# Title 25 and 28 INSTRUCTIONS

## 25.511

## FAILURE OF PARENT TO PROVIDE FOR CHILD

The crime of failure of a parent to provide for a child requires proof that the defendant was a parent who knowingly failed to furnish reasonable support for [his] [her] child.

In determining whether the defendant has failed to furnish reasonable support, you shall consider all assets, earnings, and entitlements of the defendant and whether the defendant has made all reasonable efforts to obtain the necessary funds.

[On a showing of previous employment or lack of a physical or mental disability precluding employment, you may infer that the defendant is capable of full-time employment at least at the federal adult minimum wage.]

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**SOURCE:** A.R.S. § 25-511 (statutory language as of August 6, 1999).

**USE NOTE:** Use language in brackets as appropriate to the facts. The inference that the defendant is capable of full-time employment does not apply to non-custodial parents who are under the age of eighteen and who are still attending high school. A.R.S. § 25-511(C).

The court must instruct on the culpable mental state. "Knowingly" is defined in A.R.S. § 13-105.

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## 28.1321

## REFUSAL TO SUBMIT TO TEST

Any person who operates a motor vehicle within the state gives consent to a test or tests of [his] [her] blood, breath, or urine for the purposes of determining the alcoholic content of [his] [her] blood if arrested for driving while intoxicated.

A refusal to submit to chemical test under the Implied Consent Law occurs when the conduct of the arrested motorist is such that a reasonable person in the officer's position would be justified in believing that such motorist was capable of refusal and exhibited an unwillingness to submit to the test.

If you find that the defendant refused to submit to a test, you may consider such evidence together with all the other evidence in determining whether the State has proven the defendant guilty beyond a reasonable doubt.

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**SOURCE:** A.R.S. § 28-1321 (statutory language as of September 1, 2001); *Campbell v. Superior Court*, 106 Ariz. 542, 479 P.2d 685 (1971); *McNutt v. Superior Court of Arizona*, 133 Ariz. 7, 648 P.2d 122 (1982); *State v. Holland*, 147 Ariz. 453, 711 P.2d 592 (1985); *Kunzler v. Pima County Superior Court*, 154 Ariz. 568, 744 P.2d 669 (1987); *Kunzler v. Miller*, 154 Ariz. 570, 744 P.2d 671 (1987); and *Hively v. Superior Court*, 154 Ariz. 572, 744 P.2d 673 (1987).

**COMMENT:** The statement in the 1989 RAJI that a motorist was not entitled to the assistance of counsel in deciding whether to submit to a test has been deleted because it is was an incorrect statement of law. No mention of the right to consult with counsel is included because introduction of evidence that the defendant requested to speak to counsel would be an impermissible comment on the defendant's exercise of constitutional rights. *See, State v. Juarez*, 161 Ariz. 76, 80, 81, 775 P.2d 1140, 1144, 1145 (1989) ("[I]n a criminal DUI case, the accused has the right to consult with an attorney, if doing so does not disrupt the investigation" and "Informing the driver that he may not call his attorney before taking the test misstates the law and violates the driver's right to consult with counsel under the sixth amendment of the United States Constitution and article 2, section 24 of the Arizona Constitution.").

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**28.1381(A)(1)-APC**

**ACTUAL PHYSICAL CONTROL DEFINED**

The defendant is in "actual physical control" of the vehicle if, based on the totality of the circumstances shown by the evidence, [his][her] potential use of the vehicle presented a real danger to [himself][herself] or others **at the time alleged**. Factors to be considered in any given case might include**,** but are not limited to:

1. Whether the vehicle was running or the ignition was on;
2. Where the key was located;
3. Where and in what position the driver was found in the vehicle;
4. Whether the person was awake or asleep;
5. Whether the vehicle's headlights were on;
6. Where the vehicle was stopped (in the road or legally parked);
7. Whether the driver had voluntarily pulled off the road;
8. Time of day and weather conditions;
9. Whether the heater or air conditioner was on;
10. Whether the windows were up or down;
11. Any explanation of the circumstances advanced by the parties.

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**SOURCE:** *State v. Dawley*, 201 Ariz. 285, 288-89**,** 34 P.3d 394, 397-98 (App.2001); *State v. Love*, 182 Ariz. 324, 327, 897 P.2d 626, 629 (1995).

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## 28.1381(A)(1) - 1

## [DRIVING/ACTUAL PHYSICAL CONTROL] WHILE UNDER THE INFLUENCE

The crime of [driving/actual physical control] while under the influence requires the proof of the following:

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

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

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

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**SOURCE:** A.R.S. § 28-1381(A)(1) (statutory language as of September 1, 2001).

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

The under the influence offenses can be committed while driving or while in actual physical control of a vehicle. Use the [driving/actual physical control] choices in brackets as appropriate to the facts. If there is only evidence of driving, do not include actual physical control in the instruction. If there is no issue of driving, do not refer to driving in the instruction. In some cases there may be issues of actual physical control and circumstantial evidence of driving. In those cases, the jury instruction should include both choices. See *State ex rel O'Neill v. Brown (Juan-Pascal, real party in interest),* 182 Ariz. 525, 898 P.2d 474 (1995)(police observed cloud of dust in field and then found defendant holding the keys and seated in the stopped car).

If "actual physical control" is an issue, see the definition of that term at Instruction 28.1381(A)(1)-APC.

"Vehicle" means a device in, on or by which a person or property is or may be transported or drawn on a public highway, excluding devices moved by human power or used exclusively on stationary rails or tracks. A.R.S. § 28-101(52).

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**28.1381(A)(2)**

**[DRIVING/ACTUAL PHYSICAL CONTROL] WITH AN ALCOHOL CONCENTRATION OF [0.10][0.08] OR MORE WITHIN TWO HOURS OF DRIVING**

The crime of [driving/actual physical control] with an alcohol concentration of [0.10][0.08] or more within two hours of driving requires the proof of the following:

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

2. The defendant had an alcohol concentration of [0.10][0.08] or more within two hours of [driving/being in actual physical control of] the vehicle; and

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

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**SOURCE:** A.R.S. § 28-1381(A)(2) (statutory language as of September 1, 2001). The effective date for the 0.08 legislation is September 1, 2001.

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

Under the influence offenses can be committed while driving or while in actual physical control of a vehicle. Use the [driving/actual physical control] choices in brackets as appropriate to the facts. If there is only evidence of driving, do not include actual physical control in the instruction. If there is no issue of driving, do not refer to driving in the instruction. In some cases there may be issues of actual physical control and circumstantial evidence of driving. In those cases, the jury instruction should include both choices. *See State ex rel O'Neill v. Brown (Juan-Pascal, real party in interest*), 182 Ariz. 525, 898 P.2d 474 (1995) (police observed cloud of dust in field and then found defendant holding the keys and seated in the stopped car).

If "actual physical control" is an issue, see the definition of that term at Instruction 28.1381(A)(1)-APC.

The third element must be given for an alleged offense occurring on or after July 18, 2000[September 1, 2001], when applicable legislation became effective. The State must prove that the driver was 0.10[0.08] or more within two hours based upon alcohol consumed at or prior to driving or actual physical control. If there was drinking after the defendant's driving or being actual physical control, it could not be considered in determining whether the driver was 0.10[0.08] or

above at the time of driving or being in actual physical control.

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## 28.1381(A)(3)

## [DRIVING/ACTUAL PHYSICAL CONTROL] WHILE THERE IS A DRUG IN THE DEFENDANT'S BODY

The crime of [driving/actual physical control] while there is a drug in the defendant's body requires proof that the defendant:

1. [Drove/was in actual physical control of] a vehicle in this state; and
2. Had in [his][her] body [(name of drug)][a metabolite of (name of drug)] at the time of [driving/being in actual physical control of] the vehicle.

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**SOURCE:** A.R.S. § 28-1381(A)(3) (statutory language as of September 1, 2001).

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

Under the influence offenses can be committed while driving or while in actual physical control of a vehicle. Use the [driving/actual physical control] choices in brackets as appropriate to the facts. If there is only evidence of driving, do not include actual physical control in the instruction. If there is no issue of driving, do not refer to driving in the instruction. In some cases there may be issues of actual physical control and circumstantial evidence of driving. In those cases, the jury instruction should include both choices. *See State ex rel O'Neill v. Brown (Juan-Pascal, real party in interest)*, 182 Ariz. 525, 898 P.2d 474 (1995) (police observed cloud of dust in field and then found defendant holding the keys and seated in the stopped car).

If "actual physical control" is an issue, see the definition of that term at Instruction 28.1381(A)(1)-APC.

Insert the name of the particular drug, e.g. "codeine, amphetamine", which is in the body or has been metabolized in the body. The proscribed drugs are any of those found in A.R.S. § 13-3401.

In those cases where a driver ingests a legal substance which through a bodily process unknown to a person of average intelligence and common experience, that substance is transformed into a prohibited substance, the driver is not liable under A.R.S. § 13-1381(A)(3). *State v. Boyd*, 201 Ariz. 27, 31 P.3d 140 (App. 2001).

**COMMENT:** "A person using a drug prescribed by a medical practitioner licensed pursuant to title 32, chapter 7, 11, 13 or 17 is not guilty of violating subsection A, paragraph 3 of this section." A.R.S. § 28-1381(D). The statutory defense applies to only A.R.S. § 28-1381(A)(3).

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**28.1381(H).08**

**PRESUMPTIONS OF INTOXICATION**

The amount of alcohol in a defendant's [blood/ breath/ ~~urine/~~ bodily substance] gives rise to the following presumptions:

1. If there was at that time 0.05 percent or less by concentration of alcohol in the defendant's [blood/ breath/ ~~urine/~~ bodily substance], it may be presumed that the defendant was not under the influence of intoxicating liquor.

2. If there was at that time an excess of 0.05 percent but less than 0.08 percent by concentration of alcohol in the defendant's [blood/ breath/ ~~urine/~~ bodily substance], such fact does not give rise to any presumption that the defendant was or was not under the influence of intoxicating liquor.

3. If there was at that time 0.08 percent or more by concentration of alcohol in the defendant's [blood/ breath/ ~~urine/~~ bodily substance], it may be presumed that the defendant was under the influence of intoxicating liquor.

**The statute further provides that the foregoing provisions shall not be construed as limiting the introduction and consideration of any other competent evidence bearing upon the question of whether or not the defendant was under the influence of intoxicating liquor.**

**You are instructed to look at all the facts in the case. These are rebuttable presumptions; the jury is free to accept or reject these presumptions as triers of fact. Even with the assistance of the presumption, the state must prove every element of the crime charged, driving under the influence of intoxicating liquor, beyond a reasonable doubt, before you may find the defendant guilty.**

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**SOURCE:** A.R.S. § 28-1381 **(G)** (H) (statutory language as of August 31, 2001).

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

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## 28.1381(H).10

## PRESUMPTIONS OF INTOXICATION

The amount of alcohol in a defendant's [blood/ breath/ urine/ bodily substance] gives rise to the following presumptions:

1. If there was at that time 0.05 percent or less by concentration of alcohol in the defendant's [blood/ breath/ urine/ bodily substance], it may be presumed that the defendant was not under the influence of intoxicating liquor.

2. If there was at that time an excess of 0.05 percent but less than 0.10 percent by concentration of alcohol in the defendant's [blood/ breath/ urine/ bodily substance], such fact may not give rise to any presumption that the defendant was or was not under the influence of intoxicating liquor.

3. If there was at that time 0.10 percent or more by concentration of alcohol in the defendant's [blood/ breath/ urine/ bodily substance], it may be presumed that the defendant was under the influence of intoxicating liquor.

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**SOURCE:** A.R.S. § 28-1381(H) (statutory language as of August 30, 2001).

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

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## 28.1381MS

## MENTAL STATE

The crime of driving while under the influence of intoxicating liquor or drugs does not require proof of a culpable mental state. The defendant is not required to know that [he] [she] was under the influence of intoxicating liquor or drugs.

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**SOURCE:** *State ex rel Romley v. Superior Court of Maricopa* County, 184 Ariz. 409, 411, 909 P.2d 476, 478 (App. 1995); State *v. Parker*, 136 Ariz. 474, 666 P.2d 1083 (1983); A.R.S. § 13- 202(B) (construction of statutes with respect to culpability).

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## 28.1382(A)

## EXTREME [DRIVING/ACTUAL PHYSICAL CONTROL] WITH AN ALCOHOL CONCENTRATION OF [0.18][0.15] OR MORE WITHIN TWO HOURS OF DRIVING

The crime of extreme [driving/actual physical control] with an alcohol concentration of [0.18][0.15] or more within two hours of driving requires proof of the following:

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

2. The defendant had an alcohol concentration of [0.18][0.15] or more within two hours of [driving/being in actual physical control of] the vehicle; and

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

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**SOURCE:** A.R.S. § 28-1382(A) (statutory language as of September 1, 2001). The effective date for 0.18 legislation is December 1, 1998. The effective date for 0.15 legislation is 1:00 pm on April 14, 2001.

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

The under the influence offenses can be committed while driving or while in actual physical control of a vehicle. Use the [driving/actual physical control] choices in brackets as appropriate to the facts. If there is only evidence of driving, do not include actual physical control in the instruction. If there is no issue of driving, do not refer to driving in the instruction. In some cases there may be issues of actual physical control and circumstantial evidence of driving. In those cases, the jury instruction should include both choices. *See State ex rel O'Neill v. Brown (Juan-Pascal, real party in interest)*, 182 Ariz. 525, 898 P.2d 474 (1995) (police observed cloud of dust in field and then found defendant holding the keys and seated in the stopped car).

If "actual physical control" is an issue, see the definition of that term at Instruction 28.1381(A)(1)-APC.

The third element must be given for an offense occurring on or after July 18, 2000[April 14, 2001], when that legislation became effective. The State must prove that the driver's alcohol concentration was 0.18[0.15] or more within two hours based upon alcohol consumed at or prior to driving or actual physical

control. If there was drinking after the driving or actual physical control, that alcohol could not be considered in determining whether the driver was 0.18 [0.15] or more within two hours of driving or being in actual physical control.

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## 28.1383(A)(1) – 1

## AGGRAVATED [DRIVING/ACTUAL PHYSICAL CONTROL] WHILE UNDER THE INFLUENCE WHILE [LICENSE/ PRIVILEGE TO DRIVE] [SUSPENDED/ CANCELED/ REVOKED/ REFUSED/ RESTRICTED]

The crime of aggravated [driving/actual physical control] while under the influence while [license to drive/ privilege to drive] is [suspended/ canceled/ revoked/ refused/ restricted] requires proof of the following:

1. The defendant committed the offense of [driving/actual physical control] while under the influence; and

2. The defendant's [driver's license to drive/privilege to drive] was [suspended/ canceled/ revoked/ refused/ restricted] at the time the defendant was [driving / in actual physical control].

3. The defendant knew or should have known that the defendant's [driver's license to drive/ privilege to drive] was [suspended/ canceled/ revoked/ refused/ restricted] at the time of [driving/ being in actual physical control].

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**SOURCE:** A.R.S. §§ 28-1383 (A)(1) & -1381(A)(1) (statutory language as of September 1, 2001).

**USE NOTE:** Use this instruction in conjunction with Instruction 28.1381(A)(1).

Use language in brackets as appropriate to the facts. The under the influence offenses can be committed while driving or while in actual physical control of a vehicle. Use the [driving/actual physical control] choices in brackets as appropriate to the facts. If there is only evidence of driving, do not include actual physical control in the instruction. If there is no issue of driving, do not refer to driving in the instruction. In some cases there may be issues of actual physical control and circumstantial evidence of driving. In those cases, the jury instruction should include both choices. *See State ex rel O'Neill v. Brown (Juan-Pascal, real party in interest),* 182 Ariz. 525, 898 P.2d 474 (1995) (police observed cloud of dust in field and then found defendant holding the keys and seated in the stopped car).

The State must prove that the defendant knew or should have known that the license was suspended or revoked. *State v. Agee*, 181 Ariz. 58, 61, 887 P.2d 588, 591 (App. 1994), *State v. Rivera*, 177 Ariz. 476, 479, 858 P2d 1059, 1062 (App. 1994). The knowledge of suspension or revocation may be presumed if the notice of suspension or revocation was mailed to the last known address pursuant to A.R.S. §§ 28-448 and 28-3318. See Instruction 28.3318. This

permissive presumption may be rebutted by presenting some evidence that the defendant did not know that the license was suspended or revoked. *State v. Jennings*, 150 Ariz. 90, 94, 722 P.2d 258, 262 (1986).

**COMMENT:** Driving under the influence can be established by either direct or circumstantial evidence of driving, or by establishing that the defendant was in actual physical control of a vehicle. The offense of driving while a license or privilege to drive was suspended, canceled, or revoked (hereinafter driving on a suspended license) requires either direct or circumstantial evidence of driving. There is no actual physical control element for driving while on a suspended license. Therefore, if actual physical control is part of the greater charge of aggravated driving under the influence, driving on a suspended license is not a lesser-included offense. *State v. Brown*, 195 Ariz. 206, 208, 986 P.2d 239, 241 (App. 1999). Because aggravated driving under the influence can occur on any property and driving on a suspended license can only occur on a public highway, driving on a suspended license is not a lesser-included offense unless the charging document establishes that the driving occurred on a public highway. *State v. Brown*, 195 Ariz. 206, 209, 986 P.2d 239, 242 (App. 1999).

28-1383(A)(1) "prohibits a person from, among other activities, committing a DUI offense 'while a restriction is placed' on her right to drive because of a prior DUI offense." *State v. Skiba*, 199 Ariz. 539, 19 P.3d 1255, 1257 (App. 2001).

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## 28.1383(A)(1) - 2

## AGGRAVATED [DRIVING/ACTUAL PHYSICAL CONTROL] WHILE UNDER THE INFLUENCE WHILE [LICENSE/PRIVILEGE TO DRIVE WAS [SUSPENDED/CANCELED/REVOKED/REFUSED/RESTRICTED] WITH LESSER-INCLUDED OFFENSE OF [DRIVING/ACTUAL PHYSICAL CONTROL] WHILE UNDER THE INFLUENCE

The crime of aggravated [driving/actual physical control] while under the influence while [defendant's driver's license to drive/ privilege to drive] is [suspended/ canceled/ revoked/ refused/ restricted] includes the lesser offense of [driving/ actual physical control] while under the influence. You may consider the lesser offense of [driving/ actual physical control] while under the influence if either:

1. You find the defendant not guilty of aggravated [driving /actual physical control] while under the influence; or

2. After full and careful consideration of the facts, you cannot agree on whether to find the defendant guilty or not guilty of aggravated [driving/actual physical control] while under the influence.

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**SOURCE:** A.R.S. §§ 28-1383(A)(1) & -1381(A)(1) (statutory language as of September 1, 2001); *State v. LeBlanc*, 186 Ariz. 437, 924 P.2d 441 (1996).

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

Under the influence offenses can be committed while driving or while in actual physical control of a vehicle. Use the [driving/actual physical control] choices in brackets as appropriate to the facts. If there is only evidence of driving, do not include actual physical control in the instruction. If there is no issue of driving, do not refer to driving in the instruction. In some cases there may be issues of actual physical control and circumstantial evidence of driving. In those cases, the jury instruction should include both choices. *See State ex rel O'Neill v. Brown (Juan-Pascal, real party in interest)*, 182 Ariz. 525, 898 P.2d 474 (1995) (police observed cloud of dust in field and then found defendant holding the keys and seated in the stopped car).

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## 28.1383(A)(1) - 3

## AGGRAVATED [DRIVING/ACTUAL PHYSICAL CONTROL] WITH AN ALCOHOL CONCENTRATION OF [0.10][0.08] WHILE [LICENSE/ PRIVILEGE TO DRIVE] [SUSPENDED/CANCELED/REVOKED/ REFUSED/RESTRICTED]

The crime of aggravated [driving/actual physical control] with an alcohol concentration of [0.10][0.08] while [license to drive/ privilege to drive] is [suspended/ canceled/ revoked/ refused/ restricted] requires proof of the following:

1. The defendant committed the offense of [driving/actual physical control] while under the influence; and

2. The defendant's [driver's license to drive/privilege to drive] was [suspended/ canceled/ revoked/ refused/ restricted] at the time the defendant was [driving / in actual physical control].

3. The defendant knew or should have known that the defendant's [driver's license to drive/ privilege to drive] was [suspended/ canceled/ revoked/ refused/ restricted] at the time of [driving/ being in actual physical control].

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**SOURCE:** A.R.S. §§ 28-1383(A)(1) & -1381(A)(2)(statutory language as of September 1, 2001).

**USE NOTE:** Use this instruction in conjunction with Instruction 28.1381(A)(2).

Use language in brackets as appropriate to the facts. The under the influence offenses can be committed while driving or while in actual physical control of a vehicle. Use the [driving/actual physical control] choices in brackets as appropriate to the facts. If there is only evidence of driving, do not include actual physical control in the instruction. If there is no issue of driving, do not refer to driving in the instruction. In some cases there may be issues of actual physical control and circumstantial evidence of driving. In those cases, the jury instruction should include both choices. *See State ex rel O'Neill v. Brown (Juan-Pascal, real party in interest),* 182 Ariz. 525, 898 P.2d 474 (1995) (police observed cloud of dust in field and then found defendant holding the keys and seated in the stopped car).

The State must prove that the defendant knew or should have known that the license was suspended or revoked. *State v. Agee*, 181 Ariz. 58, 61, 887 P.2d 588, 591 (App. 1994), *State v. Rivera*, 177 Ariz. 476, 479, 858 P2d 1059, 1062

(App. 1994). The knowledge of suspension or revocation may be presumed if the notice of suspension or revocation was mailed to the last known address pursuant to A.R.S. §§ 28-448 and 28-3318. See Instruction 28.3318. This permissive presumption may be rebutted by presenting some evidence that the defendant did not know that the license was suspended or revoked. *State v. Jennings*, 150 Ariz. 90, 94, 722 P.2d 258, 262 (1986).

**COMMENT:** Driving under the influence can be established by either direct or circumstantial evidence of driving, or by establishing that the defendant was in actual physical control of a vehicle. The offense of driving while a license or privilege to drive was suspended, canceled, or revoked (hereinafter driving on a suspended license) requires either direct or circumstantial evidence of driving. There is no actual physical control element for driving while on a suspended license. Therefore, if actual physical control is part of the greater charge of aggravated driving under the influence, driving on a suspended license is not a lesser-included offense. *State v. Brown*, 195 Ariz. 206, 208, 986 P.2d 239, 241 (App. 1999). Because aggravated driving under the influence can occur on any property and driving on a suspended license can only occur on a public highway, driving on a suspended license is not a lesser-included offense unless the charging document establishes that the driving occurred on a public highway. *State v. Brown*, 195 Ariz. 206, 209, 986 P.2d 239, 242 (App. 1999).

A.R.S. § 28-1383(A)(1) "prohibits a person from, among other activities, committing a DUI offense 'while a restriction is placed' on her right to drive because of a prior DUI offense." *State v. Skiba*, 199 Ariz. 539, 19 P.3d 1255, 1257 (App. 2001).

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**28.1383(A)(1) - 4**

**AGGRAVATED [DRIVING/ACTUAL PHYSICAL CONTROL] WHILE THERE IS A DRUG IN THE DEFENDANT'S BODY WHILE [LICENSE/PRIVILEGE TO DRIVE] [SUSPENDED/CANCELED/ REVOKED/REFUSED/RESTRICTED]**

The crime of aggravated [driving/actual physical control] with an alcohol concentration of [0.10][0.08] while [license to drive/ privilege to drive] is [suspended/ canceled/ revoked/ refused/ restricted] requires proof of the following:

1. The defendant committed the offense of [driving/actual physical control] while under the influence; and

2. The defendant's [driver's license to drive/privilege to drive] was [suspended/ canceled/ revoked/ refused/ restricted] at the time the defendant was [driving / in actual physical control].

3. The defendant knew or should have known that the defendant's [driver's license to drive/ privilege to drive] was [suspended/ canceled/ revoked/ refused/ restricted] at the time of [driving/ being in actual physical control].

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**SOURCE:** A.R.S. §§ 28-1383(A)(1) & -1381(A)(3) (statutory language as of September 1, 2001).

**USE NOTE:** Use this instruction in conjunction with Instruction 28.1381(A)(3).

Use language in brackets as appropriate to the facts. The under the influence offenses can be committed while driving or while in actual physical control of a vehicle. Use the [driving/actual physical control] choices in brackets as appropriate to the facts. If there is only evidence of driving, do not include actual physical control in the instruction. If there is no issue of driving, do not refer to driving in the instruction. In some cases there may be issues of actual physical control and circumstantial evidence of driving. In those cases, the jury instruction should include both choices. *See State ex rel O'Neill v. Brown (Juan-Pascal, real party in interest),* 182 Ariz. 525, 898 P.2d 474 (1995) (police observed cloud of dust in field and then found defendant holding the keys and seated in the stopped car).

The State must prove that the defendant knew or should have known that the license was suspended or revoked. *State v. Agee*, 181 Ariz. 58, 61, 887 P.2d 588, 591 (App. 1994), *State v. Rivera*, 177 Ariz. 476, 479, 858 P2d 1059, 1062

(App. 1994). The knowledge of suspension or revocation may be presumed if the notice of suspension or revocation was mailed to the last known address pursuant to A.R.S. §§ 28-448 and 28-3318. See Instruction 28.3318. This permissive presumption may be rebutted by presenting some evidence that the defendant did not know that the license was suspended or revoked. *State v. Jennings*, 150 Ariz. 90, 94, 722 P.2d 258, 262 (1986).

**COMMENT:** Driving under the influence can be established by either direct or circumstantial evidence of driving, or by establishing that the defendant was in actual physical control of a vehicle. The offense of driving while a license or privilege to drive was suspended, canceled, or revoked (hereinafter driving on a suspended license) requires either direct or circumstantial evidence of driving. There is no actual physical control element for driving while on a suspended license. Therefore, if actual physical control is part of the greater charge of aggravated driving under the influence, driving on a suspended license is not a lesser-included offense. *State v. Brown*, 195 Ariz. 206, 208, 986 P.2d 239, 241 (App. 1999). Because aggravated driving under the influence can occur on any property and driving on a suspended license can only occur on a public highway, driving on a suspended license is not a lesser-included offense unless the charging document establishes that the driving occurred on a public highway. *State v. Brown*, 195 Ariz. 206, 209, 986 P.2d 239, 242 (App. 1999).

A.R.S. 28-1383(A)(1) "prohibits a person from, among other activities, committing a DUI offense 'while a restriction is placed' on her right to drive because of a prior DUI offense." *State v. Skiba*, 199 Ariz. 539, 19 P.3d 1255, 1257 (App. 2001).

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**28.1383(A)(2) - 1**

## AGGRAVATED [DRIVING/ACTUAL CONTROL] WHILE UNDER THE INFLUENCE (WITH TWO PRIOR CONVICTIONS WITHIN SIXTY MONTHS)

The crime of aggravated [driving/actual physical control] while under the influence with two prior convictions within sixty months requires proof of the following:

1. The defendant committed the offense of [driving/actual physical control] while under the influence; and

2. The defendant had been convicted twice for driving under the influence; and

3. The two prior driving-under-the-influence offenses were committed within sixty months of the date of the current offense.

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**SOURCE:** A.R.S. §§ 28-1383(A)(2) & -1381(A)(1) (statutory language as of September 1, 2001).

**USE NOTE:** Use this instruction in conjunction with Instruction 28.1381(A)(1).

The under the influence offenses can be committed while driving or while in actual physical control of a vehicle. Use the [driving/actual physical control] choices in brackets as appropriate to the facts. If there is only evidence of driving, do not include actual physical control in the instruction. If there is no issue of driving, do not refer to driving in the instruction. In some cases there may be issues of actual physical control and circumstantial evidence of driving. In those cases, the jury instruction should include both choices. *See State ex rel O'Neill v. Brown (Juan-Pascal, real party in interest),* 182 Ariz. 525, 898 P.2d 474 (1995) (police observed cloud of dust in field and then found defendant holding the keys and seated in the stopped car).

A.R.S. § 28-1383(B) provides that the dates of commission of the offenses are the determining factors in applying this sixty-month provision.

**COMMENT:** A rebuttable presumption of regularity attaches to prior convictions used to enhance a sentence or as an element of a crime. "When the State seeks to use a prior conviction as a sentence enhancer or as an element of a crime, the State must first prove the existence of the prior conviction. At the time, the presumption of regularity attaches to the final judgment. If the defendant

presents some credible evidence to overcome the presumption, the State must fulfill its duty to establish that the prior conviction was constitutionally obtained." *State v. McCann*, 200 Ariz. 27, 31, 21 P.3d 845, 849 (2001), overruling *State v. Reagan*, 103 Ariz. 287, 440 P.2d 907 (1968), and *State v. Renaud*, 108 Ariz. 417, 499 P.2d 712 (1972).

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## 28.1383(A)(2) - 2

## AGGRAVATED [DRIVING/ ACTUAL CONTROL] WITH AN ALCOHOL CONCENTRATION OF [0.10][0.08] OR MORE WITHIN TWO HOURS OF DRIVING WITH TWO PRIOR CONVICTIONS WITHIN SIXTY MONTHS

The crime of aggravated [driving/actual physical control] with an alcohol concentration of [0.10][0.08] or more within two hours of driving with two prior convictions within sixty months requires proof of the following:

1. The defendant committed the offense of [driving/actual physical control] with an alcohol concentration of [0.10][0.08] or more within two hours of driving; and

2. The defendant had been convicted twice for driving under the influence; and

3. The two prior driving-under-the-influence offenses were committed within sixty months of the date of the current offense.

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**SOURCE:** A.R.S. §§ 28-1383(A)(2) & -1381(A)(2) (statutory language as of September 1, 2001).

**USE NOTE:** Use this instruction in conjunction with Instruction 28.1381(A)(2).

The under the influence offenses can be committed while driving or while in actual physical control of a vehicle. Use the [driving/actual physical control] choices in brackets as appropriate to the facts. If there is only evidence of driving, do not include actual physical control in the instruction. If there is no issue of driving, do not refer to driving in the instruction. In some cases there may be issues of actual physical control and circumstantial evidence of driving. In those cases, the jury instruction should include both choices. *See State ex rel O'Neill v. Brown (Juan-Pascal, real party in interest),* 182 Ariz. 525, 898 P.2d 474 (1995) (police observed cloud of dust in field and then found defendant holding the keys and seated in the stopped car).

A.R.S. § 28-1383(B) provides that the dates of commission of the offenses are the determining factors in applying this sixty-month provision.

**COMMENT:** A rebuttable presumption of regularity attaches to prior convictions used to enhance a sentence or as an element of a crime. "When the State seeks to use a prior conviction as a sentence enhancer or as an element of a crime,

the State must first prove the existence of the prior conviction. At the time, the presumption of regularity attaches to the final judgment. If the defendant presents some credible evidence to overcome the presumption, the State must fulfill its duty to establish that the prior conviction was constitutionally obtained." *State v. McCann*, 200 Ariz. 27, 31, 21 P.3d 845, 849 (2001), overruling *State v. Reagan*, 103 Ariz. 287, 440 P.2d 907 (1968), and *State v. Renaud*, 108 Ariz. 417, 499 P.2d 712 (1972).

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**28.1383(A)(2) - 3**

**AGGRAVATED [DRIVING/ACTUAL CONTROL] WHILE THERE IS A DRUG IN THE DEFENDANT'S BODY WITH TWO PRIOR CONVICTIONS WITHIN SIXTY MONTHS**

The crime of aggravated [driving/actual physical control] while under there is a drug in the defendant's body with two prior convictions within sixty months requires proof of the following:

1. The defendant committed the offense of [driving/actual physical control] while there was a drug in the defendant's body; and

2. The defendant had been convicted twice for driving under the influence; and

3. The two prior driving-under-the-influence offenses were committed within sixty months of the date of the current offense.

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**SOURCE:** A.R.S. §§ 28-1383(A)(2) & -1381(A)(3) (statutory language as of September 1, 2001).

**USE NOTE:** Use this instruction in conjunction with Instruction 28.1381(A)(3).

The under the influence offenses can be committed while driving or while in actual physical control of a vehicle. Use the [driving/actual physical control] choices in brackets as appropriate to the facts. If there is only evidence of driving, do not include actual physical control in the instruction. If there is no issue of driving, do not refer to driving in the instruction. In some cases there may be issues of actual physical control and circumstantial evidence of driving. In those cases, the jury instruction should include both choices. *See State ex rel O'Neill v. Brown (Juan-Pascal, real party in interest),* 182 Ariz. 525, 898 P.2d 474 (1995) (police observed cloud of dust in field and then found defendant holding the keys and seated in the stopped car).

A.R.S. § 28-1383(B) provides that the dates of commission of the offenses are the determining factors in applying this sixty-month provision.

**COMMENT:** A rebuttable presumption of regularity attaches to prior convictions used to enhance a sentence or as an element of a crime. "When the State seeks to use a prior conviction as a sentence enhancer or as an element of a crime, the State must first prove the existence of the prior conviction. At the time, the

presumption of regularity attaches to the final judgment. If the defendant presents some credible evidence to overcome the presumption, the State must fulfill its duty to establish that the prior conviction was constitutionally obtained." *State v. McCann*, 200 Ariz. 27, 31, 21 P.3d 845, 849 (2001), overruling *State v. Reagan*, 103 Ariz. 287, 440 P.2d 907 (1968), and *State v. Renaud*, 108 Ariz. 417, 499 P.2d 712 (1972).

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**28.1383(A)(3) - 1**

## AGGRAVATED [DRIVING/ACTUAL CONTROL] WHILE UNDER THE INFLUENCE WHILE THERE IS A PERSON UNDER THE AGE OF FIFTEEN YEARS IN THE VEHICLE

The crime of aggravated [driving/actual physical control] while under the influence while there is a person under the age of fifteen years in the vehicle requires the proof of the following:

1. The defendant committed the offense of [driving/actual physical control] while under the influence; and

2. A person under fifteen years of age was in the vehicle at the time of the offense.

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**SOURCE:** A.R.S. §§ 28-1383(A)(3) & -1381(A)(1) (statutory language as of September 1, 2001).

**USE NOTE:** Use this instruction in conjunction with Instruction 28.1381(A)(1).

Use the language in the brackets as appropriate to the facts. Under the influence offenses can be committed while driving or while in actual physical control of a vehicle. Use the [driving/actual physical control] choices in brackets as appropriate to the facts. If there is only evidence of driving, do not include actual physical control in the instruction. If there is no issue of driving, do not refer to driving in the instruction. In some cases there may be issues of actual physical control and circumstantial evidence of driving. In those cases, the jury instruction should include both choices. *See State ex rel O'Neill v. Brown (Juan-Pascal, real party in interest),* 182 Ariz. 525, 898 P.2d 474 (1995) (police observed cloud of dust in field and then found defendant holding the keys and seated in the stopped car).

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## 28.1383(A)(3) - 2

## AGGRAVATED [DRIVING/ACTUAL CONTROL] WITH AN ALCOHOL CONCENTRATION OF [0.10][0.08] OR MORE WITHIN TWO HOURS OF DRIVING WHILE THERE IS A PERSON UNDER THE AGE OF FIFTEEN YEARS IN THE VEHICLE

The crime of aggravated [driving/actual physical control] with an alcohol concentration of [0.10][0.08] or more within two hours of driving while there is a person under the age of fifteen years in the vehicle requires the proof of the following:

1. The defendant committed the offense of [driving/actual physical control] with an alcohol concentration of [0.10][0.08] or more within two hours of driving; and

2. A person under fifteen years of age was in the vehicle at the time of the offense.

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**SOURCE:** A.R.S. §§ 28-1383(A)(3) & -1381(A)(2) (statutory language as of September 1, 2001).

**USE NOTE:** Use this instruction in conjunction with Instruction 28.1381(A)(2).

Use the language in the brackets as appropriate to the facts. Under the influence offenses can be committed while driving or while in actual physical control of a vehicle. Use the [driving/actual physical control] choices in brackets as appropriate to the facts. If there is only evidence of driving, do not include actual physical control in the instruction. If there is no issue of driving, do not refer to driving in the instruction. In some cases there may be issues of actual physical control and circumstantial evidence of driving. In those cases, the jury instruction should include both choices. *See State ex rel O'Neill v. Brown (Juan-Pascal, real party in interest),* 182 Ariz. 525, 898 P.2d 474 (1995) (police observed cloud of dust in field and then found defendant holding the keys and seated in the stopped car).

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## 28.1383(A)(3) - 3

## AGGRAVATED [DRIVING/ACTUAL CONTROL] WHILE THERE IS A DRUG IN THE DEFENDANT'S BODY WHILE THERE IS A PERSON UNDER THE AGE OF FIFTEEN YEARS IN THE VEHICLE

The crime of aggravated [driving/actual physical control] while there is a drug in the defendant's body while there is a person under the age of fifteen years in the vehicle requires the proof of the following:

1. The defendant committed the offense of [driving/actual physical control] while there was a drug in the defendant's body; and

2. A person under fifteen years of age was in the vehicle at the time of the offense.

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**SOURCE:** A.R.S. §§ 28-1383(A)(3) & -1381(A)(3) (statutory language as of September 1, 2001).

**USE NOTE:** Use this instruction in conjunction with Instruction 28.1381(A)(3).

Use the language in the brackets as appropriate to the facts. Under the influence offenses can be committed while driving or while in actual physical control of a vehicle. Use the [driving/actual physical control] choices in brackets as appropriate to the facts. If there is only evidence of driving, do not include actual physical control in the instruction. If there is no issue of driving, do not refer to driving in the instruction. In some cases there may be issues of actual physical control and circumstantial evidence of driving. In those cases, the jury instruction should include both choices. *See State ex rel O'Neill v. Brown (Juan-Pascal, real party in interest),* 182 Ariz. 525, 898 P.2d 474 (1995) (police observed cloud of dust in field and then found defendant holding the keys and seated in the stopped car).

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## 28.3318

## [LICENSE TO DRIVE/PRIVILEGE TO DRIVE] [SUSPENSION/CANCELLATION/REVOCATION]

In order to prove the defendant's [license to drive/ privilege to drive] was [suspended/ cancelled/ revoked], the State need not prove the defendant actually received notice or had actual knowledge of the [suspension/ cancellation/ revocation], but must prove mailing of a [suspension/ cancellation/ revocation] notice to the defendant at the address provided to the Motor Vehicle Department on the licensee's application or provided to the Motor Vehicle Department pursuant to a notice of address change or other source, including the address on a traffic citation received by the Department.

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**SOURCE:** A.R.S. § 28-3318 (statutory language as of July 21, 1997).

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

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## 28.622.01

## UNLAWFUL FLIGHT FROM PURSUING LAW ENFORCEMENT VEHICLE

The crime of unlawful flight from a pursuing law enforcement vehicle requires proof of the following three things:

1. The defendant, who was driving a motor vehicle, willfully fled from or attempted to elude a pursuing official law enforcement vehicle; and

2. The law enforcement vehicle was appropriately marked showing it to be an official law enforcement vehicle; and

3. The law enforcement vehicle while in pursuit used an audible siren and emergency lights.

An act was done willfully if it was done knowingly.

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**SOURCE:** A.R.S. §§ 28-622.01 & -624(C) (statutory language as of October 1, 1997); *State v. Gendron,* 166 Ariz. 562, 565, 804 P.2d 95, 98 (App. 1990), *vacated in part on other grounds*, 168 Ariz. 153, 812 P.2d 626 (1991) (the definition of willfully in felony flight statute is equivalent to the definition of knowingly in A.R.S. § 13-105).

**USE NOTE:** The court must instruct on the culpable mental state. “Knowingly” is defined in A.R.S. § 13-105.

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## 28.661

## LEAVING THE SCENE OF AN INJURY OR FATAL ACCIDENT

The crime of leaving the scene of an injury or fatal accident requires that the defendant:

1. Was driving a vehicle involved in an accident resulting in injury to or death of any person; and
2. Failed to stop at the scene or as close as possible and immediately return; and
3. Failed to remain at the scene of the accident until the defendant fulfilled the duties required by law of a driver involved in an accident resulting in injury or death.

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**SOURCE:** A.R.S. §§ 28-661 & -663 (statutory language as of October 1, 1997).

**USE NOTE:** Definitions of "physical injury" and "serious physical injury" should be given from A.R.S. § 13-105, if at issue.

This instruction should be given with Instruction 28.663, Driver's Duty to Give Information and Assistance.

This instruction shall also be followed by the instruction concerning knowledge of injury, if that is at issue- Instruction 28-6611. *See State v. Blevins*, 128 Ariz. 64, 68, 623 P.2d 853, 857 (App. 1981) (holding that failure to instruct the jury on the issue of defendant's knowledge of the personal injury was fundamental, reversible error when defendant's personal knowledge was at issue).

**COMMENT:** Term "accident" is broadly construed to include any vehicular incident resulting in injury or death, whether or not such harm was intended. *State v. Rodgers*, 184 Ariz. 378, 380, 909 P.2d 445, 447 (App. 1995) (holding that statute applied when passenger in defendant driver's vehicle jumped from moving car and was struck and killed by another car).

Leaving the scene is one crime, regardless of the number of persons injured. *State v. Powers*, 200 Ariz. 363, 26 P.3d 1134 (2001).

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## 28.6611

## KNOWLEDGE OF INJURY

The State must prove that the defendant actually knew of the injury to another or that the defendant possessed knowledge that would lead to a reasonable anticipation that such injury had occurred. Circumstantial evidence may be used to prove such knowledge.

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**SOURCE:** *State v. Porras*, 125 Ariz. 490, 493, 610 P.2d 1051, 1054 (1980), *appeal after remand*, 133 Ariz. 417, 652 P.2d 156 (App. 1982).

**USE NOTE:** Use this instruction in conjunction with Instruction 28.661. Failure to instruct the jury on the issue of defendant's knowledge of the personal injury of the victim is fundamental, reversible error. *State v. Blevins*, 128 Ariz. 64, 68, 623 P.2d 853, 857 (1981).

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**28.6612**

**LEAVING THE SCENE OF AN INJURY OR FATAL ACCIDENT – FORM OF VERDICT**

We, the jury, duly impaneled and sworn in the above-entitled action, upon our oaths, do find the defendant,

_____ Not Guilty

_____ Guilty

of Leaving the Scene of an Injury or Fatal Accident.

If you find the defendant guilty, then please decide whether the defendant was guilty of (check only one):

_____ Driving a vehicle involved in an accident resulting in injury to any person, other than death or serious physical injury;

OR

_____ Driving a vehicle involved in an accident resulting in the death, or serious physical injury, of any person.

If you decide that the defendant was guilty of driving a vehicle involved in an accident resulting in the death or serious physical injury of any person, please decide whether the State has proved that the defendant caused the accident:

We find that the State has (check only one)

_____ Proved that the defendant caused the accident.

OR

_____ Not proved that the defendant caused the accident.

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**SOURCE:** A.R.S. § 28-661(B) & (C) (statutory language as of 2002).

**COMMENT:** The findings contained in the interrogatories determine the class of felony.
"A driver who is involved in an accident resulting in death or serious physical injury as defined in A.R.S. § 13-105 and who fails to stop or to comply with the requirements of A.R.S. § 28-663 is guilty of a class 4 felony, except that if the driver caused the accident the driver is guilty of a class 3 felony." A.R.S. § 28-

661(B).

“A driver who is involved in an accident resulting in an injury other than death or serious physical injury as defined in A.R.S. § 13-105 and who fails to stop or to comply with the requirements of A.R.S. § 28-663 is guilty of a class 6 felony.” A.R.S. § 28-661(C).

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## 28.662

## LEAVING THE SCENE OF AN ACCIDENT

The crime of leaving the scene of an accident resulting only in damage to a vehicle that is driven or attended by a person requires that the defendant:

1. Was driving a vehicle involved in an accident resulting in damage to a vehicle that is driven or attended by a person; and

2. Failed to stop at the scene or as close as possible and immediately return; and

3. Failed to remain at the scene until the driver had fulfilled the duties required by law of a driver involved in an accident resulting in damage to a vehicle driven or attended by a person.

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**SOURCE:** A.R.S. §§ 28-662 & -663 (statutory language as of October 1, 1997).

**USE NOTE:** This instruction should be given with Instruction 28.663, Driver's Duty To Give Information And Assistance.

**COMMENT:** Term "accident" is broadly construed to include any vehicular incident resulting in injury or death, whether or not such harm was intended. *State v. Rodgers*, 184 Ariz. 378, 380, 909 P.2d 445, 447 (App. 1995) (holding that statute applied when passenger in defendant driver's vehicle jumped from moving car and was struck and killed by another car).

Leaving the scene is one crime, regardless of the number of persons injured. *State v. Powers*, 200 Ariz. 363, 26 P. 3d 1134 (2001).

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## 28.663

## DRIVER’S DUTY TO GIVE INFORMATION AND ASSISTANCE

The driver of a vehicle involved in an accident resulting in injury to or death of a person or damage to a vehicle that is driven or attended by a person shall:

1. Give the driver's name and address and the registration number of the vehicle the driver was driving; and

2. On request, exhibit the person's license to drive to the person struck or the driver or occupants of, or person attending, a vehicle collided with; and

3. Render reasonable assistance to a person injured in the accident, including making arrangements for the carrying of the person to a physician, surgeon, or hospital for medical or surgical treatment if it is apparent that treatment is necessary or if the carrying is requested by the injured person.

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**SOURCE:** A.R.S. § 28 -663 (statutory language as of October 1, 1997).

**USE NOTE:** This instruction must be given in conjunction with Instructions 28.661 and/or 28.662.

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**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, took [opium] [morphine] [cocaine] [a narcotic] [an intoxicating liquor] [a firearm] [a weapon] [explosives] into [a jail] [the grounds belonging or adjacent to a jail].

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**SOURCE:** A.R.S. § 31-129 (statutory language as of October 1, 1978).

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

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