# PRELIMINARY CRIMINAL INSTRUCTIONS

## Preliminary Criminal 1 – Importance of Jury Service

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

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

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

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

## Preliminary Criminal 2 – Duty of Jurors

Ladies and Gentlemen:

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

It will be your duty to decide the facts. You must decide the facts only from the evidence produced in court. You must not speculate or guess about any fact. In deciding this case, you are not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling. Race, color, religion, national ancestry, gender or sexual orientation should not influence you.

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

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

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**SOURCE:** Capital Case Instruction 1.2.

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

## Preliminary Criminal 3 – Evidence

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

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

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

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

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

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

## Preliminary Criminal 4 – Direct and Circumstantial Evidence

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

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

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

## Preliminary Criminal 5 – Stipulations

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

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

 

## Preliminary Criminal 6 – Evidence, Statements of Lawyers and Rulings

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

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

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

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

## Preliminary Criminal 7 – Rulings of the Court

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

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

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

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

 

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

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

## Preliminary Criminal 8 – Exclusion of Witnesses

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

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

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

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

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

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

## Preliminary Criminal 9 – Bench Conferences and Recesses

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

 

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

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

## Preliminary Criminal 10 – Credibility of Witnesses

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

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

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

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

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

## Preliminary Criminal 11 – Expert Witness

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

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

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

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

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

 

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

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

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

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

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

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

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

## Preliminary Criminal 13 – Admonition

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

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

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

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

 

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

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

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

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

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

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

 

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

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

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

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

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

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

## Preliminary Criminal 14 – Media Coverage

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

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

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

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

## Preliminary Criminal 15 – Presence of a Deputy

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

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

 

## Preliminary Criminal 16 – Questions by Jurors

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

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

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

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

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

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

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

## Preliminary Criminal 17 – Alternate Jurors

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

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

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

**COMMENT:** ARIZ. CONST., art. 2, § 23 and A.R.S. § 21-102(A) require a 12-person jury if the potential sentence is 30 years or more. "A defendant's exposure to a sentence of at least thirty years' imprisonment establishes his or her right to a twelve-person jury, notwithstanding the actual sentence imposed. *State v. Luque,* 171 Ariz. 198, 201, 829 P.2d 1244, 1247 (App.1992) ("commencement of deliberations is the crucial point" in

 

determining when defendant's right to twelve-person jury under article II, § 23 of Arizona Constitution attaches); *see also State v. Smith,* 197 Ariz. 333, 4 P.3d 388 (App. 1999)." *State v. Benenati*, 203 Ariz. 235, 239 n. 3, 52 P.3d 804 (App. 2002); *State v. Kuck*, 210 Ariz. 288, 110 P.3d 1022 (App. 2005) distinguishing *State v. Maldonado*, 206 Ariz. 339, 342, 78 P.3d 1060, 1063 (App. 2003) (jury size is determined at the outset of the trial) and holding that the size of the jury is determined by the maximum sentence to which the defendant is exposed when the case goes to the jury. Defense counsel's waiver of a twelve-person jury without the defendant's knowing waiver is fundamental error requiring reversal and a new trial. *Maldonado*, 206 Ariz. 339, 78 P.3d 1060 (App. 2003). The possible prison sentence, even if it is a mandatory consecutive sentence, in a probation violation matter is not required to be included in determining whether a twelve-person jury is required for defendant's new, untried case. *State v. Nguyen*, 208 Ariz. 316, 318, 93 P.3d 516, 518 (App. 2004).

## Preliminary Criminal 18 – Constitutional Right Not to Testify

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

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

## Preliminary Criminal 19 – Statements of Defendant

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

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

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

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

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

## Preliminary Criminal 20 – Presumption of Innocence and Burden of Proof

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

 

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

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

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him/her guilty. If, on the other hand, you think there is a real possibility that he/she is not guilty, you must give him/her the benefit of the doubt and find him/her not guilty.

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

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

**COMMENT:** This instruction is to be given in every criminal case. *Portillo*, *supra.* The instruction should be given exactly as written without any modification. *State v. Sullivan*, 205 Ariz. 285, 288, 69 P.3d 1006, 1009 (App. 2003).

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

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

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

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

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

 

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

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

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

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

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

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

## Preliminary Criminal 21.1 – Interpreter for the Defendant

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

## Preliminary Criminal 21.2 – Citizenship/Nationality Instruction

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

 

## Preliminary Criminal 22 – The Charged Offense

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

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

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

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

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

## Preliminary Criminal 23 – Scheduling During Trial

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

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

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

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

## Preliminary Criminal 24 – Order of Trial

Criminal trials generally proceed in the following order:

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

 

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

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

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

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

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

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

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

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

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

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

**COMMENT:** The second bracketed "fourth" paragraph is included because where the defense has the burden of proof on an affirmative defense, the trial court has the discretion to grant surrebuttal. *See State v. Moody*, 208 Ariz. 424, 468-69, ¶¶ 202-04, 94 P.3d 1119 (2004); *State v. Steelman,* 120 Ariz. 301, 319, 585 P.2d 1213, 1231 (1978). If the court has made the decision to allow surrebuttal before hearing the evidence, the court may wish to use the second bracketed "fourth" paragraph.

 

# STANDARD CRIMINAL INSTRUCTIONS

## Standard Criminal 1 – Duty of Jury

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

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

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

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

## Standard Criminal 2 – Indictment/Information Is Not Evidence

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

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

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## Standard Criminal 3 – Presumption of Innocence

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

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

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

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

that the failure to give a requested instruction on the presumption of innocence in and of itself does not violate the Constitution, and noted that the error it found in *Taylor* was based on the facts of that case. *Accord State v. White,* 160 Ariz. 24, 31, 770 P.2d 328, 335 (1989). Because any error in the failure to give a presumption of innocence instruction will depend on the facts of the case, the Committee is of the opinion that the better practice is to give this instruction in every case.

## Standard Criminal 4(a) – Burden of Proof

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

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find [him][her] guilty. If, on the other hand, you think there is a real possibility that [he][she] is not guilty, you must give [him][her] the benefit of the doubt and find [him][her] not guilty.

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**SOURCE:** *State v. Portillo,* 182 Ariz. 592, 596, 898 P.2d 970, 974 (1995), with the addition of the language contained in the second sentence of the first paragraph.

**COMMENT:** This is the instruction verbatim from *State v. Portillo,* 182 Ariz. 592, 596, 898 P.2d 970, 974 (1995), with the addition of the language contained in the second sentence of the first paragraph. In *State v. Van Adams,* 194 Ariz. 408, 418, 984 P.2d 16, 26 (1999), the Arizona Supreme Court rejected a challenge to the "firmly convinced" language in the *Portillo* instruction, and stated: "We have clearly indicated our preference for this instruction, which is based upon the Federal Judicial Center's proposed instruction." 194 Ariz. 408, ¶ 30. This instruction is included for those who are of the opinion that the Arizona Supreme Court has mandated that the courts must now use only the exact language given in *Portillo.* The Committee believes, however, that the *Portillo* instruction is incorrect to the extent that it states that the preponderance of the evidence standard and the clear and convincing evidence standard apply only in a civil case. In a criminal case, facts in general must be proved by a preponderance of the evidence, and certain specific facts must be proved by either a preponderance of the evidence or by clear and convincing evidence. A.R.S. § 13-205(A) (unless otherwise provided, a defendant must prove an affirmative defense by a preponderance of the evidence); A.R.S. § 13-206(B) (defendant must prove entrapment by clear and convincing evidence); A.R.S. § 13-502 (defendant must prove legal insanity by clear and convincing evidence); *State v. Terrazas,* 189 Ariz. 580, 582, 944 P.2d 1194, 1196 (1997) (State must prove by clear and convincing evidence that defendant committed other act). Standard Criminal Instruction 5b(2) defines these other standards for the jurors.

 

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

There are three standards for the burden of proof:

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

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

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

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

There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find [him][her] guilty. If, on the other hand, you think there is a real possibility that [he][she] is not guilty, you must give [him][her] the benefit of the doubt and find [him][her] not guilty.

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**COMMENT:** This instruction takes the instruction given in *State v. Portillo,* 182 Ariz. 592, 596, 898 P.2d 970, 974 (1995), and combines it with the definitions for preponderance of the evidence and clear and convincing evidence from the civil RAJI. In a criminal case, facts in general must be proved by a preponderance of the evidence, and certain specific facts must be proved by either a preponderance of the evidence or by clear and convincing evidence. A.R.S. § 13-205(A) unless otherwise provided, a defendant must prove an affirmative defense by a preponderance of the evidence); A.R.S. § 13-206(B) (defendant must prove entrapment by clear and convincing evidence); A.R.S. § 13-502 (defendant must prove legal insanity by clear and convincing evidence); *State v. Terrazas,* 189 Ariz. 580, 582, 944 P.2d 1194, 1196 (1997) (State must prove by clear and convincing evidence that defendant committed other act).

## Standard Criminal 5 – Jury Not to Consider Penalty

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

 

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

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**SOURCE:** RAJI (Criminal) No. 7 (1996); *State v. Koch*, 138 Ariz. 99, 105, 673 P.2d 297, 303 (1983); *State v. Van Dyke*, 127 Ariz. 335, 337, 621 P.2d 22, 24 (1983).

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

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

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

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

## Standard Criminal 7 – Defendant Absent at Trial

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

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

## Standard Criminal 8 – Evidence to Be Considered

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

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

**COMMENT:** When the trial court sustains a defendant's objection to an improper comment and admonishes the jury to disregard it, this is generally sufficient to cure the prejudicial impact unless it is highly damaging or the instruction from the court is clearly inadequate. *State v. Clow*, 130 Ariz. 125, 127, 634 P.2d 576, 578 (1981).

 

## Standard Criminal 9 – Defendant Need Not Produce Evidence

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

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

**USE NOTE:** If a defendant testifies and refers to absent witnesses or defense counsel argues about others involved or infers that the State could have called other witnesses, the State may argue to the jury that although the State has the burden of proof, the defense has the power of subpoena also. This comment is not a comment on defendant's right not to testify. *See State v. Petzolt*, 172 Ariz. 272, 278, 836 P.2d 982, 988 (App.1991); *State v. Rutledge,* 205 Ariz. 7, 14, 66 P.3d 50, 57 (2003) (stating that the comments must be taken in the context of the facts presented and in that case, where defense raised an alibi defense, it was proper for prosecutor to comment that the defendant's interview with the police did not include any alibi evidence). It is well settled law that a prosecutor may comment on defendant's failure to produce exculpatory evidence as long as the State does not call attention to defendant's failure to testify. *State v. Herrera*, 203 Ariz. 131, 137, 51 P.3d 353, 359 (App. 2002). However, the State is not permitted to argue to the jury about the defense failure to produce witnesses or evidence when there has been no evidence presented or arguments made by counsel about absent witnesses or evidence or the failure of the State to call witnesses or present specific evidence. *See State v. Corona*, 188 Ariz. 85, 89, 932 P.2d 1356, 1360 (App. 1997).

## Standard Criminal 10 – Lawyers' Comments Are Not Evidence

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

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

**COMMENT:** The opening statement should not contain any facts that the parties cannot prove at trial. *State v. Bowie*, 119 Ariz. 336, 339, 580 P.2d 1190, 1193 (1978). The trial court should not restrict an opening statement containing facts that the party believes in good faith that it can establish at trial. *State v. Pedroza-Perez*, 240 Ariz. 114, 377 P.3d 311 (2016).

## Standard Criminal 11 – Stipulations

The lawyers are permitted to stipulate that certain facts exist. This means that both sides agree those facts do exist and are part of the evidence. You are to treat a stipulation as any other evidence. You are free to accept it or reject it, in whole or in part, just as any other evidence.

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

 

**USE NOTE**: In *State v. Allen*, 223 Ariz. 125, 126, ¶10, n. 2, 220 P.3d 245, 246 (Ariz. 2009), the Arizona Supreme Court noted that it was incorrect to instruct the jury that it "should accept * * * as true" any fact stipulated to by the parties.

## Standard Criminal 12 – Judicial Notice of Adjudicative Facts

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

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

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

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

## Standard Criminal 13 – Redacted Exhibits

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

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**SOURCE:** *State v. Kennedy*, 122 Ariz. 22, 27, 592 P.2d 1288, 1293 (App. 1979).

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

## Standard Criminal 14 – Direct and Circumstantial Evidence

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

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**SOURCE:** RAJI (Criminal) No. 24 (1996); *State v. Carter*, 118 Ariz. 562, 564, 578 P.2d 991, 993 (1978); *State v. Salinas*, 106 Ariz. 526, 527, 479 P.2d 411, 412 (1971); *State v. Harvill*, 106 Ariz. 386, 390, 476 P.2d 841, 845 (1970).

 

## Standard Criminal 15 – Credibility [Believability] of Witnesses

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

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

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

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

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

## Standard Criminal 16 – Testimony of Law Enforcement Officers

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

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**SOURCE:** RAJI (Criminal) No. 34 (1996); *State v. Walters*, 155 Ariz. 548, 552, 748 P.2d 777, 781 (1987).

## Standard Criminal 17 – Expert Witness

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

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

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**SOURCE:** Rule 702, Arizona Rules of Evidence; Preliminary 6, RAJI (Civil) 4th; Rule 21.1, Arizona Rules of Criminal Procedure: "The law relating to instructions to the jury in civil actions shall apply to criminal actions, except as otherwise provided." *State v. Roberts*, 139 Ariz. 117, 122-23, 677 P.2d 280, 285-86 (App. 1983).

## Standard Criminal 18(a) – Defendant Need Not Testify

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

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

## Standard Criminal 18(b) – Defendant's Testimony

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

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

## Standard Criminal 19 – Voluntariness of Defendant's Statements

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

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

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

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**SOURCE:** RAJI (Criminal) No. 6 (1996); A.R.S. § 13-3988 (statutory language as of October 1, 1978); *State v. Williams*, 136 Ariz. 52, 56, 664 P.2d 202, 206 (1983); *State v. McVay*, 127 Ariz. 18, 20, 617 P.2d 1134, 1136 (1980); *State v. Brooks*, 127 Ariz. 130, 138, 618 P.2d 624, 632 (App. 1980).

## Standard Criminal 20 – Reserved

 

## Standard Criminal 21 – Defendant Witness (Prior Conviction)

You have heard evidence that defendant has previously been convicted of a criminal offense. You may consider that evidence only as it may affect defendant's believability as a witness. You must not consider a prior conviction as evidence of guilt of the crime for which the defendant is now on trial.

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**SOURCE:** RAJI (Criminal) No. 19 (1996); Rule 609, Arizona Rules of Evidence; *State v. Green*, 200 Ariz. 496, 499, 29 P.3d 271, 274 (2001).

**USE NOTE:** This instruction must be given if the court allows evidence of defendant's prior conviction. "Whenever evidence is admitted of other offenses there is an imperative duty on the trial court to clearly instruct the jury as to the restricted and limited purpose for which such evidence is to be considered." *State v. Canedo*, 125 Ariz. 197, 200, 608 P.2d 774, 777 (1980). The court's failure to provide this type of instruction constitutes reversible error. *Id.*

**COMMENT:** The above instruction is appropriate when the trial court admits the evidence of the prior conviction only for impeachment under Ariz. R. Evid. 609. If relevant, the trial court may also admit the evidence of the prior conviction under Ariz. R. Evid. 404(b); *State v. Smith*, 146 Ariz. 491, 499, 707 P.2d 289, 297 (1985); *State v. Burciaga*, 146 Ariz. 333, 335, 705 P.2d 1384, 1386 (App. 1985).

If the trial court admits the evidence under both Rule 404(b) and Rule 609, the trial court should delete the word "only" in the second sentence. Also, the trial court should consider combining this instruction with Standard Criminal 26A or 26B, dealing with evidence of other crimes, wrongs, or acts. The Court should also consider whether the specific reference to the nature of the prior offense(s) should or should not be sanitized to prevent prejudice. *See State v. Smyers,* 207 Ariz. 314, 318, 86 P.3d 370, 374 (2004); *State v. Montano,* 204 Ariz. 413, 426, 65 P.3d 61, 74 (2003).

## Standard Criminal 22 – Witness (Prior Conviction)

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

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

**USE NOTE:** The Court should consider whether the specific reference to the nature of the prior offense(s) of a witness should be sanitized to prevent prejudice. *See State v. Montano,* 204 Ariz. 413, 426, 65 P.3d 61, 74 (2003) (case involving witness' prior conviction).

**SOURCE:** RAJI (Criminal) No. 21 (1996); *State v. Nieto,* 186 Ariz. 449, 457, 924 P.2d 453, 461 (1996); *State v. Amaya-Ruiz*, 166 Ariz. 152, 174, 800 P.2d 1260, 1282 (1990), *cert. denied*, 500 U.S. 929 (1991).

 

## Standard Criminal 23 – Evidence for Limited Purpose

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

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

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

## Standard Criminal 24 – Other Acts

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

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**SOURCE:** RAJI (Criminal) No. 26A (1996); Rule 404(b), Arizona Rules of Evidence (Statutory language as of Nov. 1, 1988); *State v. Terrazas,* 189 Ariz. 580, 944, 946, P.2d 1194, 1196 (1997) (added the requirement of proof by clear and convincing evidence).

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

The bracketed list in the third sentence is not exhaustive. The trial court should include in the instruction the specific relevant purpose or purposes for which the evidence was admitted. For a broad listing of relevant purposes, see M. UDALL ET AL., LAW OF EVIDENCE § 84, at 182-89 (3d ed. 1991). If the defendant requests a limiting instruction, the trial court MUST give a limiting instruction. *State v. Ives,* 187 Ariz. 102, 111, 927 P.2d 762, 771 (1996).

**COMMENT:** Based on Arizona Supreme Court cases, the Committee recommends that the trial court conduct a Rule 403 balancing and state on the record that it has done so. *See State v. Hughes,* 189 Ariz. 62, 68, 938 P.2d 457, 463 (1997); *State v. Ives*, 187 Ariz. 102, 111, 927 P.2d 762, 771 (1996); *State v. Dickens,* 187 Ariz. 1, 19, 926 P.2d 468, 486 (1996); *State v. Taylor,* 169 Ariz. 121, 125-26, 817 P.2d 488, 492-93 (1991). *But see State v. Cannon,* 148 Ariz. 72, 76, 713 P.2d 273, 277 (1985) (when defendant makes Rule 404(b) objection, trial court not required *sua sponte* to conduct Rule 403 balancing).

## Standard Criminal 25 – Character Evidence in Sexual Misconduct Cases

Evidence of other acts has been presented. [Evidence to rebut this has also been presented.] You may consider this evidence in determining whether the defendant had a

 

character trait that predisposed [him][her] to commit the [crime][crimes] charged. You may determine that the defendant had a character trait that predisposed [him][her] to commit the [crime][crimes] charged only if you decide that the State has proved by clear and convincing evidence that:

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

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

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

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**SOURCE:** RAJI (Criminal) No. 26B (1996); Rule 404(c), Arizona Rules of Evidence (statutory language as of Nov. 1, 1988); A.R.S. § 13-1420 (statutory language as of April 28, 1997); *State v. Terrazas,* 189 Ariz. 580, 583, 944 P.2d 1194, 1197 (1997) (added the requirement of proof by clear and convincing evidence).

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

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

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

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

## Standard Criminal 26 – Character and Reputation of the Defendant

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

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**SOURCE:** RAJI (Criminal) No. 8 (1996); *State v. Childs*, 113 Ariz. 318, 322, 553 P.2d 1192, 1196 (1976); *State v. Vild*, 155 Ariz. 374, 379-380, 746 P.2d 1304, 1309-1310 (App. 1987).

## Standard Criminal 27– Facility Dog

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

 

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

## Standard Criminal 28 – Absence of Other Participant

The only matter for you to determine is whether the State has proved the defendant guilty beyond a reasonable doubt. The defendant's guilt or innocence is not affected by the fact that another person or persons might have participated or cooperated in the crime and is not on trial now. You should not guess about the reason any other person is absent from the courtroom.

**SOURCE:** RAJI (Criminal) No. 12 (1996); *State v. Cannon*, 148 Ariz. 72, 79-80, 713 P.2d 273, 280-81 (1985).

## Standard Criminal 29 – Consider Evidence Separately

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

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

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

**SOURCE:** RAJI (Criminal) No. 32 (1996); *Zafiro v. United States*, 506 U.S. 534 (1993); *State v. Runningeagle*, 176 Ariz. 59, 68, 859 P.2d 169, 178 (1993).

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

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

## Standard Criminal 30 – Separate Counts

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

**SOURCE:** RAJI (Criminal) No. 35 (1996); *State v. Hoskins*, 199 Ariz. 127, 145, 12 P.3d 997, 1015 (2000); *State v. Parra*, 10 Ariz. App. 427, 431, 459 P.2d 344, 348 (1969).

 

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

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

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

**SOURCE:** Federal Jury Instruction 2.13.

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

## Standard Criminal 32 – Disposition of Charge Against Defendant

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

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**SOURCE:** Federal Jury Instruction 2.14.

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

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

## Standard Criminal 33 – Multiple Acts

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

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**SOURCE:** CALJIC 17.01 (West 2008).

**USE NOTES:** In *State v. Klokic*, 219 Ariz. 241, 244, ¶14, 196 P.3d 844, 847 (App. 2008), the court wrote:

> "[I]n drafting an indictment, the State may choose to charge as one count separate criminal acts that occurred during the course of a single criminal undertaking even if those acts might otherwise provide a basis for charging multiple criminal violations. In such cases, however, if the State introduces

> evidence of multiple criminal acts to prove a single charge, the trial court is normally obliged to take one of two remedial measures to insure that the defendant receives a unanimous jury verdict."

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

## Standard Criminal 34 – Reserved

## Standard Criminal 35 – Voluntary Act

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

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**SOURCE:** RAJI (Criminal) No. 17 (1996); A.R.S. §§ 13-105 (statutory language as of April 19, 1994) and 13-201 (statutory language as of October 1, 1978); *State v. Lara*, 183 Ariz. 233, 234-35, 902 P.2d 1337, 1338-39 (1995).

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

## Standard Criminal 36 – Lesser-Included Offense

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

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

You cannot find the defendant guilty of [insert the lesser offense] unless you find that the State has proved each element of [insert the lesser offense] beyond a reasonable doubt.

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**SOURCE:** RAJI (Criminal) No. 22; *State v. LeBlanc*, 186 Ariz. 437, 439-40, 924 P.2d 441, 443-44 (1996).

**USE NOTE:** In determining whether an instruction on a lesser-included offense is proper, the Arizona Supreme Court has set forth a two-part test: (1) whether the offense is a lesser-included offense of the crime charged, and (2) whether the evidence otherwise supports the

 

giving of the instruction. *State v. Vickers,* 159 Ariz. 532, 542, 768 P.2d 1177, 1187 (1989), *cert. denied,* 497 U.S. 1033 (1990); *State v. Celaya,* 135 Ariz. 248, 251, 660 P.2d 849, 852 (1983).

To determine whether a lesser-included offense instruction is warranted, the trial court may consider whether by its very nature the included offense is always a constituent part of the greater offense or whether the terms of the charging document describe the lesser offense even though the lesser offense would not always form a constituent part of the greater offense. *State v. Gooch,* 139 Ariz. 365, 366, 678 P.2d 946, 947 (1984); *State v. Magana,* 178 Ariz. 416, 418, 874 P.2d 973, 975 (App. 1994).

As a general rule, a defendant is entitled to a lesser-included offense instruction if there is evidence from which the jury could convict on the lesser offense and find that the State failed to prove an element of the greater offense. *State v. Jansing,* 186 Ariz. 63, 68, 918 P.2d 1081, 1086 (1996); *State v. Ruelas,* 165 Ariz. 326, 328, 798 P.2d 1335, 1337 (App. 1990); *State v. Conroy,* 131 Ariz. 528, 532, 642 P.2d 873, 877 (App. 1982). The evidence supporting the lesser-included offense may be circumstantial and it may be in dispute. *State v. Cousin,* 136 Ariz. 83, 87, 664 P.2d 233, 237 (App. 1983).

When the record is such that the defendant is either guilty of the crime charged or not guilty, the trial court should refuse to give a lesser-included instruction. *State v. Jackson,* 186 Ariz. 20, 27, 918 P.2d 1038, 1045 (1996); *State v. Salazar,* 173 Ariz. 399, 408, 844 P.2d 566, 575 (1992), *cert. denied,* 509 U.S. 912 (1993); *State v. Williams,* 144 Ariz. 479, 486, 698 P.2d 724, 731 (1985); *State v. Gendron,* 166 Ariz. 562, 566, 804 P.2d 95, 99 (App. 1990).

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

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

## Standard Criminal 37 – Possession Defined

The law recognizes different types of possession.

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

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

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

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

 

**SOURCE:** RAJI (Rev. Criminal) No. 37 (1996); A.R.S. § 13-105; (statutory language as of September 21, 2006); *State v. Cox,* 214 Ariz. 518, 520, 155 P.3d 357, 359 (App. 2007); *State v. Barreras,* 112 Ariz. 421, 422-23, 542 P.2d 1120, 1121-22 (1975); *State v. Scarborough,* 110 Ariz. 1, 2, 5, 514 P.2d 997, 998, 1001 (1973); *State v. Arce,* 107 Ariz. 156, 163, 483 P.2d 1395, 1402 (1971).

## Standard Criminal 38 – Deliberate Ignorance

The State is required to prove beyond a reasonable doubt that the defendant knew that [he] [she] was [transporting] [in possession of] [transferring] {*insert name of illegal drug*}. That knowledge can be established by either direct or circumstantial evidence showing that the defendant was aware of the high probability that the [package(s)] [container(s)] [vehicle] contained {*insert name of illegal drug*}, and that the defendant acted with conscious purpose to avoid learning the true contents of the [package(s)] [container(s)] [vehicle]. You may not find such knowledge, however, if you find that the defendant actually believed that no {*insert name of illegal drug*} were in the [vehicle driven by the defendant] [package(s)] [container], or if you find that the defendant was simply careless.

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**SOURCE:** *State v. Haas*, 138 Ariz. 413, 675 P.2d 673 (1983); *State v. Diaz*, 166 Ariz. 442, 803 P.2d 435 (App. 1990), *vacated in part on other grounds*, 168 Ariz. 363, 813 P.2d. 728 (1991); *State v. Fierro*, 220 Ariz. 337, 206 P.3d 786 (App. 2008); *United States v. Heredia*, 483 F.3d 913 (9th Cir. 2007).

**USE NOTE:** This instruction is drafted in the context of a drug offense because the issue of deliberate ignorance appears most often in that context. For example, in *State v. Diaz*, 166 Ariz. 442, 803 P.2d 435 (App. 1990), *vacated in part on other grounds*, 168 Ariz. 363, 813 P.2d. 728 (1991) the defendant was charged with transporting marijuana. Although the defendant admitted being told that the truck contained "drugs," the defendant claimed he did not know the true contents of the truck. Addressing defendant's claim of ignorance, the court wrote:

> We agree with appellant that the instruction given was improper. First, the court refused appellant's request that it define the term "illegal substance." That term could include innumerable items both within and without the list of drug offenses. Secondly, the statute under which appellant was charged requires the state to prove that the defendant knowingly transported or transferred a narcotic drug. A.R.S. § 13-3408(A)(7); *see State v. Arce,* 107 Ariz. 156, 483 P.2d 1395 (1971). The state is thus required to show that appellant knew that what he was transporting was a narcotic drug, not an illegal substance. That knowledge can be established either by direct or circumstantial evidence. It can be established by showing that appellant was aware of the high probability that the packages contained a narcotic drug and that he acted with a conscious purpose to avoid learning the true contents of the packages. *United States v. Lopez-Martinez,* 725 F.2d 471 (9th Cir.), *cert. denied,* 469 U.S. 837, 105 S. Ct. 134, 83 L. Ed. 2d 74 (1984). Any self-imposed ignorance cannot protect appellant from criminal responsibility.
>
> 166 Ariz. at 445, 803 P.2d at 438.

 

Deliberate ignorance can be an issue in other types of cases. *E.g., see, State v. Haas*, 138 Ariz. 413, 420, 675 P.2d 673, 680 (1983) ("Thus, the jury could easily have concluded that even if defendant had no actual knowledge of the fraud, he was aware of the high probability that the scheme was fraudulent and deliberately shut his eyes to avoid learning the truth. Such a conclusion justifies the ultimate inference of knowing participation.") The instruction should be modified to reflect the nature of the case and the type of knowledge required to be proved.

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

The instruction should only be given "'when the defendant claims a lack of guilty knowledge and there are facts and evidence that support an inference of deliberate ignorance." *United States v. McAllister,* 747 F.2d 1273, 1275 (9th Cir.1984), *cert. denied,* 474 U.S. 829, 106 S. Ct. 92, 88 L. Ed.2d 76 (1985). The reason such an instruction should not be given in all cases is "because of the possibility that the jury will be led to employ a negligence standard and convict a defendant on the impermissible ground that he should have known [an illegal act] was taking place." *United States v. Beckett,* 724 F.2d 855, 856 (9th Cir.1984) (per curiam)." *United States v. White*, 794 F.2d 367, 371 (8th Cir. 1986).

## Standard Criminal 39 – Involuntary Intoxication

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

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

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

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**SOURCE:** *State v. Edmisten*, 220 Ariz. 517, 521, ¶ 9, 207 P.3d 770, 774 (App. 2009); *State v. McKeon*, 201 Ariz. 571, 38 P.3d 1236 (App. 2002).

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

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

> If you find that the defendant became intoxicated solely as a result of the non-abuse of prescription medication, you should then consider whether the

 

degree of intoxication caused the defendant to be unable to act with the mental state[s] required to establish the offense[s].

## Standard Criminal 40 – Flight or Concealment

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

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

**USE NOTE:** Use language in brackets if supported by the facts. Case law allows the jury to consider the defendant's offered reasons for the alleged flight or concealment. *State v. Hunter*, 136 Ariz. 45, 49, 664 P.2d 195, 199 (1983). Thus, the bracketed language should be given only upon the defendant's request.

"Use of the flight instruction is proper where the circumstances of leaving the crime scene reveal a defendant's consciousness of guilt. . . . It is not necessary to show that law enforcement officers were pursuing the defendant at the time in order to satisfy the 'consciousness of guilt' requirement." Merely leaving the crime scene is not tantamount to flight. The inquiry focuses on "whether [the defendant] voluntarily withdrew himself in order to avoid arrest or detention." *State v. Wilson*, 185 Ariz. 254, 257, 914 P.2d 1346, 1349 (App. 1995). "A two-fold test must be applied to determine whether a flight instruction should be given. First, the evidence is viewed to ascertain whether it supports a reasonable inference that the flight or attempted flight was open, such as the result of an immediate pursuit. If this is not the case then the evidence must support the inference that the accused utilized the element of concealment or attempted concealment. The absence of any evidence supporting either of these findings would mean that the giving of an instruction on flight would be prejudicial error." *Wilson*, *supra*, 185 at 257, 914 at 1349. Depending on the facts, the failure of a defendant to appear at trial may be justification for the court to give a flight instruction. *State v. Roderick*, 9 Ariz. App. 19, 22-23, 448 P.2d 891, 894-95 (1968). Absence of the defendant at the time set for trial after being released on bond, is insufficient to support an inference of the element of concealment or attempted concealment, which is essential to warrant the giving of a flight instruction unless the flight or attempted flight is open, as upon immediate pursuit. *State v. Camino*, 118 Ariz. 89, 91, 574 P.2d 1308, 1310 (App. 1977).

## Standard Criminal 41 – Threats by Defendant

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

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**SOURCE:** RAJI (Criminal) No. 14 (1996); *State v. Settle*, 111 Ariz. 394, 397, 531 P.2d 151, 154 (1975); *State v. Contreras*, 122 Ariz. 478, 481, 595 P.2d 1023, 1026 (App. 1979).

## Standard Criminal 42 – Lost, Destroyed, or Unpreserved Evidence

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

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**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 *Sate 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.

## Standard Criminal 43 – Mere Presence

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

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**SOURCE:** *State v. Doerr*, 193 Ariz. 56, 65, 969 P.2d 1168, 1177 (1998); *State v. Noriega,* 187 Ariz. 282, 286, 928 P.2d 706, 710 (App. 1996).

**USE NOTE:** In a prosecution for accomplice liability based on actual presence, the trial judge must, if requested, give a mere presence instruction. *State v. Noriega, supra*, (reversible error to refuse to give mere presence instruction in this circumstance). However, the instruction must be supported by competent evidence. *State v. Portillo,* 179 Ariz. 116, 119, 876 P.2d 1151, 1154, *affirmed in part, vacated in part on other grounds,* 182 Ariz. 592, 898 P.2d 970 (1995); *State v. Martinez,* 175 Ariz. 114, 118, 854 P.2d 147, 151 (App. 1993) (trial court properly refused to give a mere presence instruction where the defendant's presence at the crime scene was not an issue and the instruction did not fit the facts).

## Standard Criminal 44 – Motive

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

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**SOURCE:** RAJI (Criminal) No. 38 (1996); *State v. Tucker*, 157 Ariz. 433, 447, 759 P.2d 579, 593 (1988); *State v. Hunter*, 136 Ariz. 45, 50, 664 P.2d 195, 220 (1983).

**COMMENT:** The court's failure to instruct the jury on motive did not deny defendant a fair trial. *State v. Tucker*, 157 Ariz. 433, 447, 759 P.2d 579, 593 (1986). The presence or absence of motive is relevant in a murder prosecution and a proper motive instruction should be given upon request. *Id.*

Motive is not an element of the crime of murder; nonetheless, in a murder prosecution, the presence or absence of motive is relevant. *State v. Hunter*, 136 Ariz. 45, 50, 664 P.2d 195, 200 (1983).

## Standard Criminal 45 – Identification

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

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

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

 

**SOURCE:** RAJI (Criminal) No. 39 (1996); *State v. Dessureault*, 104 Ariz. 380, 381-85 453 P.2d 951, 952-56 (1969), *cert. denied,* 397 U.S. 965 (1970). *See also*; *Manson v. Brathwaite*, 432 U.S. 98 (1977); *Neil v. Biggers*, 409 U.S. 188 (1972).

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

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

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

## Standard Criminal 47 – Third Party Culpability

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

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

**USE NOTE:** Although instructions should be given on any theory of the case reasonably supported by the evidence, failure to give a third party culpability instruction *sua sponte* does not rise to the level of fundamental error. *State v. Parker*, 231 Ariz. 391, ¶¶ 51-56, 296 P.3d 54, 67-68 (2013).

**COMMENT:** In *State v. Parker*, 231 Ariz. 391, ¶¶ 51-56, 296 P.3d 54, 67-68 (2013), the Arizona Supreme Court found no error in the trial court's failure *sua sponte* to give a proper third party culpability instruction when trial counsel's requested instruction violated the constitutional prohibition against commenting on the evidence and trial counsel refused the trial judge's invitation to modify the requested instruction.

On the other hand, in *State v. Rodriguez*, 192 Ariz. 58, 61-63 ¶¶ 16-26, 961 P.2d 1006, 1009-11 (1998), the Supreme Court found reversible error where a requested alibi instruction was denied. In *Rodriguez*, the Supreme Court noted that alibi is not an affirmative defense and thus would fall under the "aegis of a general denial" of the charges, reliance on other instructions regarding the state's requirement to prove guilt would be "inconsistent with the general rule entitling a party to an instruction on any theory reasonably supported by the evidence." *Id.* at 63 ¶¶ 23-24, 961 P.2d at 1011. *See also State v. Edmisten*, 220 Ariz. 517, 524 ¶ 21, 207 P.3d 770, 777 (App. 2009) (distinguishing harmless error review conducted in *Rodriguez* from the fundamental error review Court of Appeals must apply when trial counsel failed to preserve error for appeal).

 

## Standard Criminal 48 – Reserved

## Standard Criminal 49 – Reserved

## Standard Criminal 50 – Reserved

## Standard Criminal 51 – Jury Foreperson

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

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

The jury foreperson's responsibilities include the following:

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

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

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

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

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

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

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

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

## Standard Criminal 52 – Closing Instruction

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

 

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

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

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

Should any of you, or the jury as a whole, have a question for me during your deliberations or wish to communicate with me on any other matter, please utilize the jury question form that we will provide you. Your question or message must be communicated to me in writing and must be signed by you or the Foreperson.

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

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

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

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

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

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

## Standard Criminal 53 – Impasse Instruction

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

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

 

the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

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

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

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

Please take a few minutes and discuss this instruction among yourselves. Then advise me in writing of whether we can attempt to assist you in the manner indicated above or whether you do not believe that such assistance and additional deliberation would assist you in reaching a verdict.

---

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

**COMMENT:** Before giving an impasse instruction, the trial judge must determine whether the jury is at an impasse because "prematurely giving an impasse instruction may * * * be a form of coercion." *State v. Fernandez,* 216 Ariz. 545, 550, ¶ 13, 169 Ariz. 641, 646 (App. 2007); *State v. Huerstel,* 206 Ariz. 93, 99, ¶ 17, 101, ¶ 25, 75 P.3d 698, 704, 706 (2003).

Where a jury has not reached a unanimous decision and has notified the court, the trial judge should ask the jury whether it is at an impasse and needs assistance from the court. If the jurors indicate their decision is final, the impasse instruction is not appropriate. *State* v. *Kuhs*, 223 Ariz. 376, 385, 224 P.3d 192, 201 (2010).

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

## Standard Criminal 54 – Reconstituting the Jury

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

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

You are to start your deliberations anew, starting with selection of a [Presiding Juror] [Jury Foreperson]. Any preliminary or final decisions you may have made about [any aspect

 

of the case] [this phase] must be set aside and discussed anew. You shall not consider any part of your prior deliberations and/or discussions.

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

---

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

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

## Standard Criminal 55 – Jury Polling

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

---

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

 

# CHAPTER 11

Many of the homicide instructions in the 1989 edition of the RAJI Criminal Instructions contained a comment that "[t]he latest version of § 13-503 makes intoxication a partial defense only to the mental state of intentionally." The comment was based on A.R.S. § 13-503 which, prior to its amendment in 1993, stated:

> § 13-503. Effect of intoxication; consideration by jury
>
> No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition, but when the actual existence of the culpable mental state of *intentionally or with the intent to* is a necessary element to constitute any particular species or degree of offense, the jury may take into consideration the fact that the accused was intoxicated at the time in determining the culpable mental state with which he committed the act.

Laws 1980, Ch. 229, § 6.

A.R.S. § 13-503 now reads:

> Effect of alcohol or drug use
>
> Temporary intoxication resulting from the voluntary ingestion, consumption, inhalation or injection of alcohol, an illegal substance under chapter 34 of this title or other psychoactive substances or the abuse of prescribed medications does not constitute insanity and is not a defense for any criminal act or requisite state of mind.

The exception regarding voluntary intoxication and the mental state of "intentionally" was eliminated. Therefore, the comments in the 1989 edition of the RAJI Criminal Instructions based on the former A.R.S. § 13-503 should be considered incorrect.

Because lesser-included offense instructions are often given with first or second degree murder instructions, the Committee believed it would be helpful to include a sample first degree murder instruction including some possible lesser-included offenses and sample jury verdict form.

## 11.02 – Negligent Homicide

The crime of negligent homicide requires proof that the defendant:

1. caused the death of another person; *and*
2. failed to recognize a substantial and unjustifiable risk of causing the death of another person.

The risk must be such that the failure to perceive it is a gross deviation from what a reasonable person would observe in the situation.

[The distinction between manslaughter and negligent homicide is this: for manslaughter the defendant must have been aware of a substantial risk and consciously disregarded the risk that [his] [her] conduct would cause death. Negligent homicide only requires that the defendant failed to recognize the risk.]

[If you determine that the defendant is guilty of either manslaughter or negligent homicide but you have a reasonable doubt as to which it was, you must find the defendant guilty of negligent homicide.]

---

**SOURCE:** A.R.S. § 13-1102 (statutory language as of August 12, 2005.)

**USE NOTE:** Use the bracketed language if this instruction is given as a lesser-included offense instruction.

Because the culpable mental state is included in the instruction, there is no need to add any additional language.

**COMMENT:** The statute provides that it "applies to an unborn child in the womb at any stage of its development" and then gives three exceptions to its application. *See* A.R.S. § 13-1102(B).

"Negligent homicide is distinguished from reckless manslaughter in that for the latter offense, the defendant is aware of the risk of death and consciously disregards it, whereas, for the former offense, he is unaware of the risk." *State v. Walton*, 133 Ariz. 282, 291, 650 P.2d 1264, 1273 (App. 1982).

## 11.03A1 – Manslaughter (Reckless)

The crime of manslaughter requires proof that the defendant:

1. caused the death of another person; *and*
2. was aware of and showed a conscious disregard of a substantial and unjustifiable risk of death.

The risk must be such that disregarding it was a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

[It is no defense that the defendant was unaware of the risk solely by reason of voluntary intoxication as a result of the ingestion of alcohol or drugs.]

[Second degree murder and manslaughter may both result from recklessness. The difference is that the culpable recklessness involved in manslaughter is less than the culpable recklessness involved in second degree murder.]

[If you determine that the defendant is guilty of either second degree murder or manslaughter but you have a reasonable doubt as to which it was, you must find the defendant guilty of manslaughter.]

---

**SOURCE:** A.R.S. § 13-1103(A)(1) (statutory language as of August 12, 2005).

**USE NOTE:** Include the first bracketed paragraph only if there is evidence that the defendant was intoxicated.

Use both the second and third bracketed paragraphs if this instruction is given as a lesser-included offense instruction.

 

**COMMENT:** The statute provides that it "applies to an unborn child in the womb at any stage of its development" and then gives three exceptions to its application. *See* A.R.S. § 13-1103(B).

## 11.03A2 – Manslaughter by Sudden Quarrel or Heat of Passion

The crime of manslaughter by sudden quarrel or heat of passion requires proof that:

1. a. The defendant intentionally killed another person; *or*

   b. The defendant caused the death of another person by conduct which the defendant knew would cause death or serious physical injury; *or*

   c. Under circumstances which showed an extreme indifference to human life, the defendant caused the death of another person by consciously disregarding a grave risk of death. The risk must be such that disregarding it was a gross deviation from what a reasonable person in the defendant's situation would have done; *and*

2. The defendant acted upon a sudden quarrel or heat of passion; *and*

3. The sudden quarrel or heat of passion resulted from adequate provocation by the person who was killed.

[It is no defense that the defendant was unaware of the risk solely by reason of intoxication.]

"Adequate provocation" means conduct or circumstances sufficient to deprive a reasonable person of self-control. Words alone are not adequate provocation to justify reducing an intentional killing to manslaughter. [There must not have been a "cooling off" period between the provocation and the killing. A "cooling off" period is the time it would take a reasonable person to regain self-control under the circumstances.]

[If you determine that the defendant is guilty of either second degree murder or manslaughter but you have a reasonable doubt as to which it was, you must find the defendant guilty of manslaughter.]

---

**SOURCE:** A.R.S. § 13-1103(A)(2) (statutory language as of August 12, 2005).

**USE NOTE:** Use the bracketed language if this instruction is given as a lesser-included offense instruction.

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

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

**COMMENT:** "Adequate provocation" is defined in A.R.S. § 13-1101(4). In *State v. Doss*, 116 Ariz. 156, 162, 568 P.2d 1054 (1977), the court held that "words alone are not adequate provocation to justify reducing an intentional killing to manslaughter." In *State v. Ortiz*, 158 Ariz. 528, 764 P.2d 13 (1988), the Arizona Supreme Court approved the definition contained in the model instruction. If there is evidence to support an instruction on the "cooling-off" period, use the bracketed language.

 

The statute provides that it "applies to an unborn child in the womb at any stage of its development" and then gives three exceptions to its application. *See* A.R.S. § 13-1103(B).

In *State v. Eddington*, 226 Ariz. 72, 244 P.3d 76 (App. 2011), the court suggested that "heat-of-passion manslaughter" may not be a lesser-included offense of second-degree murder. *See also State v. Garcia*, 220 Ariz. 49, 202 P.3d 514 (App. 2008).

## 11.03A3 – Manslaughter by Aiding Suicide

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

---

**SOURCE:** A.R.S. § 13-1103(A)(3) (statutory language as of July 24, 2014).

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

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

## 11.03A4 – Manslaughter by Coercion

The crime of manslaughter by coercion requires proof that:

1. Under circumstances manifesting extreme indifference to human life, the defendant recklessly engaged in conduct which created a grave risk of death and thereby caused the death of another person; *and*
2. The defendant was coerced to engage in the conduct by the use or threatened immediate use of unlawful deadly physical force upon the defendant or another person, which a reasonable person in the defendant's situation would have been unable to resist.

**SOURCE:** A.R.S. § 13-1103(A)(4) (statutory language as of August 12, 2005).

**USE NOTE:** Use Statutory Definition Instruction 1.0510(c) defining "reckless."

## 11.03A5 – Manslaughter of Unborn Child

The crime of manslaughter of an unborn child requires proof that the defendant:

[1. Knew or should have known that the mother was pregnant; *and*

2.] Knowingly or recklessly caused the death of an unborn child by any physical injury to the mother.

---

**SOURCE:** A.R.S. § 13-1103(A)(5) (statutory language as of August 12, 2005).

**USE NOTE:** Use Statutory Criminal Instructions 1.0510(b) and 1.0510(c) for the mental states of "knowingly" and "recklessly."

 

There are a number of exceptions set forth in A.R.S. § 13-1103(B).

**COMMENT:** Element 1 is bracketed. The statute reads:

> A person commits manslaughter by knowingly or recklessly causing the death of an unborn child by any physical injury to the mother.

Because this is a dangerous crime against children (*see* A.R.S. § 13-705), the Committee was of the opinion that the statute requires that the defendant knew or should have known that the mother was pregnant. A dangerous crime against children requires that the conduct be directed against the child. Also, the statute could be viewed as a strict liability offense where, for example, an unborn child dies as a result of injuries received in an automobile accident. The general rule is that a statute should not be interpreted as imposing strict liability. If the trial judge concludes that there is no requirement that the defendant knew or should have known that the mother was pregnant, then the instruction should be given without element 1.

In *State v. Cotton*, 197 Ariz. 584, 5 P.3d 918 (App. 2000), the court held that this statute applies only to the killing of an unborn child and, therefore, the defendant could not be charged with manslaughter under A.R.S. § 13-1103(A)(5) where the child was born alive and died the next day after its mother had been killed by the defendant.

In *State v. Amaya-Ruiz*, 166 Ariz. 152, 173, 800 P.2d 1260, 1281 (1990), the court wrote:

> Although the doctrine of transferred intent generally applies in criminal law, a particular statute may be worded so as to preclude its application. *See* W. LaFave & A. Scott, *Criminal Law* 253 n. 36 (1972). We hold that A.R.S. § 13-1103(A)(5) is such a statute that precludes the doctrine of transferred intent because it explicitly requires two separate mental states, one toward the mother, and the other toward the unborn child. The defendant must (1) knowingly or recklessly cause the death of an unborn child at any stage of its development, *and* (2) death must be caused by a physical injury to the mother of the unborn child that would be murder if the death of the mother had occurred. [FN1]
>
> FN1. We need not address the second criminal intent required by A.R.S. § 13-1103(A)(5). We note that the statutory language appears susceptible to differing interpretations. The phrase "*if* the death of the mother *had occurred*" might support an argument that the statute is inapplicable if the woman is murdered, and is only applicable if she survives. Defendant did not raise this argument and, because we reverse his manslaughter conviction on other grounds, we decline to decide the question.

The statute was amended in 2005 and the phrase "if the death of the mother had occurred" was deleted. Because that phrase was deleted, there is likely no further requirement of a "second criminal intent" under the statute.

 

## 11.04 – Second-Degree Murder

The crime of second-degree murder requires proof of one of the following:

1. The defendant intentionally caused the death of [another person] [an unborn child]; *or*
2. The defendant caused the death of [another person] [an unborn child] by conduct which the defendant knew would cause death or serious physical injury; *or*
3. Under circumstances manifesting extreme indifference to human life, the defendant recklessly engaged in conduct that created a grave risk of death and thereby caused the death of [another person] [an unborn child]. The risk must be such that disregarding it was a gross deviation from what a reasonable person in the defendant's situation would have done; *or*

[The difference between first-degree murder and second-degree murder is that second-degree murder does not require premeditation by the defendant.]

[If you determine that the defendant is guilty of either first-degree murder or second-degree murder and you have a reasonable doubt as to which it was, you must find the defendant guilty of second-degree murder.].

[If you find the elements of second-degree murder proven beyond a reasonable doubt, you must consider whether the homicide was committed upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim. If you unanimously find that the homicide was committed upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim, then you must find the defendant guilty of manslaughter rather than second-degree murder.

---

**SOURCE:** A.R.S. § 13-1104 (statutory language as of January 1, 2009).

**USE NOTE:** Use Statutory Definition Instruction 1.0510(b) defining "knowingly."

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

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

Use the first and/or second bracketed language if this instruction is given as a lesser-included offense instruction of first-degree murder.

Use the third bracketed language only when there is a claim that the homicide was committed upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim.

**COMMENT:** The statute provides that it "applies to an unborn child in the womb at any stage of its development" and gives three exceptions to its application. *See* A.R.S. § 13-1104(B).

If the victim was under fifteen years of age or an unborn child, the crime is a "dangerous crime against children" and sentencing is pursuant to A.R.S. § 13-604.01. *See* A.R.S. § 13-1104(C). If the victim was under fifteen years of age or an unborn child, a finding by the jury regarding that fact should be made as part of its verdict.

 

There is no crime of attempted second-degree murder if the defendant only knows that his or her action would cause serious physical injury rather than death. *See State v. Ontiveros*, 206 Ariz. 539, 542, 81 P.3d 330, 333 (App. 2003). *See also State v. Felix,* 237 Ariz. 280, ¶ 14, 349 P.3d 1117 (App. 2015).

In *State v. Eddington*, 226 Ariz. 72, 81-82, ¶¶ 29-33, 244 P.3d 76, 85-86 (App. 2010), the Court of Appeals held that fundamental, prejudicial error did not result from instructing the jury that it may only consider the offense of manslaughter upon a sudden quarrel or heat of passion if it first acquits or cannot reach a verdict on second-degree murder. *See State v. LeBlanc*, 186 Ariz. 437, 438, 924 P.2d 441, 442 (1996). The Court recognized, however, that the Arizona Supreme Court had already decided in *Peak v. Acuña*, 203 Ariz. 83, 84-85, ¶¶ 5-6, 50 P.3d 833, 834-35 (2002), that "heat-of-passion manslaughter" is not a true lesser-included offense of second-degree murder, because manslaughter includes all of the elements of second-degree murder and has the additional "circumstance" of being caused by a sudden quarrel or heat of passion. *Eddington* recognized that juries are presumed to follow the instructions, and a jury that follows the *LeBlanc*-modeled instruction for homicide lesser offenses could never reach the question of whether there was a sudden quarrel or heat of passion upon adequate provocation because the jury would have already found all of the elements of second-degree murder proven and found the defendant guilty. A majority of the committee recognized that the previous *LeBlanc*-modeled instruction rendered manslaughter under A.R.S. § 13-1103(A)(2) a nullity and modified the instruction to ensure that the jury would consider whether the circumstance justifying the lesser offense was present.

## 11.04A – Second-Degree Murder (Mother and Unborn Child)

The crime of second-degree murder requires proof that the defendant intentionally, knowingly or under circumstances manifesting extreme indifference to human life recklessly engaged in conduct that created a grave risk of death and caused the death of another person and thereby caused the death of an unborn child.

[The difference between first-degree murder and second-degree murder is that second-degree murder does not require premeditation by the defendant.]

[If you determine that the defendant is guilty of either first-degree murder or second-degree murder and you have a reasonable doubt as to which it was, you must find the defendant guilty of second-degree murder.]

[If you find the elements of second-degree murder proven beyond a reasonable doubt, you must consider whether the homicide was committed upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim. If you unanimously find that the homicide was committed upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim, then you must find the defendant guilty of manslaughter rather than second-degree murder.]

---

**SOURCE:** A.R.S. § 13-1104 (statutory language as of January 1, 2009).

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

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

 

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

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

This instruction should only be given when the defendant's culpable mental state was directed at the mother of the unborn child, and the defendant's conduct resulted in the death of the mother and the unborn child.

Use the first and/or second bracketed language if this instruction is given as a lesser-included offense instruction of first-degree murder.

Use the third bracketed language only when there is a claim that the homicide was committed upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim.

**COMMENT:** The statute provides that it "applies to an unborn child in the womb at any stage of its development" and gives three exceptions to its application. *See* A.R.S. § 13-1104(B).

If the victim was under fifteen years of age or an unborn child, the crime is a "dangerous crime against children" and sentencing is pursuant to A.R.S. § 13-604.01. *See* A.R.S. § 13-1104(C). If the victim was under fifteen years of age or an unborn child, a finding by the jury regarding that fact should be made as part of its verdict.

There is no crime of attempted second-degree murder if the defendant only knows that his or her action would cause serious physical injury rather than death. *See State v. Ontiveros*, 206 Ariz. 539, 542, 81 P.3d 330, 333 (App. 2003).

In *State v. Eddington*, 226 Ariz. 72, 81-82, ¶¶ 29-33, 244 P.3d 76, 85-86 (App. 2010), the Court of Appeals held that fundamental, prejudicial error did not result from instructing the jury that it may only consider the offense of manslaughter upon a sudden quarrel or heat of passion if it first acquits or cannot reach a verdict on second-degree murder. *See State v. LeBlanc*, 186 Ariz. 437, 438, 924 P.2d 441, 442 (1996). The Court recognized, however, that the Arizona Supreme Court had already decided in *Peak v. Acuña*, 203 Ariz. 83, 84-85, ¶¶ 5-6, 50 P.3d 833, 834-35 (2002), that "heat-of-passion manslaughter" is not a true lesser-included offense of second-degree murder, because manslaughter includes all of the elements of second-degree murder and has the additional "circumstance" of being caused by a sudden quarrel or heat of passion. *Eddington* recognized that juries are presumed to follow the instructions, and a jury that follows the *LeBlanc*-modeled instruction for homicide lesser offenses could never reach the question of whether there was a sudden quarrel or heat of passion upon adequate provocation because the jury would have already found all of the elements of second-degree murder proven and found the defendant guilty. A majority of the committee recognized that the *LeBlanc*-modeled instruction rendered manslaughter under A.R.S. § 13-1103(A)(2) a nullity and modified the instruction to ensure that the jury would consider whether the circumstance justifying the lesser offense was present.

## 11.05 – First-Degree Premeditated Murder

The crime of first-degree premeditated murder requires proof that the defendant:

1. caused the death of another person; *and*

 

2. intended or knew that [he] [she] would cause the death of another person; *and*
3. acted with premeditation.

"Premeditation" means that the defendant intended to kill another human being or knew [he] [she] would kill another human being, and that after forming that intent or knowledge, reflected on the decision before killing. It is this reflection, regardless of the length of time in which it occurs, that distinguishes first-degree murder from second degree murder. An act is not done with premeditation if it is the instant effect of a sudden quarrel or heat of passion. [The time needed for reflection is not necessarily prolonged, and the space of time between the intent or knowledge to kill and the act of killing may be very short.]

---

**SOURCE:** A.R.S. § 13-1105 (statutory language as of August 12, 2005.)

**USE NOTE:** Use Statutory Definition Instruction 1.0510(b) defining "knowingly."

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

If the court gives both the first-degree premeditated murder instruction and first-degree felony-murder instruction, the court should include the following in the instruction:

> You must unanimously agree that the State has proven "first-degree murder" beyond a reasonable doubt before you may find the defendant guilty of "first-degree murder." However, all of you do not have to agree on whether it was "premeditated murder" or "felony murder."

The court also should include the following in the verdict form:

> [Complete this portion of the verdict form only if you find the defendant "guilty" of "first-degree murder."]
>
> Please indicate the number of jurors who found beyond a reasonable doubt that the offense of "first-degree murder" was committed as follows:
>
> _____ Premeditated murder
>
> _____ Felony murder
>
> _____ Both premeditated murder and felony murder

**COMMENT:** In *State v. Thompson*, 204 Ariz. 471, 65 P.2d 420 (2003), the Arizona Supreme Court directed trial courts to give the definition of "premeditation" as set forth in this instruction. The bracketed language of that definition is to be included "only when the facts of the case require it." *Id.* at 480, 65 P.2d at 429. Therefore, this definition should not be modified.

The statute provides that it "applies to an unborn child in the womb at any stage of its development." *See* A.R.S. § 13-1105(C). Statutory Criminal Instruction 11.05A1 deals with the unborn child situation.

 

## 11.05A1 – First-Degree Murder of an Unborn Child

The crime of first degree murder of an unborn child requires proof that the defendant committed one of the following:

1. Intentionally or knowingly, with premeditation, caused the death of an unborn child; *or*
2. Intentionally or knowingly, with premeditation, caused the death of a person and thereby caused the death of an unborn child.

"Premeditation" means that the defendant intended to kill another human being or knew [he] [she] would kill another human being, and that after forming that intent or knowledge, reflected on the decision before killing. It is this reflection, regardless of the length of time in which it occurs, that distinguishes first degree murder from second degree murder. An act is not done with premeditation if it is the instant effect of a sudden quarrel or heat of passion. [The time needed for reflection is not necessarily prolonged, and the space of time between the intent or knowledge to kill and the act of killing may be very short.]

---

**SOURCE:** A.R.S. § 13-1105(A)(1) (statutory language as of August 12, 2005).

**USE NOTE:** Use Statutory Definition Instruction 1.0510(b) defining "knowingly."

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

**COMMENT:** In *State v. Thompson*, 204 Ariz. 471, 65 P.2d 420 (2003), the Arizona Supreme Court directed trial courts to give the definition of "premeditation" as set forth in this instruction. The bracketed language of that definition is to be included "only when the facts of the case require it." *Id.* at 480, 65 P.2d at 429. Therefore, this definition should not be modified.

The statute provides that it "applies to an unborn child in the womb at any stage of its development" and gives three exceptions to its application. *See* A.R.S. § 13-1105(C).

## 11.05A3 – First-Degree Murder of a Law Enforcement Officer

The crime of first-degree murder of a law enforcement officer requires proof that:

1. The defendant engaged in conduct intending or knowing that the conduct would cause the death of a person, who the defendant knew was a law enforcement officer; *and*
2. The defendant caused the death of a law enforcement officer; *and*
3. The law enforcement officer was in the line of duty.

---

**SOURCE:** A.R.S. § 13-1105(A)(3) (statutory language as of August 12, 2005).

**USE NOTE:** Use Statutory Definition Instruction 1.0510(b) defining "knowingly."

 

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

## 11.052 – First-Degree Felony Murder

The crime of first-degree felony murder requires proof that:

1. The defendant [and another person] [and other persons] committed or attempted to commit [insert one of the offenses listed in A.R.S. § 13-1105(A)(2)]; and
2. In the course of and in furtherance of this crime or immediate flight from this crime, the defendant or another person caused the death of any person.

---

**SOURCE:** A.R.S. § 13-1105(A)(2) (statutory language as of August 12, 2005).

**USE NOTE:** A.R.S. § 13-1105(B) provides that this offense "requires no specific mental state other than what is required for the commission of any of the enumerated felonies."

The court will need to instruct the jury on the predicate felony.

If the court gives both the first-degree premeditated murder instruction and first-degree felony-murder instruction, the court should include the following in the instruction:

> You must unanimously agree that the State has proven "first-degree murder" beyond a reasonable doubt before you may find the defendant guilty of "first-degree murder." However, all of you do not have to agree on whether it was "premeditated murder" or "felony murder."

The court also should include the following in the verdict form:

> [Complete this portion of the verdict form only if you find the defendant "guilty" of "first-degree murder."]
>
> Please indicate the number of jurors who found beyond a reasonable doubt that the offense of "first-degree murder" was committed as follows:
>
> _____ Premeditated murder
>
> _____ Felony murder
>
> _____ Both premeditated murder and felony murder

**COMMENT:** First-degree felony murder has no lesser-included offenses. *State v. Bocharski*, 200 Ariz. 50, 22 P.3d 43 (2001).

## Sample Instruction with Lesser-Included Offenses and Verdict Form

### The Charged Offense

I will now tell you about the crime with which [insert defendant's name] is charged. [Insert defendant's name] is charged with one count of "first-degree murder."

### First-Degree Murder

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

 

1. caused the death of another person; *and*
2. intended or knew that [he] [she] would cause the death of another person; *and*
3. acted with premeditation.

"Premeditation" means that the defendant intended to kill another human being or knew [he] [she] would kill another human being, and that after forming that intent or knowledge, reflected on the decision before killing. It is this reflection, regardless of the length of time in which it occurs, that distinguishes first-degree murder from second degree murder. An act is not done with premeditation if it is the instant effect of a sudden quarrel or heat of passion. [The time needed for reflection is not necessarily prolonged, and the space of time between the intent or knowledge to kill and the act of killing may be very short.]

**"Intentionally" or "With Intent To" Defined**

"Intentionally" or "with intent to" means that a defendant's objective is to cause that result or to engage in that conduct.

**Intent – Inference**

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

**"Knew" or "Knowingly" Defined**

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

**Included Mental States – Knowingly**

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

**Lesser-Included Offenses of First-Degree Murder – Sample Instruction and Verdict Form**

**Second-Degree Murder**

The crime of "first degree murder" includes the lesser offenses of "second degree murder," "manslaughter" and "negligent homicide." You may consider the lesser offense of "second degree murder" if either:

1. You find the defendant not guilty of "first-degree murder"; *or*
2. After full and careful consideration of the facts, you cannot agree on whether to find the defendant guilty or not guilty of "first-degree murder."

The crime of second-degree murder requires proof of one of the following:

1. The defendant intentionally caused the death of [another person] [an unborn child]; *or*
2. The defendant caused the death of [another person] [an unborn child] by conduct which the defendant knew would cause death or serious physical injury; *or*

 

3. Under circumstances manifesting extreme indifference to human life, the defendant recklessly engaged in conduct that created a grave risk of death and thereby caused the death of [another person] [an unborn child]. The risk must be such that disregarding it was a gross deviation from what a reasonable person in the defendant's situation would have done; *or*
4. The defendant intentionally, knowingly or under circumstances manifesting extreme indifference to human life recklessly engaged in conduct that created a grave risk of death and caused the death of another person and thereby caused the death of an unborn child.

The above definitions of "intentionally," "intent – inference" and "knowingly" apply. "Recklessly" means that a defendant is aware of and consciously disregards a substantial and unjustifiable risk that conduct will result in the death of another. The risk must be such that disregarding it is a gross deviation from what a reasonable person would do in the situation.

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

The difference between first-degree murder and second degree murder is that second degree murder does not require premeditation by the defendant.

If you determine that the defendant is guilty of either first-degree murder or second degree murder and you have a reasonable doubt as to which it was, you must find the defendant guilty of second degree murder.

## Manslaughter

You may consider the lesser offense of "manslaughter" if either:

1. You find the defendant not guilty of both "first-degree murder" and "second degree murder"; *or*
2. After full and careful consideration of the facts, you cannot agree on whether to find the defendant guilty or not guilty of "first-degree murder" or "second-degree murder."

The crime of manslaughter can be committed in two ways. The first is "reckless manslaughter." Reckless manslaughter requires proof that the defendant recklessly caused the death of another person.

"Reckless" has the same definition as used above.

The second way to commit "manslaughter" is manslaughter by sudden quarrel or heat of passion. Manslaughter by sudden quarrel or heat of passion requires proof that:

1. a. The defendant intentionally killed another person; *or*
   b. The defendant caused the death of another person by conduct which the defendant knew would cause death or serious physical injury; *or*
   c. Under circumstances which showed an extreme indifference to human life, the defendant caused the death of another person by consciously disregarding a grave risk of death. The risk must be such that disregarding it was a gross deviation from what a reasonable person in the defendant's situation would have done; *and*

 

2. The defendant acted upon a sudden quarrel or heat of passion; *and*
3. The sudden quarrel or heat of passion resulted from adequate provocation by the person who was killed.

[It is no defense that the defendant was unaware of the risk solely by reason of intoxication.]

"Adequate provocation" means conduct or circumstances sufficient to deprive a reasonable person of self-control. Words alone are not adequate provocation to justify reducing an intentional killing to manslaughter. [There must not have been a "cooling off" period between the provocation and the killing. A "cooling off" period is the time it would take a reasonable person to regain self-control under the circumstances.]

You must unanimously agree that the State has proven "manslaughter" beyond a reasonable doubt before you may find the defendant guilty of "manslaughter." However, all of you do not have to agree on whether it was "reckless manslaughter" or "manslaughter by sudden quarrel or heat of passion."

If you determine that the defendant is guilty of either second-degree murder or manslaughter but you have a reasonable doubt as to which it was, you must find the defendant guilty of manslaughter.

## Negligent Homicide

You may consider the lesser offense of "negligent homicide" if either:

1. You find the defendant not guilty of "first-degree murder," "second-degree murder," and "manslaughter"; or
2. After full and careful consideration of the facts, you cannot agree on whether to find the defendant guilty or not guilty of "first-degree murder," "second-degree murder," or "manslaughter."

The crime of negligent homicide requires proof that the defendant:

1. caused the death of another person; *and*
2. failed to recognize a substantial and unjustifiable risk of causing the death of another person.

The risk must be of such nature and degree that the failure to perceive it is a gross deviation from what a reasonable person would observe in the situation.

The distinction between manslaughter and negligent homicide is this: for manslaughter the defendant must have been aware of a substantial risk and consciously disregarded the risk that [his] [her] conduct would cause death. Negligent homicide only requires that the defendant failed to recognize the risk.

If you determine that the defendant is guilty of either manslaughter or negligent homicide but you have a reasonable doubt as to which it was, you must find the defendant guilty of negligent homicide.

You cannot find the defendant guilty of any lesser-included offense unless you find that the State has proved each element of the lesser-included offense beyond a reasonable doubt.

 

**Verdict – Count One (First-Degree Murder)**

We the jury, duly empanelled and sworn in the above entitled action, and upon our oaths, do find the Defendant, [insert defendant's name], on the charge of "first-degree murder" on [insert date of the offense] as the result of the death of [insert victim's name] as follows (check only one):

_____ Not Guilty

_____ Guilty

_____ Unable to agree

[Lesser-Included Offense Verdict on "second degree murder": If you find the defendant "guilty" of "first-degree murder", **do not** complete this portion of the verdict form. In other words, complete this portion only if you find the defendant either "not guilty" of "first-degree-murder" or you are unable to decide.]

We the jury, duly empanelled and sworn in the above entitled action, and upon our oaths, do find the Defendant, [insert defendant's name], on the lesser-included offense of "second degree murder" on [insert date of the offense] as the result of the death of [insert victim's name], as follows (check only one):

_____ Not guilty

_____ Guilty

_____ Unable to agree

[Lesser-Included Offense Verdict on "manslaughter": If you find the defendant "guilty" of "first-degree murder" or "guilty" of "second degree-murder," **do not** complete this portion of the verdict form. In other words, complete this portion only if you find the defendant either "not guilty" of both "first-degree murder" and "second degree murder" or you are unable to decide.]

We the jury, duly empanelled and sworn in the above entitled action, and upon our oaths, do find the Defendant, [insert defendant's name], on the lesser-included offense of "manslaughter" on [insert date of the offense] as the result of the death of [insert victim's name], as follows (check only one):

_____ Not guilty

_____ Guilty

_____ Unable to agree

[Complete this portion of the verdict form only if you find the defendant "guilty" of "manslaughter."]

Please indicate the number of jurors who found beyond a reasonable doubt that the offense of "manslaughter" was committed as follows:

_____ Reckless manslaughter

_____ Manslaughter by sudden quarrel or heat of passion

 

_____ Both reckless manslaughter and manslaughter by sudden quarrel or heat of passion

[Lesser-Included Offense Verdict on "negligent homicide": If you find the defendant "guilty" of "first-degree murder" or "guilty" of "second-degree murder" or "guilty" of "manslaughter," **do not** complete this portion of the verdict form. In other words, complete this portion only if you find the defendant either "not guilty" of "first-degree murder," "second-degree murder," and "manslaughter" or you are unable to decide.]

We the jury, duly empanelled and sworn in the above entitled action, and upon our oaths, do find the Defendant, [insert defendant's name], on the lesser-included offense of "negligent homicide" on [insert date of the offense] as the result of the death of [insert victim's name], as follows (check only one):

_____ Not guilty

_____ Guilty

Signed: _____

Foreperson (Juror # _____)

Foreperson (please print name): _____

---

**USE NOTE:** This sample instruction and verdict form is provided to illustrate how to structure the lesser-included instructions and verdict form in a first-degree murder case where the facts support instructing on lesser-included offenses. This instruction and verdict must be modified if the facts do not support all of the lesser-included offenses set forth in this sample instruction and verdict form. For example, if "manslaughter by sudden quarrel or heat of passion" is not a theory supported by the evidence, that theory must be deleted.

## 11.99 – "Modified LeBlanc" Instruction for Felony Murder

As an alternative to [First] [Second] Degree Murder, you must also consider [Second Degree Murder] [and] [Manslaughter]. If you unanimously agree the defendant committed a homicide, you must indicate on your verdict form the charge or charges on which you agree. If you believe a homicide was committed, but are uncertain as to which charge was proven, you must vote to convict the defendant of [insert less serious offense]. You may not find the defendant guilty of any offense unless you find that the state has proven each element of the charge beyond a reasonable doubt.

---

**SOURCE:** *State v. Lua*, 237 Ariz. 301, 306-07 ¶¶ 19-20 (2015); *State v. Dansdill*, 246 Ariz. 593, 609 ¶ 64, ___ P.3d ___, ___ (App. 2019).

 

**USE NOTE:** If the court instructs the jury not only on second-degree murder but also on manslaughter and/or negligent homicide, then the court should use the bracketed language for "homicide."

**COMMENT:** In *State v. Dansdill*, 246 Ariz. 593, 609 ¶ 64, ___ P.3d ___ (App. 2019), the court addressed the propriety of using the standard instruction for lesser-included offenses pursuant to *State v. LeBlanc*, 186 Ariz. 437, 924 P.2d 441 (1996), in a situation where the State charged the defendant with "first-degree felony murder, or in the alternative, second-degree murder." The court recognized that this was a duplicitous indictment because second-degree murder is not a lesser-included offense of first-degree felony murder. Because Dansdill's convictions were reversed on other grounds, and because Dansdill did not preserve an objection to the indictment or the instruction below, the court of appeals noted the impropriety of the *LeBlanc* instruction in this context but did not suggest a proper instruction, leaving it to the trial court in the first instance "to provide the correct instruction."

 

# CHAPTER 12

## 12.01 – Endangerment

The crime of endangerment requires proof of the following:

1. The defendant disregarded a substantial risk that his or her conduct would cause [imminent death/physical injury], *and*
2. The defendant's conduct did in fact create a substantial risk of [imminent death/physical injury].

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**SOURCE:** A.R.S. § 13-1201 (statutory language as of October 1, 1978).

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

"Recklessly" and "Physical Injury" are defined in A.R.S. § 13-105.

If an issue is whether there was a substantial risk of imminent death, a special form of verdict should be used. *State v. Carpenter*, 141 Ariz. 29, 684 P.2d 910 (App. 1984).

The victim must be placed in actual substantial risk of imminent death in order for a defendant to be found guilty of endangerment involving the substantial risk of imminent death. *State v. Doss*, 192 Ariz. 408, 966 P.2d 1012 (App. 1998).

## 12.02 – Threatening or Intimidating

The crime of threatening or intimidating requires proof that the defendant threatened or intimidated by word or conduct:

1. to cause physical injury to another person; *or*
2. to cause serious damage to the property of another person; *or*
3. to cause, or in reckless disregard to causing, serious public inconvenience including, but not limited to, evacuation of a building, place of assembly, or transportation facility; *or*
4. to cause physical injury to another person or damage to the property of another person in order to promote, further or assist, in the interests of or to cause, induce or solicit, another person to participate in a criminal street gang, a criminal syndicate, or a racketeering enterprise.

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**SOURCE:** A.R.S. § 13-1202 (statutory language as of April 19, 1994).

**USE NOTE:** "Physical Injury" is defined in A.R.S. § 13-105.

A special verdict form should be used to determine which subsection applies.

The State must prove that a reasonable person would foresee that the words would be taken as a serious expression of intent to inflict bodily harm; the State does not have to show that the defendant had the ability to carry out the threat or that the defendant had the intent to carry out the threat. *In re Kyle M.*, 200 Ariz. 447, 27 P.3d 804 (App. 2001).

The State does not have to show that the victim was in fact in fear; the subjective fear of the victim is not necessary for the defendant to be guilty of threatening or intimidating. *In re Ryan A.*, 202 Ariz. 19, 39 P.3d 543 (App. 2002).

The felony offense of threatening and intimidating may also include the lesser misdemeanor offense of threatening and intimidating. *State v. Corona*, 188 Ariz. 85, 932 P.2d 1356 (App. 1997).

## 12.03 – Assault

The crime of assault requires the proof that the defendant:

1. [Intentionally/knowingly/recklessly] caused a physical injury to another person; *or*
2. Intentionally put another person in reasonable apprehension of imminent physical injury; *or*
3. Knowingly touched another person with the intent to injure, insult, or provoke that person.

---

**SOURCE:** A.R.S. § 13-1203 (statutory language as of October 1, 1978).

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

"Intentionally," "knowingly," "recklessly," and "physical injury" are defined in A.R.S. § 13-105.

"Knowingly touching" does not require a direct, person-to-person physical contact. Instead, it is sufficient if the defendant sets in motion a force, process, or some substance that produces some sort of contact with the victim. *In re P.D.*, 216 Ariz. 336, 166 P.3d 127 (App. 2007), *State v. Matthews*, 130 Ariz. 46, 633 P.2d 1039 (App. 1981).

A special verdict form should be used to determine which subsection applies.

## 12.04 – Aggravated Assault – General

The crime of aggravated assault requires proof of the following:

1. The defendant committed an assault, *and*
2. The assault was aggravated by at least one of the following factors:
   - The defendant caused serious physical injury to another person; *or*
   - The defendant used a deadly weapon or dangerous instrument; *or*
   - The defendant committed the assault after entering the private home of another with the intent to commit the assault; *or*
   - The defendant was eighteen years of age or older and the person assaulted was fifteen years of age or under; *or*
   - The defendant knew or had reason to know that the person assaulted was a peace officer; *or*

 

- The defendant knew or had reason to know that the person assaulted was someone summoned and directed by a peace officer; *or*
- The defendant knew or had reason to know that the person assaulted was a [code enforcement officer] [state park ranger] [municipal park ranger] [constable] [firefighter] [fire investigator] [fire inspector] [emergency medical technician] [paramedic] [prosecutor] [public defender] [judicial officer] [while engaged in the execution of any official duties] [if the assault results from the execution of his/her official duties]; *or*
- The defendant knew or had reason to know that the person assaulted was someone summoned and directed by a [code enforcement officer] [state park ranger] [municipal park ranger] [constable] [firefighter] [fire investigator] [fire inspector] [emergency medical technician] [paramedic] performing any official duties; *or*
- The defendant committed the assault while the person assaulted was bound or otherwise physically restrained; *or*
- The defendant committed the assault while the assaulted person's ability to resist was substantially impaired; *or*
- The defendant knew or had reason to know that the victim was a health care provider or a person summoned and directed by such person performing professional duties; *or*
- The assault was committed by any means of force that caused temporary but substantial disfigurement, temporary but substantial loss or impairment of any body organ or part, or a fracture of any body part; *or*
- The defendant was in violation of an order of protection issued against him or her pursuant to A.R.S. § 13-3602 or 13-3624.

---

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

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

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

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

"Recklessly" is defined in A.R.S. § 13-105 (Statutory Definitional Instruction 1.0510(c)).

"Code enforcement officer" is defined in A.R.S. § 39-123.

"Dangerous instrument" is defined in A.R.S. §13-105 (Statutory Definitional Instruction 1.058).

"Deadly weapon" is defined in A.R.S. § 13-105 (Statutory Definitional Instruction 1.0510).

"Physical injury" is defined in A.R.S. § 13-105 (Statutory Definitional Instruction 1.0529).

 

"Public defender" is not defined in A.R.S § 13-1204. In a separate context, A.R.S. § 13-2401 defines "public defender" as a federal public defender, county public defender, county legal defender or county contract indigent defense counsel and includes an assistant or deputy federal public defender, county public defender or county legal defender.

"Serious physical injury" is defined in A.R.S. §13-105 (Statutory Definitional Instruction 1.0534).

a. The court shall also instruct on assault (Statutory Criminal Instruction 12.03).

b. A special verdict form should be used to determine which subsection applies.

c. If assault is aggravated by a deadly weapon, dangerous instrument, or serious physical injury, a special verdict form should be used if the victim is under 15 years of age.

d. If assault is aggravated by a deadly weapon, dangerous instrument, serious physical injury, or if the means of force used caused a temporary but substantial disfigurement, temporary but substantial loss or impairment of any body organ of part, or a fracture of any body part, a special verdict form should be used if the victim is a peace officer.

e. If the person who commits the assault is seriously mentally ill, as defined in A.R.S. § 36-550, or is inflicted with Alzheimer's disease or related dementia, the specific provisions relating to aggravated assaults on licensed health care providers do not apply [13-1204(A)(10)].

f. When the offense is alleged to have arisen in violation of an order of protection, the assault must have occurred as defined by A.R.S. § 13-1203(A)(1) or (3).

A.R.S. §13-1204(D) provides that it is not a defense to a prosecution for assaulting a peace officer or a mitigating circumstance that the peace officer was not on duty or engaged in the execution of official duties.

## 12.04B – Aggravated Assault – Domestic Violence

The crime of aggravated assault requires proof that:

1. The defendant [intentionally, knowingly or recklessly caused any physical injury to another person] [intentionally placed another person in reasonable apprehension of imminent physical injury] [knowingly touched another person with the intent to injure the person]; *and*
2. The defendant [intentionally/knowingly] [impeded the normal breathing or circulation of blood of another person by applying pressure to the throat or neck] [obstructed the nose and mouth of another person either manually or through the use of an instrument]; *and*
3. [The defendant and the victim were married.] [The defendant and the victim are married.] [The defendant and the victim reside in the same household.] [The defendant and the victim resided in the same household.] [The defendant and the victim have a child in common.] [The defendant or the victim is pregnant by the other party.] [The victim is the defendant's or defendant's spouse's parent, grandparent, child, grandchild, brother or sister.] [The victim is the defendant or defendant's parent-in-law, grandparent-in-law, stepparent, step-grandparent, stepchild, step-grandchild, brother-in-law or sister-in-law.] [The victim is a child who

 

resides or has resided in the same household as the defendant and is related by blood to a former spouse of the defendant or to a person who resides or who has resided in the same household as the defendant.] [The victim is the defendant or defendant's adopted child.] [The relationship between the victim and the defendant was/had been a romantic or sexual relationship. The following factors may be considered in determining whether the relationship between the victim and the defendant was/had been a romantic or sexual relationship:

(a) The type of relationship.

(b) The length of the relationship.

(c) The frequency of the interaction between the victim and the defendant.

(d) If the relationship has terminated, the length of time since the termination.]

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**SOURCE**: A.R.S. §§ 13-1204(B) and 13-3601(A) (statutory language as of July 29, 2010).

## 12.048 – Aggravated Assault Upon Teacher or School Employee

The crime of aggravated assault upon a teacher or school employee requires proof of the following:

1. The defendant committed an assault; *and*

2. The defendant knew or had reason to know that the person assaulted was a [teacher/school nurse/school employee]; *and*

3. The defendant committed the assault [on school grounds/on grounds next to a school/in a building or motor vehicle used for school purposes/while the teacher or school nurse was visiting a private home in the course of professional duties/on any teacher engaged in any authorized and organized classroom activity held off school grounds].

**SOURCE:** A.R.S. § 13-1204(A)(8) (statutory language as of January 1, 2009).

**USE NOTE:** Under most of the situations in A.R.S. § 13-1204(A)(6), an assault upon a teacher or an employee of a school is aggravated. However, the only employees of a school subject to aggravated assault in a private home are teachers and school nurses. For the sake of clarity, "nurse" is added here.

The court shall also instruct on assault (Statutory Criminal Instruction 12.03).

## 12.04.09A – Aggravated Assault – Control of Officer's Firearm

The crime of aggravated assault requires proof that:

1. The defendant committed an assault; *and*

2. The defendant knowingly [took control] [attempted to exercise control] over the firearm of [a peace officer] [a state department of corrections officer] [a department of juvenile corrections officer] [a law enforcement agency officer] [a city/county jail officer] [a city/county juvenile detention facility officer] [an officer of an entity that

 

had contracted with any state or federal agency responsible for sentenced or unsentenced prisoners]; *and*

3. The defendant knew or had reason to know that the person assaulted was [a peace officer] [state department of corrections officer] [a department of juvenile corrections officer] [a law enforcement agency officer] [a city/county jail officer] [a city/county juvenile detention facility officer] [an officer of an entity that had contracted with any state or federal agency responsible for sentenced or unsentenced prisoners].

---

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

**USE NOTE:** The court shall also instruct on assault (Statutory Criminal Instruction 12.03).

The court shall instruct on the culpable mental state.

Use bracketed language as appropriate to the facts of the case.

*See* Statutory Criminal Instruction 1.0517 for the definition of "firearm."

A.R.S. §13-1204(D) provides that it is not a defense to a prosecution for assaulting a peace officer or a mitigating circumstance that the peace officer was not on duty or engaged in the execution of official duties.

## 12.04.09B – Aggravated Assault – Control of Officer's Weapon Other Than a Firearm

The crime of aggravated assault requires proof that:

1. The defendant committed an assault; and
2. The defendant knowingly [took control] [attempted to exercise control] over any weapon that was being used or attempting to be used by [a peace officer] [a state department of corrections officer] [a department of juvenile corrections officer] [a law enforcement agency officer] [a city/county jail officer] [a city / county juvenile detention facility officer] [an officer of an entity that had contracted with any state or federal agency responsible for sentenced or unsentenced prisoners]; *and*
3. The defendant knew or had reason to know that the person assaulted was [a peace officer] [a state department of corrections officer] [a department of juvenile corrections officer] [a law enforcement agency officer] [a city / county jail officer] [a city/county juvenile detention facility officer] [an officer of an entity that had contracted with any state or federal agency responsible for sentenced or unsentenced prisoners].

---

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

**USE NOTE:** The court shall also instruct on assault (Statutory Criminal Instruction 12.03).

The court shall instruct on the culpable mental state.

Use bracketed language as appropriate to the facts of the case.

 

A.R.S. §13-1204(D) provides that it is not a defense to a prosecution for assaulting a peace officer or a mitigating circumstance that the peace officer was not on duty or engaged in the execution of official duties.

## 12.04.09C – Aggravated Assault – Control of Officer's Implement Other Than a Firearm

The crime of aggravated assault requires proof that:

1. The defendant committed an assault; *and*
2. The defendant knowingly [took control] [attempted to exercise control] over any implement that was being used or attempting to be used by [a peace officer] [a state department of corrections officer] [a department of juvenile corrections officer] [a law enforcement agency officer] [a city/county jail officer] [a city/county juvenile detention facility officer] [an officer of an entity that had contracted with any state or federal agency responsible for sentenced or unsentenced prisoners]; *and*
3. The defendant knew or had reason to know that the person assaulted was [a peace officer] [a state department of corrections officer] [a department of juvenile corrections officer] [a law enforcement agency officer] [a city/county jail officer] [a city/county juvenile detention facility officer] [an officer of an entity that had contracted with any state or federal agency responsible for sentenced or unsentenced prisoners].

"Implement" means an object that is designed for or that is capable of restraining or injuring an individual, but does not include handcuffs.

---

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

**USE NOTE:** The court shall also instruct on assault (Statutory Criminal Instruction 12.03).

The court shall instruct on the culpable mental state.

Use bracketed language as appropriate to the facts of the case.

A.R.S. §13-1204(D) provides that it is not a defense to a prosecution for assaulting a peace officer or a mitigating circumstance that the peace officer was not on duty or engaged in the execution of official duties.

## 12.04.10 – Aggravated Assault – Defendant in Custody

The crime of aggravated assault requires proof that:

1. The defendant committed an assault; *and*
2. At the time of the assault, the defendant was [imprisoned] [subject to custody] in [the state department of corrections] [the department of juvenile corrections] [a law enforcement agency] [a county/city jail] [a city/county juvenile detention facility] [an entity having responsibility for sentenced or unsentenced prisoners]; *and*
3. The defendant knew or had reason to know that the person assaulted was, at the time of the assault, acting in [his] [her] official capacity as an employee of [the state

 

department of corrections] [the department of juvenile corrections] [a law enforcement agency] [a county/city jail] [a city/county juvenile detention facility] [an entity having responsibility for sentenced or unsentenced prisoners].

---

**SOURCE:** A.R.S. § 13-1204(A)(10) (statutory language as of January 1, 2009).

**USE NOTE:** The court shall also instruct on assault (Statutory Criminal Instruction 12.03).

The court shall instruct on the culpable mental state.

Use bracketed language as appropriate to the facts of the case.

## 12.05 – Unlawfully Administering Intoxicating Liquors, or Drug

The crime of unlawfully administering liquor or drug requires proof of the following:

1. The defendant knowingly introduced or caused to be introduced into the body of another person [intoxicating liquors/narcotic drug/dangerous drug]; *and*
2. The person did not consent; *and*
3. It was for a purpose other than lawful medical or therapeutic treatment.

---

**SOURCE:** A.R.S. § 13-1205 (statutory language as of October 1, 1978).

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

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

"Narcotic drug" and "dangerous drug" are defined in A.R.S. § 13-3401.

A special verdict form should be used if the victim is a minor.

## 12.06 – Dangerous or Deadly Assault by a Prisoner

The crime of dangerous or deadly assault by a prisoner requires proof that the defendant:

1. Was in the custody of [the department of corrections/a county jail/a city jail/a law enforcement agency]; *and*
2. Committed an assault [involving the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument]; *or* [by intentionally or knowingly inflicting serious physical injury upon another person].

---

**SOURCE:** A.R.S. § 13-1206 (statutory language as of September 2, 2002).

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

The court shall instruct on the culpable mental state.

The court shall instruct on assault (Statutory Criminal Instruction 12.03).

"Intentionally," "knowingly," "deadly weapon," "dangerous instrument," and "serious physical injury" are defined in A.R.S. § 13-105.

 

Definition of "custody" in § 13-2501 defining the word as it relates to escape offenses does not apply to § 13-1206 proscribing dangerous or deadly assault by a prisoner; "custody" in latter statute must be read to mean the imposition of actual or constructive restraint pursuant to an on-site arrest or court order or pursuant to detention in a correctional facility, juvenile detention center, or state hospital. *See State v. Newman*, 141 Ariz. 554, 688 P.2d 180 (1984).

## 12.07 – Prisoners [Committing Assault with Intent to Incite to Riot/Participating in a Riot]

The crime of a prisoner [committing assault with intent to incite to riot/participating in a riot] requires proof that the defendant:

Was in the custody of [the state department of corrections/a county or city jail]; *and*

1. committed an assault upon another person with the intent to incite to riot; *or*
2. participated in a riot.

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**SOURCE:** A.R.S. § 13-1207 (statutory language as of January 1, 1994).

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

"With the intent to" is defined in A.R.S. § 13-105.

The court shall also instruct on assault if subsection (a) applies (Statutory Criminal Instruction 12.03).

## 12.08 – Assault; Vicious Animals

The crime of assault by a vicious animal requires proof that:

1. The defendant owned a dog that the defendant knew or had reason to know had a propensity to attack, to cause injury or otherwise endanger the safety of human beings without provocation, or that had been found to be a vicious animal by a court of competent authority; and
2. The dog, while at large, bit, inflicted physical injury on, or attacked a human being.

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**SOURCE:** A.R.S. § 13-1208 (statutory language as of September 21, 2006).

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

"Knowingly," and "physical injury" are defined in A.R.S. § 13-105.

## 12.09 – Drive-By Shooting

The crime of drive-by shooting requires proof that:

1. The defendant intentionally discharged a weapon from a motor vehicle; *and*

 

2. The discharge was at a person, another occupied motor vehicle, or an occupied structure.

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**SOURCE:** A.R.S. § 13-1209 (statutory language as of October 1, 1997).

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

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

"Motor Vehicle" is defined in A.R.S. § 28-101.

"Occupied structure" is defined in A.R.S. § 13-3101.

## 12.11 – Discharging a Firearm at a Structure

The crime of discharging a firearm at a [residential] [nonresidential] structure requires proof that the defendant knowingly:

1. discharged a firearm; *and*
2. discharged at a [residential [nonresidential] structure.

---

**SOURCE:** A.R.S. § 13-1211 (statutory language as of July 20, 1996).

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

"Knowingly" and "firearm" are defined in A.R.S. § 13-105.

"Residential structure," "nonresidential structure," and "structure" are defined in A.R.S. § 13-1211.

A special verdict form should be used to determine the type of structure.

A storage room that was under the same roof as the living quarters was found to be a residential structure. *See State v. Ekmanis*, 183 Ariz. 180, 901 P.2d 1210 (App. 1995).

An almost completed home is not a residential structure because it has not been adapted for human residence. *See State v. Bass*, 184 Ariz. 543, 911 P.2d 549 (App. 1995).

## 12.12 – Prisoner Assault with Bodily Fluids

The crime of prisoner assault with bodily fluids requires proof that the defendant:

1. was a prisoner; *and*
2. threw or projected any saliva, blood, seminal fluid, urine or feces at or onto a person who is a correctional facility employee or private prison security officer; *and*
3. knew or reasonably should have known the person was a correctional facility employee or private prison security officer.

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**SOURCE:** A.R.S. § 13-1212 (statutory language as of April 28, 1997).

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

"Knowingly" and "physical injury" are defined in A.R.S. § 13-105.

 

## 12.14 – Unlawful Mutilation

The crime of unlawful mutilation requires proof that the defendant:

[knowingly mutilated a female who was under eighteen years of age.]

[knowingly transported a female under eighteen years of age to another jurisdiction for the purpose of mutilation.]

[recklessly transported a female under eighteen years of age to another jurisdiction where mutilation was likely to occur.]

The consent of the minor on whom the mutilation is performed or the parents of the minor is not a defense to a prosecution for unlawful mutilation.

"Mutilate" or "mutilation" means the partial or total removal of the clitoris, prepuce, labia minora, with or without excision of the labia major, the narrowing of the vaginal opening through the creation of a covering seal formed by cutting and repositioning the inner or outer labia, with or without removal of the clitoris, or any harmful procedure to the genitalia, including pricking, piercing, incising, scraping or cauterizing.

[Mutilate and mutilation do not include procedures performed by a licensed physician that are proven to be medically necessary due to a medically recognized condition.]

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**SOURCE:** A.R.S. § 13-1214 (statutory language as of July 24, 2014).

**USE NOTE:** Use statutory definition instruction 1.0510(b) defining "knowingly."

Pursuant to *Blakely v. Washington*, 542 U.S. 296 (2004), and its progeny, the trial judge must instruct the jury to determine the minor's age because a violation of this statute is a Class 2 felony, unless the minor is under fifteen years of age, in which case the offense is punishable as a dangerous crime against children pursuant to A.R.S. § 13-705. *See* statutory criminal 7.05 for the instruction and verdict form if it is necessary for the jury to determine whether the offense is a "dangerous crime against a child."

**COMMENT:** The committee notes that the statute fails to set forth the burden of proof for subsection f, or to whom that burden belongs.

 

# CHAPTER 13

## 13.01 – Definition of "Restrain"

"Restrain" means to restrict a person's movements without consent, without legal authority, and in a manner that interferes substantially with such person's liberty, by either moving such person from one place to another or by confining such person. Restraint is without consent if it is accomplished by [(physical force) (intimidation) (or) (deception)] [any means including acquiescence of the victim if the victim is a child less than eighteen years old or an incompetent person and victim's lawful custodian has not acquiesced in the movement or confinement.]

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**SOURCE:** A.R.S. § 13-1301(2) (statutory language as of April 23, 1980).

## 13.02 – Custodial Interference

The crime of custodial interference requires proof that the defendant;

1. [took] [enticed] [kept] from lawful custody any [child] [incompetent person] entrusted by authority of law to the custody of another person or institution; *or*

   before a court order determining custodial rights denying that parent access to any child, [took] [enticed] [withheld] any child from the other parent; *or*

   had joint legal custody of the child and [took] [enticed] [withheld] the child from the physical custody of the other custodian; *or*

   intentionally failed or refused to return [or impeded the return] of the child to the lawful custodian at the time the defendant's access rights outside this state had expired; *and*

2. knew or had reason to know that the defendant had no legal right to do so.

---

**SOURCE:** A.R.S. § 13-1302 (statutory language as amended in August 21, 1998).

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

"Knowingly" is defined in A.R.S. § 13-105 (Statutory Definitional Instruction 1.056(b)).

For A.R.S. §13-1302(a)(2) & (3), if justified by the facts, the following instruction should be given:

It is not a crime if the defendant is the child's parent and both of the following are found:

1. Defendant had filed an emergency petition regarding custodial rights with the superior court and had received a hearing date from the court; and
2. Defendant had a good faith and reasonable belief that the child would be in immediate danger if the child was left with the other parent.

A.R.S. § 13-1302(D).

The state must convince you beyond a reasonable doubt that the exception to the crime does not apply to the defendant.

Use Verdict Form 13.02 for Statutory Criminal Instruction 13.02.

**COMMENT:** "Out of wedlock" children are assumed to be in the custody of the mother until paternity and custody are determined by a court. A.R.S. § 13-1302(B). A.R.S. § 13-1302(B) making the mother of child born out of wedlock legal custodian until paternity is established is substantially related to important state interest and, therefore, is not a gender-based equal protection violation nor does the statute violate due process. *State v. Bean*, 174 Ariz. 544, 851 P.2d 843 (App. 1992).

"Custody" includes parental authority and other lawful authority to have control of the person; it does not mean arrest or incarceration as "custody" is defined in A.R.S. § 13-2501(3).

A.R.S. § 13-1302(A)(2) does not require that there be ongoing custody proceedings before a person may be charged with custodial interference. "Pending custody proceedings are not a prerequisite to a prosecution for custodial interference under this section." *State v. Wood*, 198 Ariz. 275, 277, 8 P.3d 1189, 1191 (App. 2000).

## 13.02 – Verdict Form (Custodial Interference)

We the jury, duly empanelled and sworn in the above-entitled action, upon our oaths, do find the Defendant, [insert the defendant's name], on the charge of custodial interference as follows (check only one):

_____ Not guilty

_____ Guilty

_____ Unable to agree

(Complete this portion of the verdict form only if you find the defendant guilty of custodial interference.)

We, the jury find as follows (check only one):

[____ the defendant was child's [parent] [agent of a parent].

____ the defendant was not the child's [parent] [agent of a parent].]

[____ the defendant was the incompetent person's [custodian] [agent of the custodian].

____ the defendant was not the incompetent person's [custodian] [agent of the custodian].]

We, the jury find as follows (check only one):

_____ the [child] [incompetent person] was [taken] [enticed] [kept] out of this state.

_____ the [child] [incompetent person] was not [taken] [enticed] [kept] out of this state.

We, the jury find as follows (check only one):

 

_____ the [child] [incompetent person] was voluntarily returned without physical injury prior to arrest or the issuance of an arrest warrant.

_____ the [child] [incompetent person] was not voluntarily returned without physical injury prior to arrest or the issuance of an arrest warrant.

---

**USE NOTE:** These elements must be found by the jury in order to determine the classification of the offense as a misdemeanor or a felony and sentencing range for the offense. *See* A.R.S. § 13-1302(D); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *State v. Gross*, 201 Ariz. 41, 31 P.3d 815 (App. 2001).

## 13.02C – Defense to Custodial Interference

It is a defense to the charge of custodial interference if the defendant proves the following had occurred:

1. The defendant had begun the process to obtain an order of protection or filed a petition for custody within a reasonable period of time after taking the child and the order of protection or petition states the defendant's belief that the child was at risk if left with the other parent; *and*
2. The defendant is the child's parent, had the right of custody and, before the events giving rise to the charge of custodial interference, the defendant either:
   a. had a good faith and reasonable belief that the taking, enticing or withholding was necessary to protect the child from immediate danger; *or*
   b. was a victim of domestic violence by the other parent and had a good faith and reasonable belief that the child would be in immediate danger if the child was left with the other parent.

The defendant has the burden of proving this defense by a preponderance of the evidence, which is a lesser burden than proof beyond a reasonable doubt. As stated earlier, the state always has the burden of proving the crime charged beyond a reasonable doubt, and this burden never shifts during the trial.

Proof by "a preponderance of the evidence" means that a fact is more probably true than not true.

If you find that the defendant has proved this defense by a preponderance of the evidence then you must find the defendant not guilty of custodial interference.

---

**SOURCE:** A.R.S. § 13-1302(C) (statutory language as of August 21, 1998); Statutory Criminal Instruction 2.025.

**USE NOTE:** This is a defense **only** to paragraph A, subsection 2 of A.R.S. § 13-1302. *See* A.R.S. § 13-1302(C).

This instruction includes Statutory Criminal Instruction 2.025 so it need not be given. The court may also wish to give Standard Criminal Instruction 5b(2).

 

**COMMENT:** In *State v. Wood*, 198 Ariz. 275, 8 P.3d 1189 (App. 2000), the court held that the events giving rise to the charge of custodial interference must have already taken place before custody proceedings began or the defense under this statute would be meaningless.

## 13.031 – Unlawful Imprisonment

The crime of unlawful imprisonment requires proof that the defendant knowingly restrained another person.

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**SOURCE:** A.R.S. § 13-1303 (statutory language as of October 1, 1978).

**USE NOTE:** Use Statutory Definition Instruction 1.056(b) defining "knowingly."

Use Statutory Criminal Instruction 13.01 defining "restrain."

**COMMENT:** This offense may be a lesser-included offense of kidnapping. *State v. Detrich*, 178 Ariz. 380, 873 P.2d 1302 (1994); *State v. Atwood*, 171 Ariz. 576, 832 P.2d 593 (1992); *State v. Gonzales,* 140 Ariz. 349, 351, 681 P.2d 1368, 1370 (1984); *State v. Tschilar*, 200 Ariz. 427, 437, 27 P.3d 331, 341 (App. 2001); *State v. Flores*, 140 Ariz. 469, 682 P.2d 1136 (App. 1984); *State v. Mendibles*, 126 Ariz. 218, 613 P.2d 1274 (App. 1980). However, if the evidence is that the defendant is guilty of kidnapping or no crime at all, it is not error to not instruct on the lesser-included offense of unlawful imprisonment. *State v. Lucas*, 146 Ariz. 597, 604, 708 P.2d 81, 88 (1985).

## 13.032 – Unlawful Imprisonment – Defense

It is a defense to the crime of unlawful imprisonment if the following existed:

[The restraint was accomplished by a peace officer or a detention officer acting in good faith in the lawful performance of his or her duty.] *or*

[1. The defendant was a relative of the person restrained; *and*

2. The defendant's sole intent was to take lawful custody of the person restrained; *and*

3. The restraint was accomplished without physical injury to (insert name of the victim).

"Relative" means a parent or stepparent, ancestor, descendant, sibling, uncle or aunt, including an adoptive relative of the same degree through marriage or adoption, or a spouse.]

The defendant has the burden of proving this defense by a preponderance of the evidence, which is a lesser burden than proof beyond a reasonable doubt. As stated earlier, the state always has the burden of proving the crime charged beyond a reasonable doubt, and this burden never shifts during the trial.

Proof by "a preponderance of the evidence" means that a fact is more probably true than not.

If you find that the defendant has proved this defense by a preponderance of the evidence then you must find the defendant not guilty of unlawful imprisonment.

 

**SOURCE:** A.R.S. §§ 13-1301(1) and 13-1303(B)(2) (statutory language as of July 24, 2014).

## 13.04 – Kidnapping

The crime of kidnapping requires proof that the defendant knowingly restrained another person with the intent to:

[hold the person (for ransom) (as a shield) (or) (as a hostage)]

[hold the person for involuntary servitude]

[inflict (death) (physical injury) (or) (a sexual offense) on the person]

[aid in the commission of a felony]

[place the victim or a third person in reasonable fear of imminent physical injury to the victim or such third person]

[interfere with the performance of a governmental or political function]

[seize or exercise control over any (airplane) (train) (bus) (ship) (other vehicle)].

**SOURCE:** A.R.S. § 13-1304 (statutory language as of May 16, 1985).

**USE NOTE:**

Use Statutory Definition Instruction 1.056(b) defining "knowingly."

Use Statutory Definition Instructions 1.056(a)(1) and 1.056(a)(2) defining "intent" and "intent – inference."

Use Statutory Criminal Instruction 13.01 defining "restrain."

If the restriction was with the intent to commit a sexual offense on the person, the court should insert the name of the sexual offense and give an instruction defining the sexual offense.

**COMMENT:** A.R.S. § 13-1304(B) provides that kidnapping is a class 2 felony "unless the victim is released voluntarily by the defendant without physical injury in a safe place prior to arrest and prior to accomplishing any of the further enumerated offenses in subsection A." In *State v. Eagle*, 196 Ariz. 188, 192, 994 P.2d 395, 399 (2000), the Arizona Supreme Court held that the factors listed in subsection B do not change the elements of kidnapping, that kidnapping is presumptively a class 2 felony, that all of the elements in B must be met to justify a decrease in the classification of the offense from a class 2 felony to a class 4 felony, that subsection B "is a mitigating factor relevant solely for sentencing purposes" and that "because the defendant alone benefits from the presence of mitigating circumstances, it is proper to place the burden of proving them on the defense" by a preponderance of the evidence. Because this is a sentencing issue and mitigating factors may be determined by the judge without a jury finding, no jury instruction or verdict form concerning subsection B has been provided. *See also State v. Tschilar*, 200 Ariz. 427, 27 P.3d 331 (App. 2001).

The *Eagle* court also noted that the kidnapping statute does not require the defendant to complete a predicate offense, such as a sexual assault; all that is required is "the intent to commit" a predicate offense. *Eagle,* 196 Ariz. at 190, 994 P.2d at 397. If the defendant has been convicted of both kidnapping and a predicate offense, the court may wish to review

 

*State v. Gordon*, 161 Ariz. 308, 778 P.2d 1204 (1989), which discusses the factors to consider in deciding whether to impose concurrent or consecutive sentences.

## 13.05 – Access Interference

The crime of access interference requires proof that the defendant:

1. knowingly engaged in a pattern of behavior that prevented, obstructed or frustrated a person's court ordered access rights to a child knowing or having reason to know that the defendant had no legal right to do so; *and*
2. removed the child from this state.

"Access order" means a court order that allows a person to have direct access to a child.

---

**SOURCE:** A.R.S. § 13-1305 (statutory language as of July 21, 1997).

**USE NOTE:** Use Statutory Definition Instruction 1.056(b) defining "knowingly."

**COMMENT:** The statute requires that the "access order" was issued pursuant to Title 25.

## 13.06 – Unlawfully Obtaining Labor or Services

The crime of unlawfully obtaining labor or services requires proof that the defendant knowingly obtained labor or services of another person by [causing or threatening to cause bodily injury to that person or another person] [restraining or threatening to restrain that person or another person without lawful authority and against that person's will] [withholding that person's governmental records, identifying information or other personal property].

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**SOURCE:** A.R.S. § 13-1306 (statutory language as of August 12, 2005).

**USE NOTE:** Use Statutory Definition Instruction 1.056(b) defining "knowingly."

Use language in brackets as appropriate to the facts.

## 13.07.01 – Sex Trafficking

The crime of sex trafficking requires proof that the defendant knowingly transported another person with [the intent to cause the other person to] [knowledge that the other person will] engage in any prostitution or sexually-explicit performance by deception, force or coercion.

"Coercion" means [abusing or threatening to abuse the law or the legal system] [knowingly destroying, concealing, removing, confiscating, possessing or withholding another person's actual or purported passport or other immigration document, government issued identification document, government record or personal property] [extortion] [causing or threatening to cause financial harm to any person] [facilitating or controlling another person's access to a controlled substance].

"Force" means [to cause or threaten to cause serious harm to another person] [physically restraining or threatening to physically restrain another person].

 

"Prostitution" means engaging in or agreeing or offering to engage in sexual contact, sexual intercourse, oral sexual contact or sadomasochistic abuse under a fee arrangement with any person for money or any other valuable consideration.

"Sexual contact" means any direct or indirect fondling or manipulating of any part of the genitals, anus or female breast.

"Sexual intercourse" means penetration into the penis, vulva or anus by any part of the body or by any object.

"Oral sexual contact" means oral contact with the penis, vulva or anus.

"Sadomasochistic abuse" means flagellation or torture by or on a person who is nude or clad in undergarments or in revealing or bizarre costume or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

"Sexually explicit performance" means a live or public act or show intended to arouse or satisfy the sexual desires or appeal to the prurient interest of patrons.

[or]

The crime of sex trafficking requires proof that the defendant knowingly [recruited] [enticed] [harbored] [provided] [obtained] another person for transport with [the intent to cause the other person to] [knowledge that the other person will] engage in any prostitution or sexually-explicit performance by deception, force or coercion.

"Coercion" means [abusing or threatening to abuse the law or the legal system] [knowingly destroying, concealing, removing, confiscating, possessing or withholding another person's actual or purported passport or other immigration document, government issued identification document, government record or personal property] [extortion] [causing or threatening to cause financial harm to any person] [facilitating or controlling another person's access to a controlled substance].

"Force" means [to cause or threaten to cause serious harm to another person] [physically restraining or threatening to physically restrain another person].

"Prostitution" means engaging in or agreeing or offering to engage in sexual contact, sexual intercourse, oral sexual contact or sadomasochistic abuse under a fee arrangement with any person for money or any other valuable consideration.

"Sexual contact" means any direct or indirect fondling or manipulating of any part of the genitals, anus or female breast.

"Sexual intercourse" means penetration into the penis, vulva or anus by any part of the body or by any object.

"Oral sexual contact" means oral contact with the penis, vulva or anus.

"Sadomasochistic abuse" means flagellation or torture by or on a person who is nude or clad in undergarments or in revealing or bizarre costume or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

"Sexually explicit performance" means a live or public act or show intended to arouse or satisfy the sexual desires or appeal to the prurient interest of patrons.

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**SOURCE:** A.R.S. § 13-1307(A) (statutory language as of September 30, 2009) and § 13-3211 (statutory language as of June 13, 2007).

 

**USE NOTE:** Use Statutory Definition Instruction 1.056(a)(1) defining "intentionally" or 1.056(b) defining "knowingly."

Use bracketed language as appropriate to the facts of the case.

## 13.07.02 – Sex Trafficking of a Minor

The crime of sex trafficking of a minor requires proof that the defendant knowingly transported another person under the age of eighteen with [the intent to cause the other person to] [knowledge that the other person will] engage in any prostitution or sexually-explicit performance.

"Prostitution" means engaging in or agreeing or offering to engage in sexual contact, sexual intercourse, oral sexual contact or sadomasochistic abuse under a fee arrangement with any person for money or any other valuable consideration.

"Sexual contact" means any direct or indirect fondling or manipulating of any part of the genitals, anus or female breast.

"Sexual intercourse" means penetration into the penis, vulva or anus by any part of the body or by any object.

"Oral sexual contact" means oral contact with the penis, vulva or anus.

"Sadomasochistic abuse" means flagellation or torture by or on a person who is nude or clad in undergarments or in revealing or bizarre costume or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

"Sexually explicit performance" means a live or public act or show intended to arouse or satisfy the sexual desires or appeal to the prurient interest of patrons.

[or]

The crime of sex trafficking of a minor requires proof that the defendant knowingly [recruited] [enticed] [harbored] [provided] [obtained] another person under the age of eighteen for transport with [the intent to cause the other person to] [knowledge that the other person will] engage in any prostitution or sexually-explicit performance.

"Prostitution" means engaging in or agreeing or offering to engage in sexual contact, sexual intercourse, oral sexual contact or sadomasochistic abuse under a fee arrangement with any person for money or any other valuable consideration.

"Sexual contact" means any direct or indirect fondling or manipulating of any part of the genitals, anus or female breast.

"Sexual intercourse" means penetration into the penis, vulva or anus by any part of the body or by any object.

"Oral sexual contact" means oral contact with the penis, vulva or anus.

"Sadomasochistic abuse" means flagellation or torture by or on a person who is nude or clad in undergarments or in revealing or bizarre costume or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

"Sexually explicit performance" means a live or public act or show intended to arouse or satisfy the sexual desires or appeal to the prurient interest of patrons.

 

**SOURCE:** A.R.S. § 13-1307(B) (statutory language as of September 30, 2009) and § 13-3211 (statutory language as of June 13, 2007).

**USE NOTE:** Use Statutory Definition Instruction 1.056(a)(1) defining "intentionally" or 1.056(b) defining "knowingly."

Use bracketed language as appropriate to the facts of the case.

A.R.S. § 13-1307(D) provides that if this "offense is committed against a person who is under fifteen years of age, the offense is a dangerous crime against children punishable pursuant to A.R.S. § 13-604.01." Accordingly, if the victim is alleged to have been under the age of fifteen, a separate jury finding should be made regarding the victim's age.

## 13.07.A – Sex Trafficking (Victim Eighteen Years of Age or Older)

The crime of sex trafficking requires proof that the defendant knowingly [recruited] [enticed] [harbored] [transported] [provided] [obtained] by any means another person who was eighteen years of age or older [with the intent of causing the other person to engage in prostitution or sexually explicit performance by force, deception or coercion**]** [knowing that the other person would engage in prostitution or sexually explicit performance by deception, coercion or force].

"Coercion" means any of the following

(a) Abusing or threatening to abuse the law or the legal system.

(b) Knowingly destroying, concealing, removing, confiscating, possessing or withholding another person's actual or purported passport or other immigration document, government issued identification document, government record or personal property.

(c) Extortion.

(d) Causing or threatening to cause financial harm to any person.

(e) Facilitating or controlling another person's access to a controlled substance.

"Force" includes causing or threatening to cause serious harm to another person or physically restraining or threatening to physically restrain another person.

"Sexually explicit performance" means a live or public act or show intended to arouse or satisfy the sexual desires or appeal to the prurient interest of patrons.

---

**SOURCE:** A.R.S. § 13-1307 (statutory language as of July 29, 2010).

**USE NOTE:** Use Statutory Definition Instruction 1.056(b) defining "knowingly."

Use bracketed language as appropriate to the facts of the case.

## 13.07.B – Sex Trafficking (Victim Under Eighteen Years of Age)

The crime of sex trafficking requires proof that the defendant knowingly [recruited] [enticed] [harbored] [transported] [provided] [obtained] by any means another person who was under eighteen years of age [with the intent of causing the other person to engage in

 

prostitution or sexually explicit performance] [knowing that the other person would engage in prostitution or sexually explicit performance].

"Sexually explicit performance" means a live or public act or show intended to arouse or satisfy the sexual desires or appeal to the prurient interest of patrons.

---

**SOURCE:** A.R.S. § 13-1307 (statutory language as of July 29, 2010).

**USE NOTE:** Use Statutory Definition Instruction 1.056(b) defining "knowingly."

Use bracketed language as appropriate to the facts of the case.

A.R.S. § 13-1307(D) provides that if this "offense is committed against a person who is under fifteen years of age, the offense is a dangerous crime against children punishable pursuant to A.R.S. § 13-705." Accordingly, if the victim is alleged to have been under the age of fifteen, a separate jury finding should be made regarding the victim's age.

This instruction should only be used for offenses committed prior to August 9, 2017. For offenses committed after that date, see A.R.S. § 13-3212; Statutory Criminal Jury Instructions 32.12A and 32.12B.

## 13.08 – Trafficking of Persons for Forced Labor or Services

The crime of trafficking of persons for forced labor or services requires proof that the defendant knowingly:

[trafficked another person with the intent or knowledge that the other person would be subject to forced labor or services]

[benefited, financially or by receiving anything of value, from participation in a venture that was engaged in an act of unlawfully obtaining labor or services]

[benefited, financially or by receiving anything of value, from participation in a venture that was engaged in an act of sex trafficking]

[benefited, financially or by receiving anything of value, from participation in a venture that was engaged in an act of trafficking of persons for forced labor or services]

[benefited, financially or by receiving anything of value, from participation in a venture that was engaged in an act of [recruitment] [enticement] [harboring] [transportation] [making available to another] [obtaining] by any means a minor with the intent of causing the minor to engage in prostitution or sexually explicit performance]

[benefited, financially or by receiving anything of value, from participation in a venture that was engaged in an act of [recruitment] [enticement] [harboring] [transportation] [providing] [obtaining] by any means a minor knowing that the minor would engage in prostitution or sexually explicit performance]

"Forced labor or services" means labor or services that are performed or provided by another person and that are obtained through the defendant [either] [causing or threatening to cause serious physical injury to any person] [or] [restraining or threatening to physically restrain another person] [or] [withholding from another person that person's government records, identifying information or personal property].

 

"Traffic" means to entice, recruit, harbor, provide**, transport** or otherwise obtain another person by deception, coercion or force.

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**SOURCE:** A.R.S. § 13-1308 (statutory language as of August 9, 2017).

USE NOTE: Use Statutory Definition Instruction 1.056(b) defining "knowingly."

"Unlawfully obtaining labor or services" is defined in A.R.S. § 13-1306 (Statutory Definition Instruction 13.06).

"Sex trafficking" is defined in A.R.S. § 13-1307 (Statutory Definition Instruction 13.07).

"Prostitution is defined in A.R.S. § 13-3211(5).

"Sexually Explicit Performance" is defined in A.R.S. § 13-1307(C)(3)

"Forced labor or services" does not include ordinary household chores and reasonable disciplinary measures between a parent or legal guardian and the parent's or legal guardian's child. A.R.S. §13-1308(C)(1)(b).

## 13.10 – Abduction of a Child from a State Agency

The crime of abduction of a child from a state agency requires proof that the defendant, knowing or having reason to know that a child is entrusted by authority of law to the custody of a state agency,

[took, enticed or kept the child from the lawful custody of the state agency.]

[intentionally failed or refused to immediately return or impeded the immediate return of a child to the lawful custody of the state agency, including at the expiration of visitation or access.]

"State agency" means the department of child safety or the department of juvenile corrections.

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**SOURCE:** A.R.S. § 13-1310 (statutory language as of August 27, 2019).

**COMMENT:** A.R.S. § 13-1310 created two separate offenses.

 

# CHAPTER 25

## 25.01.1 – Definition of "Contraband"

"Contraband" means any dangerous drug, narcotic drug, marijuana, intoxicating liquor of any kind, deadly weapon, dangerous instrument, explosive or other article whose use or possession would endanger the safety, security or preservation of order in a correctional facility or a juvenile secure care facility, or of any person within a correctional or juvenile secure care facility.

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**SOURCE:** A.R.S. § 13-2501(1) (statutory language as of August 9, 2001).

**USE NOTE:** If it becomes an issue, the court may need to define the particular type of facility in question.

## 25.01.2 – Definition of "Correctional Facility"

"Correctional facility" means any place used for the confinement or control of a person:

1. charged with or convicted of an offense; *or*
2. held for extradition; *or*
3. pursuant to an order of court for law enforcement purposes.

Lawful transportation or movement incident to correctional facility confinement is within the control of a correctional facility. However, being within the control of a correctional facility does not include release on parole, on community supervision, on probation or by other lawful authority upon the condition of subsequent personal appearance at a designated place and time.

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**SOURCE:** A.R.S. § 13-2501(2) (statutory language as of August 9, 2001).

## 25.01.3 – Definition of "Custody"

"Custody" means the imposition of actual or constructive restraint pursuant to an on-site arrest or court order but does not include detention in a correctional facility, juvenile detention center or state hospital.

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**SOURCE:** A.R.S. § 13-2501(3) (statutory language as of August 9, 2001).

## 25.01.4 – Definition of "Escape"

"Escape" means:

1. departure from custody; *or*
2. departure from a juvenile secure care facility; *or*

3. departure from a juvenile detention facility; *or*
4. departure from an adult correctional facility

in which a person is held or detained with knowledge that such departure is not permitted; *or*

5. failure to return to custody or detention following a temporary leave granted for a specific purpose or for a limited period.

---

**SOURCE:** A.R.S. § 13-2501(4) (statutory language as of August 9, 2001).

## 25.02 – Escape in the Third Degree

The crime of escape in the third degree requires proof that the defendant:

1. was [arrested for] [charged with] [found guilty of] a misdemeanor or petty offense; *and*
2. knowingly escaped or attempted to escape from custody.

---

**SOURCE:** A.R.S. § 13-2502 (statutory language as of 1983).

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

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

"Custody" and "escape" are defined in A.R.S. § 13-2501 (Statutory Definition Instructions 25.01.3 and 25.01.4).

## 25.03 – Escape in the Second Degree

The crime of escape in the second degree requires proof that the defendant:

[knowingly escaped or attempted to escape from an adult correctional facility/a juvenile detention facility/a juvenile secure care facility.]

[knowingly escaped or attempted to escape from custody as a result of being arrested for/charged with/or found guilty of/a felony.]

[knowingly escaped or attempted to escape from the Arizona State Hospital if the person was committed to the hospital for treatment as a sexually violent person.]

---

**SOURCE:** A.R.S. § 13-2503 (statutory language as of August 2, 2012).

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

The court shall instruct on the culpable mental state.

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

"Correctional facility," "custody" and "escape" are defined in A.R.S. § 13-2501 (Statutory Definition Instructions 25.01.2, 25.01.3 and 25.01.4).

Sexually violent persons are defined in Title 36, Chapter 37.

 

## 25.04 – Escape in the First Degree

The crime of escape in the first degree requires proof that:

1. The defendant knowingly escaped, or attempted to escape, from custody/an adult correctional facility/a juvenile secure care facility/a juvenile detention facility; *and*
2. The escape, or attempt to escape, involved the defendant's use or threatened use of physical force/a deadly weapon/a dangerous instrument /against another person.

---

**SOURCE:** A.R.S. § 13-2504 (statutory language as of July 21, 1997).

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

The court shall instruct on the culpable mental state.

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

"Correctional facility," custody" and "escape" are defined in A.R.S. § 13-2501 (Statutory Criminal Instructions 25.01.2, 25.01.3 and 25.01.4).

## 25.05 – Promoting Prison Contraband

The crime of promoting prison contraband requires proof that the defendant knowingly:

[took contraband into a correctional facility or the grounds of such facility.]

[conveyed contraband to any person confined in a correctional facility.]

[made, obtained, or possessed contraband while being confined in a correctional facility.]

[made, obtained, or possessed contraband while being lawfully transported or moved incident to correctional facility confinement.]

[with reasonable grounds to believe there was a violation, or attempted violation, of promoting secure care facility contraband, failed to immediately report the violation, or attempted violation, to the official in charge of the facility or to a peace officer.]

---

**SOURCE:** A.R.S. § 13-2505 (statutory language as of 1992).

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

A violation based on the duty to report is a class 5 felony. With regard to all other bases for violations, the classification of the offense depends on the nature of the contraband. *See* A.R.S. § 13-2505(C). If the class 2 and class 5 are charged together or if the evidence presented at trial shows different types of contraband supporting both the class 2 and class 5 offenses, then the court should use a separate finding on the verdict form such as:

(Complete this portion of the verdict form only if you find the defendant guilty of promoting prison contraband. You must find each specific item unanimously and beyond a reasonable doubt.)

We, the jury, find that the contraband was (check all that apply):

_____ deadly weapon

_____ dangerous instrument

 

_____ explosive

_____ dangerous drug

_____ narcotic drug

_____ marijuana

_____ other contraband

Include only those items that apply on the verdict form. This type of separate finding should be used if there are multiple items of contraband even if all fall within the class 2 offense. If this type of finding is included on the verdict form, the court will need to include definitions for "deadly weapon," "dangerous instrument," "explosive," "dangerous drug," "narcotic drug" and "marijuana." A separate finding would not be needed if only one item of contraband is alleged or shown at trial.

There are two circumstances to which the statute does not apply set forth in A.R.S. § 13-2505(E).

The court shall instruct on the culpable mental state.

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

"Contraband" and "correctional facility" are defined in A.R.S. § 13-2501 (Statutory Definition Instructions 25.01.1 and 25.01.2).

## 25.07 – Failure to Appear in the First Degree

The crime of failure to appear in the first degree requires proof that the defendant:

1. was required by law to appear in connection with any felony; *and*
2. knowingly failed to appear as required, regardless of the disposition of the charge requiring the appearance.

---

**SOURCE:** A.R.S. § 13-2507 (statutory language as of July 21, 1997).

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

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

## 25.08 – Resisting Arrest

The crime of resisting arrest requires proof that:

1. A peace officer, acting under official authority, sought to arrest either the defendant or some other person; *and*
2. The defendant knew, or had reason to know, that the person seeking to make the arrest was a peace officer acting under color of such peace officer's official authority; *and*
3. The defendant intentionally prevented, or attempted to prevent, the peace officer from making the arrest; *and*

 

4. The means used by the defendant to prevent the arrest involved either the use or threat to use physical force or any other substantial risk of physical injury to either the peace officer or another.

[Whether the attempted arrest was legally justified is irrelevant.]

---

**SOURCE:** A.R.S. § 13-2508 (statutory language as of April 23, 1980).

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

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

**COMMENT:** In *State v. Cagle*, 228 Ariz. 374, 377-78 ¶¶ 11, 13 (App. 2011), the court held that the statute requires proof of intent only to prevent the arrest and does not require proof of intent to create a substantial risk of physical injury.

Case law protects on-duty peace officers dressed in uniform because the uniform identifies the peace officer. It is less clear that this instruction should be used when the evidence involves an off-duty peace officer without a uniform. *See generally State v. Zavala*, 136 Ariz. 389 (App. 1982); *State v. Davis*, 119 Ariz. 529 (App. 1978). Generally, this instruction would not be warranted under a lesser-included offense analysis when the crime of disorderly conduct (A.R.S. § 13-2904) is charged. Resisting arrest may be committed without committing disorderly conduct. *State v. Diaz*, 135 Ariz. 496 (App. 1983).

Lawfulness of the arrest is not an issue. *See State v. Jurden*, 239 Ariz. 526, 530 ¶ 18 (2016). However, the use of excessive force by the peace officer may be a defense. *See* A.R.S. § 13-404(B)(2); use Statutory Criminal Instruction 4.04.01.

There may be a need to define "arrest." *See* A.R.S. §§ 13-3881 and 13-3888; *State v. Stroud*, 209 Ariz. 410, 103 P.3d 912 (2005).

The resisting arrest statute describes an event-directed unit of prosecution; therefore, the defendant should be charged with one count for a single, continuous act of resisting arrest. *State v. Jurden*, 239 Ariz. 526, 373 P.3d 543 (2016).

## 25.08(A)(3) – Resisting Arrest (Passive Resistance)

The crime of resisting arrest requires proof that:

1. A peace officer, acting under official authority, sought to arrest either the defendant or some other person; *and*

2. The defendant knew, or had reason to know, that the person seeking to make the arrest was a peace officer acting under color of such peace officer's official authority; *and*

3. The defendant intentionally prevented, or attempted to prevent, the peace officer from making the arrest by engaging in passive resistance.

"Passive resistance" means a nonviolent physical act or failure to act that is intended to impede, hinder or delay the effecting of an arrest.

 

**SOURCE:** A.R.S. § 13-2805 (statutory language as of August 2, 2012).

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

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

## 25.081 – Defense to Resisting Arrest

Mere argument with or criticism of a peace officer is not sufficient grounds, without more, to find a person guilty of resisting arrest.

**SOURCE:** *State v. Tages*, 10 Ariz. App. 127, 457 P.2d 289 (1969); *State v. Snodgrass*, 121 Ariz. 409, 590 P.2d 948 (App. 1979); S*tate v. Snodgrass*, 117 Ariz. 107, 570 P.2d 1280 (App. 1977).

**USE NOTE:** In the appropriate circumstances, the failure to give a limiting instruction is reversible error. *State v. Tages*, 10 Ariz. App. 127, 457 P.2d 289 (1969). This instruction is required in order to avoid a constitutionally impermissible construction. *Id.* It is required only when there is a factual question whether the conduct had exceeded "merely remonstrating" against the peace officer. *Id.*

## 25.12 – Hindering Prosecution in the First Degree

The crime of hindering prosecution in the first degree requires proof that the defendant:

1. intended to hinder the [apprehension/prosecution/conviction/punishment] of another for any felony; *and*
2. rendered assistance to the other person.

**SOURCE:** A.R.S. § 13-2510 (statutory language as of September 19, 2007).

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

The court shall instruct on the culpable mental state.

"Intentionally or with intent to" is defined in A.R.S. § 13-105 (Statutory Definition Instructions 1.0510(a)(1).

"Rendered assistance to another person" is defined in A.R.S. § 13-2510. The appropriate definitions from that statute must be included with this instruction.

This offense is a class 5 felony. If the hindered prosecution involved terrorism or murder, or if the hindering was committed with the intent to promote, further or assist a criminal street gang, the offense is a class 3 felony. Therefore, if any of those facts are alleged, the court will need to instruct the jury on the issue and include a finding on the verdict form. The following sample instruction is offered as a guide:

> Should you find the defendant "guilty" of hindering prosecution in the first degree, you must decide whether the offense was committed with the intent to promote, further or assist a criminal street gang. The state has the burden

 

of proving this allegation beyond a reasonable doubt.

"Intent" has the same meaning as set forth previously in these instructions.

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

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

(a) Self-proclamation.

(b) Witness testimony or official statement.

(c) Written or electronic correspondence.

(d) Paraphernalia or photographs.

(e) Tattoos.

(f) Clothing or colors.

(g) Any other indicia of street gang membership.

Your finding on this issue must be set forth on the verdict form.

The following addition to the standard "guilty / not guilty" verdict form is offered as a guide:

[Complete this portion of the verdict form only if you find the defendant "guilty" of hindering prosecution in the first degree.]

We, the jury, find as follows (check only one):

___ The offense was committed with the intent to promote, further or assist a criminal street gang.

___ The offense was not committed with the intent to promote, further or assist a criminal street gang.

## 25.14 – Promoting Secure Care Facility Contraband

The crime of promoting secure care facility contraband requires proof that the defendant knowingly:

[took contraband onto the grounds of or into a secure care facility under the jurisdiction of the department of juvenile corrections.] *or*

[conveyed contraband to any person confined in a secure care facility under the jurisdiction of the department of juvenile corrections.] *or*

[made, obtained or possessed contraband while in a secure care facility under the jurisdiction of the department of juvenile corrections.]

[with reasonable grounds to believe there was a violation, or attempted violation, of promoting secure care facility contraband, failed to immediately report the violation, or attempted violation, to the official in charge of the facility or to a peace officer.]

 

**SOURCE:** A.R.S. § 13-2514 (statutory language as of August 9, 2001).

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

A violation based on the duty to report is a class 5 felony. With regard to all other bases for violations, the classification of the offense depends on the nature of the contraband. *See* A.R.S. § 13-2514(C). If the class 2 and class 5 are charged together or if the evidence presented at trial shows different types of contraband supporting both the class 2 and class 5 offenses, then the court should use a separate finding on the verdict form such as:

(Complete this portion of the verdict form only if you find the defendant guilty of promoting prison contraband. You must find each specific item unanimously and beyond a reasonable doubt.)

We, the jury, find that the contraband was (check all that apply):

_____ deadly weapon

_____ dangerous instrument

_____ explosive

_____ dangerous drug

_____ narcotic drug

_____ marijuana

_____ other contraband

Include only those items that apply on the verdict form. This type of separate finding should be used if there are multiple items of contraband even if all fall within the class 2 offense. If this type of finding is included on the verdict form, the court will need to include definitions for "deadly weapon", "dangerous instrument", "explosive", "dangerous drug", "narcotic drug" and "marijuana." A separate finding would not be needed if only one item of contraband is alleged or shown at trial.

The court shall instruct on the culpable mental state.

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

"Contraband" and "correctional facility" are defined in A.R.S. § 13-2501 (Statutory Definition Instructions 25.01.1 and 25.01.2).

A.R.S. § 13-2514(B) contains an exception "for information protected under attorney client privilege" regarding the obligation to report a violation of this section.

 

# CHAPTER 29

## 29.03 – Riot

The crime of riot requires proof that the defendant, while acting together with two or more other persons, recklessly [used force or violence] [threatened to use force or violence, if such threat was accompanied by immediate power of execution], which disturbed the public peace.

"Public" means affecting or likely to affect a substantial group of persons.

---

**SOURCE:** A.R.S. § 13-2903 (statutory language as of October 1, 1978).

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

The court shall instruct on the culpable mental state.

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

## 29.04 – Disorderly Conduct

The crime of disorderly conduct requires proof that the defendant knowingly or intentionally disturbed the peace or quiet of a [neighborhood] [family] [person] by recklessly [handling] [displaying] [discharging] a [deadly weapon] [dangerous instrument].

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

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

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

---

**SOURCE:** A.R.S. § 13-2904 (statutory language as of April 19, 1994).

**USE NOTE:** Use the bracketed language as appropriate to the facts.

If evidence has been raised that the offense of disorderly conduct is a lesser-included offense of another offense, the court should give an instruction on lesser-included offenses. (Standard Criminal Instruction 22).

The court shall instruct on the culpable mental state.

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

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

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

**COMMENT:** Disorderly conduct under A.R.S. § 13-2904(A)(6) is a lesser-included offense of intentional aggravated assault with a deadly weapon or dangerous instrument. *State v. Angle,* 149 Ariz. 478, 479, 720 P.2d 79, 80 (1986).

Resisting arrest is not a lesser-included offense of disorderly conduct. *State v. Diaz,* 135 Ariz. 496, 497, 662 P.2d 461, 462 (App. 1983).

Disorderly conduct is not a lesser-included offense of obstructing justice. *State v. O'Kelley,* 117 Ariz. 34, 37, 570 P.2d 805, 808 (App. 1977).

Disorderly conduct is not a lesser-included offense of drive-by shooting. *State v. Torres-Mercado,* 191 Ariz. 279, 282, 955 P.2d 35, 38 (App. 1997).

## 29.07 – False Reporting

The crime of false reporting requires proof that the defendant [initiated] [circulated] a report of a [bombing] [fire] [offense] [emergency] knowing that the report was false and intending that the report would:

[cause action of any sort by [an official] [a volunteer agency] organized to deal with emergencies.]

[place a person in fear of imminent serious physical injury.]

[(prevent) (interrupt) the occupation of any [building] [room] [place of assembly] [public place] [means of transportation.]

[and

The defendant has a prior conviction of false reporting.]

["Public" means affecting or likely to affect a substantial group of persons.]

["Public agency" means this state, any city, county, municipal corporation or district, any Arizona federally recognized Native American tribe or any other public authority that is located in whole or in part in this state and that provides police, fire fighting, medical or other emergency services.]

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**SOURCE:** A.R.S. § 13-2907 (statutory language as of August 12, 2005).

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

If the defendant has no prior conviction for false reporting, but is charged with more than one count of false reporting, the instruction need not include the element of the prior conviction.

The court shall instruct on the culpable mental state.

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

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

 

## 29.10 – Cruelty to Animals

The crime of [cruelty to animals] [interference with a working or service animal] requires proof that the defendant:

[intentionally, knowingly or recklessly subjected any animal under the defendant's custody or control to cruel neglect or abandonment.]

[intentionally, knowingly or recklessly failed to provide medical attention necessary to prevent protracted suffering to any animal under the defendant's custody or control.]

[intentionally, knowingly or recklessly inflicted unnecessary physical injury to any animal.]

[recklessly subjected any animal to cruel mistreatment.]

[intentionally, knowingly or recklessly killed any animal under the custody or control of another person without either legal privilege or consent of the owner.]

[recklessly interfered with, killed, or harmed a working or service animal without either legal privilege or consent of the owner.]

[intentionally, knowingly or recklessly left an animal unattended and confined in a motor vehicle under circumstances likely to result in physical injury to or death to the animal.]

[intentionally or knowingly subjected any animal under the defendant's custody or control to cruel neglect or abandonment that resulted in serious physical injury to the animal.]

[intentionally or knowingly subjected any animal to cruel mistreatment.]

[intentionally or knowingly interfered with, killed, or harmed a working or service animal without either legal privilege or consent of the owner.]

[intentionally or knowingly allowed any dog that was under the defendant's custody or control to interfere with, kill or cause physical injury to a service animal.]

[recklessly allowed any dog that was under the defendant's custody or control to interfere with, kill or cause physical injury to a service animal.]

[intentionally or knowingly obtained or exerted unauthorized control over a service animal with the intent to deprive the service animal handler of the service animal.]

[intentionally or knowingly subjected a domestic animal to cruel mistreatment.]

[intentionally or knowingly killed a domestic animal without legal privilege or the owner's consent.]

"Animal" means a mammal, bird, reptile or amphibian.

["Cruel mistreatment" means to torture or otherwise inflict unnecessary serious physical injury upon an animal or to kill an animal in a manner that caused protracted suffering to the animal.]

["Cruel neglect" means to fail to provide an animal with necessary food, water or shelter.]

["Handler" means a law enforcement officer or any other person who has successfully completed a course of training prescribed by the person's agency or the service animal

 

owner and who used a specially trained animal under the direction of the person's agency or the service animal owner.]

["Service animal" means an animal that has completed a formal training program that assists its owner in one or more daily living tasks that are associated with a productive lifestyle and that is trained to not pose a danger to the health and safety of the general public.]

["Working animal" means a horse or dog that is used by a law enforcement agency that is specially trained for law enforcement work and that is under the control of a handler.]

---

**SOURCE:** A.R.S. § 13-2910 (statutory language as of August 27, 2019).

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

The court shall instruct on the culpable mental state.

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

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

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

**COMMENT:** A specific defense exists under A.R.S. § 13-2910(B). The defense relates to the use of poisons in an attempt to protect people, livestock, and poultry or to control wild or domestic rodents on the property.

## 29.10.01 – Animal Fighting

The crime of animal fighting requires proof that the defendant knowingly:

[owned, possessed, kept or trained any animal with the intent that such animal engage in an exhibition of fighting with another animal.]

[for amusement or gain, caused any animal to fight with another animal, or caused any animals to injure each other.]

[permitted (insert specific act from either bracketed paragraph above) to be done on any premises under the defendant's charge or control.]

"Animal" means a mammal, bird, reptile or amphibian.

---

**SOURCE:** A.R.S. § 13-2910.01 (statutory language as of September 30, 2009).

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

The court shall instruct on the culpable mental state.

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

For cock fighting, *see* Criminal Jury Instruction 29.10.03.

This statute does not apply to prohibit or restrict activities permitted by or pursuant to Title 3 nor to animals that are trained to protect livestock predation and engage in actions to protect livestock.

 

## 29.10.02 – Presence at Animal Fight

The crime of presence at an animal fight requires proof that the defendant knowingly was present at any place or building where preparations were being made for an exhibition of the fighting of animals, or was present at such exhibition.

"Animal" means a mammal, bird, reptile or amphibian.

---

**SOURCE:** A.R.S. § 13-2910.02 (statutory language as of September 30, 2009).

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

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

**COMMENT:** The instruction is consistent with the statute. As written, the statute appears to create a strict liability offense for anyone present in a location where preparations are being made for an animal fight even though the person has no knowledge of those preparations. The same issue arises with A.R.S. § 13-2910.04, presence at cockfight.

## 29.10.03 – Cockfighting

The crime of cockfighting requires proof that the defendant knowingly

[owned, possessed, kept or trained any cock with the intent that such cock engage in an exhibition of fighting with another cock.]

[for amusement or gain, caused any cock to fight with another cock or caused any cocks to injure each other.]

[permitted (list specific act from either paragraph above) to be done on any premises under the defendant's charge or control.]

"Cock" means any male chicken, including game fowl except for wild birds.

---

**SOURCE:** A.R.S. § 13-2910.03 (statutory language as of November 23, 1998) and A.R.S. § 17-101 (statutory language as of September 21, 2006).

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

The court shall instruct on the culpable mental state.

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

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

**COMMENT:** The statute exempts "wildlife" as defined in A.R.S. § 17-101. The only applicable exception is wild birds.

## 29.10.06 – Defense to Cruelty to Animals and Bird Fighting

It is a defense to [cruelty to animals] [dog fighting] presence at [dog fight] [cockfighting] that the activity charged involved the possession, training, exhibition or use of a bird or

 

animal in the otherwise lawful sports of falconry, animal hunting, rodeos, ranching, or the training or use of hunting dogs.

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**SOURCE:** A.R.S. § 13-2910.06 (statutory language as of November 23, 1998).

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

## 29.11 – Interference with or Disruption of an Educational Institution

The crime of interference with or disruption of an educational institution requires proof that the defendant:

[intentionally, knowingly or recklessly interfered with or disrupted the normal operations of an educational institution by threatening to cause physical injury to any employee or student of an educational institution or any person on the property of an educational institution.]

[intentionally, knowingly or recklessly interfered with or disrupted the normal operations of an educational institution by threatening to cause damage to any educational institution, the property of any educational institution or the property of any employee or student of an educational institution.]

[intentionally or knowingly entered or remained on the property of any educational institution for the purpose of interfering with the lawful use of the property or in any manner as to deny or interfere with the lawful use of the property by others.]

[intentionally or knowingly refused to obey a lawful order by the chief administrative officer of an educational institution, or an officer or employee designated by the chief administrative officer to maintain order, for the defendant to leave the property of an educational institution if the officer or employee had reasonable grounds to believe:

1. any person or persons was/were committing any act that interfered with or disrupted the lawful use of the property by others at the educational institution; *or*
2. any person entered on the property of an educational institution for the purpose of committing any act that interfered with or disrupted the lawful use of the property by others at the educational institution.]

"Educational institution" means any university, college, community college, high school or common school in this state.

"Governing board" means the body, whether appointed or elected, that has the responsibility for the maintenance and government of an educational institution.

"Interference with or disruption of" includes any act that might reasonably lead to the evacuation or closure of any property of the educational institution or the postponement, cancellation or suspension of any class or other school activity. An actual evacuation, closure, postponement, cancellation or suspension is not required for the act to be considered an interference or disruption.

"Property of an educational institution" means all land, buildings, and other facilities that are owned, operated or controlled by the governing board of an educational institution and that are devoted to educational purposes.

 

**SOURCE:** A.R.S. § 13-2911 (statutory language as of August 22, 2002).

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

The court shall instruct on the culpable mental state.

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

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

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

**COMMENT:** To commit the offense under A.R.S. § 13-2911(A)(1), the prohibited act does not need to be directed at a specific individual, educational institution or property of an educational institution. A.R.S. § 13-2911(B).

## 29.12 – Unlawful Introduction of Disease or Parasite

The crime of unlawful introduction of [disease] [parasite] requires proof that the defendant:

1. knowingly introduced into the State of Arizona; *and*
2. a [disease] [parasite] of [animals] [poultry]; *and*
3. that constitutes a threat to [the livestock or poultry industry in Arizona] [human health] [human life].

It is a defense to this crime if the disease or parasite is introduced as part of any research conducted by the government or an educational institution.

**SOURCE:** A.R.S. § 13-2912 (statutory language as of August 22, 2002.)

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

The court shall instruct on the culpable mental state.

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

**COMMENT:** The chapter does not define disease or parasite of animals or poultry.

The phrase "livestock or poultry industry in Arizona" is unclear. It may refer to the livestock industry and the poultry industry, but industry is not stated in the plural, so it may refer only to individual livestock and to poultry in the sense of a threat to the business or industry of raising and processing poultry.

## 29.21B – Harassment of a Public Officer or Employee

The crime of harassment of a public [officer] [employee] requires proof that:

1. the defendant, with the intent to harass, filed a nonconsensual lien; *and*
2. the nonconsensual lien was filed against a public [officer] [employee]; *and*

 

3. the lien was not accompanied by an (order) (judgment) from a court of competent jurisdiction authorizing the filing of the lien.]

[The lien was not issued by (a governmental entity) (a political subdivision) (an agency) pursuant to its statutory authority.]

[The lien was not issued by (a validly licensed utility) (a validly licensed water delivery company) (a mechanics' lien claimant) (an entity created under covenants, conditions, restrictions or declaration affecting real property)].

"Harassment" means conduct directed at a specific person that would cause a reasonable person to be seriously alarmed, annoyed or harassed and the conduct in fact seriously alarms, annoys or harasses the person.

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**SOURCE:** A.R.S. § 13-2921 (statutory language of as August 21, 1998).

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

The court shall instruct on the culpable mental state.

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

## 29.21.01 – Aggravated Harassment

The crime of aggravated harassment requires proof that the defendant, [with intent to harass] [knowing that the defendant was harassing another person]:

1. [anonymously or otherwise communicated or caused a communication with another person by verbal, electronic, mechanical, telegraphic, telephonic or written means in a manner that harassed;]

   [continued to follow another person in or about a public place for no legitimate purpose after being asked to desist;]

   [repeatedly committed an act or acts that harassed another person;]

   [surveiled or caused another person to surveil a person for no legitimate purpose;]

   [on more than one occasion made a false report to a law enforcement, credit or social service agency;]

   [interfered with the delivery of any public or regulated utility to a person;]

*and*

2. [The harassment was done after a court had issued an (order of protection) (injunction against harassment) against the defendant in the harassment victim's favor and the (order of protection) (injunction against harassment) had been served and was still valid;]

   [The defendant has been previously convicted of the offense of (*insert previous conviction of domestic violence here*);]

*and*

3. The victim of the previously convicted offense was the same person alleged to have been harassed in this case.

 

"Harassment" means conduct directed at a specific person which would cause a reasonable person to be seriously alarmed, annoyed or harassed and the conduct in fact seriously alarms, annoys or harasses the person.

["Convicted" means a person who was convicted of an offense including domestic violence, or who was adjudicated delinquent for conduct that would constitute a historical prior felony conviction if the juvenile had been tried as an adult for the offense of domestic violence.]

---

**SOURCE:** A.R.S. §§ 13-2921.01(A) and (B) (statutory language as of August 25, 2004); 13-2921 (statutory language as of August 21, 1998).

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

The court shall instruct on the culpable mental state.

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

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

## 29.22A – Unlawful Interference with Emergency Public Safety Land Mobile Radio Frequency Transmissions

The crime of unlawful interference with emergency public safety land mobile radio frequency transmission requires proof that the defendant recklessly [interrupted] [impeded] [directly interfered] with an emergency communication over a public safety land mobile radio frequency communications network or system created for emergency communications.

"Emergency" means a situation in which a person is or is reasonably believed by the person transmitting the communication to be in imminent danger of serious physical injury or in which property is or is reasonably believed by the person transmitting the communication to be in imminent danger of damage or destruction.

"Public safety land mobile radio frequency" means a frequency designated as such by federal law.

"Public safety land mobile radio frequency communications network or system" means those radio services and emergency communications systems that are designated as such by federal law.

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**SOURCE:** A.R.S. § 13-2922 (statutory language as of May 19, 1998).

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

The court shall instruct on the culpable mental state.

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

 

## 29.23 – Stalking

The crime of stalking requires proof that the defendant:

1. knowingly or intentionally engaged in a course of conduct that was directed toward another person; *and*

[2. that conduct caused the victim to:

[suffer emotional distress or reasonably fear that the victim's property will be damaged or destroyed]

[suffer emotional distress or reasonably fear that the victim will be physically injured]

[suffer emotional distress or reasonably fear that the victim's family member will be physically injured]

[suffer emotional distress or reasonably fear that the victim's domestic animal or livestock will be physically injured]

[suffer emotional distress or reasonably fear that a person with whom the victim has or has previously had a romantic or sexual relationship will be physically injured]

[suffer emotional distress or reasonably fear that a person who regularly resides in the victim's household or has resided in the victim's household within the six months before the last conduct occurred will be physically injured]

[reasonably fear death]

[reasonably fear the death of the victim's family member]

[reasonably fear the death of the victim's domestic animal]

[reasonably fear the death of the victim's livestock]

[reasonably fear the death of a person with whom the victim has or has previously had a romantic or sexual relationship]

[reasonably fear the death of a person who regularly resides in the victim's household or has resided in the victim's household within the six months before the last conduct occurred].

"Course of conduct" means directly or indirectly, in person or through one or more third persons or by any other means, to do any of the following

A. Maintain visual or physical proximity to a specific person or directing verbal, written or other threats, whether express or implied, to a specific person on two or more occasions over a period of time, however short.

B. Use any electronic, digital or global positioning system device to surveil a specific person or a specific person's internet or wireless activity continuously for twelve hours or more or on two or more occasions over a period of time, however short, without authorization.

C. Communicate, or cause to be communicated, words, images or language by or through the use of electronic mail or an electronic communication that is directed at a specific person without authorization and without a legitimate purpose on more than one occasion.

 

Course of conduct does not include constitutionally protected activity or other activity authorized by law, the other person, the other person's authorized representative or if the other person is a minor, the minor's parent or guardian.

"Emotional distress" means significant mental suffering or distress that may, but does not have to, require medical or other professional treatment or counseling.

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**SOURCE:** A.R.S. § 13-2923 (statutory language as of August 6, 2016.)

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

The court shall instruct on the culpable mental state.

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

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

## 29.25 – Hoax

The crime of hoax requires proof that the defendant knowingly or intentionally engaged in conduct that:

1. was likely to impart the false impression that an act of terrorism [was taking place] [would take place]; *and*
2. [would reasonably be expected to cause] [Caused] an emergency response by a governmental agency.

"Terrorism" means any felony that involves the use of a deadly weapon or a weapon of mass destruction or the intentional or knowing infliction of serious physical injury with the intent to [(influence policy or affect the conduct of the state or any of the political subdivisions, agencies or instrumentalities of this state) (cause substantial interruption of public communications, communication service providers, public transportation, common carriers, public utilities, public establishments, or other public services)].

---

**SOURCE:** A.R.S. § 13-2925 (statutory language as of August 22, 2002) and 13-2301 (statutory language as of January 1, 2006).

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

The court shall instruct on the culpable mental state.

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

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

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

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

"Weapon of mass destruction" is defined in A.R.S. § 13-2301 (Statutory Definition Instruction 23.01.C.15).

 

## 29.26 – Abandonment or Concealment of a Dead Body

The crime of abandonment or concealment of a dead body requires proof that the defendant:

1. knowingly moved [a dead human body] [parts of a dead human body]; *and*

2. the move was with the intent to [(abandon) (conceal)] [(the dead human body) (parts of a dead human body)].

---

**SOURCE:** A.R.S. § 13-2926 (statutory language as of August 12, 2005.)

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

The court shall instruct on the culpable mental state.

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

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

**COMMENT:** Under A.R.S. § 36-325, the person responsible for the remains has seven days to submit the death certificate for registration to a local registrar.

 

# CHAPTER 31

## 31.01.01 – Definition of "Deadly Weapon"

"Deadly weapon" means anything that is designed for lethal use. The term includes a firearm.

## 31.01.02 – Definition of "Deface"

"Deface" means to remove, alter, or destroy the manufacturer's serial number.

## 31.01.03 – Definition of "Explosive"

"Explosive" means any dynamite, nitroglycerin, black powder or other similar explosive material including plastic explosives. The term "explosive" does not include ammunition or ammunition components such as primers, percussion caps, smokeless powder, black powder and black powder substitutes used for hand loading purposes.

## 31.01.04 – Definition of "Firearm"

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

## 31.01.05 – Definition of "Improvised Explosive Device"

"Improvised explosive device" means a device that incorporates explosives or destructive lethal, noxious, pyrotechnic or incendiary chemicals and that is designed to destroy, disfigure, terrify or harass.

## 31.01.06 – Definition of "Occupied Structure"

"Occupied structure" means any building, object, vehicle, watercraft, aircraft or place with sides and a floor that is separately securable from any other structure attached to it, that is used for lodging, business, transportation, recreation or storage and in which one or more human beings either is or is likely to be present or so near as to be in equivalent danger at the time the discharge of a firearm occurs. Occupied structure includes any dwelling house, whether occupied, unoccupied or vacant.

## 31.01.07 – Definition of "Prohibited Possessor"

"Prohibited possessor" means any person who:

 

[pursuant to court order has been found to constitute a danger to himself/herself or to others or have persistent or acute disabilities or grave disabilities and whose right to possess a firearm has not been restored pursuant to Arizona law.]

[has been convicted within or without the State of Arizona of a felony or who has been adjudicated delinquent for a felony [and whose civil right to possess or carry a gun or firearm has not been restored.]]

[is at the time of possession serving a term of imprisonment in any correctional or detention facility.]

[is at the time of possession serving a term of probation pursuant to a conviction for a domestic violence offense or a felony offense, parole, community supervision, work furlough, home arrest or release on any other basis or who is serving a term of probation or parole pursuant to the interstate compact.]

[is a prohibited possessor under federal law for shipping or transporting any firearm or ammunition in interstate or foreign commerce, or possessing any firearm or ammunition in or affecting commerce, or receiving any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, while being an alien illegally or unlawfully in the United States or having been admitted to the United States under a non-immigrant visa of the Immigration and Nationality Act.]

[has been found incompetent and subsequently has not been found competent.]

[is found guilty except insane.]

You may consider this evidence only as to whether the defendant is a prohibited possessor. [You must not consider this evidence for any other purpose.]

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**USE NOTE:** Language within the bracketed portion of paragraph 2 should only be given when the defendant has produced evidence demonstrating that his or her right to possess or carry a firearm has been restored. *See* Statutory Criminal Instruction 31.02, Affirmative Defense to Misconduct Involving Weapons under A.R.S. § 13-3101(A)(6)(b).

Language within the bracketed portion of the last paragraph should only be given when appropriate. If, however, a defendant's prohibited possessor status can be considered for another reason, such as prior conviction that can be considered under Evidence Rule 609, the bracketed language should be omitted.

## 31.01.08 – Definition of "Prohibited Weapon"

"Prohibited weapon" means:

[an item that is a (bomb) (grenade) (rocket having a propellant charge of more than four ounces) (mine) *and* that is explosive, incendiary or poison gas]

[a device that is designed, made or adapted to muffle the report of a firearm.]

[a firearm that is capable of shooting more than one shot automatically, without manual reloading, by a single function of the trigger.]

[a rifle with a barrel length of less than sixteen inches.]

[a shotgun with a barrel length of less than eighteen inches.]

 

[any firearm that is made from a rifle or a shotgun and that, as modified, has an overall length of less than twenty-six inches.]

[a breakable container that contains a flammable liquid with a flashpoint of one hundred fifty degrees Fahrenheit or less and that has a wick or similar device capable of being ignited.]

[a chemical or combination of chemicals, compounds or materials, including dry ice, that is (possessed) (manufactured) for the purpose of generating a gas to cause a mechanical failure, rupture or bursting.]

[a chemical or combination of chemicals, compounds or materials, including dry ice, that is (possessed) (manufactured) for the purpose of generating an (explosion) (detonation) of the chemical or combination of chemicals compounds or materials.]

[an improvised explosive device.]

[any combination of parts or materials that is designed and intended for use in making or converting a device into an item that is (list prohibited weapon from A.R.S. §13-3101(A)(8)(a)(i), (v) or (vii).]

The term "prohibited weapon" does not include any fireworks that are imported, distributed or used in compliance with state laws or local ordinances, any propellant, propellant actuated devices or propellant actuated industrial tools that are manufactured, imported or distributed for their intended purposes or a device that is commercially manufactured primarily for the purpose of illumination.

[The term "prohibited weapon" does not include any firearms or devices that are possessed, manufactured or transferred in compliance with federal law.]

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**SOURCE:** A.R.S. § 13-3101 (statutory language as of August 27, 2019).

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

The determination of whether a firearm is permanently inoperable under A.R.S. § 13-3101(A)(4) is a question of fact. *State v. Young*, 192 Ariz. 303, 306-307, 965 P.2d 37, 40-41 (App. 1998) (noting that a disassembled or broken weapon may constitute a firearm if it can be made operable with reasonable preparation, including the addition of a readily replaceable part or the accomplishment of a quickly-effected repair).

Neither operability nor knowledge of operability of a firearm is an element of the offense; rather, permanent inoperability is an affirmative defense. *State v. Young*, 192 Ariz. 303, 307, 965 P.2d 37, 41 (App. 1998).

If the State has alleged that the prohibited possessor has a felony conviction, the defendant has the burden of proof and the burden of persuasion to show by a preponderance of the evidence that the defendant's civil rights to possess or carry a gun or firearm has been restored. *State v. Kelly,* 210 Ariz. 460, 464-65, 112 P.3d 682, 686-87 (App. 2005).

If the State has alleged that the prohibited possessor has been found to constitute a danger to himself/herself or others, the court should ensure that the finding was made under A.R.S. § 36-540.

 

If the State alleged that the prohibited possessor was a prohibited possessor as defined under federal law (18 U.S.C. § 922(g)(5)) pursuant to A.R.S. § 13-3101(A)(6)(e) prior to September 26, 2008, the court should insure that the federal finding was not made under 18 U.S.C. § 922(y) (pertaining to aliens admitted under non-immigrant visas). When the offense occurred on or between August 24, 2004 and September 25, 2008, the State must prove all of the provisions of 18 U.S.C. § 922(g)(5), including the requirement that any firearm or ammunition allegedly possessed by the defendant must have an interstate or foreign commerce nexus. *State ex rel. Thomas v. Contes*, 216 Ariz. 525, 530 ¶16, 169 P.3d 115, 120 ¶16 (App. 2007).

For alleged violations of A.R.S. § 13-3101(A)(6)(e) [recodified as A.R.S. § 13-3101(A)(7)(e)] occurring on or after September 26, 2008, the Committee was unable to find a definition of "undocumented alien" in either federal or state statutes or case law. The following definition of "alien" is taken from 8 U.S.C. §101(a)(3), which the court may choose to use in its instruction: "The term "alien" means any person not a citizen or national of the United States." The term "undocumented" appears to be the commonly understood meaning of the word. The categories of "nonimmigrant aliens" can be found in 8 U.S.C. §1101(a)(15)(A)–(V).

In a prosecution alleging the possession of a sawed-off rifle or sawed-off shotgun under A.R.S. § 13-3101(A)(7)(d) [now codified as A.R.S. § 13-3101(A)(8)(a)(iv)], the State must prove that the defendant knew that he or she possessed a sawed-off or short-barreled shotgun or rifle, but the State does not have to prove that the defendant knew the specific barrel or overall length that made it a statutorily prohibited weapon. *State v. Young*, 192 Ariz. 303, 311-12, 965 P.2d 37, 45-46 (App. 1998).

The State is not required to prove the non-registration of a prohibited weapon by the United States Treasury Department, which is instead an affirmative defense to be proved by the defense. *State v. Berryman,* 178 Ariz. 617, 621, 875 P.2d 850, 854 (App. 1994) (holding that the failure of the police to test the weapon or to determine registration did not call for a *Willits* instruction, because the burden of showing such is on the defendant).

In regard to a prohibited possessor under A.R.S. § 13-3101(A)(67)(d) who was at the time of possession serving a term of probation, parole, etc., as defined in Statutory Criminal Definition Instruction 31.01.06**7**, the offense is based upon the defendant being on probation, etc., at the time of the possession, regardless of whether the underlying conviction was vacated after the time of possession. *State v. Mangum*, 214 Ariz. 165, 169 ¶13, 150 P.3d 252, 256 ¶13 (App. 2007) (holding that the subsequent invalidation of the underlying conviction is irrelevant and shall be precluded from evidence, argument and jury instructions.)

The last bracketed paragraph in 31.01.08 applies only to A.R.S. § 13-3101(A)(8)(a)(i), (ii), (iii) and (iv).

**COMMENT:** The reference to Arizona law in the first bracketed item in 31.01.07 is A.R.S. § 13-924 regarding the restoration of right to possess a firearm by mentally ill persons.

A flare gun is not a prohibited weapon. *In Re Robert A.*, 199 Ariz. 485, 487, 19 P.3d 626, 628 (App. 2001) (holding that a flare gun falls within the exception in A.R.S. § 13-3101(A)(7) [now codified as A.R.S. § 13-3101(A)(8)(b)(ii)] regarding propellant actuated devices commercially manufactured for the purpose of illumination).

 

Effective September 29, 2019, it is no longer a criminal offense to possess a nunchaku. The offense of misconduct involving prohibited weapons does not apply to a nunchaku under A.R.S. § 13-3101(8)(a)(v) (prior to amendment of statute effective September 29, 2019) if the nunchaku is possessed for the purposes of preparing for, conducting or participating in lawful exhibition, demonstrations, contests or athletic events involving the use of such weapon. A.R.S. § 13-3102(H) (prior to amendment of statute effective September 29, 2019).

From August 25, 2004 to September 25, 2008, A.R.S. § 13-3101(A)(6)(e) provided that one was a prohibited possessor if that person was considered a prohibited possessor under federal law (18 U.S.C. § 922(g)(5)) As of September 26, 2008, A.R.S. §3-3101(A)(6)(e) was recodified as A.R.S. § 13-3101(A)(7)(e)] and rewritten to remove that definition and replaced with the requirement that the person was "an undocumented alien or a nonimmigrant alien traveling with or without documentation in this state for business or pleasure or who is studying in this state and who maintains a foreign residence abroad," with certain exceptions.

Therefore, in regard to A.R.S. § 13-3101(A)(6)(e), the following comments apply to any offenses that occurred on or between August 25, 2004 and September 25, 2008:

With respect to Statutory Criminal Definition Instruction 31.01.06, A.R.S. § 13-3101(A)(6)(e) provides that a person who would be a prohibited possessor under 18 U.S.C. § 922(g)(5), is also a prohibited possessor under Arizona law unless the person is exempted by a provision in 18 U.S.C. § 922(y). *See State ex rel. Thomas v. Contes*, 216 Ariz. 525, 530 ¶16, 169 P.3d 115, 120 ¶16 (App. 2007) (holding that the plain language of §13-3101(A)(6)(e) adopts all of 18 U.S.C. §922(g)(5), including the necessity to show a nexus to interstate or foreign commerce).

While A.R.S. § 13-3101(A)(6)(e) refers to the relevant federal statute by its U.S.C. number, Statutory Criminal Definitional Instruction 31.01.06 has included the text of the federal statute to make it more "jury friendly." The statutory language of A.R.S. § 13-3101(A)(6)(e) does not require that a defendant be previously convicted of a violation of 18 U.S.C. § 922(g)(5) in order to be a prohibited possessor, only that the State prove a defendant is in violation of the provisions of such federal statute. However, the trial court should be aware that a federal preemption argument could be asserted in regard to the element of proving a defendant's immigration status in the absence of a prior federal conviction. The United States Supreme Court in *DeCanas v. Bica,* 424 U.S. 351, 354-58 (1975) held that a state statute could not regulate immigration, would be preempted if Congress demonstrated a manifest intent to occupy the field and could not conflict with federal law. In *State v. Hernandez-Mercado*, 124 Wash. 2d 368, 379-81, 879 P.2d 283, 290-291 (1994), the Washington Supreme Court, relying upon *DeCanas,* affirmed a conviction under a similar, but less specific, state firearms possession statute of a defendant who pled guilty to not being a citizen and who had not been previously convicted of a federal alienage offense. The court in *Hernandez-Mercado* held that the statute was not preempted by the Immigration and Nationality Act (8 U.S.C. § 1101 *et seq.*) and the federal firearms laws (18 U.S.C. §§ 921-930), and did not violate the Equal Protection Clause. Nonetheless, an Arizona appellate court has not ruled on this issue. Absent further appellate clarification, there is the possibility that a state court jury would be held to be preempted from finding a violation of federal law absent a prior federal conviction of 18 U.S.C. § 922(g)(5). If the preemption argument is accepted by the trial court, the following instruction is suggested:

 

"Prohibited possessor" means any person who is a prohibited possessor under federal law for a conviction in federal court of shipping or transporting any firearm or ammunition in interstate or foreign commerce, or possessing any firearm or ammunition in or affecting commerce, or receiving any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, while being an alien illegally or unlawfully in the United States or having been admitted to the United States under a non-immigrant visa of the Immigration and Nationality Act.

In regard to A.R.S. § 13-3101(A)(7)(e), the following comment applies to any offenses that occurred on or after September 26, 2008:

As of September 26, 2008, the legislature expanded the definition of prohibited possessor under A.R.S. § 13-3101(A)(7)(e) from its previous limitation of a federal prohibited possessor under 18 U.S.C. § 922(g)(5) to include all undocumented aliens and nonimmigrant aliens, subject to certain enumerated exceptions. Therefore, as of September 26, 2008, a prohibited possessor under the statute is no longer limited to the requirements of 18 U.S.C. § 922(g)(5).

## 31.01.09 – Definition of "Trafficking"

"Trafficking" means to sell, transfer, distribute, dispense or otherwise dispose of a weapon explosive to another person, or to buy, receive, possess or obtain control of a weapon or explosive with the intent to sell, transfer, distribute, dispense or otherwise dispose of the weapon or explosive to another person.

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**SOURCE:** A.R.S. § 13-3101 (statutory language as of August 2, 2012).

## 31.02.01 – Definition of "Public Establishment"

"Public establishment" means a structure, vehicle or craft that is owned, leased or operated by the State of Arizona or a political subdivision of the State of Arizona.

## 31.02.02 – Definition of "Public Event"

"Public event" means a specifically named or sponsored event of limited duration either conducted by a public entity or conducted by a private entity with a permit or license granted by a public entity. Public event does not include an unsponsored gathering of people in a public place.

## 31.02.03 – Definition of "School"

"School" means a public or nonpublic kindergarten program, common school or high school.

 

## 31.02.04 – Definition of "School Grounds"

"School grounds" means in, or on the grounds of, a school.

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**SOURCE:** A.R.S. § 13-3102(K) (statutory language as of September 21, 2006).

## 31.07 – Unlawful Discharge of Firearms

The crime of unlawful discharge of a firearm requires proof that the defendant, with criminal negligence, discharged a firearm within or into the limits of a municipality.

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**SOURCE:** A.R.S. §13-3107 (statutory language as of July 20, 2011).

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

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

"Firearm" is defined in A.R.S. § 13-3101 (Statutory Criminal Instruction 31.01.04).

"Municipality" is defined in A.R.S. §13-3107 (Statutory Criminal Instruction 31.07.01).

This offense shall not apply if the firearm is discharged:

1. as allowed by Chapter 4;
2. on a properly supervised range;
3. To lawfully take wildlife during an open season established by the Arizona Game and Fish Commission and subject to the limitations prescribed by Title 17 and Arizona Game and Fish Commission rules and orders. This paragraph does not prevent a city, town or county from adopting an ordinance or rule restricting the discharge of a firearm within one-fourth mile of an occupied structure. For purposes of this paragraph, "take" has the same meaning prescribed in section 17-101.
4. for the control of nuisance wildlife by permit from the Arizona Game & fish Department or the U.S. Fish & Wildlife Service;
5. by special permit of the chief of police of the municipality;
6. as required by an animal control officer in the performance of official duties;
7. using blanks;
8. more than one mile from any occupied structure as defined in §13-3101; or
9. in self-defense or defense of another person against an animal attack if a reasonable person would believe that deadly physical force against the animal is necessary and reasonable under the circumstances to protect oneself or the other person.

A.R.S. § 13-3107(C).

 

**COMMENT:** In a case brought under the predecessor to this statute, A.R.S. §§ 13-917 and 917.01, the Arizona Supreme Court held that the intent to do bodily harm was not an element of the statute. *State v. Andrews,* 106 Ariz. 372, 377, 476 P.2d 673, 678 (1970).

## 31.07.01 – Definition of "Municipality"

"Municipality" means any city or town and includes any property that is fully enclosed within the city or town.

## 31.07.02 – Definition of "Properly Supervised Range"

"Properly supervised range" means a range that is operated:

1. by a club affiliated with the national rifle association of America, the amateur trapshooting association, the national skeet association or any other nationally recognized shooting organization, or by any public or private school, *or*
2. with the approval of any agency of the federal government, the State of Arizona, a county or a city within which the range is located; *or*
3. with adult supervision for shooting air or carbon dioxide gas operated guns, or for shooting in underground ranges on private or public property.

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**SOURCE:** A.R.S. § 13-3107(D) (statutory language as of July 18, 2000).

## 31.16.01 – Definition of "Body Armor"

"Body armor" means any clothing or equipment designed in whole or in part to minimize the risk of injury from a deadly weapon.

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**SOURCE:** A.R.S. § 13-3116(C) (statutory language as of August 6, 1999).

**USE NOTE**: "Deadly weapon" is defined in A.R.S. § 13-3101(A)(1) (Statutory Definition Instruction 31.01.01).

## 31.17.01 – Definition of "Authorized Remote Stun Gun"

"Authorized remote stun gun" means a remote stun gun that has all of the following:

1. an electrical discharge that is less than one hundred thousand volts and less than nine joules of energy per pulse; *and*
2. a serial or identification number on all projectiles that are discharged from the remote stun gun; *and*
3. an identification and tracking system that, on deployment of remote electrodes, disperses coded material that is traceable to the purchaser through records that are

 

kept by the manufacturer on all remote stun guns and all individual cartridges sold; *and*

4. a training program that is offered by the manufacturer.

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**SOURCE:** A.R.S. § 13-3117(E)(1) (statutory language as of August 12, 2005).

## 31.17.02 – Definition of "Remote Stun Gun"

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

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**SOURCE:** A.R.S. § 13-3117(A)(2) (statutory language as of August 12, 2005).

## 31.023 – Misconduct Involving Weapons (Prohibited Weapon)

The crime of misconduct involving weapons requires proof that:

1. the defendant knowingly [manufactured] [possessed] [transported] [sold] [transferred] a weapon; *and*
2. the weapon is a prohibited weapon.

---

**SOURCE:** A.R.S. § 13-3102(A)(3) (statutory language as of September 21, 2006).

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

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

"Prohibited weapon" is defined in A.R.S. § 13-3101 (Statutory Definition Instruction 31.01.07).

"Possession" is defined in A.R.S. § 13-105(31) (Statutory Definition Instruction 1.0531).

In *State v. Young*, 192 Ariz. 303, 311-12, 965 P.2d 37, 45-46 (App. 1998), a case alleging a violation of A.R.S. § 13-3102, the court rejected the defendant's argument that the State had to prove that he knew the specific characteristics of the weapon that made it prohibited, i.e., the length of his sawed-off or short-barreled shotgun was under the legal limit, but the court, relying upon a line of federal cases, required the State to prove a less rigorous scienter requirement that the defendant knew that the weapon was sawed-off or short-barreled. The court in *Young* specifically held that A.R.S. § 13-3102(A)(3) is not a strict liability crime and that the inclusion of this less rigorous scienter requirement provides some level of knowledge to remove it from being a strict liability crime. The court and counsel may wish to consider adding language to the instruction when the prohibited weapon involves a short-barreled or sawed-off shotgun.

 

In *State v. Kerr*, 142 Ariz. 426, 433, 690 P.2d 145, 152 (App. 1984), the court held that the definition of "possession" in A.R.S. § 13-105 is a correct instruction to give under A.R.S. § 13-3102(A)(3), but it noted that constructive possession (defendant was merely in the home of a registered firearm owner) was not sufficient to violate this subsection. *Cf. State v. Coley,* 158 Ariz. 471, 471-72, 763 P.2d 535, 535-36 (App. 1988) (noting that *Kerr* was correct as to A.R.S. § 13-3102(A)(3), but that the giving of an instruction on constructive possession was not error in regard to a violation of A.R.S. § 13-3102(A)(4), which pertains to possession by a prohibited possessor rather than possession of a prohibited weapon).

The State is not required to prove the nonregistration of a prohibited weapon by the United States Treasury Department, which is instead an affirmative defense to be proved by the defense. *State v. Berryman,* 178 Ariz. 617, 621, 875 P.2d 850, 854 (App. 1994) (holding that the failure of the police to test the weapon or to determine registration did not call for a *Willits* instruction, because the burden of showing such is on the defendant).

This offense shall not apply to:

1. A peace officer or anyone summoned by a peace officer to assist and while actually assisting in the performance of official duties;
2. A member of the U.S. military forces or national guard in the performance of official duties;
3. A warden, deputy warden or correctional officer of the Arizona Department of Corrections; *or*
4. A person specifically licensed, authorized or permitted pursuant to an Arizona state or federal statute.

A.R.S. § 13-3102(C).

This offense shall not apply to:

1. The possessing, transporting, selling or transferring weapons by a museum as part of its collection or an educational institution for educational purposes or by an authorized employee of such museum or institution if:
   a. Such museum or institution is operated by the United States or the State of Arizona or a political subdivision of the State of Arizona or by an organization under federal law as a recipient of a charitable contribution; *and*
   b. Reasonable precautions were taken with respect to theft or issue of such material.
2. The regular and lawful transporting as merchandise.
3. Acquisition by a person by operation of law such as by gift, devise or descent or in a fiduciary capacity as a recipient of the property or former property of an insolvent, incapacitated or deceased person.

A.R.S. § 13-3102(D).

This offense does not apply to the merchandise of an authorized manufacturer of or dealer in prohibited weapons, when such material is intended to be manufactured, possessed, transported, sold or transferred solely for or to a dealer, a regularly constituted or appointed state, county or municipal police department or police officer, detention facility, the military

 

service of any state or the United States, a museum or educational institution or a person specifically licensed or permitted pursuant to federal or state law. A.R.S. § 13-3102(E).

This offense does not apply to a nunchaku under A.R.S. § 13-3101(A)(7)(e) if the nunchaku is possessed for the purposes of preparing for, conducting or participating in lawful exhibition, demonstrations, contests or athletic events involving the use of such weapon. A.R.S. § 13-3102(H).

**COMMENT:** A flare gun is not a prohibited weapon. *In Re Robert A.*, 199 Ariz. 485, 487, 19 P.3d 626, 628 (App. 2001) (holding that a flare gun falls within the exception in A.R.S. § 13-3101(A)(7) regarding propellant actuated devices commercially manufactured for the purpose of illumination).

The fact that there is a valid registration in the name of another is not a defense to actual possession under A.R.S. § 13-3102. *State v. Kerr,* 142 Ariz. 426, 434, 690 P.2d 145, 153 (App. 1984).

## 31.023-A – Misconduct Involving Weapons (Prohibited Weapon)

The crime of misconduct involving weapons requires proof that:

1. the defendant knowingly [manufactured] [possessed] [transported] [sold] [transferred] a weapon; *and*
2. the weapon is a prohibited weapon.

---

**SOURCE:** A.R.S. § 13-3102(A)(3) (statutory language as of September 26, 2008).

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

Use this instruction in all prohibited weapon cases except those involving dry ice. If the offense involves dry ice, use Statutory Criminal Instruction 31.023-B.

The court shall instruct on the culpable mental state.

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

"Prohibited weapon" is defined in A.R.S. § 13-3101 (Statutory Criminal Instruction 31.01.08).

"Possession" is defined in A.R.S. § 13-105(31) (Statutory Criminal Instruction 1.05(31)).

In *State v. Young*, 192 Ariz. 303, 311-12, 965 P.2d 37, 45-46 (App. 1998), a case alleging a violation of A.R.S. § 13-3102, the court rejected the defendant's argument that the state had to prove that he knew the specific characteristics of the weapon that made it prohibited, i.e., the length of his sawed-off or short-barreled shotgun was under the legal limit, but the court, relying upon a line of federal cases, required the State to prove a less rigorous scienter requirement that the defendant knew that the weapon was sawed-off or short-barreled. The court in *Young* specifically held that A.R.S. § 13-3102(A)(3) is not a strict liability crime and that the inclusion of this less rigorous scienter requirement provides some level of knowledge to remove it from being a strict liability crime. The court and counsel may wish to consider adding language to the instruction when the prohibited weapon involves a short-barreled or sawed-off shotgun.

 

In *State v. Kerr,* 142 Ariz. 426, 433, 690 P.2d 145, 152 (App. 1984), the court held that the definition of "possession" in A.R.S. § 13-105 is a correct instruction to give under A.R.S. § 13-3102(A)(3), but it noted that constructive possession (defendant was merely in the home of a registered firearm owner) was not sufficient to violate this subsection. *Cf. State v. Coley,* 158 Ariz. 471, 471-72, 763 P.2d 535, 535-36 (App. 1988) (noting that *Kerr* was correct as to A.R.S. § 13-3102(A)(3), but that the giving of an instruction on constructive possession was not error in regard to a violation of A.R.S. § 13-3102(A)(4), which pertains to possession by a prohibited possessor rather than possession of a prohibited weapon).

The State is not required to prove the nonregistration of a prohibited weapon by the United States Treasury Department, which is instead an affirmative defense to be proved by the defense. *State v. Berryman,* 178 Ariz. 617, 621, 875 P.2d 850, 854 (App. 1994) (holding that the failure of the police to test the weapon or to determine registration did not call for a *Willits* instruction, because the burden of showing such is on the defendant).

This offense shall not apply to:

1. a peace officer or anyone summoned by a peace officer to assist and while actually assisting in the performance of official duties;
2. a member of the U.S. military forces or national guard in the performance of official duties;
3. a warden, deputy warden or correctional officer of the Arizona Department of Corrections; *or*
4. a person specifically licensed, authorized or permitted pursuant to an Arizona state or federal statute.

A.R.S. § 13-3102(C).

This offense shall not apply to:

1. the possessing, transporting, selling or transferring weapons by a museum as part of its collection or an educational institution for educational purposes or by an authorized employee of such museum or institution if:
   a. Such museum or institution is operated by the United States or the State of Arizona or a political subdivision of the State of Arizona or by an organization under federal law as a recipient of a charitable contribution; and
   b. Reasonable precautions were taken with respect to theft or issue of such material.
2. the regular and lawful transporting as merchandise.
3. acquisition by a person by operation of law such as by gift, devise or descent or in a fiduciary capacity as a recipient of the property or former property of an insolvent, incapacitated or deceased person.

A.R.S. § 13-3102(D).

This offense does not apply to the merchandise of an authorized manufacturer of or dealer in prohibited weapons, when such material is intended to be manufactured, possessed, transported, sold or transferred solely for or to a dealer, a regularly constituted or appointed state, county or municipal police department or police officer, detention facility, the military

 

service of any State or the U.S., a museum or educational institution or a person specifically licensed or permitted pursuant to federal or state law. A.R.S. § 13-3102(E).

This offense does not apply to a nunchaku under A.R.S. § 13-3101(A)(7)(e) [now codified as A.R.S. § 13-3101(A)(8)(a)(v)] if the nunchaku is possessed for the purposes of preparing for, conducting or participating in lawful exhibition, demonstrations, contests or athletic events involving the use of such weapon. A.R.S. § 13-3102(H).

**COMMENT:** A flare gun is not a prohibited weapon. *In Re Robert A.*, 199 Ariz. 485, 487, 19 P.3d 626, 628 (App. 2001) (holding that a flare gun falls within the exception in A.R.S. § 13-3101(A)(7) [now codified as A.R.S. § 13-3101(A)(8)(b)(ii)] regarding propellant actuated devices commercially manufactured for the purpose of illumination).

The fact that there is a valid registration in the name of another is not a defense to actual possession under A.R.S. § 13-3102. *State v. Kerr,* 142 Ariz. 426, 434, 690 P.2d 145, 153 (App. 1984).

## 31.023-B – Misconduct Involving Weapons (Prohibited Weapon Involving Dry Ice)

The crime of misconduct involving weapons requires proof that:

1. the defendant knowingly [manufactured] [possessed] [transported] [sold] [transferred] a weapon; and
2. the weapon is a prohibited weapon; and

[3. the defendant knowingly possessed the dry ice with the intent to cause (injury to) (death) of another person.]

[3. the defendant knowingly possessed the dry ice with the intent to cause damage to the property of another person.]

---

**SOURCE:** A.R.S. § 13-3102(A)(3) (statutory language as of July 31, 2009).

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

Use this instruction if the offense involves dry ice. In all other prohibited weapon cases, except those involving dry ice, use Statutory Criminal 31.023-A.

The court shall instruct on the culpable mental state.

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

"Intentionally" or "with intent to" is defined in A.R.S. § 13-105.

"Prohibited weapon" is defined in A.R.S. § 13-3101. Statutory Criminal Instruction 31.01.08.

"Possession" is defined in A.R.S. § 13-105(31). Statutory Criminal Instruction 1.05(31).

This offense shall not apply to:

1. A peace officer or anyone summoned by a peace officer to assist and while actually assisting in the performance of official duties;

 

2. A member of the U.S. military forces or national guard in the performance of official duties;
3. A warden, deputy warden, community correctional officer, detention officer, special investigator or correctional officer of the Arizona Department of Corrections or the department of juvenile corrections; or
4. A person specifically licensed, authorized or permitted pursuant to an Arizona state or federal statute.

A.R.S. §13-3102(C).

This offense shall not apply to:

1. The possessing, transporting, selling or transferring weapons by a museum as part of its collection or an educational institution for educational purposes or by an authorized employee of such museum or institution if:
   a. Such museum or institution is operated by the United States or the State of Arizona or a political subdivision of the State of Arizona or by an organization under federal law as a recipient of a charitable contribution; and
   b. Reasonable precautions were taken with respect to theft or issue of such material.
2. The regular and lawful transporting as merchandise.
3. Acquisition by a person by operation of law such as by gift, devise or descent or in a fiduciary capacity as a recipient of the property or former property of an insolvent, incapacitated or deceased person.

A.R.S. § 13-3102(D).

This offense does not apply to the merchandise of an authorized manufacturer of or dealer in prohibited weapons, when such material is intended to be manufactured, possessed, transported, sold or transferred solely for or to a dealer, a regularly constituted or appointed state, county or municipal police department or police officer, detention facility, the military service of any State or the U.S., a museum or educational institution or a person specifically licensed or permitted pursuant to federal or state law. A.R.S. § 13-3102(E).

**COMMENT:** The fact that there is a valid registration in the name of another is not a defense to actual possession under A.R.S. § 13-3102. *State v. Kerr,* 142 Ariz. 426, 434, 690 P.2d 145, 153 (App. 1984).

## 31.024 – Misconduct Involving Weapons (Prohibited Possessor)

The crime of misconduct involving weapons requires proof that the defendant:

1. knowingly possessed a [deadly] [prohibited] weapon; *and*
2. was a prohibited possessor at the time of possession of the weapon.

---

**SOURCE:** A.R.S. § 13-3102(A)(4) (statutory language as of September 21, 2006).

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

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

 

"Deadly weapon" is defined in A.R.S. § 13-3101 (Statutory Definition Instruction 31.01.01).

"Prohibited possessor" is defined in A.R.S. § 13-3101 (Statutory Definition Instruction 31.01.06).

"Prohibited weapon" is defined in A.R.S. § 13-3101 (Statutory Definition Instruction 31.01.07).

"Possession" is defined in A.R.S. § 13-105(31) (Statutory Criminal Instruction 1.0531).

If the State has established that the prohibited possessor has a felony conviction, the defendant has the burden of proof and the burden of persuasion to show by a preponderance of the evidence that the defendant's civil rights to possess or carry a gun or firearm has been restored. *State v. Kelly,* 210 Ariz. 460, 464-65, 112 P.3d 682, 686-87 (App. 2005).

In *State v. Coley,* 158 Ariz. 471, 471-72, 763 P.2d 535, 535-36 (App. 1988), the court held that the giving of an instruction on constructive possession was not error in regard to a violation of A.R.S. § 13-3102(A)(4).

If the State has established that the prohibited possessor has been found to constitute a danger to himself/herself or others, the court should insure that the finding was made under A.R.S. § 36-540.

If the State has established that the defendant is a prohibited possessor under federal law, the Court should insure that the federal finding was not made under 18 U.S.C. § 922(y) (pertaining to aliens admitted under non-immigrant visas).

If the State established that the prohibited possessor was a prohibited possessor as defined under federal law (18 U.S.C. § 922(g)(5)) pursuant to A.R.S. § 13-3101(A)(6)(e) prior to September 26, 2008, the court should insure that the federal finding was not made under 18 U.S.C. § 922(y) (pertaining to aliens admitted under non-immigrant visas). When the offense occurred on or between August 24, 2004 and September 25, 2008, the State must prove all of the provisions of 18 U.S.C. § 922(g)(5), including the requirement that any firearm or ammunition allegedly possessed by the defendant must have an interstate or foreign commerce nexus. *State ex rel. Thomas v. Contes*, 216 Ariz. 525, 530 ¶16, 169 P.3d 115, 120 (App. 2007).

For alleged violations of A.R.S. § 13-3101(A)(6)(e) [now codified as A.R.S. § 13-3101(A)(7)(e)] occurring on or after September 26, 2008, the Committee was unable to find a definition of "undocumented alien" in either federal or state statutes or case law. The following definition of "alien" is taken from 8 U.S.C. § 101(a)(3), which the court may choose to use in its instruction: "The term 'alien' means any person not a citizen or national of the United States." The term "undocumented" appears to be the commonly understood meaning of the word. The categories of "nonimmigrant aliens" can be found in 8 U.S.C. § 1101(a)(15)(A)-(V).

**COMMENT:** The fact that there is a valid registration in the name of another is not a defense to actual possession under A.R.S. § 13-3102. *State v. Kerr,* 142 Ariz. 426, 434, 690 P.2d 145, 153 (App. 1984).

From August 25, 2004 to September 25, 2008, A.R.S. § 13-3101(A)(6)(e) provided that one was a prohibited possessor if that person was considered a prohibited possessor under federal law (18 U.S.C. § 922(g)(5)) As of September 26, 2008, A.R.S. § 13-3101(A)(6)(e) was

 

recodified as A.R.S. § 13-3101(A)(7)(e) and rewritten to remove that definition and replaced with the requirement that the person was "an undocumented alien or a nonimmigrant alien traveling with or without documentation in this state for business or pleasure or who is studying in this state and who maintains a foreign residence abroad," with certain exceptions.

Therefore, in regard to A.R.S. § 13-3101(A)(6)(e), the following comments apply to any offenses that occurred on or between August 25, 2004 and September 25, 2008:

> With respect to Statutory Criminal Definitional Instruction 31.01.06, A.R.S. § 13-3101(A)(6)(e) provides that a person who would be a prohibited possessor under 18 U.S.C. § 922(g)(5), is also a prohibited possessor under Arizona law unless the person is exempted by a provision in 18 U.S.C. § 922(y). *See State ex rel. Thomas v. Contes*, 216 Ariz. 525, 530 ¶16, 169 P.3d 115, 120 (App. 2007) (holding that the plain language of § 13-3101(A)(6)(e) adopts all of 18 U.S.C. § 922(g)(5), including the necessity to show a nexus to interstate or foreign commerce).

In regard to A.R.S. § 13-3101(A)(7)(e), the following comment applies to any offenses that occurred on or after September 26, 2008:

> As of September 26, 2008, the legislature expanded the definition of prohibited possessor under A.R.S. § 13-3101(A)(7)(e) [previously codified as A.R.S. § 13-3101(A)(6)(e)] from its previous limitation of a federal prohibited possessor under 18 U.S.C. § 922(g)(5) to include all undocumented aliens and nonimmigrant aliens, subject to certain enumerated exceptions. Therefore, as of September 26, 2008, a prohibited possessor under the statute is no longer limited to the requirements of 18 U.S.C. § 922(g)(5).

## 31.025 – Misconduct Involving Weapons (Selling or Transferring Deadly Weapon to Prohibited Possessor)

The crime of misconduct involving weapons requires proof that:

1. the defendant knowingly [sold] [transferred] a deadly weapon to another person; *and*
2. the other person was a prohibited possessor.
3. the defendant knew the other person was a prohibited possessor.

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**SOURCE:** A.R.S. § 13-3102(A)(5) (statutory language as of September 21, 2006).

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

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

"Deadly weapon" is defined in A.R.S. § 13-3101 (Statutory Definition Instruction 31.01.01).

"Prohibited possessor" is defined in A.R.S. § 13-3101 (Statutory Definition Instruction 31.01.06).

If the State has alleged that the prohibited possessor has a felony conviction, the defendant has the burden of proof and the burden of persuasion to show by a

 

preponderance of the evidence that the defendant's civil rights to possess or carry a gun or firearm has been restored. *State v. Kelly,* 210 Ariz. 460, 464-65, 112 P.3d 682, 686-87 (App. 2005).

If the State has alleged that the prohibited possessor has been found to constitute a danger to himself/herself or others, the court should insure that the finding was made under A.R.S. § 36-540.

If the State has alleged that the prohibited possessor is a prohibited possessor under federal law, the court should insure that the federal finding was not made under 18 U.S.C. § 922(y) (pertaining to aliens admitted under nonimmigrant visas).

## 31.026 – Misconduct Involving Weapons (Defacing a Deadly Weapon)

The crime of misconduct involving weapons requires proof that the defendant knowingly defaced a deadly weapon.

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**SOURCE:** A.R.S. § 13-3102(A)(6) (statutory language as of September 21, 2006).

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

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

"Deadly weapon" is defined in A.R.S. § 13-3101 (Statutory Definition Instruction 31.01.01).

"Deface" is defined in A.R.S. § 13-3101 (Statutory Definition Instruction 31.01.02).

## 31.027 – Misconduct Involving Weapons (Possessing a Defaced Deadly Weapon)

The crime of misconduct involving weapons requires proof that the defendant knowingly possessed a defaced deadly weapon, knowing that the deadly weapon was defaced.

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**SOURCE:** A.R.S. § 13-3102(A)(7) (statutory language as of July 13, 2009).

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

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

"Deadly weapon" is defined in A.R.S. § 13-3101 (Statutory Definition Instruction 31.01.01).

"Deface" is defined in A.R.S. § 13-3101 (Statutory Definition Instruction 31.01.02).

"Possession" is defined in A.R.S. § 13-105(31) (Statutory Definition Instruction 1.0531).

This offense shall not apply to:

1. A peace officer or anyone summoned by a peace officer to assist and while actually assisting in the performance of official duties;
2. A member of the U.S. military forces or national guard in the performance of official duties;

 

3. A warden, deputy warden, community correctional officer, detention officer, special investigator or correctional officer of the Arizona Department of Corrections or the department of juvenile corrections; *or*
4. A person specifically licensed, authorized or permitted pursuant to an Arizona state or federal statute.

A.R.S. § 13-3102(C).

This offense shall not apply to:

1. The possessing, transporting, selling or transferring weapons by a museum as part of its collection or an educational institution for educational purposes or by an authorized employee of such museum or institution if:
   a. Such museum or institution is operated by the United States or the State of Arizona or a political subdivision of the State of Arizona or by an organization under federal law as a recipient of a charitable contribution; *and*
   b. Reasonable precautions were taken with respect to theft or issue of such material.
2. The regular and lawful transporting as merchandise.
3. Acquisition by a person by operation of law such as by gift, devise or descent or in a fiduciary capacity as a recipient of the property or former property of an insolvent, incapacitated or deceased person.

A.R.S. § 13-3102(D).

**COMMENT:** The fact that there is a valid registration in the name of another is not a defense to actual possession under A.R.S. § 13-3102. *State v. Kerr,* 142 Ariz. 426, 434, 690 P.2d 145, 153 (App. 1984).

## 31.028 – Misconduct Involving Weapons (Use or Possession of Deadly Weapon during Commission of Drug Offense)

The crime of misconduct involving weapons during the commission of a felony drug offense requires proof that the defendant:

1. committed the offense of (felony offense under chapter 34); *and*
2. during the commission of such offense, knowingly possessed a deadly weapon that the defendant [used] [intended to use or could have used] to further the offense of (felony offense under chapter 34).

[The offense of (insert the name of the felony drug offense under chapter 34) requires proof that (insert the elements for the felony drug offense under chapter 34).]

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**SOURCE:** A.R.S. § 13-3102(A)(8) (statutory language as of September 21, 2006); *State v. Petrak,* 198 Ariz. 260, 266, 8 P.3d 1174, 1180 (App. 2000).

**USE NOTE:** This instruction must be used in place of an instruction that merely tracks the statutory language. In *State v. Petrak,* 198 Ariz. 260, 8 P.3d 1174 (App. 2000), the court of appeals held that the statutory language requires nothing more than, "a temporal nexus

 

between possession of the weapon and commission of the offense," which could lead to a person being convicted of this offense if the drugs were found in a defendant's house while a deadly weapon might be found in the defendant's car, completely unrelated to the drug offense. *Id.* at 264, 8 P.3d at 1178. The court of appeals, while conceding that a conviction for such unrelated possessions may have been intended by the legislature, expressed a concern that such a strict interpretation of the statute might not withstand an overbreadth challenge. *Id.* at 265, 8 P.3d at 1179. The court of appeals held that the trial court must instruct the jury that it was required to find that, "the weapon was used or available for use or was intended to further the drug offense." *Id.* at 266, 8 P.3d at 1180. Factors tending to establish the necessary nexus between the weapon and the drug offense include the spatial proximity and accessibility of the weapon to the defendant and to the site of the drug offense. *Id.*

The court shall instruct on the culpable mental state.

Use the bracketed language if the defendant has not been charged with the drug offense.

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

"Deadly weapon" is defined in A.R.S. § 13-3101 (Statutory Definition Instruction 31.01.01).

"Possession" is defined in A.R.S. § 13-105(31) (Statutory Definition Instruction 1.0531).

Use language in brackets as appropriate to the facts.

**COMMENT:** The fact that there is a valid registration in the name of another is not a defense to actual possession under A.R.S. § 13-3102. *State v. Kerr,* 142 Ariz. 426, 434, 690 P.2d 145, 153 (App. 1984).

## 31.029 – Misconduct Involving Weapons (Discharging Firearm at Occupied Structure)

The crime of misconduct involving weapons requires proof that the defendant knowingly discharged a firearm at an occupied structure in order to [assist] [promote] [further] the interests of a [criminal street gang] [criminal syndicate] [racketeering enterprise].

---

**SOURCE:** A.R.S. § 13-3102(A)(9) (statutory language as of September 21, 2006).

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

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

"Firearm" is defined in A.R.S. § 13-3101 (Statutory Definition Instruction 31.01.04).

"Occupied structure" is defined in A.R.S. § 13-3101 (Statutory Definition Instruction 31.01.05).

"Criminal street gang" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.057).

"Criminal syndicate" is defined in A.R.S. § 13-2301 (Statutory Definition Instruction 23.01.C.07).

 

"Racketeering" is defined in A.R.S. § 13-2301 (Statutory Definition Instruction 23.01.D.04).

"Enterprise" is defined in A.R.S. § 13-2301 (Statutory Definition Instruction 23.01.D.02).

## 31.0212 – Misconduct Involving Weapons (Possessing Deadly Weapon on School Grounds Felony Allegation)

The crime of misconduct involving weapons requires proof that:

1. the defendant knowingly possessed a deadly weapon on school grounds; *and*
2. the possession of such deadly weapon on school grounds occurred in connection with conduct that violated (offense under A.R.S. §§ 13-2308(A)(5), 13-2312(C), 13-3409 or 13-3411).

---

**SOURCE:** A.R.S. § 13-3102(A)(12) (statutory language as of June 13, 2009).

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

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

"Deadly weapon" is defined in A.R.S. § 13-3101 (Statutory Definition Instruction 31.01.01).

"School grounds" is defined in A.R.S. § 13-3102 (Statutory Definition Instruction 31.02.04).

Use language in parentheses as applicable to facts of case.

This offense is a misdemeanor unless the violation occurs in connection with conduct which violates A.R.S. §§ 13-2308(A)(5), 13-2312(C), 13-3409 or 13-3411. In such cases, the court should provide a special verdict form that specifies that this crime occurred in connection with conduct that violates one of the above offenses. If the predicate offense is not charged, the court will need to instruct the jury on the elements of the offense.

This offense shall not apply to:

1. A peace officer or anyone summoned by a peace officer to assist and while actually assisting in the performance of official duties;
2. A member of the U.S. military forces or national guard in the performance of official duties;
3. A warden, deputy warden, community correctional officer, detention officer, special investigator or correctional officer of the Arizona Department of Corrections or the department of juvenile corrections; *or*
4. A person specifically licensed, authorized or permitted pursuant to an Arizona state or federal statute.

A.R.S. § 13-3102(C).

This offense shall not apply to the possession of a:

 

1. Firearm that is not loaded and that is carried within a vehicle under the control of an adult provided that if the adult leaves the vehicle, the firearm shall not be visible from the outside of the vehicle and the vehicle shall be locked.
2. Firearm for use on school grounds in a program approved by a school.

A.R.S. § 13-3102(I).

## 31.0213 – Misconduct Involving Weapons (Carrying Deadly Weapon in Nuclear or Hydroelectric Plant)

The crime of misconduct involving weapons requires proof that the defendant knowingly and without legal authorization:

1. entered a [nuclear] [hydroelectric] generating station; *and*
2. carried a deadly weapon [on his/her person] [within the immediate control of any person].

---

**SOURCE:** A.R.S. § 13-3102(A)(13) (statutory language as of June 13, 2009).

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

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

"Deadly weapon" is defined in A.R.S. § 13-3101 (Statutory Definition Instruction 31.01.01).

This offense shall not apply to:

1. A peace officer or anyone summoned by a peace officer to assist and while actually assisting in the performance of official duties;
2. A member of the U.S. military forces or national guard in the performance of official duties;
3. A warden, deputy warden, community correctional officer, detention officer, special investigator or correctional officer of the Arizona Department of Corrections or the department of juvenile corrections; *or*
4. A person specifically licensed, authorized or permitted pursuant to an Arizona state or federal statute.

A.R.S. § 13-3102(C).

## 31.0214 – Misconduct Involving Weapons (Supplying Firearm to Another Person Who Will Commit Felony)

The crime of misconduct involving weapons requires proof that the defendant knowingly [supplied] [sold] [gave possession or control of] a firearm to another person knowing or having reason to know that the other person would use the firearm in the commission of a felony.

 

**SOURCE:** A.R.S. § 13-3102(A)(14) (statutory language as of September 21, 2006).

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

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

"Firearm" is defined in A.R.S. § 13-3101 (Statutory Definition Instruction 31.01.04).

"Felony" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0516).

## 31.0215 – Misconduct Involving Weapons (Using Deadly Weapon in Terrorism Act)

The crime of misconduct involving weapons requires proof that the defendant knowingly:

1. [(used) (possessed) (exercised control of) a deadly weapon in furtherance of any act of terrorism.]
2. possessed or exercised control over a deadly weapon knowing or having reason to know that it would be used to facilitate any act of terrorism.]

"Terrorism" means any felony, including any completed or preparatory offense, that involves the use of a deadly weapon or a weapon of mass destruction or the intentional or knowing infliction of serious physical injury with the intent to either:

(a) influence the policy or affect the conduct of this state or any of the political subdivisions, agencies or instrumentalities of this state.

(b) cause substantial damage to or substantial interruption of public communications, communication service providers, public transportation, common carriers, public utilities, public establishments or other public services.

**SOURCE:** A.R.S. §§ 13-3102(A)(15), 13-2301 (statutory language as of September 21, 2006).

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

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

"Deadly weapon" is defined in A.R.S. § 13-3101 (Statutory Definition Instruction 31.01.01).

"Terrorism" is defined in A.R.S. § 13-2301 (Statutory Definition Instruction 23.01.C.12).

"Facilitation" is defined in A.R.S. § 13-1004 (Statutory Definition Instruction 10.04).

"Possession" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0531).

"Preparatory offenses" are defined in A.R.S. § 13-1001 *et seq*.

## 31.0216 – Misconduct Involving Weapons (To Further a Criminal Street Gang)

The crime of misconduct involving weapons requires proof that the defendant knowingly:

 

1. Trafficked [weapons] [explosives]; and
2. The trafficking was for financial gain to [assist] [promote] [further the interests] of a [criminal street gang] [criminal syndicate] [racketeering enterprise].

---

**SOURCE:** A.R.S. §§ 13-3102(a)(16) (statutory language as of August 2, 2012).

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

"Knowingly" is defined in A.R.S. § 13-105 (statutory definition instruction 1.0510(b)).

"Trafficking" is defined in A.R.S. § 13-3101.

"Criminal street gang" is defined in A.R.S. § 13-105 (statutory definition instruction 1.057).

"Criminal street gang member" is defined in A.R.S. § 13-105 (statutory definition instruction 1.058).

"Criminal syndicate" is defined in A.R.S. § 13-2301(C) (statutory definition instruction 23.01.C.07).

"Racketeering" is defined in A.R.S. § 13-2301(D) (statutory definition instruction 23.01.D.04).

"Enterprise" is defined in A.R.S. § 13-2301(D) (statutory definition instruction 23.01.D.02).

## 31.02(A)(4) –Affirmative Defense to Misconduct Involving Weapons Under A.R.S. § 13-3101(A)(4)

The defendant has been accused of misconduct involving weapons [allege violation pertaining to a firearm].

It is a defense to such charge if the defendant proves by a preponderance of the evidence that the firearm was in a permanently inoperable condition at the time of the offense.

---

**SOURCE:** A.R.S. §§ 13-3101 (statutory language as of August 25, 2004); 13-3102 (statutory language as of September 21, 2006).

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

The court shall instruct on "affirmative defense" so as to inform the jury on the burden of proof.

"Affirmative defense" is defined in A.R.S. § 13-205 (Statutory Definition Instruction 2.025).

Because the burden of proof for the defendant is preponderance of the evidence, the court shall use Standard Criminal Instruction 5b(2), which discusses the different burdens of proof.

The determination of whether a firearm is permanently inoperable under A.R.S. § 13-3101(A)(4) is a question of fact. *State v. Young*, 192 Ariz. 303, 306-307, 965 P.2d 37, 40-41 (App. 1998) (noting that a disassembled or broken weapon may constitute a firearm if

 

it can be made operable with reasonable preparation, including the addition of a readily replaceable part or the accomplishment of a quickly-effected repair).

Neither operability nor knowledge of operability of a firearm is an element of the offense; rather, permanent inoperability is an affirmative defense. *State v. Young*, 192 Ariz. 303, 307, 965 P.2d 37, 41 (App. 1998).

## 31.02(A)(6) –Affirmative Defense to Misconduct Involving Weapons under A.R.S. § 13-3101(A)(6)(b)

The defendant has been accused of misconduct involving weapons by being a prohibited possessor due to a [felony conviction] [delinquency adjudication].

It is a defense to such charge if the defendant proves by a preponderance of the evidence that the defendant's civil rights to possess or carry a gun or firearm had been restored at the time of the offense.

---

**SOURCE:** A.R.S. §§ 13-3101 (statutory language as of August 25, 2004); 13-3102 (statutory language as of September 21, 2006).

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

The court shall instruct on "affirmative defense" so as to inform the jury on the burden of proof.

"Affirmative defense" is defined in A.R.S. § 13-205 (Statutory Definition Instruction 2.025).

Because the burden of proof for the defendant is preponderance of the evidence, the court shall use Standard Criminal Instruction 5b(2), which discusses the different burdens of proof.

If the State has alleged that the prohibited possessor has a felony conviction, the defendant has the burden of proof and the burden of persuasion to show by a preponderance of the evidence that the defendant's civil rights to possess or carry a gun or firearm has been restored. *State v. Kelly,* 210 Ariz. 460, 464-65, 112 P.3d 682, 686-87 (App. 2005).

## 31.02(A)(7) –Affirmative Defense to Misconduct Involving Weapons under A.R.S. § 13-3101(A)(7)(a), (b), (c) or (d)

The defendant has been accused of misconduct involving weapons [allege violation pertaining to a prohibited weapon under § 13-3101(A)(7)(a), (b), (c) or (d)].

It is a defense to such charge if the defendant proves by a preponderance of the evidence that, at the time of the offense:

[the weapon or firearm alleged to be a prohibited weapon was registered in the national firearms registry and transfer records of the United States Treasury Department.]

[the firearm alleged to be a prohibited weapon had been classified as a curio or relic by the United States Treasury Department.]

 

**SOURCE:** A.R.S. §§ 13-3101 (statutory language as of August 25, 2004); 13-3102 (statutory language as of September 21, 2006).

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

The court shall instruct on "affirmative defense" so as to inform the jury on the burden of proof.

"Affirmative defense" is defined in A.R.S. § 13-205 (Statutory Definition Instruction 2.025).

Because the burden of proof for the defendant is preponderance of the evidence, the court shall use Standard Criminal Instruction 5b(2), which discusses the different burdens of proof.

The State is not required to prove the nonregistration of a prohibited weapon by the United States Treasury Department, which is instead an affirmative defense to be proved by the defense. *State v. Berryman,* 178 Ariz. 617, 621, 875 P.2d 850, 854 (App. 1994) (holding that the failure of the police to test the weapon or to determine registration did not call for a *Willits* instruction, because the burden of showing such is on the defendant).

## 31.04 – Depositing Explosives

The crime of depositing explosives requires proof that the defendant, with the intent to physically endanger, injure, intimidate or terrify any person, knowingly deposited any explosive on, in or near any vehicle, building or place where persons inhabit, frequent or assemble.

**SOURCE:** A.R.S. § 13-3104 (statutory language as of October 1, 1978).

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

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

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

"Explosive" is defined in A.R.S. § 13-3101 (Statutory Definition Instruction 31.01.03).

"Vehicle" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0536).

## 31.07 – Unlawful Discharge of Firearms

The crime of unlawful discharge of a firearm requires proof that the defendant, with criminal negligence, discharged a firearm within or into the limits of a municipality.

 

**SOURCE:** A.R.S. § 13-3107 (statutory language as of July 18, 2000).

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

"Criminal negligence" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0510(d)).

"Firearm" is defined in A.R.S. § 13-3101 (Statutory Definition Instruction 31.01.04).

"Municipality" is defined in A.R.S. § 13-3107 (Statutory Criminal Instruction 31.07.01).

This offense shall not apply if the firearm is discharged:

1. as allowed by Chapter 4;
2. on a properly supervised range;
3. in an area recommended as a hunting area by the Arizona Game & Fish Department, approved and posted as required by the chief of police, but any such area may be closed when deemed unsafe by the chief of police or the director of the Game and Fish Department;
4. for the control of nuisance wildlife by permit from the Arizona Game and Fish Department or the U.S. Fish and Wildlife Service;
5. by special permit of the chief of police of the municipality;
6. as required by an animal control officer in the performance of official duties;
7. using blanks;
8. more than one mile from any occupied structure as defined in § 13-3101; *or*
9. in self-defense or defense of another person against an animal attack if a reasonable person would believe that deadly physical force against the animal is necessary and reasonable under the circumstances to protect oneself or the other person.

A.R.S. § 13-3107(C).

**COMMENT:** In a case brought under the predecessor to this statute, A.R.S. §§ 13-917 and 13-917.01, the Arizona Supreme Court held that the intent to do bodily harm was not an element of the statute. *State v. Andrews,* 106 Ariz. 372, 377, 476 P.2d 673, 678 (1970).

## 31.09 – Sale or Gift of Firearm to Minor

The crime of sale or gift of firearm to minor requires proof that the defendant, without written consent of the minor's parent or legal guardian, [sold] [gave] to a minor [a firearm] [ammunition] [a toy pistol by which dangerous and explosive substances may be discharged].

**SOURCE:** A.R.S. § 13-3109 (statutory language as of July 17, 1994).

**USE NOTE:** "Firearm" is defined in A.R.S. § 13-3101 (Statutory Definition Instruction 31.01.04).

"Explosive" is defined in A.R.S. § 13-3101 (Statutory Definition Instruction 31.01.03).

 

"Minor" is defined in A.R.S. § 1-215(22) as "a person under the age of eighteen years."

**COMMENT:** This offense does not provide for a culpable mental state.

The statute contains two exceptions. It is not a crime if the act involved a temporary transfer of firearms or ammunition by firearms safety instructors, hunter safety instructors, competition coaches or their assistants if the minor's parent or legal guardian gave consent for the minor to participate in activities such as firearms or hunting safety courses, firearms competition or firearms training. It is not a crime if the defendant accompanied minors, with the consent of the minor's parent or legal guardian, temporarily transferred firearms, ammunition to one or more of such minors for the purpose of engaging in hunting, formal or informal target shooting activities.

## 31.10 – Misconduct Involving Simulated Explosive Devices

The crime of misconduct involving simulated explosive devices requires proof that the defendant, with the intent to [terrify] [intimidate] [threaten] [harass]:

[intentionally (gave) (sent) a simulated explosive device to another person].

[intentionally placed a simulated explosive device in a private or public place].

"Simulated explosive device" means a simulation of an improvised explosive device that a reasonable person would believe is an improvised explosive device.

"Improvised explosive device" means a device that incorporates explosives or destructive lethal, noxious, pyrotechnic or incendiary chemicals and that is designed to destroy, disfigure, terrify or harass.

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**SOURCE:** A.R.S. § 13-3110 (statutory language as of September 26, 2008).

**USE NOTE:** Statutory Criminal Instruction 31.10.01, the statutory presumption related to misconduct involving weapons (simulated explosive devices), should be given with this instruction.

Use language in brackets as appropriate to the facts.

The court shall instruct on the culpable mental state.

"Intentionally" or "with intent to" is defined in A.R.S. § 13-105.

**COMMENT:** A.R.S. § 13-3110(B) provides for a mandatory presumption (the statute uses the phrase "*prima facie* evidence," which appears to convey the same meaning as a mandatory presumption).There are no cases pertaining to this presumption or prima facie evidence, but mandatory presumptions are deemed to be unconstitutional, because they shift the burden of proof to the defendant. *State v. Herrera,* 176 Ariz. 21, 30-31, 859 P.2d 131, 140-41 (1993); *State v. Mohr,* 150 Ariz. 564, 568-69, 724 P.2d 1237-38 (App. 1986), *relying upon Francis v. Franklin,* 471 U.S. 307 (1985). Therefore, it seems more appropriate to interpret the presumption in the statute as a permissive one, which would pass constitutional muster. *See, e.g., State v. Mohr,* 150 Ariz. 564, 568-69, 724 P.2d 1237-38 (App. 1986) (holding that a statutory inference must be permissive to withstand constitutional due process and to avoid burden-shifting to the defendant).

 

## 31.10.01 – Interference on Placing or Sending a Simulated Explosive Device

The defendant has been accused of misconduct involving simulated explosive device. The defendant's intent to [terrify] [intimidate] [threaten] [harass] may be inferred if the defendant [placed] [sent] the simulated explosive device without attaching a written notice to the device in a conspicuous place that the device had been rendered inert and was possessed for the purpose of curio or relic collection, display or other similar purpose.

You are free to accept or reject this inference as triers of fact. You must determine whether the facts and circumstances shown by the evidence in this case warrant any inference that the law permits you to make. Even with the inference, the State has the burden of proving each and every element of the offense of misconduct involving simulated explosive device beyond a reasonable doubt before you can find the defendant guilty.

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**SOURCE:** A.R.S. § 13-3110(B) (statutory language as of September 26, 2008).

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

Use this instruction in conjunction with Statutory Criminal Instruction 31.10.

**COMMENT:** A.R.S. § 13-3110(B) provides for a mandatory presumption by stating that the placing or sending of a device without certain written disclosures creates *prima facie* evidence of an element of the crime. *See Norton v. Superior Court ex rel. Woods,* 171 Ariz. 155, 157, 829 P.2d 345, 347 (App. 1992) (holding that inclusion of similar language in A.R.S. §12-2458(B) unconstitutionally shifted the State's burden of proof by establishing a mandatory, though rebuttable presumption). *Accord, State v. Herrera,* 176 Ariz. 21, 30-31, 859 P.2d 131, 140-41 (1993); *In the Matter of 1986 Chevrolet Corvette,* 183 Ariz. 637, 639, 905 P.2d 1372, 1374 (1994); *Barlage v. Valentine,* 210 Ariz. 270, 277 ¶27, 110 P.3d 371, 378 (App. 2005). Mandatory presumptions are deemed to be unconstitutional, because they shift the burden of proof to the defendant. *Norton v. Superior Court ex rel. Woods, supra; State v. Mohr,* 150 Ariz. 564, 568-69, 724 P.2d 1237-38 (App. 1986), *relying upon Francis v. Franklin,* 471 U.S. 307 (1985). Therefore, it seems more appropriate to interpret the presumption in the statute as a permissive one, which would pass constitutional muster. *See, e.g., State v. Mohr,* 150 Ariz. 564, 568-69, 724 P.2d 1237-38 (App. 1986) (holding that a statutory inference must be permissive to withstand constitutional due process and to avoid burden-shifting to the defendant).

## 31.11 – Minors Prohibited From Carrying or Possessing Firearms

The crime of a minor prohibited from carrying or possessing a firearm requires proof that the defendant:

1. was under eighteen years of age; *and*
2. was an unemancipated person; *and*
3. was not accompanied by a [parent] [grandparent] [guardian] [certified hunter safety instructor acting with the consent of the defendant's parent or guardian] [certified firearms safety instructor acting with the consent of the defendant's parent or guardian]; *and*

 

4. knowingly carried or possessed [on the defendant's person] [within the defendant's immediate control] [in or on a means of transportation] a firearm [in any place that was open to the public] [on a street] [on a highway] [on any private property owned or leased by the defendant] [on any private property owned or leased by the defendant's parent, grandparent or guardian].

---

**SOURCE:** A.R.S. § 13-3111 (statutory language as of September 21, 2006).

**USE NOTE:** The previous version of the statute was declared unconstitutional because it was limited to counties with a population over 500,000. *See In Re Cesar R.*, 197 Ariz. 437, 440, 4 P.3d 980, 983 (App. 1999). The legislature amended the statute and deleted the population provision.

The court shall instruct on the culpable mental state.

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

"Firearm" is defined in A.R.S. § 13-3101 (Statutory Definition Instruction 31.01.04).

"Means of transportation" is defined in A.R.S. § 13-1801 (Statutory Criminal Instruction 18.01(9)).

"Emancipation" is defined in A.R.S. § 12-2451.

The statute contains exceptions. It is not a crime if the defendant was fourteen, fifteen, sixteen or seventeen and was engaged in:

A. lawful hunting or shooting events or marksmanship practice at established ranges or other areas where the discharge of a firearm is not prohibited; *or*

B. lawful transportation of an unloaded firearm for the purpose of lawful hunting; *or*

C. lawful transportation of an unloaded firearm between the hours of 5:00 a.m. and 10:00 p.m. for the purpose of shooting events or marksmanship practice at established ranges or other areas where the discharge of a firearm is not prohibited; *or*

D. activities requiring the use of a firearm that are related to the production of crops, livestock, poultry, livestock products, poultry products or ratites or in the production or storage of agricultural commodities.

## 31.13.01 – Possession of Firearm by Adjudicated Delinquent

The crime of possession of a firearm by an adjudicated delinquent requires proof that the defendant:

1. was previously adjudicated delinquent for an offense that would be a felony if committed by an adult; *and*

2. [possessed] [used] [carried] a firearm within ten years from the date of [the adjudication] [the defendant's release or escape from custody].

---

**SOURCE:** A.R.S. § 13-3113 (statutory language as of September 21, 2006).

 

**USE NOTE:** This instruction is used for a first offense and subsequent offense unless certain circumstances apply. If those circumstances apply, the court will use Statutory Criminal Instruction 31.13.02.

"Firearm" is defined in A.R.S. § 13-3101 (Statutory Criminal Instruction 31.01.04).

**COMMENT:** This offense does not provide for a culpable mental state. A first offense is a class 5 felony. A subsequent offense under certain circumstances is a class 4 felony.

## 31.13.02 – Subsequent Possession of Firearm by Adjudicated Delinquent

The crime of subsequent possession of a firearm by an adjudicated delinquent requires proof that the defendant:

1. was previously adjudicated delinquent for an offense that if committed as an adult would constitute the offense[s] of:

   [burglary in the first degree]

   [burglary in the second degree]

   [arson]

   [any felony offense involving the use or threatening exhibition of a deadly weapon or dangerous instrument]

   [a serious offense];

   *and*

2. [possessed] [used] [carried] a firearm within ten years from the date of [the adjudication] [the defendant's release or escape from custody];

   *and*

3. has been previously [adjudicated] [convicted] of the crime of possession of a firearm by an adjudicated delinquent.

---

**SOURCE:** A.R.S. § 13-3113 (statutory language as of September 21, 2006).

**USE NOTE:** This instruction shall be used for second or subsequent offenses if the defendant has had a prior adjudication for one of the predicate offenses listed in the statute. If the defendant is accused of a first or a subsequent offense where the defendant has not had a prior adjudication for one of the predicate offenses, the court shall use Criminal Statutory Instruction 31.13.01.

"Firearm" is defined in A.R.S. § 13-3101 (Statutory Definition Instruction 31.01.04).

"Burglary in the first degree" is defined in A.R.S. § 13-1508 (Statutory Definition Instruction 15.08).

"Burglary in the second degree" is defined in A.R.S. § 13-1507 (Statutory Definition Instruction 15.07).

"Arson" is defined in A.R.S. §§ 13-1702, -1703, -1704, and -1705 (Statutory Criminal Instructions 17.02 through 17.05).

"Felony" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0516).

 

"Serious offense" is defined in A.R.S. § 13-706.

**COMMENT:** This offense does not provide for a culpable mental state. A first offense is a class 5 felony. A subsequent offense under certain circumstances is a class 4 felony.

## 31.16 – Misconduct Involving Body Armor

The crime of misconduct involving body armor requires proof that the defendant knowingly wore or otherwise used body armor during the commission of any felony offense.

---

**SOURCE:** A.R.S. § 13-3116 (statutory language as of August 6, 1999).

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

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

"Body armor" is defined in A.R.S. § 13-3116 (Statutory Definition Instruction 31.16.01).

"Firearm" is defined in A.R.S. § 13-3101 (Statutory Definition Instruction 31.01.04).

"Felony" is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0516).

## 31.17 – Misconduct Involving Remote Stun Gun

The crime of misconduct involving remote stun gun requires proof that the defendant knowingly used or threatened to use a remote stun gun or an authorized remote stun gun against a law enforcement officer who is engaged in the performance of the officer's official duties.

---

**SOURCE:** A.R.S. § 13-3117 (statutory language as of August 12, 2005).

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

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

"Authorized remote stun gun" is defined in A.R.S. § 13-3117 (Statutory Definition Instruction 31.17.01).

"Remote stun gun" is defined in A.R.S. § 13-3117 (Statutory Definition Instruction 31.17.02).

**COMMENT:** This offense does not preclude the prosecution of a person for the use of a remote sun gun or authorized remote stun gun during the commission of a criminal offense. A.R.S. § 13-3117(B).

This offense does not preclude a justification defense under chapter 4 of title 13. A.R.S. § 13-3117(B).

## 31.22 – Misconduct Involving Remote Stun Gun

The crime of Unlawful Use of Electronic Firearm Tracking Technology requires proof that the defendant [required a person to use electronic firearm tracking technology] [required

 

a person to be subjected to electronic firearm tracking technology] [disclosed any identifiable information about another person for the purpose of using electronic firearm tracking technology] [disclosed any identifiable information about another person's firearm for the purpose of using electronic firearm tracking technology].

"Electronic firearm tracking technology" means a platform, system or device or a group of systems or devices that uses a shared ledger, distributed ledger or block chain technology or any other similar form of technology or electronic database for the purpose of storing information in a decentralized or centralized way, that is not owned or controlled by any single person or entity and that is used to locate or control the use of a firearm. electronic firearm tracking technology does not include a law enforcement database, including the adult probation enterprise tracking system, the juvenile online tracking system, the justice web interface, the Arizona Criminal Justice Information System, the national crime information center, the national integrated ballistic information network and a local records management system that is used to manage or process stolen, lost, found, stored or evidentiary firearms.

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**SOURCE:** A.R.S. § 13-3122 (effective August 9, 2017).

**USE NOTE:** The statute, A.R.S. §13-3122, was written without expressly prescribing a culpable mental state. *See* A.R.S. §13-202(B).

Use bracketed language as appropriate to the facts of the case.

A.R.S. § 13-3122(B) provides that this section does not apply to any of the following:

1. A criminal justice employee (defined in A.R.S. § 13-3122(D)(1)) who obtains a search warrant.

2. A pawnbroker or an employee of a pawnshop, secondhand dealer or auction house while the pawnbroker or employee uses electronic firearm tracking technology to report information to the sheriff or the sheriff's designee pursuant to section 44-1625 or a similar reporting requirement.

3. A probation, parole or surveillance officer who supervises a person who is serving a term of probation, community supervision or parole.

4. The owner of a firearm if the owner consents in writing to the use of electronic firearm tracking technology on that owner's firearm.

## 31.129 – Taking Prohibited Articles into Jail or onto Jail Grounds

The crime of taking prohibited articles into a jail or onto jail grounds requires proof that the defendant, unauthorized by law, knowingly took [an intoxicating liquor] [a firearm] [a weapon] [explosives] [marijuana] [a narcotic drug] [a dangerous drug] into [a jail] [the grounds belonging to a jail].

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**SOURCE:** A.R.S. § 31-129 (statutory language as of August 3, 2018).

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

Use language in brackets as appropriate to the facts.

 