December 18, 2020 - Clerical Changes Only.

Re: Capital Jury Instruction Revisions Part 1, Capital Jury Instruction Subcommittee

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Capital Case 1.6 – Aggravating Circumstances (for offenses occurring after August 27, 2019)

The State has alleged that the following aggravating circumstance[s] exist[s] in this case:

[1. The defendant has been convicted of another offense in the United States, and under Arizona law a sentence of life imprisonment or death could be or was imposed;]

[2. The defendant was previously convicted of a serious offense, either preparatory or completed. Convictions for serious offenses committed on the same occasion as the homicide, or not committed on the same occasion but consolidated for trial with the homicide, shall be treated as a serious offense under this paragraph];

[3. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value [or] the defendant committed the offense as a result of payment, or a promise of payment, of anything of pecuniary value;

[4. The defendant committed the offense in an

[a. especially cruel] or

[b. especially heinous or depraved] manner;]

[5. The defendant committed the offense while in the custody of, or on authorized or unauthorized release from, the state department of corrections, a law enforcement agency or a county or city jail [or while on probation for a felony offense];]

[6. The defendant has been convicted of one or more other homicides, and those homicides were committed during the commission of the offense;]

[7. The defendant was at least eighteen years of age at the time the offense was committed, and the murdered person was under fifteen years of age, or was seventy years of age or older;] [The murdered person was an unborn child in the womb at any stage of its development;]

[8. The murdered person was an on-duty peace officer who was killed in the course of performing the officer's official duties, and the defendant knew, or should have known, that the murdered person was a peace officer;]

[9. The defendant committed the offense with the intent to promote, further or assist the objectives of a criminal street gang or criminal syndicate or to join a criminal street gang or criminal syndicate;]

[10. The defendant committed the offense to prevent a person's cooperation with an official law enforcement investigation, to prevent a person's testimony in a court proceeding, in retaliation for a person's cooperation with an official law enforcement investigation or in retaliation for a person's testimony in a court proceeding;]

As to each aggravating circumstance alleged, you may choose one of the following: (1) you may unanimously find beyond a reasonable doubt that the alleged aggravating circumstance is proven; or (2) you may unanimously find that the alleged aggravating circumstance is not proven. If you cannot unanimously agree whether an aggravating circumstance is proven or not proven, leave the verdict form blank for that circumstance and your foreperson shall tell the judge.

If you unanimously find that an aggravating circumstance is proven or not proven, you must indicate this finding on the verdict form.

SOURCE: A.R.S. §§ 13-751(F), -752(E); *Zant v. Stephens*, 462 U.S. 862, 877 (1983) (purpose of aggravating circumstances); *State v. Tucker*, 205 Ariz. 157, 169 (2003) (same).

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

Use bracketed material as applicable.

Capital Case 1.6 – Aggravating Circumstances (for offenses occurring before August 27, 2019)

The State has alleged that the following aggravating circumstance[s] exist[s] in this case:

[1. The defendant has been convicted of another offense in the United States, and under Arizona law a sentence of life imprisonment or death could be or was imposed;]

[2. The defendant was previously convicted of a serious offense, either preparatory or completed. Convictions for serious offenses committed on the same occasion as the homicide, or not committed on the same occasion but consolidated for trial with the homicide, shall be treated as a serious offense under this paragraph];

[3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the person murdered during the commission of the offense;]

[4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value;]

[5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value;]

[6. The defendant committed the offense in an

[a. especially cruel] or

[b. especially heinous or depraved] manner;]

[7. The defendant committed the offense while in the custody of, or on authorized or unauthorized release from, the state department of corrections, a law enforcement agency or a county or city jail [or while on probation for a felony offense];]

[8. The defendant has been convicted of one or more other homicides, and those homicides were committed during the commission of the offense;]

[9. The defendant was at least eighteen years of age at the time the offense was committed, and the murdered person was under fifteen years of age, or was seventy years of age or older;] [The murdered person was an unborn child in the womb at any stage of its development;]

[10. The murdered person was an on-duty peace officer who was killed in the course of performing the officer's official duties, and the defendant knew, or should have known, that the murdered person was a peace officer;]

[11. The defendant committed the offense with the intent to promote, further or assist the objectives of a criminal street gang or criminal syndicate or to join a criminal street gang or criminal syndicate;]

[12. The defendant committed the offense to prevent a person's cooperation with an official law enforcement investigation, to prevent a person's testimony in a court proceeding, in retaliation for a person's cooperation with an official law enforcement investigation or in retaliation for a person's testimony in a court proceeding;]

[13. The offense was committed in a cold, calculated manner without pretense of moral or legal justification;]

[14. The defendant used a remote stun gun or an authorized remote stun gun in the commission of the offense. For the purposes of this factor:

"Authorized remote stun gun" means a remote stun gun that has all of the following: (i) An electrical discharge that is less than one hundred thousand volts and less than nine joules of energy per pulse; (ii) A serial or identification number on all projectiles that are discharged from the remote stun gun; (iii) An identification and tracking system that, on deployment of remote electrodes, disperses coded material that is traceable to the purchaser through records that are kept by the manufacturer on all remote stun guns and all individual cartridges sold; (iv) A training program that is offered by the manufacturer.

"Remote stun gun" means an electronic device that emits an electrical charge and that is designed and primarily employed to incapacitate a person or animal either through contact with electrodes on the device itself or remotely through wired probes that are attached to the device or through a spark, plasma, ionization or other conductive means emitting from the device.]

In determining whether an aggravating circumstance is proven, you may consider only those aggravating circumstances listed in these instructions.

As to each aggravating circumstance alleged, you may choose one of the following: (1) you may unanimously find beyond a reasonable doubt that the alleged aggravating circumstance is proven; or (2) you may unanimously find that the alleged aggravating circumstance is not proven. If you cannot unanimously agree whether an aggravating circumstance is proven or not proven, leave the verdict form blank for that circumstance and your foreperson shall tell the judge.

If you unanimously find that an aggravating circumstance is proven or not proven, you must indicate this finding on the verdict form.

SOURCE: A.R.S. §§ 13-751(F), -752(E); *Zant v. Stephens*, 462 U.S. 862, 877 (1983) (purpose of aggravating circumstances); *State v. Tucker*, 205 Ariz. 157, 169 (2003) (same).

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

Use bracketed material as applicable.

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

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

~~The statutory language of A.R.S. § 13-752(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[.]")~~

Capital Case 1.6(a)(1) – Definition of "Serious Offense" (for offenses occurring on or after July 17, 1993)

A "serious offense," as referred to in these instructions, means any of the following offenses, as either a preparatory offense or a completed offense, if committed in this state [or any offense committed outside this state that if committed in this state would constitute one of the following offenses]:

[1. First-degree murder.]

[2. Second-degree murder.]

[3. Manslaughter.]

[4. Aggravated assault resulting in serious physical injury or committed by the use, threatened use or threatening exhibition of a deadly weapon or dangerous instrument.]

[5. Sexual assault.]

[6. Any dangerous crime against children.]

[7. Arson of an occupied structure.]

[8. Robbery.]

[9. Burglary in the first degree.]

[10. Kidnapping.]

[11. Sexual conduct with a minor under fifteen years of age.]

[12. Burglary in the second degree.]

[13. Terrorism.]

A conviction occurs when a jury, or the court, finds the defendant guilty of an offense, or the defendant pleads guilty to a charge.

[Convictions for serious offenses committed on the same occasion as the homicide, or not committed on the same occasion but consolidated for trial with the homicide, shall be treated as a serious offense.]

SOURCE: A.R.S. §§ 13-751(F)(2), (I) (statutory language as of August 12, 2005), -751.01(A), (C), (P) (statutory language as of August 1, 2002); *State v. Jones*, 197 Ariz. 290, 310-11 (2000).

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

~~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.

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

If the prior conviction is from a foreign jurisdiction, the court must first conclude that the elements of the foreign prior conviction include every element that would be required to prove an enumerated Arizona offense, before the allegation may go to the jury. *State v. Crawford*, 214 Ariz. 129, 131 ¶ 7 (2007); *State v. Roque*, 213 Ariz. 193, 216-17 (2006) (refusing to "look beyond the language of the [foreign] statutes" to the complaint describing the defendant's conduct in determining whether prior California robbery conviction constituted a "serious offense" under A.R.S. § 13-751(F)(2)); *State v. Schaaf,* 169 Ariz. 323, 334 (1991) (reviewing Nevada attempted murder statute to determine if that crime involved violence and holding that sentencing courts "may consider only the statute that the defendant [was] charged with violating; it may not consider other evidence").

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

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

Capital Case 1.6(b) – Definition of "Grave Risk of Death to Another"

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

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

The mere presence of a [third person] [bystander] is insufficient to prove this aggravating circumstance and the actual intent to kill the [third person] [bystander] precludes finding this as an aggravating circumstance.

SOURCE: A.R.S. § 13-751(F)(3) (statutory language as of October 1, 1978); *State v. Johnson*, 212 Ariz. 425, 431 (2006) (mere presence of a third person insufficient to prove aggravator; intent to kill third person precludes finding the aggravator); *State v. Carreon*, 210 Ariz. 54, 67 (2005) (using "specific third person" language); *State v. McMurtrey,* 151 Ariz. 105, 108 (1986) (holding that the (F)(3) circumstance does not apply when the person in the zone of danger is the intended victim of the murder).

USE NOTE: Effective August 27, 2019, this aggravating circumstance was repealed and does not apply for offenses committed on or after that date. This instruction shall be given only if the State alleges the (F)(3) circumstance.

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

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

Whether the (F)(3) circumstance should be presented to the jury may be the subject of motions that will need to be ruled on by the court under the Arizona Rules of Criminal Procedure, Rules 13.5(c) and Rules 16.1(b) & (c), 16.6(b) (challenging the legal sufficiency of an alleged aggravating circumstance in a capital case), and/or Rule 20(a) and (b) (motion for judgment of acquittal before and/or after verdict).

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

COMMENT: This instruction defines "zone of danger" by enumerating the four main ingredients identified by the Arizona Supreme Court that make up this very fact-intensive concept: (1) proximity (not mere presence); (2) time (during the course of the murder); (3) level of intent (knowingly create a risk, without intending to kill/actually murder the third person); and (4) conduct (creating a real and substantial likelihood of fatal injury).

In *State v. Johnson*, *supra*, the court approved an instruction that used the word "bystander." The court in *Johnson* used both "bystander" and "third person." The committee has included both "bystander" and "third person" to be used as appropriate.

Capital Case 1.6(c) – Definition for "Consideration for the Receipt, or in Expectation of the Receipt, of Anything of Pecuniary Value"

In order to find this aggravating circumstance, you must find that the State has proven beyond a reasonable doubt that the defendant's motive, cause or impetus for the commission of the first-degree murder was consideration for the receipt, or the expectation of receipt of pecuniary value. This finding may be based on tangible evidence and/or [strong] circumstantial evidence. "Pecuniary value" may be money or property.

Mere taking of items of value before, during or after the first-degree murder is not enough to establish this aggravating circumstance.

You need not find that consideration for the receipt, or the expectation of the receipt of, the pecuniary value was the sole motivation or cause of the first-degree murder in order to find that this circumstance exists. However, the existence of a pecuniary motive at some point during the events surrounding the first-degree murder is not enough to establish this aggravating circumstance. There must be a connection between the motive and the killing. The mere fact that the person was killed, and the defendant made a financial gain, does not by itself establish this aggravating circumstance.

[While a conviction of robbery or burglary indicates a taking of property, the conviction does not itself prove that the motivation for the killing was the consideration for the receipt, or the expectation of, the receipt of pecuniary value.]

SOURCE: A.R.S. § 13-751(F)(5) (statutory language as of October 1, 1978); "[A] conviction for felony murder predicated on robbery or armed robbery does not automatically prove the (F)(5) aggravator." *State v. Anderson (II)*, 210 Ariz. 327, 341-42, 111 P.3d 369, 383-84 (2005) (where the court also stated that, "the superior court properly instructed the jury on this aggravating factor" where the (F)(5) instruction included the language, "[a] finding of pecuniary gain may be based on tangible evidence or *strong* circumstantial evidence," and the court was reviewing whether a misstatement of the law regarding the (F)(5) circumstance by the prosecutor should cause a reversal (emphasis added)); *State v. Carreon*, 210 Ariz. 54, 67, 107 P.3d 900, 913 (2005) (holding that, "[t]he finding of pecuniary gain may be based on tangible evidence or strong circumstantial evidence."); *State v. Moody,* 208 Ariz. 424, 471, 94 P.3d 1119, 1166 (2004) (holding that the expectation of pecuniary gain must be a, "motive, cause or impetus for the murder, and not merely a result of the murder[,]" and that the State is required to, "establish the connection between the murder and the motive through direct or strong circumstantial evidence."); *State v. Armstrong*, 208 Ariz. 360, 363 n.2, 93 P.3d 1076, 1079 n.2 (2004) (rejecting "but for" requirement, *i.e.*, receipt of item(s) of pecuniary value need not be the *only* cause of the murder); *State v. Sansing*, 200 Ariz. 347, 353, 356, 26 P.3d 1118, 1124, 1127 (2001) (holding that to prove the (F)(5) circumstance, the State must prove, "a connection between a pecuniary motive and the killing itself; the expectation of pecuniary gain must be a motive for the murder[,]" "[w]e reserve the death penalty for murders committed during a robbery or burglary for those cases in which the facts clearly indicate a connection between a pecuniary motive and the killing itself[,]" and that, "[t]he murder, which occurred at least an hour after the victim's arrival, did not facilitate the defendant's ability to secure pecuniary gain, particularly in light of the fact that he bound the victim

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

USE NOTE: Effective August 27, 2019, this aggravating circumstance was repealed and does not apply for offenses committed on or after that date.

This instruction shall be given only if the State alleges the (F)(5) circumstance.

The court should define "value" on a case-by-case basis, in light of the evidence presented. For example, the "value" at issue in *Carreon* was money, while the "value" at issue in *Anderson (II)* was a truck.

Use bracketed material as applicable.

Whether the (F)(5) circumstance should be presented to the jury may be the subject of motions that will need to be ruled on by the court under the Arizona Rules of Criminal Procedure, Rules 13.5(c) and Rules 16.1(b) and (c), 16.6(b) (challenging the legal sufficiency of an alleged aggravating circumstance in a capital case), and/or Rule 20(a) and (b) (motion for judgment of acquittal before and/or after verdict).

COMMENT: The Committee could not reach a consensus on whether the word "strong" when referring to "circumstantial evidence" should be included in the RAJI instruction, so the word "strong" appears in brackets. Some members of the Committee believe that the term "strong circumstantial evidence" is confusing, does not add anything to the fact that the circumstance must be proved beyond a reasonable doubt and does not consider the situation where there is tangible and circumstantial evidence to support the aggravating circumstance. Those members of the Committee suggest that the word "strong" contradicts the general instruction concerning "direct and circumstantial evidence."

Other members of the Committee believe that the term "strong circumstantial evidence" is not confusing, and it informs the jurors that if they rely, at least in part, on circumstantial evidence, that evidence must be "strong" circumstantial evidence. Furthermore, that distinction has been drawn by the Arizona Supreme Court regarding the (F)(5) circumstance, and its intent was to distinguish the (F)(5) circumstance from other situations where circumstantial evidence may be presented. Additionally, use of the word "strong" does not preclude the State from presenting both tangible and circumstantial evidence in the same trial.

As noted above in the source section, the word "strong" was used in the instruction discussed in *Anderson (II)*. That instruction read in full:

> The pecuniary gain aggravating circumstance only applies if you find beyond a reasonable doubt that the defendant committed the offense as consideration for the receipt or in expectation of the receipt of anything of pecuniary value.
>
> In order to prove this factor, the State must prove that the expectation of pecuniary gain was a motive, cause, or impetus for murder and not merely the result of it.

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

Anderson (II), 210 Ariz. at 341-42; *see also State v. Garza,* 216 Ariz. 56, 67 ¶ 52 (2007).

Capital Case 1.6(d) – Definition of "Especially Cruel, Heinous or Depraved"

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

To find that the defendant "inflicted gratuitous violence," you must find that the defendant intentionally inflicted violence clearly beyond what was necessary to kill the victim, and that the

defendant continued to inflict this violence after the defendant knew or should have known that the [defendant had inflicted a fatal injury] [victim was dead].

Needless Mutilation

"Needlessly mutilating" means that the defendant, apart from the killing, committed acts after the victim's death and separate from the acts that led to the death of the victim, with the intent to disfigure the victim's body. "Needlessly mutilating" indicates a mental state marked by debasement.

Verdict Form

Even if you determine that "especially cruel" and "especially heinous or depraved" have been proven beyond a reasonable doubt, you can only consider this as one aggravating circumstance, which is why you will find only one choice on the verdict form. There is an interrogatory on the verdict form that you must complete to set out your findings regarding "especially cruel" and/or "especially heinous or depraved".

A unanimous finding of "especially cruel" and/or "especially heinous or depraved" establishes this aggravating circumstance.

SOURCE: A.R.S. § 13-751(F)(4) (statutory language as of August 27, 2019); A.R.S. § 13-751(F)(6) (statutory language as of October 1, 1978); *State v. Bocharski*, 218 Ariz. 476 ¶ 87 (2008) (defining gratuitous violence to include that State must also show that the defendant continued to inflict violence after he knew or should have known that a fatal action had occurred); *State v. Wallace*, 219 Ariz. 1 (2008); *State v. Tucker*, 215 Ariz. 298 (2007); *State v. Andriano*, 215 Ariz. 497 (2007); *State v. Velazquez*, 216 Ariz. 300 (2007); *State v. Anderson*, 210 Ariz. 327, 352 n.19 (defining gratuitous violence and using "clearly beyond" language); *State v. Carlson*, 202 Ariz. 570, 581-83 (2002) (especial cruelty); *State v. Canez*, 202 Ariz. 133, 161 (2002) (holding that re especial cruelty, defendant knew or should have known that victim would consciously suffer); *State v. Medina*, 193 Ariz. 504, 513 (1999) (disjunctive); *State v. Doerr*, 193 Ariz. 56, 67-68 (1999) (relishing); *State v. Miles*, 186 Ariz. 10, 18-19 (1996) (holding that a finding of especially cruel, heinous or depraved, "is a single (F)(6) factor, and the trial judge erred when he characterized them as two separate (F)(6) factors."); *State v. Murray*, 184 Ariz. 9, 37 (1995) (especial cruelty); *State v. Ross*, 180 Ariz. 598, 605-06 (1994) (witness elimination/extraordinary circumstances language); *State v. Richmond*, 180 Ariz. 573, 580 (1994) (mutilation); *State v. King*, 180 Ariz. 268, 284-85 (1994) (witness elimination alone insufficient); *State v. Milke*, 177 Ariz. 118, 124-26 (1993) (holding that proof of parent/child relationship, along with victim being helpless and murder being senseless, satisfied especially heinous or depraved circumstance); *State v. Styers*, 177 Ariz. 104, 115 (1993) (holding the same where defendant was child's full-time caregiver for several months before the murder and therefore had a special relationship with the child); *State v. Amaya-Ruiz*, 166 Ariz. 152, 178 (1990) (gratuitous violence); *State v. Beaty*, 158 Ariz. 232, 242 (1988) (individual definitions of especially heinous or depraved).

USE NOTE: Effective August 27, 2019, this aggravating circumstance was renumbered to A.R.S. § 13-751(F)(4). This instruction shall be given only if the State alleges the (F)(4) circumstance. The jury should only be instructed on the theory or theories that the State is pursuing.

"Especially" means unusually great or significant. *See* MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1997), 396 (defining "especially"). All first-degree murders are to some

extent heinous, cruel or depraved; therefore, to be especially cruel, heinous or depraved, a murder must be more heinous, cruel or depraved than usual. *State v. Smith*, 146 Ariz. 491, 503 (1985). In other words, the murder must have been committed in such a way as to, "set [the] Defendant's' acts apart from the norm of first degree murder." *State v. Brookover*, 124 Ariz. 38, 41 (1979).

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

Especially Cruel

The language of "a murder is especially cruel when there has been the infliction of pain and suffering in an especially wanton and insensitive or vindictive manner" as used in defining "especially cruel" in the *Anderson II* instruction was deemed "not require[d]" in *State v. Tucker*, 215 Ariz. 298 ¶ 29– 33 (2007). *See also State v. Andriano*, 215 Ariz. 497 (2007) and *State v. Velazquez*, 216 Ariz. 300 (2007) in which instructions were approved without the bracketed language; *State v. Cropper*, 223 Ariz. 522 ¶ 13 (2010) (citing *Tucker* and *Anderson II*, the Court noted that its "cases make clear that an (F)(6) instruction is sufficient if it requires the state to establish that the victim consciously experienced physical or mental pain and the defendant knew or should have known that the victim would suffer"); *State v. Snelling*, 225 Ariz. 182, 190 ¶ 39 (2010) (F(6) aggravator was not proved where there was no evidence that the victim "consciously suffered mental anguish or physical pain").

Gratuitous Violence

After considering the case law, the committee could not agree what the Arizona Supreme Court meant by "a fatal action had occurred," whether the victim was dead when the additional violence was inflicted, or whether a fatal injury had been inflicted before the additional violence was inflicted. The bracketed language sets forth the two views of the majority of the committee. The minority view was to use the supreme court's language of "a fatal action had occurred" in the instruction and that "the victim was dead" option should not be included in the instruction. The trial court will need to select the appropriate language based on the facts of the case and the court's interpretation of the case law.

In *State v. Wallace*, 219 Ariz. 1 ¶ 24 (2008), the Arizona Supreme Court held that "a 'less violent alternative' instruction is not appropriate in gratuitous violence cases."

Capital Case 1.6(e) – Definition for "During the Commission of the Offense"

To find that the defendant committed one or more homicides "during the commission of the offense," you must find [that the other homicide was] [those other homicides were] related in

1. time, *and*
2. space, *and*
3. motivation

to the first-degree murder at issue.

SOURCE: A.R.S. § 13-751 (F)(6) (statutory language as of August 27, 2019); A.R.S. § 13-751(F)(8) (if the offense was committed before August 27, 2019); *see, e.g.*, *State v. Dann*, 206 Ariz. 371, 373 (2003) (requiring all three subfactors of time, space, and motivation); *State v. Rogovich*, 188 Ariz. 38, 45 (1997); *State v. Lavers*, 168 Ariz. 376, 393 (1991).

USE NOTE: This instruction shall be given only if the State alleges the (F)(6) circumstance. Use applicable bracketed material.

Capital Case 1.6(f) – Definition of "Cold, Calculated Manner Without Pretense of Moral or Legal Justification"

The State alleges that the murder was committed in a cold, calculated manner without pretense of moral or legal justification. This aggravating circumstance requires more than the premeditation necessary to find a defendant guilty of first-degree murder. This aggravating circumstance cannot be found to exist unless the State has proved beyond a reasonable doubt that the defendant exhibited a cold-blooded intent to kill that is more contemplative, more methodical, more controlled than that necessary to prove premeditated first-degree murder. In other words, a heightened degree of premeditation is required.

"Cold" means the murder was the product of calm and cool reflection.

"Calculated" means having a careful plan or prearranged design to commit murder.

This aggravating circumstance focuses on the defendant's state of mind at the time of the offense, as reflected by the defendant's words and acts. To determine whether a murder was committed in a cold, calculated manner without pretense of moral or legal justification you must find that the State proved beyond a reasonable doubt that the defendant:

1. had a careful plan or prearranged design to commit murder before the fatal incident; *and*

2. exhibited a cool and calm reflection for a substantial period of time before killing; *and*

3. had no pretense of moral or legal justification or excuse.

A "pretense of moral or legal justification" is any claim of justification or excuse that, though insufficient to reduce the degree of murder, nevertheless rebuts the otherwise cold, calculated nature of the murder.

SOURCE: A.R.S. § 13-751(F)(13); based on State of Florida jury instruction 7.11 PENALTY PROCEEDINGS – CAPITAL CASES; *Jackson v. State*, 648 So.2d 85, 88-89 (Fla. 1994). The Arizona Supreme Court affirmed the use of the RAJI instruction for this circumstance in *State v. Hausner,* 230 Ariz. 60 (2012).

USE NOTE: Effective August 27, 2019, this aggravating circumstance was repealed and does not apply for offenses committed on or after that date. If the jury considering this aggravator was not the jury that determined guilt, the court should include the definition of "premeditation." *See* Statutory Instruction 11.05.

Capital Case Verdict Form ~~1~~ Aggravating Circumstances – Date of offense before August 27, 2019

ARIZONA SUPERIOR COURT
_____ COUNTY

THE STATE OF ARIZONA, **PLAINTIFF,** **vs.** **JOHN DOE,** **DEFENDANT.**	**Case No. _____**

We, the jury, ~~empanelled~~ empaneled and sworn in the above-entitled cause, do upon our oaths unanimously find the following aggravating circumstance or circumstances as shown by the circumstance or circumstances checked:

Proven Beyond a Reasonable Doubt	Not Proven	Aggravating circumstance related to the death of [victim's name here].
		The Defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death could be or was imposed.
		The Defendant was previously convicted of a serious offense, either preparatory or completed.
		In the commission of the offense the Defendant knowingly created a grave risk of death to another person or persons in addition to the person murdered during the commission of the offense.
		The Defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.
		The Defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.
		The Defendant committed the offense in an especially cruel, heinous or depraved manner.

		The Defendant committed the offense while in the custody of or on authorized or unauthorized release from the state department of corrections, a law enforcement agency or a county or city jail [or while on probation].
		The Defendant has been convicted of one or more other homicides, and those homicides were committed during the commission of the offense.
		The Defendant was at least eighteen years of age at the time the offense was committed and the murdered person was under fifteen years of age or was seventy years of age or older. *or* The murdered person was an unborn child at any state of its development.
		The murdered person was an on duty peace officer who was killed in the course of performing the officer's official duties and the defendant knew, or should have known, that the murdered person was a peace officer.
		The Defendant committed the offense with the intent to promote, further or assist the objectives of a criminal street gang or criminal syndicate or to join a criminal street gang or criminal syndicate.
		The Defendant committed the offense to prevent a person's cooperation with an official law enforcement investigation, to prevent a person's testimony in a court proceeding, in retaliation for a person's cooperation with an official law enforcement investigation or in retaliation for a person's testimony in a court proceeding.
		The offense was committed in a cold, calculated manner without pretense of moral or legal justification.
		The Defendant used a remote stun gun or an authorized remote stun gun in the commission of the offense.

[If you have unanimously found beyond a reasonable doubt that the offense was committed in an especially cruel and/or especially heinous or depraved manner, then you must answer the following interrogatories:

We, the jury, duly ~~empanelled~~ empaneled and sworn in the above-entitled cause, do upon our oaths unanimously find beyond a reasonable doubt that the murder was committed in an especially cruel manner (check only one):

_____ Yes

_____ No

We, the jury, duly ~~empanelled~~ empaneled and sworn in the above-entitled cause, do upon our oaths unanimously find beyond a reasonable doubt that the murder was committed in an especially heinous or depraved manner (check only one):

_____ Yes

_____ No]

_____

FOREPERSON

SOURCE: A.R.S. §§ 13-751(F), -752(E).

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

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

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

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

Capital Case Verdict Form Aggravating Circumstances – Date of offense on or after August 27, 2019

ARIZONA SUPERIOR COURT
_____ COUNTY

THE STATE OF ARIZONA, **PLAINTIFF,** **vs.** **JOHN DOE,** **DEFENDANT.**	**Case No. _____**

We, the jury, empaneled and sworn in the above-entitled cause, do upon our oaths unanimously find the following aggravating circumstance or circumstances as shown by the circumstance or circumstances checked:

Proven Beyond a Reasonable Doubt	Not Proven	
		Aggravating circumstance related to the death of [victim's name here].
		The Defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death could be or was imposed.
		The Defendant was previously convicted of a serious offense, either preparatory or completed.
		The Defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value, or the defendant committed the offense as a result of payment, or a promise of payment, of anything of pecuniary value.
		The Defendant committed the offense in an especially cruel, heinous or depraved manner.

		The Defendant committed the offense while in the custody of or on authorized or unauthorized release from the state department of corrections, a law enforcement agency or a county or city jail [or while on probation].
		The Defendant has been convicted of one or more other homicides, and those homicides were committed during the commission of the offense.
		The Defendant was at least eighteen years of age at the time the offense was committed and the murdered person was under fifteen years of age or was seventy years of age or older. *or* The murdered person was an unborn child at any state of its development.
		The murdered person was an on duty peace officer who was killed in the course of performing the officer's official duties and the defendant knew, or should have known, that the murdered person was a peace officer.
		The Defendant committed the offense with the intent to promote, further or assist the objectives of a criminal street gang or criminal syndicate or to join a criminal street gang or criminal syndicate.
		The Defendant committed the offense to prevent a person's cooperation with an official law enforcement investigation, to prevent a person's testimony in a court proceeding, in retaliation for a person's cooperation with an official law enforcement investigation or in retaliation for a person's testimony in a court proceeding.

[If you have unanimously found beyond a reasonable doubt that the offense was committed in an especially cruel and/or especially heinous or depraved manner, then you must answer the following interrogatories:

We, the jury, duly empaneled and sworn in the above-entitled cause, do upon our oaths unanimously find beyond a reasonable doubt that the murder was committed in an especially cruel manner (check only one):

_____ Yes

_____ No

We, the jury, duly empaneled and sworn in the above-entitled cause, do upon our oaths unanimously find beyond a reasonable doubt that the murder was committed in an especially heinous or depraved manner (check only one):

_____ Yes

_____ No]

_____

FOREPERSON

SOURCE: A.R.S. §§ 13-751(F), -752(E).

USE NOTE: The verdict form shall include only the theory or theories that the State is pursuing. Use the bracketed material only if the State is pursuing the (F)(4) (formerly (F)(6)) circumstance.

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

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

Regarding hung juries at the eligibility phase, the proper procedure is specified in A.R.S. § 13-752(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."