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.

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

Standard Criminal 2 – 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.

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).

Standard Criminal 3 – 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.

SOURCE: RAJI (Criminal) No. 3 (1996).

Standard Criminal 4 – Evidence to Be Considered

You are to determine what the facts in the case are from the evidence produced in court. If the court sustained an objection to a lawyer's question, you must disregard it and any answer given. Any testimony stricken from the court record must not be considered.

SOURCE: RAJI (Criminal) No. 4 (1996).

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 5a – 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.

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 5b(1) – 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.

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 5b(2) – 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.

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 6 – 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.

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 7 – 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.

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 8 – 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.

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 9 – 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.

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 10 – Lost, Destroyed, or Unpreserved Evidence

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

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

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)). "Evidence must possess exculpatory value that is apparent before it is destroyed." *State v. Davis*, 205 Ariz. 174, 180, 68 P.3d 127, 133 (App. 2002) (instruction not warranted where the police failed to preserve the carpet in which the victim was wrapped because the defendant admitted wrapping the victim in the carpet and burning her body with gasoline). Whether either showing has been made is a question for the trial court; its decision to forego a *Willits* instruction for failure to satisfy either or both of the above requirements will not be reversed absent an abuse of discretion. *State v. Reffitt*, 145 Ariz. 452, 461, 702 P.2d 681, 690 (1985).

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*.

The following cases are cited to assist the court and counsel in determining whether the instruction should be utilized:

State v. Wooten, 193 Ariz. 357, 369, 972 P.2d 993, 1005 (App. 1998) (No *Willits* instruction given where the State introduced copies, not the originals, of tapes of telephone calls by defendant from the jail. The defendant claimed he could not show that the original tapes contained exculpatory evidence because the destruction of the tapes effectively prevented him from doing so. The supreme court disagreed noting the defendant was a party to each of the conversations. He was in a position to know whether or not any exculpatory information had been excluded from the copies but failed to indicate to the trial court that

any material would have been preserved on the original tapes that did not also appear on the copies.)

State v. Tinajero, 188 Ariz. 350, 355, 935 P.2d 928, 933 (App. 1997) (No *Willits* instruction given where the police sold for salvage the truck involved in a fatal crash. The defendant admitted to police he was alone in the truck, but denied hitting anything. The defendant argued if the truck had been preserved he could have tested bloodstains in the truck to prove that he had been in the passenger seat and not driving. The police had no reason to preserve the truck in light of defendant's admissions that he was the truck's sole occupant. There was no reason to believe that the truck would have provided any exculpatory evidence. The duty of police to preserve potentially exculpatory evidence arises when the evidence is "obviously material.")

State v. Boston, 170 Ariz. 315, 318, 823 P.2d 1323, 1326 (App. 1991) (No *Willits* instruction given at defendant's trial for possession of a narcotic drug. Officers recovered packets of heroin from a motel room table, but an officer did not retrieve a syringe from a toilet bowl. Obtaining the syringe would have tended to prove the defendant guilty, rather than exonerate her.)

State v. Geotis, 187 Ariz. 521, 525, 930 P.2d 1324, 1328 (App. 1996) (No *Willits* instruction given where the police did not seize cash, pager, club, and water pistol as evidence, but instead left those items in the car the defendant was driving. The car, which did not belong to defendant, was impounded. Property left in an impounded car may be retrieved by its owners. Even if the items were potentially exculpatory, there was no showing that they were rendered inaccessible to defendant for his later use.)

State v. Strong, 185 Ariz. 248, 251, 914 P.2d 1340, 1343 (App. 1995) (No *Willits* instruction given where the police destroyed some fingerprint lift cards after making a unilateral decision that they were not usable and did not attempt to obtain fingerprints at other locations where the robber was reported to have been.)

State v. Torres, 162 Ariz. 70, 75-76, 781 P.2d 47, 52-53 (App. 1989) (No *Willits* instruction given where the defendant argued the state failed to test a heroin packet for fingerprints and that the evidence could have eliminated him as a suspect. The absence of fingerprints on the packet of heroin would not have eliminated him as a suspect. The police simply chose not to collect fingerprints from the cellophane packaging. Police generally have no duty to seek out and obtain potentially exculpatory evidence.)

State v. Perez, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (The Supreme Court stated, "We realize that in some situations it may not be clear that a particular bit of evidence of which the state is aware is, or will prove to be, material. When the state fails to procure and/or assure the preservation of evidence that, though not obviously material, turns out to be material, it is up to the trial judge to determine if the state's failure to recognize its materiality was reasonable or not and to give a *Willits* instruction only where it finds the failure to have been unreasonable.")

Standard Criminal 11 – 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.

SOURCE: CALJIC 17.01 (West 2008).

USE NOTES: In *State v. Klokic*, 530 Ariz. Adv. Rep. 5, ¶ 14 (App., Apr. 29, 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).

As of June 27, 2008, *Klokic* still was subject to further appellate review.

Standard Criminal 12 – 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 13 – Entrapment (Deleted; Replaced by Statutory Criminal 2.026)

Standard Criminal 14 – 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.

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 15 – Defendant Need Not Testify

The State must prove guilt beyond a reasonable doubt based on the evidence. You must not conclude that the defendant is likely to be guilty because the defendant did 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.

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 16 – Evidence of Any Kind

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 decision on whether to produce any evidence is left to the defendant acting with the advice of an attorney. The defendant's decision not to produce any evidence is not evidence of guilt.

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 17 – 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].

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 18 – 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.

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 19 – 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.

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 20 – 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.

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).

Standard Criminal 21 – 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.

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 22 – 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.

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).

Standard Criminal 23 – Proof of Prior Conviction (Deleted)

Standard Criminal 24 – 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.

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 25 – 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.

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 26A – 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.

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 26B – 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.

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.

Prior case law regarding sexual propensity included the following crimes: sexual assault; child molestation; sexual conduct with a minor; sexual abuse of a minor; indecent exposure to a minor; public sexual indecency to a minor; sexual exploitation of a minor; and contributing to the delinquency of a minor.

Standard Criminal 27 – Intentionally or With Intent To Defined (Replaced by Statutory Criminal 1.056(a)(1) and (2)

Standard Criminal 28 – Knowingly Defined (Replaced by Statutory Criminal 1.056(b)

Standard Criminal 29 – Recklessly or Reckless Disregard Defined (Replaced by Statutory Criminal 1.056(c))

Standard Criminal 30 – Accomplice (Replaced by Statutory Criminal 3.01)

Standard Criminal 31 – 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.

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 32 – 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 33 – 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.

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

Standard Criminal 34 – 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.

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

Standard Criminal 35 – 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 36 – Defendant's Testimony

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

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

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 – Motive

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

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 39 – 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 Court has concluded that pretrial identification procedures were unduly suggestive, but that the proposed in-court identification has been shown by clear and convincing evidence to be reliable and derived from an independent source. *State v. Dessureault*, 104 Ariz. at 384, 453 P.2d at 955.