Colorado Jury Instructions
Criminal
2015

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Model Criminal Jury Instructions Committee
of the Colorado Supreme Court

COLORADO SUPREME COURT
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COLORADO SUPREME COURT

ORDER

WHEREAS, the Colorado Supreme Court Model Criminal Jury Instructions Committee has formulated instructions concerning criminal cases necessitated by numerous amendments to the statutes of the State of Colorado since the previous edition of these instructions was published; and

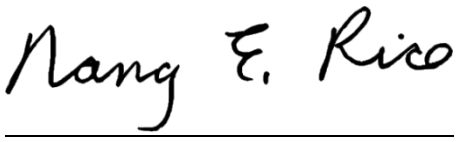
WHEREAS, the Chair of the Committee has regularly informed the Court of the Committee's work;

NOW, THEREFORE, IT IS ORDERED that these jury instructions and comments are approved by this Court for use in jury trials in criminal cases in the State of Colorado, subject to the following qualifications:

These instructions are intended as guidelines and should be used in cases in which they are applicable. The Court does not specifically approve any of these instructions not yet tested in an adversary proceeding. They are not intended to be a complete set of instructions for each case and additional or different instructions may be required depending on the issues of fact and law presented at the trial. Until these instructions are tested in adversary proceedings, they are approved in principle.

DONE and signed this 1st day of September, 2014.

COLORADO SUPREME COURT

By 

Nancy E. Rice, Chief Justice

PREFACE

In 2011, then-Chief Justice Michael L. Bender established the Colorado Supreme Court's Model Criminal Jury Instructions Committee (the Committee) and charged it with publishing an updated edition of COLJI-Crim. The Committee thanks the former Chief Justice for providing the Committee with the staff and other resources necessary to accomplish this sizeable undertaking. The Committee is equally grateful to Chief Justice Nancy E. Rice, who has continued this support during her tenure.

The Committee has endeavored to draft model instructions that accurately state the law in neutral language. However, the precise format and wording for instructions and verdict forms have never been mandated as a matter of positive law in Colorado, and this publication is neither a restatement nor a comprehensive summary of the law.

The comments that follow the instructions include references to relevant legal authorities, cross-references to other instructions, and directions for addressing alternative scenarios. These comments include citations to relevant decisions of the United States Supreme Court and the Colorado Supreme Court that were announced prior to publication of this volume, as well as relevant decisions of the Colorado Court of Appeals that became final prior to publication (i.e., cases for which a mandate issued).

The Committee's drafting protocols are explained in greater detail in Chapter A (General Directions For Use of COLJI-Crim.), which includes a section with several search tips.

The Committee intends to keep these jury instructions current by periodically publishing new editions or supplements. During the periods between these formal publications, the Committee Reporter will post online summaries of developments in the law related to criminal jury instructions based on legislative changes and decisions of the United States Supreme Court, the Colorado Supreme Court, and the Colorado Court of Appeals. This list, which will be captioned as the "Reporter's Online Update," will be available on the Committee's web page.

Although the Committee expects that the Reporter's Online Update will be a valuable research tool, the Committee emphasizes that it will be an informal publication that is not subject to review by the Committee. Thus, users should not assume that the Committee will make modifications based on information that appears in the Reporter's Online Update.

In addition to these interim summaries of developments in the law related to criminal jury instructions, the Reporter's Online Update will include

notations documenting any errors that the Reporter learns of subsequent to publication. Accordingly, the Committee encourages users to alert the Reporter of errors at:

mcjic@judicial.state.co.us

However, here again, users should not assume that the Committee will make modifications based on recommended corrections that may appear in the Reporter's Online Update.

The Committee invites users to submit recommendations for substantive improvements to the Reporter at the above e-mail address. Although such submissions will not be posted online as part of the Reporter's Online Update, the Reporter will present all suggestions to the Committee for consideration.

Finally, the Committee wishes to express its appreciation for the suggestions of the Plain Language Jury Instructions Committee, a subcommittee of the Colorado Supreme Court's Jury System Standing Committee: Judge James B. Breese (Chair), former Chief Justice Michael L. Bender, Justice Brian D. Boatright, Judge Catherine A. Lemon, Judge Tamara S. Russell, Ruth Falkenberg, Jay S. Grant, Esq., Robert S. Grant, Esq., Thomas J. Hammond, Esq., Professor Timothy Hurley, Professor Anthony Lozano, Miles Madorin, Esq., Penny McPherson, Blake Renner, Esq., Marjorie Seawell, and Penny Wagner.

In addition, the Committee thanks: Weld County Court Judge Dana Nichols and Diane Balkin, Esq. (who collaborated to review a preliminary draft of Chapter 9-2 (Cruelty to Animals)); Christopher T. Ryan, Clerk of the Colorado Supreme Court, and staff (who provided the Committee with administrative and logistical support); Daniel Cordova, Supreme Court Law Librarian, and staff (who assisted the Committee with research); Bryan Lopez (who provided the cover photograph); Andrea Cole, Joan Cordutsky, Joseph DeStafney, Kristin Marburg, Melissa McClure, Catherine McDaugale, Sandy Mills, David Steiner, and J.J. Wallace, Associate Staff Attorneys for the Colorado Court of Appeals (who helped proofread the manuscript); Jenny Moore, Rules Research Attorney for the Colorado Supreme Court (who also helped proofread the manuscript); and Christine Kreger, of the Colorado State Library (who provided technical assistance).

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CHAPTER A

GENERAL DIRECTIONS FOR USE OF COLJI-Crim. (2015)

SCOPE OF COVERAGE

This publication includes several sections of model instructions that are generally applicable, as well as model instructions for selected offenses and defenses from Titles 18 and 42.

The instructions reflect all relevant statutory revisions that were made during the 2015 legislative session.

Although the Committee has not drafted model instructions for every offense and defense in the Colorado Criminal Code, the instructions in this volume encompass a sufficiently wide array of offenses and defenses that users should find them to be helpful templates when drafting instructions for other offenses and defenses.

CORRELATION WITH EARLIER EDITIONS

The numbering and lettering of the chapters in this edition of COLJI-Crim. is similar to the format that was used in COLJI-Crim. (2008). The instructions in Chapter B through Chapter I cover general matters, evidentiary issues, defenses, and definitions of terms. The elemental instructions for the Title 18 offenses are located in Chapter 3-1 through Chapter 18, with numbering before the colon that is derived from the number of the relevant Article and Part (this method of numbering is also utilized in Chapter 1.3 (crime of violence sentence enhancement interrogatories)). The numbers that appear after the colons are not derived from statute; they denote the order of the instruction within the chapter. For example, Chapter 3-4 (Unlawful Sexual Behavior) includes the instructions for all offenses in Title 18, Article 3, Part 4, and Instruction 3-4:39.INT (sexual assault on a child - interrogatory (at-risk victim)) is numbered in a manner that identifies it as the thirty-ninth instruction in Chapter 3-4.

The numbering for Chapter 42 (vehicle and traffic offenses) is an exception (as it was in COLJI-Crim. (2008)). It is numbered based on the Title that contains statutes defining vehicle and traffic offenses. Further, because the chapter includes only selected offenses from Title 42, the numbering of the individual instructions, after the colons, is based solely on their sequence within the chapter (and not according to the Article or Part number of the underlying statutes).

Due to the extensive revisions in this edition, it was not feasible to maintain the 2008 numbering and lettering for individual instructions. Although a handful of instructions in this edition happen to have the same numbers or letters as the corresponding instructions that appeared in COLJI-Crim. (2008), most do not. Accordingly, when conducting historical research to compare an instruction from this volume with an earlier version, take care to use the statute number or other source of authority as a search term (a method of research that should be familiar to most users, since COLJI-Crim. (2008) was a complete departure from the organizational framework of COLJI-Crim. (1983)).

ORGANIZATION WITHIN CHAPTERS

Interrogatories and special instructions are sequentially numbered like the other instructions, but they are also identified with suffixes (e.g., "3-1:08.INT" and "3-1:15.SP").

The Committee has positioned the interrogatories and special instructions in each chapter immediately after the elemental instruction(s) to which they apply. Therefore, the comments to the elemental instructions do not include citations directing users to the relevant special instructions and interrogatories (except where a comment for an elemental instruction includes a discussion of a particular interrogatory or special instruction).

CULPABLE MENTAL STATES

Where a culpable mental state for an offense is specified by statute, the Committee has segregated it as a separate element to make clear that it modifies *all* elements that follow. *See* § 18-1-503(4), C.R.S. 2015 ("When a statute defining an offense prescribes as an element thereof a specified culpable mental state, that mental state is deemed to apply to every element of the offense unless an intent to limit its application clearly appears."); *People v. Rodriguez*, 914 P.2d 230, 272 (Colo. 1996) ("'knowingly,' when offset from other elements, modifies all succeeding conduct elements"); *People v. Bossert*, 722 P.2d 998 (Colo. 1986) (no error if "knowingly" element set out in instruction as first element and all others described under number two); *People v. Stephens*, 837 P.2d 231 (Colo. App. 1992) (no error if "knowingly" element listed as number 3 and each later element assigned separate number). Further, out of

an abundance of caution, the Committee adopted the following drafting protocol to guide its application of section 18-1-503(4): "a clear intent to limit the application of a mens rea should not be inferred merely because an offense is defined in such a way that the mens rea does not appear at the beginning of a statutory provision."

Where the statutory definition of an offense does not include a culpable mental state, the issue of whether to impute a mental state is frequently the subject of litigation. *See, e.g.*, *People v. Manzo*, 144 P.3d 551, 552 (Colo. 2006) (leaving the scene of an accident with serious bodily injury constitutes a strict liability offense because the plain language of the statute does not require or imply a culpable mental state); *Gorman v. People*, 19 P.3d 662, 665 (Colo. 2000) ("We have held that legislative silence on the element of intent in a criminal statute is not to be construed as an indication that no culpable mental state is required. *See People v. Moore*, 674 P.2d 354, 358 (Colo. 1984). Rather, the requisite mental state may be implied from the statute."); *People v. Bridges*, 620 P.2d 1, 3 (Colo. 1980) ("We conclude that the mental state 'knowingly' is implied by the statute and is required for the offense of engaging in a riot."). Therefore, unlike in previous editions of COLJI-Crim., the Committee has refrained from adding the culpable mental state of "knowingly" to any elemental instruction that does not include a mens rea as part of the statutory definition of the offense (unless the imputation has been recognized by case law, in which case the relevant authority is discussed in a comment). Nevertheless, where the Committee has concluded that it is debatable whether a mental state should be imputed to an offense, it has noted that possibility by including the following citation in a comment:

> *see also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

TERM DEFINITIONS

Definitional instructions for terms that have statutory definitions are located in Chapter F.

Citations to definitional instructions located in Chapter F are included in the comments for the instructions in other chapters. However, citations for instructions defining subsidiary terms (i.e., statutorily-defined terms that are used in the statutory definitions of other terms) are included only in comments for instructions which use the subsidiary terms. For example, Instruction 3-2:01 defines the offense of assault in the first degree with a deadly weapon, in violation of section 18-3-202(1)(a), C.R.S. 2015. Accordingly, the comment to Instruction 3-2:01 includes a citation referring users to Instruction F:88 (defining "deadly weapon"), and, because Instruction F:88 uses the term "firearm" as part of the definition of a "deadly weapon," the comment for Instruction F:88 includes a citation referring users to Instruction F:154 (defining "firearm").

When utilizing the definitional instructions, note that some terms have more than one statutory definition. For example, there are four definitions of the term "masturbation." *See* § 18-6-403(2)(f), C.R.S. 2015 (defining "masturbation" for purposes of sexual exploitation of children); § 18-7-201(2)(c), C.R.S. 2015 (defining "masturbation" for purposes of prostitution); § 18-7-302(5), C.R.S. 2015 (defining "masturbation" for purposes of indecent exposure); § 18-7-401(5), C.R.S. 2015 (defining "masturbation" for purposes of child prostitution). Accordingly, the citations to definitional instructions direct users to the correct instruction. *See* Instruction F:216 (defining "masturbation" (sexual exploitation of children)); Instruction F:217 (defining "masturbation" (prostitution)); Instruction F:218 (defining "masturbation" (indecent exposure)); Instruction F:219 (defining "masturbation" (child prostitution)).

Where the Committee has concluded that a term that is not defined by statute may be unfamiliar to jurors, it has included a comment noting the absence of a statutory definition. Many of these comments are followed by citations to other relevant sources of authority, primarily dictionaries, that trial judges may wish to consider when deciding whether to exercise their discretion to draft supplemental definitional instructions. However, the Committee emphasizes that it has not adopted these dictionary definitions as model instructions, and courts should be cautious when drafting definitional instructions based on extra-statutory sources. *See*, *e.g.*, *People v. Mascarenas*, 972 P.2d 717, 724 (Colo. App. 1998) ("choosing one of the varying and not entirely consistent dictionary definitions of 'dominion'

could have amounted to an expression of opinion by the court on a matter that was properly determinable by the jury").

DEFENSES

Model instructions defining defenses are located in Chapter H, which is divided into two sections: (I) defenses that are generally applicable; and (II) defenses to inchoate offenses and specific crimes. In addition, there are several "Chapter Comments" at the beginning of the chapter that discuss organizational matters, relevant legal principles, and the reasoning underlying certain drafting decisions of the Committee.

As in previous editions of COLJI-Crim., this publication does not include a model "theory of defense" instruction. For guidance in drafting such an instruction, the Committee recommends that users refer to *Colorado Practice Series*, Vol. 15, Robert J. Dieter, *Colorado Criminal Practice and Procedure*, § 18.119 (2004) ("Instructions—Theory of Defense").

BRACKETED MATERIAL

The Committee has used brackets sparingly to identify alternative language within instructions, interrogatories, and verdict forms. For example, where a single statutory subsection defines more than one way to commit an offense, the Committee has not enclosed the alternatives within brackets unless the Committee perceived a clear disjunctive separation point that warranted distinct numbering of the alternative element(s). *See, e.g.*, Instruction 3-2:25.INT (assault in the third degree – interrogatory (at-risk adult or juvenile)); Instruction 9-1:36 (harassment (communication)). But the fact that the Committee has enclosed two or more alternatives within brackets does not necessarily mean that there may not be situations where the court should instruct the jury regarding more than one of the bracketed alternatives.

Similarly, where the Committee has not bracketed alternative ways of committing an offense, it may be appropriate to delete one or more unbracketed alternative for which there is no evidentiary support. For example, in a case where the defendant is charged with possession of burglary tools in violation of section 18-4-205(1), C.R.S. 2015, it would be appropriate to excise the word "explosive" from the third

element of Instruction 4-2:08 if it is undisputed that the only tool in the defendant's possession was a screwdriver.

In summary, the Committee's bracketing decisions are, like all other aspects of these model instructions, purely advisory.

SENTENCING PROVISIONS

The use of interrogatories in this edition is in accord with Colorado Supreme Court precedent explaining how to distinguish an element from a sentencing factor.

For example, the supreme court has held that a statutory circumstance which reduces a defendant's sentence for an offense reflects a binding legislative choice to create a mitigating factor, and not to add an element to the offense. *See Rowe v. People*, 856 P.2d 486, 492-93 (Colo. 1993) (endorsing COLJI-Crim. 10:20 (1983), a separate heat of passion interrogatory for first and second degree assault that informed the jury that it was to consider the interrogatory only if it first found the defendant guilty of the assault).

Similarly, the supreme court has made clear that "a sentence enhancement provision is not an element of the offense charged. A defendant still may be convicted of the underlying offense without any proof of the sentence enhancer, and this would not be possible if we were dealing with an essential element of the offense." *Armintrout v. People*, 864 P.2d 576, 580 (Colo. 1993). Consequently, a sentence enhancer that turns on a factual determination distinct from the elements of offense should be determined by means of an interrogatory, as indicated throughout this publication.

However, some sentence enhancement provisions that are based on determinations concerning prior convictions need not be submitted to the jury. *See Misenhelter v. People*, 234 P.3d 657, 660 (Colo. 2010) (explaining the prior conviction exception to the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004)).

The model special verdict form, Instruction E:28, is designed to ensure that the jury's response to each "verdict question" corresponds to a guilty verdict for a charged offense. *Cf. Sanchez v. People*, 2014 CO 29, ¶¶ 2, 17, 325 P.3d 553, 554-59 (jury's findings with respect to a sentence enhancer were not a constitutionally proper basis for inferring that it had found

the defendant guilty of a substantive offense). Thus, where a defendant is charged with multiple counts of the same offense, the model special verdict form will prevent the jury from answering a verdict question for a sentence enhancement factor without clearly identifying the specific guilty verdict to which it applies (conversely, this same protection exists with regard to a verdict question that asks about a mitigation factor, such as heat of passion). Nevertheless, in a case involving evidence of an uncharged act that is similar to a charged offense, the Committee recommends modifying the verdict question to include language that explicitly links the jury's response to the verdict question to its guilty verdict for a charged offense. For example, in a case where the defendant is charged with first degree arson and evidence of a second, uncharged act of arson is admitted pursuant to CRE 404(b), the court could modify Instruction 4-1:02.INT by inserting the following italicized language: "Did the defendant commit the offense *of first degree arson, for which you have found him [her] guilty in Instruction* ___, by the use of an explosive?".

Finally, although some of the comments include references to the sentencing classification levels for particular offenses, the Committee has included such information solely for the purpose of providing guidance with respect to instructional issues. *See, e.g.*, Instruction 3-1:16.INT, Comment 1. The Committee strongly discourages users from relying on this publication at sentencing.

CROSS-REFERENCING

The Committee recognizes that cross-references to other numbered instructions can serve as useful guideposts for jurors (e.g., a first degree burglary instruction that identifies the crime that the defendant allegedly intended to commit with the following language: "robbery, as defined in Instruction 23"). However, because an incorrect cross-reference may inject error into otherwise accurate instructions, the Committee has not included entries for such cross-references except where the Committee has determined that such cross-referencing is necessary to help the jury understand the interrelationship of instructions. *See, e.g.*, Instruction H:27.SP (explaining that this special instruction is provided for purposes of one or more particular affirmative defense instructions, which are to be identified by specifying the relevant instruction number(s)).

SEARCH TIPS

This publication is navigable using the main hyperlinked Table of Contents, the individual hyperlinked tables of contents (located at the beginning of each chapter), and the Summary of Contents.

To use a hyperlink, maneuver the mouse pointer over a hyperlinked entry. In Microsoft Word®, a small pop-up box will prompt you to press the Ctrl key while clicking on the link. Doing so will take you directly to the corresponding bookmarked location. Pressing the Ctrl key with a mouse click works the same way in Adobe Reader®, though that program does not include a prompting pop-up box.

To search within the document in Microsoft Word®, use the "Find" function (press and hold Ctrl while pressing the key for the letter "F," or click on the icon in the tool bar that looks like a small pair of binoculars). To search within the document in Adobe Reader®, use the "Find" box in the navigation bar (or use the Ctrl + F keystroke combination). In both programs, craft your search terms as narrowly as possible (e.g., by using statutory citations, case names, or key words).

Use the "Find" function to return to the Summary of Contents from anywhere in the document by entering three hash tags (#) as your search term. Alternatively, in Microsoft Word®, use the Ctrl + Home keystroke combination to return to the beginning of the document, place the mouse over the photograph (which is hyperlinked to the Summary of Contents), and use the Ctrl + mouse click keystroke combination (in Adobe Acrobat®, the photograph is not hyperlinked, but the line of text with the credit and description, which appears immediately below the photograph, is).

Use the "Find" function to return to the main Table of Contents from anywhere in the document by entering three asterisks (*) as your search term.

To go directly to a particular page in Microsoft Word®, press F5 and enter the page number (once this function is open, it can also be used to move forward or backward through the sections). In Adobe Acrobat®, enter the page number in the box that is part of the tool bar.

MISCELLANEOUS

1. The captions and comments are designed to assist users. They should be omitted from the set of instructions that the court provides to the jury.

2. When possible, draft instructions using the proper names of all parties and witnesses. Avoid using indefinite pronouns, formal titles, or words which can be construed as connoting prejudgment of the evidence (e.g., the term "victim," which presupposes the commission of a crime).

3. Although the term "bailiff" is used in several of the model instructions, it may be appropriate (depending on the court's staffing) to substitute the term "court clerk" or "law clerk."

4. + These instructions were drafted using Microsoft Word 2010®. The PDF version of this volume was created using Adobe Acrobat 8 Professional®.

CITATION

The publication should be cited as:

COLJI-Crim. (2015).

Individual instructions should be cited as:

COLJI-Crim. ___:___ (2015).

Individual comments should be cited as:

COLJI-Crim. ___:___, Comment ___ (2015).

The Committee has utilized the following abbreviated form of citation when citing to materials located within this publication:

See Instruction ___:___.

However, this shortened form of citation should not be used in briefs, orders, opinions, or other documents where it is important to identify the title and edition of the publication.

+ NOTATION OF REVISIONS AND NEW MATERIAL

COLJI-Crim. (2015) contains new chapters, expanded Comments, revisions based on 2015 legislation, corrections to substantive errors that appeared in COLJI-Crim. (2014), and corrections to non-substantive formatting irregularities. The Committee has highlighted each substantive revision by means of the "+" symbol (which can be used as a search term by those who wish to survey the 2015 revisions). However, the Committee has not highlighted formatting revisions that are inconsequential.

Where a new chapter has been added, the "+" appears next to the chapter heading, and again in a new Chapter Comment which documents the year of the augmentation. *See, e.g.*, Chapter 3-5 (human trafficking and slavery), Chapter Comment 1 ("The Committee added this chapter in 2015.").

Where the text of a model instruction has been altered, the "+" symbol appears at the point of the revision, and again in the new separate Comment which explains the change. *See, e.g.*, Instruction H:76 (driving with excessive alcohol content - subsequent consumption of alcohol), Comment 2 ("In 2015, the Committee corrected this instruction, where noted by the '+' symbol, by deleting the word 'all' and substituting the words: 'at least one of the above.'").

Where a Comment has been added, corrected, or significantly expanded, the "+" symbol appears at the point of the revision, and again in the new separate Comment which explains the reason for the change. *See, e.g.*, Instruction 3-1:04 (murder in the first degree (extreme indifference)), Comment 7 ("+ In 2015, the Committee modified the first sentence of Comment 6 by deleting the words 'the above definition was developed through case law.'").

Finally, where a revision to a Comment is simple and the purpose for the alteration is obvious (e.g., the addition of a citation to a new case), the Comment explaining the "+" symbol consists of nothing more than a brief entry documenting the year in which the Committee made the change. *See, e.g.*, Instruction F:10, Comment 4 ("+ In 2015, the Committee revised Comment 2 by adding a citation to *Martinez v. People*.").

CHAPTER B

CRIMINAL JURY ORIENTATION, EXAMINATION AND SELECTION PROCESS

B:01 INTRODUCTORY REMARKS, JUROR QUALIFICATIONS, AND JURY SELECTION

Good Morning, Ladies and Gentlemen:

Welcome to [Courtroom] [Division] No. [ ] of the [ ] Court. I am Judge [ ].

I want to thank all of you for your service. Jury service is both a right and a responsibility of citizenship in this country. We deeply appreciate your participation in this important aspect of our democratic society.

Before we begin the trial, I want to tell you what will be happening. Let me start by introducing the people involved.

This is a criminal case. It was filed on behalf of the People of the State of Colorado by the District Attorney's office. We will sometimes refer to the District Attorney as the "Prosecution" or the "People." The District Attorney's Office is represented by [ ] in this case. The "Defendant" is [ ].

[He [she] is represented by [ ].]

[He [she] has decided to represent himself [herself] instead of being represented by a lawyer. It is his [her] right to do this. His [her] decision to represent himself [herself] has nothing to do with whether he [she] is guilty or not. His [her] choice to represent himself [herself] cannot be considered by the jury for any purpose and should not influence the jury's decision in any way. It must not result in either prejudice against the defendant or sympathy for the defendant.]

[The person seated beside the defendant is [insert name of counsel], who is an advisory attorney. An advisory attorney serves as a resource to help the defendant with legal matters during trial, but will not address the Court or the jury during the trial.]

The charge[s] against the Defendant [is] [are] contained in what is called an [information] [indictment] [complaint].

[The [information] [indictment] [complaint] in this case reads as follows:]

[The following is a summary of the charges in this case:]

> [Note to court: Crim. P. 24(a)(2)(v) states that "the judge shall explain . . . in plain and clear language . . . [the] elements of charged offenses."]

The charge itself is not evidence of anything. It is not proof the defendant committed any crime. No juror should assume the defendant committed a crime just because he [she] was charged with doing so.

The Defendant has pleaded "not guilty" to the charge[s]. By pleading "not guilty," the defendant says that he [she] did not commit the crime[s] charged. The defendant is presumed to be innocent. Therefore, the prosecution has the burden of proving the charge[s] beyond a reasonable doubt. At the end of the trial, the jury will decide whether the prosecution has proven, beyond a reasonable doubt, that the defendant is guilty of the crime[s] charged.

We will select [ ] jurors [and [ ] alternate[s]] to be the jury. These jurors will consider all of the evidence presented during the trial. The jurors will then decide what has been proved, based on all of the evidence.

Then, based upon the law which I will explain to you, the jury will decide whether the prosecution has proved any charges beyond a reasonable doubt.

Before we begin with the jury selection process, I want to explain a few other matters.

[If you are selected to be on the jury, you will be able to go home each evening, but you will have to follow certain rules. I will explain those rules later.]

[If you are selected to be on the jury, you will be sequestered and have to follow certain rules. I will explain those rules later.]

If you are excused from being a juror in this case, you may have to return to the main jury room, if we still need jurors in other courtrooms.

In a few minutes I will be asking all of you some questions. These questions are not intended to embarrass you, but to find out if you are qualified to be a juror.

If any of you need to answer a question about a sensitive matter that you prefer to discuss privately, please let me know and we will have a more private discussion.

Since there will be questions asked of each of you, it is necessary that I place you under oath to tell the truth. Please stand and raise your right hand. Answer "I do" if you agree with the oath or affirmation.

Do you solemnly swear or affirm under penalty of law to answer truthfully the questions asked by the Court or counsel concerning your service as a juror in this case?

Thank you. Please be seated.

I first need to determine if you are legally qualified to serve on a criminal jury in this district.

Please raise your hand if you think any of these apply to you.

Are any of you not a citizen of the United States?

Are any of you not a resident of [ ]?

Are any of you not at least eighteen years old?

Are any of you not able to read, speak and understand the English Language?

Are any of you not able to serve on a jury because of a physical or mental disability?

Are any of you solely responsible for the daily care of an individual with a permanent disability who lives with you?

Have any of you served on a jury within the last twelve months, or are any of you scheduled for jury service within the next twelve months?

[Note to court: Rule on any challenges for cause.]

There are certain other situations that may require me to excuse you as jurors.

Before asking about these situations, I will give you more information about this case.

This case involves allegations of: [ ].

[Note to court: Describe the allegations using a method that complies with Crim. P. 24(a)(iv) (" When prospective jurors have reported to the courtroom, the judge shall explain to them in plain and clear language . . . [t]he nature of the case using applicable instructions if available or, alternatively a joint statement of factual information intended to provide a relevant context for the prospective jurors to respond to questions asked of them. Alternatively, at the request of counsel and in the discretion of the judge, counsel may present such information through brief non-argumentative statements.").]

The witnesses who may testify are: [ ].

Please raise your hand if you think that any of these apply to you:

Do any of you believe you may be related to the defendant or the attorneys?

Do any of you know anyone involved in this case, including the defendant, the alleged victim, the attorneys, the witnesses, me, or my court staff?

Do any of you know each other?

Have any of you ever had any business or financial dealings with the defendant, the alleged victim, or the attorneys, including any employment relationship?

Have any of you ever been involved in legal proceedings of any kind with anyone involved in this case?

Did any of you personally see, hear, or read anything about this case in the media or on the internet, including computers, other electronic devices or through other tools of technology?

Were any of you involved in the prosecution of this case?

Do any of you work for a public law enforcement agency or for a public defender's office?

[Note to court: Rule on any challenges for cause.]

I will now go over a few basic rules of law that apply in all criminal cases. These rules are important because they come from our state and federal constitutions and are the backbone of our American system of justice. They assure that both sides receive a fair trial. All jurors must be able to follow these rules.

> [Note to court: The next series of paragraphs is designed to comply with Crim. P. 24(a)(2)(v), which requires that the court explain – in addition to the elements of the charges – "[g]eneral legal principles applicable to the case including the presumption of innocence, burden of proof, [and the] definition of reasonable doubt." Because this provision also states that the court is to explain "other matters that jurors will be required to consider and apply in deciding the issues," consider including definitions of culpable mental states, affirmative defenses (including insanity, if pled), key terms, etc.]

Every person charged with a crime is presumed innocent. This presumption of innocence remains with the defendant throughout the trial and should be given effect by you unless, after considering all of the evidence, you are then convinced that the defendant is guilty beyond a reasonable doubt.

The burden of proof is upon the prosecution to prove to the satisfaction of the jury beyond a reasonable doubt the existence of all of the elements necessary to constitute the crime charged.

Reasonable doubt means a doubt based upon reason and common sense which arises from a fair and rational consideration of all of the evidence, or the lack of evidence, in the case. It is a doubt which is not a vague, speculative or imaginary doubt, but such a doubt as would cause reasonable people to hesitate to act in matters of importance to themselves.

Every defendant has a constitutional right not to testify. The decision not to testify cannot be used as an inference of guilt and cannot prejudice the defendant. It is not evidence, does not prove anything, and you must not consider it for any purpose.

Sympathy and prejudice have no place in a criminal trial. The guilt or innocence of the defendant must not be decided as a result of either sympathy or prejudice for or against the prosecution or the defendant.

This case must be decided only on the evidence presented at trial and the law as I instruct you.

You may have to decide what testimony to believe. You should carefully consider all of the testimony given and the circumstances under which each witness has testified.

Consider each witness's knowledge, motive, state of mind, demeanor, and manner while on the stand. Consider the witness's means of knowledge, ability to observe, and strength of memory. Consider also any relationship each witness may have to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case. You should consider all facts and circumstances shown by the evidence which affects the credibility of the witness's testimony. You may believe all of the testimony of a witness, or part of it, or none of it.

Do all of you understand these principles?

Are there any of you who could not follow these principles if you become a juror?

If you cannot follow these principles, you must say so now.

[Note to court: Rule on any challenges for cause.]

I want to ask one more very important question. Jurors are valuable because of their life experiences. However, sometimes those life experiences leave a juror feeling they could not be fair in a particular case. Do any of you believe that you could not be a fair juror in this case, for any reason?

[Note to court: Rule on any challenges for cause.]

I expect that this case will probably last until [ ].

The trial may last longer than that. I always have to qualify my time estimate because there are so many things that might affect our schedule. This includes jury deliberations. Once the trial is finished and I turn the case over to the jury to decide, there is no stopwatch on your deliberations. You will have as much or as little time as you need to reach a unanimous decision.

During trial, we will start each day promptly at [ ], we will take one [ ] minute break in the morning and one in the

afternoon, and we will usually break for lunch between [ ] and [ ].

Recognizing that all of you will be significantly inconvenienced by jury service, would any of you experience an extreme hardship?

[Note to court: Address claims of hardship based on the statutes summarized in Comment 1.]

In a moment, some of you will be called to the jury box. At that time, the attorneys and I will ask additional questions.

I want to impress on you that there are no "right" or "wrong" answers to the questions you will be asked. What is important is that you be completely honest in all your answers.

Please remember to answer all questions honestly and completely.

Each of you must listen carefully to all questions and answers, even when we are talking to someone else.

By listening to what we ask others, you will be better prepared to answer when you will be questioned. This will help shorten the jury selection process.

[Note to court: Conduct voir dire using a method that complies with Crim. P. 24(a)(3), (4).]

Do any of you feel that you may not be able to be fair and impartial toward the prosecution, the defendant, the attorneys, or any of the witnesses?

Do any of you feel you may not be able to follow the law for any reason?

Do any of you feel you might be disqualified from being a juror for any other reason?

[Note to court: Rule on any challenges for cause.]

Now, each side may now excuse up to [ ] jurors, without stating a reason. Therefore, do not be embarrassed or consider it any reflection upon you if you are one of those excused.

[Note to court: After the parties exercise their peremptory challenges, read a list of the jurors who have been selected to serve.]

Ladies and gentlemen, you have been selected as the jurors to try the case of "The People of the State of Colorado versus [ ]." You now have duties in addition to your obligation to answer our questions truthfully, so I must now administer an additional oath to you. Please stand and raise your right hands:

Do you solemnly swear or affirm under penalty of law that you will well and truly try the matter before the court, and render a true verdict, according to the evidence and the law as I instruct you? If so, please say, "I do."

COMMENT

1. *See* Crim. P. 24 (trial jurors); § 16-10-103(1), C.R.S. 2015 (challenge of jurors for cause); § 13-71-105, C.R.S. 2015 (qualifications for juror service); § 13-71-119(2), C.R.S. 2015 (excusing prospective jurors for "extreme hardship"); § 13-71-121, C.R.S. 2015 (excusing jurors for "hardship or inconvenience" in trials that are expected to take more than three days); *see also* § section 13-71-119.5(2)(a)(II), C.R.S. 2015 (a prospective juror may seek to be "excused temporarily from service as a juror if his or her jury service would cause undue or extreme physical hardship to him or her or to another person under his or her direct care or supervision," but he or she "shall take all actions necessary to obtain a determination on the request before the date on which the person is scheduled to appear for jury duty").

2. This model instruction is not a rigid script. Like many of the other generally applicable instructions that explain trial procedures, it should be regarded as a template that trial judges can use as a starting point when drafting instructions that reflect their own preferred practices.

3. For example, the model instruction does not include language explaining the role of alternate jurors, how or why they are selected, or why they may not be identified until the end of the trial. The Committee recognizes that trial judges (1) utilize a variety of methods to select and discharge alternate jurors; and (2) have differing views concerning what information, if any, prospective jurors should be provided during jury selection about alternate jurors.

4. In cases where the defendant enters a plea of "not guilty by reason of insanity," modify the paragraph that explains the defendant's plea as follows:

> The Defendant has pleaded "not guilty by reason of insanity" to the charge[s]. By pleading "not guilty by reason of insanity," the defendant says that he [she] is not legally responsible for the offense[s] charged because he [she] was insane at the time of the commission of the act[s]. The defendant is presumed to be innocent. Therefore, it is the prosecution's burden to prove beyond a reasonable doubt: (1) each element of [the] [each] crime charged; and (2) that the defendant was sane at the time of the commission of the act[s]. At the end of the trial, the jury will decide whether the prosecution has proven, beyond a reasonable doubt, the defendant's guilt and sanity.

5. *See People v. Smith*, 848 P.2d 365, 371 (Colo. 1993) ("Although this court has held that the procedure of administering an oath to a jury charged with trying a case has been judicially recognized and is implicitly required, we have not articulated any guidelines as to when such an oath must be administered."); *Hollis v. People*, 630 P.2d 68, 69 (Colo. 1981) ("While there is no explicit statute or rule requiring the administration of an oath to a jury in this state, the need for such an oath had been judicially recognized. *See Minich v. People*, 9 P. 4 (Colo. 1885). *See also*, *e.g.*, *People v. Freeman*, 583 P.2d 921 (Colo. 1978). As well, our rules of criminal procedure implicitly require that a jury will be sworn to try a case." (internal citations omitted)); *see also* C.R.C.P. 47(i) ("As soon as the jury is completed, an oath or affirmation shall be administered to the jurors in substance: That you and each of you will well and truly try the matter at issue between _____, the plaintiff, and _____, the defendant, and a true verdict render, according to the evidence.").

6. *See People v. Kinney*, 148 P.3d 318, 320 (Colo. App. 2006) (trial court did not abuse its discretion in excusing a prospective juror based on a finding of hardship, pursuant to section 13-71-121, where the prospective juror "told the court she was a teacher, could not get a substitute for more than three days, and was scheduled to do a type of assessment testing that a substitute could not handle"), *rev'd on other grounds*, 187 P.3d 548 (Colo. 2008); *People v. Isom*, 140 P.3d 100, 103 (Colo. App. 2005) (because the trial was expected to last more than three days, the court had discretionary authority to excuse

a prospective juror for "hardship or inconvenience" under section 13-71-121, and the court did not abuse that discretion by excusing a prospective juror who stated that he had purchased a nonrefundable airfare for a business trip and was scheduled to leave before the end of trial); *see also People v. Reese*, 670 P.2d 11, 14 (Colo. App. 1983) (holding, under the "undue hardship" standard of the since-repealed section 13-71-112(1), that the trial court did not abuse its discretion by excusing a prospective juror for whom jury service would have caused an undue financial burden).

B:02 ADMONITION PRIOR TO RECESS DURING JURY SELECTION

Before we take our break, let me remind you that you must not discuss anything about this case with each other or with anyone else, and you must not try to find out any information about this case from any source other than what you see and hear in this courtroom. Do not look up anything about the case on the internet or engage in any electronic communications about it with anyone.

B:03 INSTRUCTION PRIOR TO OPENING STATEMENTS (GENERAL)

Before we begin the trial, I would like to tell you about what will be happening here.

The first step in the trial will be the opening statements. The attorneys may make opening statements if they choose to do so. [Defendant[’s attorney] may reserve opening statement until later in the trial, or he [she] may decide not to make an opening statement at all.]

An opening statement is not evidence. Its purpose is to give you a framework to help you understand the evidence as it is presented.

Next, the prosecution will offer evidence. Evidence is what the witnesses say under oath, and items allowed as exhibits.

After the prosecution’s evidence, the defense may present evidence, but is not required to do so. I want to remind you that the defendant is presumed to be innocent. The prosecution must prove the defendant guilty beyond a reasonable doubt. The defendant does not have to prove his [her] innocence or call any witnesses or introduce any evidence.

After all the evidence has been presented, I will tell you the rules of law which you must use in reaching your verdict. These rules of law are called jury instructions. I will read them to you and you will be allowed to take them with you to the jury room during your deliberations.

It is my job to decide what rules of law apply to the case. You must follow all of the rules as I explain them to you. You cannot follow some and ignore others. Even if you disagree or do not understand the reasons for some of the rules, you must follow them. You will then apply these rules to the facts you have determined from the evidence. In this way you will decide whether the prosecution has proven the guilt of the defendant beyond a reasonable doubt.

After you have heard all the evidence and the jury instructions, the prosecution and the defense may make their closing arguments. Because the prosecution has the burden of proof, it will have the opportunity to reply to any closing argument made by the defense. Like opening statements, closing arguments are not evidence. Their purpose is to remind you of

the evidence that was presented during the trial and to argue why you should return a verdict of either not guilty or guilty.

After the closing arguments, you will then go to the jury room to deliberate on a verdict. Your role as jurors is to decide what the facts are, and your decision must be based only upon the evidence that was presented during the trial.

At times during the trial, the attorneys may make objections. This means that the attorney is asking me to decide a particular legal issue.

It is proper for an attorney to object to things which he or she believes should not be presented as evidence. When an objection is made, I have two choices. I can disagree and overrule the objection, or I can agree and sustain the objection.

Do not concern yourselves with the reasons for my decisions about any objections. You must not let yourself be influenced in any way by the objections or my rulings on the objections.

If I overrule an objection to a question, the witness may answer. If I sustain an objection to a question, the witness may not answer. You must not consider the question for any purpose or guess how the witness might have answered.

If I overrule an objection to an exhibit, it will be allowed into evidence. If I sustain an objection to an exhibit, it will not be allowed into evidence and you must not consider it for any purpose.

At times I may instruct you to disregard statements you have already heard or things you have already seen. You must treat them as if you had never heard or seen them. You must not consider them for any purpose.

During the trial I may need to talk with the attorneys out of your hearing about questions of law. Sometimes you may be asked to leave the courtroom or wait in the jury room while we discuss these things. We will try to limit these interruptions as much as possible. As a judge, I do not have any opinions either for or against anyone involved in this case. You must not think that I do, based on any rulings that I make or anything that I say or do during this trial.

COMMENT

1. *See* Crim. P. 24(a)(5) ("Once the jury is impaneled, the judge shall again explain in more detail the general principles of law applicable to criminal cases, the procedural guidelines regarding conduct by jurors during the trial, case specific legal principles and definitions of technical or special terms expected to be used during the presentation of the case.").

B:04 INSTRUCTION PRIOR TO OPENING STATEMENTS (NOTEBOOKS)

You have received [writing materials] [notebooks]. You may use these [writing materials] [notebooks] to take notes during the trial. However, you are not required to do so.

If you take notes, you should not allow the note taking to detract from your close attention to the testimony and conduct of each witness and all other evidence received during the trial.

Whether or not you take notes, you should rely on your memory as much as possible. The notes you take are to refresh your own memory. You should not give additional weight to the comments of any juror based upon the quantity or quality of his or her note taking.

These [writing materials] [notebooks] may only be used in the courtroom or jury room, and may not be taken anywhere else.

To identify your [writing materials] [notebook], please write your name[s] on [it] [them]. No one else will read your notes. At the end of the case, these notes will be returned to the Court and destroyed.

COMMENT

1. *See* Crim. P. 16(IV)(f) ("Juror notebooks shall be available during all felony trials and deliberations to aid jurors in the performance of their duties. The parties shall confer about the items to be included in juror notebooks and, by the pre-trial conference or other date set by the court, shall make a joint submission to the court of items to be included in a juror notebook. In non-felony trials, juror notebooks shall be optional."); *see also* "Implementation Plan: Jury Reform in Colorado," p. 12, Appendix D (Proposed Criminal Jury Instruction 1:05) (Mar. 12, 1998).

2. *See Frasco v. People*, 165 P.3d 701, 703-05 (Colo. 2007) (although Crim. P. 57(b) directs criminal courts to look to the Rules of Civil Procedure when no Rule of Criminal Procedure exists, and C.R.C.P. 47(m) states that "[u]pon retiring, the jurors shall take the jury instructions, their juror notebooks and notes they personally made, if any, and to the extent feasible, those exhibits that have been admitted as evidence," trial courts retain discretionary control over jury access to

trial exhibits during their deliberations "[d]espite . . . evolving views in this jurisdiction about the nature of jury deliberations and the expanded allowance of questioning and note-taking by jurors").

3. *See People v. Willcoxon*, 80 P.3d 817, 820 (Colo. App. 2002) (although the trial court erred by allowing the jurors to take the juror notebooks home because this procedure is not expressly authorized by Crim. P. 16(IV)(f), the error was not structural, and reversal was not required, because any harm to defendant could be measured by determining: (1) whether the jurors were admonished not to show the juror notebooks to anyone, or discuss the case or the contents of the juror notebooks with anyone; (2) whether there is evidence that jurors did anything improper as a result of taking juror notebooks home, such as using extrinsic information to assist in deliberations; and (3) whether taking the juror notebooks home prompted jurors to discuss the case prior to jury deliberations).

B:05 INSTRUCTION PRIOR TO OPENING STATEMENTS (JUROR QUESTIONS)

Rules governing jury trials do not allow jurors to ask questions directly of a witness. However, if you have a question you would like to ask a witness during the trial, write your question down, but do not sign it. Before the witness is permitted to leave, I will ask if anyone has a question for the witness. [Occasionally, I forget to ask. If that should happen and any of you have a question, please signal the bailiff or me before the witness leaves the stand.]

I may discuss the question with the attorneys. If I decide the question is proper, it will be asked when appropriate. Keep in mind, however, that the rules of evidence or other rules of law may prevent some questions from being asked. I will apply the same legal standards to your questions as I do to the questions asked by the attorneys.

If a particular question is not asked, do not guess why or what the answer might have been. If I don't ask a proposed question it is not a reflection on the person proposing it, and you should not attach any significance to it.

COMMENT

1. *See* Crim. P. 24(g) ("Jurors shall be allowed to submit written questions to the court for the court to ask of witnesses during trial, in compliance with procedures established by the trial court. The trial court shall have the discretion to prohibit or limit questioning in a particular trial for reasons related to the severity of the charges, the presence of significant suppressed evidence or for other good cause."); *see also* CJI-Civ. 1:16 (2014).

2. *See Medina v. People*, 114 P.3d 845, 853-55 (Colo. 2005) (permitting the jury to ask questions through the judge did not violate defendant's due process rights); *People v. Stevenson*, 228 P.3d 161, 170 (Colo. App. 2009) (trial court did not abuse its discretion in allowing juror's question, and concluding that it was not precluded by the parties' evidentiary stipulation); *People v. Zamarripa-Diaz*, 187 P.3d 1120, 1124 (Colo. App. 2008) (although a trial court is not obligated to do so under Crim. P. 24(g), "it would be better practice that a trial court consult with counsel prior to asking the jurors' questions").

B:06 ADMONITION ABOUT CONDUCT DURING TRIAL

Now that you have been selected to be jurors, there are rules you must follow. These are the same rules jurors have always had to follow. During the trial, this courtroom is a place partially isolated from the outside world. Your decision must be made inside this place and you must follow its rules. You must decide this case based only on the evidence and law presented in the courtroom. You must avoid any other information about the case from any other source. These rules are designed to make sure there is a fair trial.

There are two basic rules:

1. You must not communicate with others or among yourselves about the trial as it is going on.

2. You must not do any independent investigation or research about the case.

I will go over these rules in great detail because they are very important. I will also explain the reasons for these rules. If you learn anyone has violated these rules you must report that to me or my staff at once.

You must not discuss the case among yourselves in any way during the course of the trial. You may not discuss the case among yourselves until after you have heard all the evidence and you begin to deliberate on a verdict. In fairness, you must keep an open mind throughout the trial, and you should reach your decision only during your deliberations at the end of the trial.

Do not permit anyone else to discuss the case with you, or near you. If anyone, including one of your fellow jurors, attempts to do so, report that fact immediately.

Do not talk with any witness, or with the defendant, or with any of the attorneys in the case. You cannot talk to them and they cannot talk to you, even casually.

Do not communicate about the case with anyone else in any way, including in person, by telephone, cell phone, smart phone, iPhone®, Blackberry®, computer, the internet, or any internet service. This means you must not e-mail, text, instant message, Tweet®, blog, or post information about this case, or about your experience as a juror on this case, on any website, list serve,

chat room, blog, or website such as Facebook®, My Space®, LinkedIn®, YouTube®, or Twitter®.

> [Note to court: If necessary, modify this list to reflect any developments in communication technology.]

You must not read, review, or accept any communications in any form from anyone regarding this case or cases like this.

You are permitted, however, to explain to family, friends, and employers that you are on a jury and to inform them of how long the trial will last. You cannot say anything else about any aspect of your experience until you are released from jury service.

While each of you want as much information as possible before deciding the case, you cannot be investigators outside the courtroom. Attempting to get further information outside the courtroom would be unfair to the parties and would be a direct and serious violation of your oath.

Do not attempt to gather any information on your own. Do not read or research about this case or this kind of case from any other source, including the internet. Many of us routinely use the internet to research topics of interest. But you may not do that in this case. You may not use Google®, Bing®, Yahoo®, or any other type of internet search engine to learn about any person, place or thing that is involved in this case. This includes the defendant, the attorneys, the witnesses, your fellow jurors, and the court personnel. This applies whether you are here, at home, or anywhere else. Do not read about this case in the newspapers or on the internet, or listen to any radio or television broadcasts about the trial. The law even prohibits you from consulting a dictionary.

Do not attempt to visit any places mentioned in this case. Finally, do not in any other way try to learn about this case or this kind of case outside the courtroom.

Why aren't you allowed to do these things? Evidence presented to a jury in court must meet at least three legal standards:

First, it must be allowable under the Rules of Evidence. The Rules of Evidence are designed to eliminate information that is not reasonably reliable.

Second, in a courtroom, witnesses are placed under oath to tell the truth, under penalty of perjury. A witness who lies can be prosecuted and sentenced to jail.

Third, all witnesses' testimony is subject to cross examination, which means questioning by the other side. Cross examination can help you determine whether testimony is credible or evidence is reliable. By contrast, information you might obtain on your own would not have been subject to the Rules of Evidence, would not be under oath, and would not have been cross-examined. Therefore, it may not be credible or reliable. Furthermore, if you secretly obtain information on your own, the prosecution and defense would not know you had done this, and would not have a fair opportunity to show that such information may be false, inaccurate, or incomplete. Trials must not be decided based upon secret information.

Breaking any of these rules would violate your oath as a juror and would subject you to punishment for contempt of court. If you violate any of these rules, you and your fellow jurors might have to come back to court after this trial to testify about your conduct. Furthermore, violating your oath could require a new trial before a new jury. Your misconduct will have wasted all the time you, your fellow jurors, the Court, the attorneys, and parties have spent in this trial.

After the trial is over and you have been discharged as jurors, you will be free to discuss any aspect of this case with anyone and you may do any research that you like. But no such communication with others or research about this case may occur until then.

We are all depending upon you to uphold the oath that you have taken to follow the rules as jurors and we are confident you will do so.

COMMENT

1. *See People v. Flockhart*, 2013 CO 42 ¶¶ 12-15, 304 P.3d 227, 231-32 (in a criminal case, it is error to instruct the jurors that they may discuss the case prior to deliberations; such an instruction is not authorized by rule or existing law).

CHAPTER C

GENERAL INSTRUCTIONS

C:01 OATH FOR WITNESSES

Do you solemnly swear or affirm under penalty of law that the testimony you will give before this court shall be the truth, the whole truth and nothing but the truth?

C:02 OATH FOR INTERPRETER

Do you solemnly swear or affirm under penalty of law that you will accurately, impartially, and to the best of your ability translate from English into [ ], the oaths that are administered and the questions asked the witness(es), and will accurately translate from [ ] into English, the answers given?

C:03 COURT'S QUESTIONING OF WITNESSES

During the course of the trial I may ask a question of a witness. If I do, that does not indicate in any way that I have an opinion about the facts in the case. My questions are intended only to clarify the testimony. The answers that witnesses give to my questions are, therefore, of no greater value or weight than any other answer that may be given.

C:04 BENCH CONFERENCES

During the trial I may need to talk with the lawyers out of your hearing about questions of law.

Sometimes you may be asked to leave the courtroom while we discuss these things. We will try to limit these interruptions as much as possible.

C:05 EVIDENCE ADMISSIBLE FOR PARTICULAR PURPOSE ONLY

The evidence you are about to [hear] [see] [insert a description of the evidence] is being presented for [insert description of purpose(s) for which the evidence is being admitted] only. You may not consider it for any other reason.

COMMENT

1. *See People v. Garner*, 806 P.2d 366, 374 (Colo. 1991) ("If the other-crime evidence is admitted [pursuant to CRE 404(b)], the court should instruct the jury, pursuant to CRE 105, on the limited purpose for which such evidence is admitted at the time of admission. Although the Colorado Rules of Evidence do not address whether, as we previously held in [*Stull v. People*, 344 P.2d 455, 458 (Colo. 1959)], the limited-purpose instruction should be repeated in the court's written instructions to the jury, we conclude that, in order to safeguard against the potential for the jury's misuse of the other-crime evidence, the trial court should repeat the limited-purpose instruction in its general charge to the jury at the conclusion of the evidence. For reasons stated in *Stull*, the court should refer to the other-crime evidence as a 'transaction,' 'act,' or 'conduct' and should avoid such terms as 'offense' or 'crime.'"); + *Perez v. People*, 2015 CO 45, ¶ 31, 351 P.3d 97, 405–06 (holding that the trial court's improper admission of prejudicial 404(b) evidence as to one count necessarily tainted the jury's determination of the remaining two counts because "(1) all three counts for which [the defendant] was convicted include a similar element regarding sexual conduct, and (2) the prosecutor's statements and arguments repeatedly urged the jury to consider the 404(b) evidence beyond its limited scope and implied that it was relevant to all counts").

2. *See* § 16-10-301(3), C.R.S. 2015 (when evidence of similar acts or transactions is admitted in a prosecution for one of the statutorily-enumerated sexual offenses: "The trial court shall, at the time of the reception into evidence of similar acts or transactions and again in the general charge to the jury, direct the jury as to the limited purpose for which the evidence is admitted and for which the jury may consider it. The court in instructing the jury, and the parties when making statements in the presence of the jury, shall use the words 'similar act or transaction' and shall at no time refer to 'similar offenses', 'similar crimes', or other terms which have the same connotations.").

3. *See* § 18-6-801.5(5), C.R.S. 2015 ("Upon admitting evidence of other acts or transactions [involving domestic violence] into evidence pursuant to this section and again in the general charge to the jury, the trial court shall direct the jury as to the limited purpose for which the evidence is admitted and for which the jury may consider it.").

4. + In 2015, the Committee revised Comment 1 by adding a citation to *Perez v. People*.

C:06 EVIDENCE NOT ADMISSIBLE AGAINST ALL DEFENDANTS

The prosecution will now present evidence against defendant[s] [ ][and [ ].]

You are instructed that you must not consider such evidence against the other defendant[s], [ ] [and [ ].]

COMMENT

1. *See People v. Vigil*, 678 P.2d 554, 558 (Colo. App. 1983) (court erred by not instructing the jury, either at the time the co-defendant's statements were admitted or in its charge to the jury, that statements were not to be considered as proof of defendant's guilt).

2. *See Qwest Services Corp. v. Blood*, 252 P.3d 1071, 1090 (Colo. 2011) (explaining that, although in *Bruton v. United States*, 391 U.S. 123 (1968), the United States Supreme Court created a very narrow exception to the almost invariable assumption of the law that jurors follow instructions when it held that a defendant is deprived of his Sixth Amendment right of confrontation when the facially incriminating confessions of a nontestifying codefendant is introduced at their joint trial, even if the jury is instructed to consider the confession only against the codefendant, the Court thereafter limited *Bruton* to its facts when it held, in *Richardson v. Marsh*, 481 U.S. 200, 206 (1987), that the Confrontation Clause is not violated by the admission of a non-testifying codefendant's confession with a proper limiting instruction, when the confession is redacted to eliminate not only the defendant's name, but any reference to the defendant's existence).

C:07 ORDER TO DISREGARD EVIDENCE

You are ordered to disregard [the witness's last answer] [the exhibit].

You must not consider [testimony] [evidence] which you are ordered to disregard.

You must treat it as if you had never heard it or seen it.

C:08 OATH FOR BAILIFF PRIOR TO JURY VIEWING

Do you solemnly swear or affirm under penalty of law that you will: take this jury in your charge and take them to the location involved in this case for their inspection; not permit any person to speak to them or speak to them yourself in relation to the matters in issue; and, after they have completed their inspection, return with them into court?

C:09 DIRECTIONS TO JURY PRIOR TO VIEWING

The Court has concluded that you should now view [insert appropriate description of the subject or scene] as a group, and you are to go with the bailiff(s). While you are there or in transit do not discuss this case among yourselves and do not ask any questions of the attorneys or of the people who may be there. The purpose of the viewing is to assist you in understanding and applying the testimony you hear and the exhibits introduced at this trial.

C:10 ADMONITION ABOUT CONDUCT DURING TRIAL

I want to remind you that there are rules you must follow. These are the same rules jurors have always had to follow. During the trial, this courtroom is a place partially isolated from the outside world. Your decision must be made inside this place and you must follow its rules. You must decide this case based only on the evidence presented in the courtroom and the law as I instruct you. You must avoid any other information about the case from any other source. These rules are designed to make sure there is a fair trial.

There are two basic rules:

1. You must not communicate with others or among yourselves about the trial as it is going on.

2. You must not do any independent investigation or research about the case.

I will go over these rules in great detail because they are very important. I will also explain the reasons for these rules. If you learn anyone has violated these rules you must report that to me or my staff at once.

You must not discuss the case among yourselves in any way during the course of the trial. You may not discuss the case among yourselves until after you have heard all the evidence and you begin to deliberate on a verdict. In fairness, you must keep an open mind throughout the trial, and you may not form any opinions about the case or reach your decision until I tell you that you may start deliberating on a verdict.

Do not permit anyone else to discuss the case with you, or near you. If anyone, including one of your fellow jurors, attempts to do so, report that fact immediately.

Do not talk with any witness, the defendant, or any of the attorneys who are involved in the case. You cannot talk to them and they cannot talk to you, even casually.

Do not communicate about the case with anyone else in any way, including in person, by telephone, cell phone, smart phone, iPhone®, Blackberry®, computer, the internet, or any internet service. This means you must not e-mail, text, instant message, Tweet®, blog, or post information about this case, or about your experience as a juror on this case, on any website, list serve,

chat room, blog, or website such as Facebook®, My Space®, LinkedIn®, YouTube®, or Twitter®.

[Note to court: Modify this list to reflect changes in communication technology.]

You must not read, review, or accept any communications in any form from anyone regarding this case or cases like this. Therefore, you may not mention that this is a criminal case or the charges that have been filed.

You are permitted, however, to explain to family, friends, and employers that you are on a jury and to inform them of how long the trial will last. You cannot say anything else though, about any aspect of your experience until you are released from jury service.

While each of you want as much information as possible before deciding the case, you cannot be investigators outside the courtroom. Attempting to get further information outside the courtroom would be unfair to the parties and would be a direct and serious violation of your oath.

Do not attempt to gather any information on your own. Do not read or research about this case or this kind of case from any other source, including the internet. Many of us routinely use the internet to research topics of interest. But you may not do that in this case. You may not use Google®, Bing®, Yahoo®, or any other type of internet search engine to learn about any person, place or thing that is involved in this case. This includes the defendant, the attorneys, the witnesses, your fellow jurors, and the court personnel. This applies whether you are here, at home, or anywhere else. Do not read about this case in the newspapers or on the internet, or listen to any radio or television broadcasts about the trial. The law even prohibits you from consulting a dictionary.

Do not attempt to visit any places mentioned in this case. Finally, do not in any other way try to learn about this case or this kind of case outside the courtroom.

Why aren't you allowed to do these things? Evidence presented to a jury in court must meet at least three legal standards:

First, it must be allowable under the Rules of Evidence. The Rules of Evidence are designed to eliminate information that is not reasonably reliable.

Second, in a courtroom, witnesses are placed under oath to tell the truth, under penalty of perjury.

Third, all witnesses' testimony is subject to cross examination, which means questioning by attorneys from the other side of the case. Cross examination can help you determine whether testimony is credible or evidence is reliable. By contrast, information you might obtain on your own would not have been subject to the Rules of Evidence, would not be under oath, and would not have been cross-examined. Therefore, it may not be credible or reliable. Furthermore, if you secretly obtain information on your own, the prosecution and defense would not know you had done this, and would not have a fair opportunity to show that such information may be false, inaccurate, or incomplete. Trials must not be decided based upon secret information.

Breaking any of these rules would violate your oath as a juror and would subject you to punishment for contempt of court. If you violate any of these rules, you and your fellow jurors might have to come back to court after this trial to testify about your conduct. Furthermore, violating your oath could require a new trial before a new jury. Your misconduct will have wasted all the time you, your fellow jurors, the Court, the attorneys, and parties have spent in this trial.

After the trial is over and you have been discharged as jurors, you will be free to discuss any aspect of this case with anyone and you may do any research that you like. But no such communication with others or research about this case may occur until then.

We are all depending upon you to uphold the oath that you have taken to follow the rules as jurors and we are confident you will do so.

COMMENT

1. This instruction is nearly identical to Instruction B:06. The introductory language is slightly different to reflect the fact that, if the court elects to give this instruction again after jury selection, the jury will have already heard the admonition once before.

C:11 OATH FOR BAILIFF PRIOR TO FIRST RECESS

Do you solemnly swear or affirm under penalty of law that at this and all other recesses, you will keep this jury together; you will not permit any person to speak to them; you will not speak to them yourself in relation to this trial; and you will return with them as ordered?

C:12 ADMONITION AT RECESS

We will now take a break.

I want to remind you that until the trial is completed you must not discuss this case with anyone either in person, using the internet, or by any other means.

This includes members of your family, people involved in the trial, other jurors, or anyone else.

If someone approaches you and tries to discuss the trial with you, or if you see or hear anything about it, even accidentally, let me know about it immediately.

You must not conduct any research, undertake any investigation, or otherwise obtain information about the case from an outside source. You must not read or listen to any news reports or internet information or other electronic sources about the trial. Your verdict must be based solely on the evidence presented in the courtroom and the law as I instruct you.

Finally, it is especially important that you do not form or express any opinion on the case until your deliberations at the end of the trial.

C:13 JURORS' CONDUCT DURING TRIAL - DISCUSSIONS OUTSIDE PRESENCE OF ENTIRE JURY

Members of the jury, you may discuss this case only when you are all present and you may only deliberate in the jury room. No juror should attempt to discuss this case with other jurors or anyone else at any other time except when all jurors are in the jury room.

C:14 PRE-TRIAL PUBLICITY AND PUBLICITY DURING TRIAL

If there has been or is any news coverage of this case you must completely disregard it. Your decision in this case must be made solely on the evidence presented at the trial.

C:15 OATH FOR BAILIFF PRIOR TO DELIBERATIONS

Do you solemnly swear or affirm under penalty of law that you will keep this jury together as ordered, that you will not permit any person to speak to them, that you will not speak to them yourself unless by order of the Court or to ask them if they have agreed upon a verdict, and that when they have agreed upon a verdict you will return with them into Court?

CHAPTER D

EVIDENTIARY INSTRUCTIONS

D:01 DIRECT AND CIRCUMSTANTIAL EVIDENCE - NO DISTINCTION

A fact may be proven by either direct or circumstantial evidence. Under the law, both are acceptable ways to prove something. Neither is necessarily more reliable than the other.

Direct evidence is based on first-hand observation of the fact in question. [For example, a witness's testimony that he [she] looked out a window and saw snow falling might be offered as direct evidence that it had snowed.]

Circumstantial evidence is indirect. It is based on observations of related facts that may lead you to reach a conclusion about the fact in question. [For example, a witness's testimony that he [she] looked out a window and saw snow covering the ground might be offered as circumstantial evidence that it had snowed.]

COMMENT

1. *See People v. Bennett*, 515 P.2d 466, 469 (Colo. 1973) ("we now cast aside as outmoded and as confusing the requirement that the prosecution's evidence, when wholly circumstantial, must exclude every reasonable hypotheses other than that of guilt and no longer require such an instruction or such a test to be applied").

D:02 EVIDENCE LIMITED AS TO PURPOSE

The court admitted certain evidence for a limited purpose.

You are again instructed that you cannot consider that evidence except for the limited purpose I told you about when it was admitted.

COMMENT

1. In most cases, the court should avoid unduly highlighting the evidence and provide this general reminder without summarizing the evidence or restating the limited purpose for which it was admitted. However, it may be appropriate to provide greater specificity in cases where the court admits multiple items of evidence for different purposes.

D:03 EVIDENCE NOT ADMISSIBLE AGAINST ALL DEFENDANTS

The court admitted certain evidence concerning defendant[s] [insert name(s) of defendant(s)] but not concerning defendant[s] [insert name(s) of defendant(s)]. You are again instructed that you cannot consider it against defendant[s] [insert name of defendant(s)].

You must reach your verdict[s] as to each defendant as if he [she] were being tried separately.

D:04 LIMITING INSTRUCTION FOR EVIDENCE OF THE DEFENDANT'S MENTAL PROCESSES ACQUIRED DURING A COURT-ORDERED EXAMINATION

You are about to hear evidence that you may consider as to the question of the defendant's mental condition with respect to [a charged crime] [the crime(s) of (insert name of offense(s)]. You shall not consider it for any other purpose.

COMMENT

1. *See* §§ 16-8-107(1)(a), 16-8-107(1.5)(a), C.R.S. 2015.

2. The above model limiting instruction is suitable both for: (1) evidence that is offered "to rebut evidence of [the defendant's] mental condition introduced by the defendant to show incapacity to form a culpable mental state," pursuant to section 16-8-107(1)(a); and (2) with respect to offenses committed on or after July 1, 1999, evidence that is admissible "as to the defendant's mental condition," pursuant to section 16-8-107(1.5)(a). *See People v. Herdman*, 2012 COA 89, ¶ 25, 310 P.3d 170, 177 (the term "mental condition," as used in section 16–8–107(1.5)(a), does not refer exclusively to insanity); *People v. Herrera*, 87 P.3d 240, 245 (Colo. App. 2003) ("The reference in § 16–8–107(1.5)(a) to . . . the defendant's 'mental condition,' . . . is, in our view, equivalent to the reference in § 16–8–107(1)(a) to a defendant's 'capacity to form a culpable mental state.'").

D:05 ACCOMPLICE TESTIMONY - UNCORROBORATED

The prosecution has presented a witness who claims to have been a participant with the defendant in the crime charged. There is no evidence other than the testimony of this witness which tends to establish the participation of the defendant in the crime.

While you may convict upon this testimony alone, you should act upon it with great caution. Give it careful examination in the light of other evidence in the case. You are not to convict upon this testimony alone, unless you are convinced beyond a reasonable doubt that it is true.

COMMENT

1. *See People v. Montoya*, 942 P.2d 1287, 1293 (Colo. App. 1996) ("COLJI-Crim. 4:06 (1983) - warning the jury to act with care and caution when considering accomplice testimony - is to be given *only* when the prosecution's case is based on uncorroborated testimony of an accomplice. The propriety of a trial court's refusal to give this instruction thus turns on whether corroborating evidence of the accomplice's testimony exists in the record. . . . Evidence to corroborate an accomplice may be direct or circumstantial. It should identify the defendant and show his connection with the offense, rather than merely tending to prove that an offense has been committed. Accomplice testimony, however, need not be corroborated in every part; corroboration of one element of the testimony is sufficient.").

2. *See People v. Martinez*, 531 P.2d 964, 965 (Colo. 1975) ("In Colorado, an accomplice is not per se an unworthy witness. His status as an accomplice goes to credibility, but not to competency. This is true even though the accomplice has been promised immunity from prosecution by appearing as a witness against the defendant. *Barr v. People*, 30 Colo. 522, 71 P. 392 (1903). If the jury is instructed to review the testimony with great caution, it may convict upon the uncorroborated testimony of an accomplice which is clear and convincing and shows guilt beyond a reasonable doubt.").

D:06 CONVICTION OF FELONY – WITNESS OR DEFENDANT

The credibility of a witness may be challenged by showing that the witness has been convicted of a felony. A previous felony conviction is one factor you may consider in determining the credibility of a witness. It is up to you to determine what weight, if any, is to be given to such a conviction.

[The credibility of statements made by a person who did not testify in court may be challenged by showing that the person has been convicted of a felony. A previous conviction is one factor that you may consider in determining the credibility of that person. You must determine the weight to be given to any prior conviction when considering the credibility of that person's statement.]

[The defendant is to be tried for the crime charged in this case, and no other. You may consider testimony of a previous conviction only in determining the credibility of the defendant as a witness, and for no other purpose. When the defendant testifies, his [her] credibility is to be determined in the same manner as any other witness.]

COMMENT

1. *See* § 13-90-101, C.R.S. 2015 ("In every case the credibility of the witness may be drawn in question, as now provided by law, but the conviction of any person for any felony may be shown for the purpose of affecting the credibility of such witness. The fact of such conviction may be proved like any other fact, not of record, either by the witness himself, who shall be compelled to testify thereto, or by any other person cognizant of such conviction as impeaching testimony or by any other competent testimony."); *cf. Lee v. People*, 460 P.2d 796, 798-99 (Colo. 1969) (final sentence of statute, which prohibits the impeachment of witnesses in a civil case by evidence of a previous conviction of a felony more than five years before the time the witness testified, does not violate equal protection because it was reasonable "for the Legislature to permit a more searching inquiry into the credibility of witnesses in a criminal trial where the burden is on the People to prove the guilt of the defendant beyond a reasonable doubt").

2. *See* C.R.E. 806 ("When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), has been admitted in

evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness.").

3. *See People v. Wright*, 678 P.2d 1072, 1074 (Colo. App. 1984) (entry and subsequent expungement of a conviction pursuant to Missouri's deferred judgment and sentence statute, which was analogous to Colorado's deferred judgment statute, was not an existing conviction for purposes of testimonial impeachment under section 13-90-101).

D:07 REPUTATION FOR TRUTH AND VERACITY

The credibility of a witness may be discredited or supported by testimony about his [her] reputation for truthfulness or by the opinion of another witness. It is entirely your decision to determine what weight shall be given such testimony.

COMMENT

1. *See* CRE 608(a) ("The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.").

2. *See People v. Wittrein*, 221 P.3d 1076, 1081 (Colo. 2009) ("In Colorado, neither lay nor expert witnesses may give opinion testimony that another witness was telling the truth on a specific occasion.").

D:08 JUDICIAL NOTICE

A judicially noticed fact is one which the court determines is not subject to reasonable dispute and has accepted as being true.

You may or may not accept this fact as true. It is entirely your decision to determine what weight, if any, shall be given the evidence.

COMMENT

1. *See* CRE 201(g) ("In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.").

2. + This instruction was approved by the Committee before the Colorado Supreme Court's opinion in *Doyle v. People*, 2015 CO 10, 343 P.3d 961, which raises a question about the language in the first paragraph of this instruction.

3. + The Committee added Comment 2 in 2015.

D:09 STIPULATION AS TO TESTIMONY

The parties have agreed that if [insert name] were called as a witness he [she] would testify as set forth in the stipulation. You should consider that stipulated testimony in the same way you consider testimony given here in court, and you should judge it in the same manner in which you judge the testimony of any witness who appeared and testified before you.

COMMENT

1. *See Martin v. People*, 738 P.2d 789, 798 (Colo. 1987) ("If the defendant offers to stipulate to a fact and the prosecution's case is not thereby weakened, the trial court may, after employing the appropriate balancing test, require the prosecution to accept the stipulation.").

D:10 STIPULATION AS TO FACTS

The parties have agreed as to the existence of [a] certain fact[s]. You may regard [that] [those] fact[s] as proven.

[Specifically, the parties have stipulated to the following facts:]

D:11 INFERENCES - GENERAL

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

COMMENT

1. *See Jolly v. People*, 742 P.2d 891, 897 (Colo. 1987) (provision of statute proscribing driving while license revoked authorized only a permissible inference that defendant had knowledge of fact of revocation from proof of registered mailing of notice, rather than creating a conclusive presumption or mandatory burden-shifting presumption with respect to that element of the offense; the statutory term "prima facie proof" is functionally equivalent to a permissible inference); *Barnes v. People*, 735 P.2d 869, 872-74 (Colo. 1987) ("a mandatory presumption may not be constitutionally used against a criminal defendant if a reasonable jury could construe it as conclusive or shifting the burden of persuasion on an essential element of a crime"; driving under the influence statute, which provided that it shall be presumed that defendant was under influence of alcohol if there was 0.10 or more grams of alcohol per 100 milliliters of blood, as shown by chemical analysis of defendant's blood, authorized only permissible inference that defendant was under the influence of alcohol); *People v. Felgar*, 58 P.3d 1122, 1124-25 (Colo. App. 2002) (instruction establishing mandatory presumption concerning the defendant's knowledge violated due process, even though the instruction tracked the statutory language).

2. In some circumstances, an instruction describing an evidentiary inference may be based on precedent. For example, in cases where evidence of the defendant's unexplained, exclusive possession of recently stolen goods is relevant (e.g., theft, robbery, burglary), refer to the instruction in the appendix to *Wells v. People*, 592 P.2d 1321 (Colo. 1979). *See also People v. Hampton*, 758 P.2d 1344, 1355 (Colo. 1988) ("In

Wells, we . . . appended to our opinion a recommended instruction for use in future jury trials.").

3. Both the United States Supreme Court and the Colorado Supreme Court have used the terms "permissive inference" and "permissible inference" interchangeably. *See, e.g.*, *County Court of Ulster County, N. Y. v. Allen*, 442 U.S. 140, 157 (1979) (using both terms within the same paragraph); *People in Matter of R.M.D.*, 829 P.2d 852, 854 (Colo. 1992) (same). Further, it does not appear that any appellate court has ever analyzed whether there is a meaningful distinction between the two terms. Accordingly, the Committee has elected, for the sake of clarity and consistency, to use the term "permissible inference" throughout the model instructions.

D:12 OUT OF COURT STATEMENTS – CHILD DECLARANT

In this case, you heard evidence of [an] out of court statement[s] [allegedly] made by [insert name of child].

You are instructed that it is for you to determine the weight and credit to be given any such statement[s]. In making this determination you shall consider the age and maturity of the child, the nature of the [alleged] statement[s], the circumstances under which the statement[s] [was] [were] [allegedly] made, and any other evidence that has been admitted that you choose to consider for this purpose.

COMMENT

1. *See* § 13-25-129(2), C.R.S. 2015 ("If a statement is admitted pursuant to this section, the court shall instruct the jury in the final written instructions that during the proceeding the jury heard evidence repeating a child's out-of-court statement and that it is for the jury to determine the weight and credit to be given the statement and that, in making the determination, the jury shall consider the age and maturity of the child, the nature of the statement, the circumstances under which the statement was made, and any other relevant factor.").

2. *See People v. Burgess*, 946 P.2d 565, 567-68 (Colo. App. 1997) ("The supreme court had construed the pre-amendment version of [section 13-25-129] to require that a cautionary instruction be given contemporaneously with the hearsay testimony and also in the final written instructions to the jury. . . . We conclude that, by amending the statute, the General Assembly intended to eliminate the contemporaneous instruction requirement that previously had been established in decisional law.").

3. The admissibility of statements pursuant to section 13-25-129 may be limited due to constitutional confrontation clause issues, at least where such statements are "testimonial" and the child does not testify. *See Crawford v. Washington*, 541 U.S. 46 (2007) (admitting testimonial hearsay at trial, absent the unavailability of the declarant and a prior opportunity for cross-examination by the defendant, violates the accused's confrontation right under the Sixth Amendment to the United States Constitution); *People v. Moreno*,160 P.3d 242 (Colo. 2007) ("To the extent that the statute allows for the admission of

out-of-court testimonial statements without the defendant being afforded an opportunity to cross-examine the declarant, it is now clear that the statute violates the confrontation guaranty of the Sixth Amendment."); *People v. Vigil*, 127 P.3d 916, 929-30 (Colo. 2006) (explaining what type of statements are "testimonial" for purposes of the Sixth Amendment); *People v. Argoramirez*, 102 P.3d 1015, 1017-18 (Colo. 2004) (prior videotaped statements made by children to law enforcement official could be introduced into evidence when children testified at trial without violating confrontation clause; *Crawford* does not affect the analysis for admission of out-of-court statements where the declarant testifies at trial).

4. The words "allegedly" and "alleged" are enclosed within brackets because they should not be used when statements are admitted by means of a video-recording.

CHAPTER E

FINAL CHARGE TO JURY, GENERAL INSTRUCTIONS, AND VERDICT FORMS

E:01 DUTIES OF JUDGE AND JURY

Members of the jury, the evidence in this case has been completed. In a moment, I will read to you jury instructions that contain the rules of law you must apply to reach your verdict. You will have copies of what I read to take with you to the jury room. But first, I want to mention a few things you need to keep in mind when you are discussing this case in the jury room.

Until you have returned a verdict, you must not do any research about this case or this kind of case using any source, including dictionaries, reference materials, the internet or any other electronic means. You must not communicate in any way with anyone else about this case or this kind of case until you have returned a verdict in court. This includes your family and friends. If you have a cell phone or other electronic device, you must keep it turned off during jury deliberations.

> [Note to court: Consider giving a more detailed admonishment like that in Instruction B:06 (admonition about conduct during trial). Also, consider having the jurors surrender their electronic devices during deliberations.]

It is my job to decide what rules of law apply to the case. While the attorneys may comment on some of these rules, you must follow the instructions I give you. Even if you disagree with or do not understand the reasons for some of the rules of law, you must follow them. No single instruction describes all the law which must be applied; the instructions must be considered together as a whole.

During the trial, you received all of the evidence that you may properly consider in deciding the case. Your decision must be made by applying the rules of law that I give you to the evidence presented at trial. Remember, you must not be influenced by sympathy, bias or prejudice in reaching your decision.

> [You should not allow bias or any kind of prejudice based upon gender to influence your decision.]

If you decide that the prosecution has proved beyond a reasonable doubt that the defendant is guilty, it will be my job to decide what the punishment will be. In making your decision, you must not consider punishment at all. At times during the

trial, attorneys made objections. Do not draw any conclusions from the objections or from my rulings on the objections. These only related to legal questions I had to decide and should not influence your thinking. If I told you not to consider a particular statement that was made during the trial, you must not consider it in your deliberations.

[I have asked questions of witnesses during the trial. That did not mean I had any opinion about the facts in the case.]

Finally, you should consider all the evidence in light of your experience in life.

COMMENT

1. *See* § 18-3-408, C.R.S. 2015 ("In any criminal prosecution under sections 18-3-402 to 18-3-405, [sexual assault, unlawful sexual contact, and sexual assault on a child,] or for attempt or conspiracy to commit any crime under sections 18-3-402 to 18-3-405, the jury shall . . . be instructed not to allow gender bias or any kind of prejudice based upon gender to influence the decision of the jury.").

E:02 THE CHARGE AGAINST THE DEFENDANT

The charge against the defendant is not evidence. The charge against the defendant is just an accusation. The fact that the defendant has been accused is not evidence that the defendant committed any crime.

The defendant is charged with committing the crime[s] of [ ], in [ ] County, Colorado, on or about [ ]. The defendant has pleaded not guilty [by reason of insanity].

E:03 PRESUMPTION OF INNOCENCE, BURDEN OF PROOF, AND REASONABLE DOUBT

Every person charged with a crime is presumed innocent. This presumption of innocence remains with the defendant throughout the trial and should be given effect by you unless, after considering all of the evidence, you are then convinced that the defendant is guilty beyond a reasonable doubt.

The burden of proof is upon the prosecution to prove to the satisfaction of the jury beyond a reasonable doubt the existence of all of the elements necessary to constitute the crime charged.

Reasonable doubt means a doubt based upon reason and common sense which arises from a fair and rational consideration of all of the evidence, or the lack of evidence, in the case. It is a doubt which is not a vague, speculative or imaginary doubt, but such a doubt as would cause reasonable people to hesitate to act in matters of importance to themselves.

If you find from the evidence that each and every element of a crime has been proven beyond a reasonable doubt, you should find the defendant guilty of that crime. If you find from the evidence that the prosecution has failed to prove any one or more of the elements of a crime beyond a reasonable doubt, you should find the defendant not guilty of that crime.

E:04 NUMBER OF WITNESSES

The number of witnesses testifying for or against a certain fact does not, by itself, prove or disprove that fact.

E:05 CREDIBILITY OF WITNESSES

You are the sole judges of the credibility of each witness and the weight to be given to the witness's testimony. You should carefully consider all of the testimony given and the circumstances under which each witness has testified.

For each witness, consider that person's knowledge, motive, state of mind, demeanor, and manner while testifying. Consider the witness's ability to observe, the strength of that person's memory, and how that person obtained his or her knowledge. Consider any relationship the witness may have to either side of the case, and how each witness might be affected by the verdict. Consider how the testimony of the witness is supported or contradicted by other evidence in the case. You should consider all facts and circumstances shown by the evidence when you evaluate each witness's testimony.

You may believe all of the testimony of a witness, part of it, or none of it.

E:06 EXPERT WITNESSES

You are not bound by the testimony of [a] witness[es] who [has] [have] testified as [an] expert[s]; the credibility of an expert's testimony is to be considered as that of any other witness. You may believe all of an expert witness's testimony, part of it, or none of it.

The weight you give the testimony is entirely your decision.

COMMENT

1. *See Hampton v. People*, 465 P.2d 394, 400 (Colo. 1970) ("The weight to be accorded expert testimony is a question solely for the jury. Such testimony is subject to the test of cross-examination as any other testimony and the jurors are not bound by it and may accept or reject it as they see fit.").

E:07 TESTIMONY OF DEFENDANT - NOT COMPELLED

Every defendant has a constitutional right not to testify. The decision not to testify cannot be used as an inference of guilt and cannot prejudice the defendant. It is not evidence, does not prove anything, and must not be considered for any purpose.

COMMENT

1. An instruction concerning the defendant's right not to testify must be given if the defendant requests it. *See Carter v. Commonwealth of Kentucky*, 450 U.S. 288, 305 (1981) ("[T]he failure to limit the jurors' speculation on the meaning of [the defendant's decision to remain silent and not testify], when the defendant makes a timely request that a prophylactic instruction be given, exacts an impermissible toll on the full and free exercise of the privilege. Accordingly, we hold that a state trial judge has the constitutional obligation, upon proper request, to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify."); *People v. Crawford*, 632 P.2d 626, 627-28 (Colo. App. 1981) (trial court's refusal to give, at close of trial, defendant's tendered instruction that a defendant never has the burden of testifying or offering any evidence constituted reversible error, even though the jury panel was told by the court that defendant was not "obliged" to offer evidence, that the burden is always on the prosecution to prove every element of the offense charged beyond a reasonable doubt, and that the law never imposes on the defendant in any criminal case the burden of calling any witnesses or introducing any evidence).

E:08 JURORS' CONDUCT DURING TRIAL-DISCUSSIONS OUTSIDE PRESENCE OF ENTIRE JURY

Members of the jury, you may discuss this case only when you are all present and you may only deliberate in the jury room. No juror should attempt to discuss this case with other jurors or anyone else at any other time except when all jurors are in the jury room.

E:09 QUESTIONS DURING DELIBERATIONS

Once you begin your deliberations, if you have a question, your foreperson should write it on a piece of paper, sign it and give it to the bailiff, who will bring it to me.

The Court will then determine the appropriate way to answer the question.

However, there may be some questions that, under the law, the Court is not permitted to answer. Please do not speculate about what the answer to your question might have been or why the Court is not able to answer a particular question.

Finally, please be sure to keep the original question and response. Do not destroy them as they are part of the official record in this case, and must be returned to me when you return the instructions and verdict forms at the end of the case.

COMMENT

1. *See* "Implementation Plan: Jury Reform in Colorado," Appendix D (Mar. 12, 1998); "With Respect to the Jury: A Proposal For Jury Reform, Report of the Colorado Supreme Court Committee on the Effective and Efficient Use of Juries" (adopted "in principle" by the Colorado Supreme Court, February 1997).

E:10 JUROR QUESTIONS OF WITNESSES

During this trial you were permitted to submit written questions to witnesses. If a particular question was not asked, do not guess why the question was not asked or what the answer might have been. My decision not to ask a question submitted by a juror is not a reflection on the person asking it, and you should not attach any significance to the failure to ask a question. By making legal rulings on the admissibility of questions, I did not intend to suggest or express any opinion about the question. My decision whether or not to allow a question is based on the applicable rules of evidence and other rules of law, and not on the facts of this particular case. It is my responsibility to assure that all parties receive a fair trial according to the law and the rules of evidence.

The fact that certain questions were not asked must not affect your consideration of the evidence in any way. Do not give greater weight to questions, or answers to questions, that are submitted by yourself or your fellow jurors. In making your decision, you must consider all of the evidence that has been presented.

COMMENT

1. *See* Crim. P. 24(g) ("Jurors shall be allowed to submit written questions to the court for the court to ask of witnesses during trial, in compliance with procedures established by the trial court. The trial court shall have the discretion to prohibit or limit questioning in a particular trial for reasons related to the severity of the charges, the presence of significant suppressed evidence or for other good cause.").

2. *See Medina v. People*, 114 P.3d 845, 853-55 (Colo. 2005) (permitting the jury to ask questions through the judge did not violate defendant's due process rights); *People v. Stevenson*, 228 P.3d 161, 170 (Colo. App. 2009) (trial court did not abuse its discretion in allowing juror's question, and concluding that it was not precluded by the parties' evidentiary stipulation); *People v. Zamarripa-Diaz*, 187 P.3d 1120, 1123 (Colo. App. 2008) (a trial court's alleged error in not consulting with defense counsel before asking juror-posed questions does not constitute structural error; such claims are subject to review under the harmless error standard).

E:11 SERIES OF ACTS IN A SINGLE COUNT

In order to convict the defendant of [insert name of crime], you must either unanimously agree that the defendant committed the same act or acts, or that he [she] committed all of the acts alleged.

COMMENT

1. This instruction is for ensuring jury unanimity with respect to the charged *act(s)* forming the basis for a finding of guilt. *See Thomas v. People*, 803 P.2d 144, 153-54 (Colo. 1990) ("We . . . hold that when the evidence does not present a reasonable likelihood that jurors may disagree on which acts the defendant committed, the prosecution need not designate a particular instance. If the prosecutor decides not to designate a particular instance, the jurors should be instructed that in order to convict the defendant they must either unanimously agree that the defendant committed the same act or acts or that the defendant committed all of the acts described by the victim and included within the time period charged. Necessarily, the determination whether there is a reasonable likelihood that jurors may disagree on which acts the defendant committed requires the exercise of discretion by the trial court. In some instances, special verdicts may be advisable to provide assurance that a verdict is supported by unanimous jury agreement."). Typically, this issue arises because of the "difficulty of applying the specification requirement to certain cases involving evidence of a continuing pattern of sexual abuse of very young children." *Id.* at 152.

Do not use this instruction to impose a requirement for jury unanimity with respect to *alternative factual theories*. *See Schad v. Arizona*, 501 U.S. 624, 632 (1991) (plurality opinion) ("We see no reason . . . why the rule that the jury need not agree as to mere means of satisfying the actus reus element of an offense should not apply equally to alternative means of satisfying the element of mens rea."); *People v. Dunaway*, 88 P.3d 619, 622 (Colo. 2004) ("[W]hen a jury instruction includes two alternative factual theories of the same charged offense and the jury returns a general verdict of guilt, due process does not require reversal of that conviction merely because the evidence only supports one of the theories beyond a reasonable doubt."); *People v. Hall* 60 P.3d 728, 731 (Colo. App. 2002) (holding, based on the plurality opinion in *Schad v. Arizona*, *supra*, that the defendant's due process rights

were not violated where "the trial court did not instruct the jury it had to determine unanimously whether [the defendant] had committed the murder as the principal or as a complicitor").

E:12 MULTIPLE COUNTS

In this case a separate offense is charged against [one or more of] [each of] the defendant[s] in each count of the [information][indictment]. Each count charges a separate and distinct offense and the evidence and the law applicable to each count should be considered separately, uninfluenced by your decision as to any other count. The fact that you may find [all or some of] the defendant[s] guilty or not guilty of one of the offenses charged, should not control your verdict as to any other offense charged against [any of] the [other] defendant(s).

The defendant[s] may be found guilty or not guilty of any one or all of the offenses charged.

E:13 MULTIPLE DEFENDANTS

In this case, you must decide separately whether each of the [two] [several] defendants is guilty or not guilty. If you cannot agree upon a verdict as to [both] [all] the defendants, but do agree as to one [or more] of them, you must render a verdict as to the one [or more] upon which you do agree.

It is your duty to give separate personal consideration to the case of each individual defendant. When you do so, you should analyze what the evidence in the case shows with respect to that individual, leaving out entirely any evidence admitted solely against some other defendant or defendants. Each defendant is entitled to have his [her] case determined from evidence as to his [her] own acts and culpable state of mind, and any other evidence in this case which may be applicable to him [her]. You must state your finding as to each defendant uninfluenced by your verdict as to [the other] [any other] defendant.

COMMENT

1. *See* Instruction F:80 (defining "culpable state of mind").

E:14 LESSER-INCLUDED OFFENSES

If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the offense charged, he [she] may, however, be found guilty of any lesser offense, the commission of which is necessarily included in the offense charged if the evidence is sufficient to establish his [her] guilt of the lesser offense beyond a reasonable doubt.

The offense of [insert name of offense(s) here], as charged in the information in this case necessarily includes the lesser offense[s] of [insert name(s) of lesser-included offense(s) here].

> [Using the appropriate elemental instruction for each lesser-included offense as a guide, insert a definition of each such offense here, leaving out the last two paragraphs of the inserted instruction (i.e., the paragraphs that begin with the words: "After considering all the evidence"). List the lesser-included offenses from highest to lowest degree if submitting more than one lesser-included offense.]

You should bear in mind that the burden is always upon the prosecution to prove beyond a reasonable doubt each and every element of any lesser-included offense which is necessarily included in any offense charged in the information; the law never imposes upon a defendant in a criminal case the burden of calling any witnesses or producing any evidence.

After considering all the evidence, if you decide that the prosecution has proven each of the elements of the crime charged or of a lesser-included offense, you should find the defendant guilty of the offense proven, and you should so state in your verdict.

After considering all the evidence, if you decide that the prosecution has failed to prove one or more elements of the crime charged and one or more elements of the lesser-included offenses, you should find the defendant not guilty of these offenses, and you should so state in your verdict.

While you may find the defendant not guilty of the crimes charged and the lesser-included offense[s], you may not find the defendant guilty of more than one of the following offenses:

[Insert the charged offense and all lesser-included offenses.]

COMMENT

1. *See* § 18-1-408(5)(a-c), C.R.S. 2015 (establishing several methods for identifying a lesser-included offense); *People v. Leske*, 957 P.2d 1030, 1036 (Colo. 1998) (explaining the "strict elements test" of section 18-1-408(5)(a), C.R.S. 2015); *People v. Loyas*, 259 P.3d 505, 509 (Colo. App. 2010) (explaining the "less serious injury or risk of injury" and the "lesser kind of culpability" tests of section 18-1-408(5)(c)).

2. Use a separate copy of this instruction for each pairing of a charged offense with one or more lesser-included offenses.

E:15 SPECIAL VERDICT FORM (LESSER-INCLUDED OFFENSES)

District Court, [City and] County of [ ], Colorado
Case No. [ ], Div. [ ].

People of the State of Colorado

v.

[insert name of defendant]

JURY VERDICT, Count No.[ ]

CHARGE OF [insert name of offense here]

I.* We, the jury, find the defendant, [insert name], NOT GUILTY of Count No. ____, [insert name of offense], and the lesser-included offense[s] of [insert name(s) of lesser-included offense(s)].

_____
FOREPERSON

II.**We, the jury, find the defendant, [insert name], GUILTY of:

[ ] [insert principal crime charged]

OR

[ ] [insert lesser-included offense, and include a separate entry and corresponding box for each lesser-included offense.]

_____
FOREPERSON

* If you find the defendant NOT GUILTY of the charged offense and the lesser-included offense[s], the foreperson should sign section I above.

** If you find the defendant guilty of the crime charged or [one of] the lesser-included offense[s], the foreperson should complete only this GUILTY verdict by placing, in ink, an "X" in the appropriate square. ONLY ONE SQUARE may be filled in, with

the remainder to remain unmarked. The foreperson should then sign only section II above.

COMMENT

1. Instructions E:14 and E:15 enable the jury to find the defendant not guilty of the greater and lesser offenses as a collective matter. However, a trial court has discretion to modify the instruction and the special verdict form (or to use separate verdict forms) to give the jury "the option of considering the charge and its lesser-included offenses on an individual basis, and acquitting the defendant on some or all of them." *People v. Richardson*, 184 P.3d 755, 762 (Colo. 2008); *see also Blueford v. Arkansas*, 132 S. Ct. 2044 (2012) (where jurors became deadlocked using instructions that limited their options to convicting on one of the offenses or acquitting on all offenses, the foreperson's earlier disclosure that they were unanimous against guilt on two of the charges lacked the finality necessary to amount to an acquittal on those offenses for purposes of the Double Jeopardy Clause).

Although there are numerous ways to draft such an instruction and verdict form(s), the Committee has prepared an example of how a court could explain the available options in a case where a charged offense, such as first degree murder, has multiple lesser-included offenses.

First, the court would include the following language in the instruction:

> A. If you have unanimously agreed that the defendant is NOT GUILTY of the charged offense and ALL of the lesser-included offenses, you will select ONLY Special Verdict Form A and the Foreperson will sign that form as the Court has stated.
>
> B. If you have unanimously agreed that the Defendant is GUILTY of the crime charged or of a lesser-included offense, the Foreperson will complete ONLY Special Verdict Form B by placing, in ink, an "X" in the appropriate square and sign the form as the Court has stated.
>
> C. If you complete either Special Verdict Form A or Special Verdict Form B, you should ignore Special Verdict Form C. However, if, based on your deliberations, you cannot complete either Special Verdict Form A or Special

Verdict Form B, then please read Special Verdict Form C and, if you unanimously agree that the Defendant is NOT GUILTY of any offense(s), have the Foreperson place, in ink, an "X" in the appropriate square(s) and sign the form as the Court has stated.

Consistent with the foregoing directions, the court would then include the following language in the special verdict forms (with signature lines for the foreperson, and captions, both of which have been omitted here for the sake of brevity):

Verdict Form A

We, the jury, find the Defendant, [insert name], NOT GUILTY of First Degree Murder, and the lesser-included offenses of Second Degree Murder, Reckless Manslaughter, and Criminally Negligent Homicide.

Verdict Form B

We, the jury, find the Defendant, [insert name], GUILTY* of:

[] First Degree Murder
[] Second Degree Murder
[] Manslaughter
[] Criminally Negligent Homicide

*ONLY ONE SQUARE may be filled in, with the remainder to remain unmarked.

Verdict Form C

We, the jury, find the Defendant, [insert name], NOT GUILTY* of:

[] First Degree Murder
[] Second Degree Murder
[] Manslaughter
[] Criminally Negligent Homicide

*ONE OR MORE SQUARES may be filled in, as applicable (but do not fill in all of the squares, because if you find the defendant not guilty of all of the offenses you should leave this special verdict form blank and, instead, complete Special Verdict Form A).

E:16 STIPULATION FOR SEALED VERDICT

District Court, [City and] County of [ ], Colorado
Case No. [ ], Div. [ ]

STIPULATION FOR SEALED VERDICT

People of the State of Colorado

v.

[insert name], Defendant.

Pursuant to Rule 31(a)(2), Crim. P. and section 16-10-108 C.R.S. 2015, it is stipulated and agreed that in the above-entitled case the Court may instruct the jury that if they reach a verdict during the recess or adjournment of the Court they may seal their verdict which shall be retained by their foreperson to be delivered to the Court at the opening of Court, and that after so sealing their verdict they may separate, to meet in the jury box at the opening of Court. It is further stipulated that such a verdict may be received by the Court as the lawful verdict of the jury.

_____
Date

_____
Prosecutor

_____
Defendant

_____
Attorney for the Defendant

COMMENT

1. *See* § 16-10-108, C.R.S. 2015 ("The jury shall return its verdict in open court, but a sealed verdict may be received as provided by rule of the supreme court of Colorado."); Crim. P. 31(a)(2) ("When they have agreed upon a verdict, the bailiff shall return the jury into court. However, in any case except where the punishment may be death or life imprisonment, the court, upon stipulation of counsel for all parties, may order that if the jury should agree upon a verdict during the recess or adjournment of court for the day, it shall seal its verdict, to be retained by the foreperson and delivered by the jury to the judge at the opening of the court, and that thereupon the jury may separate, to meet in the jury box at the opening of court. Such a sealed verdict may be received by the court as the lawful verdict of the jury.").

2. In *People v. Herrera*, 512 P.2d 1160, 1161 (Colo. 1973), the Colorado Supreme Court held that it was not error to use the sealed verdict procedure in a case where the defendant was charged with aggravated robbery (an offense then carrying a "penalty . . . [of imprisonment for] not less than four years, or for life") because "the term 'death or life imprisonment' does not embrace offenses which have a sentence of less than life imprisonment as a minimum and a maximum of either life imprisonment or death." Although *Herrera* was decided under an earlier version of the statute (then codified as § 39-7-20), the provision that was subject to interpretation (which has since been deleted by amendment) mirrored the languge of Crim P. 31(a)(2).

E:17 ORDER FOR SEALED VERDICT

District Court, [City and] County of [ ], Colorado
Case No. [ ], Div. [ ]

ORDER FOR SEALED VERDICT

People of the State of Colorado

v.

[insert name], Defendant.

You are instructed that should you agree upon a verdict during the recess or adjournment of court for the day, your verdict shall be reduced to writing, and your foreperson shall sign it, enclose it in an envelope, seal the envelope and retain it, so sealed, to be delivered by the jury to the Court at the opening of court. After so sealing your verdict you may separate, to meet in the jury box at the opening of court. You will not disclose the result of your deliberations until your verdict is read in open court.

_____
Judge Date

E:18 SUPPLEMENTAL INSTRUCTION — WHEN JURORS FAIL TO AGREE

Since it appears to the Court that your deliberations have been somewhat lengthy without a verdict being reached, the Court wishes to suggest a few thoughts that you should consider in your deliberations, along with the evidence in the case and all of the instructions previously given.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching a verdict, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

You are not advocates. You are judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

COMMENT

1. This is known as a "modified-*Allen*" instruction, a label that is somewhat ambiguous in Colorado because there are two relevant cases involving criminal defendants with the last name of "Allen."

The first decision is *Allen v. United States*, 164 U.S. 492 (1896), in which the United States Supreme Court held that it was not error to charge the jury, on their return for further instructions, that it is their duty to decide the case, if they can conscientiously do so; that they should listen to each other's arguments with a disposition to be convinced; that, if the much larger number are for conviction, a dissenting juror should consider whether his doubt is a reasonable one; and that, if a majority is for acquittal, the minority should consider whether they may not reasonably doubt their judgment.

The original *Allen* instruction had a "stormy career" in appellate jurisprudence, *United States v. Silvern*, 484 F.2d 879, 880 (7th Cir. 1973), and, on September 22, 1971, the Chief Justice of the Colorado Supreme Court issued the following

directive for trial judges to utilize a four-part "modified-*Allen*" instruction adopted by other jurisdictions, in accordance with the recommendation of the A.B.A. Standards Relating to Trial by Jury, § 15.4 (1968) (now Standard 15-4.4), and the model instruction set forth in Jury Instructions and Forms for Federal Criminal Cases, 27 F.R.D. 39, 97-98 (1961):

> IT IS HEREBY ORDERED that the "Allen" Instruction, otherwise known as the Third Degree Instruction, be no longer given to juries in trials conducted in this state. If it appears that a jury has been unable to agree, the trial court may in its discretion require the jury to continue its deliberations and may give an instruction which informs the jury that:
>
> 1) Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement if it can be done without violence to individual judgment;
>
> 2) Each juror must decide the case for himself, but only after impartial consideration with his fellow jurors;
>
> 3) In the course of deliberation, a juror should not hesitate to re-examine his own views and change his opinion if convinced it is erroneous; and
>
> 4) No juror should surrender his honest conviction as to the weight and effect of the acts solely because of the opinion of his fellow jurors or for the mere purpose of returning a verdict.
>
> A jury shall be discharged by the trial judge without having agreed upon a verdict if it appears to the trial judge that there is no reasonable probability of agreement.

Although the foregoing directive sets forth all components of the "modified-*Allen*" instruction, the potential for confusion concerning the genesis of this term exists because, twelve years later, in *Allen v. People*, 660 P.2d 896, 898-99 n.2 (Colo. 1983), the Colorado Supreme Court disapproved of "time-fuse" instructions (in which the court informs the jury that it will declare a mistrial if a verdict is not returned by a specific time), explaining that such instructions "may have a coercive effect, like that of the [original] *Allen* charge."

More recently, in *Gibbons v. People*, 2014 CO 67, ¶ 20, 328 P.3d 95, 99-100, the supreme court held that "the interrelationship of the two *Allen* cases can be summarized as follows: the four-part modified-*Allen* instruction does not include a time-fuse admonition, and Colorado's *Allen* decision discourages a trial court from adding one."

The court in *Gibbons* further held that, when giving a modified-*Allen* instruction, the trial court has discretion, but is not required, to advise the jury that, if it appears to the court that a unanimous decision cannot be reached, the court will discharge the jurors and declare a mistrial. *Gibbons*, ¶ 33, 328 P.3d at 101-02 ("The trial court has discretion to instruct a deadlocked jury about the possibility of a mistrial when, considering the content of the instruction and the context in which it is given, the instruction will not have a coercive effect on the jury. The court should consider exercising its discretion in rare circumstances, for example when a jury has actually indicated a mistaken belief in indefinite deliberations.").

2. As set forth in the Chief Justice Directive, the decision whether to give a modified-*Allen* instruction is a matter of trial court discretion. *See People v. Schwartz*, 678 P.2d 1000, 1012 (Colo. 1984). In order to properly exercise that discretion, "[t]he trial court must first determine whether there is a likelihood of progress towards a unanimous verdict upon further deliberations." *Id.*

But when inquiring as to the progress of a jury's deliberations:

> It is better practice to not ask a jury numerically how they are divided but rather to make inquiry as to whether any progress has been made toward reaching an agreement and what the likelihood is for such future progress. Also, the judge should . . . try to carefully avoid any disclosure as to whether the divided jury is for conviction or acquittal.

Lowe v. People, 488 P.2d 559, 561 (Colo. 1971) (reversal required because "[t]he probable result [of the court's inquiry] was to bring all the eleven jurors' efforts to bear on the one juror to act against his true beliefs and to abandon a sincere conscientious position").

3. Due to a 2000 statutory amendment, the procedure for dealing with a jury impasse in a case involving one or more lesser-included offenses has changed. *See* § 18-1-408(8), C.R.S. 2015 ("Without the consent of the prosecution, no jury shall be instructed to return a guilty verdict on a lesser offense if any juror remains convinced by the facts and law that the defendant is guilty of a greater offense submitted for the jury's consideration, the retrial of which would be barred by conviction of the lesser offense.").

Prior to the enactment of section 18-1-408(8), the supreme court had outlined the following procedure for trial courts to use with seemingly deadlocked juries in cases involving lesser-included offenses:

> The court should first ask the jury whether there is a likelihood of progress towards a unanimous verdict upon further deliberation. An affirmative response should require further deliberation without any additional instruction. If the jury indicates that the deadlock is such that progress towards a unanimous verdict is unlikely, the court should then inquire whether the jury is divided over guilt as to any one of the offenses and nonguilt as to all offenses, or instead, whether the division centers only on the particular degree of guilt. In the event the jury impasse relates solely to the issue of guilt as to any one of the offenses and nonguilt as to all offenses, the court in its discretion may give Colo. J.I. (Crim.) 38:14 (1983), which is patterned after ABA Standards for Criminal Justice 15-4.4 (2d ed. 1980) and the 1971 directive of the Chief Justice. If, however, the jury deadlock centers solely on a particular degree of guilt, rather than on the issue of guilt or nonguilt, then the court should consider an additional instruction charging the jury to return a guilty verdict on the lesser offense as long as every essential element of the lesser offense is necessarily included in the greater offense and all jurors unanimously agree on the defendant's guilt as to either the lesser or greater offenses submitted to them for their consideration.

People v. Lewis, 676 P.2d 682, 689 (Colo. 1984) (footnotes omitted).

However, in *People v. Richardson*, 184 P.3d 755, 761-62 (Colo. 2008), the Court acknowledged that:

> Contrary to *Lewis*'s guidelines, section 18–1–408(8) expressly prohibits the trial court from alleviating jury deadlock over the degree of guilt by instructing the jury, without the prosecution's consent, to return a guilty verdict on a lesser-included offense. Rather, if any juror remains convinced by the facts and the law that the defendant is guilty of a greater offense, the jury cannot be instructed, without the prosecution's consent, to return a verdict on a lesser-included offense. Because *Lewis* instructions are not constitutionally required, the General Assembly may prohibit or alter them. Therefore, we hold that section 18–1–408(8) abrogates the part of *Lewis* that allows the trial court to instruct the jury, without the prosecution's consent, to return a guilty verdict on a lesser-included offense if the jury has reached consensus as to the defendant's guilt but is deadlocked as to the degree of guilt.

4. Significantly, although *Richardson* states that the General Assembly abrogated the portion of *Lewis* having to do with the trial court's ability to instruct the jury to return a verdict as to a lesser-included offense, nothing in *Richardson* suggests that section 18-1-408(8) abrogated the first portion of *Lewis*, in which the Court advised trial courts that:

> If the jury indicates that the deadlock is such that progress towards a unanimous verdict is unlikely, the court should then inquire whether the jury is divided over guilt as to any one of the offenses and nonguilt as to all offenses, or instead, whether the division centers only on the particular degree of guilt.

Lewis, 676 P.2d at 689. Accordingly, depending on the circumstances, such an inquiry may still be appropriate if: (1) the trial court has provided the jurors with a verdict form that enables them to return a verdict of acquittal as to one or more charges, even if they are deadlocked as to a lesser-included offense, *see* Instruction E:15, Comment 1; or (2) the facts of the case are such that the court concludes that the inquiry will help it decide whether there is manifest necessity to declare a mistrial.

E:19 RETURN OF JURY AFTER POLLING

In the polling of the jury one of your members provided an answer which indicates that you may not have reached a unanimous verdict. For this reason, the Court asks you to return to the jury room for further consideration of your verdict. Whenever you have reached a unanimous verdict, you may return it into Court. If you are not unanimous, then you should continue your deliberations.

After you return to the jury room any member is free to change his vote on any issue submitted to you. Each juror is free to change his vote until the jury is discharged.

COMMENT

1. *See* Crim. P. 31(d) ("When a verdict is returned and before it is recorded, the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.").

2. "[M]atters relating to the manner of conducting a jury poll are generally committed to the discretion of the trial court." *People v. Phillips*, 91 P.3d 476, 479 (Colo. App. 2004); *see People v. Barnard*, 12 P.3d 290, 295 (Colo. App. 2000) (trial court did not abuse its discretion in determining that the verdict was not unanimous when one juror, in answering the court's question whether this was her verdict, stated, "Yes, under duress."). However, the court "may not engage in extensive questioning as to why a juror rejects the verdict." *People v. Juarez*, 271 P.3d 537, 544 (Colo. App. 2011).

E:20 INSTRUCTION TO DISCHARGED EXTRA JUROR(S)

At this time, I have to announce who the alternate[s] is [are] in this case. The alternate[s] in this case is [are] the juror[s] sitting in seat number[s] [ ], and that is [identify juror(s) by name]. I want to remind you that I chose the seat number[s] for the alternate juror[s] randomly before I even knew who was summoned for jury service in this case. This is by no means a reflection on your performance as a juror. You just happened to land in a seat number that I randomly designated before trial for the alternate juror[s]. In a moment, I will give you an opportunity to retrieve any personal belongings you may have in the jury room and you will be excused with the thanks of the Court.

COMMENT

1. When discharging alternate jurors, administer the mandatory discharge instruction outside the presence of the other jurors. *See* Instruction E:25.

2. *See* § 16-10-105, C.R.S. 2015 ("An alternate juror shall be discharged when the jury retires to consider its verdict or at such time as determined by the court."); Crim. P. 24(e) ("An alternate juror shall not be discharged until the jury renders its verdict or until such time as determined by the court.").

E:21 ORDER DISCHARGING EXTRA JUROR

District Court, [City and] County of [ ], Colorado
Case No. [ ], Div. [ ]

ORDER DISCHARGING EXTRA JUROR[S]

People of the State of Colorado

v.

[insert name], Defendant.

At this day it appears to the Court that the matters at issue herein are ready for the consideration of the jury and that the regular jurors herein called have been and now are all present as required;

IT IS ORDERED by the Court that [ ] [and], the extra juror[s] hereto called, be and hereby [is] [are] discharged from further consideration of this cause.

BY THE COURT

_____
Judge

Done in open Court this ____ day of _____, 20__.

E:22 INSTRUCTION TO EXTRA JUROR RELEASED SUBJECT TO RECALL

At this time, I have to announce who the alternate[s] is [are] in this case. The alternate[s] in this case is [are] the juror[s] sitting in seat number[s] [ ], and that is [identify juror(s) by name]. I want to remind you that I chose the seat number[s] for the alternate juror[s] randomly before I even knew who was summoned for jury service in this case. This is by no means a reflection on your performance as a juror. You just happened to land in the [a] seat number I randomly designated before trial for the alternate juror[s]. In a moment, I will give you an opportunity to retrieve any personal belongings you may have in the jury room and you will be excused temporarily with the thanks of the Court.

I am not discharging you from your jury service yet. I'm simply excusing you temporarily. Please continue to follow all of the instructions I have been giving you throughout the trial because there is a chance that if one of the jurors deliberating unexpectedly becomes unavailable, I may be in a position to call on you to replace that juror. You may go about your life as you were doing before you first reported for jury service, but you must continue to follow all of my instructions until my staff notifies you that you are discharged. All of my instructions will continue to apply to you until my staff notifies you otherwise.

Do you understand?

Do you agree to follow my instructions?

Please make sure we have good contact information for you so that we can get in touch with you. Thank you again.

COMMENT

1. *See* § 16-10-105, C.R.S. 2015 ("An alternate juror shall be discharged when the jury retires to consider its verdict or at such time as determined by the court."); Crim. P. 24(e) ("An alternate juror shall not be discharged until the jury renders its verdict or until such time as determined by the court.").

2. *See Carrillo v. People*, 974 P.2d 478, 488-90 (Colo. 1999) (noting that "whether the legislature has granted trial courts the authority to substitute alternate jurors once deliberations

have begun is unclear"; declining to resolve two conflicting Court of Appeals' opinions concerning whether the trial court possesses such statutory authority; and reaffirming precedent indicating that a mid-deliberation substitution raises a presumption of prejudice to the defendant's right to a fair trial, which may be overcome by an adequate showing that procedural precautions taken by the trial court obviated the danger of prejudice to the defendant); *see also Garcia v. People* 997 P.2d 1, 6 (Colo. 2000) ("We did not determine in *Carrillo* whether or not dismissing a juror and substituting an alternate juror during the course of deliberations violates our current statute and rule, as that issue was not relevant to the outcome of the case. *See Carrillo*, 974 P.2d at 488, 490. Whether or not a trial court has the power to order such a substitution, the substitution raises a presumption of prejudice to the defendant. *See id.* at 490. Since we simply follow the principles announced in *Burnette* and *Carrillo*, we need not and do not decide the issue left open in *Carrillo*."); *People v. Burnette*, 775 P.2d 583, 590-91 (Colo. 1989) (presumption of prejudice arising from mid-deliberation substitution of an alternate juror for a regular juror was not rebutted because the court did not: (1) initially instruct the conditionally released alternate that he was not to discuss the case with others or form an opinion based on information that he acquired while he was conditionally released; (2) question the recalled alternate about his activities while conditionally released, and about his ability to serve on the jury; (3) inquire of the regular jurors whether they would be capable of disregarding their previous deliberations and any opinions they may have formed, and whether they could be receptive if the alternate juror asserted a non-conforming view; and (4) obtain assurances, from both the alternate and regular jurors, that the substitution would not impair the ability of the reconstituted jury to render a fair verdict).

3. When unconditionally discharging an alternate juror who was initially discharged subject to recall, administer the final discharge instruction. *See* Instruction E:25.

E:23 FINAL CONCLUDING INSTRUCTION

The bailiff will now escort you to the jury room, where you will select one of your members to be your foreperson. Your foreperson will preside over your deliberations and shall sign any verdict form [and verdict question form] that you may agree on, according to the rules that I am about to explain.

The verdict [for each charge] must represent the considered judgment of each juror, and it must be unanimous. In other words, all of you must agree to all parts of it. [This requirement also applies to any determination[s] that you make in response to [a] verdict question[s] which you conclude should be answered.]

Only one verdict shall be returned signed [for each count][for each defendant] [for each count, for each defendant]. The verdict form[s] [, verdict question form[s],] and these instructions shall remain in the possession of your foreperson until I ask for them in open court. Upon reaching a verdict [and, if required by your verdict[s], answering any verdict question[s],] you will inform the bailiff, who in turn will notify me, and you will remain in the jury room until I call you into the courtroom.

You will be provided with [insert number] verdict forms. [You also will be provided with [insert number] verdict question form[s] with directions that explain under what circumstances you should complete [that] [those] form[s].]

When you have unanimously agreed upon your verdict[s] you will select the option on [the] [each] form which reflects your verdict, and the foreperson will sign the verdict form[s] as I have stated. [Similarly, if you conclude that [the] [any] verdict question[s] should be answered, you will select the option on [the] [each] verdict question form which reflects your unanimous decision, and the foreperson will sign [the] [each] verdict question form as I have stated.]

I will now read to you the verdict [and verdict question[s]] form[s]. You must not draw any inferences based on the order in which I read them. The verdict [and verdict question [s] form[s] you will receive read[s] as follows:

COMMENT

1. *See People v. Poe*, 2012 COA 166, ¶ 10, 316 P.3d 13, 15 (no error in trial court's closing instruction, which "merely expanded on the model instructions, which instruct jurors to keep an open mind and reach a considered decision during final deliberations").

E:24 VERDICT FORM — GENERAL

District Court, [City and] County of [ ], Colorado
Case No. [ ], Div. [ ].

People of the State of Colorado
v.

[insert name of defendant]

JURY VERDICT, Count No. [ ]

CHARGE OF [insert name of offense here]

I.* We, the jury, find the defendant, [insert name of defendant], NOT GUILTY of Count No. [ ], [insert name of offense].

_____
FOREPERSON

II.* We, the jury, find the defendant, [ ], GUILTY of Count No. [ ], [insert name of offense].

_____
FOREPERSON

* The foreperson should sign *only one* of the above (I or II). If the verdict is NOT GUILTY, then I. above should be signed. If the verdict is GUILTY then II. above should be signed.

E:25 MANDATORY INSTRUCTION UPON DISCHARGE

You have now completed your duties as jurors in this case and are discharged with the thanks of the court. The question may arise whether you may now discuss this case with the lawyers, the defendant, or other persons involved in the case. For your guidance the Court instructs you that whether you talk to anyone is entirely your own decision. It is proper for others to discuss the case with you and you may talk with them but you need not. If you talk to them you may tell them as much or as little as you like about your deliberations or the facts that influenced your decision. If any person persists in discussing the case over your objection, or becomes critical of your service either before or after any discussion has begun, please report it to me.

COMMENT

1. When unconditionally discharging one or more alternate jurors before the jury has reached a verdict, administer this instruction outside the presence of the other jurors.

2. Remember to administer this instruction when unconditionally discharging alternate jurors who were initially discharged subject to recall. After reading this instruction to the alternate(s), enter a discharge order. *See* Instruction E:26.

E:26 ORDER DISCHARGING EXTRA JUROR(S) RELEASED SUBJECT TO RECALL

District Court, [City and] County of [ ], Colorado
Case No. [ ], Div. [ ]

ORDER DISCHARGING EXTRA JUROR[S]

People of the State of Colorado

v.

[insert name], Defendant.

At this day it appears to the Court that the [twelve] [six] regular jurors in this case have reached a verdict.

IT IS ORDERED by the Court that [ ] [and], the extra juror[s] hereto called, be and hereby [is] [are] discharged from further consideration of this cause.

BY THE COURT

_____
Judge

Done in open Court this ____ day of _____, 20__.

E:27 FORM FOR INTERROGATORY

If you find the defendant not guilty of [insert offense[s]], you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of [insert offense[s]], you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question:

[Insert question]? (Answer "Yes" or "No")

The [restate question as a proposition] only if:

1. [insert condition][.] [, and]

[2. [insert additional condition, if any].]

The prosecution has the burden to prove [the] [each] numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

E:28 SPECIAL VERDICT FORM FOR INTERROGATORY (WITH FORMAT FOR MULTIPLE INTERROGATORIES)

District Court, [City and] County of [ ], Colorado
Case No. [ ], Div. [ ].
People of the State of Colorado
v.
[insert name of defendant]

JURY VERDICT, Count No. [ ]

CHARGE OF [insert name of offense here]

I. We, the jury, find the defendant, [ ], NOT GUILTY of Count No. [ ], [insert name of offense].

_____
FOREPERSON*

II. We, the jury, find the defendant, [ ], GUILTY of Count No. [ ], [insert name of offense].

_____
FOREPERSON*

We further find, with respect to the verdict question[s] for this count, as follows:

1. [Insert question from interrogatory. For example: Did the defendant cause submission through force or violence?]

[___] Yes [___] No

2. [Insert question from interrogatory. For example: Did the defendant cause submission by threat?]

[___]Yes [___]No

_____
FOREPERSON*

* The foreperson should use ink to sign on one of the two lines indicating a verdict of "not guilty" or "guilty." If the verdict is "guilty," the foreperson should use ink to mark the appropriate space[s] indicating the answer[s] to [the] [each]

verdict question[s], and then sign on the line following [the] [each] verdict question.

COMMENT

1. Because the above format provides separate "Yes" and "No" options for answering each interrogatory, it is not necessary to include a footnote explaining that only one of these items may be selected from each pairing. However, it may be necessary to include additional directional footnoting when asking the jury to answer: (1) separate interrogatories for a sentence mitigator and a sentence enhancer (e.g., first degree assault, committed under a heat of passion, against an at-risk adult, *see* §§ 18-3-202(2)(a), 18-6.5-103(3)(a), C.R.S. 2015); or (2) interrogatories that address mutually exclusive sentence enhancement factors (e.g., the valuation parameters for stolen property, *see* § 18-4-401(2), C.R.S. 2015 (valuation provisions for theft)).

CHAPTER F

DEFINITIONS

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CHAPTER COMMENTS

1. All definitional instructions in this chapter are derived from statute or the state constitution.

2. The instructions that are based on definitions from section 18-1-901(3), C.R.S. 2015, "apply wherever the same term is used in the same sense in another section [of the Criminal Code] unless the definition is specifically limited or the context indicates that it is inapplicable." § 18-1-901(1), C.R.S. 2015; *see also* § 18-1-901(2), C.R.S. 2015 (the definitions of terms relating to principles of criminal culpability in section 18-1-501, C.R.S. 2015 are generally applicable). Each of these instructions uses the prefatory word that appears in the corresponding subsection of the statute (i.e., that a certain term either "means" or "includes" that which follows). *Compare* Instruction F:165 ("'Governmental function' includes. . ."), *with* Instruction F:30 ("'Benefit' means. . ."). This distinction may have significance, depending on the facts of a particular case. *See Colorado Common Cause v. Meyer*, 758 P.2d 153, 164 (Colo. 1988) ("The word 'includes' has been found by the overwhelming majority of jurisdictions to be a term of extension or enlargement when used in a statutory definition.").

3. In a few instructions, the Committee has made minor alterations to statutory language which, in the Committee's judgment, do not alter the meaning of the defined terms (e.g., changing "shall not" to "does not" in Instruction F:68 (defining "consent")). Nevertheless, the Committee recommends that, as with all model jury instructions, users conduct their own research to determine whether a definition is accurate.

4. Where the Committee has concluded that a definition should not be used in a certain context because the term has a different meaning, this determination is noted. For example, Instruction F:70 defines "contraband" for purposes of introducing contraband in the second degree, and Comment 4 to that instruction states: "Do not use the definition of 'obscene' in Instruction F:246 (defining the term for purposes of the harassment statute)."

5. Several instructions include bracketed directions to insert descriptive statements from statutory provisions that are referenced in the term definitions. The Committee has used this mechanism where the referenced material is lengthy. *See*, *e.g.*, F:45 (" the term 'medical directive or order,' as used in the definition of 'caretaker neglect,' includes, but is not limited to, a medical durable power of attorney, a declaration as to medical treatment executed [insert description from section 15-18-104], a medical order for scope of treatment form executed [insert description from article 18.7 of title 15], and a CPR

directive executed [insert description from article 18.6 of title 15].]”).

F:01 INTRODUCTION FOR LIST OF TERM DEFINITIONS

In this case, certain words and phrases have particular meanings.

Accordingly, you are to use the following definitions where these words and phrases appear in instructions that define crimes, defenses, special rules, and verdict questions.

[Insert all definitions, arranged alphabetically.]

F:02 ABANDON (MOTOR VEHICLE)

"Abandon" means to leave a thing with the intention not to retain possession of or assert ownership over it. The intent need not coincide with the act of leaving.

COMMENT

1. *See* § 18-4-512(2), C.R.S. 2015.

F:03 ABANDON (CRUELTY TO ANIMALS)

"Abandon" means the leaving of an animal without adequate provisions for the animal's proper care by its owner, the person responsible for the animal's care or custody, or any other person having possession of such animal.

COMMENT

1. *See* § 18-9-201(1), C.R.S. 2015 (cruelty to animals).

F:04 ACADEMIC RECORD

"Academic record" means a transcript, diploma, grade report, or similar document of an institution of secondary or higher education.

COMMENT

1. *See* § 18-5-104.5(2)(a), C.R.S. 2015.

F:05 ACCESSORY

"Accessory" means any physical evidence in the vicinity of a survey monument, the relative location of which is of public record and which is used to help perpetuate the location of the monument. Accessories shall be construed to include the accessories recorded in the original survey notes and additional reference points and dimensions furnished by subsequent land surveyors or attested to in writing by persons having personal knowledge of the original location of the monument.

COMMENT

1. *See* § 18-4-508(2), C.R.S. 2015 (defacing, destroying, or removing landmarks, monuments, or accessories; incorporating the above definition from section 38-53-103(1), C.R.S. 2015).

2. *See* Chapter 8-1 for definitions of criminal liability as an accessory.

F:06 ACCOUNT HOLDER (FINANCIAL TRANSACTION DEVICE CRIME ACT)

"Account holder" means the person or business entity named on the face of a financial transaction device to whom or for whose benefit the financial transaction device is issued by an issuer.

COMMENT

1. *See* § 18-5-701(1), C.R.S. 2015 (financial transaction device crime act).

2. *See* Instruction F:30 (defining "benefit"); Instruction F:153 (defining "financial transaction device").

F:07 ACCOUNT HOLDER (IDENTITY THEFT AND RELATED OFFENSES)

"Account holder" means any person or business entity named on or associated with the account or named on the face of a financial device to whom or for whose benefit the financial device is issued by an issuer.

COMMENT

1. *See* § 18-5-901(1), C.R.S. 2015 (identity theft and related offenses).

2. *See* Instruction F:150 (defining "financial device"); Instruction F:190 (defining "issuer").

F:08 ACT

"Act" means a bodily movement, and includes words or possession of property.

COMMENT

1. *See* § 18-1-501(1), C.R.S. 2015.

F:09 ADMINISTER

"Administer" means to apply a controlled substance, whether by injection, inhalation, ingestion, or any other means, directly to the body of a patient or research subject by a practitioner (or, in the practitioner's presence, by the practitioner's authorized agent), or the patient or research subject, at the direction and in the presence of the practitioner.

COMMENT

1. *See* § 18-18-102(1), C.R.S. 2015 (controlled substances offenses).

2. *See* Instruction F:13 (defining "agent").

+ F:09.5 ADULTERATED

"Adulterated" means varying from the standard of composition or quality prescribed by or pursuant to [insert description of any statute of the state of Colorado or the United States providing criminal penalties for such variance], or set by established commercial usage.

COMMENT

1. *See* § 18-5-301(1)(d), C.R.S. 2015.

2. + The Committee added this instruction in 2015.

F:10 AFTER DELIBERATION

The term "after deliberation" means not only intentionally but also that the decision to commit the act has been made after the exercise of reflection and judgment concerning the act. An act committed after deliberation is never one which has been committed in a hasty or impulsive manner.

COMMENT

1. *See* § 18-3-101(3), C.R.S. 2015 (homicide and related offenses).

2. Under this definition, some "'appreciable length of time must have elapsed to allow deliberation, reflection and judgment.'" *Key v. People*, 715 P.2d 319, 322 (Colo. 1986) (quoting *People v. Sneed*, 183 Colo. 96, 100, 514 P.2d 776, 778 (1973)). + *See Martinez v. People*, 2015 CO 16, ¶ 11, 344 P.3d 862 ("The trial court in this case erroneously instructed the jury that 'after deliberation' means an interval of time 'sufficient for one thought to follow another.' The prosecution culled this language from an 1895 case, *Van Houten v. People*, that considered how quickly premeditation can occur in the first-degree murder context. 22 Colo. 53, 43 P. 137, 142 (1895). More recently, however, this court has rejected the *Van Houten* language as inconsistent with the element of deliberation that the current first-degree murder statute requires. *People v. Sneed*, 183 Colo. 96, 514 P.2d 776, 778 (1973). . . . [However,] because the record in this case reveals overwhelming evidence of deliberation, and the instructions as a whole adequately informed the jury of the law, the instructional error did not seriously impair the reliability of the jury's guilty verdict. We therefore affirm the court of appeals' holding that there was no plain error in the trial court's jury instructions.").

3. Evidence of voluntary intoxication is admissible to counter the specific intent element of first-degree murder, which includes "after deliberation" as an element. *See People v. Miller*, 113 P.3d 743, 750 (Colo. 2005); *People v. Harlan*, 8 P.3d 448, 471-75 (Colo. 2000).

4. + In 2015, the Committee revised Comment 2 by adding a citation to *Martinez v. People*.

F:11 AGENT (BUSINESS ENTITIES)

"Agent" means any director, officer, or employee of a business entity, or any other person who is authorized to act in behalf of the business entity.

COMMENT

1. *See* § 18-1-606(2)(a), C.R.S. 2015.

2. *See* Instruction G1:04 (criminal liability of business entities).

F:12 AGENT (ASSISTED SUICIDE MANSLAUGHTER – MEDICAL CAREGIVER AFFIRMATIVE DEFENSE)

"Agent" means a person appointed to represent the interests of the terminally ill patient by a medical power of attorney, power of attorney, health care proxy, or any other similar statutory or regular procedure used for designation of such person.

COMMENT

1. *See* § 18-3-104(4)(b)(I), C.R.S. 2015.

F:13 AGENT (CONTROLLED SUBSTANCES OFFENSES)

"Agent" means an authorized person who acts on behalf of or at the direction of a person licensed or otherwise authorized [insert description of relevant provision from "this article or under part 2 of article 80 of title 27"].

["Agent" does not include a common or contract carrier, a public warehouseman, or an employee of a carrier or warehouseman.]

COMMENT

1. *See* § 18-18-102(2), C.R.S. 2015 (controlled substances offenses).

F:14 AID OR ASSIST

"To aid" or "to assist" includes knowingly to give or lend money or extend credit to be used for, or to make possible or available, or to further the activity thus aided or assisted.

COMMENT

1. *See* § 18-1-901(3)(a), C.R.S. 2015.

F:15 ALCOHOL BEVERAGE

"Alcohol beverage" means fermented malt beverage or malt, vinous, or spirituous liquors.

COMMENT

1. *See* § 18-9-123(1), C.R.S. 2015 (bringing alcohol beverages, bottles, or cans into the major league baseball stadium; incorporating the above definition from § 12-47-103(2), C.R.S. 2015).

2. *See* Instruction F:148 (defining "fermented malt beverage"); Instruction F:205 (defining "malt liquors"); Instruction F:350 (defining "spirituous liquors"); Instruction F:390 (defining "vinous liquors").

3. The model definition does not include the excepting language of the statute; this language should be included when it is relevant. *See* § 12-47-103(2), C.R.S. 2015 ("except that 'alcohol beverage' shall not include confectionery containing alcohol within the limits prescribed by section 25-5-410(1)(i)(II), C.R.S.").

F:16 ANAL INTERCOURSE

"Anal intercourse" means contact between human beings of the genital organs of one and the anus of another.

COMMENT

1. *See* § 18-7-201(2)(d), C.R.S. 2015 (prostitution); § 18-7-401(1), C.R.S. 2015 (child prostitution); *see also* § 18-3-401(6), C.R.S. 2015 (defining "sexual penetration" as including "anal intercourse").

F:17 ANIMAL

"Animal" means any living dumb creature, including a service animal.

COMMENT

1. *See* § 18-9-201(2), C.R.S. 2015 (cruelty to animals).

2. *See* Instruction F:334 (defining "service animal").

F:18 ANOTHER

A thing of value is that of "another" if anyone other than the defendant has a possessory or proprietary interest therein.

COMMENT

1. *See* § 18-4-401(1.5), C.R.S. 2015 (theft).

2. In *People v. Clayton*, 728 P.2d 723, 726 (Colo. 1986), the supreme court concluded that the definition of property belonging to "another" in section 18-4-101(3), C.R.S. 2015, did not apply to the theft statute, and held that, "without specific statutory authority, the unauthorized taking by a partner of partnership assets is not a crime." However, the General Assembly amended the theft statute in 1987 and added the above definition.

F:19 ANTIQUE FIREARM

The term "antique firearm" means

[any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) manufactured in or before 1898]

[any replica of any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) manufactured in or before 1898 if the replica [is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition] [uses rimfire or conventional centerfire fixed ammunition which is no longer manufactured in the United States and which is not readily available in the ordinary channels of commercial trade]]

[any muzzle loading rifle, muzzle loading shotgun, or muzzle loading pistol, which is designed to use black powder, or a black powder substitute, and which cannot use fixed ammunition].

The term "antique firearm" does not include any weapon which incorporates a firearm frame or receiver, any firearm which is converted into a muzzle loading weapon, or any muzzle loading weapon which can be readily converted to fire fixed ammunition by replacing the barrel, bolt, breechblock, or any combination thereof.

COMMENT

1. *See* § 18-12-112(6)(a), C.R.S. 2015 (exempting antique firearms from background check requirements, and incorporating the above definition from 18 U.S.C. § 921(a)(16)).

F:20 ANOTHER PERSON

"Another person" includes a fetus born dead.

COMMENT

1. *See* § 18-8-109, C.R.S. 2015 (concealing death).

F:21 ANYTHING OF VALUE

"Anything of value" means any "thing of value," as that term is defined in these instructions.

COMMENT

1. *See* Instruction F:371 (defining "thing of value").

+ F:21.5 APPLICANT

"Applicant" means any person applying to a private employment agency in order to secure employment with any person, firm, association, or corporation other than the private employment agency.

COMMENT

1. *See* § 18-5-307(1)(a), C.R.S. 2015 (prohibited practice by a private employment agency).

2. *See* Instruction F:285.5 (defining "private employment agency").

3. + The Committee added this instruction in 2015.

F:22 ARTICLE (THEFT OF TRADE SECRETS)

"Article" means any object, material, device, or substance, or copy thereof, including any writing, record, recording, drawing, sample, specimen, prototype, model, photograph, microorganism, blueprint, or map.

COMMENT

1. *See* § 18-4-408(2)(a), C.R.S. 2015 (theft of trade secrets).

F:23 ASSIST

COMMENT

1. *See* § 18-8-201(3), C.R.S. 2015 (for purposes of the offense of aiding escape, "'[a]ssist' includes any activity characterized as 'rendering assistance' in section 18-8-105"); Instruction F:311 (defining "render assistance").

F:24 AT-RISK ADULT

"At-risk adult" means any person who is [seventy years of age or older] [eighteen years of age or older, and is a person with a disability].

COMMENT

1. *See* § 18-6.5-102(2), (11)(a-h) C.R.S. 2015.

2. *See* Instruction F:273 (defining "person with a disability").

F:25 AT-RISK ELDER

"At-risk elder" means any person who is seventy years of age or older.

COMMENT

1. *See* § 18-6.5-102(3), C.R.S. 2015.

F:26 AT-RISK JUVENILE

"At-risk juvenile" means any person who is under the age of eighteen years, and is a person with a disability.

COMMENT

1. *See* § 18-6.5-102(4), (11)(a-h), C.R.S. 2015.

2. *See* Instruction F:273 (defining "person with a disability").

F:27 AUDIOVISUAL RECORDING FUNCTION

"Audiovisual recording function" means the capability of a device to record or transmit a motion picture or any part thereof by means of any technology now known or hereafter developed.

COMMENT

1. *See* § 18-4-516(6)(a), C.R.S. 2015 (criminal operation of a device in a motion picture theater).

F:28 AUTHORIZATION

"Authorization" means the express consent of a person which may include an employee's job description to use said person's computer, computer network, computer program, computer software, computer system, property, or services.

COMMENT

1. *See* 18-5.5-101(1), C.R.S. 2015 (computer crime).

2 *See* Instruction F:289 (defining "property").

F:29 BALLISTIC KNIFE

"Ballistic knife" means any knife that has a blade which is forcefully projected from the handle by means of a spring-loaded device or explosive charge.

COMMENT

1. *See* § 18-12-101(1)(a.3), C.R.S. 2015.

2. *See* Instruction F:194 (defining "knife").

F:30 BENEFIT (GENERAL DEFINITION)

"Benefit" means any gain or advantage to the beneficiary including any gain or advantage to another person pursuant to the desire or consent of the beneficiary.

COMMENT

1. *See* § 18-1-901(3)(b), C.R.S. 2015.

+ F:30.5 BENEFIT (BRIBERY AND CORRUPT INFLUENCES)

"Benefit" means any gain or advantage to the beneficiary, including any gain or advantage to a third person pursuant to the desire or consent of the beneficiary.

COMMENT

1. *See* § 18-8-301(1), C.R.S. 2015.

2. Although this instruction is virtually identical to Instruction F:30 (defining "benefit" (general definition)), the Committee has created a separate instruction because the General Assembly specifically created this definition to apply to offenses involving bribery and corrupt influences. *See* § 18-8-301.

3. + The Committee added this instruction in 2015.

F:31 BENEFIT (PERJURY AND RELATED OFFENSES; OFFENSES RELATED TO JUDICIAL AND OTHER PROCEEDINGS)

"Benefit" means any gain or advantage to the beneficiary, including any gain or advantage to a third person pursuant to the desire or consent of the beneficiary.

COMMENT

1. *See* § 18-8-501, C.R.S. 2015 (perjury and related offenses; incorporating the definitions of section 18-8-301, C.R.S. 2015 (bribery and corrupt influences)); § 18-8-702, C.R.S. 2015 (victims and witnesses protection; incorporating the definitions of section 18-8-301).

F:32 BICYCLE

"Bicycle" means a vehicle propelled by human power applied to pedals upon which a person may ride having two tandem wheels or two parallel wheels and one forward wheel, all of which are more than fourteen inches in diameter.

COMMENT

1. *See* § 42-1-102(10), C.R.S. 2015.

F:33 BLACKJACK (ILLEGAL WEAPON)

"Blackjack" includes any billy, sand club, sandbag, or other hand-operated striking weapon consisting, at the striking end, of an encased piece of lead or other heavy substance and, at the handle end, a strap or springy shaft which increases the force of impact.

COMMENT

1. *See* § 18-12-101(1)(a.5), C.R.S. 2015.

F:34 BLANK FINANCIAL TRANSACTION DEVICE

A "blank financial transaction device" is one that has at least one or more characteristics of a financial transaction device but does not contain all of the characteristics of a completed financial transaction device.

COMMENT

1. *See* § 18-5-705(6), C.R.S. 2015.

2. *See* Instruction F:153 (defining "financial transaction device").

F:35 BLIND

"Blind" means having not more than ten percent visual acuity in the better eye with correction, or not more than 20/200 central visual acuity in the better eye with correction, or a limitation in the fields of vision such that the widest diameter of the visual field subtends an angle no greater than twenty degrees.

COMMENT

1. *See* § 18-6.5-102(11)(g), C.R.S. 2015 (defining "a person with a disability," for purposes of the terms "at-risk adult" and "at-risk juvenile," as including a person who "[i]s blind as that term is defined in section 26-2-103(3), C.R.S."). *See also* § 18-6.5-102(11)(a), (b), C.R.S. 2015 (defining a "person with a disability" as someone who "[i]s impaired because of . . . the permanent impairment of vision of both eyes to such a degree as to constitute virtual blindness" or "[i]s unable to . . . see").

F:36 BODILY INJURY (GENERAL DEFINITION)

"Bodily injury" means physical pain, illness, or any impairment of physical or mental condition.

COMMENT

1. *See* § 18-1-901(3)(c), C.R.S. 2015.

2. *See People v. Hines*, 572 P.2d 467, 470 (Colo. 1977) ("[t]o support a finding of bodily injury the prosecution must prove that at least some physical pain, illness or physical or mental impairment, *however slight*" (emphasis added)).

3. *See People v. Lobato*, 530 P.2d 493, 495 (Colo. 1975) ("the injury need not be of a crippling or otherwise incapacitating nature to be within the statutory prohibition").

F:37 BODILY INJURY (UNLAWFUL OWNERSHIP OF A DANGEROUS DOG)

"Bodily injury" means any physical injury that results in severe bruising, muscle tears, or skin lacerations requiring professional medical treatment or any physical injury that requires corrective or cosmetic surgery.

COMMENT

1. *See* § 18-9-204.5(2)(a), C.R.S. 2015.

F:38 BOMB

"Bomb" means any explosive or incendiary device or Molotov cocktail, or any chemical device which causes or can cause an explosion, which is not specifically designed for lawful and legitimate use in the hands of its possessor.

COMMENT

1. *See* § 18-12-101(1)(b), C.R.S. 2015.

2. The relevant statute provides as follows: "'Bomb' means any explosive or incendiary device or molotov cocktail as defined in section 9-7-103, C.R.S., or any chemical device which causes or can cause an explosion, which is not specifically designed for lawful and legitimate use in the hands of its possessor." § 18-12-101(1)(b), C.R.S. 2015. It is clear that this section incorporates the statutory definition of "Molotov cocktail" contained in section 9-7-103(5), which is part of Article 7 of Title 9 (having to do with the regulation and inspection of explosives). *See* Instruction F:232 (defining "Molotov Cocktail"). However, it does not appear that this section incorporates the definition of an "explosive" in section 9-7-103(3), C.R.S. 2015, or the definition of an "incendiary device" in section 9-7-103(4), C.R.S. 2015. Rather, the disjunctive term "explosive or incendiary device" is specifically defined (with enumerated exclusions) in section 18-12-109(1)(a)(I), C.R.S. 2015. *See* Instruction F:134 (defining "explosive or incendiary device").

F:39 BOTTLE

"Bottle" means a container that is made of nonporous material including but not limited to glass or ceramic, typically with a comparatively narrow neck or mouth, but excluding containers made of cardboard, paper, or plastic; or thermos bottles.

COMMENT

1. *See* § 18-9-123(1)(b)(I), C.R.S. 2015 (bringing alcohol beverages, bottles, or cans into the major league baseball stadium).

F:40 BUILDING

"Building" means a structure which has the capacity to contain, and is designed for the shelter of man, animals, or property, and includes a ship, trailer, sleeping car, airplane, or other vehicle or place adapted for overnight accommodations of persons or animals, or for carrying on of business therein, whether or not a person or animal is actually present.

COMMENT

1. *See* § 18-4-101(1), C.R.S. 2015 (defining the term for Article 4).

F:41 BUILDING OF ANOTHER

A "building of another" is a unit, in a building divided into units for separate occupancy, that is not occupied by the defendant.

COMMENT

1. *See* § 18-4-101(4), C.R.S. 2015 (defining the term for Article 4).

F:42 BUSINESS ENTITY

"Business entity" means a corporation or other entity that is subject to [insert description of the relevant provisions of Title 17]; foreign corporations qualified to do business in this state [insert description of from article 115 of Title 7], specifically including federally chartered or authorized financial institutions; a corporation or other entity that is subject to [insert description of the relevant provisions of Title 11]; or a sole proprietorship or other association or group of individuals doing business in the state.

COMMENT

1. *See* § 18-1-606(2)(b), C.R.S. 2015.

F:43 CAN

"Can" means a container of cylindrical shape that is made of metal or metallic alloys.

COMMENT

1. *See* § 18-9-123(1)(b)(II), C.R.S. 2015 (bringing alcohol beverages, bottles, or cans into the major league baseball stadium).

F:44 CARETAKER

"Caretaker" means a person who [is responsible for the care of an at-risk [adult] [elder] [juvenile] as a result of a family or legal relationship] [has assumed responsibility for the care of an at-risk [adult] [elder] [juvenile]] [is paid to provide care or services to an at-risk [adult] [elder] [juvenile]].

COMMENT

1. *See* § 18-6.5-102(5), C.R.S. 2015.

F:45 CARETAKER NEGLECT

"Caretaker neglect" means neglect that occurs when adequate food, clothing, shelter, psychological care, physical care, medical care, or supervision is not secured for an at-risk adult or an at-risk elder or is not provided by a caretaker in a timely manner and with the degree of care that a reasonable person in the same situation would exercise.

[However, "caretaker neglect" does not include the withholding, withdrawing, or refusing of any medication, any medical procedure or device, or any treatment, including but not limited to resuscitation, cardiac pacing, mechanical ventilation, dialysis, and artificial nutrition and hydration, in accordance with any valid medical directive or order, or as described in a palliative plan of care.

Further, the term "medical directive or order," as used in the definition of "caretaker neglect," includes, but is not limited to, a medical durable power of attorney, a declaration as to medical treatment executed [insert description from section 15-18-104], a medical order for scope of treatment form executed [insert description from article 18.7 of title 15], and a CPR directive executed [insert description from article 18.6 of title 15].]

COMMENT

1. *See* § 18-6.5-102(6), C.R.S. 2015.

F:46 CAVE

"Cave" means any naturally occurring void, cavity, recess, lava tube, or system of interconnected passages that occurs beneath the surface of the earth or within a cliff or ledge, including any cave resource therein, but not including any mine, tunnel, aqueduct, or other artificial excavation, and that is large enough to permit an individual to enter, regardless of whether the entrance is naturally formed or has been artificially created or enlarged. "Cave" includes any natural pit, sinkhole, or other feature that is an extension of the entrance.

COMMENT

1. *See* § 18-4-509(1)(c)(II)(A), C.R.S. 2015.

F:47 CAVE RESOURCE

"Cave resource" includes any material or substance occurring naturally in caves, such as animal life, plant life, paleontological deposits, sediments, minerals, speleogens, and speleothems.

COMMENT

1. *See* § 18-4-509(1)(c)(II)(B), C.R.S. 2015.

2. *See* Instruction F:348 (defining "speleogen"); Instruction F:349 (defining "speleothem").

F:48 CELLULAR PHONE

"Cellular phone" means a radio telecommunications device that may be used to obtain telecommunications services and that is programmed with an electronic serial number by or with the consent of the cellular phone manufacturer.

COMMENT

1. *See* § 18-8-204(2)(n), C.R.S. 2015 (introducing contraband in the second degree; incorporating the definition of a "cloned cellular phone" from section 18-9-309(1)(a.7), which incorporates the definition of a "cellular phone" from section 18-9-309(1)(a.5), C.R.S. 2015 (telecommunications crimes)).

2. *See* Instruction F:116 (defining "electronic serial number"); Instruction F:363 (defining "telecommunications device"); Instruction F:364 (defining "telecommunications service").

+ F:48.5 CHECK

"Check" means a written, unconditional order to pay a sum certain in money, drawn on a bank, payable on demand, and signed by the drawer. "Check" also includes a negotiable order of withdrawal and a share draft.

COMMENT

1. *See* § 18-5-205(1)(a), C.R.S. 2015.

2. *See* Instruction F:107.7 (defining "drawer"); Instruction F:241.5 (defining "negotiable order of withdrawal" and "share draft").

3. + The Committee added this instruction in 2015.

F:49 CHILD (CHILD ABUSE)

"Child" means a person under the age of sixteen years.

COMMENT

1. *See* § 18-6-401(2), C.R.S. 2015.

2. *See* Instruction F:52, Comment 1 (identifying offenses which have an age disparity requirement).

3. *Cf. People v. Lage*, 232 P.3d 138 (Colo. App. 2009) ("child," as used in the statute defining the offense of reckless child abuse causing death, includes a fetus who is injured while in the womb, is subsequently born and lived outside the womb, and then died from the injuries suffered; unborn child could be a victim of reckless vehicular eluding resulting in death and careless driving resulting in death).

F:50 CHILD (SECOND DEGREE KIDNAPPING; VIOLATION OF CUSTODY; UNLAWFUL SEXUAL CONTACT; SEXUAL ASSAULT ON A CHILD BY ONE IN A POSITION OF TRUST; SEXUAL EXPLOITATION OF A CHILD; CHILD PROSTITUTION; TRAFFICKING IN CHILDREN)

"Child" means a person under the age of eighteen years.

COMMENT

1. *See* § 18-3-302(2), C.R.S. 2015 (second degree kidnapping); § 18-3-304(1), (2), C.R.S. 2015 (violation of custody); § 18-3-404(1.5), C.R.S. 2015 (unlawful sexual contact); § 18-3-405.3(1), C.R.S. 2015 (sexual assault on a child by one in a position of trust); § 18-3-501(2), C.R.S. 2015 (trafficking in children); § 18-6-403(2)(a), C.R.S. 2015 (sexual exploitation of a child); § 18-6-404, C.R.S. 2015 (defining the offense of procurement of a child for sexual exploitation which, by implication, incorporates the definition of a "child" in section 18-6-403(2)(a), the statute defining the offense of sexual exploitation of a child); § 18-7-401(2), C.R.S. 2015 (child prostitution).

2. *See* Instruction F:52, Comment 1 (identifying offenses which have an age disparity requirement).

F:51 CHILD (ENTICEMENT OF A CHILD)

"Child" means a person under the age of fifteen years.

COMMENT

1. *See* § 18-3-305(1), C.R.S. 2015.

F:52 CHILD (AGGRAVATED INCEST)

"Child" means a person under the age of twenty-one years.

COMMENT

1. *See* § 18-6-302(1)(a), C.R.S. 2015.

2. In addition to the three foregoing definitions, certain offenses have specific definitions of the term "child" that include an age disparity requirement with respect to the "actor." *See, e.g.*, § 18-3-405(1), C.R.S. 2015 (sexual assault on a child); § 18-3-405.3, C.R.S. 2015 (sexual assault on a child by one in a position of trust); § 18-3-405.4(1), C.R.S. 2015 (internet sexual exploitation of a child).

F:53 CHOP SHOP

"Chop shop" means any building, lot, facility, or other structure or premise where: any person or persons possess, receive, store, disassemble, or alter, including the alteration or concealment of any identifying feature or number, an unlawfully obtained motor vehicle or major component motor vehicle part for the purpose of using, selling, or disposing of the motor vehicle or major component motor vehicle part; or two or more unlawfully obtained motor vehicles are present for the purpose of alteration, sale, or disposal; or six or more unlawfully obtained major component motor vehicle parts from two or more motor vehicles are present for the purpose of alteration, sale, or disposal.

COMMENT

1. *See* § 18-4-420(5)(a)(I-III), C.R.S. 2015.

2. *See* Instruction F:204 (defining "major component motor vehicle part"); Instruction F:238 (defining "motor vehicle"); Instruction F:381 (defining "unlawfully obtained").

F:54 CIVIL DISORDER

"Civil disorder" means any planned public disturbance involving acts of violence by an assemblage of two or more persons that causes an immediate danger of, or results in, damage or injury to property or to another person.

COMMENT

1. *See* § 18-9-120(1)(a), C.R.S. 2015 (terrorist training activities).

+ F:54.5 CLAIM

"Claim" means a demand for money, property, or services pursuant to a contract of insurance as well as any documentation in support of such claim whether submitted contemporaneously with the claim or at a different time. A claim and any supporting information may be in written, oral, electronic, or digital form.

COMMENT

1. *See* § 18-5-211(7)(a), C.R.S. 2015.

2. *See* Instruction F:183.7 (defining "insurance").

3. + The Committee added this instruction in 2015.

F:55 CLONED CELLULAR PHONE

"Cloned cellular phone" means a cellular phone, the electronic serial number of which has been altered without the consent of the cellular phone's manufacturer.

COMMENT

1. *See* § 18-8-204(2)(n), C.R.S. 2015 (introducing contraband in the second degree; incorporating the above definition from § 18-9-309(1)(a.7), C.R.S. 2015 (telecommunications crimes)).

2. *See* Instruction F:48 (defining "cellular phone"); Instruction F:116 (defining "electronic serial number").

F:56 COCAINE

"Cocaine" means coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed; cocaine, its salts, optical and geometric isomers, and salts of isomers; ecgonine, its derivatives, their salts, isomers, and salts of isomers; or any compound, mixture, or preparation which contains any quantity of any of the substances referred to in this definition.

COMMENT

1. *See* § 18-18-102(4), C.R.S. 2015.

+ F:56.5 COERCING

"Coercing" means inducing a person to act or to refrain from acting, if the inducement is accomplished by any one or more of the following means:

[the use or threat of the use of force against, abduction of, causing of serious harm to, or physical restraint of a person]

[the use of a plan, pattern, or statement for the purpose of causing the person to believe that failure to perform the act or failure to refrain from performing the act will result in the use of force against, abduction of, causing of serious harm to, or physical restraint of that person or another person]

[using or threatening to use the law or the legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed]

[threatening to notify law enforcement officials that a person is present in the United States in violation of federal immigration laws]

[the destruction or taking, or a threat to destroy or take, a person's identification document or other property]

[controlling or threatening to control a person's access to a controlled substance]

[the use of debt bondage]

[the exploitation of a person's physical or mental impairment, where such impairment has a substantial adverse effect on the person's cognitive or volitional functions].

COMMENT

1. *See* § 18-3-502(2), C.R.S. 2015.

2. *See* Instruction F:89.5 (defining "debt bondage"); Instruction F:174.5 (defining "identification document").

3. + The Committee added this instruction in 2015.

F:57 COIN MACHINE

"Coin machine" means a coin box, turnstile, vending machine, or other mechanical or electronic device or receptacle designed to receive a coin or bill of a certain denomination or token made for the purpose and, in return for the insertion or deposit thereof, to offer, to provide, to assist in providing, or to permit the acquisition of some property or some public or private service.

COMMENT

1. *See* § 18-5-111(2), C.R.S. 2015 (unlawfully using slugs).

+ F:57.3 COMMERCIAL ELECTRONIC MAIL MESSAGE (ELECTRONIC MAIL FRAUD)

"Commercial electronic mail message" means any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on an internet website operated for a commercial purpose).

The term "commercial electronic mail message" does not include a transactional or relationship message.

COMMENT

1. *See* 18-5-308(1), C.R.S. 2015 (incorporating 18 U.S.C. § 1037(a)(2014), which uses the term "commercial electronic mail message," which is defined in 15 U.S.C. § 7702(2) (2014), and incorporated by reference in 18 U.S.C. § 1037(d)(4)(2014)).

2. In 15 U.S.C. § 7702(2)(C) (2014), Congress directed the Federal Trade Commission to issue regulations "defining the relevant criteria to facilitate the determination of the primary purpose of an electronic mail message." Those regulations were promulgated as 16 C.F.R. § 316.3.

3. + The Committee added this instruction in 2015.

+ F:57.5 COMMERCIAL SEXUAL ACTIVITY

"Commercial sexual activity" means sexual activity for which anything of value is given to, promised to, or received by a person.

COMMENT

1. *See* § 18-3-502(3), C.R.S. 2015.

2. *See* Instruction F:21 (defining "anything of value"); Instruction F:335.5 (defining "sexual activity").

3. + The Committee added this instruction in 2015.

F:58 COMMON CARRIER (AFFIRMATIVE DEFENSE: USE OF FORCE BASED ON A SPECIAL RELATIONSHIP)

"Common carrier" means every person directly or indirectly affording a means of transportation, or any service or facility in connection therewith, within this state by motor vehicle or other vehicle whatever by indiscriminately accepting and carrying passengers for compensation; and every person affording a means of transportation within this state by railroad by indiscriminately accepting and carrying for compensation passengers or property.

COMMENT

1. *See* § 18-1-703(1)(c), C.R.S. 2015 (affirmative defense of use of physical force based on a special relationship – common carrier; incorporating the definition of section 40-1-102(3)(a)).

2. Although the above instruction will be sufficient when the affirmative defense is raised in cases involving buses, trains, and taxis, there are numerous exceptions to the definition which may require modification. For example, the definition of a "common carrier" excludes hearse and ambulance drivers, as well as persons who are ridesharing or transporting school children, friends, or neighbors. *See* § 40-1-102(3)(b), C.R.S. 2015 ("'Common carrier' does not include a motor carrier that provides transportation not subject to regulation pursuant to section 40-10.1-105 or that is subject to part 3, 4, or 5 of article 10.1 of this title.").

F:59 COMMUNITY CORRECTIONS PROGRAM

"Community corrections program" means a community-based or community-oriented program that provides supervision of offenders, that is operated by a unit of local government, the department, or any private individual, partnership, corporation, or association, and that provides residential or nonresidential services for offenders, monitoring of the activities of offenders, oversight of victim restitution and community service by offenders, programs and services to aid offenders in obtaining and holding regular employment, programs and services to aid offenders in enrolling in and maintaining academic courses, programs and services to aid offenders in participating in vocational training programs, programs and services to aid offenders in utilizing the resources of the community, meeting the personal and family needs of such offenders, programs and services to aid offenders in obtaining appropriate treatment for such offenders, programs and services to aid offenders in participating in whatever specialized programs exist within the community, day reporting programs, or and such other services and programs as may be appropriate to aid in offender rehabilitation and public safety.

COMMENT

1. *See* § 18-8-208.1(1.5), C.R.S. 2015 (attempt to escape; referencing direct sentences to community corrections pursuant to section 18-1.3-301, C.R.S. 2015, for which the term "community corrections" is defined, as set forth above, in section 17-27-102(3), C.R.S. 2015).

F:60 COMPLETE WRITTEN INSTRUMENT

"Complete written instrument" means one which purports to be a genuine written instrument fully drawn with respect to every essential feature thereof.

COMMENT

1. *See* § 18-5-101(1), C.R.S. 2015 (forgery and impersonation offenses).

2. *See* Instruction F:180 (definition of an "incomplete written instrument"); Instruction F:394 (defining "written instrument").

F:61 COMPUTER

"Computer" means an electronic, magnetic, optical, electromagnetic, or other data processing device which performs logical, arithmetic, memory, or storage functions by the manipulations of electronic, magnetic, radio wave, or light wave impulses, and includes all input, output, processing, storage, software, or communication facilities which are connected or related to or operating in conjunction with such a device.

COMMENT

1. *See* 18-5.5-101(2), C.R.S. 2015 (computer crime).

F:62 COMPUTER NETWORK

"Computer network" means the interconnection of communication lines (including microwave or other means of electronic communication) with a computer through remote terminals, or a complex consisting of two or more interconnected computers.

COMMENT

1. *See* 18-5.5-101(3), C.R.S. 2015 (computer crime).

2. *See* Instruction F:61 (defining "computer").

F:63 COMPUTER PROGRAM

"Computer program" means a series of instructions or statements, in a form acceptable to a computer, which permits the functioning of a computer system in a manner designed to provide appropriate products from such computer system.

COMMENT

1. *See* 18-5.5-101(4), C.R.S. 2015 (computer crime).

2. *See* Instruction F:61 (defining "computer").

F:64 COMPUTER SOFTWARE

"Computer software" means computer programs, procedures, and associated documentation concerned with the operation of a computer system.

COMMENT

1. *See* 18-5.5-101(5), C.R.S. 2015 (computer crime).

2. *See* Instruction F:61 (defining "computer"); Instruction F:63 (defining "computer program").

F:65 COMPUTER SYSTEM

"Computer system" means a set of related, connected or unconnected, computer equipment, devices, and software.

COMMENT

1. *See* 18-5.5-101(6), C.R.S. 2015 (computer crime).

2. *See* Instruction F:61 (defining "computer"); Instruction F:64 (defining "computer software").

F:66 CONDUCT

"Conduct" means an act or omission and its accompanying state of mind or, where relevant, a series of acts or omissions.

COMMENT

1. *See* § 18-1-501(2), C.R.S. 2015.

2. *See* Instruction F:251 (defining "omission").

F:67 CONDUCT IN CONNECTION WITH A CREDIBLE THREAT

"Conduct 'in connection with' a credible threat" means acts which further, advance, promote, or have a continuity of purpose, and may occur before, during, or after the credible threat.

COMMENT

1. *See* § 18-3-602(2)(a), C.R.S. 2015 (stalking).

+ F:67.5 CONDUCTS OR ATTEMPTS TO CONDUCT A FINANCIAL TRANSACTION

"Conducts or attempts to conduct a financial transaction" includes, but is not limited to, initiating, concluding, or participating in the initiation or conclusion of a transaction.

COMMENT

1. *See* § 18-5-309(3)(a), C.R.S. 2015 (money laundering).

2. *See* Instruction F:374.5 (defining "transaction").

3. + The Committee added this instruction in 2015.

F:68 CONSENT

"Consent" means cooperation in act or attitude pursuant to an exercise of free will and with knowledge of the nature of the act. A current or previous relationship is not sufficient to constitute consent. Submission under the influence of fear does not constitute consent.

COMMENT

1. *See* § 18-3-401(1.5), C.R.S. 2015 (sexual offenses).

F:69 CONTRABAND (INTRODUCING OR POSSESSING CONTRABAND IN THE FIRST DEGREE)

"Contraband" means a dangerous instrument, malt, vinous or spirituous liquor, fermented malt beverage, a controlled substance, or marijuana or marijuana concentrate.

COMMENT

1. *See* § 18-8-203,(1)(a), C.R.S. 2015; *see also* § 18-8-204.1, C.R.S. 2015 (incorporating this definition for purposes of possession of contraband in the first degree).

2. *See* Instruction F:73 (defining "controlled substance" by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S. 2015); Instruction F:85 (defining "dangerous instrument" pursuant to section 18-8-203(4)); Instruction F:205 (defining "malt liquor"); Instruction F:390 (defining "vinous liquors"); Instruction F:148 (defining "fermented malt beverage"); Instruction F:208 (defining "marijuana"); Instruction F:210 (defining "marijuana concentrate").

3. Section 18-8-203(1)(a) states that the term "controlled substance" is "as defined in section 18-18-102(5)." Section 18-18-102(5), C.R.S. 2015, states: "'Controlled substance' means a drug, substance, or immediate precursor included in schedules I through V of part 2 of this article, including cocaine, marijuana, marijuana concentrate, cathinones, any synthetic cannabinoid, and salvia divinorum."

F:70 CONTRABAND (INTRODUCING CONTRABAND IN THE SECOND DEGREE)

"Contraband" means any of the following, but does not include a dangerous instrument, malt, vinous or spirituous liquor, fermented malt beverage, a controlled substance, marijuana or marijuana concentrate:

[any key, key pattern, key replica or lock pick] [any tool or instrument which could be used to cut fence or wire, dig, pry or file]

[any money or coin of the United States or foreign currency or any written instrument of value] [any uncancelled postage stamp or implement of the United States Postal Service]

[any counterfeit or forged identification card] [any combustible material other than safety matches] [any drug, other than a controlled substance, in quantities other than those authorized by a physician]

[any mask, wig, disguise, or other means of altering normal physical appearance which could hinder ready identification]

[any drug paraphernalia]

[any material which is "obscene"]

[any chain, rope, or ladder] [any article or thing that poses or may pose a threat to the security of the detention facility as determined by the administrative head of the detention facility if reasonable notice was given that such article or thing was contraband]

[for purposes of a facility of the department of corrections or any private contract prison, any cigarettes or tobacco products]

[any portable electronic communication device, including but not limited to cellular telephones; cloned cellular telephones; public, private, or family-style radios; pagers; personal digital assistants; any other device capable of transmitting or intercepting cellular or radio signals between providers and users of telecommunication and data services; and portable computers; except those

devices authorized by the executive director of the department of corrections or his [her] designee].

COMMENT

1. *See* § 18-8-204(2)(a-n), C.R.S. 2015.

2. *See* Instruction F:48 (defining "cellular phone"); Instruction F:55 (defining "cloned cellular telephone"); Instruction F:73 (defining "controlled substance" by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S. 2015); Instruction F:113 (defining "drug paraphernalia").

3. The second comment to Instruction F:69 contains citations to the instructions in Chapter F that define items that section 18-8-204(2) excludes from the definition of "contraband."

4. Do not use the definition of "obscene" in Instruction F:246 (defining the term for purposes of the harassment statute). Section 18-8-204(2)(j) specifies that the term "obscene" is to be defined by the obscenity statute: section 18-7-101(2)(a-c), C.R.S. 2015.

5. *See* § 39-28.5-101(5), C.R.S. 2015 (defining "tobacco products").

F:71 CONTROL CORNER

"Control corner" means any land survey corner the position of which controls the location of the boundaries of a tract or parcel of land, and "corner" means a point of reference determined by the surveying process.

COMMENT

1. *See* § 18-4-508(2), C.R.S. 2015 (defacing, destroying, or removing landmarks, monuments, or accessories; incorporating sections 38-53-103(6), (6.3), C.R.S. 2015).

F:72 CONTROLLED AGRICULTURAL BURN

"Controlled agricultural burn" means a technique used in farming to clear the land of any existing crop residue, kill weeds and weed seeds, or reduce fuel buildup and decrease the likelihood of a future fire.

COMMENT

1. *See* § 18-4-105(6), C.R.S. 2015 (fourth degree arson).

F:73 CONTROLLED SUBSTANCE

COMMENT

1. There is no model instruction defining this term. Users should consult the relevant statutory schedule and draft an instruction tailored to the facts of the case. *See* § 18-18-102(5), C.R.S. 2015 ("'Controlled substance' means a drug, substance, or immediate precursor included in schedules I through V of part 2 of this article, including cocaine, marijuana, marijuana concentrate, cathinones, any synthetic cannabinoid, and salvia divinorum."); *see also* § 18-18-102(6)(a), C.R.S. 2015 (defining "controlled substance analog," a term which is used in schedules I and II).

2. *See also* Instruction F:179 (defining "immediate precursor").

F:74 COPY (THEFT OF TRADE SECRETS)

"Copy" means any facsimile, replica, photograph, or other reproduction of an article, and any note, drawing, or sketch made of or from an article.

COMMENT

1. *See* § 18-4-408(2)(d), C.R.S. 2015.

2. *See* Instruction F:22 (defining "article").

F:75 COPY (THEFT OF MEDICAL RECORDS)

"Copy" means any facsimile, replica, photograph, sound recording, magnetic or electronic recording, or other reproduction of a medical record and any note, drawing or sketch made of or from a medical record.

COMMENT

1. *See* § 18-4-412(2)(d), C.R.S. 2015.

+ F:75.5 CORRECTIONAL INSTITUTION

"Correctional institution" means a correctional facility, a local jail operated by or under contract with the department of corrections, a jail, a facility operated by or under contract with the department of human services in which juveniles are or may be lawfully held for detention or commitment for the commission of a crime, or a facility of a community corrections program.

COMMENT

1. *See* § 18-7-701(2)(a), C.R.S. 2015.

2. *See* Instruction F:59 (defining "community corrections program"); § 17-1-102(1.7), C.R.S. 2015 (defining "correctional facility"); § 17-1-102(7), C.R.S. 2015 (defining "local jail").

3. + The Committee added this instruction in 2015.

F:76 COUNTERFEIT MARK

"Counterfeit mark" means a mark identical to or substantially indistinguishable from a trademark that, without the permission of the owner of the trademark, is affixed or designed to be affixed to, or displayed or otherwise associated with, goods; or displayed in advertising for, or otherwise associated with, services.

COMMENT

1. *See* § 18-5-110.5(3)(a), C.R.S. 2015.

2. *See* Instruction F:373 (defining "trademark").

F:77 CREDIBLE THREAT (STALKING; RETALIATION AGAINST A JUDGE; + RETALIATION AGAINST A PROSECUTOR)

"Credible threat" means a threat, physical action, or repeated conduct that would cause a reasonable person to be in fear for the person's safety or the safety of his [her] immediate family or of someone with whom the person has or has had a continuing relationship. The threat need not be directly expressed if the totality of the conduct would cause a reasonable person such fear.

COMMENT

1. *See* § 18-3-602(2)(b), C.R.S. 2015 (stalking); § 18-8-615(1)(a), C.R.S. 2015 (retaliation against a judge); + § 18-8-616(1)(a), C.R.S. 2015.

2. + In 2015, the Committee revised this instruction, and the preceding Comment, to reflect the enactment of section 18-8-616(1), C.R.S. 2015 (retaliation against a prosecutor). *See* Ch. 239, sec. 1, § 18-8-616(1), 2015 Colo. Sess. Laws 884, 884.

F:78 CREDIBLE THREAT (INTERFERENCE WITH STAFF, FACULTY, OR STUDENTS OF EDUCATIONAL INSTITUTIONS)

"Credible threat" means a threat or physical action that would cause a reasonable person to be in fear of bodily injury with a deadly weapon or death.

COMMENT

1. *See* § 18-9-109(6)(b), C.R.S. 2015.

2. *See* Instruction F:88 (defining "deadly weapon").

F:79 CRIMINAL NEGLIGENCE

A person acts with "criminal negligence" when, through a gross deviation from the standard of care that a reasonable person would exercise, he [she] fails to perceive a substantial and unjustifiable risk that a result will occur or that a circumstance exists.

COMMENT

1. *See* § 18-1-501(3), C.R.S. 2015.

2. *See* Instruction G1:01 (requirements for criminal liability in general).

F:80 CULPABLE STATE OF MIND

"Culpable state of mind" means intentionally, or with intent, or knowingly, or willfully, or recklessly, or with criminal negligence, as these terms are defined in these instructions.

COMMENT

1. *See* § 18-1-501(4), C.R.S. 2015 (defining "culpable mental state," for which the Committee has substituted "culpable state of mind").

F:81 CUNNILINGUS

"Cunnilingus" means any act of oral stimulation of the vulva or clitoris.

COMMENT

1. *See* § 18-7-201(2)(b), C.R.S. 2015 (prostitution); § 18-7-401(3), C.R.S. 2015 (child prostitution).

F:82 CURIO OR RELIC

"Curios or relics" are firearms which are of special interest to collectors by reason of some quality other than is associated with firearms intended for sporting use or as offensive or defensive weapons.

To be recognized as a curio or relic, a firearm must meet [one of] the following definition[s]:

> [a firearm which was manufactured at least 50 years prior to the date of the transfer (not including replicas thereof)]
>
> [a firearm which is certified by the curator of a municipal, State, or Federal museum which exhibits firearms to be a curio or relic of museum interest]
>
> [a firearm which derives a substantial part of its monetary value from the fact that it is novel, rare, bizarre, or because of its association with some historical figure, period, or event].

COMMENT

1. *See* § 18-12-112(6)(a), C.R.S. 2015 (exempting curios and relics from background check requirement for firearms transfers, and incorporating the above definition from 27 C.F.R 478.11).

2. When instructing the jury concerning the exception for a firearm that derives a "substantial part" of its "monetary value" from its novelty, rarity, or historical significance, draft a special instruction based on the following provision (but omit the words "Proof of," so as not to suggest that the defendant bears any burden of proof):

> Proof of qualification of a particular firearm under this category may be established by evidence of present value and evidence that like firearms are not available except as collector's items, or that the value of like firearms available in ordinary commercial channels is substantially less.

27 C.F.R 478.11.

F:83 DAMAGE

"Damage" includes, but is not limited to, any impairment to the integrity of availability of information, data, computer program, computer software, or services on or via a computer, computer network, or computer system or part thereof.

COMMENT

1. *See* 18-5.5-101(6.3), C.R.S. 2015 (computer crime).

F:84 DANGEROUS DOG

"Dangerous dog" means any dog that inflicts bodily or serious bodily injury upon or causes the death of a person or domestic animal; or demonstrates tendencies that would cause a reasonable person to believe that the dog may inflict bodily or serious bodily injury upon or cause the death of any person or domestic animal; or engages in or is trained for animal fighting.

COMMENT

1. *See* § 18-9-204.5(2)(b), C.R.S. 2015 (unlawful ownership of a dangerous dog).

2. *See* Instruction F:37 (defining "bodily injury"); Instruction F:106 (defining "dog"); Instruction F:107 (defining "domestic animal"); Instruction F:332 (defining "serious bodily injury").

F:85 DANGEROUS INSTRUMENT

"Dangerous instrument" means a firearm, explosive device or substance (including ammunition), knife or sharpened instrument, poison, acid, bludgeon, or projective device, or any other device, instrument, material or substance which was readily capable of causing or inducing fear of death or bodily injury, the use of which is not specifically authorized.

COMMENT

1. *See* § 18-8—203(4), C.R.S. 2015 (introducing contraband in the first degree); § 18-8-204.1, C.R.S. 2015 (possession of contraband in the first degree).

2. *See* Instruction F:154 (defining "firearm"); Instruction F:194 (defining "knife").

3. This definition does not apply to the term "dangerous instrument," as used to define a "knife" in section 18-12-101(1)(f), C.R.S. 2015. *See People v. Gross*, 830 P.2d 933, 941 (Colo. 1992) (rejecting a constitutional overbreadth challenge to the statute criminalizing possession of a weapon by a previous offender by construing the "other dangerous instrument" language within the definition of a "knife" as requiring that the defendant have intended to use the instrument as a weapon).

F:86 DANGEROUS WEAPON

"Dangerous weapon" means a firearm silencer, machine gun, short shotgun, short rifle, or ballistic knife.

COMMENT

1. *See* 18-12-102(1), C.R.S. 2015 possessing a dangerous weapon); *see also* § 18-1.3-406(7)(a), C.R.S. 2015 (crime of violence sentence enhancement).

2. *See* Instruction F:29 (defining "ballistic knife"); Instruction F:154 (defining "firearm"); Instruction F:156 (defining "firearm silencer"); Instruction F:203 (defining "machine gun"); Instruction F:344 (defining "short rifle"); Instruction F:345 (defining "short shotgun").

F:87 DEADLY PHYSICAL FORCE

"Deadly physical force" means force, the intended, natural, and probable consequence of which is to produce death, and which does, in fact, produce death.

COMMENT

1. *See* § 18-1-901(3)(d), C.R.S. 2015.

2. *See People v. Vasquez*, 148 P.3d 326, 330 (Colo. App. 2006) (concluding that the General Assembly included an intent element as a necessary ingredient of "deadly physical force"); *People v. Ferguson*, 43 P.3d 705 (Colo. App. 2001) (trial court, in giving jury instruction concerning self-defense in attempted murder and assault prosecution where the victim did not die, erred in defining deadly physical force as "force, the intended, natural, and probable consequence of which is to produce death"; the error was not harmless because the jury was permitted to hold defendant to a higher standard in establishing self-defense than what was required by law).

F:88 DEADLY WEAPON

["Deadly weapon" means a firearm, whether loaded or unloaded.]

["Deadly weapon" means a knife, bludgeon, or any other weapon, device, instrument, material, or substance, whether animate or inanimate, that, in the manner it is used or intended to be used, is capable of producing death or serious bodily injury.]

COMMENT

1. *See* § 18-1-901(3)(e), C.R.S. 2015.

2. *See* Instruction F:154 (defining "firearm"); Instruction F:194 (defining "knife"); Instruction F:332 (defining "serious bodily injury").

3. *See People v. Saleh*, 45 P.3d 1272, 1275 (Colo. 2002) (any object can be a deadly weapon if it is used in a manner capable of producing death or serious bodily injury; body parts can be deadly weapons depending upon the manner in which they are used; whether an object is a deadly weapon does not depend upon the ultimate result of an object's use; the statute does not require that the object actually cause serious bodily injury; rather, it must be "capable of producing" such injury).

4. The definition of a "deadly weapon" was amended in 2013, following the supreme court's decision in *Montez v. People*, 2012 CO 6, ¶¶ 3-22, 269 P.3d 1228, 1229-32 (the General Assembly has not classified firearms as per se deadly weapons for purposes of the first degree burglary statute; the legislature did not intend theft of a firearm from a building to constitute first degree burglary regardless of the manner the burglar used or intended to use the firearm).

F:89 DEBILITATING MEDICAL CONDITION

"Debilitating medical condition" means:

[Cancer, glaucoma, positive status for human immunodeficiency virus, or acquired immune deficiency syndrome, or treatment for such conditions.]

[A chronic or debilitating disease or medical condition, or treatment for such conditions, which produces, for a specific patient, one or more of the following, and for which, in the professional opinion of the patient's physician, such condition or conditions reasonably may be alleviated by the medical use of marijuana: cachexia; severe pain; severe nausea; seizures, including those that are characteristic of epilepsy; or persistent muscle spasms, including those that are characteristic of multiple sclerosis.]

[Any other medical condition, or treatment for such condition, approved by the state health agency.]

COMMENT

1. *See* Colo. Const. art. XVIII, § 14(1)(a) (medical marijuana).

2. The final provision, allowing for inclusion of "other" medical conditions, requires that the state health agency act "pursuant to its rule making authority or its approval of any petition submitted by a patient or physician as provided in this section." In the unlikely event that a case arises in which there is a dispute concerning the propriety of the approval process, the court should determine this issue as a matter of law.

+ F:89.5 DEBT BONDAGE

"Debt bondage" means demanding:

[commercial sexual activity as payment toward or satisfaction of a real or purported debt]

[or demanding labor or services as payment toward or satisfaction of a real or purported debt and failing to apply the reasonable value of the labor or services toward the liquidation of the debt]

[demanding labor or services where the length of the labor or services is not limited and the nature of the labor or services is not defined.

COMMENT

1. *See* § 18-3-502(4), C.R.S. 2015.

2. + The Committee added this instruction in 2015.

F:90 DEFACE

"Deface" means to alter the appearance of something by removing, distorting, adding to, or covering all or part of the thing.

COMMENT

1. *See* § 18-1-901(3)(f), C.R.S. 2015.

F:91 DELIVER OR DELIVERY

"Deliver" or "delivery" means to transfer or attempt to transfer a substance, actually or constructively, from one person to another, whether or not there is an agency relationship.

COMMENT

1. *See* § 18-18-102(7), C.R.S. 2015 (controlled substances offenses).

F:92 DESCENDANT

"Descendant" includes a child by adoption and a stepchild, but only if the person is not legally married to the child by adoption or the stepchild.

COMMENT

1. *See* § 18-6-301(1), C.R.S. 2015 (stating that this definition applies only to the offense of incest).

F:93 DESECRATE

"Desecrate" means defacing, damaging, polluting, or otherwise physically mistreating in a way that the defendant knows will outrage the sensibilities of persons likely to observe or discover his action or its result

COMMENT

1. *See* § 18-9-113(2), C.R.S. 2015 (desecration of venerated objects).

F:94 DESTRUCTIVE DEVICE

"Destructive device" means any material, substance, or mechanism capable of being used, either by itself or in combination with any other substance, material, or mechanism, to cause sudden and violent injury, damage, destruction, or death.

COMMENT

1. *See* § 18-9-101(1), C.R.S. 2015 (public peace and order offenses).

F:95 DETENTION FACILITY (AFFIRMATIVE DEFENSE; USE OF FORCE TO PREVENT AN ESCAPE)

"Detention facility" means any place maintained for the confinement, pursuant to law, of persons charged with or convicted of an offense, held pursuant to the "Colorado Children's Code", held for extradition, or otherwise confined pursuant to an order of a court.

COMMENT

1. *See* § 18-1-707(9), C.R.S. 2015.

F:96 DETENTION FACILITY (FIRST DEGREE ASSAULT; SECOND DEGREE ASSAULT NOT INVOLVING BODILY FLUIDS OR HAZARDOUS MATERIALS; ATTEMPT TO ESCAPE; INTRODUCING CONTRABAND IN THE FIRST DEGREE; ATTEMPT TO ESCAPE)

"Detention facility" means any building, structure, enclosure, vehicle, institution, worksite, or place, whether permanent or temporary, fixed or mobile, where persons are or may be lawfully held in custody or confinement under the jurisdiction of the department of corrections or under the authority of the United States, the state of Colorado, or any political subdivision of the state of Colorado.

COMMENT

1. *See* § 18-8-203(3), C.R.S. 2015 (introducing contraband in the first degree); § 18-3-202(1)(f), C.R.S. 2015 (first degree assault, incorporating this definition by reference); section 18-3-203(1)(f), C.R.S. 2015 (second degree assault, incorporating this definition by reference); § 18-8-208.1(6), C.R.S. 2015 (attempt to escape, incorporating this definition by reference).

F:97 DETENTION FACILITY (SECOND DEGREE ASSAULT INVOLVING A BODILY FLUID OR A HAZARDOUS MATERIAL; RIOTS IN DETENTION FACILITIES; USE OF MARIJUANA IN DETENTION FACILITIES)

"Detention facility" means any building, structure, enclosure, vehicle, institution, or place, whether permanent or temporary, fixed or mobile, where persons are or may be lawfully held in custody or confinement under the authority of the state of Colorado or any political subdivision of the state of Colorado.

COMMENT

1. *See* § 18-3-203(1)(f.5)(III)(A), C.R.S. 2015 (second degree assault involving a bodily fluid or a hazardous material); § 18-8-211(4), C.R.S. 2015 (riots in detention facilities; same definition); § 18-18-406.5(3), C.R.S. 2015 (use of marijuana in detention facilities; same definition).

2. *See People v. Luna*, 2013 COA 67, ¶¶ 30-32, __ P.3d __ (for purposes of sections 18-3-203(1)(f.5)(I), (III)(A), being placed under arrest in a patrol vehicle by a police officer constitutes being lawfully confined in a "detention facility" by an "employee of a detention facility").

F:98 DEVELOPMENTAL DISABILITY

COMMENT

1. *See* § 27-10.5-102(11)(a), C.R.S. 2015 ("'developmental disability' has the same meaning as 'intellectual and developmental disability,' as set forth in 25.5-10-202"); Instruction F:184 (defining "intellectual and developmental disability").

F:99 DISEASED OR DEFECTIVE IN MIND

"Diseased or defective in mind" does not refer to an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

COMMENT

1. *See* § 16-8-101.5(2)(a), C.R.S. 2015 (insanity).

F:100 DISPENSE

"Dispense" means to deliver a controlled substance to an ultimate user, patient, or research subject by or pursuant to the lawful order of a practitioner, including the prescribing, administering, packaging, labeling, or compounding necessary to prepare the substance for that delivery.

["Dispense" does not include preparing and affixing a label to any drug container.]

COMMENT

1. *See* § 18-18-102(9), C.R.S. 2015 (controlled substances offenses); § 18-18-405(1)(b), C.R.S. 2015 (limiting the definition of "dispense" to exclude "labeling," as defined in section 12-42.5-102(18), C.R.S. 2015, for purposes of the offense of unlawful distribution, manufacturing, dispensing, or sale of a controlled substance); § 18-18-406(2)(b)(II), C.R.S. 2015 (same); § 18-18-406.2(4), C.R.S. 2015 (same).

2. *See* Instruction F:376 (defining "ultimate user").

F:101 DISPENSER

"Dispenser" means a practitioner who dispenses.

COMMENT

1. *See* § 18-18-102(10), C.R.S. 2015 (controlled substances offenses).

F:102 DISTRIBUTE

"Distribute" means to deliver other than by administering or dispensing a controlled substance, with or without remuneration.

COMMENT

1. *See* § 18-18-102(11), C.R.S. 2015 (controlled substances offenses).

2. *See* Instruction F:310 (defining "remuneration").

F:103 DISTRIBUTE (IMITATION CONTROLLED SUBSTANCE)

"Distribute" means the actual, constructive, or attempted transfer, delivery or dispensing to another of an imitation controlled substance, with or without remuneration.

COMMENT

1. *See* § 18-18-420(2), C.R.S. 2015 (explicitly supplanting, for purposes of offenses in "sections 18-18-419 to 18-18-424," the alternate definition set forth in section 18-18-102(11)).

2. *See* Instruction F:310 (defining "remuneration").

F:104 DISTRIBUTOR

"Distributor" means a person who distributes.

COMMENT

1. *See* § 18-18-102(12), C.R.S. 2015 (controlled substances offenses).

F:105 DOCUMENT-MAKING IMPLEMENT

"Document-making implement" means any implement or impression, including but not limited to a template or a computerized template or form, specifically designed or primarily used for making identification documents, false identification documents, or another document-making implement."

COMMENT

1. *See* § 18-5-101(1.5), C.R.S. 2015 (forgery and impersonation offenses).

2. *See* Instruction F:174 (defining "identification document").

F:106 DOG

"Dog" means any domesticated animal related to the fox, wolf, coyote, or jackal.

COMMENT

1. *See* § 18-9-204.5(2)(c), C.R.S. 2015 (unlawful ownership of a dangerous dog).

F:107 DOMESTIC ANIMAL

"Domestic animal" means any dog, cat, any animal kept as a household pet, or livestock.

COMMENT

1. *See* § 18-9-204.5(2)(d), C.R.S. 2015 (unlawful ownership of a dangerous dog).

+ F:107.5 DRAWEE

"Drawee" means the bank upon which a check is drawn or a bank, savings and loan association, or credit union on which a negotiable order of withdrawal or a share draft is drawn.

COMMENT

1. *See* § 18-5-205(1)(b), C.R.S. 2015.

2. *See* Instruction F:48.5 (defining "check"); Instruction F:241.5 (defining "negotiable order of withdrawal" and "share draft").

3. + The Committee added this instruction in 2015.

+ F:107.7 DRAWER

"Drawer" means a person, either real or fictitious, whose name appears on a check as the primary obligor, whether the actual signature be that of himself [herself] or of a person authorized to draw the check on himself [herself].

COMMENT

1. *See* § 18-5-205(1)(c), C.R.S. 2015.

2. *See* Instruction F:48.5 (defining "check").

3. + The Committee added this instruction in 2015.

F:108 DOMESTIC VIOLENCE

"Domestic violence" means an act or threatened act of violence upon a person with whom the actor is or has been involved in an intimate relationship. "Domestic violence" also includes any other crime against a person, or against property, including an animal, or any municipal ordinance violation against a person, or against property, including an animal, when used as a method of coercion, control, punishment, intimidation, or revenge directed against a person with whom the actor is or has been involved in an intimate relationship.

COMMENT

1. *See* § 18-6-800.3(1), C.R.S. 2015.

2. *See* § 18-6-401(7)(e)(IV), (III), C.R.S. 2015 (child abuse sentence enhancement, determinable by trier of fact, applicable to a repeat offender who commits a continued pattern of acts of domestic violence in the presence of the child); § 18-6-801(7), C.R.S. 2015 (elevating misdemeanors to class five felonies where the defendant is adjudicated as an habitual domestic violence offender).

3. *See* Instruction F:187 (defining "intimate relationship").

F:109 DRIVING UNDER THE INFLUENCE (VEHICULAR HOMICIDE; VEHICULAR ASSAULT; + AGGRAVATED VEHICULAR UNLAWFUL TERMINATION OF PREGNANCY)

"Driving under the influence" means driving a vehicle when a person has consumed alcohol or one or more drugs, or a combination of alcohol and one or more drugs, which alcohol alone, or one or more drugs alone, or alcohol combined with one or more drugs affect such person to a degree that such person is substantially incapable, either mentally or physically, or both mentally and physically, of exercising clear judgment, sufficient physical control, or due care in the safe operation of a vehicle.

COMMENT

1. *See* § 18-3-106(1)(b)(IV), C.R.S. 2015 (vehicular homicide); § 18-3-205(1)(b)(IV), C.R.S. 2015 (vehicular assault); + § 18-3.5-108(1)(b)(I), C.R.S. 2015 (aggravated vehicular unlawful termination of pregnancy).

2. *See* Instruction F:252 (defining "one or more drugs").

3. + In 2015, the Committee modified the title of this instruction and added a citation in Comment 1.

F:110 DRIVING UNDER THE INFLUENCE (TRAFFIC CODE)

"Driving under the influence" means driving a motor vehicle or vehicle when a person has consumed alcohol or one or more drugs, or a combination of alcohol and one or more drugs, that affects the person to a degree that the person is substantially incapable, either mentally or physically, or both mentally and physically, to exercise clear judgment, sufficient physical control, or due care in the safe operation of a vehicle.

COMMENT

1. *See* § 42-4-1301(1)(f), C.R.S. 2015.

2. *See* Instruction F:239 (defining "motor vehicle"); Instruction F:252 (defining "one or more drugs"); Instruction F:386 (defining "vehicle").

F:111 DRIVING WHILE ABILITY IMPAIRED

"Driving while ability impaired" means driving a motor vehicle or vehicle when a person has consumed alcohol or one or more drugs, or a combination of both alcohol and one or more drugs, that affects the person to the slightest degree so that the person is less able than the person ordinarily would have been, either mentally or physically, or both mentally and physically, to exercise clear judgment, sufficient physical control, or due care in the safe operation of a vehicle.

COMMENT

1. *See* § 42-4-1301(1)(g), C.R.S. 2015.

2. *See* Instruction F:239 (defining "motor vehicle"); Instruction F:252 (defining "one or more drugs"); Instruction F:386 (defining "vehicle").

F:112 DRUG (TITLE 18 OFFENSES)

"Drug" means substances [recognized as drugs in the official United States pharmacopoeia, national formulary, or the official homeopathic pharmacopoeia of the United States, or any supplement to any of them] [intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in individuals or animals] [(other than food) intended to affect the structure or any function of the body of individuals or animals].

["Drug" also means substances intended for use as a component of any of the foregoing.]

[However, the term does not include devices or their components, parts, or accessories.]

COMMENT

1. *See* § 18-18-102(13), C.R.S. 2015.

F:113 DRUG PARAPHERNALIA

"Drug paraphernalia" means all equipment, products, and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of the laws of this state.

"Drug paraphernalia" includes, but is not limited to: testing equipment used, intended for use, or designed for use in identifying or in analyzing the strength, effectiveness, or purity of controlled substances under circumstances in violation of the laws of this state; scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances; separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from or in otherwise cleaning or refining marijuana; blenders, bowls, containers, spoons, and mixing devices used, intended for use, or designed for use in compounding controlled substances; capsules, balloons, envelopes, and other containers used, intended for use, or designed for use in packaging small quantities of controlled substances; containers and other objects used, intended for use, or designed for use in storing or concealing controlled substances; or objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, or hashish oil into the human body, such as: metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls; water pipes; carburetion tubes and devices; smoking and carburetion masks; roach clips, meaning objects used to hold burning material, such as a marijuana cigarette that has become too small or too short to be held in the hand; miniature cocaine spoons and cocaine vials; chamber pipes; carburetor pipes; electric pipes; air-driven pipes; chillums; bongs; or ice pipes or chillers.

"Drug paraphernalia" does not include any equipment, products, or materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, composting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, vaporizing, or

containing marijuana, or for ingesting, inhaling, or otherwise introducing marijuana into the human body.

COMMENT

1. *See* § 18-18-426(1), C.R.S. 2015.

2. *See* Instruction F:56 (defining "cocaine").

3. Section 18-18-427(1), C.R.S. 2015, enumerates several factors that a court may consider in determining whether an object is drug paraphernalia. Section 18-18-427(2), C.R.S. 2015, states that: "In the event a case brought pursuant to sections 18-18-425 to 18-18-430 is tried before a jury, the court shall hold an evidentiary hearing on issues raised pursuant to this section. Such hearing shall be conducted in camera." Although the Committee has not drafted a special instruction identifying these factors, it may be appropriate for the court to do so.

4. *See* § 18-18-426(2), C.R.S. 2015 ("'Drug paraphernalia' does not include any marijuana accessories as defined in section 16(2)(g) of article XVIII of the state constitution.").

+ F:113.5 DUAL CONTRACTS

The term "dual contracts," either written or oral, means two separate contracts concerning the same parcel of real property, one of which states the true and actual purchase price and one of which states a purchase price in excess of the true and actual purchase price, and is used, or intended to be used, to induce persons to make a loan or a loan commitment on such real property in reliance upon the stated inflated value.

COMMENT

1. *See* § 18-5-208, C.R.S. 2015.

2. + The Committee added this instruction in 2015.

F:114 DWELLING

"Dwelling" means a building which is used, intended to be used, or usually used by a person for habitation.

COMMENT

1. *See* § 18-1-901(3)(g), C.R.S. 2015.

2. *See People v. Jiminez*, 651 P.2d 395 (Colo. 1982) (the definition of dwelling encompasses the entire residential structure including an attached garage); *People v. Morales*, 2012 COA 2, ¶¶ 58-76, 298 P.3d 1000, 1011-14 ("the phrase 'intended to be used' includes future use in addition to present use, and, therefore, existing homes undergoing renovation are 'dwellings,' provided they are intended to be used for habitation"); *People v. Cushinberry*, 855 P.2d 18, 19 (Colo. App. 1992) (the common areas of an apartment building, such as a stairwell, do not constitute a dwelling); *People v. Germany*, 586 P.2d 1006, 1009 (Colo. App. 1978) (a hospital room falls within the definition of a dwelling), *rev'd on other grounds*, 599 P.2d 904 (Colo. 1979).

F:115 ELECTRICAL ASSISTED BICYCLE

"Electrical assisted bicycle" means a vehicle having two tandem wheels or two parallel wheels and one forward wheel, fully operable pedals, an electric motor not exceeding seven hundred fifty watts of power, and a top motor-powered speed of twenty miles per hour.

COMMENT

1. *See* § 42-1-102(28.5), C.R.S. 2015.

F:116 ELECTRONIC SERIAL NUMBER

"Electronic serial number" means an electronic number that is programmed into a cellular phone by or with the consent of the manufacturer, transmitted by the cellular phone, and used by cellular phone telecommunications providers to validate radio transmissions as having been made by cellular phones authorized or approved by telecommunications providers.

COMMENT

1. *See* § 18-8-204(2)(n), C.R.S. 2015 (introducing contraband in the second degree; which incorporates the definition of a "cloned cellular phone" from section 18-9-309(1)(a.7); which incorporates the definition of a "cellular phone" from section 18-9-309(1)(a.5); which uses the term "electronic serial number," as defined in § 18-9-309(1)(b.7), C.R.S. 2015); *see also* § 18-9-309(1)(e), C.R.S. 2015 (defining "telecommunications provider").

F:117 EMERGENCY DRUG OR ALCOHOL OVERDOSE EVENT

"Emergency drug or alcohol overdose event" means an acute condition including, but not limited to, physical illness, coma, mania, hysteria, or death resulting from the consumption or use of a controlled substance, or of alcohol, or another substance with which a controlled substance or alcohol was combined, and that a layperson would reasonably believe to be a drug or alcohol overdose that requires medical assistance.

COMMENT

1. *See* § 18-1-711(5), C.R.S. 2015 (affirmative defense of "reporting an emergency drug or alcohol overdose event").

F:118 EMERGENCY MEDICAL CARE PROVIDER

"Emergency medical care provider" means a doctor, intern, nurse, nurse's aide, physician's assistant, ambulance attendant or operator, air ambulance pilot, paramedic, or any other member of a hospital or health care facility staff or security force who is involved in providing emergency medical care at a hospital or health care facility, or in an air ambulance or ambulance.

COMMENT

1. *See* § 18-3-201(1),+ C.R.S. 2015.

2. *See* § 25-3.5-103(1), (1.5), C.R.S. 2015 (defining "air ambulance" and "ambulance").

3. + In 2015, the Committee changed the citation in Comment 1 to reflect a legislative reorganization. *See* Ch. 109, secs. 2, 4, §§ 18-3-201(1), 18-3-204(4), 2015 Colo. Sess. Laws 316, 317-19.

F:119 EMERGENCY MEDICAL SERVICE PROVIDER (ASSAULTS)

"Emergency medical service provider" means an individual who holds a valid emergency medical service provider certificate issued by the Department of Public Health and Environment. The term refers to both paid and volunteer emergency medical service providers.

COMMENT

1. *See* § 18-1.3-501(1.5)(a), (b), C.R.S. 2015 (incorporating this definition, from section 25-3.5-103(8), C.R.S. 2015, for purposes of a sentence enhancement provision applicable to third degree assault); § 18-3-201(1.3),+ C.R.S. 2015 ("'Emergency medical service provider' has the same meaning as set forth in section 25-3.5-103(8), C.R.S. The term refers to both paid and volunteer emergency medical service providers."); *see also* Instruction 3-1:01, Comment 5 (discussing the offense of first degree murder of an emergency medical service provider engaged in the performance of his or her duties, in violation of section 18-3-107(1), C.R.S. 2015).

2. + In 2015, the Committee changed the subsection number of the citation to 18-3-201 that appears in Comment 1. This was done to reflect a legislative reorganization. *See* Ch. 109, sec. 4, § 18-3-201(1), (1.3), 2015 Colo. Sess. Laws 316, 319.

F:120 EMERGENCY MEDICAL SERVICE PROVIDER (OBSTRUCTING)

"Emergency medical service provider" means a member of a public or private emergency medical service agency, whether that person is a volunteer or receives compensation for services rendered as such emergency medical service provider.

COMMENT

1. *See* § 18-8-104(5)(a), C.R.S. 2015 (obstructing).

F:121 EMPLOYEE OF A DETENTION FACILITY

"Employee of a detention facility" includes employees of the department of corrections, employees of any agency or person operating a detention facility, law enforcement personnel, and any other persons who are present in or in the vicinity of a detention facility and are performing services for a detention facility.

"Employee of a detention facility" does not include a person lawfully confined in a detention facility.

COMMENT

1. *See* § 18-3-203(1)(f.5)(III)(B), C.R.S. 2015.

+ F:121.5 EMPLOYMENT

"Employment" means every character of service rendered or to be rendered for wages, salary, commission, or other form of remuneration.

COMMENT

1. *See* § 18-5-307(1)(b), C.R.S. 2015 (prohibited practice by a private employment agency).

2. + The Committee added this instruction in 2015.

F:122 ENCLOSED

"Enclosed" means a permanent or semi-permanent area covered and surrounded on all sides. Temporary opening of windows or doors or the temporary removal of wall or ceiling panels does not convert the area into an unenclosed space.

COMMENT

1. *See* § 18-18-102(14.5), C.R.S. 2015 (defining the term for purposes of lawful marijuana cultivation).

F:123 ENGAGED IN THE PERFORMANCE OF HIS [HER] DUTIES (THIRD DEGREE ASSAULT SENTENCE ENHANCEMENT)

A peace officer, emergency medical service provider, emergency medical care provider, or firefighter is "engaged in the performance of his [her] duties" if he [she] is engaged or acting in, or who is present for the purpose of engaging or acting in, the performance of any duty, service, or function imposed, authorized, required, or permitted by law to be performed by a peace officer, emergency medical service provider, emergency medical care provider, or firefighter, whether or not the peace officer, emergency medical service provider, emergency medical care provider, or firefighter is within the territorial limits of his [her] jurisdiction, if the peace officer, emergency medical service provider, emergency medical care provider, or firefighter is in uniform or the person committing an assault upon or offense against or otherwise acting toward such peace officer, emergency medical service provider, emergency medical care provider, or firefighter knows or reasonably should know that the victim is a peace officer, emergency medical service provider, emergency medical care provider, or firefighter or if the peace officer, emergency medical service provider, emergency medical care provider, or firefighter is intentionally assaulted in retaliation for the performance of his [her] official duties.

COMMENT

1. *See* § 18-1.3-501(1.5)(a), (b), C.R.S. 2015.

2. *See* Instruction F:118 (defining "emergency medical care provider"); Instruction F:119 (defining "emergency medical service provider"); Instruction F:157 (defining "firefighter"); Instruction F:263 (defining "peace officer").

F:124 ENGAGED IN THE PERFORMANCE OF HIS [HER] DUTIES (FIRST DEGREE MURDER AND FIRST AND SECOND DEGREE ASSAULT)

A [peace officer] [firefighter] [emergency medical service provider] is "engaged in the performance of his [her] duties" if he [she] is engaged or acting in, or is present for the purpose of engaging in or acting in, the performance of any duty, service, or function imposed, authorized, required or permitted by law to be performed by a [peace officer] [firefighter] [emergency medical service provider], whether or not the [peace officer] [firefighter] [emergency medical service provider] is within the territorial limits of his [her] jurisdiction, if the [peace officer] [firefighter] [emergency medical service provider] is in uniform, or the person committing the assault upon or offense against or otherwise acting toward the [peace officer] [firefighter] [emergency medical service provider] knows or reasonably should know that the victim is a [peace officer] [firefighter] [emergency medical service provider].

COMMENT

1. *See* § 18-3-201(2), C.R.S. 2015 (defining this term for purposes of first degree assault in violation of section 18-3-202, C.R.S. 2015, and second degree assault in violation of section 18-3-203, C.R.S. 2015).

2. *See* Instruction F:119 (defining "emergency medical service provider"); Instruction F:157 (defining "firefighter"); Instruction F:263 (defining "peace officer").

3. Section 18-3-201(2) states that the definition of the "term 'peace officer' includes county enforcement personnel designated pursuant to section 29-7-101(3), C.R.S." There is no model instruction defining the term "county enforcement personnel" because the statutory definition delegates authority to boards of county commissioners to define the scope of the term. Accordingly, in cases where this term is applicable, users should consult section 29-7-101(3) and draft an instruction tailored to the facts of the case.

F:125 ENTERPRISE

"Enterprise" means any individual, sole proprietorship, partnership, corporation, trust, or other legal entity or any chartered union, association, or group of individuals, associated in fact although not a legal entity, and shall include illicit as well as licit enterprises and governmental as well as other entities.

COMMENT

1. *See* 18-17-103(2), C.R.S. 2015 (Colorado Organized Crime Control Act).

F:126 ENTERS UNLAWFULLY OR REMAINS UNLAWFULLY

A person "enters unlawfully" or "remains unlawfully" in or upon premises when the person is not licensed, invited, or otherwise privileged to do so. A person who, regardless of his [her] intent, enters or remains in or upon premises that are at the time open to the public does so with license and privilege unless the person defies a lawful order not to enter or remain, personally communicated to him [her] by the owner of the premises or some other authorized person. A license or privilege to enter or remain in a building that is only partly open to the public is not a license or privilege to enter or remain in that part of the building that is not open to the public.

COMMENT

1. *See §* 18-4-201(3), C.R.S. 2015 (offenses against property in Article 4).

2. When relevant, the above definition should be modified to include an explanation of the following principle, which is also set forth in section 18-4-201(3):

> Except as is otherwise provided in section 33-6-116(1), C.R.S., [relating to hunting, fishing, and trapping,] a person who enters or remains upon unimproved and apparently unused land that is neither fenced nor otherwise enclosed in a manner designed to exclude intruders does so with license and privilege unless notice against trespass is personally communicated to the person by the owner of the land or some other authorized person or unless notice forbidding entry is given by posting with signs at intervals of not more than four hundred forty yards or, if there is a readily identifiable entrance to the land, by posting with signs at such entrance to the private land or the forbidden part of the land. In the case of a designated access road not otherwise posted, said notice shall be posted at the entrance to private land and shall be substantially as follows: 'ENTERING PRIVATE PROPERTY REMAIN ON ROADS.'").

F:127 EROTIC FONDLING

"Erotic fondling" means touching a person's clothed or unclothed genitals or pubic area, developing or undeveloped genitals or pubic area (if the person is a child), buttocks, breast, or developing or undeveloped breast area (if the person is a child), for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved.

"Erotic fondling" does not include physical contact, even if affectionate, which is not for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved.

COMMENT

1. *See* § 18-6-403(2)(c), C.R.S. 2015 (sexual exploitation of a child).

2. *See* Instruction F:50 (defining "child").

F:128 EROTIC NUDITY

"Erotic nudity" means the display of the human male or female genitals or pubic area, the undeveloped or developing genitals or pubic area of the human male or female child, the human breasts, or the undeveloped or developing breast area of the human child, for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved.

COMMENT

1. *See* § 18-6-403(2)(d), C.R.S. 2015 (sexual exploitation of a child).

2. *See* Instruction F:50 (defining "child).

3. *See People v. Gagnon*, 997 P.2d 1278, 1283 (Colo. App. 1999) (definition of "erotic nudity" was not unconstitutionally vague, as applied, where the sexually suggestive context of the photos included more than a mere display of a substantial portion of the girl's breasts).

F:129 ESCAPE

"Escape" is deemed to be a continuing activity commencing with the conception of the design to escape and continuing until the escapee is returned to custody or the attempt to escape is thwarted or abandoned.

COMMENT

1. *See* § 18-8-201(2), C.R.S. 2015 (aiding escape).

F:130 EXCEED AUTHORIZED ACCESS

"Exceed authorized access" means to access a computer with authorization and to use such access to obtain or alter information, data, computer program, or computer software that the person is not entitled to so obtain or alter.

COMMENT

1. *See* 18-5.5-101(6.7), C.R.S. 2015 (computer crime).

2. *See* Instruction F:28 (defining "authorization"); Instruction F:61 (defining "computer"); Instruction F:63 (defining "computer program"); Instruction F:64 (defining "computer software"); Instruction F:383 (defining "use").

F:131 EXHIBITION

"Exhibition" means a show or sale of livestock at a fair or elsewhere in this state that is sponsored by or under the authority of the state or any unit of local government or any agricultural, horticultural, or livestock society, association, or corporation.

COMMENT

1. *See* § 18-9-207(1)(a), C.R.S. 2015 (tampering with livestock).

F:132 EXPLICIT SEXUAL CONDUCT

"Explicit sexual conduct" means sexual intercourse, erotic fondling, erotic nudity, masturbation, sadomasochism, or sexual excitement.

COMMENT

1. *See* § 18-6-403(2)(e), C.R.S. 2015 (sexual exploitation of a child).

2. *See* Instruction F:127 (defining "erotic fondling"); Instruction F:128 (defining "erotic nudity"); Instruction F:216 (defining "masturbation"); Instruction F:326 (defining "sadomasochism"); Instruction F:338 (defining "sexual excitement"); Instruction F:339 (defining "sexual intercourse").

F:133 EXPLOSIVE OR INCENDIARY DEVICE (TERRORIST TRAINING ACTIVITIES)

"Explosive or incendiary device" means dynamite and all other forms of high explosives; any explosive bomb, grenade, missile, or similar device; or any incendiary bomb or grenade, fire bomb, or similar device, including any device which consists of or includes a breakable receptacle containing a flammable liquid or compound and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound, and can be carried or thrown by one person acting alone.

COMMENT

1. *See* § 18-9-120(b), C.R.S. 2015.

2. *See People v. Owens*, 670 P.2d 1233, 1237 (Colo. 1983) ("an incendiary device without a wick may be prosecuted under the incendiary device statute, despite any apparent language to the contrary in [*People v. Brown*, 574 P.2d 92 (Colo. 1978)]"); *People v. Lovato*, 630 P.2d 597, 599-600 (Colo. 1981) (blasting caps with attached safety fuses were "explosive or incendiary devices," rather than "explosive or incendiary parts").

F:134 EXPLOSIVE OR INCENDIARY DEVICE (POSSESSION, USE, OR REMOVAL)

"Explosive or incendiary device" means dynamite and all other forms of high explosives, including, but not limited to water gel, slurry, military C-4 (plastic explosives), blasting agents to include nitro-carbon-nitrate, and ammonium nitrate and fuel oil mixtures, cast primers and boosters, R.D.X., P.E.T.N., electric and nonelectric blasting caps, exploding cords commonly called detonating cord or det-cord or primacord, picric acid explosives, T.N.T. and T.N.T. mixtures, and nitroglycerin and nitroglycerin mixtures; any explosive bomb, grenade, missile, or other similar device; any incendiary bomb or grenade, fire bomb, or similar device, including any device, except kerosene lamps, which consists of or include a breakable container including a flammable liquid or compound and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound and can be carried or thrown by one individual acting alone.

["Explosive or incendiary device" does not include a rifle, pistol or shotgun ammunition, or the components for handloading rifle, pistol or shotgun ammunition.]

COMMENT

1. *See* § 18-12-109(1)(a)(I), C.R.S. 2015 (possession, use, or removal of explosives or incendiary devices).

F:135 EXPLOSIVE OR INCENDIARY PARTS

"Explosive or incendiary parts" means any substances or materials or combinations thereof which have been prepared or altered for use in the creation of an explosive or incendiary device. Such substances or materials may include, but are not limited to, any timing device, clock or watch which has been altered in such a manner as to be used as the arming device in an explosive; pipe, end caps, or metal tubing which has been prepared for a pipe bomb; mechanical timers, mechanical triggers, chemical time delays, electronic time delays, or commercially made or improvised items which, when used singly or in combination, may be used in the construction of a timing delay mechanism, booby trap, or activating mechanism for any explosive or incendiary device.

["Explosive or incendiary parts" does not include rifle, pistol or shotgun ammunition, or the components for handloading rifle, pistol or shotgun ammunition, or any signaling device customarily used in the operation of railroad equipment.]

COMMENT

1. *See* § 18-12-109(1)(b)(I), C.R.S. 2015.

2. *See People v. Lovato*, 630 P.2d 597, 599-600 (Colo. 1981) (blasting caps with attached safety fuses were "explosive or incendiary devices," rather than "explosive or incendiary parts").

F:136 EXTENSION OF CREDIT (IDENTITY THEFT AND RELATED OFFENSES)

"Extension of credit" means any loan or agreement, express or implied, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred.

COMMENT

1. *See* 18-5-901(2), C.R.S. 2015 (identity theft and related offenses).

F:137 FACILITY OF PUBLIC TRANSPORTATION

"Facility of public transportation" includes a public conveyance and any area, structure, or device which is designed, adapted, and used to support, guide, control, permit, or facilitate the movement, starting, stopping, takeoff, landing, or servicing of a public conveyance or the loading or unloading of passengers, freight, or goods.

COMMENT

1. *See* § 18-9-115(4), C.R.S. 2015 (endangering public transportation).

2. *See* Instruction F:297 (defining "public"); Instruction F:299 (defining "public conveyance").

F:138 FACILITY OF UTILITY TRANSMISSION

"Facility of utility transmission" includes any area, structure, or device that is designed, adopted, or used to support, guide, control, permit, or facilitate transmission of electrical energy in excess of thirty thousand volts; or water, liquid fuel, or gaseous fuel by pipeline.

COMMENT

1. *See* § 18-9-115(4.5), C.R.S. 2015.

F:139 FALSELY ALTER (FORGERY AND IMPERSONATION OFFENSES)

To "falsely alter" a written instrument means to change a written instrument without the authority of anyone entitled to grant such authority, whether it be in complete or incomplete form, by means of erasure, obliteration, deletion, insertion of new matter, transposition of matter, or any other means, so that such instrument in its thus altered form falsely appears or purports to be in all respects an authentic creation of or fully authorized by its ostensible maker.

COMMENT

1. *See* § 18-5-101(2), C.R.S. 2015 (forgery and impersonation offenses).

2. *See* Instruction F:394 (defining "written instrument"); *see also Webster's Third New International Dictionary* 1597 (2002) (defining "ostensible" as meaning "professing genuineness and sincerity but . . . concealing the real aspects behind a plausible facade.").

F:140 FALSELY ALTER (FINANCIAL TRANSACTION DEVICE)

To "falsely alter" a financial transaction device means to change such device without the authority of anyone entitled to grant such authority, whether it be in complete or incomplete form, by means of erasure, obliteration, deletion, insertion of new matter, transposition of matter, or any other means, so that such device in its thus altered form falsely appears or purports to be in all respects an authentic creation of or fully authorized by its ostensible issuer.

COMMENT

1. *See* § 18-5-707(2)(a), C.R.S. 2015 (unlawful manufacture of a financial transaction device).

2. *See* Instruction F:153 (defining "financial transaction device"); Instruction F:189 (defining "issuer"); *see also Webster's Third New International Dictionary* 1597 (2002) (defining "ostensible" as meaning "professing genuineness and sincerity but . . . concealing the real aspects behind a plausible facade.").

F:140.5 FALSELY ALTER (IDENTITY THEFT AND RELATED OFFENSES)

To "falsely alter" a written instrument or financial device means to change a written instrument or financial device without the authority of anyone entitled to grant such authority, whether it be in complete or incomplete form, by means of erasure, obliteration, deletion, insertion of new matter, transposition of matter, or any other means, so that the written instrument or financial device in its thus altered form falsely appears or purports to be in all respects an authentic creation of or fully authorized by its ostensible maker.

COMMENT

1. *See* § 18-5-901(3), C.R.S. 2015.

2. *See* Instruction F:395 (defining "written instrument"); *see also Webster's Third New International Dictionary* 1597 (2002) (defining "ostensible" as meaning "professing genuineness and sincerity but . . . concealing the real aspects behind a plausible facade.").

F:141 FALSELY COMPLETE (FORGERY AND IMPERSONATION OFFENSES)

To "falsely complete" a written instrument means to transform an incomplete written instrument into a complete one by adding,+ inserting, or changing matter without the authority of anyone entitled to grant that authority, so that the complete written instrument falsely appears or purports to be in all respects an authentic creation of or fully authorized by its ostensible maker; or to transform an incomplete written instrument into a complete one by adding or inserting materially false information or adding or inserting a materially false statement.

A materially false statement is a false assertion that affects the action, conduct, or decision of the person who receives or is intended to receive the asserted information in a manner that directly or indirectly benefits the person making the assertion.

COMMENT

1. *See* § 18-5-101(3)(a), (b), C.R.S. 2015 (forgery and impersonation offenses).

2. *See* Instruction F:30 (defining "benefit"); Instruction F:394 (defining "written instrument"); *see also Webster's Third New International Dictionary* 1597 (2002) (defining "ostensible" as meaning "professing genuineness and sincerity but . . . concealing the real aspects behind a plausible facade.").

3. *See People v. Kovacs*, 2012 COA 111, ¶ 19, 284 P.3d 186, 190 ("[A] person falsely completes a written instrument under section 18-5-101(3)(b) when he or she adds or inserts materially false information or a materially false statement to any instrument, genuine or non-genuine, thereby purporting to complete the instrument so as to render it legally operative.").

4. + In 2015, the Committee corrected this instruction, to reflect the statutory language, by changing the words "by adding or" to "by adding,".

F:142 FALSELY COMPLETE (UNLAWFUL MANUFACTURE OF FINANCIAL TRANSACTION DEVICE)

To "falsely complete" a financial transaction device means to transform an incomplete device into a complete one by adding, inserting, or changing matter without the authority of anyone entitled to grant that authority, so that the complete device falsely appears or purports to be in all respects an authentic creation of or fully authorized by its ostensible issuer.

COMMENT

1. *See* § 18-5-707(2)(b), C.R.S. 2015 (unlawful manufacture of a financial transaction device).

2. *See* Instruction F:153 (defining "financial transaction device"); Instruction F:189 (defining "issuer"); *see also Webster's Third New International Dictionary* 1597 (2002) (defining "ostensible" as meaning "professing genuineness and sincerity but . . . concealing the real aspects behind a plausible facade.").

F:143 FALSELY COMPLETE (IDENTITY THEFT AND RELATED OFFENSES)

To "falsely complete" a written instrument or financial device means to transform an incomplete written instrument or financial device into a complete one by adding, inserting, or changing matter without the authority of anyone entitled to grant that authority, so that the complete written instrument or financial device falsely appears or purports to be in all respects an authentic creation of or fully authorized by its ostensible maker; or to transform an incomplete written instrument or financial device into a complete one by adding or inserting materially false information or adding or inserting a materially false statement.

A materially false statement is a false assertion that affects the action, conduct, or decision of the person who receives or is intended to receive the asserted information in a manner that directly or indirectly benefits the person making the assertion.

COMMENT

1. *See* § 18-5-901(4)(a), (b), C.R.S. 2015 (identity theft and related offenses).

2. *See* Instruction F:30 (defining "benefit"); Instruction F:150 (defining "financial device"); Instruction F:395 (defining "written instrument"); *see also Webster's Third New International Dictionary* 1597 (2002) (defining "ostensible" as meaning "professing genuineness and sincerity but . . . concealing the real aspects behind a plausible facade.").

F:144 FALSELY MAKE (FORGERY)

To "falsely make" a written instrument means to make or draw a written instrument, whether complete or incomplete, which purports to be an authentic creation of its ostensible maker, but which is not, either because the ostensible maker is fictitious or because, if real, he did not authorize the making or the drawing thereof.

COMMENT

1. *See* § 18-5-101(4), C.R.S. 2015.

2. *See* Instruction F:394 (defining "written instrument"); *see also Webster's Third New International Dictionary* 1597 (2002) (defining "ostensible" as meaning "professing genuineness and sincerity but . . . concealing the real aspects behind a plausible facade.").

F:145 FALSELY MAKE (FINANCIAL TRANSACTION DEVICE)

To "falsely make" a financial transaction device means to make or manufacture a device, whether complete or incomplete, which purports to be an authentic creation of its ostensible issuer, but which is not, either because the ostensible issuer is fictitious, or because, if real, he [she] did not authorize the making or the manufacturing thereof.

COMMENT

1. *See* § 18-5-707(2)(c), C.R.S. 2015 (unlawful manufacture of a financial transaction device).

2. *See* Instruction F:153 (defining "financial transaction device"); Instruction F:189 (defining "issuer"); *see also Webster's Third New International Dictionary* 1597 (2002) (defining "ostensible" as meaning "professing genuineness and sincerity but . . . concealing the real aspects behind a plausible facade.").

F:146 FALSELY MAKE (IDENTITY THEFT AND RELATED OFFENSES)

To "falsely make" a written instrument or financial device means to make or draw a written instrument or financial device, whether it be in complete or incomplete form, that purports to be an authentic creation of its ostensible maker, but that is not, either because the ostensible maker is fictitious or because, if real, the ostensible maker did not authorize the making or the drawing of the written instrument or financial device.

COMMENT

1. *See* 18-5-901(5), C.R.S. 2015 (identity theft and related offenses).

2. *See* Instruction F:150 (defining "financial device"); Instruction F:395 (defining "written instrument"); *see also Webster's Third New International Dictionary* 1597 (2002) (defining "ostensible" as meaning "professing genuineness and sincerity but . . . concealing the real aspects behind a plausible facade.").

+ F:146.5 FEE-PAID POSITION

"Fee-paid position" means a position of employment which is available to an applicant where no fee or cost accrues to the applicant as a condition of obtaining such position.

COMMENT

1. *See* § 18-5-307(1)(b.5), C.R.S. 2015 (prohibited practice by a private employment agency).

2. *See* Instruction F:21.5 (defining "applicant"); Instruction F:121.5 (defining "employment").

3. + The Committee added this instruction in 2015.

F:147 FELLATIO

"Fellatio" means any act of oral stimulation of the penis.

COMMENT

1. *See* § 18-7-201(2)(a), C.R.S. 2015 (prostitution)); § 18-7-401(4), C.R.S. 2015 (child prostitution).

F:148 FERMENTED MALT BEVERAGE

"Fermented malt beverage" means any beverage obtained by the fermentation of any infusion or decoction of barley, malt, hops, or any similar product or combination thereof in water containing not less than one-half of one percent alcohol by volume and not more than three and two-tenths percent alcohol by weight or four percent alcohol by volume.

COMMENT

1. *See* § 18-8-203(1)(a), C.R.S. 2015 (introducing contraband in the first degree; incorporating the definition from section 12-46-103(1), C.R.S. 2015).

2. The model definition does not include the statutory excepting language, which should be added when it is relevant. *See* § 12-46-103(1), C.R.S. 2015 ("except that 'fermented malt beverage' shall not include confectionery containing alcohol within the limits prescribed by section 25-5-410(1)(i)(II), C.R.S. [2014]").

F:149 FINANCIAL ASSISTANCE

"Financial assistance" means financial assistance for educational purposes, including, but not limited to, loans, scholarships, grants, fellowships, assistantships, work-study programs, or other forms of financial aid.

COMMENT

1. *See* § 18-5-109(2)(b), C.R.S. 2015.

F:150 FINANCIAL DEVICE

"Financial device" means any instrument or device that can be used to obtain cash, credit, property, services, or any other thing of value or to make financial payments, including but not limited to a credit card, banking card, debit card, electronic fund transfer card, or guaranteed check card; a check; a negotiable order of withdrawal; a share draft; or a money order.

COMMENT

1. *See* 18-5-901(6), C.R.S. 2015 (identity theft and related offenses).

F:151 FINANCIAL IDENTIFYING INFORMATION

"Financial identifying information" means any of the following that can be used, alone or in conjunction with any other information, to obtain cash, credit, property, services, or any other thing of value or to make a financial payment: a personal identification number, credit card number, banking card number, checking account number, debit card number, electronic fund transfer card number, guaranteed check card number, or routing number; or a number representing a financial account or a number affecting the financial interest, standing, or obligation of or to the account holder.

COMMENT

1. *See* 18-5-901(7), C.R.S. 2015 (identity theft and related offenses).

2. *See* Instruction F:271 (defining "personal identification number").

F:152 FINANCIAL INSTRUMENT

"Financial instrument" means any check, draft, money order, certificate of deposit, letter of credit, bill of exchange, credit card, debit card, or marketable security.

COMMENT

1. *See* 18-5.5-101(7), C.R.S. 2015 (computer crime).

+ F:152.5 FINANCIAL TRANSACTION (MONEY LAUNDERING)

"Financial transaction" means a transaction involving the movement of moneys by wire or other means; one or more monetary instruments; the transfer of title to any real property, vehicle, vessel, or aircraft; or the use of a financial institution.

COMMENT

1. *See* 18-5-309(3)(b), C.R.S. 2015 (money laundering).

2. *See* Instruction F:374.5 (defining "transaction"); Instruction F:232.5 (defining "monetary instrument").

3. + The Committee added this instruction in 2015.

F:153 FINANCIAL TRANSACTION DEVICE

"Financial transaction device" means any instrument or device whether known as a credit card, banking card, debit card, electronic fund transfer card, or guaranteed check card, or account number representing a financial account or affecting the financial interest, standing, or obligation of or to the account holder, that can be used to obtain cash, goods, property, or services or to make financial payments, but it does not include a "check," a "negotiable order of withdrawal," and a "share draft."

COMMENT

1. *See* § 18-5-701(3), C.R.S. 2015; *see also* § 18-5-205(1)(a), (f), C.R.S. 2015 (definitions of "check", "negotiable order of withdrawal," and "share draft," which are incorporated by section 18-5-701(3)).

F:154 FIREARM

"Firearm" means any handgun, automatic, revolver, pistol, rifle, shotgun, or other instrument or device capable or intended to be capable of discharging bullets, cartridges, or other explosive charges.

COMMENT

1. *See* § 18-1-901(3)(h), C.R.S. 2015.

F:155 FIREARM (TERRORIST TRAINING ACTIVITIES)

"Firearm" means any weapon which is designed to expel or may readily be converted to expel any projectile by the action of an explosive or the frame or receiver of any such weapon.

COMMENT

1. *See* § 18-9-120(1)(c), C.R.S. 2015 (terrorist training activities).

F:156 FIREARM SILENCER

"Firearm silencer" means any instrument, attachment, weapon, or appliance for causing the firing of any gun, revolver, pistol, or other firearm to be silent or intended to lessen or muffle the noise of the firing of any such weapon.

COMMENT

1. *See* § 18-12-101(1)(c), C.R.S. 2015.

F:157 FIREFIGHTER

"Firefighter" means an officer or member of a fire department or fire protection or fire-fighting agency of the state, or any municipal or quasi-municipal corporation in this state, whether that person is a volunteer or receives compensation for services rendered as such firefighter.

COMMENT

1. *See* § 18-3-201(1.5), C.R.S. 2015 (assaults); *see also* § 18-3-107(2), C.R.S. 2015 (first degree murder; incorporating this definition).

2. *See People v. Montoya*, 104 P.3d 303, 305-06 (Colo. App. 2004) ("[T]he word 'firefighter' in § 18–3–201 and § 18–3–203(1)(c) encompasses a person like the victim here, who is employed by the fire department to respond to such emergencies as medical calls, fire calls, and car accidents. The statute is not limited to firefighters performing fire suppression functions.").

F:158 FORGED INSTRUMENT

"Forged instrument" means a written instrument that has been falsely made, completed, or altered.

See § 18-5-101(5), C.R.S. 2015 (forgery and impersonation offenses).

COMMENT

1. *See* Instruction F:139 (defining "falsely alter"); Instruction F:141 (defining "falsely complete"); Instruction F:144 (defining "falsely make").

F:159 FUNERAL

"Funeral" means the ceremonies, rituals, and memorial services held in connection with the burial, cremation, or memorial of a deceased person, including the assembly and dispersal of the mourners.

COMMENT

1. *See* § 18-9-101(1.4), C.R.S. 2015.

F:160 FUNERAL SITE

"Funeral site" means a church, synagogue, mosque, funeral home, mortuary, cemetery, gravesite, mausoleum, or other place where a funeral is conducted.

COMMENT

1. *See* § 18-9-101(1.5), C.R.S. 2015.

F:161 GAS GUN

"Gas gun" means a device designed for projecting gas-filled projectiles which release their contents after having been projected from the device and includes projectiles designed for use in such a device.

COMMENT

1. *See* § 18-12-101(1)(d), C.R.S. 2015.

+ F:161.5 GOODS

"Goods" means all things that are treated as movable for the purposes of a contract for storage or transportation.

COMMENT

1. *See* § 4-7-102(a)(7), C.R.S. 2015.

2. + The Committee added this instruction in 2015.

F:162 GOVERNMENT (GENERAL DEFINITION)

"Government" includes the United States, any state, county, municipality, or other political unit, any branch, department, agency, or subdivision of any of the foregoing, and any corporation or other entity established by law to carry out any governmental function.

COMMENT

1. *See* § 18-1-901(3)(i), C.R.S. 2015.

2. + *See also* § 18-8-101(1), C.R.S. 2015 (incorporating this definition for all offenses in Title 18, Article 8, unless the context requires otherwise).

3. + In 2015, the Committee added Comment 2.

F:163 GOVERNMENT (FORGERY)

"Government" means the United States, any state, county, municipality, or other political unit, any department, agency, or subdivision of any of the foregoing, or any corporation or other entity established by law to carry out governmental functions.

COMMENT

1. *See* § 18-5-101(6), C.R.S. 2015 (forgery and impersonation offenses).

F:164 GOVERNMENT (IDENTITY THEFT AND RELATED OFFENSES)

"Government" means the United States and its departments, agencies, or subdivisions; a state, county, municipality, or other political unit and its departments, agencies, or subdivisions; and a corporation or other entity established by law to carry out governmental functions.

COMMENT

1. *See* § 18-5-901(8), C.R.S. 2015 (identity theft and related offenses).

F:165 GOVERNMENTAL FUNCTION

"Governmental function" includes any activity which a public servant is legally authorized to undertake on behalf of government.

COMMENT

1. *See* § 18-1-901(3)(j), C.R.S. 2015.

2. + *See also* § 18-8-101(2), C.R.S. 2015 (incorporating this definition for all offenses in Title 18, Article 8, unless the context requires otherwise).

3. + In 2015, the Committee added Comment 2.

F:166 GRAVITY KNIFE

"Gravity knife" means any knife that has a blade released from the handle or sheath thereof by the force of gravity or the application of centrifugal force.

COMMENT

1. *See* § 18-12-101(1)(e), C.R.S. 2015.

2. *See* Instruction F:194 (defining "knife").

F:167 HANDGUN

"Handgun" means a pistol, revolver, or other firearm of any description, loaded or unloaded, from which any shot, bullet, or any other missile can be discharged; and the length of the barrel, excluding any revolving, detachable, or magazine breech, does not exceed twelve inches.

COMMENT

1. *See* § 18-12-101(1)(e.5), C.R.S. 2015.

2. *See* Instruction F:154 (defining "firearm").

3. The terms "pistol" and "revolver" are not defined by statute.

F:168 HAZING

"Hazing" means any activity by which a person recklessly endangers the health or safety of or causes a risk of bodily injury to an individual for purposes of initiation or admission into or affiliation with any student organization; except that "hazing" does not include customary athletic events or other similar contests or competitions, or authorized training activities conducted by members of the armed forces of the state of Colorado or the United States.

"Hazing" includes but is not limited to: forced and prolonged physical activity; forced consumption of any food, beverage, medication or controlled substance, whether or not prescribed, in excess of the usual amounts for human consumption or forced consumption of any substance not generally intended for human consumption; and prolonged deprivation of sleep, food, or drink.

COMMENT

1. *See* § 18-9-124(2), C.R.S. 2015 (hazing).

F:169 HEALTH CARE FACILITY

"Health care facility" means any entity that is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment in Colorado.

COMMENT

1. *See* § 18-9-122(4), C.R.S. 2015) (preventing passage to and from a health care facility; engaging in prohibited activities near a facility).

F:170 HIGH MANAGERIAL AGENT

"High managerial agent" means an officer of a business entity or any other agent in a position of comparable authority with respect to the formulation of the business entity's policy or the supervision in a managerial capacity of subordinate employees.

COMMENT

1. *See* § 18-1-606(2)(a), C.R.S. 2015 (criminal liability of business entities).

F:171 HIGHWAY

"Highway" means the entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel or the entire width of every way declared to be a public highway by any law of this state.

COMMENT

1. *See* § 42-1-102(43), C.R.S. 2015 (vehicles and traffic).

F:172 HOLD HOSTAGE

"Hold hostage" means to seize, imprison, entice, detain, confine, or persuade another person to remain in any premises or on any property during a violation of any provision of this section in order to seek concessions from law enforcement personnel or their representatives, or to prevent their entry to property or premises. The term includes imprisoning, enticing, detaining, confining, or persuading any child to remain in said premises or on said property in an attempt to secure said concessions.

COMMENT

1. *See* § 18-9-119(8), C.R.S. 2015 (failure or refusal to leave premises or property upon request of a peace officer).

F:173 HOME DETENTION

"Home detention" means an alternative correctional sentence or term of probation supervision wherein a defendant convicted of any felony, other than a class 1 or violent felony, is allowed to serve his sentence or term of probation, or a portion thereof, within his [her] home or other approved residence.

COMMENT

1. *See* § 17-27.8-101(1), C.R.S. 2015.

F:174 IDENTIFICATION DOCUMENT + (FORGERY AND IMPERSONATION OFFENSES)

"Identification document" means a document made or issued by or under the authority of the United States Government, a state, a political subdivision of a state, a foreign government, a political subdivision of a foreign government, an international governmental, or an international quasi-governmental organization which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of identification of individuals.

COMMENT

1. *See* § 18-5-101(6.5), C.R.S. 2015 (forgery and impersonation offenses).

2. *See* Instruction F:162 (defining "government").

3. + In 2015, the Committee added the parenthetical to this instruction's title to distinguish it from the new Instruction F:174.5 (defining "identification document").

+ F:174.5 IDENTIFICATION DOCUMENT

"Identification document" means a real or purported passport, driver's license, immigration document, travel document, or other government-issued identification document, including a document issued by a foreign government.

COMMENT

1. *See* § 18-3-502(5), C.R.S. 2015.

2. + The Committee added this instruction in 2015.

+ F:174.7 IDENTIFICATION NUMBER

"Identification number" means a serial or motor number placed by the manufacturer upon an article as a permanent individual identifying mark.

COMMENT

1. *See* § 18-5-305(2), C.R.S. 2015 (altering an identification number).

2. + The Committee added this instruction in 2015.

F:175 IDENTIFYING INFORMATION (FALSE REPORTING TO AUTHORITIES)

"Identifying information" means a person's name, address, birth date, social security number, or driver's license or Colorado identification number.

COMMENT

1. *See* § 18-8-111(3), C.R.S. 2015 (false reporting to authorities).

F:176 ILLEGAL WEAPON

"Illegal weapon" means a blackjack, gas gun, metallic knuckles, gravity knife, or switchblade knife.

COMMENT

1. *See* § 18-12-102(2), C.R.S. 2015.

2. *See* Instruction F:33 (defining "blackjack"); Instruction F:161 (defining "gas gun"); Instruction F:166 (defining "gravity knife"); Instruction F:358 (defining "switchblade knife").

3. The term "metallic knuckles" is not defined by statute.

F:177 IMITATION CONTROLLED SUBSTANCE

"Imitation controlled substance" means a substance that is not the controlled substance that it is purported to be but which, by appearance, including color, shape, size, and markings, by representations made, and by consideration of all relevant factors set forth below, would lead a reasonable person to believe that the substance is the controlled substance that it is purported to be.

In determining whether a substance is an imitation controlled substance, you may consider, in addition to all other relevant factors, the following: (a) statements by an owner or by anyone in control of the substance concerning the nature of the substance or its use or effect; (b) statements made to the recipient that the substance may be resold for inordinate profit which is more than the normal markup charged by legal retailers of similar pharmaceutical products; (c) whether the substance is packaged in a manner normally used for illicit controlled substances; (d) evasive tactics or actions utilized by the owner or person in control of the substance to avoid detection by law enforcement authorities; and (e) the proximity of the imitation controlled substance to any controlled substances when conduct purported to be illegal was observed.

COMMENT

1. *See* §§ 18-18-420(3), 18-18-421(1), C.R.S. 2015.

F:178 IMMEDIATE FAMILY (STALKING)

"Immediate family" includes the person's spouse and the person's parent, grandparent, sibling, or child.

COMMENT

1. *See* § 18-3-602(2)(c), C.R.S. 2015 (stalking).

F:179 IMMEDIATE PRECURSOR

"Immediate precursor" means a substance which is a principal compound commonly used or produced primarily for use, and which is an immediate chemical intermediary used, or likely to be used, in the manufacture of a controlled substance, the control of which is necessary to prevent, curtail, or limit manufacture.

COMMENT

1. *See* § 18-18-102(15), C.R.S. 2015.

2. This definition is generally applicable under the definition of a "controlled substance." *See* Instruction F:73 (defining "controlled substance" by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S. 2015). In addition, it is independently applicable to: § 18-6-401(1)(c)(I), (III), C.R.S. 2015 (child abuse); § 18-18-412.5, C.R.S. 2015 (unlawful possession of materials to make methamphetamine and amphetamine); § 18-18-418(1)(c), C.R.S. 2015 (exemption from criminal liability if possession is for bona fide chemistry education).

F:180 INCOMPLETE WRITTEN INSTRUMENT

"Incomplete written instrument" means one which contains some matter by way of content or authentication but which requires additional matter in order to render it a complete written instrument.

COMMENT

1. *See* § 18-5-101(7), C.R.S. 2015 (forgery and impersonation offenses).

F:181 IN CONNECTION WITH

"In connection with" means communications that further, advance, promote, or have a continuity of purpose and may occur before, during, or after the invitation to meet.

COMMENT

1. *See* § 18-3-306(4), C.R.S. 2015 (internet luring of a child).

+ F:181.5 INHERENTLY HAZARDOUS SUBSTANCE

"Inherently hazardous substance" means any liquid chemical, compressed gas, or commercial product that has a flash point at or lower than thirty-eight degrees celsius or one hundred degrees fahrenheit, including butane, propane, and diethyl ether and excluding all forms of alcohol and ethanol.

COMMENT

1. *See* § 18-18-406.6(4), C.R.S. 2015.

2. + The Committee added this instruction in 2015. *See* Ch. 242, sec. 2, § 18-18-406.6(4), 2015 Colo. Sess. Laws 895, 896.

F:182 INJURY

"Injury" means physical pain, illness, or any impairment of physical or mental condition.

COMMENT

1. *See* § 42-4-1601(4)(a), C.R.S. 2015 (failure to fulfill duties after involvement in an accident involving injury or death).

2. Although this definition is identical to the definition of "bodily injury" in section § 18-1-901(3)(c), *see* Instruction F:36, a separate entry is included here because section 42-4-1601(1) does not include the adjective "bodily" (except in reference to "serious bodily injury").

F:183 INSANITY

Under the two legal tests defining "insanity," a person is not accountable if:

1. he [she] was so diseased or defective in mind at the time of the commission of the act as to be incapable of distinguishing right from wrong with respect to that act; or

2. he [she] suffered from a condition of mind caused by a mental disease or defect that prevented him [her] from forming a culpable state of mind that is an essential element of a crime charged.

But, under both tests, care should be taken not to confuse mental disease or defect with moral obliquity, mental depravity, or passion growing out of anger, revenge, hatred, or other motives and kindred evil conditions because, when an act is induced by any of these causes, the person is accountable to the law.

COMMENT

1. *See* § 16-8-101.5(1)(a), (b), C.R.S. 2015.

2. *See* Instruction F:80 (defining "culpable state of mind"); Instruction F:99 (defining "diseased or defective in mind"); Instruction F:226 (defining "mental disease or defect").

+ F:183.3 INSOLVENT

A financial institution is "insolvent" when from any cause it is unable to pay its obligations in the ordinary or usual course of business or its liabilities exceed its assets.

COMMENT

1. *See* § 18-5-201, C.R.S. 2015.

2. + The Committee added this instruction in 2015.

+ F:183.5 INSUFFICIENT FUNDS (FRAUD IN OBTAINING PROPERTY OR SERVICES)

"Insufficient funds" means a drawer has insufficient funds with the drawee to pay a check when the drawer has no checking account, negotiable order of withdrawal account, or share draft account with the drawee or has funds in such an account with the drawee in an amount less than the amount of the check plus the amount of all other checks outstanding at the time of issuance; and a check dishonored for "no account" shall also be deemed to be dishonored for "insufficient funds."

COMMENT

1. *See* § 18-5-205(1)(d), C.R.S. 2015.

2. *See* Instruction F:48.5 (defining "check"); Instruction F:107.5 (defining "drawee"); Instruction F:107.7 (defining "drawer"); Instruction F:241.7 (defining "negotiable order of withdrawal account" and "share draft account").

3. + The Committee added this instruction in 2015.

+ F:183.6 INSUFFICIENT FUNDS (OFFENSES RELATING TO THE UNIFORM COMMERCIAL CODE)

"Insufficient funds" means not having a sufficient balance in account with a bank or other drawee for the payment of a check or order when the check or order is presented for payment and it remains unpaid thirty days after such presentment.

COMMENT

1. *See* § 18-5-512(2), C.R.S. 2015.

2. + The Committee added this instruction in 2015.

+ F:183.7 INSURANCE

"Insurance" means a contract whereby one, for consideration, undertakes to indemnify another or to pay a specified or ascertainable amount or benefit upon determinable risk contingencies, and includes annuities.

COMMENT

1. *See* § 18-5-211(7)(b), C.R.S. 2015 (incorporating section 10-1-102(12), C.R.S. 2015).

2. + The Committee added this instruction in 2015.

+ F:183.8 INSURANCE PRODUCER

"Insurance producer" means a person who solicits, negotiates, effects, procures, delivers, renews, continues, or binds policies of insurance for risks residing, located, or to be performed in this state; membership in a prepayment plan; or membership enrollment in a health care plan; and a public adjuster.

[However, "insurance producer" does not include the following: [insert relevant exemption(s) from section 10-2-105(2)(a-j), C.R.S. 2015].]

COMMENT

1. *See* § 18-5-211(7)(c), C.R.S. 2015 (incorporating section 10-2-103(6), C.R.S. 2015).

2. *See* Instruction F:183.7 (defining "insurance").

3. The term "membership in a prepayment plan" should be defined based on the relevant provisions in Title 10, Article 16, Parts 2 and 3, and the term "membership enrollment in a health care plan" should be defined based on the relevant provisions in Title 10, Article 16, Part 4.

4. + The Committee added this instruction in 2015.

+ F:183.9 INSURER

"Insurer" means every person engaged as principal, indemnitor, surety, or contractor in the business of making contracts of insurance.

COMMENT

1. *See* § 18-5-211(7)(d), C.R.S. 2015 (incorporating section 10-1-102(13), C.R.S. 2015).

2. *See* Instruction F:183.7 (defining "insurance").

3. + The Committee added this instruction in 2015.

F:184 INTELLECTUAL AND DEVELOPMENTAL DISABILITY

"Intellectual and developmental disability" means a disability that manifests before the person reaches twenty-two years of age, that constitutes a substantial disability to the affected person, and that is attributable to mental retardation or related conditions, which include cerebral palsy, epilepsy, autism, or other neurological conditions when those conditions result in impairment of general intellectual functioning or adaptive behavior similar to that of a person with mental retardation.

COMMENT

1. *See* § 18-6.5-102(11)(d), C.R.S. 2015 (incorporating the definition of a "person with an intellectual and developmental disability as defined in section 25.5-10-202, C.R.S"); section 25.5-10-202(26)(a), C.R.S. 2015 (defining "intellectual and developmental disability" as set forth above, and specifying that: "Unless otherwise specifically stated, the federal definition of "developmental disability" found in 42 U.S.C. sec. 15001 et seq. shall not apply.").

F:185 INTENTIONALLY (AND WITH INTENT)

A person acts "intentionally" or "with intent" when his [her] conscious objective is to cause the specific result proscribed by the statute defining the offense. It is immaterial to the issue of specific intent whether or not the result actually occurred.

COMMENT

1. *See* § 18-1-501(5), C.R.S. 2015.

F:186 INTIMATE PARTS

"Intimate parts" means the external genitalia, perineum, anus, buttocks, pubes, or breast of any person.

COMMENT

1. *See* § 18-3-401(2), C.R.S. 2015.

2. The terms "perineum" and "pubes" are not defined by statute. *See, e.g., United States v. Crosby*, 106 F. Supp. 2d 53, 57 n.7 (D. Me. 2000) ("The *Random House Dictionary of the English Language* provides two definitions for the perineum. The first defines it as 'the area in front of the anus extending to the fourchette of the vulva in the female and to the scrotum in the male' and the second as 'the diamond-shaped area corresponding to the outlet of the pelvis, containing the anus and vulva or the roots of the penis.' *Random House Dictionary of the English Language* 1440 (2d ed. unabridged 1987). In an illustration of the male perineum (absent the skin) in *Grant's Atlas of Anatomy*, the urogenital and anal region are depicted as part of the male perineum, and described as such in the accompanying description. *See Grant's Atlas of Anatomy* 185 (9th ed. 1991)."); *Nickerson v. State*, 69 S.W.3d 661, 666 n.3 (Tex. Ct. App. 2002) ("The perineum is 'the area between the anus and the posterior part of the external genitalia.' *Merriam Webster's Collegiate Dictionary* 864 (10th ed. 1993)."); *Webster's Third New International Dictionary* 1836 (2002) (defining "pubes" as "the hair that appears upon the lower part of the hypogastric region at the age of puberty," "the lower part of the hypogastric region," or "the pubic region").

F:187 INTIMATE RELATIONSHIP

"Intimate relationship" means a relationship between spouses, former spouses, past or present unmarried couples, or persons who are both the parents of the same child regardless of whether the persons have been married or have lived together at any time.

COMMENT

1. *See* § 18-6-800.3(2), C.R.S. 2015 (domestic violence).

2. *See People v. Disher*, 224 P.3d 254, 258 (Colo. 2010) ("When determining if a relationship falls within the category of intimate relationships a court may take into account the following three factors: (1) the length of time the relationship has existed, or did exist; (2) the nature or type of the relationship; (3) the frequency of interaction between the parties. These factors are not intended to be an exhaustive list of the characteristics a court may consider; they are a guide that may be used in whole or in part. However, an intimate relationship should not include mere social or business acquaintances and friends.").

F:188 INTOXICATION

"Intoxication" means a disturbance of mental or physical capacities resulting from the introduction of any substance into the body.

COMMENT

1. *See* § 18-1-804(4), C.R.S. 2015.

+ F:188.5 ISSUE (FRAUD IN OBTAINING PROPERTY OR SERVICES)

A person "issues" a check when he [she] makes, draws, delivers, or passes it or causes it to be made, drawn, delivered, or passed.

COMMENT

1. *See* § 18-5-205(1)(e), C.R.S. 2015.

2. *See* Instruction F:48.5 (defining "check").

3. + The Committee added this instruction in 2015.

F:189 ISSUER (FINANCIAL TRANSACTION DEVICE CRIMES)

"Issuer" means any person or banking, financial, or business institution, corporation, or other business entity that assigns financial rights by acquiring, distributing, controlling, or cancelling a financial transaction device.

COMMENT

1. *See* § 18-5-701(4), C.R.S. 2015 (financial transaction device crimes).

F:190 ISSUER (IDENTITY THEFT AND RELATED OFFENSES)

"Issuer" means a person, a banking, financial, or business institution, or a corporation or other business entity that assigns financial rights by acquiring, distributing, controlling, or cancelling an account or a financial device.

COMMENT

1. *See* § 18-5-901(9), C.R.S. 2015 (identity theft and related offenses).

2. *See* Instruction F:150 (defining "financial device").

F:191 JUDGE (RETALIATION AGAINST A JUDGE)

"Judge" means any justice of the supreme court, judge of the court of appeals, district court judge, juvenile court judge, probate court judge, water court judge, county court judge, district court magistrate, county court magistrate, municipal judge, administrative law judge, or unemployment insurance hearing officer.

COMMENT

1. *See* 18-8-615(3), C.R.S. 2015.

F:192 JUROR

"Juror" means any person who is a member of any jury or grand jury impaneled by any court of this state or by any public servant authorized by law to impanel a jury, and includes any person who has been drawn or summoned to attend as a prospective juror.

COMMENT

1. *See* § 18-8-601(1), C.R.S. 2015 (offenses relating to judicial and other proceedings).

F:193 JUVENILE

"Juvenile" means any person under the age of eighteen years.

COMMENT

1. *See* § 18-12-101(1)(e.7), C.R.S. 2015 (offenses relating to firearms and weapons).

F:194 KNIFE

"Knife" means any dagger, dirk, knife, or stiletto with a blade over three and one-half inches in length, or any other dangerous instrument capable of inflicting cutting, stabbing, or tearing wounds, but does not include a hunting or fishing knife carried for sports use.

COMMENT

1. *See* § 18-12-101(1)(f), C.R.S. 2015.

2. Section 18-12-101(1)(f) states that "[t]he issue that a knife is a hunting or fishing knife must be raised as an affirmative defense."

3. *See A.P.E. v. People*, 20 P.3d 1179, 1183 (Colo. 2001) (because all knives of any blade length necessarily meet the catchall definition in § 18-12-101(1)(f), a conclusion that any knife is per se illegal would render meaningless the blade length distinction); *People in Interest of J.W.T.*, 93 P.3d 580, 582-83 (Colo. App. 2004) (although a knife is a deadly weapon when it is used or intended to be used during the commission of another crime, a person carrying a knife with a blade less than three and one-half inches in length, on school grounds, cannot be prosecuted under § 18-12-105.5(1) unless the prosecution can also establish that the person used or intended to use the knife as a weapon).

F:195 KNOWINGLY OR WILLFULLY

A person acts "knowingly" or "willfully" with respect to conduct or to a circumstance described by a statute defining an offense when he [she] is aware that his [her] conduct is of such nature or that such a circumstance exists. A person acts "knowingly" or "willfully," with respect to a result of his [her] conduct, when he [she] is aware that his [her] conduct is practically certain to cause the result.

COMMENT

1. *See* § 18-1-501(6), C.R.S. 2015.

F:196 KNOWLEDGE (OF DRIVING RESTRAINT)

"Knowledge" means actual knowledge of any restraint from whatever source or knowledge of circumstances sufficient to cause a reasonable person to be aware that such person's license or privilege to drive was under restraint. "Knowledge" does not mean knowledge of a particular restraint or knowledge of the duration of restraint.

COMMENT

1. *See* § 42-2-138(4)(a), C.R.S. 2015.

2. *See People v. Ellison*, 14 P.3d 1034, 1035, 1040 (Colo. 2000) ("the definition of knowledge in Colorado's driving under restraint statute does not violate the guarantees of due process of law" because "this statute requires both a subjective and objective component of knowledge" and "a driver may not be punished without proof of actual knowledge of facts that show that a reasonable person would believe his license to drive was under restraint").

+ F:196.5 LEASE

"Lease" means any grant of use and possession for consideration, with or without an option to buy.

COMMENT

1. *See* § 18-5-801(1), C.R.S. 2015.

2. + The Committee added this instruction in 2015.

F:197 LITTER

"Litter" means all rubbish, waste material, refuse, garbage, trash, debris, or other foreign substances, solid or liquid, of every form, size, kind, and description.

COMMENT

1. *See* § 18-4-511(3)(a), C.R.S. 2015.

F:198 LIVESTOCK

"Livestock" means any domestic animal generally used for food or in the production of food, including, but not limited to, cattle, sheep, goats, poultry, swine, or llamas.

COMMENT

1. *See* § 18-9-207(1)(b), C.R.S. 2015 (tampering with livestock).

F:199 LOADED

A handgun is "loaded" if [there is a cartridge in the [chamber of the handgun] [cylinder of the handgun, if the handgun is a revolver]] [the handgun, and the ammunition for such handgun, are carried on the person of a person under the age of eighteen years, or are in such proximity to such person that he [she] could readily gain access to the handgun and the ammunition and load the handgun].

COMMENT

1. *See* § 18-12-108.5(3), C.R.S. 2015 (possession of a handgun by a juvenile; defining this term for purposes of explaining the meaning of the term "unloaded," as used in the affirmative defense related to travel that is established by section 18-12-108.5 (2)(a)(V)).

F:200 LOCKED SPACE

"Locked space" means secured at all points of ingress or egress with a locking mechanism designed to limit access such as with a key or combination lock.

COMMENT

1. *See* § 18-18-102(16.5), C.R.S. 2015 (defining the term for purposes of lawful marijuana cultivation).

F:201 LOITER

"Loiter" means to be dilatory, to stand idly around, to linger, delay, or wander about, or to remain, abide, or tarry in a public place.

COMMENT

1. *See* § 18-9-112(1), C.R.S. 2015.

F:202 LOW-POWER SCOOTER

"Low-power scooter" means a self-propelled vehicle designed primarily for use on the roadways with not more than three wheels in contact with the ground, no manual clutch, and either: A cylinder capacity not exceeding fifty cubic centimeters if powered by internal combustion; or a wattage not exceeding four thousand four hundred seventy-six if powered by electricity.

"Low-power scooter" does not include a toy vehicle, bicycle, electrical assisted bicycle, wheelchair, or any device designed to assist mobility-impaired people who use pedestrian rights-of-way.

COMMENT

1. *See* § 42-1-102(48.5), C.R.S. 2015.

F:203 MACHINE GUN

"Machine gun" means any firearm, whatever its size and usual designation, that shoots automatically more than one shot, without manual reloading, by a single function of the trigger.

COMMENT

1. *See* § 18-12-101(1)(g), C.R.S. 2015.

2. *See* Instruction F:154 (defining "firearm").

+ F:203.5 MAINTAIN

"Maintain" means to provide sustenance or care for a person less than eighteen years of age and includes but is not limited to providing shelter, food, clothing, drugs, medical care, or communication services.

COMMENT

1. *See* § 18-3-502(6), C.R.S. 2015.

2. *See* § 18-3-502(8), C.R.S. 2015 (defining "minor," as incorporated above).

3. + The Committee added this instruction in 2015.

F:204 MAJOR COMPONENT MOTOR VEHICLE PART

"Major component motor vehicle part" means any of the following parts of a motor vehicle: the engine; the transmission; a front fender; the hood; any door allowing entrance to or egress from the passenger compartment of the vehicle; the front or rear bumper; a rear quarter panel; the deck lid, tailgate, or hatchback; the trunk floor pan; the cargo box of a pickup truck; the frame, or if the vehicle has a unitized body, the supporting structure or structures that serve as the frame; the cab of a truck; the body of a passenger vehicle; an airbag or airbag assembly; a wheel or tire; or any other part of a motor vehicle that is comparable in design or function to any of the parts that have been listed, or that have been labeled with a unique traceable identification number, by the manufacturer of the motor vehicle or part.

COMMENT

1. *See* § 18-4-420(5)(b)(I-XVI), C.R.S. 2015.

2. *See* Instruction F:238 (defining "motor vehicle").

+ F:204.5 MAKES AVAILABLE

"Makes available" means to facilitate contact between a person less than eighteen years of age and another person.

COMMENT

1. *See* § 18-3-502(7), C.R.S. 2015.

2. *See* § 18-3-502(8), C.R.S. 2015 (defining "minor," as incorporated above).

3. + The Committee added this instruction in 2015.

F:205 MALT LIQUORS

"Malt liquors" includes beer and means any beverage obtained by the alcoholic fermentation of any infusion or decoction of barley, malt, hops, or any other similar product, or any combination thereof, in water containing more than three and two-tenths alcohol by weight or four percent alcohol by volume.

COMMENT

1. *See* § 18-8-203(203)(1)(a), C.R.S. 2015 (introducing contraband in the first degree; incorporating this definition from section 12-47-103(19), C.R.S. 2015).

F:206 MANUFACTURE (CONTROLLED SUBSTANCES)

"Manufacture" means to produce, prepare, propagate, compound, convert, or process a controlled substance, directly or indirectly, by extraction from substances of natural origin, chemical synthesis, or a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container.

The term does not include the preparation, compounding, packaging, repackaging, labeling, or relabeling of a controlled substance by a practitioner as an incident to the practitioner's administering or dispensing of a controlled substance in the course of the practitioner's professional practice; or by a practitioner, or by the practitioner's authorized agent under the practitioner's supervision, for the purpose of, or as an incident to, research, teaching, or chemical analysis and not for sale.

COMMENT

1. *See* § 18-18-102(17), C.R.S. 2015.

2. *See* Instruction F:13 (defining "agent").

F:207 MANUFACTURE (IMITATION CONTROLLED SUBSTANCE)

"Manufacture" means the production, preparation, compounding, processing, encapsulating, packaging or repackaging, or labeling or relabeling of an imitation controlled substance.

COMMENT

1. *See* § 18-18-420(4), C.R.S. 2015.

2. *See* Instruction F:287 (defining "production").

F:208 MARIJUANA

"Marijuana" means all parts of the plant cannabis sativa L., whether growing or not, the seeds thereof, the resin extracted from any part of the plant, and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or its resin. It does not include fiber produced from the stalks, oil, or cake made from the seeds of the plant, or sterilized seed of the plant which is incapable of germination if these items exist apart from any other item defined as "marijuana" in this instruction.

"Marijuana" does not include "marijuana concentrate."

COMMENT

1. *See* § 18-18-102(18), C.R.S. 2015; *see also* Colo. Const. Art. XVIII, § 16(2)(f); § 27-80-203(15), C.R.S. 2015.

F:209 MARIJUANA ACCESSORIES

"Marijuana accessories" means any equipment, products, or materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, composting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, vaporizing, or containing marijuana, or for ingesting, inhaling, or otherwise introducing marijuana into the human body.

COMMENT

1. *See* Colo. Const. Art. XVIII, § 16(2)(g).

F:210 MARIJUANA CONCENTRATE

"Marijuana concentrate" means hashish, tetrahydrocannabinols, or any alkaloid, salt, derivative, preparation, compound, or mixture, whether natural or synthesized, of tetrahydrocannabinols.

COMMENT

1. *See* § 18-18-102(19), C.R.S. 2015; *see also* § 27-80-203(16), C.R.S. 2015.

F:211 MARIJUANA CULTIVATION FACILITY

"Marijuana cultivation facility" means an entity licensed to cultivate, prepare, and package marijuana and sell marijuana to retail marijuana stores, to marijuana product manufacturing facilities, and to other marijuana cultivation facilities, but not to consumers.

COMMENT

1. *See* Colo. Const. Art. XVIII, § 16(2)(h).

F:212 MARIJUANA ESTABLISHMENT

"Marijuana establishment" means a marijuana cultivation facility, a marijuana testing facility, a marijuana product manufacturing facility, or a retail marijuana store.

COMMENT

1. *See* Colo. Const. Art. XVIII, § 16(2)(i).

F:213 MARIJUANA PRODUCT MANUFACTURING FACILITY

"Marijuana product manufacturing facility" means an entity licensed to purchase marijuana; manufacture, prepare, and package marijuana products; and sell marijuana and marijuana products to other marijuana product manufacturing facilities and to retail marijuana stores, but not to consumers.

COMMENT

1. *See* Colo. Const. Art. XVIII, § 16(2)(j).

F:214 MARIJUANA PRODUCTS

"Marijuana products" means concentrated marijuana products and marijuana products that are comprised of marijuana and other ingredients and are intended for use or consumption, such as, but not limited to, edible products, ointments, and tinctures.

COMMENT

1. *See* Colo. Const. Art. XVIII, § 16(2)(k).

F:215 MARIJUANA TESTING FACILITY

"Marijuana testing facility" means an entity licensed to analyze and certify the safety and potency of marijuana.

COMMENT

1. *See* Colo. Const. Art. XVIII, § 16(2)(l).

F:216 MASTURBATION (SEXUAL EXPLOITATION OF CHILDREN)

"Masturbation" means the real or simulated touching, rubbing, or otherwise stimulating of a person's own clothed or unclothed genitals or pubic area, developing or undeveloped genitals or pubic area (if the person is a child), buttocks, breasts, or developing or undeveloped breast area (if the person is a child), by manual manipulation or self-induced or with an artificial instrument, for the purpose of real or simulated overt sexual gratification or arousal of the person.

COMMENT

1. *See* § 18-6-403(2)(f), C.R.S. 2015.

F:217 MASTURBATION (PROSTITUTION)

"Masturbation" means stimulation of the genital organs by manual or other bodily contact exclusive of sexual intercourse.

COMMENT

1. *See* § 18-7-201(2)(c), C.R.S. 2015.

F:218 MASTURBATION (INDECENT EXPOSURE)

"Masturbation" means the real or simulated touching, rubbing, or otherwise stimulating of a person's own genitals or pubic area for the purpose of sexual gratification or arousal of the person, regardless of whether the genitals or pubic area is exposed or covered.

COMMENT

1. *See* § 18-7-302(5), C.R.S. 2015.

F:219 MASTURBATION (CHILD PROSTITUTION)

"Masturbation" means stimulation of the genital organs by manual or other bodily contact, or by any object, exclusive of sexual intercourse.

COMMENT

1. *See* § 18-7-401(5), C.R.S. 2015.

+ F:219.5 MATERIAL INFORMATION

"Material information" is a statement or assertion directly pertaining to an application for insurance or an insurance claim that a reasonable person making such an assertion knows or should know will affect the action, conduct, or decision of the person who receives or is intended to receive the asserted information in a manner that would directly or indirectly benefit the person making the assertion.

COMMENT

1. *See* § 18-5-211(7)(e), C.R.S. 2015.

2. *See* Instruction F:54.5 (defining "claim"); Instruction F:183.7 (defining "insurance").

3. + The Committee added this instruction in 2015.

+ F:219.7 MATERIALLY (ELECTRONIC MAIL FRAUD)

Header information or registration information is "materially" falsified if it is altered or concealed in a manner that would impair the ability of a recipient of the message, an internet access service processing the message on behalf of a recipient, a person alleging a violation of this section, or a law enforcement agency to identify, locate, or respond to a person who initiated the electronic mail message or to investigate the alleged violation

COMMENT

1. *See* 18-5-308(1), C.R.S. 2015 (incorporating 18 U.S.C. § 1037(a)(2014), which uses the term "materially," as defined in 18 U.S.C. § 1037(d)(2)(2014)).

2. + The Committee added this instruction in 2015.

F:220 MATERIALLY FALSE STATEMENT

"Materially false statement" means any false statement, regardless of its admissibility under the rules of evidence, which could have affected the course or outcome of an official proceeding, or the action or decision of a public servant, or the performance of a governmental function.

COMMENT

1. *See* § 18-8-501(1), C.R.S. 2015 (perjury and related offenses); § 18-8-801(1), C.R.S. 2015 (reporting use of excessive force by peace officers; incorporating the definition of section 18-8-501(1)).

F:221 MEDICAL CAREGIVER (MANSLAUGHTER – AFFIRMATIVE DEFENSE OF "MEDICAL CAREGIVER")

"Medical caregiver" means a physician, registered nurse, nurse practitioner, physician assistant, or anesthesiologist assistant licensed by this state.

COMMENT

1. *See* § 18-3-104(4)(b)(II), C.R.S. 2015.

F:222 MEDICAL INFORMATION

"Medical information" means any information contained in the medical records or any information pertaining to the medical, mental health, and health care services performed at the direction of a physician or other licensed health care provider which is protected by the physician patient privilege.

COMMENT

1. *See* § 18-4-412(2)(b), C.R.S. 2015 (theft of medical records or medical information).

F:223 MEDICAL MARIJUANA CENTER

"Medical marijuana center" means an entity licensed by a state agency to sell marijuana and marijuana products.

COMMENT

1. *See* Colo. Const. Art. XVIII, § 16(2)(m).

F:224 MEDICAL RECORD

"Medical record" means the written or graphic documentation, sound recording, or computer record pertaining to medical, mental health, and health care services, including medical marijuana services, that are performed at the direction of a physician or other licensed health care provider on behalf of a patient by physicians, dentists, nurses, service providers, emergency medical service providers, mental health professionals, prehospital providers, or other health care personnel.

"Medical record" includes such diagnostic documentation as X rays, electrocardiograms, electroencephalograms, and other test results.

"Medical record" includes data entered into the prescription drug monitoring program.

COMMENT

1. *See* § 18-4-412(2)(a), C.R.S. 2015 (theft of medical records or medical information).

2. *See* Instruction F:119 (defining "emergency medical service provider").

F:225 MEDICAL USE

"Medical use" means the acquisition, possession, production, use, or transportation of marijuana or paraphernalia related to the administration of such marijuana to address the symptoms or effects of a patient's debilitating medical condition, which may be authorized only after a diagnosis of the patient's debilitating medical condition by a physician or physicians.

COMMENT

1. *See* Colo. Const. art. XVIII, § 14(1)(b) (medical marijuana).

2. *See* Instruction F:89 (defining "debilitating medical condition"); Instruction F:259 (defining "patient"); Instruction F:279 (defining "physician"); Instruction F:287 (defining "production").

F:226 MENTAL DISEASE OR DEFECT

"Mental disease or defect" means only those severely abnormal mental conditions that grossly and demonstrably impair a person's perception or understanding of reality and that are not attributable to the voluntary ingestion of alcohol or any other psychoactive substance; except that it does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

COMMENT

1. *See* §§ 16-8-101.5(2)(b), 16-8-102(4.7), C.R.S. 2015.

F:227 MENTAL HEALTH PROFESSIONAL

"Mental health professional" means a mental health professional licensed to practice medicine, a person licensed as a mental health professional, a person licensed as a nurse, a certified nurse aide, or a licensed psychiatric technician.

COMMENT

1. *See* § 18-1.3-501(1.7)(b), C.R.S. 2015 (sentence enhancement provision applicable to third degree assault and reckless endangerment).

2. In cases where there is a factual dispute relevant to the determination of whether a mental health professional was licensed or certified, draft a supplemental instruction based on the relevant provision referenced in section 18-1.3-501(1.7)(b).

F:228 MENTALLY IMPAIRED

+ "Mental impairment" means any mental or psychological disorder such as an intellectual or developmental disability, organic brain syndrome, mental illness, or specific learning disability.

COMMENT

1. + *See* § 24-34-501(1.3)(b)(II), C.R.S. 2015.

2. + In 2015, the Committee modified this instruction to reflect the legislative correction of an obsolete internal reference which the Committee had noted in COLJI-Crim. Comment 1 (2014)). *See* Ch. 259, sec. 40, § 18-6.5-102(11)(f), 2015 Colo. Sess. Laws 940, 952.

F:229 METHAMPHETAMINE PRECURSOR DRUG

"Methamphetamine precursor drug" means ephedrine, pseudoephedrine, or phenylpropanolamine or their salts, isomers, or salts of isomers.

"Methamphetamine precursor drug" does not include a substance contained in any package or container that is labeled by the manufacturer as intended for pediatric use.

COMMENT

1. *See* § 18-18-412.8(4)(a)(II), C.R.S. 2015 (retail sale of methamphetamine precursor drugs).

+ F:229.5 MISLABELED

"Mislabeled" means varying from the standard of truth or disclosure in labeling prescribed or pursuant to [insert description of any statute of the state of Colorado or the United States providing criminal penalties for such variance], or set by established commercial usage.

COMMENT

1. *See* § 18-5-301(1)(d), C.R.S. 2015.

2. + The Committee added this instruction in 2015.

F:230 MISSILE

"Missile" means any object or substance.

COMMENT

1. *See* § 18-9-116(3), C.R.S. 2015 (projecting missiles at vehicles or bicyclists).

F:231 MISTREATMENT

"Mistreatment" means every act or omission that causes or unreasonably permits the continuation of unnecessary or unjustifiable pain or suffering.

COMMENT

1. *See* § 18-9-201(3), C.R.S. 2015 (cruelty to animals).

2. *See* Instruction F:251 (defining "omission").

F:232 MOLOTOV COCKTAIL

"Molotov cocktail" means a breakable container containing an explosive or flammable liquid or other substance, having a wick or similar device capable of being ignited, and may be described as either an explosive or incendiary device.

A Molotov cocktail is not a device commercially manufactured primarily for the purpose of illumination or other such uses.

COMMENT

1. *See* § 9-7-103(5), C.R.S. 2015 (explosives; incorporated by section 18-12-101(1)(b), C.R.S. 2015 (defining "bomb")).

+ F:232.5 MONETARY INSTRUMENT

"Monetary instrument" means coin or currency of the United States or any other country; a traveler's check; a personal check; a bank check; a cashier's check; a money order; a bank draft of any country; gold, silver, or platinum bullion or coins; an investment security or negotiable instrument in bearer form, or in another form such that title passes upon delivery; a gift card or other device that is the equivalent of money and can be used to obtain cash, property, or services.

COMMENT

1. *See* 18-5-309(3)(c)(I-III), C.R.S. 2015.

2. + The Committee added this instruction in 2015.

F:233 MORTGAGE LENDING PROCESS

"Mortgage lending process" means the process through which a person seeks or obtains a residential mortgage loan, including, without limitation, solicitation, application, or origination; negotiation of terms; third-party provider services; underwriting; signing and closing; funding of the loan; and perfecting and releasing the mortgage.

COMMENT

1. *See* § 18-4-401(9)(e)(I), C.R.S. 2015 (theft; sentence enhancement).

2. *See* Instruction F:317 (defining "residential mortgage loan").

F:234 MOTION PICTURE

"Motion picture" means any material that depicts a moving image of a child engaged in, participating in, observing, or being used for explicit sexual conduct.

COMMENT

1. *See* § 18-6-403(2)(k), C.R.S. 2015 (sexual exploitation of a child).

2. *See* Instruction F:132 (defining "explicit sexual conduct"); + Instruction F:389 (defining "video" and "recording or broadcast").

3. + In 2015, the Committee added a citation to Instruction F:389 in the preceding Comment in order to make clear that the terms "recording or broadcast" are defined in a separate instruction (even though the definitions are codified in the same statutory subsection).

F:235 MOTION PICTURE THEATER

"Motion picture theater" means a movie theater, screening room, or other venue when used primarily for the exhibition of motion pictures.

COMMENT

1. *See* § 18-4-516(6)(a), C.R.S. 2015 (criminal operation of a device in a motion picture theater).

F:236 MOTOR VEHICLE (GENERAL DEFINITION FOR TITLE 18)

"Motor vehicle" includes any self-propelled device by which persons or property may be moved, carried, or transported from one place to another by land, water, or air, except devices operated on rails, tracks, or cables fixed to the ground or supported by pylons, towers, or other structures.

COMMENT

1. *See* § 18-1-901(3)(k), C.R.S. 2015.

F:237 MOTOR VEHICLE (AGGRAVATED MOTOR VEHICLE THEFT)

"Motor vehicle" means all vehicles of whatever description propelled by any power other than muscular, except vehicles running on rails.

COMMENT

1. *See* § 18-4-409(1)(a), C.R.S. 2015.

F:238 MOTOR VEHICLE (CHOP SHOP ACTIVITY)

"Motor vehicle" means all vehicles of whatever description that are propelled by any power other than muscular power; except that "motor vehicle" does not include vehicles that run on rails.

COMMENT

1. *See* § 18-4-420(5)(c), C.R.S. 2015.

F:239 MOTOR VEHICLE (TRAFFIC OFFENSES IN TITLE 42)

"Motor vehicle" means any self-propelled vehicle that is designed primarily for travel on the public highways and that is generally and commonly used to transport persons and property over the public highways or a low-speed electric vehicle; except that the term does not include low-power scooters, wheelchairs, or vehicles moved solely by human power.

COMMENT

1. *See* § 42-1-102(58), C.R.S. 2015 (vehicles and traffic; defining the term as set forth above, and further stating that: "For the purposes of the offenses described in sections 42-2-128, 42-4-1301, 42-4-1301.1, and 42-4-1401 for farm tractors and off-highway vehicles, as defined in section 33-14.5-101(3), C.R.S., operated on streets and highways, 'motor vehicle' includes a farm tractor or an off-highway vehicle that is not otherwise classified as a motor vehicle. For the purposes of sections 42-2-127, 42-2-127.7, 42-2-128, 42-2-138, 42-2-206, 42-4-1301, and 42-4-1301.1, 'motor vehicle' includes a low-power scooter.").

2. *See* Instruction F:202 (defining "low-power scooter").

+ F:239.5 MULTIPLE (ELECTRONIC MAIL FRAUD)

The term "multiple" means more than 100 electronic mail messages during a 24-hour period, more than 1,000 electronic mail messages during a 30-day period, or more than 10,000 electronic mail messages during a 1-year period.

COMMENT

1. *See* 18-5-308(1), C.R.S. 2015 (incorporating 18 U.S.C. § 1037(a)(2014), which uses the term "multiple," as defined in 18 U.S.C. § 1037(d)(3)(2014)).

2. + The Committee added this instruction in 2015.

F:240 NEGLECT

"Neglect" means failure to provide food, water, protection from the elements, or other care generally considered to be normal, usual, and accepted for an animal's health and well-being consistent with the species, breed and type of animal.

COMMENT

1. *See* § 18-9-201(4), C.R.S. 2015 (cruelty to animals).

F:241 NEGLIGENCE

COMMENT

1. *See* Instruction F:79 (defining "criminal negligence").

+ F:241.5 NEGOTIABLE ORDER OF WITHDRAWAL AND SHARE DRAFT

"Negotiable order of withdrawal" and "share draft" mean negotiable or transferable instruments drawn on a negotiable order of withdrawal account or a share draft account, as the case may be, for the purpose of making payments to third persons or otherwise.

COMMENT

1. *See* § 18-5-205(1)(f), C.R.S. 2015.

2. *See* Instruction F:241.7 (defining "negotiable order of withdrawal account" and "share draft account").

3. + The Committee added this instruction in 2015.

+ F:241.7 NEGOTIABLE ORDER OF WITHDRAWAL ACCOUNT AND SHARE DRAFT ACCOUNT

"Negotiable order of withdrawal account" means an account in a bank or savings and loan association and "share draft account" means an account in a credit union, on which payment of interest or dividends may be made on a deposit with respect to which the bank or savings and loan association or the credit union, as the case may be, may require the depositor to give notice of an intended withdrawal not less than thirty days before the withdrawal is made, even though in practice such notice is not required and the depositor is allowed to make withdrawal by negotiable order of withdrawal or share draft.

COMMENT

1. *See* § 18-5-205(1)(g), C.R.S. 2015.

2. *See* Instruction F:241.5 (defining "negotiable order of withdrawal" and "share draft").

3. + The Committee added this instruction in 2015.

F:242 NOTICE

"Notice" includes either notice given in person or notice given in writing to the account holder.

COMMENT

1. *See* § 18-5-702(2), C.R.S. 2015.

F:243 NUMBER

"Number" includes, without limitation, any grouping or combination of letters, numbers, or symbols.

COMMENT

1. *See* 18-5-901(10), C.R.S. 2015 (identity theft and related offenses).

F:244 NUNCHAKU

"Nunchaku" means an instrument consisting of two sticks, clubs, bars, or rods to be used as handles, connected by a rope, cord, wire or chain, which is in the design of a weapon used in connection with the practice of a system of self-defense.

COMMENT

1. *See* § 18-12-106(1)(e), C.R.S. 2015 (prohibited use of weapons).

F:245 OATH

"Oath" includes an affirmation and every other mode authorized by law of attesting to the truth of that which is stated.

A written statement is also an oath if:

[The statement was made on or pursuant to a form of bearing notice, authorized by law, to the effect that false statements made therein are punishable.]

[The statement recites that it was made under oath, the declarant was aware of such recitation at the time he made the statement and intended that the statement should be represented as a sworn statement, and the statement was in fact so represented by its delivery or utterance with the signed jurat of an officer authorized to administer oaths appended thereto.]

[The statement is made, used, or offered with the intent that it be accepted as compliance with a statute, rule or regulation which requires a statement under oath or other like form of attestation to the truth of the matter contained in the statement.]

An oath is "required or authorized by law" when the use of the oath is specifically provided for by statute, court rule, or appropriate regulatory provision.

COMMENT

1. *See* § 18-8-501(2)(a), (b), C.R.S. 2015 (specifying that, in addition to the three foregoing examples, a written instrument constitutes an "oath" if "(IV) The statement meets the requirements for an unsworn declaration under the 'Uniform Unsworn Foreign Declarations Act,' part 3 of article 55 of title 12, C.R.S.").

2. *See* Instruction F:250 (defining "official proceeding").

3. The term "jurat" is not defined by statute. *See Black's Law Dictionary*, 979 (10th ed. 2014) (defining "jurat" as "A certification added to an affidavit or deposition stating when and before what authority the affidavit or deposition was made.").

F:246 OBSCENE (HARASSMENT)

"Obscene" means a patently offensive description of ultimate sexual acts or solicitation to commit ultimate sexual acts, whether or not said ultimate sexual acts are normal or perverted, actual or simulated, including masturbation, cunnilingus, fellatio, analingus, or excretory functions.

COMMENT

1. *See* § 18-9-111(1.5), C.R.S. 2015 (harassment; defining the term as set forth above, "[u]nless the context otherwise requires").

2. *See* Instruction F:81 (defining "cunnilingus"); Instruction F:147 (defining "fellatio").

3. The term "analingus" is not defined by statute. *See*, *e.g.*, State v. Kelly, 728 S.W.2d 642, 648 (Mo. App. S.D. 1987) ("Apparently the term 'analingus' is not defined by Colorado statute. *Webster's Third New International Dictionary* defines analingus as follows: 'erotic stimulation achieved by mouth and anus.'").

+ F:246.5 OBSCURE

"Obscure" means to destroy, remove, alter, conceal, or deface so as to render illegible by ordinary means of inspection.

COMMENT

1. See § 18-5-305(3), C.R.S. 2015 (altering an identification number).

2. + The Committee added this instruction in 2015.

F:247 OBSTRUCT

"Obstruct" means to render impassable or to render passage unreasonably inconvenient or hazardous.

COMMENT

1. *See* § 18-9-107(2), C.R.S. 2015 (obstructing a highway or other passageway).

F:248 OCCUPIED STRUCTURE

"Occupied structure" means any area, place, facility, or enclosure which, for particular purposes, may be used by persons or animals upon occasion, whether or not it is a "building," and which is in fact occupied by a person or animal, and known by the defendant to be thus occupied at the time of the alleged offense.

COMMENT

1. *See* § 18-4-101(2), C.R.S. 2015 (offenses against property defined in Article 4 of Title 18).

2. *See* Instruction F:40 (defining "building").

F:249 OF ANOTHER

"Of another" means that of a natural person, living or dead, or a business entity.

COMMENT

1. *See* 18-5-901(11), C.R.S. 2015 (identity theft and related offenses).

2. If necessary based on the facts of the case, draft a supplemental instruction defining the term "business entity." *See* § 16-3-301.1(11)(b), C.R.S. 2015 ("'Business entity' means a corporation or other entity that is subject to the provisions of title 7, C.R.S.; a foreign corporation qualified to do business in this state pursuant to article 115 of title 7, C.R.S., specifically including a federally chartered or authorized financial institution; a corporation or other entity that is subject to the provisions of title 11, C.R.S.; or a sole proprietorship or other association or group of individuals doing business in the state.").

F:249.5 OFF-HIGHWAY VEHICLE

"Off-highway vehicle" means any self-propelled vehicle which is designed to travel on wheels or tracks in contact with the ground, which is designed primarily for use off of the public highways, and which is generally and commonly used to transport persons for recreational purposes.

["Off-highway vehicle" does not include: vehicles designed and used primarily for travel on, over, or in the water; snowmobiles; military vehicles; golf carts; vehicles designed and used to carry individuals with disabilities; vehicles designed and used specifically for agricultural, logging, or mining purposes; or vehicles registered pursuant to [insert a description of the relevant provision from article 3 of title 42].]

COMMENT

1. *See §* 42-1-102(63), C.R.S. 2015 (incorporating this definition from section 33-14.5-101(3), C.R.S. 2015).

F:250 OFFICIAL PROCEEDING

"Official proceeding" means a proceeding heard before any legislative, judicial, administrative, or other governmental agency, or official authorized to hear evidence under oath, including any magistrate, hearing examiner, commissioner, notary, or other person taking testimony or depositions in any such proceedings.

COMMENT

1. *See* § 18-8-501(3), C.R.S. 2015 (perjury and related offenses); § 18-8-601, C.R.S. 2015 (incorporating the definition for offenses against witnesses and crime victims); § 18-8-702, C.R.S. 2015 (incorporating the definition for offenses against witnesses and crime victims).

F:251 OMISSION

"Omission" means a failure to perform an act as to which a duty of performance is imposed by law.

COMMENT

1. *See* § 18-1-501(7), C.R.S. 2015.

F:252 ONE OR MORE DRUGS + (VEHICULAR HOMICIDE; DRIVING UNDER THE INFLUENCE AND DRIVING WHILE ABILITY IMPAIRED)

"One or more drugs" means [insert name(s) of relevant substances defined as "drug(s)" in section 27-80-203(13)], any controlled substance, and any inhaled glue, aerosol, or other toxic vapor or vapors.

COMMENT

1. *See* § 18-3-106(1)(b)(II), C.R.S. 2015 (vehicular homicide); § 42-4-1301(1)(d), C.R.S. 2015 (DUI and DWAI).

2. *See* Instruction F:73 (defining "controlled substance" by referring users to the statutory schedules that are identified in section § 18-18-102(5), C.R.S. 2015); § 18-18-412(3), C.R.S. 2015 (defining "toxic vapors," for which there is no model definitional instruction because the list of qualifying substances is lengthy).

3. + In 2015, the Committee added the parenthetical to this instruction's title to distinguish it from Instruction F:252.5.

+ F:252.5 ONE OR MORE DRUGS (AGGRAVATED VEHICULAR UNLAWFUL TERMINATION OF PREGNANCY)

"One or more drugs" means [insert name(s) of relevant substance(s) defined as a "drug" in section 12-42.5-102(13)], any controlled substance, and glue-sniffing, aerosol inhalation, or the inhalation of any other toxic vapor or vapors.

COMMENT

1. *See* § 18-3.5-108(1)(b)(II), C.R.S. 2015.

2. *See* Instruction F:73 (defining "controlled substance" by referring users to the statutory schedules that are identified in section § 18-18-102(5), C.R.S. 2015); § 18-18-412(3), C.R.S. 2015 (defining "toxic vapors," for which there is no model definitional instruction because the list of qualifying substances is lengthy).

3. + The Committee added this instruction in 2015.

F:253 ON-LINE EVENT TICKET SALE

"On-line event ticket sale" means an electronic system utilized by the sponsor or promoter of a sporting or entertainment event to sell tickets to such event to the public over the internet.

COMMENT

1. *See* 18-5.5.102(1)(g), C.R.S. 2015 (computer crime; incorporating the above definition from section 6-1-720(2)(b), C.R.S. 2015).

F:254 ON SCHOOL GROUNDS (MURDER IN THE FIRST DEGREE: CONTROLLED SUBSTANCE ON SCHOOL GROUNDS)

"On school grounds" means within or upon the grounds of any public or private elementary school, middle school, junior high school, or high school, vocational school, or public housing development; within one thousand feet of the perimeter of any such school or public housing development grounds on any street, alley, parkway, sidewalk, public park, playground, or other area or premises that is accessible to the public; within any private dwelling that is accessible to the public for the purpose of the unlawful sale, distribution, use, exchange, manufacture, or attempted manufacture of controlled substances; or in any school vehicle while such school vehicle is engaged in the transportation of persons who are students.

COMMENT

1. *See* § 18-18-407(1)(g)(I), C.R.S. 2015; *see also* 18-3-102(1)(e), C.R.S. 2015 (murder in the first degree (controlled substance on school grounds)), which still refers to section 18-18-407(2), without an updated citation to take account of the fact that, in 2013, the definition was revised and relocated to section 18-18-407(1)(g)(I)).

2. The term "school vehicle" is defined, for purposes of traffic and vehicle offenses, in section 42-1-102(88.5), C.R.S. 2015 (vehicles and traffic).

F:255 ORDER

+ "Order" means a prescription order which is any order, other than a chart order, authorizing the dispensing of drugs or devices that is written, mechanically produced, computer generated, transmitted electronically or by facsimile, or produced by other means of communication by a practitioner and that includes the name or identification of the patient, the date, the symptom or purpose for which the drug is being prescribed, if included by the practitioner at the patient's authorization, and sufficient information for compounding, dispensing, and labeling; or a chart order which is an order for inpatient drugs or medications to be dispensed by a pharmacist, or pharmacy intern under the direct supervision of a pharmacist, which is to be administered by an authorized person only during the patient's stay in a hospital facility. It shall contain the name of the patient and of the medicine ordered and such directions as the practitioner may prescribe concerning strength, dosage, frequency, and route of administration.

COMMENT

1. *See* § 18-18-102(23), C.R.S. 2015 (controlled substances offenses).

2. + In 2015, the Committee revised this instruction to accurately reflect the statutory language (by removing the bracketing that appeared in COLJI-Crim. F:255 (2014)).

F:256 OWNER OR OWNS

"Owner" or "owns" means any person, firm, corporation, or organization owning, possessing, harboring, keeping, having financial or property interest in, or having control or custody of a domestic animal, including a dangerous dog.

COMMENT

1. *See* § 18-9-204.5(2)(e), C.R.S. 2015 (unlawful ownership of a dangerous dog).

2. *See* Instruction F:84 (defining "dangerous dog"); Instruction F:107 (defining "domestic animal").

F:257 PALLIATIVE CARE

"Palliative care" means medical care and treatment provided by a licensed medical caregiver to a patient with an advanced chronic or terminal illness whose condition may not be responsive to curative treatment and who is, therefore, receiving treatment that relieves pain and suffering and supports the best possible quality of his [her] life.

COMMENT

1. *See* § 18-3-104(4)(b)(III), C.R.S. 2015.

F:258 PARENT

"Parent" means a custodial mother or father of a patient under the age of eighteen years, any person having custody of a patient under the age of eighteen years, or any person serving as a legal guardian for a patient under the age of eighteen years.

COMMENT

1. *See* Colo. Const. art. XVIII, § 14(1)(c) (medical marijuana).

+ F:258.5 PARTY OFFICER

"Party officer" means a person who holds any position or office in a political party, whether by election, appointment, or otherwise.

COMMENT

1. *See* § 18-8-301(2), C.R.S. 2015.

2. + The Committee added this instruction in 2015.

F:259 PATIENT

"Patient" means a person who has a debilitating medical condition.

COMMENT

1. *See* Colo. Const. art. XVIII, § 14(1)(d) (medical marijuana).

2. *See* Instruction F:89 (defining "debilitating medical condition").

F:260 PATTERN

Manufacture, sale, dispensing, or distribution forms a "pattern" if it embraces criminal acts which have the same or similar purposes, results, participants, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated events.

COMMENT

1. *See* § 18-18-407(2)(d), C.R.S. 2015 (controlled substances, special offender).

F:261 PATTERN OF RACKETEERING ACTIVITY

"Pattern of racketeering activity" means engaging in at least two acts of racketeering activity which are related to the conduct of the enterprise, if at least one of such acts occurred in this state after July 1, 1981, and if the last of such acts occurred within ten years [(excluding any period of imprisonment)] after a prior act of racketeering activity.

COMMENT

1. *See* 18-17-103(3), C.R.S. 2015 (Colorado Organized Crime Control Act).

2. *See* Instruction F:307 (defining "racketeering activity").

F:262 PATTERN OF SEXUAL ABUSE

"Pattern of sexual abuse" means the commission of two or more incidents of sexual contact involving a child when such offenses are committed by an actor upon the same victim.

COMMENT

1. *See* § 18-3-401(2.5), C.R.S. 2015 (sexual offenses).

F:263 PEACE OFFICER

A person who is included within the provision[s] set forth below, and who meets all standards imposed by law as described in the provision[s] set forth below, is a "peace officer": [Insert the relevant definition(s), from sections 16-2.5-102 to 16-2.5-151].

COMMENT

1. *See* § 16-2.5-101, C.R.S. 2015.

F:264 PEACE OFFICER (RESISTING ARREST, OBSTRUCTING A PEACE OFFICER)

The term "peace officer" means a peace officer in uniform or, if out of uniform, one who has identified himself [herself] by exhibiting his [her] peace officer credentials as such peace officer to the person whose arrest is attempted.

COMMENT

1. *See* § 18-8-103(3), C.R.S. 2015 (stating that the definition is applicable to resisting arrest under this section, and obstructing under section 18-8-104, C.R.S. 2015).

F:265 PEACE OFFICER (DISARMING A PEACE OFFICER)

"Peace officer" means a peace officer in uniform or, if out of uniform, one who has identified himself by exhibiting his credentials as such peace officer to the person.

COMMENT

1. *See* § 18-8-116(3), C.R.S. 2015 (disarming a peace officer).

F:265.5 PECUNIARY BENEFIT

"Pecuniary benefit" means benefit in the form of money, property, commercial interests, or anything else, the primary significance of which is economic gain.

COMMENT

1. *See* § 18-1-901(3)(m), C.R.S. 2015.

2. *See* Instruction F:30 (defining "benefit").

+ F:265.7 PECUNIARY BENEFIT (BRIBERY AND CORRUPT INFLUENCES)

"Pecuniary benefit" is benefit in the form of money, property, commercial interests, or anything else the primary significance of which is economic gain.

COMMENT

1. *See* § 18-8-301(3), C.R.S. 2015.

2. Although this instruction is virtually identical to Instruction F:265.5 (defining "pecuniary benefit"), the Committee has created a separate instruction because the General Assembly specifically created this definition to apply to offenses involving bribery and corrupt influences. *See* § 18-8-301.

3. + The Committee added this instruction in 2015.

F:266 PECUNIARY VALUE

"Pecuniary value" means anything of value in the form of money, a negotiable instrument, or a commercial interest or anything else, the primary significance of which is economic advantage; or any other property or service that has a value in excess of one hundred dollars.

COMMENT

1. *See* § 18-17-105(4), C.R.S. 2015 (Colorado Organized Crime Control Act).

F:267 PERSON (HOMICIDE)

"Person," when referring to the victim of a homicide, means a human being who had been born and was alive at the time of the homicidal act.

COMMENT

1. *See* § 18-3-101(2), C.R.S. 2015.

2. *See People v. Lage*, 232 P.3d 138, 140 (Colo. App. 2009) (unborn child was not a "person" within the meaning of section 18-3-101(2)); *see also* Instruction F:20 (defining "another person" as including a fetus born dead, but only for purposes of the offense of concealing a death in violation of section 18-8-109, C.R.S. 2015).

F:268 PERSON (CONTROLLED SUBSTANCES OFFENSES)

"Person" means an individual, corporation, business trust, estate, trust, partnership, association, joint venture, government or governmental subdivision or agency, or any other legal or commercial entity.

COMMENT

1. *See* § 18-18-102(25), C.R.S. 2015.

2. *See* Instruction F:162 (defining "government").

F:269 PERSON (RETAIL SALE OF METHAMPHETAMINE PRECURSOR DRUGS)

"Person" means an individual who owns, operates, is employed by, or is an agent of a store.

COMMENT

1. *See* § 18-18-412.8(4)(b), C.R.S. 2015.

F:270 PERSONAL IDENTIFICATION CODE

"Personal identification code" means any grouping of letters, numbers, or symbols assigned to the account holder of a financial transaction device by the issuer to permit authorized electronic use of that financial transaction device.

COMMENT

1. *See* § 18-5-701(5), C.R.S. 2015 (financial transaction device crimes).

2. *See* Instruction F:153 (defining "financial transaction device"); Instruction F:189 (defining "issuer").

F:271 PERSONAL IDENTIFICATION NUMBER

"Personal identification number" means a number assigned to an account holder by an issuer to permit authorized use of an account or financial device.

COMMENT

1. *See* 18-5-901(12), C.R.S. 2015 (identity theft and related offenses).

2. *See* Instruction F:150 (defining "financial device"); Instruction F:243 (defining "number").

F:272 PERSONAL IDENTIFYING INFORMATION

"Personal identifying information" means information that may be used, alone or in conjunction with any other information, to identify a specific individual, including but not limited to a name; a date of birth; a social security number; a password; a pass code; an official, government-issued driver's license or identification card number; a government passport number; biometric data; or an employer, student, or military identification number.

COMMENT

1. *See* § 18-5-901(13), C.R.S. 2015 (identity theft and related offenses); § 18-5-113(3), C.R.S. 2015 (criminal impersonation, incorporating this definition by reference).

2. *See* Instruction F:164 (defining "government"); Instruction F:243 (defining "number").

F:273 PERSON WITH A DISABILITY

"Person with a disability" means any person who is [impaired because of [the [loss] [permanent loss of use] of a [hand] [foot]] [[blindness] [the permanent impairment of vision of both eyes to such a degree as to constitute virtual blindness]] [unable to [walk] [see] [hear] [speak]] [unable to breathe without mechanical assistance] [a person with an intellectual and developmental disability] [a person with a mental illness] [mentally impaired] [blind] [receiving care and treatment for a developmental disability under [insert description of relevant provision from Article 10.5 of Title 27]].

COMMENT

1. *See* § 18-6.5-102(11)(a-h), C.R.S. 2015.

2. *See* Instruction F:35 (defining "blind"); Instruction F:98 (defining "developmental disability"); Instruction F:184 (defining "intellectual and developmental disability"); Instruction F:228 (defining "mentally impaired"); Instruction F:274 (defining "person with a mental illness").

F:274 PERSON WITH A MENTAL ILLNESS

"Person with a mental illness" means a person with one or more substantial disorders of the cognitive, volitional, or emotional processes that grossly impairs judgment or capacity to recognize reality or to control behavior.

A developmental disability is insufficient to either justify or exclude a finding of mental illness.

COMMENT

1. *See* § 18-6.5-102(11)(e), C.R.S. 2015 (defining "a person with a disability," for purposes of defining the terms "at-risk adult" and "at-risk juvenile," and incorporating the above definition from section 27-65-102(14), C.R.S. 2015).

2. *See* Instruction F:98 (defining "developmental disability").

F:275 PHARMACY

"Pharmacy" means any registered pharmacy outlet where prescriptions are compounded and dispensed.

COMMENT

1. *See* § 18-18-102(27), C.R.S. 2015 (controlled substances offenses; incorporating the definition of "prescription drug outlet" as defined in 12-42.5-102(35), C.R.S. 2015).

2. *See* § 12-42.5-102(7)(a), C.R.S. 2015 ("'Compounding' means the preparation, mixing, assembling, packaging, or labeling of a drug or device").

F:276 PHOTOGRAPH

"Photograph" includes a photograph, motion picture, videotape, live feed, print, negative, slide, or other mechanically, electronically, or chemically produced or reproduced visual material.

COMMENT

1. *See* § 18-3-405.6(3), C.R.S. 2015 (invasion of privacy for sexual gratification).

+ F:276.5 PHOTOGRAPH (CRIMINAL INVASION OF PRIVACY)

"Photograph" includes a photograph, motion picture, videotape, live feed, print, negative, slide, or other mechanically, electronically, digitally, or chemically reproduced visual material.

COMMENT

1. *See* § 18-7-801(3), C.R.S. 2015.

2. Although this instruction is virtually identical to Instruction F:276 (defining "photograph"), the Committee has created a separate instruction because the General Assembly specifically created this definition to apply to the offense of criminal invasion of privacy. *See* § 18-7-801(3) (specifying that this definition applies "[f]or the purposes of this section").

3. + The Committee added this instruction in 2015.

F:277 PHYSICAL EVIDENCE

"Physical evidence" includes any article, object, document, record, or other thing of physical substance.

COMMENT

1. *See* § 18-8-610(2), C.R.S. 2015 (tampering with physical evidence).

F:278 PHYSICALLY HELPLESS

"Physically helpless" means unconscious, asleep, or otherwise unable to indicate willingness to act.

COMMENT

1. *See* § 18-3-401(3), C.R.S. 2015 (sexual offenses).

F:279 PHYSICIAN

"Physician" means a doctor of medicine who maintains, in good standing, a license to practice medicine issued by the state of Colorado.

COMMENT

1. *See* Colo. Const. art. XVIII, § 14(1)(e) (medical marijuana).

F:280 POSITION OF TRUST

One in a "position of trust" includes, but is not limited to, any person who is a parent or acting in the place of a parent and charged with any of a parent's rights, duties, or responsibilities concerning a child, including a guardian or someone otherwise responsible for the general supervision of a child's welfare, or a person who is charged with any duty or responsibility for the health, education, welfare, or supervision of a child, including foster care, child care, family care, or institutional care, either independently or through another, no matter how brief, at the time of an unlawful act.

COMMENT

1. *See* § 18-3-101(2.5), C.R.S. 2015 (homicide and related offenses); § 18-3-401(3.5), C.R.S. 2015 (sexual offenses Article 3, Part 4); § 18-6-401(7)(e)(I), C.R.S. 2015 (child abuse).

2. In *People v. Roggow*, 2013 CO 70, ¶ 15, 318 P.3d 446, 450, the supreme court analyzed the definition of "position of trust" and held as follows:

> We conclude that the statutory definition of "position of trust" in section 18–3–401(3.5) expressly includes two general categories of persons: (1) persons who are parents or acting in the place of parents, and (2) persons who are charged with a duty or responsibility for the health, education, welfare, or supervision [of] the child. However, these categories are only illustrative, and the broad definition of position of trust adopted by the legislature "is not limited to" these categories. Rather, these general categories reflect the General Assembly's overarching intent to target those offenders who are entrusted with special access to a child victim and who exploit that access to commit an offense against the child. Thus, we hold that for purposes of section 18–3–405.3, a defendant need not be expressly charged with a particular duty or responsibility over the child at the time of the unlawful act in order to occupy a position of trust. Rather, a defendant may occupy a position of trust with respect to the victim where an existing relationship or other conduct or circumstances

establish that the defendant is entrusted with special access to the child victim.

3. *See Pellman v. People*, 252 P.3d 1122, 1125 (Colo. 2011) ("[A] defendant need not be performing a specific supervisory task at the time of the unlawful act in order to occupy a position of trust. Instead, a defendant may assume a position of trust through an ongoing and continuous supervisory relationship with the victim.").

F:281 POSSESSION

Possession constitutes a "voluntary act" if the actor was aware of his [her] physical possession or control thereof for a sufficient period to have been able to have terminated it.

COMMENT

1. *See* § 18-1-501(9), C.R.S. 2015 (defining "possession" in the context of a "voluntary act").

2. *See* Instruction F:391 (defining "voluntary act").

3. *See People v. Martinez*, 780 P.2d 560, 561 (Colo. 1989) (explaining, in the context of reviewing judgment of acquittal for the offense of possession of a weapon by a previous offender, that: "In [*People v. Garcia*, 595 P.2d 228, 231 n.4 (Colo. 1979)], we did not include the requirement of exclusive control in our definition of 'possession.' We believe that imposing the requirement of exclusive control alters the generally accepted meaning of the term, making it both unduly restrictive and a potential source of confusion for jurors.")+.

4. + An earlier version of this instruction stated that "'possession' means actual or physical control" over an item. *See* COLJI-Crim. F:199 (2008). Presumably, that instruction relied on *People v. Garcia*, 595 P.2d 228, 231 (Colo. 1979), which held that "[t]he commonsense definition of "possession" as it is used in [the statute prohibiting the use of weapons], is the actual or physical control of a firearm." But following the publication of the 2008 instructions, the court of appeals recognized that the supreme court's opinion in *Garcia* was narrow. *People v. Warner*, 251 P.3d 556, 565 (Colo. App. 2010) ("Defendant relies on *People v. Garcia* for the proposition that possession of a weapon requires 'actual or physical control of a firearm.' However, *Garcia* is distinguishable because there the supreme court limited its holding to possession of a weapon by an intoxicated person." (citation omitted)). In any event, because Chapter F is reserved for terms that are defined by statute, the Committee has not included the "actual or physical control" language in its model instruction.

5. + In 2015, the Committee removed a citation to *People v. Warner*, *supra*, from Comment 3, and it added Comment 4.

+ F:281.5 POTENTIAL CONFLICTING INTEREST

A "potential conflicting interest" exists when the public servant is a director, president, general manager, or similar executive officer or owns or controls directly or indirectly a substantial interest in any nongovernmental entity participating in the transaction.

COMMENT

1. *See* § 18-8-308(2), C.R.S. 2015.

2. + The Committee added this instruction in 2015.

F:282 PRACTITIONER

"Practitioner" means a physician, a podiatrist, dentist, optometrist, veterinarian, researcher, pharmacist, pharmacy, hospital or other person licensed, registered, or otherwise permitted, by this state, to distribute, dispense, conduct research with respect to, administer, or to use in teaching or chemical analysis, a controlled substance in the course of professional practice or research.

COMMENT

1. *See* § 18-18-102(29), C.R.S. 2015 (controlled substances offenses).

+ F:282.5 PREGNANCY

"Pregnancy" means the presence of an implanted human embryo or fetus within the uterus of a woman.

COMMENT

1. *See* § 18-3.5-101(4), C.R.S. 2015.

2. + The Committee added this instruction in 2015.

F:283 PREMISES (BURGLARY AND RELATED OFFENSES)

"Premises" means any real estate and all improvements erected thereon.

COMMENT

1. *See* § 18-4-201(1), C.R.S. 2015.

F:284 PREMISES (SECOND AND THIRD DEGREE CRIMINAL TRESPASS)

"Premises" means real property, buildings, and other improvements thereon, and the stream banks and beds of any nonnavigable fresh water streams flowing through such real property.

COMMENT

1. *See* § 18-4-504.5, C.R.S. 2015.

F:285 PRIMARY CARE-GIVER

"Primary care-giver" means a person, other than the patient and the patient's physician, who is eighteen years of age or older and has significant responsibility for managing the well-being of a patient who has a debilitating medical condition.

COMMENT

1. *See* Colo. Const. art. XVIII, § 14(1)(f) (medical marijuana).

2. *See* Instruction F:89 (defining "debilitating medical condition"); Instruction F:259 (defining "patient"); Instruction F:279 (defining "physician").

3. *See People v. Clendenin*, 232 P.3d 210, 214 (Colo. App. 2009) ("[W]e conclude that the act of supplying marijuana for medical use, by itself, is insufficient to constitute significant management responsibility for a patient's well-being, and consequently is insufficient to constitutionally qualify a person doing so as a 'primary care-giver.'").

+ F:285.5 PRIVATE EMPLOYMENT AGENCY

"Private employment agency" means any nongovernmental person, firm, association, or corporation which secures or attempts to secure employment, arranges an interview between an applicant and a specific employer other than itself, or, by any form of advertising or representation, holds itself out to a prospective applicant as able to secure employment for the applicant with any person, firm, association, or corporation other than itself, or engages in employment counseling and in connection therewith supplies or represents that it is able to supply employers or available jobs, where an applicant may become liable for the payment of a fee, either directly or indirectly.

"Private employment agency" also means any nongovernmental person, firm, association, or corporation which provides a list of potential employers or available jobs in a publication, if the primary purpose of the publication, as represented by the provider, is to enable applicants to find employment or to list available jobs and if the applicant is charged more than twenty dollars within any period of time of thirty days or less for access to the publication or revisions or updates thereof, unless the listings of all jobs in the publication are initiated by employers rather than the provider.

COMMENT

1. *See* § 18-5-307(c)(I-II), C.R.S. 2015 (prohibited practice by a private employment agency).

2. *See* Instruction F:21.5 (defining "applicant"); Instruction F:121.5 (defining "employment").

3. + The Committee added this instruction in 2015.

F:286 PRODUCE

"Produce" includes alter, authenticate, or assemble.

COMMENT

1. *See* § 18-5-101(7.5), C.R.S. 2015 (forgery, simulation, impersonation, and related offenses).

F:287 PRODUCTION

"Production," includes the manufacturing of a controlled substance and the planting, cultivating, growing, or harvesting of a plant from which a controlled substance is derived.

COMMENT

1. *See* § 18-18-102(30), C.R.S. 2015 (controlled substances offenses).

F:288 PROPER AUTHORIZATION

"Proper Authorization" means a written authorization signed by the patient or his [her] duly assigned representative; or an appropriate order of court; or authorized possession pursuant to law or regulation for claims processing, possession for medical audit or quality assurance purposes, possession by a consulting physician to the patient, or possession by hospital personnel for record-keeping and billing purposes; or authorized possession pursuant to [insert description(s) of relevant provision(s) from sections 18-3-415.5 (acquired immune deficiency syndrome testing for persons charged with certain sexual offenses), 18-7-201.5 (acquired immune deficiency syndrome testing for persons convicted of prostitution), 18-7-205.5 (acquired immune deficiency syndrome testing for persons convicted of patronizing a prostitute), 25-1-122 (named reporting of certain diseases and conditions), or 30-10-606(6) (coroner inquiries)]; or authorized possession by a law enforcement officer or agency, acting in official capacity and pursuant to an official investigation.

COMMENT

1. *See* § 18-4-412(2)(c), C.R.S. 2015 (theft of medical records).

F:289 PROPERTY (COMPUTER CRIME)

"Property" includes, but is not limited to, financial instruments, information, including electronically produced data, and computer software and programs in either machine or human readable form, and any other tangible or intangible item of value.

COMMENT

1. *See* 18-5.5-101(8), C.R.S. 2015 (computer crime).

2. *See* Instruction F:63 (defining "computer program"); Instruction F:64 (defining "computer software"); Instruction F:152 (defining "financial instrument").

F:290 PROPERTY (REFUSAL TO PERMIT INSPECTIONS)

"Property" means any real or personal property, including books, records, and documents which are owned, possessed, or otherwise subject to the control of the defendant.

COMMENT

1. *See* § 18-8-106(2), C.R.S. 2015 (refusal to permit inspections).

F:291 PROPERTY OF ANOTHER

Property is that "of another" if anyone other than the defendant has a possessory or proprietary interest therein.

COMMENT

1. *See* § 18-4-101(3), C.R.S. 2015 (offenses against property in Article 4).

2. In *People v. Clayton*, 728 P.2d 723, 726 (Colo. 1986), the supreme court concluded that this definition did not apply to the theft statute and held that, "without specific statutory authority, the unauthorized taking by a partner of partnership assets is not a crime." However, in 1987, the General Assembly amended the theft statute and added a definition that mirrors the language of section 18-4-101(3). *See* § 18-4-401(1.5), C.R.S. 2015; *see also* Instruction F:18 (defining a thing of value belonging to "another," for purposes of the theft statute).

3. *See People ex. rel. VanMeveren v. District Court*, 619 P.2d 494, 496-99 (Colo. 1980) (even though defendant held legal title to motor home, credit union's security interest constituted a sufficient proprietary interest to render defendant subject to prosecution for first-degree arson committed again "property of another");*People v. Sullivan*, 53 P.3d 1181, 1183 (Colo. App. 2002) (evidence of wife's ownership of clothing was sufficient to support defendant's conviction for second degree arson committed against "property of another"; for purposes of this determination, it was immaterial that the wife's clothes may have been acquired by her during the course of the marriage and, therefore, constituted a part of the parties' "marital property" under the dissolution statute); *People v. Espinoza*, 989 P.2d 178, 180 (Colo. App. 1999) (building was the property of "another," within the meaning of the first degree arson statute, where the parties stipulated that the prior owner had a proprietary interest in the building and was still owed money by the defendant).

+ F:291.5 PROSECUTOR

"Prosecutor" means the attorney general, deputy attorney general, assistant attorney general, district attorney, deputy district attorney, assistant district attorney, appointed special prosecutor, city attorney, United States attorney, deputy United States attorney, assistant United States attorney, or special assistant United States attorney.

COMMENT

1. *See* § 18-8-616(3), C.R.S. 2015.

2. + In 2015, the Committee added this instruction to reflect the enactment of section 18-8-616(1), C.R.S. 2015 (retaliation against a prosecutor). *See* Ch. 239, sec. 1, § 18-8-616(3), 2015 Colo. Sess. Laws 884, 885.

F:292 PROSTITUTION BY A CHILD

"Prostitution by a child" means either a child performing or offering or agreeing to perform any act of sexual intercourse, fellatio, cunnilingus, masturbation, or anal intercourse with any person not the child's spouse in exchange for money or other thing of value or any person performing or offering or agreeing to perform any act of sexual intercourse, fellatio, cunnilingus, masturbation, or anal intercourse with any child not the person's spouse in exchange for money or other thing of value.

COMMENT

1. *See* § 18-7-401(6), C.R.S. 2015.

2. *See* Instruction F:16 (defining "anal intercourse"); Instruction F:81 (defining "cunnilingus"); Instruction F:147 (defining "fellatio"); Instruction F:219 (defining "masturbation").

F:293 PROSTITUTION OF A CHILD

"Prostitution of a child" means either inducing a child to perform or offer or agree to perform any act of sexual intercourse, fellatio, cunnilingus, masturbation, or anal intercourse with any person not the child's spouse by coercion or by any threat or intimidation or inducing a child, by coercion or by any threat or intimidation or in exchange for money or other thing of value, to allow any person not the child's spouse to perform or offer or agree to perform any act of sexual intercourse, fellatio, cunnilingus, masturbation, or anal intercourse with or upon such child. Such coercion, threat, or intimidation need not constitute an independent criminal offense and shall be determined solely through its intended or its actual effect upon the child.

COMMENT

1. *See* § 18-7-401(7), C.R.S. 2015.

2. *See* Instruction F:16 (defining "anal intercourse"); Instruction F:81 (defining "cunnilingus"); Instruction F:147 (defining "fellatio"); Instruction F:219 (defining "masturbation").

3. *See People v. Madden*, 111 P.3d 452, 459-60 (Colo. 2005) (the General Assembly did not intend to remove the commercial aspect of prostitution when it enacted the definition of "prostitution of a child" in section 18-7-401(7); "the crime of 'patronizing a prostituted child' requires an exchange of something of value, a commercial transaction. Such a commercial transaction must occur between the patron — i.e., the person having the sexual contact with the child — or between the patron and the one inducing the child to participate in the sexual act, the pimp. It is precisely this exchange of something of value between the patron and either the pimp or the child that distinguishes this crime from that of sexual assault.").

F:293.5 PROTECTED PERSON

"Protected person" means the person or persons identified in the protection order as the person or persons for whose benefit the protection order was issued.

COMMENT

1. *See* 18-6-803.5(1.5)(a), C.R.S. 2015 (violation of a protection order).

F:294 PROTECTION ORDER

"Protection order" means any order that prohibits the restrained person from contacting, harassing, injuring, intimidating, molesting, threatening, or touching any protected person or protected animal, or from entering or remaining on premises, or from coming within a specified distance of a protected person or protected animal or premises or any other provision to protect the protected person or protected animal from imminent danger to life or health, that is issued by a court of this state or a municipal court.

COMMENT

1. *See* § 18-6-803.5(1.5)(a.5)(I), C.R.S. 2015 (violation of a protection order).

2. *See* Instruction F:319 (defining "restrained person").

3. The question of whether a protection order was issued by a court of this state or a municipal court pursuant to one of the provisions identified in subsections (A), (B), (C), or (D) of section 18-6-803.5(a.5)(I) is a matter of law for the court to determine. Likewise, the question of whether a protection order is an order that amends, modifies, supplements, or supersedes an initial protection order, as described in subsection (II) of the same statute, is a question of law for the court to determine.

F:295 PSYCHOTHERAPIST

"Psychotherapist" means any person who performs or purports to perform psychotherapy, whether or not such person is licensed or certified by the state.

COMMENT

1. *See* § 18-3-405.5(4)(b), C.R.S. 2015 (sexual assault on a client by a psychotherapist).

F:296 PSYCHOTHERAPY

"Psychotherapy" means the treatment, diagnosis, or counseling in a professional relationship to assist individuals or groups to alleviate mental disorders, understand unconscious or conscious motivation, resolve emotional, relationship, or attitudinal conflicts, or modify behaviors which interfere with effective emotional, social, or intellectual functioning.

COMMENT

1. *See* § 18-3-405.5(4)(c), C.R.S. 2015 (sexual assault on a client by a psychotherapist).

F:297 PUBLIC

"Public" means offered or available to the public generally, either free or upon payment of a fare, fee, rate, or tariff, or offered or made available by a school or school district to pupils regularly enrolled in public or nonpublic schools in preschool through grade twelve.

COMMENT

1. *See* § 18-9-115(2), C.R.S. 2015 (endangering public transportation).

F:298 PUBLIC BUILDING

The term "public building" includes any premises being temporarily used by a public officer or employee in the discharge of his official duties.

COMMENT

1. *See* § 18-9-110(7), C.R.S. 2015 (public buildings - trespass, interference).

F:299 PUBLIC CONVEYANCE

"Public conveyance" includes a passenger or freight train, airplane, bus, truck, car, boat, tramway, gondola, lift, elevator, escalator, or other device intended, designed, adapted, and used for the public carriage of persons or property.

COMMENT

1. *See* § 18-9-115(3), C.R.S. 2015 (endangering public transportation).

2. *See* Instruction F:297 (defining "public").

F:300 PUBLIC HOUSING DEVELOPMENT

"Public housing development" means any low-income housing project of any state, county, municipal, or other governmental entity or public body owned and operated by a public housing authority that has an on-site manager. "Public housing development" does not include single-family dispersed housing or small or large clusters of dispersed housing having no on-site manager.

COMMENT

1. *See* § 18-18-407(1)(g)(III), C.R.S. 2015 (controlled substances, special offender).

F:301 PUBLIC OR PRIVATE PROPERTY

"Public or private Property" includes, but is not limited to, the right-of-way of any road or highway, any body of water or water course, including frozen areas thereof, or the shores or beaches thereof, any park, playground or building, any refuge, conservation, or recreation area, and any residential, farm, or ranch properties or timberlands.

COMMENT

1. *See* § 18-4-511(3)(b), C.R.S. 2015 (littering).

2. *See* Instruction F:197 (defining "litter").

F:302 PUBLIC LAND SURVEY MONUMENT

"Public land survey monument" means any land boundary monument established on the ground by a cadastral survey of the United States government and any mineral survey monument established by a United States mineral surveyor and made a part of the United States public land records.

COMMENT

1. *See* § 18-4-508, C.R.S. 2015 (defacing, destroying, or removing landmarks, monuments, or accessories, incorporating this definition from section 38-53-103(18), C.R.S. 2015).

F:303 PUBLIC PLACE

"Public place" means a place to which the public or a substantial number of the public has access, and includes but is not limited to highways, transportation facilities, schools, places of amusement, parks, playgrounds, and the common areas of public and private buildings and facilities.

COMMENT

1. *See* § 18-1-901(3)(n), C.R.S. 2015.

F:304 PUBLIC RECORD

The term "public record" includes all official books, papers, or records created, received, or used by or in any governmental office or agency.

COMMENT

1. *See* § 18-8-114(2), C.R.S. 2015.

F:305 PUBLIC SAFETY ORDER

A "public safety order" is an order designed to prevent or control disorder or promote the safety of persons or property issued by an authorized member of the police, fire, military, or other forces concerned with the riot.

COMMENT

1. *See* § 18-9-105, C.R.S. 2015.

F:306 PUBLIC SERVANT

"Public servant" means any officer or employee of government, whether elected or appointed, and any person participating as an advisor, consultant, process server, or otherwise in performing a governmental function, but the term does not include witnesses.

COMMENT

1. *See* § 18-1-901(3)(o), C.R.S. 2015.

2. *See* Instruction F:162 (defining "government").

3. + *See also* § 18-8-101(3), C.R.S. 2015 (incorporating this definition for all offenses in Title 18, Article 8, unless the context requires otherwise).

4. + In 2015, the Committee added Comment 3.

+ F:306.5 PUBLIC SERVANT (BRIBERY AND CORRUPT INFLUENCES)

"Public servant" means any officer or employee of government, whether elected or appointed, and any person participating as an advisor, consultant, process server, or otherwise in performing a governmental function, but the term does not include witnesses.

"Public servant" includes persons who presently occupy the position of a public servant or have been elected, appointed, or designated to become a public servant although not yet occupying that position.

COMMENT

1. *See* § 18-8-301(4), C.R.S. 2015 (incorporating the definition of "public servant" in section 18-8-101(3), C.R.S. 2015, which, in turn, incorporates the definition from section 18-1-901(3)(o), C.R.S. 2015, found in Instruction F:306).

2. The first paragraph of this definition is identical to that in Instruction F:306 (defining "public servant"); the second paragraph is unique to the chapter on bribery and corrupt influences. *See* § 18-8-301(4).

3. + The Committee added this instruction in 2015.

F:307 RACKETEERING ACTIVITY

"Racketeering activity" means to commit, to attempt to commit, to conspire to commit, or to solicit, coerce, or intimidate another person to commit [insert name(s) of qualifying predicate offense(s) from section 18-17-103(5)(a), (b)(I-XVII), C.R.S. 2015].

COMMENT

1. *See* 18-17-103(5), C.R.S. 2015 (Colorado Organized Crime Control Act).

+ F:307.5 REAL PROPERTY

"Real property" means land and any interest or estate in land [and includes a manufactured home].

COMMENT

1. *See* § 18-5-801(2), C.R.S. 2015.

2. If necessary, draft an instruction defining the term "manufactured home" based on section 42-1-102(106)(b), C.R.S. 2015.

3. + The Committee added this instruction in 2015.

F:308 RECKLESSLY

A person acts "recklessly" when he [she] consciously disregards a substantial and unjustifiable risk that a result will occur or that a circumstance exists.

COMMENT

1. *See* § 18-1-501(8), C.R.S. 2015.

F:308.5 REGISTRY IDENTIFICATION CARD

"Registry identification card" means that document, issued by the state health agency, which identifies a patient authorized to engage in the medical use of marijuana and such patient's primary care-giver, if any has been designated.

COMMENT

1. *See* Colo. Const. Art. XVIII, § 14(1)(g).

F:309 REMAINS UNLAWFULLY

COMMENT

1. *See* Instruction F:126 (defining the terms "enters unlawfully" and "remains unlawfully").

F:310 REMUNERATION

"Remuneration" means anything of value, including money, real property, tangible and intangible personal property, contract rights, choses in action, services, and any rights of use or employment or promises or agreements connected therewith.

COMMENT

1. *See* § 18-18-102(31), C.R.S. 2015 (controlled substances offenses).

2. *See* Instruction F:21 (defining "anything of value" by reference to Instruction F:371 (defining "thing of value")).

F:311 RENDER ASSISTANCE

"Render assistance" means to harbor or conceal the other; or harbor or conceal the victim or a witness to the crime; or warn such person of impending discovery or apprehension, except that this does not apply to a warning given in an effort to bring such person into compliance with the law; or provide such person with money, transportation, weapon, disguise, or other thing to be used in avoiding discovery or apprehension; or by force, intimidation, or deception, obstruct anyone in the performance of any act which might aid in the discovery, detection, apprehension, prosecution, conviction, or punishment of such person; or conceal, destroy, or alter any physical or testimonial evidence that might aid in the discovery, detection, apprehension, prosecution, conviction or punishment of such person.

COMMENT

1. *See* § 18-8-105(2), C.R.S. 2015 (accessory to crime); § 18-8-201(3), C.R.S. 2015 ("'Assist' includes any activity characterized as 'rendering assistance' in section 18-8-105.").

+ F:311.5 RENT

"Rent" means any moneys or any other thing of value received as a payment or as a deposit for the privilege of living in or using real property.

COMMENT

1. *See* § 18-5-801(3), C.R.S. 2015.

2. + The Committee added this instruction in 2015.

F:312 REPEATED OR REPEATEDLY

"Repeated" or "repeatedly" means on more than one occasion.

COMMENT

1. *See* § 18-3-602(2)(d), C.R.S. 2015 (stalking).

+ F:312.5 REPRESENT (MONEY LAUNDERING)

"Represent" includes, but is not limited to, the making of a representation by a peace officer, a federal officer, or another person acting at the direction of, or with the approval of, a peace officer or federal officer.

COMMENT

1. *See* 18-5-309(3)(d), C.R.S. 2015 (money laundering).

2. + The Committee added this instruction in 2015.

F:313 REPRESENTING

"Representing" means describing, depicting, containing, constituting, reflecting, or recording.

COMMENT

1. *See* § 18-4-408(1)(c), C.R.S. 2015 (theft of trade secrets).

F:314 RESCUE SPECIALIST

"Rescue specialist" means a member of a public or private rescue agency, whether that person is a volunteer or receives compensation for services rendered as such rescue specialist.

COMMENT

1. *See* § 18-8-104(5)(b), C.R.S. 2015.

F:315 RESEARCHER

"Researcher" means any person licensed by the Department of Public Health and Environment to experiment with, study, or test any controlled substance within this state and includes analytical laboratories.

COMMENT

1. *See* § 18-18-102(32), C.R.S. 2015 (controlled substances offenses).

F:316 RESIDENCE

"Residence" means any single-family or multi-family dwelling unit that is not being used as a targeted occupant's sole place of business or as a place of public meeting.

COMMENT

1. *See* § 18-9-108.5(2)(a), C.R.S. 2015 (targeted residential picketing).

F:317 RESIDENTIAL MORTGAGE LOAN

"Residential mortgage loan" means a loan or agreement to extend credit, made to a person and secured by a mortgage or lien on residential real property, including, but not limited to, the refinancing or renewal of a loan secured by residential real property.

COMMENT

1. *See* § 18-4-401(9)(e)(II), C.R.S. 2015 (theft; sentence enhancement).

F:318 RESIDENTIAL REAL PROPERTY

"Residential real property" means real property used as a residence and containing no more than four families housed separately.

COMMENT

1. *See* § 18-4-401(9)(e)(III), C.R.S. 2015 (theft; sentence enhancement).

F:319 RESTRAINED PERSON

"Restrained person" means the person identified in the order as the person prohibited from doing the specified act[s].

COMMENT

1. *See* § 18-6-803.5(1.5)(c), C.R.S. 2015.

F:320 RESTRAINT

"Restraint" or "restrained" means any denial, revocation, or suspension of a person's license or privilege to drive a motor vehicle in this state or another state.

COMMENT

1. *See* § 42-2-138(4)(b), C.R.S. 2015.

F:321 RETAIL MARIJUANA STORE

"Retail marijuana store" means an entity licensed to purchase marijuana from marijuana cultivation facilities and marijuana and marijuana products from marijuana product manufacturing facilities and to sell marijuana and marijuana products to consumers.

COMMENT

1. *See* Colo. Const. Art. XVIII, § 16(2)(n).

2. *See* Instruction F:210 (defining "marijuana"); Instruction F:211 (defining "marijuana cultivation facility"); Instruction F:213 (defining "marijuana product manufacturing facility"); Instruction F:214 (defining "marijuana products").

F:322 RETAIL VALUE

"Retail value" means the counterfeiter's regular selling price for the goods or services that bear or are identified by a counterfeit mark.

In the case of items bearing a counterfeit mark that are components of a finished product, "retail value" means the counterfeiter's regular selling price for the finished product.

COMMENT

1. *See* § 18-5-110.5(3)(b), C.R.S. 2015 (trademark counterfeiting).

F:323 RETALIATE

"Retaliate" includes threats of kidnapping, death, serious bodily injury, or extreme pain.

COMMENT

1. *See* § 18-3-402(4)(c), C.R.S. 2015 (sexual assault).

2. The term "retaliation" has a different meaning in other contexts. *See* § 18-8-615, C.R.S. 2015 (retaliation against a judge); § 18-8-706, C.R.S. 2015 (retaliation against a witness or victim); Instructions 8:66, 8:70.

F:324 RIOT

"Riot" means a public disturbance involving an assemblage of three or more persons which, by tumultuous and violent conduct, creates grave danger of damage or injury to property or persons or substantially obstructs the performance of any governmental function.

COMMENT

1. *See* § 18-9-101(2), C.R.S. 2015.

F:325 SABOTAGE

"Sabotage" means intentionally tampering with an animal belonging to or owned by another person that has been registered, entered, or exhibited in any exhibition or raised for the apparent purpose of being entered in an exhibition.

COMMENT

1. *See* § 18-9-207(1)(c), C.R.S. 2015 (tampering with livestock).

2. *See* Instruction F:131 (defining "exhibition"); Instruction F:185 (defining "intentionally"); Instruction F:361 (defining "tamper").

F:326 SADOMASOCHISM

"Sadomasochism" means real or simulated flagellation or torture for the purpose of real or simulated sexual stimulation or gratification; or the real or simulated condition of being fettered, bound, or otherwise physically restrained for sexual stimulation or gratification of a person.

COMMENT

1. *See* § 18-6-403(2)(g), C.R.S. 2015 (sexual exploitation of a child).

F:327 SALE

"Sale" includes a barter, an exchange, or a gift, or an offer therefor, and each such transaction made by any person, whether as the principal, proprietor, agent, servant, or employee, with or without remuneration.

COMMENT

1. *See* § 18-18-403(1), C.R.S. 2015 (controlled substances).

2. *See* Instruction F:13 (defining "agent"); Instruction F:310 (defining "remuneration").

F:328 SALVIA DIVINORUM

"Salvia divinorum" means salvia divinorum, salvinorin A, and any part of the plant classified as salvia divinorum, whether growing or not, including the seeds thereof, any extract from any part of the plant, and any compound, manufacture, salts, derivative, mixture, or preparation of the plant, its seeds, or its extracts.

COMMENT

1. *See* § 18-18-102(33.5), C.R.S. 2015 (controlled substances offenses).

F:329 SCHOOL RESOURCE OFFICER

"School resource officer" means a peace officer who has specialized training, pursuant to a training curriculum approved by the Peace Officers Standards and Training Board, to work with school staff and students and who is assigned to a public school or charter school for the purpose of creating a safe learning environment and responding to all-hazard threats that may impact the school.

COMMENT

1. *See* § 18-12-105.5(3)(e), C.R.S. 2015 (exceptions to unlawfully carrying a weapon on school, college, or university grounds; incorporating section 22-32-109.1(1)(g.5), C.R.S. 2015).

2. *See* Instruction F:263 (defining "peace officer").

3. The definition includes language referring to the P.O.S.T. curriculum, from section 24-31-312, which is incorporated by section 22-32-109.1(1)(g.5).

+ F:329.5 SECURITY INTEREST

"Security interest" means an interest in personal property which secures payment or performance of an obligation.

COMMENT

1. *See* § 18-5-801(4), C.R.S. 2015.

2. + The Committee added this instruction in 2015.

F:330 SELF-INDUCED INTOXICATION

"Self-induced intoxication" means intoxication caused by substances that the defendant knows or ought to know have the tendency to cause intoxication and that he knowingly introduced or allowed to be introduced into his body.

COMMENT

1. *See* § 18-1-804(5), C.R.S. 2015.

2. *See* Instruction F:188 (defining "intoxication"); *see also* Instruction H:34 (voluntary intoxication).

F:331 SEMIAUTOMATIC ASSAULT WEAPON

"Semiautomatic assault weapon" means any semiautomatic center fire firearm that is equipped with a detachable magazine with a capacity of twenty or more rounds of ammunition.

COMMENT

1. See § 18-1.3-406(7)(b), C.R.S. 2015 (crime of violence sentence enhancement).

F:332 SERIOUS BODILY INJURY

"Serious bodily injury" means bodily injury which, either at the time of the actual injury or at a later time, involves a substantial risk of death, a substantial risk of serious permanent disfigurement, a substantial risk of protracted loss or impairment of the function of any part or organ of the body, or breaks, fractures, or burns of the second or third degree.

COMMENT

1. *See* § 18-1-901(3)(p), C.R.S. 2015; § 42-4-1601(4)(b), C.R.S. 2015 (defining the term identically, except that the provision uses the phrase "means injury" (without "bodily") and includes an "or" immediately before the words: "a substantial risk of protracted loss."

2. *See* Instruction F:36 (defining "bodily injury").

3. *See People v. Daniels*, 240 P.3d 409, 411 (Colo. App. 2009) ("[W]e . . . hold that 'of the second or third degree' in section 18-1-901(3)(p) refers only to burns and not to breaks or fractures. Accordingly, we conclude that *any* break or fracture is sufficient to establish 'serious bodily injury.'").

F:333 SERIOUS PHYSICAL HARM

"Serious physical harm" means any physical harm that [carries a substantial risk of death] [causes permanent maiming or that involves some temporary, substantial maiming] [causes acute pain of a duration that results in substantial suffering].

COMMENT

1. *See* § 18-9-202(1.6)(a), C.R.S. 2015 (cruelty to animals).

F:334 SERVICE ANIMAL

"Service animal" means any animal, the services of which are used to aid the performance of official duties by a peace officer, law enforcement agency, fire department, fire protection district, or governmental search and rescue agency.

COMMENT

1. *See* § 18-9-202(1)(c), C.R.S. 2015 (cruelty to a service animal; incorporating the above definition from section 18-1.3-602(3.5), C.R.S. 2015).

2. *See* Instruction F:17 (defining "animal").

F:335 SERVICES

"Services" includes, but is not limited to, computer time, data processing, and storage functions.

COMMENT

1. *See* 18-5.5-101(9), C.R.S. 2015 (computer crime).

+ F:335.5 SEXUAL ACTIVITY

"Sexual activity" means sexual contact, sexual intrusion, sexual penetration, sexual exploitation of a child, or an obscene performance.

COMMENT

1. *See* § 18-3-502(11), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:337 (defining "sexual contact"); Instruction F:340 (defining "sexual intrusion"); Instruction F:343 (defining "sexual penetration"); Instruction 6-4:17 (sexual exploitation of a child (explicit sexual conduct for sexually exploitative material)); Instruction 6-4:21 (sexual exploitation of a child (explicit sexual conduct for a performance)); *see also* § 18-7-101(2), (5), C.R.S. 2015 (defining "obscene" and "performance").

3. + The Committee added this instruction in 2015.

F:336 SEXUAL ACT WITH AN ANIMAL

"Sexual act with an animal" means an act between a person and an animal involving direct physical contact between the genitals of one and the mouth, anus, or genitals of the other.

A sexual act with an animal may be proven without allegation or proof of penetration.

The definition of "sexual act with an animal" does not include accepted animal husbandry practices.

COMMENT

1. *See* § 18-9-201(5), C.R.S. 2015 (cruelty to animals).

+ F:336.5 SEXUAL CONDUCT

"Sexual conduct" means sexual contact, sexual intrusion, or sexual penetration, as these terms are defined in these instructions.

"Sexual conduct" does not include acts of an employee of a correctional institution or a person who has custody of another person that are performed to carry out the necessary duties of the employee or the person with custody.

COMMENT

1. *See* § 18-7-701(2)(b), C.R.S. 2015.

2. *See* Instruction F:75.5 (defining "correctional institution"); Instruction F:337 (defining "sexual contact"); Instruction F:340 (defining "sexual intrusion"); Instruction F:343 (defining "sexual penetration").

3. + The Committee added this instruction in 2015.

F:337 SEXUAL CONTACT

"Sexual contact" means the knowing touching of the victim's intimate parts by the actor, or of the actor's intimate parts by the victim, or the knowing touching of the clothing covering the immediate area of the victim's or actor's intimate parts if that sexual contact is for the purposes of sexual arousal, gratification, or abuse.

COMMENT

1. *See* § 18-3-401(4), C.R.S. C.R.S. 2015.

2. *See* Instruction F:186 (defining "intimate parts").

F:338 SEXUAL EXCITEMENT

"Sexual excitement" means the real or simulated condition of human male or female genitals when in a state of real or simulated overt sexual stimulation or arousal.

COMMENT

1. *See* § 18-6-403(2)(h), C.R.S. 2015 (sexual exploitation of children).

F:339 SEXUAL INTERCOURSE (SEXUAL EXPLOITATION OF CHILDREN)

"Sexual intercourse" means real or simulated intercourse, whether genital-genital, oral-genital, anal-genital, or oral-anal between persons of the same or opposite sex, or between a human and an animal, or with an artificial genital.

COMMENT

1. *See* § 18-6-403(2)(i), C.R.S. 2015 (sexual exploitation of children).

F:340 SEXUAL INTRUSION

"Sexual intrusion" means any intrusion, however slight, by an object or any part of a person's body, except the mouth, tongue, or penis, into the genital or anal opening of another person's body if that sexual intrusion can reasonably be construed as being for the purposes of sexual arousal, gratification, or abuse.

COMMENT

1. *See* § 18-3-401(5), C.R.S. 2015.

F:341 SEXUALLY EXPLOITATIVE MATERIAL

"Sexually exploitative material" means any photograph, motion picture, video, + recording or broadcast of moving visual images, print, negative, slide, or other mechanically, electronically, chemically, or digitally reproduced visual material that depicts a child engaged in, participating in, observing, or being used for explicit sexual conduct.

COMMENT

1. *See* § 18-6-403(2)(j), C.R.S. 2015 (sexual exploitation of children).

2. *See* Instruction F:132 (defining "explicit sexual conduct"); Instruction F:389 (defining "video" and + "recording or broadcast").

3. + In 2015, the Committee modified this instruction to reflect a legislative amendment by replacing the words "video tape" with "recording or broadcast of moving visual images." In addition, the Committee modified the citation to Instruction F:389 that appears in the preceding Comment. *See* Ch. 274, sec. 1, § 18-6-403(2)(j), 2015 Colo. Sess. Laws 1113, 1115.

F:342 SEXUAL ORIENTATION

"Sexual orientation" means a person's actual or perceived orientation toward heterosexuality, homosexuality, bisexuality, or transgender status.

COMMENT

1. *See* § 18-9-121(5)(b), C.R.S. 2015.

F:343 SEXUAL PENETRATION

"Sexual penetration" means sexual intercourse, cunnilingus, fellatio, analingus, or anal intercourse. Emission need not be proved as an element of any sexual penetration. Any penetration during sexual intercourse, cunnilingus, fellatio, analingus, or anal intercourse, however slight, is sufficient.

COMMENT

1. *See* § 18-3-401(6), C.R.S. 2015.

2. *See* Instruction F:16 (defining "anal intercourse"); Instruction F:81 (defining "cunnilingus"); Instruction F:147 (defining "fellatio").

3. The term "analingus" is not defined by statute. *See, e.g.*, State v. Kelly, 728 S.W.2d 642, 648 (Mo. App. S.D. 1987) ("Apparently the term 'analingus' is not defined by Colorado statute. *Webster's Third New International Dictionary* defines analingus as follows: 'erotic stimulation achieved by mouth and anus.'").

F:344 SHORT RIFLE

"Short rifle" means a rifle having a barrel less than sixteen inches long or an overall length of less than twenty-six inches.

COMMENT

1. *See* § 18-12-101(1)(h), C.R.S. 2015 (offenses relating to firearms and weapons).

F:345 SHORT SHOTGUN

"Short shotgun" means a shotgun having a barrel or barrels less than eighteen inches long or an overall length of less than twenty-six inches.

COMMENT

1. *See* § 18-12-101(1)(i), C.R.S. 2015 (offenses relating to firearms and weapons).

F:346 SLUG

"Slug" means any object or article which, by virtue of its size, shape, or any other quality, is capable of being inserted, deposited, or otherwise used in a coin machine as an improper but effective substitute for a genuine coin, bill, or token, and of thereby enabling a person to obtain without valid consideration the property or service sold through the machine.

COMMENT

1. *See* § 18-5-111(3), C.R.S. 2015.

2. The term "consideration" is not defined in section 18-5-111. *See, e.g.*, *Black's Law Dictionary* 370 (10th ed. 2014) (defining "consideration" as: "Something (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee."). The definition that appears in section 4-3-303(b), C.R.S. 2015, should not be used because it is limited to contracts.

F:347 SPECIAL SKILL OR EXPERTISE

"Special skill or expertise" in manufacture, sale, dispensing, or distribution includes any unusual knowledge, judgment, or ability, including manual dexterity, facilitating the initiation, organizing, planning, financing, directing, managing, supervising, executing, or concealing of such manufacture, sale, dispensing, or distributing, the enlistment of accomplices in such manufacture, sale, dispensing, or distribution, the escape from detection or apprehension for such manufacture, sale, dispensing, or distribution, or the disposition of the fruits or proceeds of such manufacture, sale, dispensing, or distribution.

COMMENT

1. *See* § 18-18-407(2)(c), C.R.S. 2015 (controlled substances; special offender).

F:348 SPELEOGEN

"Speleogen" means relief features on the walls, ceiling, or floor of any cave that are part of the surrounding rock, including, but not limited to, anastomoses, scallops, meander niches, petromorphs, and rock pendants in solution caves and similar features unique to volcanic caves.

COMMENT

1. *See* § 18-4-509(1)(c)(II)(C), C.R.S. 2015.

2. *See* Instruction F:46 (defining "cave").

F:349 SPELEOTHEM

"Speleothem" means any natural mineral formation or deposit occurring in a cave, including, but not limited to, any stalactite, stalagmite, helictite, cave flower, flowstone, concretion, drapery, rimstone, or formation of clay or mud.

COMMENT

1. *See* § 18-4-509(1)(c)(II)(D), C.R.S. 2015.

2. *See* Instruction F:46 (defining "cave").

F:350 SPIRITUOUS LIQUORS

"Spirituous liquors" means any alcoholic beverage obtained by distillation, mixed with water and other substances in solution, and includes among other things, brandy, rum, whiskey, gin, and every liquid or solid, patented or not, containing at least one-half of one percent alcohol by volume and which is fit for use for beverage purposes. Any liquid or solid containing beer or wine in combination with any other liquor, except malt and vinous liquors, shall not be construed to be fermented malt or vinous liquor, but shall be construed to be spirituous liquor.

COMMENT

1. *See* § 18-8-203(1)(a), C.R.S. 2015 (introducing contraband in the first degree; incorporating this definition from section 12-47-103(36), C.R.S. 2015).

2. *See* Instruction F:205 (defining "malt liquors"); Instruction F:390 (defining "vinous liquors").

+ F:350.3 SPORTS CONTEST

"Sports contest" means any professional or amateur sport or athletic game, race, or contest viewed by the public.

COMMENT

1. *See* § 18-5-403(1)(a), C.R.S. 2015

2. + The Committee added this instruction in 2015.

+ F:350.5 SPORTS OFFICIAL

"Sports official" means any person who acts or expects to act in a sports contest as an umpire, referee, judge, or otherwise to officiate at a sports contest.

COMMENT

1. *See* § 18-5-403(1)(c), C.R.S. 2015.

2. + The Committee added this instruction in 2015.

+ F:350.7 SPORTS PARTICIPANT

"Sports participant" means any person who participates or expects to participate in a sports contest as a player, contestant, or member of a team, or as a coach, manager, trainer, owner, or other person directly associated with a player, contestant, team, or entry.

COMMENT

1. *See* § 18-5-403(1)(b), C.R.S. 2015.

2. + The Committee added this instruction in 2015.

F:351 STADIUM

"Stadium" means a sports facility which is designed for use primarily as a major league baseball stadium, which meets the criteria established by the board, which meets criteria which may be established by major league baseball, and which may include, but is not limited to, such features as parking areas, sky boxes, and press boxes which are necessary or desirable for such a sports facility.

COMMENT

1. *See* § 18-9-123(1), C.R.S. 2015 (bringing alcohol beverages, bottles, or cans into the major league baseball stadium; incorporating the above definition from section 32-14-103(10), C.R.S. 2015).

F:352 STAFF SECURE FACILITY

"Staff secure facility" means a group facility or home at which each juvenile is continuously under staff supervision and at which all services, including but not limited to education and treatment, are provided on site. A staff secure facility may or may not be a locked facility.

COMMENT

1. *See* § 18-8-208.1(7), C.R.S. 2015 (attempt to escape; incorporating the above definition from section 19-1-103(101.5), C.R.S. 2015).

F:353 STORE

"Store" means any establishment primarily engaged in the sale of goods at retail.

COMMENT

1. *See* § 18-18-412.8(4)(c), C.R.S. 2015 (retail sale of methamphetamine precursor drugs).

F:354 STUN GUN

"Stun gun" means a device capable of temporarily immobilizing a person by the infliction of an electrical charge.

COMMENT

1. *See* § 18-12-101(1)(i.5), C.R.S. 2015 (offenses relating to firearms and weapons).

F:355 SUBSTANTIAL SOURCE OF THAT PERSON'S INCOME

A "substantial source of that person's income" means a source of income which, for any period of one year or more, exceeds the minimum wage, determined on the basis of a forty-hour week and fifty-week year, or which, for the same period, exceeds fifty percent of the defendant's declared adjusted gross income under Colorado or any other state law or under federal law, whichever adjusted gross income is less.

COMMENT

1. *See* § 18-18-407(2)(b), C.R.S. 2015 (controlled substances; special offender).

F:356 SUBSTANTIAL STEP

A substantial step is any conduct, whether act, omission, or possession, which is strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense.

COMMENT

1. *See* § 18-2-101(1), C.R.S. 2015 (attempt).

2. *See* Instruction F:251 (defining "omission").

3. *See People v. Lehnert*, 163 P.3d 1111, 1115 (Colo. 2007) ("By actually defining a 'substantial step' as 'any conduct . . . which is strongly corroborative of the firmness of the actor's purpose,' the Colorado statute has no need to further enumerate particular circumstances in which strongly corroborative conduct may constitute a substantial step. Conduct strongly corroborative of the firmness of the actor's criminal purpose is sufficient in itself. Drawn as they are largely from decisional law, however, the acts enumerated in the former statute and Model Penal Code, such as searching out a contemplated victim, reconnoitering the place contemplated for commission of a crime, and possessing materials specially designed for unlawful use and without lawful purpose, remain useful examples of conduct considered capable of strongly corroborating criminal purpose, and in those instances where they do, of being sufficient to establish criminal attempt.").

F:357 SUBSTANTIAL THREAT

"Substantial threat" means a threat that is reasonably likely to induce a belief that the threat will be carried out and is one that threatens that significant confinement, restraint, injury, or damage will occur.

COMMENT

1. *See* § 18-3-207(3), C.R.S. 2015 (criminal extortion).

F:358 SWITCHBLADE KNIFE

"Switchblade knife" means any knife, the blade of which opens automatically by hand pressure applied to a button, spring, or other device in its handle.

COMMENT

1. *See* § 18-12-101(1)(j), C.R.S. 2015 (offenses relating to firearms and weapons).

2. *See* Instruction F:194 (defining "knife").

F:359 SYNTHETIC CANNABINOID

"Synthetic cannabinoid" means any chemical compound that is chemically synthesized and either has been demonstrated to have binding activity at one or more cannabinoid receptors; or is a chemical analog or isomer of a compound that has been demonstrated to have binding activity at one or more cannabinoid receptors.

"Synthetic cannabinoid" includes but is not limited to [insert relevant language from section 18-18-102(34.5)(b)].

"Synthetic cannabinoid" does not mean tetrahydrocannabinols, as that term is defined in your instructions, or Nabilone.

Further, as used in this instruction, "analog" means any chemical that is substantially similar in chemical structure to a chemical compound that has been determined to have binding activity at one or more cannabinoid receptors.]

COMMENT

1. *See* § 18-18-102(34.5), C.R.S. 2015.

2. *See* Instruction F:366 (defining "tetrahydrocannabinols").

F:360 TAMPER (GENERAL)

"Tamper" means to interfere with something improperly, to meddle with it, or to make unwarranted alterations in its condition.

COMMENT

1. *See* § 18-1-901(3)(q), C.R.S. 2015.

F:361 TAMPER (LIVESTOCK)

"Tamper" means:

[treatment of livestock in such a manner that food derived from the livestock would be considered adulterated, as defined in these instructions.]

[the injection, use, or administration of any drug that is [prohibited by any federal, state, or local law] [used in a manner prohibited by federal law or Colorado law, or any Colorado locality], as defined in these instructions.]

[the injection or other internal or external administration of any product or material, whether gas, solid, or liquid, to an animal for the purposes of deception, including concealing, enhancing, or transforming the true conformation, configuration, color, breed, condition, or age of the animal or making the animal appear more sound than the animal would appear otherwise.]

[the use or administration for cosmetic purposes of steroids, growth stimulants, or internal artificial filling, including paraffin, silicone injection, or any other substance.]

[the use or application of any drug or feed additive affecting the central nervous system of the animal.]

[the use or administration of diuretics for cosmetic purposes.]

[the manipulation or removal of tissue, by surgery or otherwise, so as to change, transform, or enhance the true conformation or configuration of the animal.]

[subjecting the animal to inhumane conditions or procedures for the purpose of concealing, enhancing, or transforming the true conformation, configuration, condition, or age of the animal or making the animal appear more sound than the animal would appear otherwise.]

[attaching to the animal's hide foreign objects, including hair or hair substitutes, cloth, and fibers, for the purpose of deception, including concealing, enhancing, or transforming the true conformation, configuration, color,

breed, condition, or age of the animal or making the animal appear more sound than the animal would appear otherwise.]

[substituting a different animal for the animal registered or entered in the exhibition without the permission of a responsible official of the exhibition.]

["Tamper" does not include any action taken or activity performed or administered by a licensed veterinarian or in accordance with instructions of a licensed veterinarian if the action or activity was undertaken for accepted medical purposes during the course of a valid veterinarian-client-patient relationship or any action taken as part of accepted grooming, ranching, commercial, or medical practices.]

["Tampering" does include normal ranching practices.]

COMMENT

1. *See* 18-9-207(d)(I), (II), C.R.S. 2015 (tampering with livestock).

2. *See* Instruction F:198 (defining "livestock").

F:362 TARGETED PICKETING

"Targeted picketing" means picketing, with or without signs, that is specifically directed toward a residence, or one or more occupants of the residence, and that takes place on that portion of a sidewalk or street in front of the residence, in front of an adjoining residence, or on either side of the residence.

COMMENT

1. *See* § 18-9-108.5(2)(b), C.R.S. 2015 (targeted residential picketing).

F:363 TELECOMMUNICATIONS DEVICE

"Telecommunications device" means any instrument, apparatus, method, system, or equipment which controls, measures, directs, or facilitates telecommunications service. The term includes, but is not limited to, computer hardware, software, programs, electronic mail systems, voice mail systems, identification validation systems, and private branch exchanges.

COMMENT

1. *See* § 18-9-309(1)(d), C.R.S. 2015; *see also* § 18-8-204(2)(n), C.R.S. 2015 (introducing contraband in the second degree; incorporating the definition of a "cloned cellular phone" from section 18-9-309(1)(a.7), which incorporates the definition of a "cellular phone" from section 18-9-309(1)(a.5), which uses the term "telecommunications device").

2. *See* Instruction F:364 (defining "telecommunications service").

F:364 TELECOMMUNICATIONS SERVICE

"Telecommunications service" means a service which, in exchange for pecuniary consideration, provides or offers to provide transmission of messages, signals, facsimiles, or other communication between persons who are physically separated from each other, by means of telephone, telegraph, cable, wire, or the projection of energy without physical connection.

COMMENT

1. *See* § 18-9-309(1)(f), C.R.S. 2015*; see also* § 18-8-204(2)(n), C.R.S. 2015 (introducing contraband in the second degree; incorporating the definition of a "cloned cellular phone" from section 18-9-309(1)(a.7), which incorporates the definition of a "cellular phone" from section 18-9-309(1)(a.5), which uses the term "telecommunications service").

2. The term "consideration" is not defined in section 18-9-309. *See, e.g.*, *Black's Law Dictionary* 370 (10th ed. 2014) (defining "consideration" as: "Something (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee."). The definition that appears in section 4-3-303(b), C.R.S. 2015, should not be used because it is limited to contracts.

F:365 TESTIMONY

"Testimony" includes oral or written statements, documents, or any other evidence that may be offered by or through a witness in an official proceeding.

COMMENT

1. *See* § 18-8-601(2), C.R.S. 2015 (offenses relating to judicial and other proceedings).

2. *See* Instruction F:250 (defining "official proceeding").

F:366 TETRAHYDROCANNABINOLS

"Tetrahydrocannabinols" means synthetic equivalents of the substances contained in the plant, or in the resinous extractives of, cannabis, sp., or synthetic substances, derivatives, and their isomers with similar chemical structure and pharmacological activity, such as the following:

(I) [1]Cis or trans tetrahydrocannabinol, and their optical isomers;

(II) [6]Cis or trans tetrahydrocannabinol, and their optical isomers;

(III) [3,4]Cis or trans tetrahydrocannabinol, and their optical isomers.

Since the nomenclature of the substances listed is not internationally standardized, the foregoing definitions include compounds of these structures, regardless of the numerical designation of atomic positions.

COMMENT

1. *See* § 18-18-102(35), C.R.S. 2015.

F:367 THEFT DETECTION DEACTIVATING DEVICE

"Theft detection deactivating device" means any tool, instrument, mechanism, or other article adapted, designed, engineered, used, or operated to inactivate, incapacitate, or remove a theft detection device without authorization.

"Theft detection deactivating device" includes, but is not limited to, jumper wires, wire cutters, and electronic article surveillance removal devices.

COMMENT

1. *See* § 18-4-417(2)(a), C.R.S. 2015.

F:368 THEFT DETECTION DEVICE

"Theft detection device" means an electronic or magnetic mechanism, machine, apparatus, tag, or article designed and operated for the purpose of detecting the unauthorized removal of merchandise from a store or mercantile establishment.

COMMENT

1. *See* § 18-4-417(2)(b), C.R.S. 2015.

F:369 THEFT DETECTION SHIELDING DEVICE

"Theft detection shielding device" means any tool, instrument, mechanism, or article adapted, designed, engineered, used, or operated to avoid detection by a theft detection device during the commission of an offense involving theft. "Theft detection shielding device" includes, but is not limited to, foil lined or otherwise modified clothing, bags, purses, or containers capable of and for the sole purpose of avoiding detection devices.

COMMENT

1. *See* § 18-4-417(2)(c), C.R.S. 2015.

F:370 THERAPEUTIC DECEPTION

"Therapeutic Deception" means the representation by a psychotherapist that sexual contact, penetration or intrusion by the psychotherapist is consistent with or part of the client's treatment.

COMMENT

1. *See* § 18-3-405.5, C.R.S. 2015 (sexual assault on a client by a psychotherapist).

F:371 THING OF VALUE

"Thing of value" includes real property, tangible and intangible personal property, contract rights, choses in action, services, confidential information, medical records information, and any rights of use or enjoyment connected therewith.

COMMENT

1. *See* § 18-1-901(3)(r), C.R.S. 2015.

F:372 THROWING STAR

"Throwing star" means a disk having sharp radiating points or any disk-shaped bladed object which is hand-held and thrown and which is in the design of a weapon used in connection with the practice of a system of self-defense.

COMMENT

1. *See* § 18-12-106(1)(e), C.R.S. 2015 (prohibited use of weapons).

F:373 TRADEMARK

"Trademark" means any trademark registered under the laws of this state or of the United States.

COMMENT

1. *See* § 18-5-110.5(3)(c), C.R.S. 2015.

F:374 TRADE SECRET

"Trade secret" means the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, improvement, confidential business or financial information, listing of names, addresses, or telephone numbers, or other information relating to any business or profession which is secret and of value. To be a trade secret the owner thereof must have taken measures to prevent the secret from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

COMMENT

1. *See* § 18-4-408(2)(d), C.R.S. 2015 (theft of trade secrets).

+ F:374.5 TRANSACTION (MONEY LAUNDERING)

"Transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition and, with respect to a financial institution, includes a deposit; a withdrawal; a transfer between accounts; an exchange of currency; a loan; an extension of credit; a purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument; the use of a safe deposit box; or any other payment, transfer, or delivery by, through, or to a financial institution by whatever means.

COMMENT

1. *See* 18-5-309(3)(e), C.R.S. 2015 (money laundering).

2. + The Committee added this instruction in 2015.

F:375 TRANSFEREE

"Transferee" means a person who desires to receive or acquire a firearm from a transferor. [If a transferee is not a natural person, then each natural person who is authorized by the transferee to possess the firearm after the transfer must undergo a background check before taking possession of the firearm].

COMMENT

1. *See* § 18-12-112(1)(b), C.R.S. 2015.

F:376 ULTIMATE USER

"Ultimate user" means an individual who lawfully possesses a controlled substance for the individual's own use or for the use of a member of the individual's household or for administering to an animal owned by the individual or by a member of the individual's household.

COMMENT

1. *See* § 18-18-102(36), C.R.S. 2015 (controlled substances offenses).

F:377 UNDER COLOR OF HIS [HER] OFFICIAL AUTHORITY (RESISTING ARREST)

A peace officer acts "under color of his [her] official authority" when, in the regular course of assigned duties, he [she] is called upon to make, and does make, a judgment in good faith based upon surrounding facts and circumstances that an arrest should be made by him [her].

COMMENT

1. *See* § 18-8-103(2), C.R.S. 2015 (resisting arrest).

2. *See People in Interest of J.J.C.*, 854 P.2d 801, 807 (Colo. 1993) (evidence was insufficient to prove that off-duty police officer working as a security guard at a private business made arrest "under color of his official authority"; "However, insofar as the court of appeals opinion may be understood to suggest an off-duty peace officer serving a private employer may never act 'under color of his official authority,' we disapprove of such a reading.").

F:378 UNDER COLOR OF HIS [HER] OFFICIAL AUTHORITY (OBSTRUCTING A PEACE OFFICER)

A peace officer acts "under color of his [her] official authority" if, in the regular course of assigned duties, he [she] makes a judgment in good faith based on surrounding facts and circumstances that he [she] must act to enforce the law or preserve the peace.

COMMENT

1. *See* § 18-8-104(2), C.R.S. 2015 (obstructing a peace officer).

F:379 UNDUE INFLUENCE

"Undue influence" means the use of influence to take advantage of an at-risk elder's vulnerable state of mind, neediness, pain, or emotional distress.

COMMENT

1. *See* § 18-6.5-102(13), C.R.S. 2015; § 18-6.5.103(7.5)(a), C.R.S. 2015 (criminal exploitation of an at-risk elder).

F:380 UNLAWFUL DEBT

"Unlawful debt" means a debt [incurred or contracted in an illegal gambling activity or business] [which is unenforceable under state or federal law in whole or in part as to principal or interest because of the law relating to usury].

COMMENT

1. *See* 18-17-103(6), C.R.S. 2015 (Colorado Organized Crime Control Act).

2. When instructing the jury concerning the usury provision, draft a supplemental instruction explaining the relevant principles of law. *See* § 18-15-104, C.R.S. 2015.

F:381 UNLAWFULLY OBTAINED

"Unlawfully obtained" means obtained by theft, fraud, or deceit or obtained without the permission of the owner.

COMMENT

1. *See* § 18-4-420(5)(d), C.R.S. 2015 (chop shop activity).

+ F:381.5 UNLAWFUL TERMINATION OF PREGNANCY

"Unlawful termination of pregnancy" means the termination of a pregnancy by any means other than birth or a medical procedure, instrument, agent, or drug, for which the consent of the pregnant woman [, or a person authorized by law to act on her behalf,] has been obtained [, or for which the pregnant woman's consent is implied by law].

COMMENT

1. *See* § 18-3.5-101(6), C.R.S. 2015.

2. *See* Instruction F:282.5 (defining "pregnancy); § 18-3.5-101(1), C.R.S. 2015 ("'Consent' has the same meaning as provided in section 18-1-505."); Instructions H:03 and H:04 (defense of "consent" based on section 18-1-505).

3. In cases involving implied consent, the court should draft a supplemental instruction explaining the concept.

4. + The Committee added this instruction in 2015.

F:382 USABLE FORM OF MARIJUANA

"Usable form of marijuana" means the seeds, leaves, buds, and flowers of the plant (genus) cannabis, and any mixture or preparation thereof, which are appropriate for medical use, but excludes the plant's stalks, stems, and roots.

COMMENT

1. *See* Colo. Const. art. XVIII, § 14(1)(i) (medical marijuana).

F:383 USE

To "use" means to instruct, communicate with, store data in, retrieve data from, or otherwise make use of any resources of a computer, computer system, or computer network.

COMMENT

1. *See* 18-5.5-101(10), C.R.S. 2015 (computer crime).

2. *See* Instruction F:61 (defining "computer"); Instruction F:62 (defining "computer network"); Instruction F:65 (defining "computer system").

F:384 UTILITY

"Utility" means an enterprise which provides gas, sewer, electric, steam, water, transportation, or communication services, and includes any carrier, pipeline, transmitter, or source, whether publicly or privately owned or operated.

COMMENT

1. *See* § 18-1-901(3)(s), C.R.S. 2015.

F:385 UTTER

"Utter" means to transfer, pass, or deliver, or attempt to cause to be transferred, passed, or delivered, to another person any written instrument, article, or thing.

COMMENT

1. *See* § 18-5-101(8), C.R.S. 2015 (forgery and impersonation offenses).

+ F:385.5 VEHICLE (EQUITY SKIMMING AND RELATED OFFENSES)

"Vehicle" means any device of conveyance capable of moving itself or of being moved from place to place upon wheels or a track or by water or air, whether or not intended for the transport of persons or property, and includes any space within such "vehicle" adapted for overnight accommodation of persons or animals or for the carrying on of business.

["Vehicle" does not include a manufactured home.]

COMMENT

1. *See* § 18-5-801(5), C.R.S. 2015.

2. If necessary, draft an instruction defining the term "manufactured home" based on section 42-1-102(106)(b), C.R.S. 2015.

3. + The Committee added this instruction in 2015.

F:386 VEHICLE (TRAFFIC CODE)

"Vehicle" means a device that is capable of moving itself, or of being moved, from place to place upon wheels or endless tracks. "Vehicle" includes, without limitation, a bicycle, electrical assisted bicycle, or electric personal assistive mobility device.

[The definition of a "vehicle" does not include a wheelchair, off-highway vehicle, snowmobile, farm tractor, or implement of husbandry designed primarily or exclusively for use and used in agricultural operations or any device moved exclusively over stationary rails or tracks or designed to move primarily through the air.]

COMMENT

1. *See* § 42-1-102(112), C.R.S. 2015.

2. *See* Instruction F:249.5 (defining "off-highway vehicle").

3. The terms "bicycle," "electrical assisted bicycle," and "electric personal assistive mobility device" are defined in section 42-1-102. The Committee has not drafted model definitional instructions for these terms.

F:387 VEHICLE IDENTIFICATION NUMBER

"Vehicle identification number" means the serial number placed upon the motor vehicle by the manufacturer thereof or assigned to the motor vehicle by the department of revenue.

COMMENT

1. *See* § 18-4-409(1)(b), C.R.S. 2015 (aggravated motor vehicle theft).

F:388 VICTIM

"Victim" means any natural person against whom any crime has been perpetrated or attempted, as crime is defined under the laws of this state or of the United States.

COMMENT

1. *See* § 18-8-702(1), C.R.S. 2015 (retaliation, intimidation, and bribery of crime victims).

2. *See also* § 18-3-401(7), C.R.S. 2015 ("'Victim' means the person alleging to have been subjected to a criminal sexual assault.").

F:389 VIDEO OR +RECORDING OR BROADCAST

"Video" and + "recording or broadcast" both mean any material that depicts a moving image of a child engaged in, participating in, observing, or being used for explicit sexual conduct.

COMMENT

1. *See* § 18-6-403(2)(k), C.R.S. 2015 (sexual exploitation of a child).

2. *See* Instruction F:132 (defining "explicit sexual conduct"); + Instruction F:234 (defining "motion picture").

3. + In 2015, the Committee replaced the words "video tape" with the words "recording or broadcast" to reflect a legislative amendment. *See* Ch. 274, sec. 1, § 18-6-403(2)(k), 2015 Colo. Sess. Laws 1113, 1115. In addition, to make clear that "motion picture" is defined in a separate instruction (even though it is codified in the same statutory subsection), the Committee added a citation to Instruction F:234 in the preceding Comment.

F:390 VINOUS LIQUORS

"Vinous liquors" means wine and fortified wines that contain not less than one-half of one percent and not more than twenty-one percent alcohol by volume and means an alcoholic beverage obtained by the fermentation of the natural sugar contents of fruits or other agricultural products containing sugar.

COMMENT

1. *See* § 18-8-203(1)(a), C.R.S. 2015 (introducing contraband in the first degree; incorporating this definition from section 12-47-103(39), C.R.S. 2015).

F:391 VOLUNTARY ACT

"Voluntary act" means an act performed consciously as a result of effort or determination [, and includes the possession of property if the actor was aware of his [her] physical possession or control thereof for a sufficient period to have been able to terminate it].

COMMENT

1. *See* § 18-1-501(9), C.R.S. 2015.

2. *See also* Instruction F:281 (defining "possession").

+ F:391.5 WAREHOUSE

"Warehouse" means a person engaged in the business of storing goods for hire.

COMMENT

1. *See* § 4-7-102(a)(13), C.R.S. 2015.

2. *See* Instruction F:161.5 (defining "goods").

3. + The Committee added this instruction in 2015.

F:392 WILLFULLY

COMMENT

1. *See* Instruction F:195 (defining "knowingly" or "willfully").

F:393 WITNESS

"Witness" means any natural person [who would have been believed, by any reasonable person, to be a person]: [who had knowledge of the existence or nonexistence of facts relating to any crime] [whose declaration under oath was received or had been received as evidence for any purpose] [who had reported any crime to any peace officer, correctional officer, or judicial officer] [who had been served with a subpoena issued under the authority of any court in this state, of any other state, or of the United States].

COMMENT

1. *See* § 18-8-702(1), C.R.S. 2015 (retaliation, intimidation, and bribery of crime victims).

F:393.5 WRITTEN DOCUMENTATION

"Written documentation" means a statement signed by a patient's physician or copies of the patient's pertinent medical records.

COMMENT

1. See Colo. Const. art. XVIII, § 14(1)(j) (medical marijuana).

F:394 WRITTEN INSTRUMENT (FORGERY AND IMPERSONATION OFFENSES)

"Written instrument" means any paper, document, or other instrument containing written or printed matter or the equivalent thereof, used for purposes of reciting, embodying, conveying, or recording information, and any money, credit card, token, stamp, seal, badge, or trademark or any evidence or symbol of value, right, privilege, or identification, which is capable of being used to the advantage or disadvantage of some person.

COMMENT

1. *See* § 18-5-101(9), C.R.S. 2015 (forgery and impersonation offenses).

2. *See* Instruction F:373 (defining "trademark").

F:395 WRITTEN INSTRUMENT (IDENTITY THEFT AND RELATED OFFENSES)

"Written instrument" means a paper, document, or other instrument containing written or printed matter or the equivalent thereof, used for purposes of reciting, embodying, conveying, or recording information, and any money, token, stamp, seal, badge, or trademark or any evidence or symbol of value, right, privilege, or identification, that is capable of being used to the advantage or disadvantage of another.

COMMENT

1. *See* § 18-5-901(15), C.R.S. 2015.

CHAPTER G1

CULPABILITY

G1:01 REQUIREMENTS FOR CRIMINAL LIABILITY

A crime is committed when the defendant has committed a voluntary act prohibited by law, together with a culpable state of mind.

"Voluntary act" means an act performed consciously as a result of effort or determination [, and includes the possession of property if the actor was aware of his [her] physical possession or control thereof for a sufficient period to have been able to terminate it].

Proof of the voluntary act alone is insufficient to prove that the defendant had the required state of mind.

The culpable state of mind is as much an element of the crime as the act itself and must be proven beyond a reasonable doubt, either by direct or circumstantial evidence.

In this case, the applicable state[s] of mind is [are] explained below:

> [The term "after deliberation" means not only intentionally, but also that the decision to commit the act has been made after the exercise of reflection and judgment concerning the act. An act committed after deliberation is never one which has been committed in a hasty or impulsive manner.]
>
> [A person acts "intentionally" or "with intent" when his [her] conscious objective is to cause the specific result proscribed by the statute defining the offense. It is immaterial whether or not the result actually occurred.]
>
> [A person acts "knowingly" or "willfully" with respect to conduct or to a circumstance described by a statute defining an offense when he [she] is aware that his [her] conduct is of such nature or that such a circumstance exists. A person acts "knowingly" or "willfully", with respect to a result of his [her] conduct, when he [she] is aware that his [her] conduct is practically certain to cause the result.]
>
> [A person acts "recklessly" when he [she] consciously disregards a substantial and unjustifiable risk that a result will occur or that a circumstance exists.]

[A person acts "with criminal negligence" when, through a gross deviation from the standard of care that a reasonable person would exercise, he [she] fails to perceive a substantial and unjustifiable risk that a result will occur or that a circumstance exists.]

COMMENT

1. *See* § 18-1-501(3-6), (8-9), C.R.S. 2015; § 18-3-101(3), C.R.S. 2015.

2. *See* Instruction F:08 (defining "act"); Instruction F:10 (defining "after deliberation"); Instruction F:66 (defining "conduct"); Instruction F:79 (defining "criminal negligence"); Instruction F:80 (defining "culpable state of mind"); Instruction F:185 (defining "intentionally" and "with intent"); Instruction F:195 (defining "knowingly or willfully"); Instruction F:308 (defining "recklessly"); Instruction F:391 (defining "voluntary act").

G1:02 STRICT LIABILITY CRIMES

The crime[s] of [insert name(s) of offense(s) here] [is a] [are] "strict liability" offense[s] that [is] [are] established by proof beyond a reasonable doubt of conduct which includes a voluntary act or the omission to perform an act which the person is physically capable of performing.

COMMENT

1. *See* § 18-1-502, C.R.S. 2015 (defining the principle of strict liability); *see also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state."); § 18-1-704(4), C.R.S. 2015 (provision allowing for evidence of self-defense, where self-defense is not available as an affirmative defense, "shall not apply to strict liability crimes").

2. *See* Instruction F:66 (defining "conduct"); Instruction F:251 (defining "omission"); Instruction F:391 (defining "voluntary act").

3. *See*, *e.g.*, § 18-3-106(1)(b)(I), C.R.S. 2015 (vehicular homicide "is a strict liability crime"); § 18-3-205(1)(b)(I), C.R.S. 2015 (vehicular assault "is a strict liability crime"); § 18-13-122(2)(a), C.R.S. 2015 ("Illegal possession or consumption of ethyl alcohol by an underage person is a strict liability offense."); *People v. Manzo*, 144 P.3d 551, 552 (Colo. 2006) (leaving the scene of an accident with serious bodily injury, in violation of section 42-4-1601, C.R.S. 2015, constitutes a strict liability offense because the plain language of the statute does not require or imply a culpable mental state); *People v. Hoskay*, 87 P.3d 194, 198 (Colo. App. 2003) (concluding that "the plain language of the public indecency statute reflects the General Assembly's intent to make the offense a strict liability crime without a culpable mental state"); *People v. Wilson*, 972 P.2d 701, 703 (Colo. App. 1998) (prohibited use of a weapon – possession while under the influence, in violation of section 18-12-106(1)(d) – is a strict liability offense).

4. This instruction should not be used for offenses with a partially applicable mental state. *See*, *e.g.*, *Copeland v. People*, 2 P.3d 1283, 1287 (Colo. 2000) ("[O]ur legislature has . . . determined to focus its fourth degree arson mens rea requirement on the actor's conduct in starting or maintaining the fire, while continuing to hold the arsonist responsible for the fire's result, whether or not he or she was aware of or intended the consequences."). For this type of offense, the elemental instruction should be drafted in a manner that clearly indicates which element(s) the mens rea modifies (as the Committee has endeavored to do throughout this volume).

5. In cases where the defendant is charged with one or more strict liability offenses and one or more offenses having a mens rea, it may be appropriate to add the following language: "Strict liability crimes are different from other crimes because the prosecution does not have to prove that the person acted, or failed to act, with a culpable mental state."

G1:03 LIABILITY FOR BEHAVIOR OF AN INNOCENT PERSON

A person is legally accountable for the behavior of another person if he [she] acts with the mental state required for the commission of the offense and causes an "innocent person" to engage in such behavior.

For purposes of this instruction, an "innocent person" includes any person who is not guilty of the offense in question, despite his [her] behavior, because of [duress] [legal incapacity or exemption] [unawareness of the criminal nature of the conduct in question or of the defendant's criminal purpose], or any other factor precluding the mental state required for the offense in question.

COMMENT

1. *See* § 18-1-602(1)(b), (2), C.R.S. 2015.

2. *See* Instruction H:30 (affirmative defense of "duress"); *see also People v. Moore*, 877 P.2d 840, 841-42, n.5 (Colo. 1994) (observing, in dicta, that because the defendant "forced [his wife] to sexually assault their twelve-year-old daughter," he "could have been convicted of sexual assault on a child under § 18-1-602").

3. Although section 18-1-602(2) does not specify what type of "exemption" from criminal liability would qualify an actor as an "innocent person," it appears this is a reference to exemptions such as self-defense, execution of a public duty under authority of law, etc.

G1:04 CRIMINAL LIABILITY OF BUSINESS ENTITIES

A business entity is guilty of an offense if the conduct constituting the offense consists of an omission to discharge a specific duty of affirmative performance imposed on the business entity by law; or the conduct constituting the offense is engaged in, authorized, solicited, requested, commanded, or knowingly tolerated by the governing body, individual authorized to manage the affairs of the business entity, or by a high managerial agent acting within the scope of his employment or in behalf of the business entity.

COMMENT

1. *See* § 18-1-606(1)(a), (b), C.R.S. 2015.

2. *See* Instruction F:11 (defining "agent"); Instruction F:42 (defining "business entity"); Instruction F:170 (defining "high managerial agent"); Instruction F:251 (defining "omission").

3. *See Southern Union Co. v. United States*, 132 S. Ct. 2344, 2352 (2012) ("substantial" fines against organizational defendants implicate the Sixth Amendment right to a jury trial and are thus subject to the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000)).

G1:05 CRIMINAL LIABILITY OF AN INDIVIDUAL FOR CORPORATE CONDUCT

A person is criminally liable for conduct constituting an offense which he [she] performs or causes to occur in the name of or in behalf of a corporation to the same extent as if that conduct were performed or caused by him [her] in his [her] own name or behalf.

COMMENT

1. *See* § 18-1-607, C.R.S. 2015.

2. *See* Instruction F:66 (defining "conduct").

G1:06 COMPLICITY (INTENTIONALLY, DELIBERATELY, WILLFULLY, OR KNOWINGLY)

Complicity is not a separate crime. Rather, it is a legal theory by which one person may be found guilty of a criminal offense that was committed [in whole or in part] by another person.

To be found guilty as a complicitor, the prosecution must prove each of the following circumstances beyond a reasonable doubt:

1. A crime must have been committed.

2. Another person must have committed [all or part of] the crime.

3. The defendant must have had knowledge that the other person intended to commit [all or part of] the crime.

4. The defendant must have had the intent to promote or facilitate the commission of the crime.

5. The defendant must have aided, abetted, advised, or encouraged the other person in planning or committing the crime.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

COMMENT

1. *See* § 18-1-603, C.R.S. 2015.

2. + Instructions G1:06 and G1:07, as well as the comments that follow, were approved by the Committee before the Colorado Supreme Court's opinion in *People v. Childress*, 2015 CO 65M, __ P.3d __, which substantially modified its earlier opinion in *Bogdanov v. People*, 941 P.2d 247 (Colo.), *amended*, 955 P.2d 997 (Colo. 1997), *disapproved of on other grounds by Griego v. People*, 19 P.3d 1 (Colo. 2001). The Committee is currently reviewing these instructions.

3. The Colorado Supreme Court endorsed the fourth and fifth components of the above instruction in *Bogdanov*. Specifically, the court held as follows:

> Although the statutory definition of intent under section 18-1-501 does not apply, there is nevertheless a dual mental state requirement of the complicitor that must be proven before he or she can be legally accountable for the offense of another. Complicity liability exists when (1) the complicitor has the culpable mental state required for the underlying crime committed by the principal; and (2) the complicitor assists or encourages the commission of the crime committed by the principal "with the intent to promote or facilitate," § 18-1-603, such commission.

Bogdanov, 941 P.2d at 250-51 (footnote omitted).

The court concluded that such pattern instruction would "more properly mirror the applicable statutory language," *id*. at 254 n.10, and it identified the nexus between the two components of the dual mental state:

> The fourth paragraph [of the model instruction] then instructs the jury on the complicitor's requisite mental state. That paragraph directs that to be convicted as a complicitor, the defendant must intentionally aid, abet, advise, or encourage the principal in the commission or planning of the crime as defined in the first paragraph. We conclude that the language adequately directs the jury to determine whether the defendant had the requisite mens rea of the crime, because the defendant could not have intended his participation to further the crime unless he also intended the crime to occur. *For him to intend that the crime occur, he would necessarily share the principal's mental state.* If the defendant did not intend that his actions would assist or encourage the other principal(s) in the commission or planning of the underlying crime, the defendant cannot be criminally liable for the commission of that crime.

Id. at 254 (emphasis added).

4. Further, the court explained that the "all or part of" language contained within brackets in the second and third

components should be included only in those cases in which two or more persons, possibly including the defendant, together committed the essential elements of the underlying crime. *See id.* at 256 (citing to *Reed v. People*, 467 P.2d 809 (Colo. 1970), as "an example of a situation where" use of the "all or part of" language was appropriate because "two or more persons together committed the underlying crime"). If another person committed all essential elements of the crime with which the defendant is charged under a complicity theory, the "all or part of" language should be omitted. *Id.*

Consistent with the supreme court's direction in *Bogdanov*, the Committee has included similar bracketed language in the introductory paragraph ("in whole or in part"). That bracketed language should be included in the first paragraph only in cases where the court includes the "all or part of" language in the second and third components of the instruction.

5. For purposes of complicity liability, the term "'intent' retains its common meaning." *Id.* at 250. Nevertheless, in many cases it will be necessary to provide the jury with an instruction defining the term "intentionally" when that is the mens rea applicable to the crime allegedly committed by the principal (or to a crime allegedly committed by the defendant as a principal). *See* Instruction F:185 (defining "intentionally" in accordance with section 18-1-501(5)).

6. The instruction above is designed for a prosecution where the jury should be instructed concerning complicitor liability as to all offenses. Where this is not the case, the court should either substitute the name of the relevant offense(s) for the generic references to "a crime," or prepare a separate instruction listing those offenses as to which the jury is to determine whether the defendant is guilty as a complicitor. *Cf. People v. Calvaresi*, 600 P.2d 57, 59 (Colo. 1979)(recognizing that it is the trial court's role, when ruling on a motion for judgment of acquittal, to determine whether the prosecution has presented a prima facie case sufficient to submit a charge to the jury under a theory of complicitor liability).

7. In cases where the theory of complicity liability extends to lesser offenses (whether included or nonincluded), users should modify the instruction to make this clear. *See, e.g., Grissom v. People*, 115 P.3d 1280, 1288 (Colo. 2005) (defendant charged as complicitor was entitled to an instruction, under complicity theory, as to lesser-included offense).

8. More than one complicity instruction may be necessary in cases involving multiple criminal acts, especially if the acts were committed as part of a single criminal episode. In such circumstances, using a separate complicity instruction for each offense may help the jurors segregate the evidence of the defendant's intent as it relates to each offense.

9. *See People v. Fisher*, 9 P.3d 1189, 1192 (Colo. App. 2000) (a person can be held criminally liable for felony murder under a theory of complicity if the complicitor shared the culpable mental state for the predicate felony).

10. *See* Instruction H:07 (timely warning as an affirmative defense to complicity liability).

11. + In 2015, the Committee added Comment 2 and renumbered the subsequent elements.

G1:07 COMPLICITY (RECKLESSNESS OR CRIMINAL NEGLIGENCE)

Complicity is not a separate crime. Rather, it is a legal theory by which one person may be found guilty of a criminal offense that was committed [in whole or in part] by another person.

To be found guilty as a complicitor, the prosecution must prove each of the following circumstances beyond a reasonable doubt:

1. A crime must have been committed.

2. Another person must have committed [all or part of] the crime.

[3. The defendant must have had knowledge that the other person would consciously disregard a substantial and unjustifiable risk that a result would occur or that a circumstance would exist, as set forth in the instruction defining the crime of [insert the name(s) of crime(s) with a mens rea of recklessness here].]

[3. The defendant must have had knowledge that the other person would, through a gross deviation from the standard of care that a reasonable person would exercise, fail to perceive a substantial and unjustifiable risk that a result would occur or that a circumstance would exist, as set forth in the instruction defining the crime of [insert the name(s) of crime(s) with a mens rea of criminal negligence here].]

4. The defendant must have intended to promote or facilitate the commission of the crime.

5. The defendant must have aided, abetted, advised or encouraged the other person in the commission or planning of the crime.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

COMMENT

1. *See* § 18-1-603, C.R.S. 2015.

2. The comments for Instruction G1:06 apply to this instruction.

3. *See Grissom v. People*, 115 P.3d 1280, 1283 (Colo. 2005) ("In 'common enterprise' cases, where both parties are acting in concert to commit a threshold crime, but the principal ultimately commits a more serious crime than the complicitor initially intended, the complicitor can be held liable for the crime committed by the principal."); *People v. Wheeler*, 772 P.2d 101, 105 (Colo. 1989) ("[F]or a person to be guilty of criminally negligent homicide through a theory of complicity, he need not know that death will result from the principal's conduct because the principal need not know that. However, the complicitor must be aware that the principal is engaging in conduct that grossly deviates from the standard of reasonable care and poses a substantial and unjustifiable risk of death to another. In addition, he must aid or abet the principal in that conduct and, finally, death must result from that conduct.").

4. *See also Palmer v. People*, 964 P.2d 524, 529-30 (Colo. 1998) (distinguishing *Bogdanov* because "the word 'intent' in the complicity statute does not mean specific intent but rather retains its plain and ordinary meaning").

5. *See* Instruction H:07 (timely warning as an affirmative defense to complicity liability).

G1:08 DEFENSES THAT ARE NOT AVAILABLE WHEN CRIMINAL LIABILITY IS BASED ON THE BEHAVIOR OF ANOTHER

If the defendant's criminal liability is based upon the behavior of another, it is no defense to the crime of [insert name(s) of crime(s) here] that [the other person has not been prosecuted for or convicted of any crime based upon the behavior in question] [the other person has been convicted of a different crime] [the other person was legally incapable of committing the crime in an individual capacity].

COMMENT

1. *See* § 18-1-605, C.R.S. 2015 (this provision, enumerating unavailable defenses, applies "[i]n any prosecution for an offense in which criminal liability is based upon the behavior of another pursuant to sections 18-1-601 to 18-1-604").

CHAPTER G2

INCHOATE OFFENSES

G2:01 CRIMINAL ATTEMPT

The elements of the crime of attempt to commit [insert name(s) of crime(s) here] are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. [insert the culpable mental state for the offense attempted],

4. engaged in conduct constituting a substantial step toward the commission of [insert name(s) of offense(s)]. [and,]

[5. that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

A "substantial step" is any conduct, whether act, omission, or possession, which is strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense.

After considering the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal attempt to commit [insert name(s) of offense(s)].

After considering the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal attempt to commit [insert name(s) of offense(s)].

COMMENT

1. *See* § 18-2-101(1), C.R.S. 2015 (defining criminal attempt).

2. *See* Instruction F:10 (defining "after deliberation"); Instruction F:185 (defining "intentionally"); Instruction F:195 (defining "knowingly or willfully"); Instruction F:251 (defining "omission"); Instruction F:308 (defining "recklessly"); Instruction F:356 (defining "substantial step").

3. Always give instructions explaining the elements and culpable mental state(s) of the attempted crime. Where the defendant is charged with both the completed crime and an attempt of that same offense, arrange the instructions so that the instructions for the attempted crime precede the attempt instruction.

In cases where the defendant is charged only with an attempt to commit an offense, an elemental instruction defining the attempted crime should immediately follow the instruction defining an attempt (omit the last two paragraphs of the instruction defining the attempted offense, which describe the burden of proof and begin with the words: "After considering the evidence"). The instructions defining the mental state and relevant terms for the attempted offense should follow the elemental instruction.

4. Always include a complete description of the mens rea for the attempted offense as part of the attempt instruction. For example, where the defendant is charged with attempted first degree murder after deliberation, the mens rea should be described, in the third element, as +"after deliberation and with the intent to kill." *See Gann v. People*, 736 P.2d 37, 39 (Colo. 1987) ("[The instruction defining attempt] was erroneous because the jury was instructed on only one of the elements of culpability. The instruction omitted any reference to the requirement that the defendant must have acted after deliberation and with the intent to kill.").

5. *Compare People v. Castro*, 657 P.2d 932, 937 (Colo. 1983) (attempted extreme indifference murder is a cognizable crime), *and People v. Thomas*, 729 P.2d 972, 975-77 (Colo. 1986) (attempted reckless crimes are cognizable), *with People v. Eggert*, 923 P.2d 230, 236 (Colo. App. 1995) (attempted negligent crimes are not cognizable).

6. *See* Instruction H:37 (criminal attempt – affirmative defense of abandonment and renunciation).

7. + In 2015, the Committee modified Comment 4 to correct a potentially misleading quotation.

G2:02 CRIMINAL ATTEMPT (NON-GUILT OF OTHER PERSON NOT A DEFENSE)

A person who engages in conduct intending to aid another to commit an offense commits criminal attempt if his [her] conduct would establish his [her] complicity were the offense committed by the other person, even if the other person is not guilty of committing or attempting the offense.

COMMENT

1. *See* § 18-2-101(2), C.R.S. 2015.

G2:03 CRIMINAL ATTEMPT (FACTUAL OR LEGAL IMPOSSIBILITY NOT A DEFENSE)

Factual or legal impossibility is not a defense to criminal attempt if the underlying offense could have been committed if the facts were as the defendant believed them to be.

COMMENT

1. *See* § 18-2-101(1), C.R.S. 2015.

2. *See People v. Hrapski*, 658 P.2d 1367, 1369 (Colo. 1983) (probable cause existed to bind inmate over on charge of attempt to possess contraband, even though confiscated bullet failed to discharge when tested; because factual impossibility is not a defense under the attempt statute, it was immaterial that the bullet in the defendant's possession was defective).

G2:04 CRIMINAL ATTEMPT (COMPLETION NOT A DEFENSE)

It is no defense to the charge of criminal attempt that the crime attempted was actually completed by the defendant.

COMMENT

1. *See* § 18-2-101(1), C.R.S. 2015.

G2:05 CONSPIRACY

The elements of the crime of conspiracy are:

1. That the defendant.

2. in the State of Colorado, at or about the date and place charged,

3. with the intent to promote or facilitate the commission of the crime of [insert name of offense here],

[4. agreed with another person or persons that they, or one or more of them, would engage in conduct which constituted the crime of [insert name of offense] or an attempt to commit the crime of [insert name of offense], and]

[4. agreed to aid another person or persons in the planning or commission of the crime of [insert name of offense] or an attempt to commit the crime of [insert name of offense], and]

5. the defendant, or a co-conspirator, performed an overt act to pursue the conspiracy.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

"Overt act" means any act knowingly committed by one of the conspirators, in an effort to accomplish some object or purpose of the conspiracy. The overt act need not be criminal in nature. It must, however, be an act that tends toward accomplishment of a plan or scheme, knowingly done in furtherance of some object or purpose of the charged conspiracy.

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of conspiracy.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of conspiracy.

COMMENT

1. *See* § 18-2-201(1), (2) C.R.S. 2015.

2. Always give instructions that define the object crime(s), the crime of attempt (when applicable), and all terms that are relevant to the object crime(s).

3. Section 18-2-201(4), C.R.S. 2015, provides as follows: "If a person conspires to commit a number of crimes, he is guilty of only one conspiracy so long as such multiple crimes are part of a single criminal episode." This rule governs issues relating to merger, *see, e.g.*, *People v. Rodriguez*, 914 P.2d 230, 283 (Colo. 1996), and joinder. *See, e.g.*, *Pinelli v. District Court*, 595 P.2d 225, 228 (Colo. 1979). However, it is not necessary to instruct the jury concerning this rule, as it is the prosecution's prerogative to file a separate conspiracy count for each offense alleged to be an object of the conspiracy. *See, e.g.*, *People v. Montoya*, 141 P.3d 916, 918 (Colo. App. 2006) (defendant charged with seven conspiracy counts).

4. Section 18-2-206(2), C.R.S. 2015, provides as follows: "A person may not be convicted of conspiracy to commit an offense if he is acquitted of the offense which is the object of the conspiracy where the sole evidence of conspiracy is the evidence establishing the commission of the offense which is the object of the conspiracy." This section codifies the rule announced in *Robles v. People*, 417 P.2d 232, 234 (Colo. 1966). *See People v. Frye*, 898 P.2d 559, 567 n. 12 (Colo. 1995).

In *Frye*, the supreme court explained that the inconsistent verdict doctrine is in accord with this statute:

> We believe that the rule announced in *Robles*, prohibiting verdicts where a defendant is convicted of conspiring to commit a substantive offense and acquitted of that substantive offense, where the same evidence relied on to establish the conspiracy is the evidence that was found insufficient to establish the substantive offense, should be strictly limited to the terms of section 18-2-206(2).

Id. at 570. Thus, when this doctrine is litigated at the appellate level, the result turns on the question of whether there is "independent evidence in the record [that] implicates

the defendant in the conspiracy [for which he was convicted], separate and distinct from that supporting the substantive crime [for which he was acquitted]." *People v. Scearce*, 87 P.3d 228, 232 (Colo. App. 2003).

5. Colorado follows the "Wharton Rule" relating to conspiracies, under which "[a]n agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its commission." *People v. Bloom*, 577 P.2d 288, 290-91 (Colo. 1978) (quoting 1 Anderson, *Wharton's Criminal Law and Procedure* 89). In cases with factual scenarios implicating this rule, it may be necessary to have the jury make a factual finding regarding the number of participants to the illicit agreement. Although that can be accomplished by means of a special verdict form, a simpler method is to incorporate the determination into the elemental instruction by modifying the language concerning the number of participants. *See, e.g., People v. Weathersby*, 514 N.W.2d 493, 500 (Mich. Ct. App. 1994) (stating that Wharton's rule, though inapplicable to the statute at issue, was nevertheless adequately embodied in an elemental instruction that required the jury to find that "defendant and *two or more* people" knowingly agreed to violate the gambling law (emphasis added)).

6. *See* Instruction H:38 (renunciation as an affirmative defense to conspiracy).

7. The Colorado Criminal Code does not define the term "overt act." The above definition first appeared in the 2003 draft revisions of the model criminal jury instructions. It is substantially similar to an earlier version that appeared in COLJI-Crim. 8(1), (1983). The "Notes on Use" section for the 1983 instruction states that it was "taken from the Federal Jury Practice and Instructions." *See also People v. Schruder*, 735 P.2d 905, 907 (Colo. App. 1986) (the absence of an instruction defining "overt act" was not plain error because "[t]he plain meaning of 'overt act' is not so abstruse as to be incomprehensible to the average juror").

G2:06 CONSPIRACY (IDENTITY OF A CO-CONSPIRATOR UNKNOWN)

If the defendant knows that one with whom he [she] conspires to commit a crime has conspired with another person or persons to commit the same crime, he [she] is guilty with such other person or persons, whether or not he [she] knows their identity.

COMMENT

1. *See* § 18-2-201(3), C.R.S. 2015.

2. *See People v. Serrano*, 804 P.2d 253, 254 (Colo. App. 1990) ("In proving that a 'wheel and hub' conspiracy is a single conspiracy, rather than multiple conspiracies, there must be evidence of an agreement among all of the actors. However, there need not be evidence of a formal agreement; rather, it is sufficient to show that each conspirator knew or had reason to know of the existence and scope of the conspiracy and that each had reason to believe that his benefit depended upon the success of the entire venture. Further, it is not necessary to prove that each conspirator knew every other conspirator so long as an overall plan with a common object is shown." (citations omitted)).

G2:07 CONSPIRACY (LACK OF POSITION OR CHARACTERISTIC NOT A DEFENSE)

It is no defense to a charge of conspiracy that the defendant or the person with whom he [she] conspires did not occupy a particular position or have a particular characteristic which is an element of the crime, if the defendant believes that one of them did.

COMMENT

1. *See* § 18-2-205, C.R.S. 2015.

G2:08 CONSPIRACY (CO-CONSPIRATOR'S IMMUNITY OR LACK OF RESPONSIBILITY NOT A DEFENSE)

It is no defense to a charge of conspiracy that the person with whom the defendant conspires [is not legally responsible] [has immunity to prosecution or conviction] for the commission of the crime.

COMMENT

1. *See* § 18-2-205, C.R.S. 2015.

G2:09 CRIMINAL SOLICITATION

The elements of the crime of criminal solicitation are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent to promote or facilitate the commission of [insert name of offense here, which must be a felony],

4. under circumstances that strongly corroborate that intent,

[5. commanded, induced, entreated, or otherwise attempted to persuade another person,]

[5. offered his [her] services or another's services to a third party,]

6. to commit [insert name of the offense here, which must be a felony].

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal solicitation.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal solicitation.

COMMENT

1. *See* § 18-2-301 (1),(5), C.R.S. 2015.

2. Always give instructions defining the object crime, and all relevant terms. *See also Webster's Third New International Dictionary* 759 (2002) (defining "entreat" as meaning "beg" or "prevail upon by pleading").

3. The supreme court has explained that "[a]lthough encouragement of a criminal offense is prohibited under both [the solicitation and complicity] statutes, the solicitation statute concerns incomplete acts, and the complicity statute covers consummated criminal offenses." *Alonzi v. People*, 597 P.2d 560, 564 n.3 (Colo. 1979).

4. In *Melina v. People*, 161 P.3d 633, 641 (Colo. 2007), the court held that the defendant's numerous statements to several individuals regarding his desire to have the victim killed constituted a single transaction of solicitation. Therefore, the court rejected the defendant's claim of instructional error (which was premised on the fact that the elemental instruction used the singular term, "another person"), as well as his claim that the court had erred by not giving the jury a unanimity instruction. However, users should note that the holding of *Melina* will not apply in a case where more than one act of solicitation is charged. In such circumstances, use separate elemental instructions that identify each alleged act in some distinguishing manner (e.g., date, name of person solicited, etc.).

5. *See* Instruction H:39 (affirmative defense to criminal solicitation – sole victim, inevitably incident, or otherwise not liable); Instruction H:40 (affirmative defense to criminal solicitation – prevention and renunciation).

6. *See People v. Jacobs*, 91 P.3d 438, 441-42 (Colo. App. 2003) (because the general offense of solicitation does not apply to the separate substantive offense of soliciting for child prostitution, the affirmative defenses of prevention and renunciation under the general solicitation statute are also inapplicable).

G2:10 CRIMINAL SOLICITATION (NON-GUILT OF PERSON SOLICITED NOT A DEFENSE)

It is no defense to the charge of criminal solicitation that the person solicited could not be guilty of the offense because of lack of culpability or legal responsibility, or other incapacity.

COMMENT

1. *See* § 18-2-301(3), C.R.S. 2015.

CHAPTER H

DEFENSES

SECTION I: DEFENSES THAT ARE GENERALLY APPLICABLE

SECTION II: DEFENSES TO INCHOATE OFFENSES AND SPECIFIC CRIMES

COMMENTS ON CHAPTER USE

1. As reflected in the table of contents above, the chapter is divided into two sections. Within each section, the instructions are arranged sequentially according to the numbering of the underlying statutes.

2. The instructions for the affirmative defense of insanity are located in Chapter I.

3. In previous editions of COLJI-Crim., this chapter was captioned "Affirmative Defenses." The Committee has retitled the chapter "Defenses" because it also contains instructions for element-negating traverses.

The supreme court has explained the distinction between these two types of defenses as follows:

> There are, generally speaking, two types of defenses to criminal charges: (1) "affirmative" defenses that admit the defendant's commission of the elements of the charged act, but seek to justify, excuse, or mitigate the commission of the act; and (2) "traverses" that effectively refute the possibility

> that the defendant committed the charged act by negating an element of the act. *See People v. Huckleberry*, 768 P.2d 1235, 1238 (Colo. 1989) (citations omitted) [(defense of alibi is not an affirmative defense requiring an instruction stating that the People bear the burden of refuting an alibi beyond a reasonable doubt)]; *see also People v. Miller*, 113 P.3d 743, 750 (Colo. 2005) (further explaining the distinction between affirmative defenses and traverses). In Colorado, if presented evidence raises the issue of an affirmative defense, the affirmative defense effectively becomes an additional element, and the trial court must instruct the jury that the prosecution bears the burden of proving beyond a reasonable doubt that the affirmative defense is inapplicable. *See* § 18-1-407, C.R.S. (2010); *Huckleberry*, 768 P.2d at 1238 (citations omitted). If, on the other hand, the presented evidence raises the issue of an elemental traverse, the jury may consider the evidence in determining whether the prosecution has proven the element implicated by the traverse beyond a reasonable doubt, but the defendant is not entitled to an affirmative defense instruction. *See Huckleberry*, 768 P.2d at 1238.

People v. Pickering, 276 P.3d 553, 555 (Colo. 2011).

4. A defendant is entitled to an instruction concerning an affirmative defense if the trial court determines, as a matter of law, that there is some credible evidence in the record to support it. *See O'Shaughnessy v. People*, 2012 CO 9, ¶ 11, 269 P.3d 1233, 1236; *People v. Speer*, 255 P.3d 1115, 1119 (Colo. 2011).

5. The Committee has designed model affirmative defense instructions that are to be referenced by inclusion of the following language in an elemental instruction: "and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___."

However, when the jury is instructed concerning the affirmative defense of insanity, the following language should be included as the final element of the offense (and it should be numbered as a separate element, as shown in the example below, whether insanity is the only affirmative defense or an alternative to one of the other affirmative defenses which are

to be referenced using the "was not legally authorized" language that appears within the final bracketed element of each model elemental instruction):

> _. and that the defendant was not insane, as defined in Instruction ___.

6. Although the Committee has drafted an affirmative defense instruction for each generally applicable defense that is identified as an "affirmative defense" by statute, in a few instances the Committee has, consistent with past practice, included comments that question the correctness of the characterization. *See*, *e.g.*, Instruction H:02, Comment 2 (mistaken belief of law).

7. In COLJI-Crim. (2008), the third "Note on Chapter Use" stated that "[t]here may be other, non-statutory affirmative defenses." However, in *Oram v. People*, 255 P.3d 1032 (Colo. 2011), the supreme court explicitly rejected this proposition and held that "all affirmative defenses to crimes must be defined by the General Assembly in the Colorado Revised Statutes." *Id.* at 1036 (the common-law bonding agent's privilege does not exist in Colorado as an affirmative defense to burglary).

8. This chapter does not include an instruction defining an affirmative defense based on the concept of an "intervening cause." There is no statute establishing such an affirmative defense, and when the supreme court has likened the concept of an "intervening cause" to an affirmative defense it has done so only for a narrow purpose:

> The quantum of evidence that must be offered by the defendant in order to be entitled to an instruction on a theory of defense is "a scintilla of evidence". *See People v. Lundy*, 188 Colo. 194, 197, 533 P.2d 920, 921 (1975). "Some credible evidence", an alternative statement of the "scintilla of evidence" standard, is necessary to present an affirmative defense. *See People v. Dover*, 790 P.2d 834, 836 (Colo. 1990). It merely requires some evidence to support the defense. *See People v. Dillon*, 655 P.2d 841, 845 (Colo. 1982). We hold that the intervening cause defense is treated like an affirmative defense *or* a theory of defense for the purpose of determining the quantum of evidence necessary to submit the issue to the jury. Therefore, a defendant must present a scintilla of evidence, or

> some evidence, [of an intervening cause] in order to be entitled to submit the issue to the jury. The court, not the jury, must make threshold determinations of whether an affirmative defense can be supported by the evidence.

People v. Saavedra-Rodriguez, 971 P.2d 223, 228 (Colo. 1998) (emphasis added).

Significantly, although the court has, in dicta, referred to an "intervening cause" as an "affirmative defense," *see People v. Stewart*, 55 P.3d 107, 119 (Colo. 2002) ("[w]hile it is possible that Stewart . . . wished to deemphasize intervening cause as an affirmative defense to first and second degree assault"); *People v. Fite*, 627 P.2d 761, 765 n.6 (Colo. 1981) (acknowledging that "[t]he issue of supervening cause was submitted to the jury as an affirmative defense," but holding, as a matter of law, that there was no evidence of an intervening cause), it has never found error based on the absence of an instruction defining the concept of an intervening cause as an affirmative defense. Nor has it ever directed a trial court to instruct a jury in such a manner, even when it has concluded that an instruction was warranted. *See People v. Bowman*, 669 P.2d 1369, 1379 (Colo. 1983) ("We direct that, if the evidence presented on retrial warrants it, the jury should be fully instructed about the law concerning supervening causes as set forth in *People v. Calvaresi*, [534 P.2d 316 (Colo. 1975)]."). Moreover, no earlier edition of COLJI-Crim. has included an instruction defining an "intervening cause" as an affirmative defense.

Accordingly, the Committee has concluded that, when a defendant makes the threshold showing necessary to obtain an intervening cause instruction, *see People v. Stewart*, 55 P.3d 107, 119; *People v. Saavedra-Rodriguez*, 971 P.2d at 228, the element-negating traverse should be explained in a separate instruction, or by adding language to an instruction that defines the term "cause." The latter approach is consistent with CJI-Civ. 9:20 (2014) (defining "cause" with optional language discussing the concept of an intervening cause), and there is support for it in *People v. Deadmond*, 683 P.2d 763, 768 (Colo. 1984) (trial court did not err by rejecting the defendant's proffered instruction defining "intervening cause" because the concept was explained in the instruction defining "proximate cause," which "fully apprised the jury of the nature of the causal connection between conduct and result which the prosecution was required to establish beyond a reasonable

doubt"). *See also People v. Gentry*, 738 P.2d 1188, 1189-90 (Colo. 1987) (both the defendant's theory of defense instruction, which the supreme court disapproved because it did not state that only negligence rising to the level of "gross negligence" can constitute an "intervening cause," and the prosecution's tendered instruction, which the trial court rejected, described an "intervening cause" merely as a "defense," and not as an affirmative defense); *People v. Grassi*, 192 P.3d 496, 499 (Colo. App. 2008) (instruction defining "proximate cause" was "an amalgam of both the civil and criminal jury instructions on proximate cause [that] was done to accommodate defendant's defense that his conduct was not the proximate cause of the accident or the victim's resulting death, but that the victim's actions had been the intervening cause of both"); *People v. Marquez*, 107 P.3d 993, 997 (Colo. App. 2004) ("The instructions given by the court required the jurors to find that the prosecution had proved the causation element of vehicular homicide beyond a reasonable doubt, and they gave the jurors a correct definition of 'proximate cause.' The additional references to intervening cause and related concepts were superfluous. However, any error inured to defendant's benefit, in that it suggested the existence of a defense to the causation element that was unwarranted in light of the evidence presented.").

9. Citations to definitional instructions located in Chapter F are included in the comments that follow the defense instructions. However, citations to definitional instructions are not included for those terms that also appear in the corresponding elemental instructions (because citations to those definitional instructions are included as part of the comments for the elemental instructions). For example, the second comment for Instruction H:69 (affirmative defense of "recreational marijuana") includes numerous citations to definitional instructions in Chapter F, but it does not include a citation to Instruction F:208 (defining "marijuana"), because a citation to that definitional instruction is included in a comment for each elemental instruction that defines a marijuana offense.

10. In COLJI-Crim. (2008), the first instruction in Chapter H, Instruction H:01, was captioned as: "Affirmative Defenses – Generally." The instruction contained just two paragraphs which stated the prosecution's burden of proof with respect to affirmative defenses, and a comment advised users that "[t]his language should now be included in the concluding paragraphs of

affirmative defense instructions and not set forth in a separate instruction."

In this edition of COLJI-Crim., the Committee has substantially revised the burden-of-proof language and, as in COLJI-Crim. 2008, included the burden-of-proof language in each of the model affirmative defense instructions in Chapter H. Because the Committee did not see a need to have a freestanding instruction that merely states the prosecution's burden of proof (or, more accurately, its burden of disproof), Instruction H:01 now defines the first affirmative defense in the chapter (i.e., mistaken belief of fact).

When drafting an instruction to define a statutory affirmative defense for which there is no model instruction, use as a template one of the model instructions that includes the burden-of-proof language.

CHAPTER H: SECTION I (DEFENSES THAT ARE GENERALLY APPLICABLE)

H:01 EFFECT OF IGNORANCE OR MISTAKE UPON CULPABILITY (MISTAKEN BELIEF OF FACT)

The evidence presented in this case has raised the affirmative defense of "mistaken belief of fact," as a defense to [insert name(s) of offense(s)].

The defendant's conduct was legally authorized if:

1. the defendant engaged in the prohibited conduct under a mistaken belief, and

2. due to this mistaken belief he [she] did not form the particular mental state required in order to commit the offense.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

COMMENT

1. *See* § 18-1-504(1)(a), (3), C.R.S. 2015.

2. A division of the Court of Appeals has held that a mistake of fact instruction need not be given if proof of the mens rea necessarily requires proof that the defendant was not operating under the asserted mistaken belief of fact. *See People v. Walden*, 224 P.3d 369, 378-79 (Colo. App. 2009) (defendant's proposed mistake of fact instruction, relating to his alleged belief that he had permission to enter and stay at victim's apartment, duplicated elements of instruction defining first-degree criminal trespass; the effect of defendant's instruction, if the jury were to believe his contention, would merely have been to negate requisite "knowing" element of trespass; therefore, the trial court did not err by refusing defendant's proposed instruction); *see also People v. Andrews* 632 P.2d 1012, 1016 (Colo. 1981) ("the culpability element of 'knowingly' belies the notion that the [aggravated motor vehicle theft] statute somehow authorizes a conviction based on a mistaken belief in one's authorization to obtain or exercise control over another's vehicle").

H:02 EFFECT OF IGNORANCE OR MISTAKE UPON CULPABILITY (MISTAKEN BELIEF OF LAW)

The evidence presented in this case has raised the affirmative defense of "mistaken belief of law," as a defense to [insert name(s) of offense(s)].

The defendant's conduct was legally authorized if:

1. the defendant engaged in the prohibited conduct under a mistaken belief that his [her] conduct did not, as a matter of law, constitute an offense, and

2. the conduct was permitted by: [a statute or ordinance binding in this state] [an administrative regulation, order, or grant of permission by a body or official authorized and empowered to make such order or grant the permission under the laws of the state of Colorado] [an official written interpretation of the statute or law relating to the offense, made or issued by a public servant, agency, or body legally charged or empowered with the responsibility of administering, enforcing, or interpreting a statute, ordinance, regulation, order, or law [, which, if by judicial decision, was binding in the state of Colorado]].

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of

proof with respect to the remaining elements of [that] [those] offense[s].

COMMENT

1. *See* § 18-1-504(2), C.R.S. 2015.

2. The Committee included this instruction because the General Assembly has labeled this type of "mistake" as an "an affirmative defense." § 18-1-504(3), C.R.S. 2015. However, no published decision has analyzed a jury instruction embodying this affirmative defense, and it is difficult to conceive of a scenario that would implicate this defense without giving rise to grounds for a judgment of acquittal under Crim. P. 29(a). Moreover, "it is a well-known maxim that 'ignorance of the law constitutes no excuse for its violation,'" *Kent v. People*, 9 P. 852, 854 (Colo. 1886), and a "mistake of law" defense cannot be based on a misunderstanding of the law. *See People v. Lesslie*, 24 P.3d 22 (Colo. App. 2000) (deputy sheriff convicted of conspiracy to commit criminal eavesdropping for installing an electronic listening device in the restroom of a bar was not entitled to mistake of law instruction where (1) the sheriff, whom the deputy alleged had ordered him to place the electronic listening device, was not an official authorized or empowered to permit the interception and recording of communications by such a device; and (2) the appellate decision on which the deputy allegedly relied was inapposite, as it involved police interception of conversations without the aid of an electronic listening device).

H:03 CONSENT OF VICTIM

The evidence presented in this case has raised the affirmative defense of "consent," as a defense to [insert name(s) of offense(s)].

The defendant's conduct was legally authorized if:

1. the alleged victim consented to the conduct charged to constitute the offense, [or to the result thereof,] and

2. [the consent negates an element of the offense.]

   [the consent precluded the infliction of [insert a short statement identifying the harm or evil sought to be prevented by the law defining the offense].]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

COMMENT

1. *See* § 18-1-505(1), C.R.S. 2015.

2. Section 18-1-505(4), C.R.S. 2015, states that "[a]ny defense authorized by this section is an affirmative defense," and section 18-1-505(1), C.R.S. 2015, states that consent is a defense if it "negates an element of the offense."

The Committee notes that divisions of the Court of Appeals have held that an affirmative defense instruction is not required in cases where proof of the elements of the offense necessarily requires the prosecution to prove the absence of consent. *See People v. Bush*, 948 P.2d 16, 18 (Colo. App. 1997) (the trial court did not err in rejecting defendant's instructions defining consent as an affirmative defense to the charges of theft and unauthorized use of a financial transaction device because "a trial court is not required to give the jury an instruction defining an affirmative defense if proof of the elements of the charged offense necessarily requires disproof of the issue raised by the affirmative defense"); *People v. Cruz*, 923 P.2d 311, 312 (Colo. App. 1996) ("§ 18-1-505(1) does not impose a requirement that the jury be instructed on an affirmative defense of consent in a case under . . . [a] statute which itself requires, in effect, that the prosecution prove a lack of consent"). Nevertheless, because the General Assembly has specified that consent which negates an element of an offense is an "affirmative defense," the Committee has included bracketed language reflecting that legislative directive.

However, in 2002 the General Assembly enacted a provision directing that, in cases where the defendant is charged with a sexual offense or an invasion of privacy (or an attempt or a conspiracy with one of these enumerated offenses as the object): "*[n]otwithstanding the provisions of section 18-1-505(4),* an instruction on the definition of consent given pursuant to [the special definition of consent set forth in section 18-3-401(1.5)] shall not constitute an affirmative defense, but shall only act as a defense to the elements of the offense." § 18-3-408.5(1), C.R.S. 2015 (emphasis added); *see also* § 18-3-408.5(2), C.R.S. 2015 (listing the offenses to which this provision applies); Instruction F:68 (defining "consent" pursuant to section 18-3-401(1.5)).

H:04 CONSENT OF VICTIM (OFFENSES INVOLVING BODILY INJURY, OR THREATENED BODILY INJURY)

The evidence presented in this case has raised the affirmative defense of "consent," as a defense to [insert name(s) of offense(s)].

The defendant's conduct was legally authorized if:

1. the alleged victim consented to the conduct that caused or threatened bodily injury, or to the infliction of that injury, and

2. [the bodily injury consented to, or threatened by the conduct consented to, was not serious.]

   [the conduct and the injury were reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport.]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

COMMENT

1. *See* § 18-1-505(2), (4), C.R.S. 2015.

2. *See* Instruction F:36 (defining "bodily injury"); Instruction F:332 (defining "serious bodily injury").

3. The final clause of section 18-1-505(2) states that consent to bodily injury is a defense where "the consent establishes a justification under sections 18-1-701 to 18-1-707." *See*, *e.g.*, § 18-1-703(1)(e)(I), C.R.S. 2015 (establishing an affirmative defense where a patient consents to reasonable and appropriate physical force that is administered for a recognized physical or mental health treatment).

4. If there is evidence of consent based on "joint participation in a lawful athletic contest or competitive sport," draft a supplemental instruction in accordance with the statutes or regulations that govern the relevant activity. *See*, *e.g.*, § 12-10-106(1), C.R.S. 2015 (authorizing the Colorado state boxing commission to promulgate necessary rules and regulations).

5. *See* Instruction H:03, Comment 2 (explaining that, pursuant to section 18-3-408.5(1), consent is not an affirmative defense to certain sexual offenses).

H:05.SP SPECIAL INSTRUCTION: WHEN ASSENT DOES NOT CONSTITUTE CONSENT

Assent does not constitute consent if:

[it is given by a person who is legally incompetent to authorize the conduct charged to constitute the offense.]

[it is given by a person who, by reason of immaturity, mental disease, mental defect, or intoxication, is manifestly unable and is known or reasonably should be known by the defendant to be unable to make a reasonable judgment as to the nature or harmfulness of conduct charged to constitute the offense.]

[it is given by a person whose conduct is sought to be prevented by the law defining the offense.]

[it is induced by force, duress, or deception].

COMMENT

1. *See* § 18-1-505(3), C.R.S. 2015 (stating that these limitations apply, "[u]nless otherwise provided by this code or by the law defining the offense").

2. If the facts of the case implicate one of the above provisions, use of a separate instruction may not be the simplest way to explain the concept. Consider incorporating the relevant limiting language into the instruction defining the term "consent." *See People v. Holwuttle*, 155 P.3d 447, 450 (Colo. App. 2006) (trial court did not err by including language from section 18-1-505(3) as part of instruction defining the term "consent").

H:06 DEFENDANT AS VICTIM OR INCIDENTAL ACTOR

The evidence presented in this case has raised the affirmative defense of "defendant as [victim] [incidental actor]" as a defense to [insert name(s) of offense(s)].

The defendant's conduct was legally authorized if:

1. [he [she] was a victim of the offense] [his [her] conduct was inevitably incidental to the commission of the offense], and

2. the offense was committed by another person.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

COMMENT

1. *See* § 18-1-604(1), C.R.S. 2015 (stating that these provisions apply "[u]nless otherwise provided by the statute defining the offense").

2. Although the Committee has drafted a model instruction based on section 18-1-604(1), it is debatable whether this section establishes: (1) a defense that is subject to

determination by the jury; or (2) a principle of statutory construction that the court is to determine as a matter of law. *Compare People v. Grace*, 55 P.3d 165, 171 (Colo. App. 2001) (concluding, as part of a determination that the evidence was sufficient to support the defendant's conviction for distribution and attempted possession of cocaine, that his actions as a middleman to a drug transaction were not inevitably incidental to the commission of that offense), *with People v. Hart*, 787 P.2d 186, 189 (Colo. App. 1989) (reversing defendant's conviction for distribution of a controlled substance which entered under a theory of complicity; "as framed by the definition of the crime of distribution, the conduct of one who takes delivery of the controlled substance is 'inevitably incident' to the criminal conduct of one who delivers the controlled substance"; therefore, "a person who takes delivery of a controlled substance by purchase is exempt from liability as a complicitor for the crime of distribution committed by a person delivering the controlled substance to him").

3. Because section 18-1-604(1) speaks in terms of criminal liability "for behavior of another," it appears this provision applies only where the defendant is charged as a complicitor, or pursuant to one of the provisions of section 18-1-602, C.R.S. 2015 ("behavior of another").

H:07 COMPLICITY - TIMELY WARNING

The evidence presented in this case has raised the affirmative defense of "timely warning," as a defense to [insert name(s) of offense(s)].

The defendant's conduct was legally authorized if:

1. prior to the commission of the offense, he [she] terminated his [her] effort, as a complicitor, to promote or facilitate its commission, and

2. he [she] gave timely warning to law enforcement authorities or the intended victim.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

COMMENT

1. *See* § 18-1-604(2), C.R.S. 2015.

2. Complicity is a theory of criminal liability; it is not an offense. *See Grissom v. People*, 115 P.3d 1280, 1283 (Colo. 2005); Instructions G1:06, G1:07 (defining liability as a complicitor).

H:08 EXECUTION OF PUBLIC DUTY

The evidence presented in this case has raised the affirmative defense of "execution of public duty," as a defense to [insert name(s) of offense(s)].

The defendant's conduct was legally authorized if:

1. he [she] was [insert disputed predicate fact(s) that will determine whether the defendant was acting pursuant to a provision of law or judicial decree].] [, and]

[2. insert disputed predicate fact(s) that will determine whether the provision of law or judicial decree was binding in Colorado.]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, [at least one of] the above numbered condition[s].

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

COMMENT

1. *See* § 18-1-701, C.R.S. 2015.

2. Both COLJI-Crim. 7:07 (1983) and COLJI-Crim. H:08 (2008) indicated that "execution of public duty" was an "affirmative

defense," though neither instruction specified how the jury was to determine the issue.

Because the applicability of section 18-1-701 will, in every case, turn on an interpretation of a judicial decree or provision of law as defined by section 18-1-701(2), the Committee has concluded that the inquiry is, at least in part, a question of law. *See People v. Lesslie*, 24 P.3d 22, 25 (Colo. App. 2000) (concluding, as a matter of law, that deputy sheriff convicted of conspiracy to commit eavesdropping for placing an electronic listening device in a restroom was not entitled to raise the defense of execution of a public duty because the sheriff who allegedly directed the action did not have the authority to do so without a court order); *People v. Roberts*, 601 P.2d 654, 656 (Colo. App. 1979) (trial court did not err in refusing an instruction on execution of a public duty; "[t]he propriety of this refusal depends upon the legal question of whether defendant, as a penitentiary guard, had a public duty to apprehend an escaped convict by using undercover techniques").

Significantly, the statute does not contain any requirement that the defendant actually have had knowledge of the statutory provision or judicial decree (unlike the affirmative defense of mistake of law, which is discussed in Comment 2 to Instruction H:02). Therefore, the only possibility for a factual dispute is with respect to the predicate facts that establish whether a defendant's conduct was within the scope of a binding provision of law or judicial decree that makes the conduct non-criminal.

For example, in a case where a defendant asserts the defense based on a judicial decree from another state there could be factual disputes concerning (1) whether the defendant was acting pursuant to the judicial decree; and (2) if so, whether the out-of-state judgment was binding in Colorado.

3. Section 18-1-701(1) states that the exemption from criminal liability applies: "[u]nless inconsistent with other provisions of sections 18-1-702 to 18-1-710, defining justifiable use of physical force."

H:09 CHOICE OF EVILS

The evidence presented in this case has raised the affirmative defense of "choice of evils," as a defense to [insert name(s) of offense(s)].

The defendant's conduct was legally authorized if:

1. it was necessary as an emergency measure to avoid an imminent public or private injury, which was about to occur because of a situation occasioned or developed through no conduct of the defendant, and

2. the injury was of sufficient gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweighed the desirability of avoiding the injury sought to be prevented by the statute defining [insert name(s) of offense(s)].

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

COMMENT

1. *See* § 18-1-702, C.R.S. 2015 (stating that this affirmative defense is available unless inconsistent with other provisions of sections 18-1-703 to 707, defining the justifiable use of physical force, or with some other provision of law).

2. "When evidence relating to the defense of justification under this section is offered by the defendant, before it is submitted for the consideration of the jury, the court shall first rule as a matter of law whether the claimed facts and circumstances would, if established, constitute a justification." § 18-1-702(2), C.R.S. 2015.

3. The statute defining the defense of duress, section 18-1-708, C.R.S. 2015, states: "The choice of evils defense, provided in section 18-1-702, shall not be available to a defendant in addition to the defense of duress provided under this section unless separate facts exist which warrant its application."

4. In *People v. Brandyberry*, 812 P.2d 674 (Colo. App. 1990), a division of the Court of Appeals relied on dictionary definitions of three terms that appear in the statutory definition of the choice of evils defense: "emergency," "imminent," and "urgency." However, the division cited these definitions for the limited purpose of disapproving a trial court's decision to instruct the jury concerning the choice of evils defense (specifically, the division held that a kidnapping victim's mere affiliation with the Unification Church was insufficient to warrant an instruction in a case where the defendant asserted a need to "deprogram" the victim). Accordingly, because the Committee has concluded that all three terms are commonly understood, the dictionary definitions referenced in *Brandyberry* are not included in Chapter F.

5. A defendant is not entitled to a choice of evils instruction based on mere speculation. *See People v. Brante*, 232 P.3d 204, 210 (Colo. App. 2009) (defendant's speculative fears did not rise to the level of an impending injury demanding immediate action).

6. A division of the Court of Appeals has questioned whether the choice of evils defense applies to nonintentional conduct, and has suggested that an instruction may not be necessary where the concept is sufficiently embodied in a self-defense instruction. *See People v. Roberts*, 983 P.2d 11, 15 (Colo. App. 1998).

7. The choice of evils defense is not available as a justification for behavior that attempts to bring about social and political change outside the democratic governmental process. *See Andrews v. People*, 800 P.2d 607, 609 (Colo. 1990) (choice of evils defense unavailable to protesters charged with public order offenses committed during a protest at nuclear weapons plant).

8. *See also People v. Dover*, 790 P.2d 834, 834-35 (Colo. 1990) (attorney charged with driving eighty miles per hour in a fifty-five mile per hour zone who claimed he was late for a court hearing was not entitled to assert an emergency defense under a provision of the traffic code, now codified as section 42-4-1101(9), C.R.S. 2015, that is a corollary to the choice of evils defense); *People v. McKnight*, 626 P.2d 678, 681 (Colo. 1981) (defendant charged with escape from prison not entitled to assert choice of evils defense based on normal conditions of confinement).

9. *See also* Instruction H:64 (affirmative defense of "possession of a weapon by a previous offender - choice of evils").

H:10 USE OF PHYSICAL FORCE (SPECIAL RELATIONSHIPS)

The evidence presented in this case has raised the affirmative defense of "physical force pursuant to a special relationship," as a defense to [insert name(s) of offense(s)].

The defendant was legally authorized to use physical force upon another person if:

[1. he [she] was [a parent, guardian, or other person entrusted with the care and supervision of a minor or an incompetent person] [a teacher or other person entrusted with the care and supervision of a minor], and

2. he [she] used reasonable and appropriate physical force upon the [minor] [incompetent person], when and to the extent it was reasonably necessary and appropriate, to maintain discipline or promote the welfare of the minor [incompetent person].]

[1. he [she] was a superintendent [or other authorized official] of a [jail] [prison] [correctional institution], and

2. he [she] used reasonable and appropriate physical force, when and to the extent that he [she] reasonably believed it was necessary to maintain order and discipline. [, and]

[3. he [she] reasonably believed that the use of deadly physical force was necessary to prevent death or serious bodily injury.]]

[1. he [she] was a person responsible for the maintenance of order in a common carrier of passengers, [or was acting under the direction of a person with that responsibility,] and

2. he [she] used reasonable and appropriate physical force, when and to the extent that it was necessary, to maintain order and discipline. [, and]

[3. the use of deadly physical force was reasonably necessary to prevent death or serious bodily injury.]]

[1. he [she] was a person acting under a reasonable belief that another person was about to [commit suicide] [inflict serious bodily injury upon himself [herself]], and

2. he [she] used reasonable and appropriate physical force upon that person to the extent that it was reasonably necessary to thwart the result.]]

[1. he [she] was a duly licensed [physician] [advanced practice nurse] [person acting under the direction of a duly licensed [physician] [advanced practice nurse]], and

2. he [she] used reasonable and appropriate physical force for the purpose of administering a recognized form of treatment that he [she] reasonably believed to be adapted to promoting the physical or mental health of the patient, and

3. [the treatment was administered with the consent of the patient.] [the patient was a minor or an incompetent person, and the treatment was administered with the consent of his [her] parent, guardian, or other person entrusted with his [her] care and supervision.] [the treatment was administered in an emergency when the physician or advanced practice nurse reasonably believed that no one competent to consent could be consulted and that a reasonable person, wishing to safeguard the welfare of the patient, would consent.]]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

COMMENT

1. *See* § 18-1-703(1)(a-e), C.R.S. 2015.

2. *See* Instruction F:58 (defining "common carrier"); Instruction F:87 (defining "deadly physical force"); Instruction F:332 (defining "serious bodily injury").

3. Previously, the statute defining child abuse included "without justifiable excuse" as an element. Although the supreme court construed that language as incorporating the affirmative defense of reasonable discipline, the General Assembly has since amended the child abuse statute and removed the language. *See* § 18-6-401, C.R.S. 2015; *People v. Lybarger*, 700 P.2d 910, 916 (Colo. 1985); *People v. Hoehl*, 568 P.2d 484, 487 (Colo. 1977).

H:11 USE OF NON-DEADLY PHYSICAL FORCE (DEFENSE OF PERSON)

The evidence presented in this case has raised the affirmative defense of "defense of person," as a defense to [insert name(s) of offense(s)].

The defendant was legally authorized to use physical force upon another person without first retreating if:

1. he [she] used that physical force in order to defend himself [herself] or a third person from what he [she] reasonably believed to be the use or imminent use of unlawful physical force by that other person, and

2. he [she] used a degree of force which he [she] reasonably believed to be necessary for that purpose. [, and]

[3. he [she] did not, with intent to cause bodily injury or death to another person, provoke the use of unlawful physical force by that other person.]

[4. he [she] was not the initial aggressor, or, if he [she] was the initial aggressor, he [she] had withdrawn from the encounter and effectively communicated to the other person his [her] intent to do so, and the other person nevertheless continued or threatened the use of unlawful physical force.]

[5. the physical force involved was not the product of an unauthorized combat by agreement.]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

COMMENT

1. *See* § 18-1-704(1-3), C.R.S. 2015.

2. *See* Instruction F:36 (defining "bodily injury").

3. *See People v. Garcia*, 28 P.3d 340, 347 (Colo. 2001) ("the no-duty to retreat rule does not apply when a non-aggressor pursues an initial aggressor who has withdrawn because in that situation, the non-aggressor in fact becomes the aggressor"; however, the trial court erred in refusing to give a no-duty to retreat instruction in this case because the victim had not withdrawn, the defendant was not out of danger at the time that she killed him, and the jury could have mistakenly concluded that the defendant had a duty to retreat before using deadly force); *Idrogo v. People*, 818 P.2d 752, 757 (Colo. 1991) (because the question of whether the defendant did in fact retreat was vigorously disputed, the defendant was entitled to have the jury properly instructed on applicable law of nonretreat; trial court erred by not instructing the jury that an innocent victim of assault need not retreat before using deadly force if the victim believes the use of such force is necessary for self-protection and the belief is based on reasonable grounds).

4. If the jury is given an instruction that utilizes the language of section 18-1-704, it is unnecessary to give a separate instruction concerning the concept of "apparent necessity." *See Beckett v. People*, 800 P.2d 74, 78 (Colo. 1990) (a separate "apparent necessity" instruction is not necessary where jury instructions adequately informed the jury that it was required to consider the defendant's reasonable belief in the necessity of defensive action).

5. The above instruction does not include multiple assailant language from *People v. Jones*, 675 P.2d 9, 14 (Colo. 1984). More recently, the supreme court has explained "that *Jones* does

not require a trial court to give a specific multiple assailants instruction in *every* case involving both multiple assailants and self-defense." *Riley v. People*, 266 P.3d 1089, 1094 (Colo. 2011).

> Instead, *Jones* stands for the principle that a jury must consider the totality of the circumstances, including the number of persons reasonably appearing to be threatening the defendant, (1) when evaluating the reasonableness of the defendant's belief that he needed to use self-defense in the given situation, and (2) when evaluating the reasonableness of the actual force used by the defendant to repel the apparent danger. *See Jones*, 675 P.2d at 14. The purpose of this rule is to ensure that the jury understands that it may consider all relevant evidence when assessing the reasonableness of the defendant's actions. Thus, so long as the given instructions properly direct the jury to consider the totality of the circumstances during its deliberations on reasonableness, those instructions will satisfy *Jones*.

Riley v. People, 266 P.3d at 1094 (the instructions given, when read together, accurately described the law of self-defense in the multiple assailants situation, in that they described the law of self-defense and broadly provided that the jury should consider the totality of the circumstances when evaluating the reasonableness of the defendant's actions).

6. Participation in an unauthorized "combat by agreement" is a disqualifying condition that, like initial aggression and provocation, establishes an exception to the affirmative defense of self-defense. Although section 18-1-704(3)(c) requires proof that the agreement was "not specifically authorized by law," this language does not establish a separate defense. *See also* Instruction H:04 (defining the affirmative defense of consent, under section 18-1-505(2), where "the conduct and the injury were reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport").

"Colorado case law makes clear that there must be a definite agreement before a court can instruct a jury on the mutual combat limitation on self-defense." *Kaufman v. People*, 202 P.3d 542, 561-62 (Colo. 2009) ("Nowhere in the [self-defense] statute does the General Assembly define 'combat by agreement.' Rather, the elements of this self-defense exception have been developed through case law."). Accordingly, in a case

where there is an evidentiary basis for including language defining the combat by agreement exception, draft a supplemental instruction specifying the relevant principles of law that the jury should apply to decide whether the combat by agreement was "unauthorized." *See, e.g.*, § 12-10-103(15), C.R.S. 2015 (defining "toughperson fighting" as including nearly all types of combat by agreement, other than sanctioned boxing and martial arts training that is conducted in specified circumstances); § 12-10-107.5, C.R.S. 2015 ("toughperson fighting" is a class one misdemeanor); § 18-9-106(1)(d), C.R.S. 2015 (making it a class three misdemeanor to engage in public fighting, other than in an amateur or professional contest of athletic skill); § 18-13-104, C.R.S. 2015 (dueling statute, prohibiting (1) agreements to fight in a public place, except in sporting events authorized by law; and (2) agreements to engage in a fight with deadly weapons, whether in a public or private place).

7. When submitting an offense that is defined with the alternative mens reas of "knowingly" and "recklessly," *see, e.g.*, § 18-3-204(1)(a), C.R.S. 2015 (third degree assault), use separate instructions to define self-defense (1) as an affirmative defense to an elemental instruction that defines the offense with only the mens rea of "knowingly"; and (2) pursuant to section 18-1-704(4), with respect to a separate elemental instruction that defines the offense with only the mens rea of "recklessly." *See* Instruction H:13 (affirmative defense of "use of non-deadly physical force (defense of person - offense with a mens rea of recklessness, extreme indifference, or criminal negligence)).

8. In a case where more than one exception is submitted (e.g., initial aggression and provocation), include a conjunction.

H:12 USE OF DEADLY PHYSICAL FORCE (DEFENSE OF PERSON)

The evidence presented in this case has raised the affirmative defense of "deadly physical force in defense of person," as a defense to [insert name(s) of offense(s)].

The defendant was legally authorized to use deadly physical force upon another person without first retreating if:

1. he [she] used that deadly physical force in order to defend himself [herself] [or a third person] from what he [she] reasonably believed to be the use or imminent use of unlawful physical force by that other person, and

2. he [she] reasonably believed a lesser degree of force was inadequate, and

3. [he [she] had a reasonable ground to believe, and did believe, that he [she] or another person was in imminent danger of being killed or of receiving great bodily injury.]

   [the other person was using or reasonably appeared about to use physical force against an occupant of a dwelling or business establishment while committing or attempting to commit burglary.]

   [the other person was committing or reasonably appeared about to commit kidnapping, robbery, sexual assault, or assault in the first or second degree.]

   [, and]

[4. he [she] did not, with intent to cause bodily injury or death to another person, provoke the use of unlawful physical force by that other person.]

[5. he [she] was not the initial aggressor, or, if he [she] was the initial aggressor, he [she] had withdrawn from the encounter and effectively communicated to the other person his [her] intent to do so, and the other person nevertheless continued or threatened the use of unlawful physical force.]

[6. the physical force involved was not the product of an unauthorized combat by agreement.]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

COMMENT

1. *See* § 18-1-704(1-3), C.R.S. 2015.

2. *See* Instruction F:36 (defining "bodily injury"); Instruction F:87 (defining "deadly physical force"); Instruction F:114 (defining "dwelling"); *see also People v. Ferguson*, 43 P.3d 705, 707 (Colo. App. 2001) (in light of the way that "deadly physical force" is defined by statute, it is error to instruct the jury concerning the concept in a case in which the victim did not die); *People v. Silva*, 987 P.2d 909, 917 (Colo. App. 1999) (same).

3. Although the term "great bodily injury" appears in section 18-1-704(2)(a), it is not defined by statute. In *People v. Reed*, 695 P.2d 806, 808 (Colo. App. 1984), a division of the Court of Appeals held that the term "great bodily injury," as used in section 18-1-704(2)(a), is synonymous with the term "serious bodily injury," as defined in section 18-1-901(3)(p). *See* Instruction F:332 (defining "serious bodily injury").

4. In a case where the victim dies and there is a factual dispute concerning whether the defendant used ordinary physical force or deadly physical force (which includes an intent to cause death as a necessary ingredient), the jury should also be allowed to consider the applicability of self-defense principles relating to the use of ordinary physical force. *See People v. Vasquez*, 148 P.3d 326, 328 (Colo. App. 2006) (trial court erroneously limited the jury's consideration of self-defense principles to only those involving the use of deadly physical force).

5. *See* Instruction H:11, Comments 3-6 (no-duty to retreat; apparent necessity; multiple assailants; combat by agreement).

6. In a case where more than one exception is submitted (e.g., initial aggression and provocation), include a conjunction.

H:13 USE OF NON-DEADLY PHYSICAL FORCE (DEFENSE OF PERSON – OFFENSE WITH A MENS REA OF RECKLESSNESS, EXTREME INDIFFERENCE, OR CRIMINAL NEGLIGENCE)

The evidence presented in this case has raised the question of self-defense with respect to [insert name(s) of offense(s)].

A person is justified in using physical force upon another person without first retreating in order to defend himself [herself] [a third person] from what he [she] reasonably believes to be the use or imminent use of unlawful physical force by that other person, and he [she] may use a degree of force which he [she] reasonably believes to be necessary for that purpose.

However, a person is not justified in using physical force if:

> [with intent to cause bodily injury or death to another person, he [she] provokes the use of unlawful physical force by that other person.]
>
> [he [she] is the initial aggressor; except that his [her] use of physical force upon another person under the circumstances is justifiable if he [she] withdraws from the encounter and effectively communicates to the other person his [her] intent to do so, but the other person nevertheless continues or threatens the use of unlawful physical force.]
>
> [the physical force involved is the product of an unauthorized combat by agreement.]

You have been instructed that the prosecution has the burden of proving beyond a reasonable doubt all of the elements of [insert name(s) of offense(s)], including that the defendant acted [recklessly] [with extreme indifference] [in a criminally negligent manner].

You are further instructed that, with respect to [insert name(s) of offense(s)], the prosecution does not have an additional burden to disprove self-defense, but that a person does not act [recklessly] [with extreme indifference] [in a criminally negligent manner] if his [her] conduct is legally justified as set forth above.

COMMENT

1. *See* § 18-1-704(4), C.R.S. 2015 ("In a case in which the defendant is not entitled to a jury instruction regarding self-defense as an affirmative defense, the court shall allow the defendant to present evidence, when relevant, that he or she was acting in self-defense. If the defendant presents evidence of self-defense, the court shall instruct the jury with a self-defense law instruction."; section inapplicable to strict liability crimes); *see also People v. Duran*, 272 P.3d 1084, 1099 (Colo. App. 2011) ("the statute mandates provocation and initial aggressor instructions in cases where self-defense is asserted as an element-negating [de]fense under subsection (4), if such instructions are otherwise warranted by the evidence in the case").

2. *See* Instruction F:36 (defining "bodily injury").

3. It is permissible to inform the jury when self-defense is *not* an affirmative defense. *See People v. Pickering*, 276 P.3d 553, 557 (Colo. 2011) ("[I]nstructing the jury, pursuant to the fourth clause of section 18–1–704(4), that the prosecution bears no burden of disproving self-defense with respect to crimes to which self-defense is not an affirmative defense is an accurate statement of Colorado law and does not improperly shift the prosecution's burden to prove recklessness, extreme indifference, or criminal negligence. So long as the trial court properly instructs the jury regarding the elements of the charged crime, a carrying instruction using the language of section 18–1–704(4) is not constitutionally erroneous.").

4. The first sentence of the model instruction refers only to "self-defense" because that is the language that appears in section 18-1-704(4), C.R.S. 2015. Although the Committee is not aware of any authority addressing the question of whether the General Assembly intended for the term "self-defense" to encompass the defense of "a third person," as used in section 18-1-704(1), it is the Committee's best judgment that this was the legislative objective. Accordingly, this understanding of the statute is reflected in the second paragraph of the above instruction.

5. *See* Instruction H:11, Comment 7 (separate instructions are required when explaining self-defense with respect to an offense, such as third degree assault in violation of § 18-3-204(1)(a), C.R.S. 2015, that has alternative mens reas of "knowingly" and "recklessly").

6. *See* Instruction H:14 (affirmative defense of "use of deadly physical force (defense of person – offense with a mens rea of recklessness, extreme indifference, or criminal negligence), Comment 6 (section 18-1-704(4) applies to "extreme indifference" offenses).

H:14 USE OF DEADLY PHYSICAL FORCE (DEFENSE OF PERSON – OFFENSE WITH A MENS REA OF RECKLESSNESS, EXTREME INDIFFERENCE, OR CRIMINAL NEGLIGENCE)

The evidence presented in this case has raised the question of self-defense with respect to [insert name(s) of offense(s)].

A person is justified in using deadly physical force upon another person without first retreating in order to defend himself [herself] or a third person from what he [she] reasonably believes to be the use or imminent use of unlawful physical force by that other person if he [she] reasonably believes a lesser degree of force is inadequate, and:

[he [she] has a reasonable ground to believe, and does believe, that he [she] or another person is in imminent danger of being killed or of receiving great bodily injury.]

[the other person is using or reasonably appears about to use physical force against an occupant of a dwelling or business establishment while committing or attempting to commit burglary.]

[the other person is committing or reasonably appears about to commit kidnapping, robbery, sexual assault, or assault in the first or second degree.]

However, a person is not justified in using deadly physical force if:

[with intent to cause bodily injury or death to another person, he [she] provokes the use of unlawful physical force by that other person.]

[he [she] is the initial aggressor; except that his [her] use of deadly physical force upon another person under the circumstances is justifiable if he [she] withdraws from the encounter and effectively communicates to the other person his [her] intent to do so, but the other person nevertheless continues or threatens the use of unlawful physical force.]

[the physical force involved is the product of an unauthorized combat by agreement.]

You have been instructed that the prosecution has the burden of proving beyond a reasonable doubt all of the elements of [insert name(s) of offense(s)], including that the defendant acted [recklessly] [with extreme indifference] [in a criminally negligent manner].

You are further instructed that, with respect to [insert name(s) of offense(s)], the prosecution does not have an additional burden to disprove self-defense, but that a person does not act [recklessly] [with extreme indifference] [in a criminally negligent manner] if his [her] conduct is legally justified as set forth above.

COMMENT

1. *See* § 18-1-704(4), C.R.S. 2015 ("In a case in which the defendant is not entitled to a jury instruction regarding self-defense as an affirmative defense, the court shall allow the defendant to present evidence, when relevant, that he or she was acting in self-defense. If the defendant presents evidence of self-defense, the court shall instruct the jury with a self-defense law instruction."; section inapplicable to strict liability crimes); *see also People v. Duran*, 272 P.3d 1084, 1099 (Colo. App. 2011) ("the statute mandates provocation and initial aggressor instructions in cases where self-defense is asserted as an element-negating [de]fense under subsection (4), if such instructions are otherwise warranted by the evidence in the case").

2. *See* Instruction F:36 (defining "bodily injury"); Instruction F:87 (defining "deadly physical force"); Instruction F:114 (defining "dwelling"); *see also People v. Ferguson*, 43 P.3d 705, 707 (Colo. App. 2001) (in light of the way that "deadly physical force" is defined by statute, it is error to instruct the jury concerning the concept in a case in which the victim did not die); *People v. Silva*, 987 P.2d 909, 917 (Colo. App. 1999) (same).

3. A division of the court of appeals has held that in a case where the victim dies and there is a factual dispute concerning whether the defendant used ordinary physical force or deadly physical force (which is defined as including an intent to cause death), the jury should also be allowed to consider the applicability of self-defense principles relating to the use of ordinary physical force. *See People v. Vasquez*, 148 P.3d 326, 328 (Colo. App. 2006) (trial court erroneously limited the

jury's consideration of self-defense principles to only those involving the use of deadly physical force). Although *Vasquez* was decided in the context of affirmative defense instructions, this same method should be used when a similar dispute arises and the court instructs the jury about principles of self-defense pursuant to section 18-1-704(4).

4. *See* Instruction H:11, Comments 3-6 (no-duty to retreat; apparent necessity; multiple assailants; combat by agreement); Instruction H:13 (affirmative defense of "use of non-deadly physical force (defense of person - offense with a mens rea of recklessness, extreme indifference, or criminal negligence)), Comment 3 (explaining that, pursuant to *People v. Pickering*, 276 P.3d 553, 557 (Colo. 2011), it is permissible to inform the jury when self-defense is *not* an affirmative defense), Comment 4 (explaining why the model instruction refers only to "self-defense").

5. The plain language of section 18-1-704(4) states that: "The court shall instruct the jury that it may consider the evidence of self-defense in determining whether the defendant acted . . . with extreme indifference." And the supreme court has indicated that, in this context, self-defense operates as an "element-negating traverse" in the same manner that it does with respect to criminal recklessness and criminal negligence. *See People v. Pickering*, 276 P.3d 553, 556 (Colo. 2011); *Riley v. People*, 266 P.3d 1089, 1093 (Colo. 2011). Accordingly, notwithstanding the fact that there is a "knowingly" requirement within the statutory definition of the *actus reus* for first degree extreme indifference murder, *see* § 18-3-102(1)(d), C.R.S. 2015; *Candelaria v. People*, 148 P.3d 178, 182 (Colo. 2006); *People v. Jefferson*, 748 P.2d 1223, 1233 (Colo. 1988), a defendant so charged is not statutorily entitled to an instruction defining self-defense as an affirmative defense under section 18-1-704(1), (2), C.R.S. 2015. *See also* § 18-3-202(1)(c), C.R.S. 2015 (defining first degree extreme indifference assault).

H:15 USE OF PHYSICAL FORCE, INCLUDING DEADLY PHYSICAL FORCE (INTRUDER INTO A DWELLING)

The evidence presented in this case has raised the affirmative defense of "[deadly] physical force against an intruder," as a defense to [insert name(s) of offense(s)].

The defendant was legally authorized to use any degree of physical force [, including deadly physical force,] against another person without first retreating if:

1. he [she] was an occupant of a dwelling, and

2. the other person had made a knowingly unlawful entry into that dwelling, and

3. he [she] had a reasonable belief that, in addition to the uninvited entry, the other person had committed, was committing, or intended to commit a crime in the dwelling, and

4. he [she] reasonably believed the other person might use any physical force, no matter how slight, against any occupant of the dwelling.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

COMMENT

1. *See* § 18-1-704.5, C.R.S. 2015.

2. *See* Instruction F:114 (defining "dwelling"); Instruction F:87 (defining "deadly physical force"); Instruction F:195 (defining "knowingly"); *see also People v. Ferguson*, 43 P.3d 705, 707 (Colo. App. 2001) (in light of the way that "deadly physical force" is defined by statute, it is error to instruct the jury concerning the concept in a case in which the victim did not die); *People v. Silva*, 987 P.2d 909, 917 (Colo. App. 1999) (same).

3. *See People v. Guenther*, 740 P.2d 971, 981 (Colo. 1987) ("[I]f the pretrial motion to dismiss on grounds of statutory immunity is denied, the defendant may nonetheless raise at trial, as an affirmative defense to criminal charges arising out of the defendant's use of physical force against an intruder into his home, the statutory conditions set forth in section 18-1-704.5(2). In such an instance, the burden of proof generally applicable to affirmative defenses would apply to the defense created by section 18-1-704.5(2). The defendant would be required to present some credible evidence supporting the applicability of section 18-1-704.5(2); and, if such evidence is presented, the prosecution would then bear the burden of proving beyond a reasonable doubt the guilt of the defendant as to the issue raised by the affirmative defense as well as all other elements of the offense charged.").

4. For purposes of section 18-1-704.5, the common areas of an apartment building, such as a stairwell, do not constitute a "dwelling." *See People v. Cushinberry*, 855 P.2d 18, 19 (Colo. App. 1992).

5. Section 18-1-704.5 requires an "unlawful entry"; it does not apply when an invitee remains unlawfully. *See People v. Drennon*, 860 P.2d 589, 591 (Colo. App. 1993).

6. In *People v. McNeese*, 892 P.2d 304, 310-11 (Colo. 1995), the supreme court held that the "unlawful entry" component of section 18-1-704.5 requires a culpable mental state of "knowingly" on the part of the intruder. *See People v. Janes*, 982 P.2d 300, 303 (Colo. 1999) (observing that a jury instruction with a requirement that the victim have made a "knowingly unlawful entry" "accurately tracks the language of *People v. McNeese* in an attempt to define the term 'unlawful

entry,'" but reversing because the instruction failed to make clear that it was the prosecution's burden to disprove the affirmative defense beyond a reasonable doubt); *see also People v. Phillips*, 91 P.3d 476, 482 (Colo. App. 2004) (while every unlawful entry is necessarily uninvited, an uninvited entry is not necessarily unlawful; for example, a police officer's entry into a house can be lawful though uninvited). *People v. Zukowski*, 260 P.3d 339, 344 (Colo. App. 2010) ("Although the *McNeese* court used the phrase 'in knowing violation of the criminal law,' [*McNeese*, 892 P.2d at 310], it appears that the phrase was intended to express a requirement that an intruder must knowingly engage in criminal conduct, not that an intruder knows he or she is violating a criminal statute.").

7. This instruction does not include bracketed language describing the concepts of "provocation," acting as an "initial aggressor," or "combat by agreement." Where a defendant who raises the affirmative defense of section 18-1-704.5 also raises the affirmative defense of person on grounds unrelated to the victim's status as an intruding criminal, the court should explain one or more of these concepts (if applicable under the facts of the case) within the context of Instruction H:11 or H:12. *See, e.g., People v. Zukowski*, 260 P.3d 339, 344 (Colo. App. 2010) (jury instructed pursuant to section 18-1-704.5, and also as to self-defense with an explanation of the initial aggressor exception).

8. *See* Instruction H:11, Comments 3-6 (no-duty to retreat; apparent necessity; multiple assailants; combat by agreement).

9. + *See People v. Lane*, 2014 COA 48 ¶ 19, 343 P.3d 1019, 1024 ("[W]e conclude that [Smith v. United States, 133 S. Ct. 714 (2013) (when a defense excuses conduct that would otherwise be punishable but does not controvert any of the elements of the offense itself, the prosecution has no constitutional duty to overcome the defense by proof beyond a reasonable doubt)] did not overrule [People v. Pickering, 276 P.3d 553 (Colo. 2011) (When a defendant presents evidence that raises the issue of an affirmative defense, the affirmative defense effectively becomes an additional element, and the trial court must instruct the jury that the prosecution bears the burden of proving beyond a reasonable doubt that the affirmative defense is inapplicable; when a defendant presents evidence that raises the issue of an elemental traverse, however, no such instruction is required; self-defense is an affirmative defense to second degree murder, but it is a traverse to crimes requiring recklessness, criminal negligence, or extreme indifference, such as reckless

manslaughter)], and, thus, the trial court did not err in relying on Pickering to instruct the jury that self-defense was not an affirmative defense to the lesser-included charges of manslaughter and criminally negligent homicide.").

10. + In 2015, the Committee added Comment 9, citing to *People v. Lane*, *supra*.

H:16 USE OF NON-DEADLY PHYSICAL FORCE (DEFENSE OF PREMISES)

The evidence presented in this case has raised the affirmative defense of "physical force in defense of premises," as a defense to [insert name(s) of offense(s)].

The defendant was legally authorized to use physical force upon another person if:

1. he [she] was in possession or control of any building, realty, or other premises, [or was a person licensed or privileged to be there,] and

2. he [she] used reasonable and appropriate physical force, when and to the extent it was reasonably necessary to prevent or terminate what he [she] reasonably believed was the commission or attempted commission of an unlawful trespass by the other person in or upon the building, realty, or premises.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

COMMENT

1. *See* § 18-1-705, C.R.S. 2015.

2. *See* Instruction F:284 (defining "premises"); Instruction G2:01 (criminal attempt); Instructions 4-5:03, 4-5:04, 4-5:05, 4-5:09 (criminal trespass); *see also People v. Ferguson*, 43 P.3d 705, 707 (Colo. App. 2001) (in light of the way that "deadly physical force" is defined by statute, it is error to instruct the jury concerning the concept in a case in which the victim did not die); *People v. Silva*, 987 P.2d 909, 917 (Colo. App. 1999) (same).

3. "Section 18-1-705 is not, by its terms, inapplicable to unlawful entries where the trespassers happen to be police officers." *People v. Lutz*, 762 P.2d 715, 717 (Colo. App. 1988).

4. *See* Instruction H:11, Comment 3 (no-duty to retreat), Comment 5 (multiple assailants).

H:17 USE OF DEADLY PHYSICAL FORCE (DEFENSE OF PREMISES)

The evidence presented in this case has raised the affirmative defense of "deadly physical force in defense of premises," as a defense to [insert name(s) of offense(s)].

The defendant was legally authorized to use deadly physical force upon another person if:

1. he [she] she was in possession or control of any building, realty, or other premises, [or was a person licensed or privileged to be there,] and

2. he [she] reasonably believed the use of deadly physical force was necessary to prevent what he [she] reasonably believed to be an attempt by the trespasser to commit first degree arson.]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

COMMENT

1. *See* § 18-1-705, C.R.S. 2015.

2. *See* Instruction F:87 (defining "deadly physical force"); Instruction F:284 (defining "premises"); Instruction 4-1:01 (first degree arson); Instruction G2:01 (criminal attempt); Instructions 4-5:03, 4-5:04, 4-5:05, 4-5:09 (criminal trespass); *see also People v. Ferguson*, 43 P.3d 705, 707 (Colo. App. 2001) (in light of the way that "deadly physical force" is defined by statute, it is error to instruct the jury concerning the concept in a case in which the victim did not die); *People v. Silva*, 987 P.2d 909, 917 (Colo. App. 1999) (same).

3. *See* Instruction H:11, Comment 3 (no-duty to retreat), Comment 5 (multiple assailants); Instruction H:16 (use of non-deadly physical force in defense of premises), Comment 3 (police officers as trespassers).

H:18 USE OF NON-DEADLY PHYSICAL FORCE (DEFENSE OF PROPERTY)

The evidence presented in this case has raised the affirmative defense of "physical force in defense of property," as a defense to [insert name(s) of offense(s)].

The defendant was legally authorized to use physical force upon another person if:

1. he [she] used reasonable and appropriate physical force when and to the extent that he [she] reasonably believed it was necessary to prevent what he [she] reasonably believed to be an attempt by the other person to commit the offense of [theft] [criminal mischief] [criminal tampering involving property].

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, the above numbered condition.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

COMMENT

1. *See* § 18-1-706, C.R.S. 2015.

2. *See* Instruction G2:01 (criminal attempt); Chapter 4-4 (theft); Instruction 4-5:01 (criminal mischief); Instructions 4-5:12, 4-5:13 (tampering).

3. *See* Instruction H:11, Comment 5 (multiple assailants).

4. Because prevention of a crime is an essential condition of the defense, an instruction should not be given where a defendant uses force *after* the crime has been completed. *See People v. Oslund*, 2012 COA 62, ¶¶ 23–26, 292 P.3d 1025, 1029 (defense of property instruction not warranted where defendant used force while trying to apprehend the thief and recover the property; because theft was completed, use of force could not prevent it from occurring); *People v. Goedecke*, 730 P.2d 900, 901 (Colo. App. 1986) (defense of property instruction not warranted where defendant used physical force on the victim some time after the victim had completed the alleged theft).

5. If the defendant used deadly physical force, this affirmative defense is not applicable. *See* § 18-1-706, C.R.S. 2015 (a defendant may "use deadly physical force under these circumstances only in defense of himself or another as described in section 18-1-704").

H:19 USE OF PHYSICAL FORCE IN MAKING AN ARREST OR IN PREVENTING AN ESCAPE (PEACE OFFICER)

The evidence presented in this case has raised the affirmative defense of "peace officer's use of physical force," as a defense to [insert name(s) of offense(s)].

The defendant was legally authorized to use physical force upon another person if:

1. he [she] was a peace officer, and

2. [he [she] used reasonable and appropriate physical force upon another person when and to the extent he [she] reasonably believed it was necessary, to [make an arrest] [prevent the escape from custody of an arrested person.]

   [he [she] used reasonable and appropriate physical force upon another person when and to the extent he [she] reasonably believed it was necessary to defend himself [herself] [or a third person] from what he [she] reasonably believed to be the use or imminent use of physical force while [making, or attempting to make, such an arrest.] [preventing, or attempting to prevent, such an escape.]]

   [, and]

[3. he [she] did not know that the arrest [was unauthorized.] [warrant was invalid.]]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

COMMENT

1. *See* § 18-1-707(1), (4), C.R.S. 2015.

2. *See* Instruction F:263 (defining "peace officer").

3. Section 18-1-707(1)(a), C.R.S. 2015, encompasses two types of arrests: (1) an arrest made by the officer-defendant; and (2) an arrest, not necessarily made by the officer-defendant, that precedes the attempted escape from custody which forms the basis for the officer-defendant's use of physical force. It appears that the exceptions in section 18-1-707(1)(a),(4) (where the officer knows the arrest or arrest warrant is invalid) apply to both scenarios.

4. *See* Instruction H:27.SP (special instruction: reasonable belief that a person has committed an offense); Instruction H:28.SP (special instruction: validity of arrest warrant); Instruction H:29.SP (special instruction: unauthorized arrest).

5. *See also* § 18-8-803(2) ("As used in this section, 'excessive force' means physical force which exceeds the degree of physical force permitted pursuant to section 18-1-707. The use of excessive force shall be presumed when a peace officer continues to apply physical force in excess of the force permitted by section 18-1-707 to a person who has been rendered incapable of resisting arrest.").

H:20 USE OF DEADLY PHYSICAL FORCE IN MAKING AN ARREST OR IN PREVENTING AN ESCAPE (PEACE OFFICER)

The evidence presented in this case has raised the affirmative defense of "peace officer's use of deadly physical force," as a defense to [insert name(s) of offense(s)].

The defendant was legally authorized to use deadly physical force upon another person if:

1. he [she] was a peace officer, and

2. [he [she] used deadly physical force upon another person when he [she] reasonably believed that it was necessary, to defend himself [herself] [or a third person] from what he [she] reasonably believed to be the use or imminent use of deadly physical force, while [making, or attempting to make, an arrest.] [preventing, or attempting to prevent, such an escape from custody of an arrested person.]]

   [he [she] used deadly physical force upon another person when he [she] reasonably believed that it was necessary, to make an arrest of a person, [to prevent the escape from custody of an arrested person,] whom he [she] reasonably believed [had committed or attempted to commit a felony involving the use or threatened use of a deadly weapon.] [was attempting to escape by the use of a deadly weapon.] [had otherwise indicated, except through a motor vehicle violation, that he [she] was likely to endanger human life or to inflict serious bodily injury to another unless apprehended without delay.]]

   [, and]

[3. he [she] did not know that the [arrest was unauthorized.] [arrest warrant was invalid.]]]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

COMMENT

1. *See* § 18-1-707(2), (4), C.R.S. 2015.

2. *See* Instruction F:87 (defining "deadly physical force"); Instruction F:263 (defining "peace officer"); Instruction F:332 (defining "serious bodily injury"); *see also People v. Ferguson*, 43 P.3d 705, 707 (Colo. App. 2001) (in light of the way that "deadly physical force" is defined by statute, it is error to instruct the jury concerning the concept in a case in which the victim did not die); *People v. Silva*, 987 P.2d 909, 917 (Colo. App. 1999) (same).

3. If the evidence supports instructions as to both sets of bracketed conditions, prepare separate instructions.

4. *See* § 18-1-707(3), C.R.S. 2015 ("Nothing in subsection (2)(b) of this section shall be deemed to constitute justification for reckless or criminally negligent conduct by a peace officer amounting to an offense against or with respect to innocent persons whom he is not seeking to arrest or retain in custody.").

5. *See* Instruction H:27.SP (special instruction: reasonable belief that a person has committed an offense); Instruction H:28.SP (special instruction: validity of arrest warrant); Instruction H:29.SP (special instruction: unauthorized arrest).

6. *See also* § 18-8-803(2) ("As used in this section, 'excessive force' means physical force which exceeds the degree of physical force permitted pursuant to section 18-1-707. The use of excessive force shall be presumed when a peace officer continues to apply physical force in excess of the force permitted by section 18-1-707 to a person who has been rendered incapable of resisting arrest.").

H:21 USE OF PHYSICAL FORCE IN MAKING AN ARREST OR IN PREVENTING AN ESCAPE (PRIVATE PERSON DIRECTED BY A PEACE OFFICER)

The evidence presented in this case has raised the affirmative defense of "physical force at the direction of a peace officer," as a defense to [insert name(s) of offense(s)].

The defendant was legally authorized to use physical force upon another person if:

1. he [she] was directed by a peace officer to assist him [her] in making an arrest, [in preventing an escape from custody,] and

2. he [she] used reasonable and appropriate physical force when and to the extent that he [she] reasonably believed the force was necessary to carry out the peace officer's direction. [, and]

[3. he [she] did not know that the [arrest] [prospective arrest] was unauthorized.]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

COMMENT

1. *See* § 18-1-707(5), C.R.S. 2015.

2. *See* Instruction F:87 (defining "deadly physical force"); Instruction F:263 (defining "peace officer"); *see also People v. Ferguson*, 43 P.3d 705, 707 (Colo. App. 2001) (in light of the way that "deadly physical force" is defined by statute, it is error to instruct the jury concerning the concept in a case in which the victim did not die); *People v. Silva*, 987 P.2d 909, 917 (Colo. App. 1999) (same).

3. *See* Instruction H:29.SP (special instruction: unauthorized arrest).

4. Although it is unclear whether the definition of a "reasonable belief that a person has committed an offense" in section 18-1-707(4) applies where a private citizen makes an arrest at the direction of a peace officer, it appears that it does not because, in such circumstances, the relevant question is limited to whether the citizen knew that arrest was "not authorized." *See* § 18-1-707(5), C.R.S. 2015.

H:22 USE OF DEADLY PHYSICAL FORCE IN MAKING AN ARREST OR IN PREVENTING AN ESCAPE (PRIVATE PERSON DIRECTED BY A PEACE OFFICER)

The evidence presented in this case has raised the affirmative defense of "deadly physical force at the direction of a peace officer," as a defense to [insert name(s) of offense(s)].

The defendant was legally authorized to use deadly physical force upon another person if:

1. he [she] was directed by a peace officer to assist him [her] in [making an arrest,] [preventing an escape from custody,] and

2. he [she] used deadly physical force when he [she]reasonably believed that deadly physical force was necessary to carry out the peace officer's direction, and

3. [he [she] reasonably believed that deadly physical force was necessary to defend himself [herself] [or a third person] from what he [she] reasonably believed to be the use or imminent use of deadly physical force.]

   [he [she] was directed or authorized by the peace officer to use deadly physical force.] [, and he [she] did not know, if that was in fact the case, that the peace officer was not authorized to use deadly physical force under the circumstances.]

   [, and]

[4. he [she] did not know that the [arrest] [prospective arrest] was unauthorized.]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not

legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

COMMENT

1. *See* § 18-1-707(6), C.R.S. 2015.

2. *See* Instruction F:87 (defining "deadly physical force"); Instruction F:263 (defining "peace officer"); *see also People v. Ferguson*, 43 P.3d 705, 707 (Colo. App. 2001) (in light of the way that "deadly physical force" is defined by statute, it is error to instruct the jury concerning the concept in a case in which the victim did not die); *People v. Silva*, 987 P.2d 909, 917 (Colo. App. 1999) (same).

3. Section 18-1-707(6)(b) authorizes a citizen, in circumstances specified by section 18-1-707(5), to follow an officer's direction to use deadly physical force provided that the citizen "does not know, if that happens to be the case, that the peace officer himself is not authorized to use deadly physical force under the circumstances." Clearly, whether the defendant actually knew that the officer was not authorized to use deadly physical force is a factual matter. And it appears that the subsidiary question of whether the directing peace officer was authorized to use deadly physical force may also give rise to a factual issue. Should this occur, draft an instruction that explains the principles of Instruction H:20 (use of deadly physical force in making an arrest or in preventing an escape (peace officer)).

4. *See* Instruction H:29.SP (special instruction: unauthorized arrest).

5. Although it is unclear whether the definition of a "reasonable belief that a person has committed an offense" in

section 18-1-707(4) applies where a private citizen makes an arrest at the direction of a peace officer, it appears that it does not because, in such circumstances, the relevant question is limited to whether the citizen knew that arrest was "not authorized." *See* § 18-1-707(5), C.R.S. 2015.

H:23 USE OF PHYSICAL FORCE IN MAKING AN ARREST OR IN PREVENTING AN ESCAPE (PRIVATE PERSON, ACTING ON HIS OR HER OWN)

The evidence presented in this case has raised the affirmative defense of "physical force in [making an arrest] [preventing an escape]," as a defense to [insert name(s) of offense(s)].

The defendant was legally authorized to use physical force upon another person if:

1. he [she] used reasonable and appropriate physical force upon another person when and to the extent that he [she] reasonably believed it was necessary:

   [to make an arrest, for an offense that [had been] [was being] committed by the other person in the defendant's presence.]

   [to prevent the escape from custody of an arrested person whom the defendant had arrested for committing an offense in his [her] presence.]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, the above numbered condition.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

COMMENT

1. *See* § 18-1-707(7), C.R.S. 2015.

2. Section 16-3-201, C.R.S. 2015, provides that: "A person who is not a peace officer may arrest another person when any crime has been or is being committed by the arrested person in the presence of the person making the arrest." A division of the Court of Appeals has held that this language limits the availability of the defense set forth in section 18-1-707(7):

> [A]n arrest must first be authorized under § 16-3-201, before a private person can use physical force to effect it under § 18-1-707(7). Furthermore, when a person already under arrest has attempted an escape, the second clause of § 18-1-707(7) similarly permits a private person to use physical force but, again, only when the attempted escape is committed in his or her presence.

People v. Joyce, 68 P.3d 521, 524 (Colo. App. 2002).

3. *See* Instruction H:27.SP (special instruction: reasonable belief that a person has committed an offense).

H:24 USE OF DEADLY PHYSICAL FORCE IN MAKING AN ARREST OR IN PREVENTING AN ESCAPE (PRIVATE PERSON, ACTING ON HIS OR HER OWN)

The evidence presented in this case has raised the affirmative defense of "deadly physical force in [making an arrest] [preventing an escape]," as a defense to [insert name(s) of offense(s)].

The defendant was legally authorized to use deadly physical force upon another person if:

1. he [she] reasonably believed it was necessary [to make an arrest, for an offense that the other person [had committed][was committing] in his [her] presence,] [to prevent the escape from custody of an arrested person whom he [she] had arrested for committing an offense in his [her] presence,] and

2. he [she] reasonably believed that it was necessary to defend himself [herself] [or a third person] from what he [she] reasonably believed to be the use or imminent use of deadly physical force.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

COMMENT

1. *See* § 18-1-707(7), C.R.S. 2015.

2. *See* Instruction F:87 (defining "deadly physical force"); Instruction F:263 (defining "peace officer"); *see also People v. Ferguson*, 43 P.3d 705, 707 (Colo. App. 2001) (in light of the way that "deadly physical force" is defined by statute, it is error to instruct the jury concerning the concept in a case in which the victim did not die); *People v. Silva*, 987 P.2d 909, 917 (Colo. App. 1999) (same).

3. *See* Instruction H:27.SP (special instruction: reasonable belief that a person has committed an offense).

H:25 USE OF DEADLY PHYSICAL FORCE TO PREVENT AN ESCAPE (DETENTION FACILITY)

The evidence presented in this case has raised the affirmative defense of "deadly physical force to prevent an escape from a detention facility," as a defense to [insert name(s) of offense(s)].

The defendant was legally authorized to use deadly physical force upon another person if:

1. he [she] was a [peace officer] [guard] employed in a detention facility, and

2. he [she] reasonably believed the use of deadly physical force was necessary to prevent the escape of a prisoner [[convicted of] [charged with] [held for] a felony.] [confined under the maximum security rules of any detention facility.]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

COMMENT

1. *See* § 18-1-707(8)(a), C.R.S. 2015.

2. *See* Instruction F:87 (defining "deadly physical force"); Instruction F:95 (defining "detention facility"); Instruction F:263 (defining "peace officer"); *see also People v. Ferguson*, 43 P.3d 705, 707 (Colo. App. 2001) (in light of the way that "deadly physical force" is defined by statute, it is error to instruct the jury concerning the concept in a case in which the victim did not die); *People v. Silva*, 987 P.2d 909, 917 (Colo. App. 1999) (same).

3. The term "guard" is not defined by statute.

4. *See also* § 18-8-803(2) ("As used in this section, 'excessive force' means physical force which exceeds the degree of physical force permitted pursuant to section 18-1-707. The use of excessive force shall be presumed when a peace officer continues to apply physical force in excess of the force permitted by section 18-1-707 to a person who has been rendered incapable of resisting arrest.").

H:26 USE OF PHYSICAL FORCE TO PREVENT AN ESCAPE (DETENTION FACILITY)

The evidence presented in this case has raised the affirmative defense of "physical force to prevent an escape from a detention facility," as a defense to [insert name(s) of offense(s)].

The defendant was legally authorized to use physical force upon another person if:

1. he [she] was a [peace officer] [guard] employed in a detention facility, and

2. he [she] used reasonable and appropriate physical force, when and to the extent that he [she] reasonably believed it was necessary to prevent what he [she] reasonably believed to be the escape of a prisoner from a detention facility.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

COMMENT

1. *See* § 18-1-707(8)(b), C.R.S. 2015.

2. *See* Instruction F:95 (defining "detention facility"); Instruction F:263 (defining "peace officer").

3. The term "guard" is not defined by statute.

4. *See also* § 18-8-803(2) ("As used in this section, 'excessive force' means physical force which exceeds the degree of physical force permitted pursuant to section 18-1-707. The use of excessive force shall be presumed when a peace officer continues to apply physical force in excess of the force permitted by section 18-1-707 to a person who has been rendered incapable of resisting arrest.").

H:27.SP SPECIAL INSTRUCTION: REASONABLE BELIEF THAT A PERSON HAS COMMITTED AN OFFENSE

For purposes of Instruction ___, defining the affirmative defense of [insert name of affirmative defense from Instructions H:19-20, 23-24], a reasonable belief that a person has committed an offense means a reasonable belief in facts or circumstances which if true would constitute an offense.

If the believed facts or circumstances would not constitute an offense, an erroneous though reasonable belief that the law is otherwise does not justify the use of [deadly] force to make an arrest or to prevent an escape from custody.

Accordingly, in this case you must determine the reasonableness of the defendant's belief that [insert name of alleged victim] had committed the offense of [insert name(s) of offense(s)], as defined in Instruction[s] __.

COMMENT

1. *See* § 18-1-707(4), C.R.S. 2015.

2. Although it is unclear whether the definition of a "reasonable belief that a person has committed an offense" in section 18-1-707(4) applies where a private citizen makes an arrest at the direction of a peace officer, it appears that it does not because, in such circumstances, the relevant question is limited to whether the citizen knew that arrest was "not authorized." *See* § 18-1-707(5), C.R.S. 2015.

H:28.SP SPECIAL INSTRUCTION: VALIDITY OF ARREST WARRANT

For purposes of Instruction ___, defining the affirmative defense of "peace officer's use of [deadly] physical force in making an arrest or preventing an escape," a peace officer who is making an arrest pursuant to a warrant is justified in using [deadly] physical force, as explained in Instruction ___, unless the officer knew that the warrant was invalid.

In this case, [the court has determined] [the parties have stipulated] that the warrant for the arrest of [insert alleged victim's name] was [valid] [invalid].

COMMENT

1. *See* § 18-1-707(4), C.R.S. 2015.

H:29.SP SPECIAL INSTRUCTION: UNAUTHORIZED ARREST

For purposes of Instruction ___, defining the affirmative defense of [insert name of affirmative defense, from Instructions H:19-22], the [court has determined] [parties have stipulated] that the arrest of [insert alleged victim's name] was unauthorized.

COMMENT

1. *See* § 18-1-707(1)(a), (2), (5-6), C.R.S. 2015.

H:30 DURESS

The evidence presented in this case has raised the affirmative defense of "duress," as a defense to [insert name(s) of offense(s)].

The defendant's conduct was legally authorized if:

1. he [she] engaged in the prohibited conduct at the direction of another person, because of the use or threatened use of unlawful force upon him [her] [, or upon another person], and

2. a reasonable person in his [her] situation would have been unable to resist the use or threatened use of unlawful force, and

3. he [she] did not intentionally or recklessly place himself [herself] in a situation where it was foreseeable that he [she] would be subjected to the use or threatened use of unlawful force.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

COMMENT

1. *See* § 18-1-708, C.R.S. 2015.

2. *See* Instruction F:185 (defining "intentionally"); Instruction F:308 (defining "recklessly").

3. The affirmative defense of duress is not available in a prosecution for a class one felony. § 18-1-708, C.R.S. 2015. Although felony murder is a class one felony, in certain cases it may be appropriate to give a duress instruction with respect to the predicate felony. *See*, *e.g.*, *People v. Al-Yousif*, 206 P.3d 824, 831 (Colo. App. 2006).

4. The statute defining the defense of duress states: "The choice of evils defense, provided in section 18-1-702, shall not be available to a defendant in addition to the defense of duress provided under this section unless separate facts exist which warrant its application." § 18-1-708, C.R.S. 2015.

5. In *People v. Speer*, 255 P.3d 1115, 1119 (Colo. 2011), the supreme court analyzed the statutory provision that is embodied in the second element above and explained:

> We have consistently construed our own statute, with its requirement that the threatened force exceed any objectively reasonable ability to resist, as making the defense of duress, like the closely related defense of necessity or choice of evils, unavailable in the absence of a specific and imminent threat of injury under circumstances leaving the defendant no reasonable alternative other than to violate the law for which he stands charged.

Id. (defendant charged with robbery and other offenses was not entitled to duress instruction because he had opportunities to seek police protection and foil the robbery plot, and the allegedly coercive threats to harm his brother did not put the brother at risk of imminent injury).

3. *See People v. Nunn*, 148 P.3d 222 (Colo. App. 2006) (the term "prohibited conduct" in the model instruction for duress is not prejudicial because it refers to charged conduct that would be "prohibited" absent the existence of the affirmative defense); *People v. Yaklich*, 833 P.2d 758 (Colo. App. 1991) (trial court erred by submitting a duress instruction because

defendant who hired another person to kill her husband did not act “at the direction of another person”).

H:31 ENTRAPMENT

The evidence presented in this case has raised the affirmative defense of "entrapment," as a defense to [insert name(s) of offense(s)].

The defendant's conduct was legally authorized if:

1. he [she] is a person who, but for the inducement offered, would not have conceived of or engaged in conduct of the sort induced, and

2. he [she] engaged in the proscribed conduct because he [she] was induced to do so by a law enforcement official [or other person acting under the official's direction,] seeking to obtain evidence for the purpose of prosecution, and not as a result of his [her] own predisposition, and

3. the methods used to obtain such evidence were such as to create a substantial risk that this particular defendant would engage in the sort of conduct induced, and

4. the methods used were more persuasive than merely affording him [her] an opportunity to commit an offense, even if such an opportunity was coupled with representations or inducements calculated to overcome his [her] fear of detection.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by

this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

COMMENT

1. *See* § 18-1-709, C.R.S. 2015; *Evans v. People*, 706 P.2d 795, 801 n.6 (Colo. 1985).

2. Do not augment an entrapment instruction with language from appellate opinions analyzing the legality of police conduct. The supreme court has explained that:

> It is important to distinguish between the statutory defense of entrapment and the constitutional defense of outrageous governmental conduct. The latter provides a mechanism by which this court may curtail overzealous police activity that we find shocking to the conscience. *See People v. Vandiver*, 191 Colo. 263, 268, 552 P.2d 6, 9 (1976)(recognizing that a defense of outrageous governmental conduct exists when conduct by officers violates fundamental standards of due process). In contrast, judicial pronouncements of law regarding the propriety of police conduct are not appropriate in the context of the entrapment defense, as this defense rests upon a determination of the defendant's state of mind, which is a factual issue for the jury. *See, e.g.*, *Bailey* [*v. People*], 630 P.2d [1062, 1066 (Colo. 1981)](noting that Colorado's subjective approach to entrapment sanctions police conduct without question so long as the police actions are directed at persons predisposed to commit the offense charged).

People v. Sprouse, 983 P.2d 771, 775 n.3 (Colo. 1999); *see also Evans v. People*, 706 P.2d 795, 800 (Colo. 1985) ("a trial court's use of an excerpt from an opinion in an instruction is generally an unwise practice"; "statements taken from opinions do not necessarily translate with clarity into jury instructions because opinions and instructions have very different purposes").

3. *See People v. Taylor*, 2012 COA 91, ¶¶ 31-35, 296 P.3d 317, 327 ("we reject defendant's contention that [*Brown v. People*,

239 P.3d 764, 769-70 (Colo. 2010)] holds that failing to admit the underlying crime no longer precludes the assertion of an affirmative defense like entrapment. Rather, we agree with those divisions holding the affirmative defense of entrapment is not available to a defendant who denies commission of the crime.").

H:32 REPORTING AN EMERGENCY DRUG OR ALCOHOL OVERDOSE EVENT

The evidence presented in this case has raised the affirmative defense of "reporting an emergency drug or alcohol overdose event," as a defense to [insert name(s) of offense(s) enumerated in section 18-1-711(3)].

The defendant's conduct was legally authorized if:

1. he [she] reported in good faith an emergency drug or alcohol overdose event to a law enforcement officer, to the 911 system, or to a medical provider, and

2. he [she] remained at the scene of the event until a law enforcement officer or an emergency medical responder arrived or he [she] remained at the facilities of the medical provider until a law enforcement officer arrived, and

3. he [she] identified himself [herself] to, and cooperated with, the law enforcement officer, emergency medical responder, or medical provider, and

4. the offense for which defendant is charged arose from the same course of events from which the emergency drug or alcohol overdose event arose.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of [insert name of offense(s) enumerated in section 18-1-711(3)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name of offense(s) enumerated in section

18-1-711(3)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

COMMENT

1. *See* § 18-1-711(1-3), C.R.S. 2015 (immunity applicable to: unlawful possession of a controlled substance, as described in section 18-18-403.5(2)(a)(I), (2)(b)(I), or (2)(c); unlawful use of a controlled substance, as described in section 18-18-404; unlawful possession of two ounces or less of marijuana, as described in section 18-18-406(5)(a)(I), or more than two ounces of marijuana but not more than six ounces of marijuana, as described in section 18-18-406(4)(c), or more than six ounces of marijuana but not more than twelve ounces of marijuana or three ounces or less of marijuana concentrate as described in section 18-18-406(4)(b); open and public display, consumption, or use of less than two ounces of marijuana as described in section 18-18-406(5)(b)(I); transferring or dispensing two ounces or less of marijuana from one person to another for no consideration, as described in section 18-18-406(5)(c); use or possession of synthetic cannabinoids or salvia divinorum, as described in section 18-18-406.1; possession of drug paraphernalia, as described in section 18-18-428; and illegal possession or consumption of ethyl alcohol by an underage person, as described in section 18-13-122).

2. *See* Instruction F:117 (defining "emergency drug or alcohol overdose event").

3. + The Committee expresses no opinion concerning whether this provision allows for the determination of immunity prior to trial. *See, e.g.*, *People v. Guenther*, 740 P.2d 971, 975 (Colo. 1987) ("We conclude that section 18–1–704.5(3) was intended to and indeed does authorize a court to dismiss a criminal prosecution at the pretrial stage of the case when the conditions of the statute have been satisfied. . . . [T]he phrase 'shall be immune from criminal prosecution' can only be construed to mean that the statute was intended to bar criminal proceedings against a person for the use of force under the circumstances set forth in subsection (2) of section 18–1–704.5.").

4. + In 2015, the Committee added Comment 3.

H:33 INSUFFICIENT AGE

The evidence presented in this case has raised the affirmative defense of "insufficient age," as a defense to [insert name(s) of offense(s)].

The defendant's conduct was legally authorized if:

1. he [she] was under ten years of age when he [she] committed the crime.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, the above numbered condition.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

COMMENT

1. *See* § 18-1-801, C.R.S. 2015; *see also* § 18-1-805, C.R.S. 2015 (stating that "[t]he issue of responsibility under section[] 18-1-801 . . . is an affirmative defense").

2. As a practical matter, this affirmative defense will rarely be raised in adult prosecutions due to the significant differences between the age of legal responsibility and the various age thresholds under the transfer and direct filing statutes. *See generally* §§ 19-2-517, 19-2-518, C.R.S. 2015. Moreover, in delinquency cases where there is a factual dispute

concerning whether the juvenile had attained the age of responsibility when he or she allegedly committed the offense, the court may resolve the issue at a preliminary hearing. *See also* § 19-2-804(1), C.R.S. 2015 (in delinquency proceedings, "[j]urisdictional matters of the age and residence of the juvenile shall be deemed admitted by or on behalf of the juvenile unless specifically denied within a reasonable time prior to the trial").

3. Do not give this instruction in a case where an adult defendant is charged with contributing to the delinquency of a minor. *See People v. Miller*, 830 P.2d 1092, 1094 (Colo. App. 1991) ("Although a child under the age of ten cannot be charged with an offense, it does not necessarily follow that the child cannot violate the law.").

H:34 INTOXICATION (VOLUNTARY)

The evidence presented in this case has raised the question of self-induced intoxication with respect to the offense of [insert name of specific intent offense(s)].

For that [those] offense[s], you may consider whether or not evidence of self-induced intoxication negates the existence of the element[s] of ["with intent"] ["after deliberation and with intent"] ["intentionally"].

The prosecution has the burden of proving all the elements of the crimes charged beyond a reasonable doubt. If you find the defendant was intoxicated to such a degree that he [she] did not act with the required mental state, you should find him [her] not guilty of that offense.

[However, you may not consider evidence of self-induced intoxication for purposes of deciding whether the prosecution has proved the elements of [insert name(s) of general intent offense(s)].]

COMMENT

1. *See* § 18-1-804(1), C.R.S. 2015.

2. *See* Instruction F:10 (defining "after deliberation"); Instruction F:185 (defining "intentionally," and "with intent"); Instruction F:188 (defining "intoxication").

3. Voluntary intoxication is not an affirmative defense. *People v. Harlan*, 8 P.3d 448, 470 (Colo. 2000). Rather, "the statute sets forth a rule concerning the admissibility of evidence of intoxication by the defendant to counter the prosecution's evidence that the defendant had the requisite specific intent of the charged offense." *Id.* at 470–71. Thus, the statute "absolves a defendant of liability only for a specific intent offense when the evidence of intoxication negates the existence of the specific intent." *Id.* at 471.

4. An instruction informing a jury that it "may" consider evidence of voluntary intoxication in determining whether the defendant acted with specific intent is not erroneous. *See People v. Lucas*, 232 P.3d 155, 163 (Colo. App. 2009) (there is no requirement to instruct the jury that it "must" consider such evidence).

5. "[A] criminal defendant who maintains his innocence may receive an inconsistent jury instruction on voluntary intoxication provided there is a rational basis for the instruction in the evidentiary record." *Brown v. People*, 239 P.3d 764, 770 (Colo. 2010).

6. Evidence of voluntary intoxication is admissible to counter the specific intent element of first-degree murder, which includes "after deliberation" as an element. *See People v. Miller*, 113 P.3d 743, 750 (Colo. 2005).

7. If there is question as to the voluntariness of the defendant's intoxication, draft an instruction explaining that: (1) the jurors are to decide, as a threshold matter, whether the defendant's intoxication was "self-induced" (as defined in Instruction F:330); and (2) depending on the outcome of that determination, they should then apply either this instruction, or Instruction H:35 (involuntary intoxication). *See also* Instruction F:391 (defining "voluntary act" as "an act performed consciously as a result of effort or determination").

8. Although it is settled law that evidence of self-induced intoxication does not negate the mens rea of general intent crimes, it can be difficult to determine whether a particular offense is a general intent crime. *See*, *e.g.*, *People v. Vigil*, 127 P.3d 916 (Colo. 2006) (holding, based on a review of legislative history, that sexual assault on a child is a general intent crime with a mens rea that cannot be negated by evidence of self-induced intoxication).

The final sentence, which is enclosed within brackets, curtails a jury's consideration of evidence of the defendant's intoxication where the defendant is also charged with general intent crimes. *See People v. Vanrees*, 125 P.3d 403, 410 (Colo. 2005) (trial court did not err by instructing jury, in supplemental instruction, that: "In determining whether or not the element of 'knowingly' has been proved beyond a reasonable doubt, you may consider *any evidence, other than intoxication, presented in this case, or lack of evidence, that you believe to bear on that element*.").

H:35 INTOXICATION (INVOLUNTARY)

The evidence presented in this case has raised the affirmative defense of "involuntary intoxication," as a defense to [insert name(s) of offense(s)].

The defendant's conduct was legally authorized if:

1. he [she] lacked the capacity to conform his [her] conduct to the requirements of the law, because of intoxication, and

2. the intoxication was not self-induced.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

COMMENT

1. *See* § 18-1-804(3), C.R.S. 2015.

2. *See* Instruction F:188 (defining "intoxication"); Instruction F:330 (defining "self-induced intoxication"); *see also People v. Walden*, 224 P.3d 369, 379-80 (Colo. App. 2009) (recognizing that, for purposes of the affirmative defense of involuntary intoxication, the "legal meaning of the terms

'intoxication,' 'voluntary,' and 'involuntary' may depart, at least to some degree, from the meaning of these terms in common usage").

3. In cases where there is a factual dispute concerning whether the defendant's intoxication was self-induced, refer to Comment 7 of Instruction H:34 (intoxication (voluntary)).

4. A defendant's addiction to an intoxicant is insufficient to establish involuntariness. *See Tacorante v. People*, 624 P.2d 1324, 1327 (Colo. 1981); *People v. Grenier*, 200 P.3d 1062, 1075 (Colo. App. 2008) (same). However, a division of the Court of Appeals has held that a defendant's ignorance of the intoxicating effects of a voluntarily ingested substance may suffice to create an issue of fact. *See People v. Turner*, 680 P.2d 1290, 1293 (Colo. App. 1983) (instruction concerning involuntary intoxication warranted where defendant testified that he had not been warned of the intoxicating effects of ingesting excessive doses of Fiorinal, and that his past experience in taking excessive doses caused him to believe that he would simply fall asleep).

5. "[T]he medical condition of insulin-induced hypoglycemia may, depending upon the particular facts and circumstances involved, constitute the affirmative defense of involuntary intoxication as that defense is defined by section 18-1-804(3)." *People v. Garcia*, 113 P.3d 775, 782 (Colo. 2005).

6. *See People v. Voth*, 2013 CO 61 ¶ 22, 312 P.3d 144, 149 ("We hold that the meaning of the word 'substance' as used in section 18-1-804 is unambiguous and can be determined with reasonable certainty. After reviewing common dictionary definitions of 'substance,' relevant case law, and the statutory context in which the term appears, we conclude that the plain and ordinary meaning of the word 'substance' excludes viruses as a matter of law.").

CHAPTER H: SECTION II (DEFENSES TO INCHOATE OFFENSES AND SPECIFIC CRIMES)

H:36 CRIMINALITY OF CONDUCT – MISTAKE AS TO AGE

The evidence presented in this case has raised the affirmative defense of "mistake as to age," as a defense to [insert name(s) of offense(s)].

The defendant's conduct was legally authorized if:

1. the defendant reasonably believed [insert name of the alleged victim] was eighteen years of age or older, and

2. [insert name of the alleged victim] was in fact at least fifteen years of age.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

COMMENT

1. *See* § 18-1-503.5(1), C.R.S. 2015 (affirmative defense applies if "the criminality of conduct depends on a child being younger than eighteen years of age"); § 18-1-503.5(2), C.R.S. 2015 ("If the criminality of conduct depends on a child's being younger than eighteen years of age and the child was in fact younger than fifteen years of age, there shall be no defense that the defendant reasonably believed the child was eighteen years of age or older.").

2. This affirmative defense is unavailable if "the criminality of conduct depends on the defendant being in a position of trust," § 18-1-503.5(1), or where "the criminality of conduct depends on a child being younger than fifteen years of age." § 18-1-503.5(3), C.R.S. 2015.

3. Section 18-1-503.5(1) establishes an affirmative defense that must be raised; it does not alter the mens rea that applies to an offense. *See Gorman v. People*, 19 P.3d 662, 668 (Colo. 2000) (rejecting the analysis in *People v. Bath*, 890 P.2d 269, 271 (Colo. App. 1994), and explaining that "[w]hile we agree with the court of appeals that the affirmative defense [then codified as section 18-3-406(1)] is applicable to the offense of contributing to the delinquency of a minor, we disapprove of its reasoning that" an affirmative defense statute can alter the mens rea for an offense).

H:37 CRIMINAL ATTEMPT - ABANDONMENT AND RENUNCIATION

The evidence presented in this case has raised the affirmative defense of "abandonment and renunciation," as a defense to attempted [insert name(s) of object offense(s)].

The defendant's conduct was legally authorized if:

1. he [she] abandoned his [her] effort to commit the crime or otherwise prevented its commission, under circumstances manifesting the complete and voluntary renunciation of his [her] criminal intent, and

2. neither the abandonment nor the renunciation was motivated in whole or in part by: a belief that a circumstance existed which increased the probability of detection or apprehension of the defendant or another, or which made more difficult the consummation of the crime; or a decision to postpone the crime until another time or to substitute another victim or another but similar objective.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

COMMENT

1. *See* § 18-2-101(3), C.R.S. 2015 (establishing the affirmative defense of abandonment and renunciation); § 18-2-401(1), C.R.S. 2015 (limiting the defense where abandonment or renunciation is not voluntary and complete).

2. In *O'Shaughnessy v. People*, 2012 CO 9, ¶ 20 n.4, 269 P.3d 1233, 1237 n.4, the supreme court rejected a "bright-line rule . . . that the affirmative defense of abandonment is not available [in a prosecution for an attempt] once the defendant injures the victim." Although the court held that the defendant in that case was not entitled to an instruction concerning the affirmative defense of abandonment because there was no credible evidence to support it, the court explained that even "though the crime of attempt is complete once the actor takes a substantial step toward the commission of the crime, the affirmative defense of abandonment applies if the actor completely and voluntarily renunciates his criminal intent thereafter." *Id.* at ¶ 9, 269 P.3d at 1235.

3. It is well-established that "[a]bandonment and renunciation of criminal purpose are not affirmative defenses to *completed* crimes." *People v. Marmon*, 903 P.2d 651, 654 n.2 (Colo. 1995) (forgery); *People v. Scialabba*, 55 P.3d 207, 210 (Colo. App. 2002) (same; witness tampering). Thus, *O'Shaughnessy* is best understood as recognizing the exception that exists for the oxymoronic concept of completed attempts. *See also People v. Johnson*, 585 P.2d 306, 308 (Colo. App. 1978) ("even though, in a strict analytical sense, the crime of attempt is complete once the actor intentionally takes a substantial step towards the commission of the crime, nevertheless, the defense of abandonment is present if he thereafter voluntarily renunciates his criminal intent").

H:38 CONSPIRACY - RENUNCIATION

The evidence presented in this case has raised the affirmative defense of "renunciation," as a defense to conspiracy.

The defendant's conduct was legally authorized if:

1. after conspiring to commit a crime, he [she] thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his [her] criminal intent, and

2. the renunciation was not motivated in whole or in part by: a belief that a circumstance existed which increased the probability of detection or apprehension of the defendant or another or which made more difficult the consummation of the crime; or a decision to postpone the crime until another time or to substitute another victim or another but similar objective.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of conspiracy to commit [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of that offense.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of conspiracy to commit [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

COMMENT

1. *See* § 18-2-203, C.R.S. 2015 (establishing the affirmative defense of renunciation); § 18-2-401(1), C.R.S. 2015 (limiting the defense where the renunciation is not voluntary and complete).

2. The Committee has not included an instruction similar to COLJI-Crim. H:34 (2008), which established an affirmative defense of abandonment for the offense of conspiracy based on language in section 18-2-204, C.R.S. 2015 ("duration of conspiracy").

Unlike the attempt statute, the conspiracy statute does not state that abandonment is an affirmative defense. *Compare* § 18-2-201, C.R.S. 2015 (conspiracy), *with* § 18-2-101(3), C.R.S. 2015 (establishing the affirmative defense of abandonment and renunciation for attempt offenses). Indeed, the conspiracy statute does not mention abandonment, and there is no separate statute explicitly identifying abandonment as an affirmative defense to a charge of conspiracy (as there is for renunciation of a conspiracy, which requires proof that the defendant actually have "thwarted the success of the conspiracy," *see* § 18-2-203, C.R.S. 2015). Rather, the concept of abandonment appears in a statute that defines the "duration" of a conspiracy. *See* § 18-2-204, C.R.S. 2015.

Nevertheless, based on section 18-2-204, abandonment of a conspiracy has been characterized as an affirmative defense in case law, *see, e.g.*, *People v. Romero*, 543 P.2d 56, 58-59 (Colo. 1975) (trial court did not err by refusing to instruct the jury concerning "the affirmative defense of abandonment"), and in previous model jury instructions. *See* COLJI-Crim. H:34 (2008); COLJI-Crim. 7:32 (1983).

However, the Committee has now concluded that the supreme court's statement in *Romero* was dicta and that the earlier model instructions were erroneous. This view is consistent with the understanding of one commentator, who has explained the distinction as follows:

> Renunciation should be distinguished from abandonment, discussed . . . under the subheading DURATION OF CONSPIRACY. Abandonment does not defend against a conspiracy conviction, but merely limits the abandoning conspirator's exposure by starting the limitations period running and ending the attribution

of statements of other conspirators to him under the co-conspirator exception to the hearsay rule. Abandonment is easier to prove than renunciation, since actual prevention of the conspiracy's success is not required.

Marianne Wesson, *Crimes and Defenses in Colorado*, 57 (1989).

H:39 CRIMINAL SOLICITATION – SOLE VICTIM, INEVITABLY INCIDENT, OR OTHERWISE NOT LIABLE

The evidence presented in this case has raised the affirmative defense of ["object achieved"] ["sole victim"] "inevitably incident"] as a defense to criminal solicitation.

The defendant's conduct was legally authorized if:

[1. had the criminal object been achieved he [she] would have been the sole victim of the offense; or his [her] conduct would have been inevitably incident to its commission; or he [she] otherwise would not have been guilty under Instruction ___, defining [insert name of felony offense(s) solicited], or under Instruction ___, defining complicity liability.]

[1. he [she] was the sole victim of the offense; or his [her] conduct was inevitably incident to commission of the offense.]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, the above numbered condition.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of criminal solicitation. In that event, you must return a verdict of not guilty of that offense.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of criminal solicitation must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

COMMENT

1. *See* § 18-2-301(2), C.R.S. 2015.

2. The first example is designed for cases where the object of the solicitation was not achieved. If the solicited crime was completed, use the second example.

3. The second example does not include language reflecting the third alternative of section 18-2-301(2), C.R.S. 2015 ("or he otherwise would not be guilty under the statute defining the offense or under section 18-1-603 dealing with complicity"). It is unclear whether this instructional language would ever be necessary in a case where the solicited crime was completed because, presumably, in such circumstances the defendant would also be charged with the completed offense (and that charge would be separately submitted to the jury under a theory of complicity).

4. The first clause of section 18-2-301(1), C.R.S. 2015, establishes an exemption from criminal liability for "bona fide acts of persons authorized by law to investigate the commission of offenses by others." It is unclear whether the General Assembly intended for this provision to create an affirmative defense that is distinct from the affirmative defense of "execution of public duty." *See* § 18-1-701(1), C.R.S. 2015; Instruction H:08.

H:40 CRIMINAL SOLICITATION – PREVENTION AND RENUNCIATION

The evidence presented in this case has raised the affirmative defense of "prevention and renunciation," as a defense to criminal solicitation.

The defendant's conduct was legally authorized if:

1. he [she], after soliciting another person to commit [insert name of felony offense(s) here], persuaded him [her] not to do so, or otherwise prevented the commission of the crime,

2. under circumstances manifesting a complete and voluntary renunciation of his [her] criminal intent, and

3. the renunciation was not motivated in whole or in part by: a belief that a circumstance existed which increased the probability of detection or apprehension of the defendant or another, or which made more difficult the consummation of the crime; or a decision to postpone the crime until another time, or to substitute another victim or another but similar objective.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of criminal solicitation. In that event, you must return a verdict of not guilty of that offense.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of criminal solicitation must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

COMMENT

1. *See* §§ 18-2-301(4), 18-2-401, C.R.S. 2015.

2. *See People v. Jacobs*, 91 P.3d 438, 441-42 (Colo. App. 2003) (because the general offense of solicitation does not apply to the separate substantive offense of soliciting for child prostitution, the affirmative defenses of prevention and renunciation under the general solicitation statute are also inapplicable).

H:41 FELONY MURDER - DISENGAGEMENT

The evidence presented in this case has raised the affirmative defense of "disengagement," as a defense to the offense of first degree murder (felony murder).

The defendant's conduct was legally authorized if:

1. he [she] was not the only participant in the [insert name of offense(s) here], and

2. he [she] did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof, and

3. he [she] was not armed with a deadly weapon, and

4. he [she] had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article, or substance, and

5. he [she] did not engage himself [herself] in, or intend to engage in, or have a reasonable ground to believe that any other participant intended to engage in, conduct likely to result in death or serious bodily injury, and

6. he [she] endeavored to disengage himself [herself] from the commission of [insert name of offense(s) here] or flight therefrom immediately upon having reasonable grounds to believe that another participant was armed with a deadly weapon, instrument, article, or substance, or intended to engage in conduct likely to result in death or serious bodily injury.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you

must return a verdict of not guilty of first degree murder (felony murder).

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of first degree murder (felony murder) must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

COMMENT

1. *See* § 18-3-102(2), C.R.S. 2015.

2. *See* Instruction F:88 (defining "deadly weapon"); *see also Webster's Third New International Dictionary* 1135 (2002) (defining "importune" as meaning "to press or urge with frequent or unreasonable requests or troublesome persistence").

3. *See Auman v. People*, 109 P.3d 647, 657 (Colo. 2005) ("Like the plain language of the statutory offense, the affirmative defense provides no support for the theory that arrest, by itself, terminates a co-participant's liability for felony murder as a matter of law."); *People v. Lucas*, 992 P.2d 619, 625 (Colo. App. 1999) (defendant charged with felony murder was not entitled to affirmative defense instruction because he engaged in conduct likely to cause serious bodily injury by participating in the attack on the victim and personally hitting the victim multiple times).

H:42 MANSLAUGHTER – MEDICAL CAREGIVER

The evidence presented in this case has raised the affirmative defense of "medical caregiver," as a defense to manslaughter (intentionally aiding or causing another person to commit suicide).

The defendant's conduct was legally authorized if:

1. he [she] was a medical caregiver, with prescriptive authority or authority to administer medication,

2. who prescribed or administered medication for palliative care,

3. to a terminally ill patient,

4. with the consent of the terminally ill patient, or his [her] agent.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of manslaughter (intentionally aiding or causing another person to commit suicide). In that event, you must return a verdict of not guilty of that offense.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of manslaughter (intentionally aiding or causing another person to commit suicide) must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

COMMENT

1. *See* § 18-3-104(4)(a), C.R.S. 2015.

2. *See* Instruction F:12 (defining "agent"); Instruction F:221 (defining "medical caregiver"); Instruction F:257 (defining "palliative care").

H:43 FALSE IMPRISONMENT – PEACE OFFICER ACTING IN GOOD FAITH

The evidence presented in this case has raised the affirmative defense of "peace officer acting in good faith," as a defense to false imprisonment.

The defendant's conduct was legally authorized if:

1. he [she] was a peace officer,

2. acting in good faith within the scope of his [her] duties.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of false imprisonment. In that event, you must return a verdict of not guilty of false imprisonment.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of false imprisonment must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

COMMENT

1. *See* § 18-3-303(1), C.R.S. 2015.

2. *See* Instruction F:263 (defining "peace officer").

3. In *People v. Reed*, 932 P.2d 842, 844 (Colo. App. 1996), a division of the Court of Appeals observed, in dicta, that "COLJI-Crim. No. 11:08 (1983), the pattern criminal jury instruction for false imprisonment pursuant to § 18-3-303, . . . provides that an element of the prosecution's case is proof that the

defendant is not a peace officer acting in good faith." Although the division in *Reed* endorsed that statutory interpretation, the Committee has concluded the provision establishes an affirmative defense.

H:44 VIOLATION OF CUSTODY – CHILD IN DANGER OR NOT ENTICED

The evidence presented in this case has raised the affirmative defense of ["child in danger"] ["child not enticed"], as a defense to violation of custody.

The defendant's conduct was legally authorized if:

[1. he [she] reasonably believed that his [her] conduct was necessary to preserve the child from danger to his [her] welfare.]

[1. the child was at the time more than fourteen years old, and

2. he [she] was taken away at his [her] own instigation,

3. without enticement, and

4. the defendant had no purpose to commit a crime with or against the child.]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, [at least one of] the above numbered condition[s].

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of violation of custody. In that event, you must return a verdict of not guilty of violation of a custody order.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of violation of custody must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

COMMENT

1. *See* § 18-3-304(3), C.R.S. 2015.

2. *See People v. Mossman*, 17 P.3d 165, 168-72 (Colo. App. 2000) (under *People v. Tippett*, 733 P.2d 1183, 1191 (Colo. 1987), evidence in support of the affirmative defense to violation of custody may be limited to the defendant's state of mind at or shortly before the time of the child's abduction; however, trial court committed reversible error by refusing defendant's request for an instruction concerning the affirmative defense where the evidence, including the improperly excluded evidence, was sufficient to support defendant's assertion that he had taken his daughter to protect her after she revealed to him that his ex-wife and another man were physically, mentally, and sexually abusing her, and defendant was aware that his ex-wife and the other man were living together in violation of a restraining order which had been entered to protect his daughter); *see also People v. Beilke*, 232 P.3d 146, 150 (Colo. App. 2009) (rejecting the argument that the *Mossmann* division misconstrued *Tippett*).

H:45 FAILURE TO REGISTER OR VERIFY LOCATION AS A SEX OFFENDER - UNCONTROLLABLE CIRCUMSTANCES

The evidence presented in this case has raised the affirmative defense of "uncontrollable circumstances," as a defense to failure to [register] [verify location] as a sex offender.

The defendant's conduct was legally authorized if:

1. he [she] was prevented from complying by uncontrollable circumstances, and

2. he [she] did not contribute to the creation of the circumstances in reckless disregard of the requirement to comply, and

3. he [she] complied as soon as the circumstances ceased to exist.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of failure to [register] [verify location] as a sex offender. In that event, you must return a verdict of not guilty of failure to [register] [verify location] as a sex offender.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of failure to [register] [verify location] as a sex offender must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

COMMENT

1. *See* § 18-3-412.5(1.5)(a), C.R.S. 2015.

2. In order to raise this affirmative defense, the defendant must comply with the pretrial notification procedure and afford the prosecution an opportunity to ask the court for a pretrial ruling. *See* § 18-3-412.5(1.5)(b), C.R.S. 2015; § 18-3-412.6(2)(b), C.R.S. 2015.

+ H:45.3 UNLAWFUL TERMINATION OF A PREGNANCY (MEDICAL CARE OR SERVICE)

The evidence presented in this case has raised the affirmative defense of "medical care or service," as a defense to unlawful termination of a pregnancy.

The defendant's conduct was legally authorized if:

1. he [she] was providing medical, osteopathic, surgical, mental health, dental, nursing, optometric, healing, wellness, or pharmaceutical care; furnishing inpatient or outpatient hospital or clinic services; furnishing telemedicine services; or furnishing any service related to assisted reproduction or genetic testing.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, the above numbered condition.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of unlawful termination of a pregnancy. In that event, you must return a verdict of not guilty of unlawful termination of a pregnancy.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of unlawful termination of a pregnancy must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

COMMENT

1. *See* § 18-3.5-102(1), C.R.S. 2015.

2. + The Committee added this instruction in 2015.

+ H:45.5 UNLAWFUL TERMINATION OF A PREGNANCY (DEFENDANT'S OWN PREGNANCY)

The evidence presented in this case has raised the affirmative defense of "defendant's own pregnancy," as a defense to unlawful termination of a pregnancy.

The defendant's conduct was legally authorized if:

1. she committed the elements of the offense of unlawful termination of a pregnancy with regard to her own pregnancy.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, the above numbered condition.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of unlawful termination of a pregnancy. In that event, you must return a verdict of not guilty of unlawful termination of a pregnancy.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of unlawful termination of a pregnancy must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

COMMENT

1. *See* § 18-3.5-102(2), C.R.S. 2015.

2. + The Committee added this instruction in 2015.

H:46 FOURTH DEGREE ARSON – CONTROLLED AGRICULTURAL BURN

The evidence presented in this case has raised the affirmative defense of "controlled agricultural burn," as a defense to fourth degree arson.

The defendant's conduct was legally authorized if:

1. he [she] started and maintained a fire as a controlled agricultural burn in a reasonably cautious manner, and

2. no person suffered bodily injury, serious bodily injury, or death.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of fourth degree arson. In that event, you must return a verdict of not guilty of fourth degree arson.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of fourth degree arson must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

COMMENT

1. *See* § 18-4-105(5), C.R.S. 2015.

2. *See* Instruction F:72 (defining "controlled agricultural burn").

H:47 FALSE IMPRISONMENT – THEFT INVESTIGATION

The evidence presented in this case has raised the affirmative defense of "theft investigation," as a defense to false imprisonment.

The defendant's conduct was legally authorized if:

1. he [she] was the owner or an employee of a store or mercantile establishment, [or a peace officer,] and

2. the alleged victim[s] triggered an alarm or a theft detection device or concealed upon his [her] [their] person or otherwise carried away any unpurchased goods, wares, or merchandise held or owned by the store or mercantile establishment, and

3. the defendant, acting in good faith and upon probable cause based upon reasonable grounds therefor, detained and questioned [insert name of alleged victim(s) here], in a reasonable manner, for the purpose of ascertaining whether he [she] [they] was [were] guilty of theft.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of false imprisonment. In that event, you must return a verdict of not guilty of false imprisonment.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of false imprisonment must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

COMMENT

1. *See* § 18-4-407, C.R.S. 2015.

2. *See* Instruction F:368 (defining "theft detection device"); Instructions 4-4:01 to 4-4:03 (theft).

3. Because the statute requires that the defendant's "probable cause" be based on "reasonable grounds," it appears that the use of this language in the instruction sufficiently explains the concept of "probable cause" such that it is not necessary to give a separate instruction defining the term pursuant to case law. *See People v. Tottenhoff*, 691 P.2d 340, 343 (Colo. 1984) ("Probable cause . . . exists when the facts and circumstances . . . are sufficient to warrant a person of reasonable caution to believe that an offense has been or is being committed by the person.").

+ H:47.5 EQUITY SKIMMING OF REAL PROPERTY (FULL PAYMENT)

The evidence presented in this case has raised the affirmative defense of "full payment," as a defense to equity skimming of real property.

The defendant's conduct was legally authorized if:

[1. all deficiencies in all underlying encumbrances at the time of acquisition had been fully satisfied and brought current, and

2. any regular payments on the underlying encumbrances during the succeeding nine months after the date of acquisition have been timely paid in full.]

[1. any fees due to an association of real property owners for the upkeep of the housing facility, or common area including buildings and grounds thereof, of which the real property is a part have been paid in full.]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden, the prosecution must disprove, beyond a reasonable doubt, [at least one of] the above numbered condition[s].

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of equity skimming of real property. In that event, you must return a verdict of not guilty of equity skimming of real property.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of equity skimming of real property must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

COMMENT

1. *See* § 18-5-802(4), C.R.S. 2015.

2. Section 18-5-802(4)(a) specifies that this affirmative defense is unavailable where the defendant is charged with violating section 18-5-802(1)(b)(II), C.R.S. 2015 (collecting rent on behalf of any person other than the owner of the real property after a foreclosure in which title has vested).

3. + The Committee added this instruction in 2015.

H:48 CHILD ABUSE – SAFE SURRENDER OF A NEWBORN

The evidence presented in this case has raised the affirmative defense of "safe surrender of a newborn," as a defense to child abuse.

The defendant's conduct was legally authorized if:

1. he [she] was the child's parent, and

2. the child was seventy-two hours old or younger at the time of the alleged offense, and

3. he [she] safely, reasonably, and knowingly handed the child over to a [firefighter, when the firefighter was at a fire station.] [hospital staff member engaged in the admission, care, or treatment of patients, when the hospital staff member was at a hospital.]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of child abuse. In that event, you must return a verdict of not guilty of child abuse.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of child abuse must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

COMMENT

1. *See* § 18-6-401(9), C.R.S. 2015.

2. *See* Instruction F:157 (defining "firefighter").

H:49 LOCATING A PROTECTED PERSON – LAWFUL PURPOSE

The evidence presented in this case has raised the affirmative defense of "lawful purpose," as a defense to violation of a protection order.

The defendant's conduct was legally authorized if:

1. the person who was [hired] [employed] [, or otherwise contracted with to locate or assist in the location of the protected person, was working pursuant to an agreement with [counsel for defendant] [defendant, who was representing himself [herself]], and

[2. the defendant sought discovery of the location of the protected person for a lawful purpose as specified in a written agreement between the person doing the locating and [defendant] [defendant's counsel], and

3. the written agreement stated that the location of the protected person would not be disclosed to defendant by the person doing the locating [or by defendant's counsel] unless the protected person agreed to the disclosure in writing or the defendant obtained court permission to obtain disclosure of the location for the stated lawful purpose.]

[2. the defendant was a defendant in a criminal case or a party to a [civil case] [an action for dissolution of marriage] [, or other legal proceeding], and

3. the written agreement stated that the lawful purpose for locating the protected person was to interview or issue a lawful subpoena or summons to the protected person [or for any other lawful purpose relating to the proper investigation of the case.]]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential

element of violation of a protection order. In that event, you must return a verdict of not guilty of violation of a protection order.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of violation of a protection order must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

COMMENT

1. *See* § 18-6-803.5(1)(b), C.R.S. 2015 (violation of a protection order; excepting conduct pursuant to section 18-13-126(1)(b)(locating protected persons), from which the above instruction is derived).

2. *See* Instruction F:14 (defining "assist"); Instruction F:293.5 (defining "protected person").

3. Although section 18-13-126(1)(b)(I)(B), C.R.S. 2015, explicitly requires that the agreement be "written," section 18-13-126(1)(b)(II)(B), C.R.S. 2015, does not. Nevertheless, the Committee has included the word "written" in the second alternative because it is implied by the context (specifically, the reference to what the agreement "states").

H:50 OBSTRUCTING GOVERNMENTAL OPERATIONS (PUBLIC SERVANT, ARREST, OR LABOR DISPUTE)

The evidence presented in this case has raised the affirmative defense of ["public servant"] ["arrest"] ["labor dispute"] as a defense to obstructing government operations.

The defendant's conduct was legally authorized if:

1. the obstruction, impairment, or hindrance was of [unlawful action by a public servant] [the making of an arrest] [a governmental function, by lawful activities in connection with a labor dispute with the government].

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, the above numbered condition.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of obstructing government operations. In that event, you must return a verdict of not guilty of obstructing government operations.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of obstructing government operations must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

COMMENT

1. *See* § 18-8-102(2), C.R.S. 2015.

2. *See* Instruction F:162 (defining "government").

H:51 COMPOUNDING - RESTITUTION OR INDEMNIFICATION

The evidence presented in this case has raised the affirmative defense of "restitution or indemnification," as a defense to compounding.

The defendant's conduct was legally authorized if:

1. the benefit received by the defendant did not exceed an amount which he [she] reasonably believed to be due as restitution or indemnification for harm caused by the crime.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, the above numbered condition.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of compounding. In that event, you must return a verdict of not guilty of compounding.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of compounding must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

COMMENT

1. *See* § 18-8-108(2), C.R.S. 2015.

2. *See* Instruction F:30 (defining "benefit").

H:52 ESCAPE (COMMITMENT) – VOLUNTARY RETURN

The evidence presented in this case has raised the affirmative defense of "voluntary return," as a defense to escape (commitment).

The defendant's conduct was legally authorized if:

1. he [she] voluntarily returned to the place of confinement.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, the above numbered condition.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of escape. In that event, you must return a verdict of not guilty of escape (commitment).

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of escape (commitment) must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

COMMENT

1. *See* § 18-8-208(7), C.R.S. 2015 (defense applies only to escapes from commitment in violation of section 18-8-208(6)).

+ H:52.3 TRADING IN PUBLIC OFFICE – CUSTOMARY CONTRIBUTION

The evidence presented in this case has raised the affirmative defense of "customary contribution," as a defense to trading in public office.

The defendant's conduct was legally authorized if:

1. the pecuniary benefit was a customary contribution to political campaign funds, and

2. those funds were solicited and received by lawfully constituted political parties.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of trading in public office. In that event, you must return a verdict of not guilty of trading in public office.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of trading in public office must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

COMMENT

1. *See* § 18-8-305(2), C.R.S. 2015.

2. + The Committee added this instruction in 2015.

+ H:52.5 DESIGNATION OF SUPPLIER - SCOPE OF AUTHORITY

The evidence presented in this case has raised the affirmative defense of "scope of authority," as a defense to designation of supplier.

The defendant's conduct was legally authorized if:

1. the defendant was a public servant acting within the scope of his authority exercising the right to reject any material, subcontractor, service, bond, or contract tendered by a bidder or contractor because it did not meet bona fide specifications or requirements relating to quality, availability, form, experience, or financial responsibility.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, the above numbered condition.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of designation of supplier. In that event, you must return a verdict of not guilty of designation of supplier.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of designation of supplier must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

COMMENT

1. *See* § 18-8-307(3), C.R.S. 2015.

2. + The Committee added this instruction in 2015.

H:53 PERJURY IN THE FIRST DEGREE - RETRACTION

The evidence presented in this case has raised the affirmative defense of "retraction," as a defense to perjury in the first degree.

The defendant's conduct was legally authorized if:

1. he [she] retracted his [her] false statement, and

2. he [she] did so during the same proceeding in which the false statement was made. [, or at a separate hearing at a separate stage of the same trial or administrative proceeding.]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of perjury in the first degree. In that event, you must return a verdict of not guilty of perjury in the first degree.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of perjury in the first degree must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

COMMENT

1. *See* § 18-8-508, C.R.S. 2015.

2. For purposes of this affirmative defense, a trial ending in a mistrial and the subsequent retrial are distinct trials, and not separate parts of the "same proceeding." *See People v. Valdez*, 568 P.2d 71, 73 (Colo. App. 1977).

H:54 DISOBEDIENCE OF PUBLIC SAFETY ORDERS UNDER RIOT CONDITIONS - NEWS REPORTER OR MEDIA PERSON

The evidence presented in this case has raised the affirmative defense of "news reporter or media person," as a defense to disobedience of a public safety order under riot conditions.

The defendant's conduct was legally authorized if:

1. he [she] was a news reporter or other person observing or recording the events on behalf of the public press or other news media, and

2. he [she] was not physically obstructing efforts by police, fire, military or other forces to cope with the riot or impending riot.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of disobedience of a public safety order under riot conditions. In that event, you must return a verdict of not guilty of disobedience of a public safety order under riot conditions.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of disobedience of a public safety order under riot conditions must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

COMMENT

1. *See* § 18-9-105, C.R.S. 2015.

H:55 INTERFERENCE WITH STAFF, FACULTY, OR STUDENTS OF EDUCATIONAL INSTITUTIONS - LAWFUL ASSEMBLY

The evidence presented in this case has raised the affirmative defense of "lawful assembly," as a defense to interference with staff, faculty, or students of educational institutions.

The defendant's conduct was legally authorized if:

1. he [she] was exercising his [her] right to lawful assembly and peaceful and orderly petition for the redress of grievances. [, including any labor dispute between an educational institution and its employees, any contractor or subcontractor, or any employee thereof.]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, the above numbered condition.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of interference with staff, faculty, or students of educational institutions. In that event, you must return a verdict of not guilty of interference with staff, faculty, or students of educational institutions.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of interference with staff, faculty, or students of educational institutions must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

COMMENT

1. *See* § 18-9-109(4), C.R.S. 2015.

H:56 LOITERING – LAWFUL ASSEMBLY

The evidence presented in this case has raised the affirmative defense of "lawful assembly," as a defense to loitering.

The defendant's conduct was legally authorized if:

1. he [she] was exercising his [her] right to lawful assembly and peaceful and orderly petition for the redress of grievances. [, either in the course of a labor dispute or otherwise.]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, the above numbered condition.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of loitering. In that event, you must return a verdict of not guilty of loitering.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of loitering must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

COMMENT

1. *See* § 18-9-112(3), C.R.S. 2015.

H:57 CRUELTY TO ANIMALS - DOG FOUND RUNNING, WORRYING, OR INJURING SHEEP, CATTLE, OR OTHER LIVESTOCK

The evidence presented in this case has raised the affirmative defense of "dog found running, worrying, or injuring sheep, cattle, or other livestock" as a defense to cruelty to animals.

The defendant's conduct was legally authorized if:

1. the dog was found running, worrying, or injuring sheep, cattle, or other livestock.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, the above numbered condition.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of cruelty to animals. In that event, you must return a verdict of not guilty of cruelty to animals.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of cruelty to animals must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

COMMENT

1. *See* § 18-9-202(2.5), C.R.S. 2015.

H:58 UNLAWFUL OWNERSHIP OF A DANGEROUS DOG - CONDUCT OF THE PERSON OR ANIMAL ATTACKED

The evidence presented in this case has raised the affirmative defense of "conduct of the person or animal attacked" as a defense to unlawful ownership of a dangerous dog.

The defendant's conduct was legally authorized if:

1. The dangerous dog had not engaged in or been trained for animal fighting, and

[2. at the time of the attack by the dangerous dog which caused [injury to] [the death of] a domestic animal, the domestic animal was at large, was an estray, and had entered upon the property of the owner and the attack began, but did not necessarily end, upon such property.]

[2. at the time of the attack by the dangerous dog which caused [injury to] [the death of] a domestic animal, the animal was biting or otherwise attacking the dangerous dog or its owner.]

[2. at the time of the attack by the dangerous dog which caused [injury to] [the death of] a person, the victim of the attack was committing or attempting to commit [insert name of criminal offense, other than a petty offense], against the dog's owner, and the attack did not occur on the owner's property.]

[2. at the time of the attack by the dangerous dog which caused [injury to] [the death of] a person, the victim of the attack was committing or attempting to commit [insert name of criminal offense, other than a petty offense], against a person on the owner's property or the property itself and the attack began, but did not necessarily end, upon such property.]

[2. the person who was the victim of the attack by the dangerous dog tormented, provoked, abused, or inflicted injury upon the dog in such an extreme manner which resulted in the attack.]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of

proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of unlawful ownership of a dangerous dog. In that event, you must return a verdict of not guilty of unlawful ownership of a dangerous dog.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of unlawful ownership of a dangerous dog must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

COMMENT

1. *See* § 18-9-204.5(3)(h)(I)(A-E), (II), C.R.S. 2015.

2. *See* Instruction F:84 (defining "dangerous dog"); Instruction F:107 (defining "domestic animal"); Instruction F:256 (defining "owner"); Instruction F:332 (defining "serious bodily injury"); Instruction G2:01 (criminal attempt).

3. Because all of the provisions of 18-9-204.5(3)(h)(I)(A-E) speak in terms of an "attack," it appears that the affirmative defenses in this instruction apply only when the allegation of dangerousness is based on section 18-9-204.5(2)(b)(I), C.R.S. 2015 ("'Dangerous dog' means any dog that . . . [i]nflicts bodily or serious bodily injury upon or causes the death of a person or domestic animal"). Accordingly, it appears that these affirmative defenses would not be available where the allegations of dangerousness are based on section 18-9-204.5(2)(b)(II), C.R.S. 2015 (demonstrated dangerous tendencies). However, where the evidence of demonstrated dangerous tendencies involves evidence of a prior attack, it may be appropriate to draft a special instruction apprising the jury of the principles embodied in these affirmative defense instructions.

4. Depending on the evidence, it may be necessary to define "animal fighting." *See* Instruction 9-2:06 (animal fighting);

Instruction 9-2:07.SP (animal fighting - special instruction). If the defendant is not charged with animal fighting, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense.

5. Where the evidence supports instructing the jury concerning more than one subsection of section 18-9-204.5(3)(h)(I)(A-E), use a separate instruction (with two numbered conditions) for each relevant subsection.

6. The dangerous dog statute includes additional exemptions from criminal liability. *See* § 18-9-204.5(6), C.R.S. 2015 (exempting, among other things, herding dogs and those dogs that are used by peace officers). However, the Committee has not drafted a model affirmative defense instruction encompassing these exemptions.

H:59 KNIFE - HUNTING OR FISHING

The evidence presented in this case has raised the affirmative defense of "hunting or fishing," as a defense to [insert name of weapon offense(s)].

The defendant's conduct was legally authorized if:

1. the knife was a hunting or fishing knife, and

2. he [she] carried it for sports use.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of [insert name of weapon offense(s)]. In that event, you must return a verdict of not guilty of [insert name of weapon offense(s)].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of [insert name of weapon offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

COMMENT

1. *See* § 18-12-101(1)(f), C.R.S. 2015.

H:60 OFFENSES RELATING TO FIREARMS AND WEAPONS - PEACE OFFICERS

The evidence presented in this case has raised the affirmative defense of "peace officer," as a defense to [insert name of Article 12 offense(s)].

The defendant's conduct was legally authorized if:

1. he [she] was a peace officer, and

2. he [she] was acting in the lawful discharge of his [her] duties.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of [insert name of Article 12 offense(s)]. In that event, you must return a verdict of not guilty of [insert name of Article 12 offense(s)].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of [insert name of Article 12 offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

COMMENT

1. *See* § 18-12-101(2), C.R.S. 2015.

2. *See* Instruction F:263 (defining "peace officer").

H:61 POSSESSING AN ILLEGAL OR DANGEROUS WEAPON - PEACE OFFICERS, ARMED SERVICEPERSONS, AND LICENSED POSSESSION

The evidence presented in this case has raised the affirmative defense of ["peace officer"] ["armed serviceperson"] ["licensed possession"], as a defense to possessing [an illegal weapon] [a dangerous weapon].

The defendant's conduct was legally authorized if:

[1. he she was a [peace officer] [member of the Armed Forces of the United States] [member of the Colorado National Guard], and

2. he [she] was acting in the lawful discharge of his [her] duties.]

[1. he [she] [had a valid permit and license for possession of such weapon].

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, [at least one of] the above numbered condition[s].

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of possessing [an illegal weapon] [a dangerous weapon]. In that event, you must return a verdict of not guilty of possessing [an illegal weapon] [a dangerous weapon].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of possessing [an illegal weapon] [a dangerous weapon] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

COMMENT

1. *See* § 18-12-102(5), C.R.S. 2015.

H:62 UNLAWFULLY CARRYING A CONCEALED WEAPON – PERMISSIBLE LOCATION OR VALID PERMIT

The evidence presented in this case has raised the affirmative defense of ["permissible location"] ["valid permit"] as a defense to unlawfully carrying or possessing a concealed weapon.

The defendant's conduct was legally authorized if:

[1. he [she] was in his [her] own dwelling or place of business, or on property owned or under his [her] his control at the time of the act of carrying.]

[1. he [she] was in a private automobile, or other private means of conveyance, and

2. was carrying the weapon for lawful protection of his [her] or another's person or property while traveling.]

[1. at the time of carrying a concealed weapon, he [she] held a valid written permit to carry a concealed weapon, or, if the weapon involved was a handgun, a valid permit to carry a concealed handgun or a valid temporary emergency permit to carry a concealed handgun, and

2. he [she] [was] [did] not [insert relevant provision(s) from § 18-12-214, C.R.S. 2015.]

[1. he [she] was a peace officer, and

2. he [she] was carrying the weapon in conformance with the policy of his [her] employing agency.]

[1. he [she] was a United States probation officer or pretrial services officer, and

2. he [she] was on duty, and

3. he [she] was authorized to serve in the state of Colorado, pursuant to [insert a short description of the relevant rule and/or regulation promulgated by the judicial conference of the United States.]]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, [at least one of] the above numbered condition[s].

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of unlawfully carrying or possessing a concealed weapon. In that event, you must return a verdict of not guilty of unlawfully carrying or possessing a concealed weapon.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of unlawfully carrying or possessing a concealed weapon must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

COMMENT

1. *See* § 18-12-105(2), C.R.S. 2015.

2. When using the bracketed language applicable to peace officers, define the term "peace officer." *See* Instruction F:263 (defining "peace officer"). In addition, draft an instruction explaining the written policy of the employing agency. *See* § 16-2.5-101(2), C.R.S. 2015.

3. The court should draft a supplemental instruction explaining how it has resolved any relevant legal matters, such as the validity of a permit or a determination of the governing provision(s) of the employment policy, rule, or regulation.

4. Where the evidence supports instructing the jury concerning more than one subsection of section 18-12-105(2), use a separate instruction for each relevant subsection.

H:63 UNLAWFUL POSSESSION OF A WEAPON ON SCHOOL, COLLEGE, OR UNIVERSITY GROUNDS – PERMISSIBLE LOCATION OR PURPOSE; VALID PERMIT

The evidence presented in this case has raised the affirmative defense of ["permissible location"] ["valid permit"] as a defense to unlawful possession of a weapon on [school] [college] [university] grounds.

The defendant's conduct was legally authorized if:

[1. the weapon was unloaded, and

2. it remained inside a motor vehicle while upon the real estate of any [public] [private] [college] [university] [seminary].]

[1. he [she] was in his [her] own [dwelling] [place of business] [, or on property owned or under his [her] control] at the time of the act of carrying.]

[1. he [she] was in a private [automobile] [means of conveyance], and

2. was carrying the weapon for lawful protection of [[his] [her] [another's]] [person] [property],

3. while traveling.]

[1. at the time of carrying a concealed weapon, he [she] held a valid written permit to carry a concealed weapon, and

2. he [she] was [did] not [insert relevant provision(s) from § 18-12-214, C.R.S. 2015.]

[1. the weapon involved was a handgun, and

2. at the time of carrying a concealed weapon, he [she] she held [a valid permit to carry a concealed handgun] [a valid temporary emergency permit to carry a concealed handgun], and

3. he [she] [was] [did] not [insert relevant provision(s) from § 18-12-214, C.R.S. 2015.]

[1. he [she] was a [school resource officer] [peace officer], and

2. he [she] was carrying a weapon in conformance with the policy of his [her] employing agency.]

[1. he [she] had possession of the weapon for use in an educational program approved by a school (including, but not limited to, any course designed for the repair or maintenance of weapons).]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, [at least one of] the above numbered condition[s].

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of unlawful possession of a weapon on [school] [college] [university] grounds. In that event, you must return a verdict of not guilty of unlawful possession of a weapon on [school] [college] [university] grounds.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of unlawful possession of a weapon on [school] [college] [university] grounds must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

COMMENT

1. *See* § 18-12-105.5(3), C.R.S. 2015.

2. *See* Instruction F:329 (defining "school resource officer").

3. When using the bracketed language applicable to peace officers, draft a separate instruction defining a "peace officer" in accordance with section 16-2.5-101, C.R.S. 2015. Due to the multitude of possible definitions, there is no model instruction in Chapter F. In addition, draft an instruction

explaining the written policy of the employing agency. *See* § 16-2.5-101(2), C.R.S. 2015.

4. It may be necessary for the court to draft a supplemental instruction explaining its determinations with respect to the validity of a permit or the relevant governing provision(s) of the employment policy, rule, or regulation.

H:64 POSSESSION OF A WEAPON BY A PREVIOUS OFFENDER – CHOICE OF EVILS

The evidence presented in this case has raised the affirmative defense of "choice of evils," as a defense to possession of a weapon by a previous offender.

The defendant's conduct was legally authorized if:

1. he [she] possessed the weapon for the purpose of defending his [her] home, person or property from what he [she] reasonably believed to be a threat of imminent harm which was about to occur because of a situation occasioned or developed through no conduct of the defendant.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, the above numbered condition.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of possession of a weapon by a previous offender. In that event, you must return a verdict of not guilty of possession of a weapon by a previous offender.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of possession of a weapon by a previous offender must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

COMMENT

1. *See* Colo. Const. Art. II, § 13.

2. In *People v. Carbajal*, 2014 CO 60, ¶ 1, 328 P.3d 104, 105, the supreme court held that the trial court had not erred when it "modified the stock jury instruction regarding this

affirmative defense and instructed the jury that Carbajal must have possessed the weapons to defend against what he 'reasonably believed to be a threat of imminent harm.'" Reviewing its prior decisions, the court explained that the trial court's imposition of this imminence requirement was proper because imminence is a statutory component of the choice of evils defense and, "under [*People v. Blue*, 544 P.2d 385 (Colo. 1975)] and [*People v. Ford*, 568 P.2d 26 (Colo. 1977)], the POWPO affirmative defense is the statutory defense of choice of evils." *Carbajal*, ¶ 21, 328 P.3d at 109. Further, in a footnote, the court observed:

> The choice of evils defense also requires that the conduct in which the defendant was engaged be necessary to avoid a harm "which is about to occur by reason of a situation occasioned or developed through no conduct of the [defendant]." § 18-1-702(1). The instruction in this case did not explain this requirement to the jury. To the extent that omitting this element of the defense was error, however, it inured to Carbajal's benefit.

Carbajal, ¶ 21 n.5, 328 P.3d at 109 n.5. Accordingly, the model instruction includes the above language that was omitted from the instruction in *Carbajal*.

However, in *Carbajal* the court was not called upon to address the applicability of the following provision of the choice of evils defense: "and which is of sufficient gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue." § 18-1-702(1), C.R.S. 2015. And the Committee has elected to refrain from expressing an opinion concerning this issue. *See also* § 18-1-702(2), C.R.S. 2015 ("When evidence relating to the defense of justification under this section is offered by the defendant, before it is submitted for the consideration of the jury, the court shall first rule as a matter of law whether the claimed facts and circumstances would, if established, constitute a justification.").

H:65 POSSESSION OF A HANDGUN BY A JUVENILE – PERMISSIBLE PURPOSE

The evidence presented in this case has raised the affirmative defense of "permissible purpose," as a defense to possession of a handgun by a juvenile.

The defendant's conduct was legally authorized if:

[1. he [she] was in attendance at a hunter's safety course or a firearms safety course.]

[1. he [she] was engaging in practice in the use of a firearm or target shooting,

2. at an established range authorized by the governing body of the jurisdiction in which such range was located or any other area where the discharge of a firearm was not prohibited.]

[1. he [she] was engaging in an organized competition involving the use of a firearm or participating in or practicing for a performance by [insert name of a group organized under 501(c)(3) as determined by the federal internal revenue service] which uses firearms as a part of such performance.]

[1. hunting or trapping pursuant to a valid [insert description a license pursuant to article 4 of title 33, C.R.S.] issued to him [her].]

[1. traveling with any handgun in his [her] possession,

2. being unloaded,

3. to or from any [insert description of activity described in subparagraph (I), (II), (III), or (IV) of section 18-12-108.5(2)(a)].]

[1. he [she] was on real property under the control of his [her] parent, legal guardian, grandparent, and

2. he [she] had the permission of his [her] parent, legal guardian, to possess a handgun.]

[1. he [she] was at his [her] residence, and

2. with the permission of his [her] [parent] [legal guardian,

3. possessed a handgun for the purpose of exercising the right [insert a description of the right of self-defense, as defined by section 18-1-704, or of the right to use deadly force against an intruder, as defined by section 18-1-704.5].]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, [at least one of] the above numbered condition[s].

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of possession of a handgun by a juvenile. In that event, you must return a verdict of not guilty of possession of a handgun by a juvenile.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of possession of a handgun by a juvenile must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

COMMENT

1. *See* § 18-12-108.5(2), C.R.S. 2015.

2. *See* Instruction F:199 (defining "loaded," pursuant to section 18-12-108.5(3), for purposes of explaining the meaning of the term "unloaded," as used in the affirmative defense related to travel that is established by section 18-12-108.5 (2)(a)(V)).

3. *See People in the Interest of L.M.*, 17 P.3d 829, 830 (Colo. App. 2000) ("we conclude that the parental permission language

in § 18-12-108.5(2)(b) is an affirmative defense to the offense of unlawful possession of a handgun by a juvenile").

4. If the evidence warrants instructing the jury concerning more than one of the affirmative defenses that are defined in section 18-12-108.7(2), use a separate instruction for each such defense.

H:66 UNLAWFULLY PROVIDING A HANDGUN OR FIREARM TO A JUVENILE OR PERMITTING A JUVENILE TO POSSESS A HANDGUN OR FIREARM – PHYSICAL HARM FROM ATTEMPT TO DISARM

The evidence presented in this case has raised the affirmative defense of "physical harm from attempt to disarm," as a defense to [unlawfully providing a [handgun] [firearm] to a juvenile] [permitting a juvenile to possess a [handgun] [firearm]].

The defendant's conduct was legally authorized if:

1. he [she] believed that the juvenile would physically harm him [her] if he [she] attempted to disarm the juvenile or prevent the juvenile from unlawfully possessing a handgun.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, the above numbered condition.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of [unlawfully providing a [handgun] [firearm] to a juvenile] [permitting a juvenile to possess a [handgun] [firearm]]. In that event, you must return a verdict of not guilty of [unlawfully providing a [handgun] [firearm] to a juvenile] [permitting a juvenile to possess a [handgun] [firearm]].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of [unlawfully providing a [handgun] [firearm] to a juvenile] [permitting a juvenile to possess a [handgun] [firearm]] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

COMMENT

1. *See* § 18-12-108.7(4), C.R.S. 2015.

H:67 TRANSFER OF A FIREARM WITHOUT A BACKGROUND CHECK – PERMISSIBLE TRANSFER

The evidence presented in this case has raised the affirmative defense of "permissible transfer" as a defense to [transfer of a firearm without a background check] [accepting possession of a firearm without approval] [insert a description of one of the other transfer offenses proscribed by section 18-12-112].

The defendant's conduct was legally authorized if:

[1. the transfer was of [an antique firearm] [a curio or relic].]

[1. the transfer was a bona fide gift or loan between immediate family members (which are limited to spouses, parents, children, siblings, grandparents, grandchildren, nieces, nephews, first cousins, aunts, and uncles).]

[1. the transfer occurred [by operation of law] [because of the death of a person for whom the prospective transferor was an executor or administrator of an estate or a trustee of a trust created in a will].]

[1. the transfer was temporary, and

2. it occurred while in the home of the unlicensed transferee, and

3. the unlicensed transferee was not prohibited from possessing firearms, and

4. the unlicensed transferee reasonably believed that possession of the firearm was necessary to prevent imminent death or serious bodily injury to the unlicensed transferee.]

[1. the transfer was a temporary transfer of possession,

2. without transfer of ownership or a title to ownership,

3. which took place [at a shooting range located in or on premises owned or occupied by a duly incorporated organization organized for conservation purposes or to foster proficiency in firearms] [at a target firearm

shooting competition under the auspices of, or approved by, a state agency or a nonprofit organization] [while hunting, fishing, target shooting, or trapping], if the hunting, fishing, target shooting, or trapping] was legal in all places where the unlicensed transferee possessed the firearm, and the unlicensed transferee held any license or permit that was required for such hunting, fishing, target shooting, or trapping].

[1. the transfer was made to facilitate the repair or maintenance of the firearm, and

2. all parties who possessed the firearm as a result of the transfer could legally possess a firearm.]

[1. the transfer was a temporary transfer that occurred while in the continuous presence of the owner of the firearm.]

[1. the transfer was a temporary transfer for not more than seventy-two hours.]

[1. the transfer was from a person serving in the armed forces of the United States who was to be deployed outside of the United States within the next thirty days,

2. to a spouse, parent, child, sibling, grandparent, grandchild, niece, nephew, first cousin, aunt, or uncle of the person.]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, [at least one of] the above numbered condition[s].

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of [transfer of a firearm without a background check] [accepting possession of a firearm without approval] [insert a description of one of the other transfer offenses proscribed by section 18-12-112]. In that event, you must return a verdict of not guilty of [transfer of a firearm without a background check]

[accepting possession of a firearm without approval] [insert a description of one of the other transfer offenses proscribed by section 18-12-112].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of [transfer of a firearm without a background check] [accepting possession of a firearm without approval] [insert a description of one of the other transfer offenses proscribed by section 18-12-112] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

COMMENT

1. See § 18-12-112(6)(a-i), C.R.S. 2015.

2. *See* Instruction F:19 (defining "antique firearm"); Instruction F:82 (defining "curio or relic"); Instruction F:332 (defining "serious bodily injury").

3. When instructing the jury concerning the "repair or maintenance" exception of section 18-12-112(6)(f), draft a special instruction explaining the relevant portion(s) of the following provisions:

> An owner, manager, or employee of a business that repairs or maintains firearms may rely upon a transferor's statement that he or she may legally possess a firearm unless the owner, manager, or employee has actual knowledge to the contrary and may return possession of the firearm to the transferor upon completion of the repairs or maintenance without a background check.
>
> Unless a transferor of a firearm has actual knowledge to the contrary, the transferor may rely upon the statement of an owner, manager, or employee of a business that repairs or maintains firearms that no owner, manager, or employee of the business is prohibited from possessing a firearm.

§ 18-12-112(7)(a), (b), C.R.S. 2015.

4. Although section 18-12-112(6) states that the enumerated exceptions apply to the "provisions of this section," it appears that all of the exceptions are intended to address conduct by a transferor in violation of section 18-12-112(1)(a), (9)(a).

5. If the evidence warrants instructing the jury concerning more than one of the affirmative defenses that are defined in section 18-12-112(6), use a separate instruction for each such defense.

H:68 MEDICAL MARIJUANA

The evidence presented in this case has raised the affirmative defense of "medical marijuana," as a defense to [possession] [cultivation] [distribution] [use] [transfer] [sale] [of] [dispensing] [manufacturing] [processing] marijuana.

The defendant's conduct was legally authorized if:

1. [the defendant was] [the defendant was a primary care-giver for] a patient who had been previously diagnosed by a physician as having a debilitating medical condition, and

2. the [defendant] [patient] had been advised by his [her] physician, in the context of a bona fide physician-patient relationship, that he [she]might benefit from the medical use of marijuana in connection with a debilitating medical condition, and

3. the [defendant] [patient] and [his [her] primary care-giver] [defendant] were collectively in possession of no more than two ounces of a usable form of marijuana, and no more than six marijuana plants (with three or fewer being mature flowering plants that were producing a usable form of marijuana) [, or a larger quantity of marijuana that was medically necessary to address the [defendant's] [patient's] debilitating medical condition][.]

   [, and]

[_. the [defendant] [patient] did not engage in the medical use of marijuana in a way that endangered the health or well-being of any person, or in plain view of, or in a place open to, the general public[.]]

   [, and]

[_. the [defendant] [patient] was not under the age of eighteen, or, if he [she] was under the age of eighteen, all of the following conditions had been satisfied: two physicians had diagnosed the [defendant] [patient] as having a debilitating medical condition; one of the diagnosing physicians had explained the possible risks and benefits of medical use of marijuana to the [defendant] [patient] and each

of the [defendant's] [patient's] parents residing in Colorado; the diagnosing physicians had provided the [defendant] [patient] with the original or a copy of written documentation stating that the [defendant] [patient] had been diagnosed with a debilitating medical condition and the diagnosing physician's conclusion that the [defendant] [patient] might benefit from the medical use of marijuana; each of the [defendant's] [patient's] parents residing in Colorado had consented in writing to the state health agency to permit the [defendant] [patient] to engage in the medical use of marijuana; a parent residing in Colorado had consented in writing to serve as a [defendant's] [patient's] primary care-giver; a parent serving as a primary care-giver had submitted a complete application for a registry identification card to the state health agency (which must have included (a) the original or a copy of written documentation stating that the [defendant] [patient] had been diagnosed with a debilitating medical condition and the physician's conclusion that the patient might benefit from the medical use of marijuana; (b) the name, address, date of birth, and social security number of the [defendant] [patient]; (c) the name, address, and telephone number of the [defendant's] [patient's] physician; (d) the name and address of the [defendant's] [patient's] primary care-giver, if one was designated at the time of application; and (e) the written parental consent(s) described above)); and the state health agency had approved the [defendant's] [patient's] application and had transmitted the [defendant's] [patient's] registry identification card to the parent designated as a primary care-giver; and the primary care-giver was controlling the acquisition of marijuana and the dosage and frequency of its use by the [defendant] [patient][.]]

[, and]

[_. the [defendant] [patient] did not fraudulently represent a medical condition to a physician, state health agency, or state or local law enforcement official for the purpose of falsely obtaining a registry identification card or for the purpose of avoiding arrest and prosecution; fraudulently use or commit theft of any person's registry identification

> card to acquire, possess, produce, use, sell, distribute, or transport marijuana (including, but not limited to, a card that was required to be returned where the patient was no longer diagnosed as having a debilitating medical condition); fraudulently produce, counterfeit, or tamper with one or more registry identification cards; or, without the written authorization of the marijuana registry patient, release or make public any confidential record or any confidential information contained in any such record that was provided to or by the marijuana registry of the state health agency[.]]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of [possession] [cultivation] [distribution] [use] [transfer] [sale] [of] [dispensing] [manufacturing] [processing] marijuana. In that event, you must return a verdict of not guilty of [possession] [cultivation] [distribution] [use] [transfer] [sale] [of] [dispensing] [manufacturing] [processing] marijuana.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of [possession] [cultivation] [distribution] [use] [transfer] [sale] [of] [dispensing] [manufacturing] [processing] marijuana must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

COMMENT

1. *See* Colo. Const. Art. XVIII, § 14(2)(a), (b), (4)(a), (b), (5)(a), (6)(a-i), (8)(a-d); § 18-18-406.3(2-5), C.R.S. 2015; § 18–18–433, C.R.S. 2015 ("The provisions of this part 4 do not apply to a person twenty-one years of age or older acting in

conformance with . . . section 14 of article XVIII of the state constitution").

2. *See* Instruction F:89 (defining "debilitating medical condition"); Instruction F:225 (defining "medical use"); Instruction F:258 (defining "parent"); Instruction F:259 (defining "patient"); Instruction F:279 (defining "physician"); Instruction F:285 (defining "primary care-giver"); Instruction F:360 (defining "tamper"); Instruction F:382 (defining "usable form of marijuana"); Instruction F:393.5 (defining "written documentation"); *see also* Colo. Const. Art. XVIII, § 14(1)(h) (defining "state health agency" in a manner that is consistent with the use of the term "the department" in section 18-18-406.3, C.R.S. 2015).

3. When a defendant raises this affirmative defense as a primary care-giver, use the bracketed language referring to the "patient."

4. In a case where the defendant was a registry patient and the prosecution alleges that the defendant engaged in a fraudulent activity prohibited by section 18-18-406.3(2-5), C.R.S. 2015, evidence proving the fraudulent activity will necessarily establish that the defendant acted knowingly. However, in a case where the defendant asserting the affirmative defense was a primary care-giver for a patient who allegedly engaged in a fraudulent activity prohibited by section 18-18-406.3(2-5), C.R.S. 2015, it is unclear whether the court should instruct the jury that, in order to disprove the affirmative defense, the prosecution must establish that the defendant had knowledge of the fraud. *See also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

5. + *See People v. Fioco*, 2014 COA 22, ¶¶ 13-24, 342 P.3d 530, 533 (holding, as a matter of first impression, that the medical marijuana affirmative defense did not apply to a defendant who obtained a physician's assessment and certification of medical necessity after he committed the offense).

6. + In 2015, the committee added Comment 5, citing to *People v. Fioco*.

H:69 RECREATIONAL MARIJUANA

The evidence presented in this case has raised the affirmative defense of "recreational marijuana" as a defense to [possession] [cultivation] [distribution] [use] [transfer] [sale] [of] [dispensing] [manufacturing] [processing] marijuana.

The defendant's conduct was legally authorized if:

1. he [she] was twenty-one years of age or older, and

[2. possessed, used, displayed, purchased, or transported marijuana accessories or one ounce or less of marijuana.]

[2. possessed, grew, processed, or transported no more than six marijuana plants, with three or fewer being mature, flowering plants, and possessed the marijuana produced by the plants on the premises where the plants were grown, provided that the growing took place in an enclosed, locked space, was not conducted openly or publicly, and was not made available for sale, and

3. if the cultivation area was located in a residence where a person under twenty-one years of age lived, the cultivation area itself was enclosed and locked; or, if the cultivation area was located in a residence where no person under twenty-one years of age lived, the residence had external locks and, if a person under twenty-one years of age entered the residence, defendant ensured that access to the cultivation site was reasonably restricted for the duration of that person's presence in the residence.]

[2. transferred one ounce or less of marijuana without remuneration to a person who was twenty-one years of age or older.]

[2. consumed marijuana, provided that the consumption was not conducted openly and publicly or in a manner that endangered others.]

[2. assisted another person who was twenty-one years of age or older in [insert act(s) described in Colo. Const. Art. XVIII, § 16(3)(a-d)].]

[2. manufactured, possessed, or purchased marijuana accessories, or sold marijuana accessories to a person who was twenty-one years of age or older.]

[2. possessed, displayed, or transported marijuana or marijuana products; purchased marijuana from a marijuana cultivation facility; purchased marijuana or marijuana products from a marijuana product manufacturing facility; or sold marijuana or marijuana products to consumers, and

3. had obtained a current, valid license to operate a retail marijuana store or was acting in his [her] capacity as an owner, employee or agent of a licensed retail marijuana store.]

[2. cultivated, harvested, processed, packaged, transported, displayed, or possessed marijuana; delivered or transferred marijuana to a marijuana testing facility; sold marijuana to a marijuana cultivation facility, a marijuana product manufacturing facility, or a retail marijuana store; or purchased marijuana from a marijuana cultivation facility, and

3. had obtained a current, valid license to operate a marijuana cultivation facility or was acting in his [her] capacity as an owner, employee, or agent of a licensed marijuana cultivation facility.]

[2. packaged, processed, transported, manufactured, displayed, or possessed marijuana or marijuana products; delivered or transferred marijuana or marijuana products to a marijuana testing facility; sold marijuana or marijuana products to a retail marijuana store or a marijuana product manufacturing facility; purchased marijuana from a marijuana cultivation facility; or purchased marijuana or marijuana products from a marijuana product manufacturing facility, and

3. had obtained a current, valid license to operate a marijuana product manufacturing facility or was acting in his [her] capacity as an owner, employee, or agent of a licensed marijuana product manufacturing facility.]

[2. possessed, cultivated, processed, repackaged, stored, transported, displayed, transferred or delivered marijuana or marijuana products, and

3. had obtained a current, valid license to operate a marijuana testing facility or was acting in his [her] capacity as an owner, employee, or agent of a licensed marijuana testing facility.]

[2. leased or otherwise allowed the use of property owned, occupied or controlled by any person, corporation or other entity for [insert activity or activities described in Colo. Const. Art. XVIII, § 16(4)(a-e)].]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of [possession] [cultivation] [distribution] [use] [transfer] [sale] [of] [dispensing] [manufacturing] [processing] marijuana. In that event, you must return a verdict of not guilty of [possession] [cultivation] [distribution] [use] [transfer] [sale] [dispensing] [manufacturing] [processing] [of] marijuana.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of [possession] [cultivation] [distribution] [use] [transfer] [sale] [of] [dispensing] [manufacturing] [processing] marijuana must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

COMMENT

1. *See* Colo. Const. Art. XVIII, § 16(3)(a-e), (4)(a-f); § 18-18-406(3)(b), C.R.S. 2015; § 18–18–433, C.R.S. 2015 ("The provisions of this part 4 do not apply to a person twenty-one

years of age or older acting in conformance with section 16 of article xviii of the state constitution. . . .").

2. *See* Instruction F:122 (defining "enclosed"); Instruction F:200 (defining "locked space"); Instruction F:209 (defining "marijuana accessories"); Instruction F:211 (defining "marijuana cultivation facility"); Instruction F:212 (defining "marijuana establishment"); Instruction F:213 (defining "marijuana product manufacturing facility"); Instruction F:214 (defining "marijuana products"); Instruction F:215 (defining "marijuana testing facility"); Instruction F:223 (defining "medical marijuana center"); Instruction F:310 (defining "remuneration"); Instruction F:321 (defining "retail marijuana store").

H:70 OFFENSES RELATED TO PROVIDING A PLACE FOR THE UNLAWFUL DISTRIBUTION, TRANSPORTATION, OR MANUFACTURE OF CONTROLLED SUBSTANCES (LACK OF KNOWLEDGE; REPORTED CONDUCT)

The evidence presented in this case has raised the affirmative defense of ["lack of knowledge"] ["reported conduct"], as a defense to [insert name of offense from section 18-18-411(1), (2)].

The defendant's conduct was legally authorized if:

[1. The person who committed the [insert description of controlled substance offense] did so while unlawfully on or in the structure or place, and

2. the defendant lacked knowledge of the unlawful presence of that other person.]

[1. the defendant had notified a law enforcement agency with jurisdiction to make an arrest for the [insert description of controlled substance offense].]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, [at least one of] the above numbered condition[s].

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of [insert name of offense from section 18-18-411(1), (2)]. In that event, you must return a verdict of not guilty of [insert name of offense from section 18-18-411(1), (2)].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of [insert name of offense from section 18-18-411(1), (2)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

COMMENT

1. *See* § 18-18-411(3), C.R.S. 2015.

H:71 RETAIL DELIVERY OF METHAMPHETAMINE PRECURSOR DRUGS TO A MINOR (REASONABLE RELIANCE ON IDENTIFICATION)

The evidence presented in this case has raised the affirmative defense of "reasonable reliance on identification," as a defense to retail delivery of methamphetamine precursor drugs to a minor.

The defendant's conduct was legally authorized if:

1. the defendant was the person performing the retail sale, and

2. he [she] was presented with and reasonably relied upon a document that identified the person receiving the methamphetamine precursor drug as being eighteen years of age or older.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of retail delivery of methamphetamine precursor drugs to a minor. In that event, you must return a verdict of not guilty of retail delivery of methamphetamine precursor drugs to a minor.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of retail delivery of methamphetamine precursor drugs to a minor must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

COMMENT

1. *See* § 18-18-412.8(2.5)(b), C.R.S. 2015.

H:72 RETAIL SALE OF METHAMPHETAMINE PRECURSOR DRUGS (LACK OF KNOWLEDGE AND PARTICIPATION)

The evidence presented in this case has raised the affirmative defense of "lack of knowledge and participation," as a defense to [insert name of offense relating to the retail sale of methamphetamine precursor drugs].

The defendant's conduct was legally authorized if:

1. he [she] was an owner, operator, manager, or supervisor at the store in which, or from which, the unlawful retail sale of a methamphetamine precursor drug was made, and

2. he [she] did not have knowledge of the sale, and

3. he [she] did not participate in the sale, and

4. he [she] did not knowingly direct the person who made the sale to commit [insert name of the retail sale of methamphetamine precursor drug offense].

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of [insert name of offense relating to the retail sale of methamphetamine precursor drugs]. In that event, you must return a verdict of not guilty of [insert name of offense relating to the retail sale of methamphetamine precursor drugs].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of [insert name of offense relating to the retail sale of methamphetamine precursor drugs] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

COMMENT

1. *See* § 18-18-412.8(3)(b), C.R.S. 2015.

H:73 DRIVING WITHOUT A VALID DRIVER'S LICENSE (EMERGENCY OR EXEMPTION)

The evidence presented in this case has raised the affirmative defense of "emergency or exemption" as a defense to driving without a valid license.

The defendant's conduct was legally authorized if:

[1. the defendant's driving was necessary as an emergency measure to avoid an imminent public or private injury, and

2. the injury was about to occur by reason of a situation occasioned or developed through no conduct of the defendant, and

3. the injury was of sufficient gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweighed the desirability of avoiding the injury sought to be prevented by the statute prohibiting driving without a valid license.]

[1. he [she] was [insert applicable exemption from section 42-2-102, C.R.S. 2015].]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, [at least one of] the above numbered condition[s].

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of driving without a valid license. In that event, you must return a verdict of not guilty of driving without a valid license.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of driving without a valid license must depend upon your

determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

COMMENT

1. *See* § 42-2-101(8)(a), (b), C.R.S. 2015; *see also* § 42-2-101(9), C.R.S. 2015 ("The issue of justification or exemption is an affirmative defense.").

H:74 SPEEDING (EMERGENCY OR EXEMPTION)

The evidence presented in this case has raised the affirmative defense of "emergency" as a defense to speeding.

The defendant's conduct was legally authorized if:

1. the defendant's speeding was necessary as an emergency measure to avoid an imminent public or private injury, and

2. the injury was about to occur by reason of a situation occasioned or developed through no conduct of the defendant, and

3. the injury was of sufficient gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweighed the desirability of avoiding the injury sought to be prevented by the statute prohibiting speeding.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of speeding. In that event, you must return a verdict of not guilty of speeding.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of speeding must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

COMMENT

1. *See* § 42-4-1101(9)(a), C.R.S. 2015.

2. Section 42-4-1101(9)(b), C.R.S. 2015, establishes an exemption for a driver of an authorized emergency vehicle who meets the requirements set forth in section 42-4-108, C.R.S. 2015. However, the Committee has not drafted a model affirmative defense instruction.

H:75 DRIVING UNDER A RESTRAINT FROM ANOTHER STATE (VALID LICENSE ISSUED SUBSEQUENT TO RESTRAINT)

The evidence presented in this case has raised the affirmative defense of "valid license issued subsequent to restraint," as a defense to driving under a restraint from another state.

The defendant's conduct was legally authorized if:

1. he [she] possessed a valid driver's license issued subsequent to the restraint that is the basis of the alleged violation.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, the above numbered condition.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of driving under a restraint from another state. In that event, you must return a verdict of not guilty of driving under a restraint from another state.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of driving under a restraint from another state must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

COMMENT

1. *See* § 42-2-138(5), C.R.S. 2015.

H:76 DRIVING WITH EXCESSIVE ALCOHOL CONTENT - SUBSEQUENT CONSUMPTION OF ALCOHOL

The evidence presented in this case has raised the affirmative defense of "subsequent consumption of alcohol," as a defense to driving + with excessive alcohol content.

The defendant's conduct was legally authorized if:

1. he [she] consumed alcohol between the time that he [she] stopped driving and the time that the testing occurred, and

2. the defendant's B.A.C. of 0.08 or more was reached as a result of alcohol consumed by the defendant after he [she] stopped driving.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, + at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of driving a motor vehicle or vehicle with a B.A.C. of 0.08 or more at the time of driving, or within two hours thereafter. In that event, you must return a verdict of not guilty of driving a motor vehicle or vehicle with a B.A.C. of 0.08 or more at the time of driving, or within two hours thereafter.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of driving a motor vehicle or vehicle with a B.A.C. of 0.08 or more at the time of driving, or within two hours thereafter must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

COMMENT

1. *See* § 42-4-1301(2)(a), C.R.S. 2015.

2. + In 2015, the Committee modified the first paragraph of the instruction, where noted by the first "+" symbol, and replaced a lengthy description of the offense (which previously read: "a motor vehicle or vehicle with a B.A.C. of 0.08 or more at the time of driving, or within two hours thereafter") with the more concise description that appears in Instruction 42:13 ("driving with excessive alcohol content").

+ In 2015, the Committee corrected the instruction, where noted by the second "+" symbol, by deleting the word "all" and substituting the words: "at least one of the above."

CHAPTER I

INSANITY

CHAPTER COMMENTS

1. The instructions in this chapter apply to offenses committed on or after July 1, 1995. For offenses committed prior to that date, refer to earlier editions of COLJI-Crim.

2. When the jury is instructed concerning the affirmative defense of insanity, the following language should be included as the final element of the offense (and it should be numbered as a separate element, as shown in the example below, whether insanity is the only affirmative defense or an alternative to one of the other affirmative defenses, which are to be referenced using the "was not legally authorized" language that appears within the final bracketed element of each model elemental instruction):

> _. and that the defendant was not insane, as defined in Instruction ___.

3. This chapter is limited to the affirmative defense of insanity. In cases where the defendant enters a general plea of not guilty and mental condition evidence is admitted pursuant to section 16-8-107(1)(a) or section 16-8-107(1.5)(a), refer to Instruction D:04 (limiting instruction for evidence of the

defendant’s mental processes acquired during a court-ordered examination).

I:01 AFFIRMATIVE DEFENSE OF INSANITY

The evidence in this case has raised the defense of insanity, as a defense to the crime[s] of [insert name of offense(s) here].

The defendant was insane at the time of the commission of the act[s] if:

1. he [she] was so diseased or defective in mind at the time of the commission of the act as to be incapable of distinguishing right from wrong with respect to that act; or

2. he [she] suffered from a condition of mind caused by a mental disease or defect that prevented him [her] from forming a culpable mental state that is an essential element of a crime charged.

But care should be taken not to confuse mental disease or defect with moral obliquity, mental depravity, or passion growing out of anger, revenge, hatred, or other motives and kindred evil conditions because, when an act is induced by any of these causes, the person is accountable to the law.

In addition, "diseased or defective in mind" does not refer to an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

Similarly, "mental disease or defect" means only those severely abnormal mental conditions that grossly and demonstrably impair a person's perception or understanding of reality and that are not attributable to the voluntary ingestion of alcohol or any other psychoactive substance. "Mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

The prosecution has the burden to prove beyond a reasonable doubt that the defendant was not insane at the time of the commission of the act[s]. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, both of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove that the defendant was sane at the time of the commission of the act[s], which is an essential

element of [insert name(s) of offense(s)]. In that event, you must find the defendant not guilty and have the foreperson sign the designated section of Part A of the verdict form[s] to indicate your verdict[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved that the defendant was not insane at the time of the commission of the act[s]. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

COMMENT

1. *See* §§ 16-8-101.5(1)(a), (b), (2)(a), (b); 16-8-102(4.7), C.R.S. 2015.

2. *See* Instructions F:99 (defining "diseased or defective in mind," which is incorporated into the elemental instruction above); Instruction F:183 (defining "insanity," which is incorporated into the elemental instruction above); Instruction F:226 (defining "mental disease or defect," which is incorporated into the elemental instruction above).

3. The phrase "incapable of distinguishing right from wrong" is not defined by statute. In *People v. Serravo* 823 P.2d 128, 138-39 (Colo. 1992), the court provided the following guidance:

> A clarifying instruction on the definition of legal insanity, therefore, should clearly state that, as related to the conduct charged as a crime, the phrase 'incapable of distinguishing right from wrong' refers to a person's cognitive inability, due to a mental disease or defect, to distinguish right from wrong as measured by a societal standard of morality, even though the person may be aware that the conduct in question is criminal. Any such instruction should also expressly inform the jury that the phrase 'incapable of distinguishing right from wrong' does not refer to a purely personal and subjective standard of morality.

However, in *People v. Galimanis*, 944 P.2d 626, 631-32 (Colo. App. 1997), a division of the Court of Appeals rejected,

as erroneous, the suggestion in the "Notes on Use" following COLJI-Crim. No. 3:10-A (1993 Supp.), that a "[*Serravo* clarifying instruction] must be given in all insanity cases." The court reasoned as follows: "In context, it is apparent in *Serravo* that when the supreme court noted that a clarifying instruction on the definition of legal insanity 'should clearly state' that right from wrong is measured by a societal standard of morality, it was referring only to instances when a clarifying instruction was necessary." *Galimanis*, 944 P.2d at 632. Further, applying this reading of *Serravo* to the facts of the case at hand, the division in *Galimanis* concluded that a clarifying instruction was not warranted because: (1) "defendant did not contend that his actions were justified under his own moral beliefs or moral code, nor did he assert that he was conscious that what he was doing was right or wrong, either legally or morally"; and (2) "he provided no evidence that he was commanded by God to kill the victim." *Id.* at 631.

4. The term "moral obliquity" is not defined by statute. Although COLJI-Crim. 3:11-A (1993) and COLJI-Crim. F(164) (2008) defined the term based on language from *People v. Serravo*, 823 P.2d at 137, the court in *Serravo* did not hold that the term must be defined for the jury in every case. Accordingly, the division in *People v. Galimanis*, 944 P.2d at 632, held that the decision whether to submit a definitional instruction is a matter of trial court discretion: "The supreme court has determined that the words 'depravity' and 'moral obliquity,' while not used in everyday conversation, are well within the comprehension of a jury. *Simms v. People*, 482 P.2d 974 (Colo. 1971). Thus, the failure of a trial court to define these terms further does not constitute error."

5. Section 16-8-105.5(3), C.R.S. 2015, appears to contemplate that any defendant asserting the defense will be charged with at least one felony. It is unclear whether the same procedure is to be used in the exceedingly rare case where a defendant who is charged only with misdemeanors raises the defense:

> When the affirmative defense of not guilty by reason of insanity has been raised, the jury shall be given special verdict forms containing interrogatories. The trier of fact shall decide first the question of guilt as to felony charges that are before the court. If the trier of fact concludes that guilt has been proven beyond a reasonable doubt as to one or more of the felony charges submitted for consideration, the special interrogatories shall not be answered. Upon

> completion of its deliberations on the felony charges as previously set forth in this subsection (3), the trier of fact shall consider any other charges before the court in a similar manner; except that it shall not answer the special interrogatories regarding such charges if it has previously found guilt beyond a reasonable doubt with respect to one or more felony charges. The interrogatories shall provide for specific findings of the jury with respect to the affirmative defense of not guilty by reason of insanity.

Cf. People v. Collins, 752 P.2d 93, 97 (Colo. 1988) (declining to address, in a case construing a structurally similar provision of the predecessor statute, "the procedure to be followed pursuant to the statute when charges other than or in addition to felony charges are involved and the defendant is acquitted of all the felony charges").

6. A division of the Court of Appeals has observed that "there would appear to be little if any reason to inform the jury of the presumption of sanity where . . . the defendant has effectively overcome the presumption by presenting evidence of insanity sufficient to allow the issue to go to the jury." *People v. Welsh*, 176 P.3d 781, 786 (Colo. App. 2007) (trial court's decision to give the jury an instruction explaining the presumption of sanity did not rise to the level of plain error); *see also People v. Hill*, 934 P.2d 821 (Colo. 1997) (rejecting the defendant's contention that a jury instruction stating that the law presumes everyone to be sane effectively directed a verdict against him); *People v. Bielecki*, 964 P.2d 598, 606 (Colo. App. 1998) (rejecting the defendant's contention that a jury instruction stating the presumption of sanity impermissibly shifted the burden of proof to him).

7. In *People v. Bielecki*, 964 P.2d at 605, the division held that "it was error to instruct the jury that if defendant was found guilty on any offense he could not be found not guilty by reason of insanity on any other offense." Significantly, the error recognized in *Bielecki* (which the division ultimately concluded was invited) was purely instructional. The division explicitly rejected the defendant's claim that the special interrogatory procedure mandated by section 16-8-105.5 imposed a similar restriction:

> Construing a substantially identical statute on the affirmative defense of impaired mental condition, the

> supreme court held in *Collins* that the statute did not violate defendant's due process rights, or impermissibly preclude the jury from considering the impaired mental condition defense as to each offense charged, merely by providing that the jury need not answer the special interrogatories on impaired mental condition if it found the defendant guilty on any charge.
>
> The *Collins* court explained that the purpose of the special interrogatories was to enable the trial court to determine whether an acquitted defendant should be (1) released outright or (2) committed for treatment because impaired mental condition was the sole reason for the acquittal. A finding of guilt on one or more felony counts rendered the interrogatories irrelevant since, once the jury had found the defendant guilty of a felony, he was subject to incarceration in the Department of Corrections at the trial court's discretion, and the reasons for finding him not guilty of other charges were no longer important.

People v. Bielecki, 964 P.2d at 604-05.

8. *See* Instruction B:01, Comment 4 (in cases where the defendant enters a plea of "not guilty by reason of insanity," modify the paragraph of the introductory instruction that explains the defendant's plea).

9. *See People v. Voth*, 2013 CO 61 ¶ 37, 312 P.3d 144, 152-53 ("The language in subsection (1)(a) [of section 16-8-101.5] is unequivocal: A defendant need only be insane 'at the time of the commission of the act.' Similarly, the language in subsection (1)(b) implicitly limits the relevant period of insanity to the time of the offense by allowing defendants to assert insanity to negate the existence of criminal mens rea, which is necessarily tethered to the time of the alleged criminal conduct. Thus, although Colorado's Criminal Code does not specifically recognize temporary insanity, the mental disease or defect underlying an insanity plea can be temporary in nature because the general insanity statute only requires that a defendant prove insanity at the time he or she committed the alleged crime.").

10. The above model instruction is designed for cases where the jury is instructed concerning the definitions of insanity under both section 16-8-101.5(1)(a) and section 16-8-101.5(1)(b). In

a case where only one of these definitions is submitted for the jury's consideration, modify the second sentence of the burden-of-proof paragraph as follows: "In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, the above numbered condition."

I:02.INT AFFIRMATIVE DEFENSE OF INSANITY - INTERROGATORY (ONE FELONY CHARGE)

If you found the defendant guilty of [insert the name of the felony charge], you should disregard the remainder of this instruction and sign Section A of the verdict form for that charge to indicate your verdict of guilty.

If, however, you found the defendant not guilty of [insert the name of the felony charge], you should sign Section A of the verdict form to indicate your verdict of not guilty, and you should also answer the following verdict question in Section B of the verdict form:

> Did you find the defendant not guilty solely based on the defense of insanity? (Answer "Yes" or "No")

The Court reminds you that the prosecution has the burden to prove beyond a reasonable doubt each element of the crime charged, including that the defendant was not insane at the time of the commission of the act.

If you decided that the only element of the crime charged that the prosecution failed to prove beyond a reasonable doubt is that the defendant was sane at the time of the commission of the act, you should mark "Yes" in the appropriate place in Section B of the verdict form, and have the foreperson sign the designated line in that section of the verdict form. If you decided that the prosecution failed to prove any other element beyond a reasonable doubt, you should mark "No" in the appropriate place in Section B of the verdict form, and have the foreperson sign the designated line in that section of the verdict form.

COMMENT

1. *See* Instruction I:06 (special verdict form - insanity).

I:03.INT AFFIRMATIVE DEFENSE OF INSANITY - INTERROGATORY (MORE THAN ONE FELONY CHARGE)

If you found the defendant guilty of one or more of the following charges [list, in the disjunctive, all felony charges], you should disregard the remainder of this instruction and sign Section A of the verdict form for each charge to indicate your verdict of guilty or not guilty on each charge.

If, however, you found the defendant not guilty of all of the following charges [list, in the conjunctive, all felony charges], you should sign Section A of the verdict form for each charge to indicate your verdict of not guilty, and you should also answer the following verdict question in Section B of the verdict form for each charge:

> Did you find the defendant not guilty solely based on the defense of insanity? (Answer "Yes" or "No")

The Court reminds you that the prosecution has the burden to prove beyond a reasonable doubt each element of the crime charged, including that the defendant was not insane at the time of the commission of the act.

If you decided that the only element of the crime charged that the prosecution failed to prove beyond a reasonable doubt is that the defendant was sane at the time of the commission of the act, you should mark "Yes" in the appropriate place in Section B of the verdict form, and have the foreperson sign the designated line in that section of the verdict form. If you decided that the prosecution failed to prove any other element beyond a reasonable doubt, you should mark "No" in the appropriate place in Section B of the verdict form, and have the foreperson sign the designated line in that section of the verdict form.

COMMENT

1. *See* Instruction I:06 (special verdict form - insanity).

I:04 INFORMATIONAL INSTRUCTION ON COMMITMENT PROCEDURE

This is an informational instruction and must have no persuasive bearing on the verdict[s] you arrive at under the evidence.

If a defendant is found not guilty by reason of insanity, it is the court's duty to commit the defendant to the Department of Human Services until such time as the court determines that the defendant no longer requires hospitalization because he [she] no longer suffers from a mental disease or defect which is likely to cause him [her] to be dangerous to himself [herself], to others, or to the community in the reasonably foreseeable future.

If a defendant is found not guilty by reason of insanity, he or she will never again be tried on the merits of the criminal charges filed against him or her.

COMMENT

1. In *People v. Thomson*, 591 P.2d 1031, 1032 (Colo. 1979), the supreme court reasoned that, because "[r]ecent studies and cases have recognized that today's juries are distracted from their fact finding function by their concern that a defendant will be returned to the community at large if found not guilty by reason of insanity," "a defendant who is relying on an insanity defense is entitled, upon request, to an instruction on commitment procedures." However, the court also directed trial courts to include the prefatory admonition that is set forth in the first paragraph of the above model instruction. *Id.* at 1032 n.1.

In *Cordova v. People*, 817 P.2d 66 (Colo. 1991), the court held, under the mental status statutes then in effect, that:

> The fact that the defense of impaired mental condition is resolved in the trial on the defendant's not guilty plea, rather than in a separate trial as in the case of the insanity plea, provides no justification for refusing a defendant's request for an informational instruction on the consequences of a verdict of not guilty by reason of impaired mental condition.

Id. at 73. And the unitary trial procedure that is now in effect (which is based on a definition of insanity that includes the definition of "impaired mental condition" applicable to

offenses committed before July 1, 1995) is the same as the unitary trial procedure that previously applied only to the then-distinct defense of impaired mental condition. *See People v. Bielecki*, 964 P.2d 598, 604–05 (Colo. App. 1998). Thus, under *Cordova* and *Thompson*, an instruction describing the commitment procedure remains mandatory (if requested by the defense). *See People v. Tally*, 7 P.3d 172, 184 (Colo. App. 1999).

2. The model instruction states that the court will make any future determination as to whether a defendant who is found not guilty by reason of insanity should be released. However, this disclosure is not mandated by *Thomson*. *See People v. Tally*, 7 P.3d at 184 (no error where the trial court refused to amend the *Thomson* instruction to include information concerning what entity would determine whether sanity had been restored, though "the giving of such an instruction would not have been improper").

3. Although COLJI-Crim. I:06 (2008) advised the jury that commitment would occur if the defendant was found not guilty by reason of insanity "of all *felony* charges" (emphasis added), the Committee has concluded that the adjective in this phrase does not convey any meaningful information because courts do not advise juries which charges are felonies. Moreover, as discussed in Comment 5 to Instruction I:01, it is unclear how the procedure is to be modified if a defendant charged only with misdemeanors asserts an insanity defense. Accordingly, the model instruction no longer includes the phrase "all felony charges."

4. The final paragraph of the instruction is derived from *People v. Roark*, 643 P.2d 756, 764-65 (Colo. 1982) (holding that this language would "merely serve to answer the question that would naturally arise from reading the preceding paragraph, i.e., whether the defendant could be tried on the issue of guilt after release from the state hospital following a verdict of not guilty by reason of insanity").

I:05 LIMITING INSTRUCTION AS TO EVIDENCE OBTAINED DURING A COURT-ORDERED EXAMINATION (PLEA OF NOT GUILTY BY REASON OF INSANITY)

You are about to hear evidence that you may consider as to the question of the defendant's sanity with respect to [a charged crime] [the crime(s) of (insert name of offense(s)]. You shall not consider it for any other purpose.

COMMENT

1. *See* § 16-8-107(1.5)(a), C.R.S. 2015 ("Except as otherwise provided in this subsection (1.5), evidence acquired directly or indirectly for the first time from a communication derived from the defendant's mental processes during the course of a court-ordered examination pursuant to section 16-8-106 or acquired pursuant to section 16-8-103.6 is admissible only as to the issues raised by the defendant's plea of not guilty by reason of insanity, and the jury, at the request of either party, shall be so instructed.").

2. *See also* Instruction D:04 (limiting instruction for evidence of the defendant's mental processes acquired during a court-ordered examination).

I:06 SPECIAL VERDICT FORM – INSANITY

District Court, [City and] County of [ ], Colorado
Case No. [ ], Div. [ ].
People of the State of Colorado
v.
[insert name of defendant]
JURY VERDICT, Count No. [ ]
CHARGE OF [insert name of offense here]

PART A

I. We, the jury, find the defendant, [insert name], NOT GUILTY of Count No. [ ], [insert name of offense].

_____
FOREPERSON*

II. We, the jury, find the defendant, [insert name] GUILTY of Count No. [ ], [insert name of offense].

_____
FOREPERSON*

* The foreperson should sign only one of the above (I or II). If the verdict is NOT GUILTY, then I. above should be signed. If the verdict is GUILTY, then II. above should be signed.

PART B

If you find the defendant not guilty of this charge [and you also find him [her] not guilty of (list, in the conjunctive, all felony charges)], you should answer the following question. However, if you find the defendant guilty of this charge [or you find him [her] guilty of one or more of the following charges (list, in the disjunctive, all felony charges)], you should leave this section blank.

As to Count No. ____, charging the defendant with [insert name of offense], did you find the defendant not guilty solely based on the defense of insanity?

[ ] Yes [ ] No

_____
FOREPERSON**

** If you find the defendant "not guilty" of this charge [and of all other charges listed above], the foreperson should use ink to mark the appropriate place indicating the answer to the verdict question, and then sign on the designated line. You should mark "Yes" if you decide that the only element of the crime charged that the prosecution failed to prove beyond a reasonable doubt is that the defendant was sane at the time of the commission of the act. If you decide that the prosecution failed to prove any other element, you should mark "No."

COMMENT

1. *See* § 16-8-105.5(3), C.R.S. 2015 ("When the affirmative defense of not guilty by reason of insanity has been raised, the jury shall be given special verdict forms containing interrogatories.").

2. In a case where the defendant is charged with more than one felony, use a separate copy of this form for each charge.

3. If a jury deadlocks as to all felony charges, it appears that the statutory precondition to consideration of the insanity defense is not satisfied. Section 16-8-105.5(3), C.R.S. 2015, states that "[t]he trier of fact *shall decide* first the question of guilt as to felony charges that are before the court" (emphasis added).

4. Assuming that a defendant charged only with misdemeanors can raise the affirmative defense of not guilty by reason of insanity, a court in such circumstances should use a separate form for each charge and modify the directional language. However, the Committee expresses no opinion concerning how the directional language should be modified because it is unclear whether, in such a scenario, section 16-8-105.5(3) requires the court to instruct the jury that it is not to answer the insanity interrogatory if it finds the defendant guilty of any misdemeanor charge.

CHAPTER 1.3

CRIME OF VIOLENCE SENTENCE ENHANCEMENT INTERROGATORIES

CHAPTER COMMENTS

1. The primary crime of violence sentence enhancement provision, § 18-1.3-406(1)(a), C.R.S. 2015, is applicable to a wide array of enumerated offenses, and it is also potentially applicable to numerous other offenses by virtue of the provision pertaining to at-risk victims. *See* § 18-1.3-406(2)(a)(II)(A), C.R.S. 2015 (any crime involving a deadly weapon or infliction of serious bodily injury or death is a crime of violence if committed against an at-risk adult or at-risk juvenile). Accordingly, rather than include crime of violence interrogatories in multiple chapters of model elemental instructions, the Committee consolidated the model crime of violence interrogatories in this chapter. Further, in light of the statutory pleading requirements that govern the crime of violence sentence enhancement provisions, *see* § 18-1.3-406(3), (5), (7), C.R.S. 2015, the Committee elected not to include cross-referencing citations to these interrogatories as part of the comments that follow the model elemental instructions for substantive offenses.

2. In cases involving complicity, it may be appropriate to modify one or more crime of violence interrogatory by adding the words "or a complicitor" immediately after "the defendant." *See People v. Swanson*, 638 P.2d 45, 50 (Colo. 1981) ("The mandatory sentence for conviction of crime of violence is based on a recognition of the increased potential for harm arising from the manner in which the crime was committed. This heightened danger is present regardless of which robber held the gun. We conclude therefore that an accessory to crime of violence may be charged, tried and punished as a principal."). However, no such modification should be made to 1.3:03.INT (at-risk adult or juvenile), because that interrogatory is focused exclusively on the status of the victim (and thus does not include the words "the defendant").

1.3:01.INT CRIME OF VIOLENCE (DEADLY WEAPON)

If you find the defendant not guilty of [insert name of offense from section 18-1.3-406(2)(a)(II)(A-K)], you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of [insert name of offense from section 18-1.3-406(2)(a)(II)(A-K)], you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant use, or possess and threaten the use of, a deadly weapon? (Answer "Yes" or "No")

The defendant used, or possessed and threatened the use of, a deadly weapon only if:

1. the defendant used, or possessed and threatened the use of, a deadly weapon,

2. during the [commission of] [attempted commission of] [conspiracy to commit] [insert name of offense from section 18-1.3-406(2)(a)(II)(A-K)], or in the immediate flight therefrom.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-1.3-406(2)(a)(I)(A), (4), C.R.S. 2015.

2. *See* Instruction F:88 (defining "deadly weapon"); Instruction G2:01 (criminal attempt); Instruction G2:05

(conspiracy); *see*, *e.g.*, Instruction E:28 (special verdict form).

3. In the context of felony murder, the supreme court has held that "the scope of immediate flight is a factual question for a jury to decide because immediate flight differs according to the unique facts and circumstances of each case, such as the time and distance between the felony and the killing." *Auman v. People*, 109 P.3d 647, 659 (Colo. 2005). Although the phrase "in the immediate flight therefrom" is not defined by statute, the supreme court has interpreted it as follows:

> According to the plain language of the immediate flight provision of the statute, there are four limitations on liability for felony murder when a death occurs during flight from the predicate felony.
>
> First, the flight from the predicate felony must be "immediate," which requires a close temporal connection between the predicate felony, the flight, and the resulting death. *See Webster's New World College Dictionary* 713 (4th ed. 1999) (defining "immediate" as "without delay" or "of the present time").
>
> Second, the word "flight" limits felony-murder liability in such cases to those circumstances in which death is caused while a participant is escaping or running away from the predicate felony. *Id.* at 541 (defining "flight" as "a fleeing from . . . to run away").
>
> Third, the death must occur either "in the course of" or "in furtherance of" immediate flight, so that a defendant commits felony murder only if a death is caused during a participant's immediate flight or while a person is acting to promote immediate flight from the predicate felony. *See id.* at 333 (defining "in the course of" as "in the progress or process of; during"); and *id.* at 575 (defining "furtherance" as "a furthering, or helping forward; advancement; promotion").
>
> Fourth, the immediate flight must be "therefrom," indicating that the flight must be from the predicate felony, as opposed to being from some other episode or event.

Auman v. People, 109 P.3d at 656; *see also People v. Fuentes*, 258 P.3d 320, 327 (Colo. App. 2011) (applying the immediate flight standard of *Auman* and holding that: "[T]he first degree burglary statute requires that the entry, the assault, and the flight be close in time and that the assault occur while fleeing from the building or occupied structure. A person therefore commits an assault in immediate flight from a building where the assault is part of a continuous integrated attempt to get away from the building.").

1.3:02.INT CRIME OF VIOLENCE (SERIOUS BODILY INJURY OR DEATH)

If you find the defendant not guilty of [insert name of offense from section 18-1.3-406(2)(a)(II)(A-K)], you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of [insert name of offense from section 18-1.3-406(2)(a)(II)(A-K)], you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant cause serious bodily injury or death? (Answer "Yes" or "No")

The defendant caused serious bodily injury or death only if:

1. the defendant caused serious bodily injury or death to any person except another participant,

2. during the [commission of] [attempted commission of] [conspiracy to commit] [insert name of offense from section 18-1.3-406(2)(a)(II)(A-K)], or in the immediate flight therefrom.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-1.3-406(2)(a)(I)(B), (4), C.R.S. 2015.

2. *See* Instruction F:332 (defining "serious bodily injury"); *see, e.g.*, Instruction E:28 (special verdict form).

3. *See* Instruction 1.3:01.INT, Comment 3 (discussing the meaning of "immediate flight therefrom").

1.3:03.INT CRIME OF VIOLENCE - INTERROGATORY (AT-RISK ADULT OR JUVENILE)

If you find the defendant not guilty of [insert name of crime], you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of [insert name of crime], and you also find that the defendant [used, or possessed and threatened the use of, a deadly weapon] [caused serious bodily injury or death] you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the victim a person with protected status?
(Answer "Yes" or "No")

The victim was a person with protected status only if:

[1. the victim was seventy years of age or older.]

[1. the victim was eighteen years of age or older, and

2. was a person with a disability.]

[1. the victim was under the age of eighteen years, and

2. was a person with a disability.]

The prosecution has the burden to prove [the] [each] numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-1.3-406(2)(a)(II)(A), (c), C.R.S. 2015.

2. *See* Instruction F:24 (defining "at-risk adult"); Instruction F:26 (defining "at-risk juvenile"); Instruction F:273 (defining "person with a disability"); *see, e.g.*, Instruction E:28 (special verdict form).

1.3:04.INT CRIME OF VIOLENCE - INTERROGATORY (FELONY UNLAWFUL SEXUAL OFFENSE; THREAT, INTIMIDATION, FORCE, OR BODILY INJURY)

If you find the defendant not guilty of [insert name of felony unlawful sexual offense], you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of [insert name of felony unlawful sexual offense], you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

> Did the defendant use threat, intimidation, or force against the victim, or cause bodily injury to the victim? (Answer "Yes" or "No")

The defendant used threat, intimidation, or force against the victim, or caused bodily injury to the victim, only if:

1. the defendant used threat, intimidation, or force against the victim or caused the victim physical pain, illness, or any impairment of physical or mental condition.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-1.3-406(2)(b)(I), (II), C.R.S. 2015 (an "unlawful sexual offense" is any felony offense set forth in section 18-3-411(1)).

2. *See* Instruction F:36 (defining "bodily injury"); *see*, *e.g.*, Instruction E:28 (special verdict form).

1.3:05.INT CRIME OF VIOLENCE - INTERROGATORY (DANGEROUS WEAPON OR SEMIAUTOMATIC ASSAULT WEAPON)

If you find the defendant not guilty of [insert name of offense from section 18-1.3-406(2)(a)(II)(A-K), (2)(b)(I)], you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of [insert name of offense from section 18-1.3-406(2)(a)(II)(A-K), (2)(b)(I)], and you also find that the [defendant [used, or possessed and threatened the use of, a deadly weapon] [caused serious bodily injury or death]] [the victim was a person with protected status], you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

> Did the defendant use a dangerous weapon or semiautomatic assault weapon? (Answer "Yes" or "No")

The defendant used a dangerous weapon or semiautomatic assault weapon only if:

1. the defendant used a firearm silencer, machine gun, short shotgun, short rifle, ballistic knife, or any semiautomatic center fire firearm that was equipped with a detachable magazine with a capacity of twenty or more rounds of ammunition.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-1.3-406(7)(a), C.R.S. 2015 ("In any case in which the accused is charged with a crime of violence as defined in

this section and the indictment or information specifies the use of a dangerous weapon as defined in sections 18-12-101 and 18-12-102, or the use of a semiautomatic assault weapon as defined in paragraph (b) of this subsection (7), upon conviction for said crime of violence, the judge shall impose an additional sentence to the department of corrections of five years for the use of such weapon. The sentence of five years shall be in addition to the mandatory sentence imposed for the substantive offense and shall be served consecutively to any other sentence and shall not be subject to suspension or probation.").

2. *See* Instruction F:29 (defining "ballistic knife"); Instruction F:86 (defining "dangerous weapon"); Instruction F:154 (defining "firearm"); Instruction F:156 (defining "firearm silencer"); Instruction F:203 (defining "machine gun"); Instruction F:344 (defining "short rifle"); Instruction F:331 (defining "semiautomatic assault weapon"); Instruction F:345 (defining "short shotgun"); *see*, *e.g.*, Instruction E:28 (special verdict form).

CHAPTER 3-1

MURDER, MANSLAUGHTER, AND HOMICIDE

3-1:01 MURDER IN THE FIRST DEGREE (AFTER DELIBERATION)

The elements of the crime of murder in the first degree (after deliberation) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. after deliberation, and

4. with the intent,

5. to cause the death of a person other than himself [herself],

6. caused the death of that person or of another person.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of murder in the first degree (after deliberation).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of murder in the first degree (after deliberation).

COMMENT

1. *See* § 18-3-102(1)(a), C.R.S. 2015.

2. *See* Instruction F:10 (defining "after deliberation"); Instruction F:185 (defining "intentionally" and "with intent"); Instruction F:267 (defining "person," when referring to the victim of a homicide).

3. In *People v. Lowe*, 660 P.2d 1261, 1271 (Colo. 1983), *abrogated on other grounds by Callis v. People*, 692 P.2d 1045 (Colo. 1984), the supreme court outlined the following procedural steps as being necessary "to insure that the intent

of the [first-degree murder] statute is preserved and to make clear the effect of our decision":

> The prosecution should be allowed to charge multiple theories of first-degree murder in separate counts. The prosecution may, but should not be required to, elect among theories after the evidence is closed. If there is sufficient evidence in the record, all theories charged should be submitted to the jury for a special verdict. The jury should be informed that the defendant is charged with one crime, first-degree murder. The jury's special verdict should indicate which theories of first-degree murder, if any, have been proved by the evidence.

Id. (footnotes omitted). Further, the court provided an example of a special verdict form that would have been "appropriate" for the case at hand (where the defendant was charged with murder after deliberation and felony-murder by reason of sexual assault on a child):

> I. We, the jury, find the defendant, [insert name], NOT GUILTY of first-degree murder.
>
> _____
> Foreperson
>
> II. We, the jury, find the defendant, [insert name], GUILTY of first-degree murder and further find that
>
> > (1) the defendant, [insert name], [ ] committed first-degree murder after deliberation;
> >
> > (2) the defendant, [insert name], [ ] committed first-degree murder by felony murder.
>
> _____
> Foreperson
>
> The foreperson should sign only one of the above (I or II). If the verdict is NOT GUILTY, then I. above should be signed. If the verdict is GUILTY, then II. above should be signed.
>
> If you find the defendant guilty of the crime charged, the foreperson must complete this GUILTY verdict by

placing an "X" in the appropriate square(s). Either one or both squares shall be filled in.

Id. at 1271 n.14 (modified to include a colon and bracketed insertion points for the defendant's name).

In *People v. Glover*, 893 P.2d 1311, 1315 (Colo. 1995), the supreme court stated that, "[u]nder *Lowe* and [*People v. Bartowsheski*, 661 P.2d 235 (Colo. 1983)], when a defendant has been convicted on two different counts of first-degree murder for a single homicide, the convictions should be vacated, and the trial court should be directed to enter as many convictions and impose as many sentences as are legally possible to fully effectuate the jury's verdict." However, in *Candelaria v. People*, 148 P.3d 178 (Colo. 2006), the court explained that the pronouncement in *Glover* should be understood within the procedural context of that case:

> In *Glover*, where the trial court refused to reach the merits of the defendant's postconviction challenge to a special finding of murder after deliberation, on the ground that his mittimus reflected a generic first degree murder conviction, which was also supported by a special finding of felony murder, we held that the trial court should have amended the mittimus to reflect a conviction for first degree deliberate murder and should have entertained the defendant's postconviction challenge because a third conviction for the underlying felony of robbery required the court to maximize sentences by vacating the defendant's conviction for the greater offense of felony murder, while retaining his convictions for deliberate murder and robbery. *We nowhere suggested that entry of a single, generic first degree murder conviction, as prescribed by People v. Lowe, 660 P.2d 1261, 1270–71 (Colo. 1983), would not be proper in the absence of such a merger* or, for that matter, that the jury's special finding of felony murder could not still be relied on in maximizing the defendant's sentence, if he were to successfully challenge his conviction for deliberate murder.

Id. at 184 n.4 (emphasis added).

4. In the sixth element, insert the name of the person who was killed when submitting more than one count of first degree murder after deliberation.

5. The Committee has not drafted a separate instruction for the offense defined by section 18-3-107(1), C.R.S. 2015 (first degree murder of a peace officer, firefighter, or emergency medical service provider engaged in the performance of his or her duties). It appears unlikely that section 18-3-107(1) will be invoked in non-capital cases (except where a juvenile is charged as an adult), because the mandatory sentence of life imprisonment without the possibility of parole, *see* § 18-3-107(3), C.R.S. 2015, also applies to an adult who is convicted of first degree murder of any person. *See* § 18-3-102(3), C.R.S. 2015; § 18-1.3-401(1)(a)(V)(A), (4)(a), C.R.S. 2015; *see also* § 18-1.3-401(4)(b), C.R.S. 2015 (for juveniles convicted of first degree murder as adults, life imprisonment shall include the possibility of parole "after serving a period of forty calendar years").

To submit an instruction for the offense defined by section 18-3-107(1), modify the above instruction and include the relevant language from section 18-3-107(1), (2), C.R.S. 2015 ("peace officer, firefighter, or emergency medical service provider, engaged in the performance of his or her duties"). *See* Instruction F:119 (defining "emergency medical service provider"); Instruction F:124 (defining "engaged in the performance of his [her] duties"); F:157 (defining "firefighter"); Instruction F:263 (defining "peace officer").

6. + *See Martinez v. People*, 2015 CO 16, ¶ 11, 344 P.3d 862, 867 ("The trial court in this case erroneously instructed the jury that 'after deliberation' means an interval of time 'sufficient for one thought to follow another.' The prosecution culled this language from an 1895 case, *Van Houten v. People*, that considered how quickly premeditation can occur in the first-degree murder context. More recently, however, this court has rejected the *Van Houten* language as inconsistent with the element of deliberation that the current first-degree murder statute requires." (citation omitted)).

7. + In 2015, the Committee added Comment 6, citing to *Martinez v. People*, *supra*.

3-1:02 MURDER IN THE FIRST DEGREE (FELONY MURDER)

The elements of the crime of murder in the first degree (felony murder) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. acting alone or with one or more persons,

4. committed or attempted to commit [insert name(s) of qualifying offense(s) enumerated in section 18-3-102(1)(b)], and

5. in the course of or in furtherance of the crime of [insert name(s) of qualifying offense(s) enumerated in § 18-3-102(1)(b)] that he [she] was committing or attempting to commit, or in the immediate flight therefrom,

6. the death of a person, other than one of the participants, was caused by anyone.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of murder in the first degree (felony murder).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of murder in the first degree (felony murder).

COMMENT

1. *See* § 18-3-102(1)(b), C.R.S. 2015.

2. *See* Instruction F:267 (defining "person," when referring to the victim of a homicide); Instruction G2:01 (criminal attempt).

3. Provide the jury with an elemental instruction defining the qualifying offense(s) referenced in the fourth and fifth elements. In addition, if a qualifying crime incorporates the definition of another crime, provide the jury with an elemental instruction that fully defines the subsidiary offense. *See Auman v. People*, 109 P.3d 647, 671 (Colo. 2005) (reversing felony murder conviction premised on second degree burglary conviction because of error in jury instruction that defined theft for purposes of second degree burglary).

4. *See* Instruction 3-1:01, Comment 3 (explaining how to instruct the jury when the prosecution charges multiple theories of first-degree murder in separate counts).

5. *See* Instruction 3-1:01, Comment 5 (discussing first degree murder of a peace officer or firefighter engaged in the performance of his or her duties).

6. *See* Instruction H:41 (disengagement as an affirmative defense to felony murder).

7. "[T]he scope of immediate flight is a factual question for a jury to decide because immediate flight differs according to the unique facts and circumstances of each case, such as the time and distance between the felony and the killing." *Auman v. People*, 109 P.3d 647, 659 (Colo. 2005). Although the phrase "in the immediate flight therefrom" is not defined by statute, the supreme court has interpreted it as follows:

> According to the plain language of the immediate flight provision of the statute, there are four limitations on liability for felony murder when a death occurs during flight from the predicate felony.
>
> First, the flight from the predicate felony must be "immediate," which requires a close temporal connection between the predicate felony, the flight, and the resulting death. *See Webster's New World College Dictionary* 713 (4th ed. 1999) (defining "immediate" as "without delay" or "of the present time").
>
> Second, the word "flight" limits felony-murder liability in such cases to those circumstances in which death is caused while a participant is escaping or running away from the predicate felony. *Id.* at 541

> (defining "flight" as "a fleeing from . . . to run away").
>
> Third, the death must occur either "in the course of" or "in furtherance of" immediate flight, so that a defendant commits felony murder only if a death is caused during a participant's immediate flight or while a person is acting to promote immediate flight from the predicate felony. *See id.* at 333 (defining "in the course of" as "in the progress or process of; during"); and *id.* at 575 (defining "furtherance" as "a furthering, or helping forward; advancement; promotion").
>
> Fourth, the immediate flight must be "therefrom," indicating that the flight must be from the predicate felony, as opposed to being from some other episode or event.

Auman v. People, 109 P.3d at 656; *see also People v. Fuentes*, 258 P.3d 320, 327 (Colo. App. 2011) (applying the immediate flight standard of *Auman* and holding that: "[T]he first degree burglary statute requires that the entry, the assault, and the flight be close in time and that the assault occur while fleeing from the building or occupied structure. A person therefore commits an assault in immediate flight from a building where the assault is part of a continuous integrated attempt to get away from the building.").

3-1:03 MURDER IN THE FIRST DEGREE (EXECUTION BASED UPON PERJURY)

The elements of the crime of murder in the first degree (execution based upon perjury) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. procured the conviction and execution,

4. of any innocent person,

5. by perjury or subornation of perjury.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ____.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of murder in the first degree (execution based upon perjury).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of murder in the first degree (execution based upon perjury).

COMMENT

1. *See* § 18-3-102(1)(c), C.R.S. 2015.

2. Provide the jury with an instruction defining the offense of perjury. *See* Instructions 8-5:01, 8-5:03.

3. The term "subornation" is not defined by statute. *See Black's Law Dictionary,* 1653 (10th ed. 2014) (defining "subornation of perjury" as the "crime of persuading another to commit perjury; the act of procuring a witness to testify falsely").

4. The term procure is not defined by statute for purposes of this offense. *See Webster's Third New International Dictionary* 1809 (2002) (defining "procure" as meaning "to cause to happen or be done: bring about").

5. *See* Instruction 3-1:01, Comment 3 (explaining how to instruct the jury when the prosecution charges multiple theories of first-degree murder in separate counts).

6. *See* Instruction 3-1:01, Comment 5 (discussing first degree murder of a peace officer or firefighter engaged in the performance of his or her duties).

3-1:04 MURDER IN THE FIRST DEGREE (EXTREME INDIFFERENCE)

The elements of the crime of murder in the first degree (extreme indifference) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. under circumstances evidencing an attitude of universal malice manifesting extreme indifference to the value of human life generally,

5. engaged in conduct which created a grave risk of death to a person, or persons, other than himself [herself], and

6. thereby caused the death of another.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of murder in the first degree (extreme indifference).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of murder in the first degree (extreme indifference).

COMMENT

1. *See* § 18-3-102(1)(d), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:267 (defining "person," when referring to the victim of a homicide).

3. In the fifth element, the absence of bracketing for the terms "person, or persons," is deliberate. *See Candelaria v. People*, 148 P.3d 178, 181-83 (Colo. 2006) (observing that "'extreme indifference' murder . . . has a rich history of evolution in statutory and case law," and tracing those developments to explain why the court has consistently held that the amended version of section 18-3-102(d) now in effect "necessarily comprehends killing acts that put at grave risk a number of individuals not targeted by the defendant, as well as acts putting at risk a single victim, without knowing or caring who that may be").

4. *See* Instruction 3-1:01, Comment 3 (explaining how to instruct the jury when the prosecution charges multiple theories of first-degree murder in separate counts).

5. *See* Instruction 3-1:01, Comment 5 (discussing first degree murder of a peace officer or firefighter engaged in the performance of his or her duties).

6. "Universal malice" is not defined by statute+. *See Candelaria v. People*, 148 P.3d at 181; *People v. Jefferson*, 748 P.2d 1223, 1228 (Colo. 1988); *Longinotti v. People*, 102 P. 165, 168 (Colo. 1909).

7. + In 2015, the Committee modified the first sentence of Comment 6 by deleting the words "the above definition was developed through case law."

3-1:05 MURDER IN THE FIRST DEGREE (CONTROLLED SUBSTANCE ON SCHOOL GROUNDS)

The elements of the crime of murder in the first degree (controlled substance on school grounds) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. committed unlawful distribution, dispensation, or sale of a controlled substance,

4. to a person under the age of eighteen years,

5. on school grounds, and

6. the death of such person was caused by the use of such controlled substance.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of murder in the first degree (controlled substance on school grounds).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of murder in the first degree (controlled substance on school grounds).

COMMENT

1. *See* § 18-3-102(1)(e), C.R.S. 2015.

2. *See* Instruction F:73 (defining "controlled substance" by referring users to the statutory schedules that are identified in section § 18-18-102(5), C.R.S. 2015); Instruction F:254 (defining "on school grounds"); Instruction F:267 (defining "person," when referring to the victim of a homicide).

3. In the third element, the absence of bracketing is deliberate. *See* § 18-18-405(1)(a), C.R.S. 2015 (defining an offense that includes, among other types of conduct that are not incorporated by section 18-3-102(1)(e), unlawful distribution, dispensation, or sale of a controlled substance); *People v. Abiodun*, 111 P.3d 462, 466 (Colo. 2005) ("The one-sentence proscription [in section 18-18-405(1)(a)] is structured as a series of acts, with reference to the same controlled substance and governed by a common mens rea. The acts chosen for specific inclusion are not themselves mutually exclusive but overlap in various ways and cover a continuum of conduct from the production of a controlled substance to its delivery to another person, under any of a number of circumstances.").

4. *See* Instruction 3-1:01, Comment 3 (explaining how to instruct the jury when the prosecution charges multiple theories of first-degree murder in separate counts).

3-1:06 MURDER IN THE FIRST DEGREE (CHILD UNDER TWELVE; POSITION OF TRUST)

The elements of the crime of murder in the first degree (child under twelve; position of trust) are:

1. That the defendant,

2. in the State of Colorado at or about the date and place charged,

3. knowingly,

4. caused the death of a child who had not yet attained twelve years of age, and

5. the defendant was in a position of trust with respect to the child.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ____.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of murder in the first degree (child under twelve; position of trust).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of murder in the first degree (child under twelve; position of trust).

COMMENT

1. *See* § 18-3-102(1)(f), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:267 (defining "person," when referring to the victim of a homicide); Instruction F:280 (defining "position of trust").

3. *See* Instruction 3-1:01, Comment 3 (explaining how to instruct the jury when the prosecution charges multiple theories of first-degree murder in separate counts).

3-1:07 MURDER IN THE SECOND DEGREE

The elements of the crime of murder in the second degree are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. caused the death of another person.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ____.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of murder in the second degree.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of murder in the second degree.

COMMENT

1. *See* § 18-3-103(1), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:267 (defining "person," when referring to the victim of a homicide).

3-1:08.INT MURDER IN THE SECOND DEGREE - INTERROGATORY (PROVOKED AND SUDDEN HEAT OF PASSION)

If you find the defendant not guilty of second degree murder, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of second degree murder, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the defendant acting upon a provoked and sudden heat of passion? (Answer "Yes" or "No")

The defendant was acting upon a provoked and sudden heat of passion only if:

1. the act causing the death was performed upon a sudden heat of passion,

2. caused by a serious and highly provoking act of the intended victim,

3. affecting the defendant sufficiently to excite an irresistible passion in a reasonable person, and

4. between the provocation and the killing, there was an insufficient interval of time for the voice of reason and humanity to be heard.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant was not acting upon a provoked and sudden heat of passion. In order to meet this burden, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should find that the defendant was acting upon a provoked and sudden heat of passion, mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has met this burden, you should find that the defendant was not acting upon a provoked and sudden heat of

passion, mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-3-103(3)(b), C.R.S. 2015.

2. *See*, *e.g.*, Instruction E:28 (special verdict form).

3. *See Cassels v. People*, 92 P.3d 951, 956 (Colo. 2004) ("A provocation instruction is warranted whenever a defendant shows some supporting evidence — regardless of how incredible, unreasonable, improbable, or slight it may be — to establish each factor described in subsection (3)(b) of the second-degree murder statute."); *People v. Garcia*, 28 P.3d 340, 346 (Colo. 2001) (when a provocation instruction is given, it must make clear that the prosecution bears the burden of proving a lack of provocation).

4. Although the supreme court has held, in *People v. Brighi*, 755 P.2d 1218, 1221 (Colo. 1988), that a trial court was without authority to enter a judgment of conviction for mitigated second degree assault where the jury was deadlocked with respect to the heat of passion interrogatory, it is unclear if this aspect of the holding in *Brighi* was dependent on an erroneous characterization of heat of passion as an *element* of mitigated second degree assault. *See Rowe v. People*, 856 P.2d 486, 490 (Colo. 1993) ("We disapprove of footnote two in *People v. Brighi*, 755 P.2d 1218, 1221 (Colo. 1988), to the extent that it suggests that heat of passion is an element of second-degree assault."). Nevertheless, *Brighi* is still good authority for the proposition that a trial court has discretion to inquire whether a jury is deadlocked as to the charge, or as to the heat of passion mitigator. *See generally* Instruction E:18, Comments 1-4 (Supplemental Instruction — When Jurors Fail to Agree).

However, the Committee expresses no opinion concerning what level judgment of conviction a trial court should enter where a jury is unanimous as to guilt and firmly deadlocked as to heat of passion. This remains an unanswered question in Colorado. *See People v. Ramirez*, 56 P.3d 89, 93 n.7 (Colo. 2002) (upholding a conviction for second degree murder and concluding that, because there was no evidence to support a heat of passion interrogatory, it was unnecessary to decide whether (1) the court of appeals had correctly returned the case to the trial court for resentencing, reasoning that the absence of a jury

finding concerning the heat of passion mitigator afforded the defendant the benefit of the assumption that the jury intended the lesser felony; or (2) the prosecution should instead have the option to retry the defendant on the charge of second degree murder); *see also People v. Harris*, 797 P.2d 816 (Colo. App. 1990) (because the jury found the defendant guilty of first degree assault and neglected to check a box on the verdict form indicating whether he had acted under a heat of passion, the court was required to enter a finding that he had in fact acted under a heat of passion).

3-1:09 MANSLAUGHTER (RECKLESS)

The elements of the crime of manslaughter are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. recklessly,

4. caused the death of another person.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of manslaughter.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of manslaughter.

COMMENT

1. *See* § 18-3-104(1)(a), C.R.S. 2015.

2. *See* Instruction F:267 (defining "person," when referring to the victim of a homicide); Instruction F:308 (defining "recklessly").

3-1:10 MANSLAUGHTER (CAUSED OR AIDED SUICIDE)

The elements of the crime of manslaughter are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. intentionally,

4. caused or aided another person to commit suicide.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ____.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of manslaughter.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of manslaughter.

COMMENT

1. *See* § 18-3-104(1)(b), C.R.S. 2015.

2. *See* Instruction F:185 (defining "intentionally").

3. *See* Instruction H:42 (affirmative defense of "medical caregiver").

3-1:11 CRIMINALLY NEGLIGENT HOMICIDE

The elements of the crime of criminally negligent homicide are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. caused the death of another person,

4. by conduct amounting to criminal negligence.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminally negligent homicide.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminally negligent homicide.

COMMENT

1. *See* § 18-3-105, C.R.S. 2015.

2. *See* Instruction F:79 (defining "criminal negligence"); Instruction F:267 (defining "person," when referring to the victim of a homicide).

3-1:12 VEHICULAR HOMICIDE (RECKLESS)

The elements of the crime of vehicular homicide are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. operated or drove a motor vehicle,

4. in a reckless manner, and

5. such conduct was the proximate cause of the death of another.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of vehicular homicide.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of vehicular homicide.

COMMENT

1. *See* § 18-3-106(1)(a), C.R.S. 2015.

2. *See* Instruction F:236 (defining "motor vehicle"); Instruction F:308 (defining "recklessly"); *see also* CJI-Civ. 9:18 (2014) (defining "cause"); CJI-Civ. Ch. 9, § B (Causation) (2014) ("The [Colorado Supreme Court Committee on Civil Jury Instructions] has intentionally eliminated the use of the word 'proximate' when instructing the jury on causation issues because the concept of proximate cause is adequately included in the instructions in this Part B and because the word 'proximate' tends to be confusing to the jury."); *People v. Stewart*, 55 P.3d 107, 116 (Colo. 2002) (discussing the significance of the different definitions of "cause" and "proximate cause" that appeared in COLJI-Crim. (1983)).

3. *See* Instruction 3-1:13, Comment 3 (discussing how to define the terms "operated" and "drove").

3-1:13 VEHICULAR HOMICIDE (UNDER THE INFLUENCE OF ALCOHOL AND/OR DRUGS)

The elements of the crime of vehicular homicide are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. operated or drove a motor vehicle,

4. while under the influence of alcohol or one or more drugs, or a combination of both alcohol and one or more drugs, and

5. such conduct was the proximate cause of the death of another.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of vehicular homicide.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of vehicular homicide.

COMMENT

1. *See* § 18-3-106(1)(b)(I), C.R.S. 2015.

2. *See* Instruction F:109 (defining "driving under the influence"); Instruction F:236 (defining "motor vehicle"); Instruction F:252 (defining "one or more drugs").

3. Sections 18-3-106(1)(b)(I), (IV) (vehicular homicide) and 18-3-205(1)(b)(I), (IV) (vehicular assault), apply to a person who "*operates* or drives a motor vehicle while under the influence." (Emphasis added.) By contrast, the traffic offense of driving under the influence (DUI) does not include a

reference to operation; rather, the DUI statute specifies that it is unlawful for a person who is under the influence "to *drive* a motor vehicle or vehicle." § 42-4-1301(1)(a), C.R.S. 2015 (emphasis added). Because neither "drive" nor "operate" is defined by statute (either in the criminal code, or in the traffic code), a court exercising its discretion to draft a supplemental definitional instruction should refer to precedent:

> We have held that "drive" means to exercise "actual physical control" over a motor vehicle. *People v. Swain*, 959 P.2d 426, 429, 431 (1998) (so holding in context of a DUI case where defendant's keys were in the ignition and the truck's radio was playing, but defendant was asleep or passed out in the front seat); *Brewer v. Motor Vehicle Div., Dep't of Revenue*, 720 P.2d 564, 566–67 (Colo. 1986) (holding under the express consent statute that driving means being "in actual physical control" of a motor vehicle and is not limited to "placing and controlling a vehicle in motion"). The term "operate" is somewhat broader, connoting the action of causing something "to occur . . . [or] to cause to function usually by direct personal effort." *People v. Gregor*, 26 P.3d 530, 532 (Colo. Ct. App. 2000) (quoting *Webster's Third New International Dictionary* 1580–81 (1986)).

People v. Stewart, 55 P.3d 107, 115 (Colo. 2002).

Further, although the phrase "driving under the influence" is defined identically for purposes of sections 18-3-106(1)(b)(I), (IV)(vehicular homicide) and 18-3-205(1)(b)(I), (IV) (vehicular assault), the wording of that shared definition is slightly different from the definition of "driving under the influence" that appears as part of the traffic code in section 42-4-1301(1)(f), C.R.S. 2015. *Compare* Instruction F:109 (defining "driving under the influence" (vehicular homicide and vehicular assault)), *with* Instruction F:110 (defining "driving under the influence" (traffic code)). And there are significant differences between the definition of a "motor vehicle" in section 18-1-901(3)(k), C.R.S. 2015, and the definition of that same term that appears in section 42-1-102(58), C.R.S. 2015. *Compare* Instruction F:236 (defining "motor vehicle" for Title 18), *with* Instruction F:239 (defining "motor vehicle" for Title 42).

Finally, there are two internal inconsistencies within the statutory sections that define the criminal offenses of vehicular homicide and vehicular assault.

First, although sections 18-3-106(1)(b)(I) and 18-3-205(1)(b)(I) apply only to *motor* vehicles, the definitions of "driving under the influence" in +sections 18-3-106(1)(b)(IV) and 18-3-205(1)(b)(IV) speak in terms of driving "a vehicle," with no references to motorization. In cases involving vehicles that are indisputably motorized, this discrepancy will be inconsequential. However, in a case where there is a controversy concerning whether the vehicle in question was motorized, the court should add the word "motor" to the statutory definition that appears in Instruction F:109.

Second, as noted above, sections 18-3-106(1)(b)(I) and 18-3-205(1)(b)(I) both apply to a person who "*operates* or drives" (emphasis added) a motor vehicle while under the influence. Yet neither "operate" nor "operating" is included as part of the definition of "driving under the influence" in sections 18-3-106(1)(b)(I) and 18-3-205(1)(b)(I). In cases involving only an allegation of "driving," this discrepancy will be inconsequential. However, in other situations, the statutory definition that appears in Instruction F:109 may need to be modified as follows: (1) in a case involving only an allegation of operation, by substituting "operating" for "driving"; and (2) in a case involving an allegation of operation and/or driving, by adding the word "operating."

4. + In 2015, the Committee corrected two statutory citations in Comment 3 where indicated.

3-1:14.SP VEHICULAR HOMICIDE - SPECIAL INSTRUCTION (BLOOD OR BREATH ALCOHOL LEVEL)

As to the charge of vehicular homicide, the amount of alcohol in the defendant's blood or breath at the time of the alleged offense, or within a reasonable time thereafter, as shown by analysis of the defendant's blood or breath, gives rise to the following:

(a) Presumption:

It shall be presumed that the defendant was not under the influence of alcohol if there was at such time 0.05 or less grams of alcohol per one hundred milliliters of blood, or if there was at such time 0.05 or less grams of alcohol per two hundred ten liters of breath.

A presumption requires you to find a fact, as if it had been established by evidence, unless the presumption is rebutted by evidence to the contrary.

(b) Evidentiary Consideration:

If there was at such time more than 0.05 but less than 0.08 grams of alcohol per one hundred milliliters of blood, or if there was at such time more than 0.05 but less than 0.08 grams of alcohol per two hundred ten liters of breath, such fact may be considered with other competent evidence in determining whether or not the defendant was under the influence of alcohol.

(c) Permissible inference:

A permissible inference that the defendant was under the influence of alcohol may be drawn if there was at such time 0.08 or more grams of alcohol per one hundred milliliters of blood, or if there was at such time 0.08 or more grams of alcohol per two hundred ten liters of breath.

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a

reasonable doubt, and that an evidentiary consideration or a permissible inference does not shift that burden to the defendant.

COMMENT

1. *See* § 18-3-106(2)(a-c), C.R.S. 2015.

3-1:15.SP VEHICULAR HOMICIDE - SPECIAL INSTRUCTION (DELTA 9-TETRAHYDROCANNABINOL LEVEL)

As to the charge of vehicular homicide, a permissible inference that the defendant was under the influence of one or more drugs may be drawn if the amount of delta 9-tetrahydrocannabinol in the defendant's blood at the time of the alleged offense, or within a reasonable time thereafter, as shown by analysis of the defendant's blood, was five nanograms or more per milliliter in whole blood.

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

COMMENT

1. *See* § 18-3-106(2)(d), C.R.S. 2015.

3-1:16.INT VEHICULAR HOMICIDE – INTERROGATORY (IMMEDIATE FLIGHT FROM THE COMMISSION OF ANOTHER FELONY)

If you find the defendant not guilty of vehicular homicide, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of vehicular homicide, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

> Did the defendant commit the vehicular homicide while in immediate flight from another crime? (Answer "Yes" or "No")

The defendant committed the vehicular homicide while in immediate flight from another crime only if:

1. the defendant committed the vehicular homicide while in immediate flight from the commission of [insert name(s) of felony offense(s)].

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-1.3-401(8)(g), C.R.S. 2015 ("If the defendant is convicted of class 4 or class 3 felony vehicular homicide under section 18-3-106(1)(a) or (1)(b), and while committing vehicular homicide the defendant was in immediate flight from the commission of another felony, the court shall be required to sentence the defendant to the department of corrections for a term of at least the midpoint in the presumptive range but not more than twice the maximum term authorized in the presumptive

range for the punishment of the class of felony vehicular homicide of which the defendant is convicted.").

2. *See, e.g.*, Instruction E:28 (special verdict form).

CHAPTER 3-2

ASSAULTS AND SIMILAR OFFENSES

3-2:01 ASSAULT IN THE FIRST DEGREE (DEADLY WEAPON)

The elements of the crime of assault in the first degree (deadly weapon) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to cause serious bodily injury to another person,

5. caused serious bodily injury to any person,

6. by means of a deadly weapon.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of assault in the first degree (deadly weapon).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of assault in the first degree (deadly weapon).

COMMENT

1. *See* § 18-3-202(1)(a), C.R.S. 2015.

2. *See* Instruction F:88 (defining "deadly weapon"); Instruction F:185 (defining "with intent"); Instruction F:332 (defining "serious bodily injury").

3-2:02 ASSAULT IN THE FIRST DEGREE (PERMANENT DISFIGUREMENT)

The elements of the crime of assault in the first degree (permanent disfigurement) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to disfigure another person seriously and permanently, or to destroy, amputate, or disable permanently a member or organ of another person's body,

5. caused such an injury to any person.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of assault in the first degree (permanent disfigurement).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of assault in the first degree (permanent disfigurement).

COMMENT

1. *See* § 18-3-202(1)(b), C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent").

3. In *People v. Dominguez*, 568 P.2d 54, 55 (Colo. 1977), the supreme court declared section 18-3-202(1)(b) unconstitutional because it imposed a higher penalty for essentially the same conduct proscribed in section 18-3-203(1)(a). However, in 1994 the General Assembly cured the infirmity by repealing section 18-3-203(1)(a). *See* ch. 287, sec. 8, § 18-3-203(1)(a), 1994 Colo. Sess. Laws 1717.

3-2:03 ASSAULT IN THE FIRST DEGREE (EXTREME INDIFFERENCE)

The elements of the crime of assault in the first degree (extreme indifference) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. under circumstances manifesting extreme indifference to the value of human life,

5. engaged in conduct which created a grave risk of death to another person, and

6. thereby caused serious bodily injury to any person.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of assault in the first degree (extreme indifference).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of assault in the first degree (extreme indifference).

COMMENT

1. *See* § 18-3-202(1)(c), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:332 (defining "serious bodily injury").

3. *See People v. Esparza-Treto*, 282 P.3d 471, 480 (Colo. App. 2011) (trial court did not abuse its discretion by rejecting proffered jury instruction defining the terms "extreme indifference" and "grave risk of death" for purposes of assault

in the first degree; both terms are ones which reasonable persons of common intelligence would be familiar with, and the jury indicated no confusion about their meaning).

3-2:04 ASSAULT IN THE FIRST DEGREE (PEACE OFFICER, FIREFIGHTER, OR EMERGENCY MEDICAL SERVICE PROVIDER)

The elements of the crime of assault in the first degree (peace officer, firefighter, or emergency medical service provider) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to cause serious bodily injury upon the person of a peace officer, firefighter, or emergency medical service provider,

5. threatened with a deadly weapon a peace officer, firefighter, or emergency medical service provider engaged in the performance of his [her] duties, and

6. the defendant knew, or reasonably should have known, that the victim was a peace officer, firefighter, or emergency medical service provider acting in the performance of his [her] duties.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of assault in the first degree (peace officer, firefighter, or emergency medical service provider).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of assault in the first degree (peace officer, firefighter, or emergency medical service provider).

COMMENT

1. *See* § 18-3-202(1)(e), C.R.S. 2015.

2. *See* Instruction F:88 (defining "deadly weapon"); Instruction F:119 (defining "emergency medical service provider"); Instruction F:124 (defining "engaged in the performance of his [her] duties"); Instruction F:157 (defining "firefighter"); Instruction F:185 (defining "with intent"); Instruction F:263 (defining "peace officer"); Instruction F:332 (defining "serious bodily injury").

3-2:05 ASSAULT IN THE FIRST DEGREE (JUDGE OR OFFICER OF COURT)

The elements of the crime of assault in the first degree (judge or officer of court) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to cause serious bodily injury upon the person of a judge or an officer of a court of competent jurisdiction,

5. threatened with a deadly weapon a judge or an officer of a court of competent jurisdiction, and

6. the defendant knew, or reasonably should have known, that the victim was a judge or an officer of a court of competent jurisdiction.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of assault in the first degree (judge or officer of court).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of assault in the first degree (judge or officer of court).

COMMENT

1. *See* § 18-3-202(1)(e.5), C.R.S. 2015.

2. *See* Instruction F:88 (defining "deadly weapon"); Instruction F:185 (defining "with intent"); Instruction F:332 (defining "serious bodily injury").

3. The terms "court of competent jurisdiction" and "officer" are not defined for purposes of section 18-3-202(1)(e.5).

3-2:06 ASSAULT IN THE FIRST DEGREE (CONFINED OR IN CUSTODY)

The elements of the crime of assault in the first degree (confined or in custody) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. while lawfully confined or in custody, as a result of being charged with or convicted of a crime or as a result of being charged or adjudicated as a delinquent child, and

4. with intent,

5. to cause serious bodily injury to a person employed by or under contract with a detention facility, or to a person employed by the division in the department of human services responsible for youth services and who is a youth services counselor or is in the youth services worker classification series,

6. threatened such a person with a deadly weapon,

7. while such a person was engaged in the performance of his [her] duties, and

8. the defendant knew, or reasonably should have known, that the person was engaged in the performance of his [her] duties while employed by or under contract with a detention facility or while employed by the division in the department of human services responsible for youth services.

[9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of assault in the first degree (confined or in custody).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of assault in the first degree (confined or in custody).

COMMENT

1. *See* § 18-3-202(1)(f), C.R.S. 2015.

2. *See* Instruction F:88 (defining "deadly weapon"); Instruction F:96 (defining "detention facility"); Instruction F:185 (defining "with intent").

3. Pursuant to § 18-3-202(1)(f), C.R.S. 2015, where appropriate, the court should consider instructing the jury that a person who participates in a work release program, a furlough, or any other similar authorized supervised or unsupervised absence from a detention facility and who is required to report back to the detention facility at a specified time is deemed to be "in custody" for purposes of this instruction.

3-2:07.INT ASSAULT IN THE FIRST DEGREE - INTERROGATORY (PROVOKED AND SUDDEN HEAT OF PASSION)

If you find the defendant not guilty of assault in the first degree, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of assault in the first degree, you should sign the verdict form to indicate your finding of guilt and answer the following verdict question on the verdict form:

Was the defendant acting upon a provoked and sudden heat of passion? (Answer "Yes" or "No")

The defendant was acting upon a provoked and sudden heat of passion only if:

1. the act causing the injury was performed upon a sudden heat of passion,

2. caused by a serious and highly provoking act of the intended victim,

3. affecting the defendant sufficiently to excite an irresistible passion in a reasonable person, and

4. between the provocation and the assault, there was an insufficient interval of time for the voice of reason and humanity to be heard.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant was not acting upon a provoked and sudden heat of passion. In order to meet this burden, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should find that the defendant was acting upon a provoked and sudden heat of passion, mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has met this burden, you should find that the defendant was not acting upon a provoked and sudden heat of

passion, mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-3-202(2)(a), C.R.S. 2015.

2. *See*, *e.g.*, Instruction E:28 (special verdict form).

3. *See Cassels v. People*, 92 P.3d 951, 956 (Colo. 2004) ("A provocation instruction is warranted whenever a defendant shows some supporting evidence — regardless of how incredible, unreasonable, improbable, or slight it may be — to establish each factor described in subsection (3)(b) of the second-degree murder statute."); *People v. Garcia*, 28 P.3d 340, 346 (Colo. 2001) (when a provocation instruction is given, it must make clear that the prosecution bears the burden of proving a lack of provocation).

4. Although the supreme court has held, in *People v. Brighi*, 755 P.2d 1218, 1221 (Colo. 1988), that a trial court was without authority to enter a judgment of conviction for mitigated second degree assault where the jury was deadlocked with respect to the heat of passion interrogatory, it is unclear if this aspect of the holding in *Brighi* was dependent on an erroneous characterization of heat of passion as an *element* of mitigated second degree assault. *See Rowe v. People*, 856 P.2d 486, 490 (Colo. 1993) ("We disapprove of footnote two in *People v. Brighi*, 755 P.2d 1218, 1221 (Colo. 1988), to the extent that it suggests that heat of passion is an element of second-degree assault."). Nevertheless, *Brighi* is still good authority for the proposition that a trial court has discretion to inquire whether a jury is deadlocked as to the charge, or as to the heat of passion mitigator. *See generally* Instruction E:17, Comments 1-4 (Supplemental Instruction — When Jurors Fail to Agree).

However, the Committee expresses no opinion concerning what level judgment of conviction a trial court should enter where a jury is unanimous as to guilt and firmly deadlocked as to heat of passion. This remains an unanswered question in Colorado. *See People v. Ramirez*, 56 P.3d 89, 93 n.7 (Colo. 2002) (upholding a conviction for second degree murder and concluding that, because there was no evidence to support a heat of passion interrogatory, it was unnecessary to decide whether (1) the court of appeals had correctly returned the case to the trial court for resentencing, reasoning that the absence of a jury

finding concerning the heat of passion mitigator afforded the defendant the benefit of the assumption that the jury intended the lesser felony; or (2) the prosecution should instead have the option to retry the defendant on the charge of second degree murder); *see also People v. Harris*, 797 P.2d 816 (Colo. App. 1990) (because the jury found the defendant guilty of first degree assault and neglected to check a box on the verdict form indicating whether he had acted under a heat of passion, the court was required to enter a finding that he had in fact acted under a heat of passion).

3-2:08.INT ASSAULT IN THE FIRST DEGREE - INTERROGATORY (AT-RISK ADULT OR JUVENILE)

If you find the defendant not guilty of assault in the first degree, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of assault in the first degree, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the victim a person with protected status?
(Answer "Yes" or "No")

The victim was a person with protected status only if:

[1. the victim was seventy years of age or older.]

[1. the victim was eighteen years of age or older, and

2. was a person with a disability.]

[1. the victim was under the age of eighteen years, and

2. was a person with a disability.]

The prosecution has the burden to prove [the] [each] numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-6.5-103(3)(a), C.R.S. 2015.

2. *See* Instruction F:24 (defining "at-risk adult"); Instruction F:26 (defining "at-risk juvenile"); Instruction

F:273 (defining "person with a disability"); *see*, *e.g.*, Instruction E:28 (special verdict form).

3. First degree assaults of at-risk persons may be subject to heat of passion mitigation. *See* § 18-6.5-103(3)(a), C.R.S. 2015. Accordingly, where supported by the evidence, also use Instruction 3-2:07.INT.

3-2:09 ASSAULT IN THE SECOND DEGREE (BODILY INJURY WITH A DEADLY WEAPON)

The elements of the crime of assault in the second degree (bodily injury with a deadly weapon) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to cause bodily injury to another person,

5. caused such injury to any person,

6. by means of a deadly weapon.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of assault in the second degree (bodily injury with a deadly weapon).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of assault in the second degree (bodily injury with a deadly weapon).

COMMENT

1. *See* § 18-3-203(1)(b), C.R.S. 2015.

2. *See* Instruction F:36 (defining "bodily injury"); Instruction F:88 (defining "deadly weapon"); Instruction F:185 (defining "with intent").

3-2:10 ASSAULT IN THE SECOND DEGREE (PEACE OFFICER, FIREFIGHTER, OR EMERGENCY MEDICAL SERVICE PROVIDER+ – BODILY INJURY)

The elements of the crime of assault in the second degree (peace officer, firefighter, or emergency medical service provider+ – bodily injury) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to prevent a person whom he [she] knew, or should have known, to be a peace officer, firefighter, +emergency medical care provider, or emergency medical service provider from performing a lawful duty,

5. intentionally,

6. caused bodily injury to any person.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of assault in the second degree(peace officer, firefighter, or emergency medical service provider+ – bodily injury).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of assault in the second degree (peace officer, firefighter, or emergency medical service provider+ – bodily injury).

COMMENT

1. *See* § 18-3-203(1)(c), C.R.S. 2015.

2. *See* Instruction F:36 (defining "bodily injury"); Instruction F:119 (defining "emergency medical service provider"); Instruction F:157 (defining "firefighter"); Instruction F:185 (defining "intentionally" and "with intent"); Instruction F:263 (defining "peace officer").

3. *See People v. Montoya*, 104 P.3d 303, 306 (Colo. App. 2004) ("[T]he word 'firefighter' in § 18-3-201 and § 18-3-203(1)(c) encompasses a person . . . who is employed by the fire department to respond to such emergencies as medical calls, fire calls, and car accidents. The statute is not limited to firefighters performing fire suppression functions.").

4. + In 2015, the Committee added the words "emergency medical care provider" to the fourth element. *See* Ch. 337, sec. 2, § 18-3-203(1)(c), 2015 Colo. Sess. Laws 1366, 1366. It also added the phrase "bodily injury" to the parenthetical to distinguish this instruction from Instruction 3-2:10.5 (assault in the second degree (peace officer, firefighter, or emergency medical service provider - *serious* bodily injury)).

+ 3-2:10.5 ASSAULT IN THE SECOND DEGREE (PEACE OFFICER, FIREFIGHTER, OR EMERGENCY MEDICAL SERVICE PROVIDER – SERIOUS BODILY INJURY)

The elements of the crime of assault in the second degree (peace officer, firefighter, or emergency medical service provider – serious bodily injury) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to prevent a person whom he [she] knew, or should have known, to be a peace officer, firefighter, or emergency medical service provider from performing a lawful duty,

5. intentionally,

6. caused serious bodily injury to any person.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of assault in the second degree(peace officer, firefighter, or emergency medical service provider – serious bodily injury).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of assault in the second degree (peace officer, firefighter, or emergency medical service provider – serious bodily injury).

COMMENT

1. *See* § 18-3-203(1)(c.5), C.R.S. 2015.

2. *See* Instruction F:119 (defining "emergency medical service provider"); Instruction F:157 (defining "firefighter"); Instruction F:185 (defining "intentionally" and "with intent"); Instruction F:263 (defining "peace officer"); Instruction F:332 (defining "serious bodily injury").

3. *See People v. Montoya*, 104 P.3d 303, 306 (Colo. App. 2004) ("[T]he word 'firefighter' in § 18-3-201 and § 18-3-203(1)(c) encompasses a person . . . who is employed by the fire department to respond to such emergencies as medical calls, fire calls, and car accidents. The statute is not limited to firefighters performing fire suppression functions.").

4. + The Committee added this instruction in 2015. *See* Ch. 211, sec. 1, § 18-3-203(1)(c.5), 2015 Colo. Sess. Laws 771, 771.

3-2:11 ASSAULT IN THE SECOND DEGREE (RECKLESS)

The elements of the crime of assault in the second degree (reckless) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. recklessly,

4. caused serious bodily injury to another person,

5. by means of a deadly weapon.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of assault in the second degree (reckless).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of assault in the second degree (reckless).

COMMENT

1. *See* § 18-3-203(1)(d), C.R.S. 2015.

2. *See* Instruction F:88 (defining "deadly weapon"); Instruction F:308 (defining "recklessly"); Instruction F:332 (defining "serious bodily injury").

3-2:12 ASSAULT IN THE SECOND DEGREE (UNLAWFUL ADMINISTRATION OF DRUGS)

The elements of the crime of assault in the second degree (unlawful administration of drugs) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. intentionally,

4. for a purpose other than lawful medical or therapeutic treatment,

5. caused stupor, unconsciousness, or other physical or mental impairment or injury to another person,

6. by administering a drug, substance, or preparation capable of producing the intended harm,

7. without that person's consent.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of assault in the second degree (unlawful administration of drugs).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of assault in the second degree (unlawful administration of drugs).

COMMENT

1. *See* § 18-3-203(1)(e), C.R.S. 2015.

2. *See* Instruction F:185 (defining "intentionally").

3-2:13 ASSAULT IN THE SECOND DEGREE (LAWFULLY CONFINED OR IN CUSTODY)

The elements of the crime of assault in the second degree (lawfully confined or in custody) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly and violently,

4. while lawfully confined or in custody,

5. applied physical force against the person of a peace officer, firefighter, or emergency medical service provider engaged in the performance of his [her] duties, or a judge or an officer of a court of competent jurisdiction,

6. and the defendant knew, or reasonably should have known, that the victim was a peace officer, firefighter, or emergency medical service provider engaged in the performance of his [her] duties, or a judge or an officer of a court of competent jurisdiction.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of assault in the second degree (lawfully confined or in custody).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of assault in the second degree (lawfully confined or in custody).

COMMENT

1. *See* § 18-3-203(1)(f), C.R.S. 2015.

2. *See* Instruction F:119 (defining "emergency medical service provider"); Instruction F:124 (defining "engaged in the performance of his [her] duties"); Instruction F:157 (defining "firefighter"); Instruction F:195 (defining "knowingly"); Instruction F:263 (defining "peace officer").

3. The terms "lawfully confined" and "in custody" are not defined by statute, and the provision that uses these terms to define the above type of second degree assault is not modified by a clause that specifies that the confinement or custody must have been the "result of" a charge, conviction, or adjudication (as is the case for the provision that defines the type of second degree assault described in Instruction 3-2:14, and the type of first degree assault described in Instruction 3-2:06). Accordingly, a court exercising its discretion to draft a supplemental definitional instruction should refer to precedent, which makes clear that the phrase "while lawfully confined or in custody" encompasses confinements that occur in facilities, as well as custodial situations that take place in the field. *See People v. Olinger*, 566 P.2d 1367, 1368 (Colo. App. 1977) ("the word 'confined' in the second degree assault statute connotes detention in an institution"); *see, e.g.*, *People v. Armstrong*, 720 P.2d 165, 169 (Colo. 1986) ("[W]e hold that an arrest precedes 'in custody' for purposes of section 18–3–203(1)(f), when the person subject to an arrest resists that arrest."); *People in Interest of D.S.L.*, 134 P.3d 522, 525 (Colo. App. 2006) ("To be deemed to be in custody for purposes of [section 18–3–203(1)(f)], a person need not be subject to a formal arrest. All that is required is that the 'peace officer must have applied a level of physical control over the person being detained so as reasonably to ensure that the person does not leave.'" (quoting *People v. Rawson*, 97 P.3d 315, 323 (Colo. App. 2004))); *People v. Ortega*, 899 P.2d 236, 238 (Colo. App. 1994) ("[W]hen, as here, an officer has detained a suspect for purposes of further investigation rather than arrest, but nevertheless has applied a sufficient level of physical control so as reasonably to ensure that the suspect does not leave, then the suspect is in custody for purposes of § 18–3–203(1)(f)"); *see also People v. Thornton*, 929 P.2d 729, 733 (Colo. 1996) (interpreting the phrase "in custody or confinement," as used in section 18-8-208(3), C.R.S. 2015 (escape), and explaining: "A teaching of *Armstrong* is that custody connotes physical control. . . . However, physical control, in a situation not involving resistance to arrest, does not necessarily require physical restraint through application of force. . . . The officer's presence and the suspect's submission in concert may be sufficient to establish the assurance, requisite to a

determination of physical control, that the suspect will not leave.").

4. Pursuant to § 18-3-202(1)(f), C.R.S. 2015, where appropriate, the court should consider instructing the jury that a person who participates in a work release program, a furlough, or any other similar authorized supervised or unsupervised absence from a detention facility and who is required to report back to the detention facility at a specified time is deemed to be "in custody" for purposes of this instruction.

3-2:14 ASSAULT IN THE SECOND DEGREE (LAWFULLY CONFINED OR IN CUSTODY; CHARGED, CONVICTED, OR ADJUDICATED)

The elements of the crime of assault in the second degree (lawfully confined or in custody; charged, convicted, or adjudicated) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly and violently,

4. while lawfully confined or in custody as a result of being charged with or convicted of a crime or as a result of being charged as a delinquent child or adjudicated as a delinquent child,

5. applied physical force against a person engaged in the performance of his [her] duties while employed by or under contract with a detention facility, or while employed by the division in the department of human services responsible for youth services as a youth services counselor or in the youth services worker classification series, and

6. the defendant knew, or reasonably should have known, that the victim was a person engaged in the performance of his [her] duties while employed by or under contract with a detention facility, or employed by the division in the department of human services responsible for youth services.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of assault in the second degree (lawfully confined or in custody; charged, convicted, or adjudicated).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not

guilty of assault in the second degree (lawfully confined or in custody; charged, convicted, or adjudicated).

COMMENT

1. *See* § 18-3-203(1)(f), C.R.S. 2015.

2. *See* Instruction F:96 (defining "detention facility"); Instruction F:124 (defining "engaged in the performance of his [her] duties"); Instruction F:195 (defining "knowingly").

3. Pursuant to § 18-3-203(1)(f), where appropriate, the court should consider instructing the jury that a person who participates in a work release program, a furlough, or any other similar authorized supervised or unsupervised absence from a detention facility and who is required to report back to the detention facility at a specified time is deemed to be "in custody" for purposes of this instruction.

3-2:15 ASSAULT IN THE SECOND DEGREE (WHILE CONFINED IN A DETENTION FACILITY; BODILY FLUIDS OR HAZARDOUS MATERIAL)

The elements of the crime of assault in the second degree (while confined in a detention facility; bodily fluids or hazardous material) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. while lawfully confined in a detention facility within this state,

4. with the intent,

5. to infect, injure, harm, harass, annoy, threaten, or alarm,

6. a person in a detention facility whom the defendant knew, or reasonably should have known, to be an employee of a detention facility,

7. caused such employee to come into contact with blood, seminal fluid, urine, feces, saliva, mucus, vomit, or any toxic, caustic, or hazardous material,

8. by any means, including, but not limited to, throwing, tossing, or expelling such fluid or material.

[9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of assault in the second degree (while confined in a detention facility; bodily fluids or hazardous material).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of assault in the second degree (while confined in a detention facility; bodily fluids or hazardous material).

COMMENT

1. *See* § 18-3-203(1)(f.5)(I), C.R.S. 2015.

2. *See* Instruction F:97 (defining "detention facility"); Instruction F:121 (defining "employee of a detention facility"); Instruction F:185 (defining "intentionally" and "with intent").

3. *See People v. Miller*, 97 P.3d 171, 173 (Colo. App. 2003) ("although the language 'lawfully confined to a detention facility' may lend itself to multiple interpretations, the language of § 18-3-203(1)(f.5)(I) and (III)(A) and (B) and its legislative history compel the conclusion that the statute applies to individuals in lawful custody of law enforcement officials").

4. *See People v. Luna*, 2013 COA 67, ¶¶ 30-32, __ P.3d __ (for purposes of sections 18-3-203(1)(f.5)(I), (III)(A), being placed under arrest in a patrol vehicle by a police officer constitutes being lawfully confined in a "detention facility" by an "employee of a detention facility").

3-2:16 ASSAULT IN THE SECOND DEGREE (INTENT TO CAUSE BODILY INJURY; CAUSING SERIOUS BODILY INJURY)

The elements of the crime of assault in the second degree (intent to cause bodily injury; causing serious bodily injury) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to cause bodily injury to another person,

5. caused serious bodily injury to that person or another person.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of assault in the second degree (intent to cause bodily injury; causing serious bodily injury).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of assault in the second degree (intent to cause bodily injury; causing serious bodily injury).

COMMENT

1. *See* § 18-3-203(1)(g), C.R.S. 2015.

2. *See* Instruction F:36 (defining "bodily injury"); Instruction F:185 (defining "with intent"); Instruction F:332 (defining "serious bodily injury").

+ 3-2:16.5 ASSAULT IN THE SECOND DEGREE (BODILY FLUIDS OR HAZARDOUS MATERIAL; EMERGENCY RESPONDERS ENGAGED IN DUTIES)

The elements of the crime of assault in the second degree (bodily fluids or hazardous material; emergency responders engaged in duties) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to infect, injure, or harm another person,

5. whom the defendant knew or reasonably should have known to be engaged in the performance of his or her duties as a peace officer, a firefighter, an emergency medical care provider, or an emergency medical service provider,

6. caused such person to come into contact with blood, seminal fluid, urine, feces, saliva, mucus, vomit, or any toxic, caustic, or hazardous material,

7. by any means, including by throwing, tossing, or expelling such fluid or material.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of assault in the second degree (bodily fluids or hazardous material; emergency responders engaged in duties).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of assault in the second degree (bodily fluids or hazardous material; emergency responders engaged in duties).

COMMENT

1. *See* § 18-3-203(1)(h), C.R.S. 2015.

2. *See* Instruction F:118 (defining "emergency medical care provider"); Instruction F:119 (defining "emergency medical service provider"); Instruction F:123 (defining "engaged in the performance of his [her] duties"); Instruction F:157 (defining "firefighter"); Instruction F:185 (defining "with intent"); Instruction F:263 (defining "peace officer").

3. + The Committee added this instruction in 2015. *See* Ch. 337, sec. 2, § 18-3-203(1)(h), 2015 Colo. Sess. Laws 1366, 1366-67.

3-2:17.INT ASSAULT IN THE SECOND DEGREE - INTERROGATORY (PROVOKED AND SUDDEN HEAT OF PASSION)

If you find the defendant not guilty of assault in the second degree, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of assault in the second degree, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the defendant acting upon a provoked and sudden heat of passion? (Answer "Yes" or "No")

The defendant was acting upon a provoked and sudden heat of passion only if:

1. the act causing the injury was performed upon a sudden heat of passion,

2. caused by a serious and highly provoking act of the intended victim,

3. affecting the defendant sufficiently to excite an irresistible passion in a reasonable person, and

4. between the provocation and the assault, there was an insufficient interval of time for the voice of reason and humanity to be heard.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant was not acting upon a provoked and sudden heat of passion. In order to meet this burden, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should find that the defendant was acting upon a provoked and sudden heat of passion, mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has met this burden, you should find that the defendant was not acting upon a provoked and sudden heat of

passion, mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-3-203(2)(a), C.R.S. 2015.

2. *See*, *e.g.*, Instruction E:28 (special verdict form).

3. *See Cassels v. People*, 92 P.3d 951, 956 (Colo. 2004) ("A provocation instruction is warranted whenever a defendant shows some supporting evidence — regardless of how incredible, unreasonable, improbable, or slight it may be — to establish each factor described in subsection (3)(b) of the second-degree murder statute."); *People v. Garcia*, 28 P.3d 340, 346 (Colo. 2001) (when a provocation instruction is given, it must make clear that the prosecution bears the burden of proving a lack of provocation).

4. Although the supreme court has held, in *People v. Brighi*, 755 P.2d 1218, 1221 (Colo. 1988), that a trial court was without authority to enter a judgment of conviction for mitigated second degree assault where the jury was deadlocked with respect to the heat of passion interrogatory, it is unclear if this aspect of the holding in *Brighi* was dependent on an erroneous characterization of heat of passion as an *element* of mitigated second degree assault. *See Rowe v. People*, 856 P.2d 486, 490 (Colo. 1993) ("We disapprove of footnote two in *People v. Brighi*, 755 P.2d 1218, 1221 (Colo. 1988), to the extent that it suggests that heat of passion is an element of second-degree assault."). Nevertheless, *Brighi* is still good authority for the proposition that a trial court has discretion to inquire whether a jury is deadlocked as to the charge, or as to the heat of passion mitigator. *See generally* Instruction E:18, Comments 1-4 (Supplemental Instruction — When Jurors Fail to Agree).

However, the Committee expresses no opinion concerning what level judgment of conviction a trial court should enter where a jury is unanimous as to guilt and firmly deadlocked as to heat of passion. This remains an unanswered question in Colorado. *See People v. Ramirez*, 56 P.3d 89, 93 n.7 (Colo. 2002) (upholding a conviction for second degree murder and concluding that, because there was no evidence to support a heat of passion interrogatory, it was unnecessary to decide whether (1) the court of appeals had correctly returned the case to the trial court for resentencing, reasoning that the absence of a jury

finding concerning the heat of passion mitigator afforded the defendant the benefit of the assumption that the jury intended the lesser felony; or (2) the prosecution should instead have the option to retry the defendant on the charge of second degree murder); *see also People v. Harris*, 797 P.2d 816 (Colo. App. 1990) (because the jury found the defendant guilty of first degree assault and neglected to check a box on the verdict form indicating whether he had acted under a heat of passion, the court was required to enter a finding that he had in fact acted under a heat of passion).

3-2:18.INT ASSAULT IN THE SECOND DEGREE - INTERROGATORY (SERIOUS BODILY INJURY DURING SPECIFIED FELONY)

If you find the defendant not guilty of assault in the second degree [, or if you find the defendant guilty of assault in the second degree but find that he [she] committed the assault under a provoked and sudden heat of passion], you should disregard this instruction and sign the verdict form to indicate your verdict.

If, however, you find the defendant guilty of assault in the second degree [, and you also find that the defendant did not act upon a provoked and sudden heat of passion], you should sign the verdict form to indicate your guilty verdict and answer the following verdict question on the verdict form:

Did a non-participant suffer serious bodily injury? (Answer "Yes" or "No")

A non-participant suffered serious bodily injury only if:

1. [Insert name of victim] suffered serious bodily injury,

2. during the commission or attempted commission or flight from the commission or attempted commission of [insert name of qualifying felony offense(s) from section 18-3-203(2)(b.5)], and

3. he [she] was not a participant in the crime.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-3-203(2)(b.5), C.R.S. 2015.

2. *See* Instruction F:332 (defining "serious bodily injury"); Instruction G2:01 (criminal attempt); *see, e.g.*, Instruction E:28 (special verdict form).

3. Section 18-3-203(2)(b.5) states that this sentence enhancement provision is not applicable where the assault is committed under a sudden and provoked heat of passion. Accordingly, it may be necessary to give the jury both Instruction 3-2:17.INT and Instruction 3-2:18.INT (using the "and you also find that the defendant did not act upon a provoked and sudden heat of passion" language that appears in brackets in the first two paragraphs of 3-2:18.INT).

4. If the defendant is not separately charged with a qualifying felony offense(s), give the jury the elemental instruction for the offense(s) without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the qualifying felony offense(s).

3-2:19.INT ASSAULT IN THE SECOND DEGREE - INTERROGATORY (AT-RISK ADULT OR JUVENILE)

If you find the defendant not guilty of assault in the second degree, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of assault in the second degree, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the victim a person with protected status?
(Answer "Yes" or "No")

The victim was a person with protected status only if:

[1. the victim was seventy years of age or older.]

[1. the victim was eighteen years of age or older, and

2. was a person with a disability.]

[1. the victim was under the age of eighteen years, and

2. was a person with a disability.]

The prosecution has the burden to prove [the] [each] numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-6.5-103(3)(b), C.R.S. 2015.

2. *See* Instruction F:24 (defining "at-risk adult"); Instruction F:26 (defining "at-risk juvenile"); Instruction

F:273 (defining "person with a disability"); *see*, *e.g.*, Instruction E:28 (special verdict form).

3. Second degree assaults of at-risk persons may be subject to heat of passion mitigation. *See* § 18-6.5-103(3)(b), C.R.S. 2015. Accordingly, where supported by the evidence, also use Instruction 3-2:17.INT.

3-2:20 ASSAULT IN THE THIRD DEGREE (KNOWINGLY OR RECKLESSLY)

The elements of the crime of assault in the third degree (knowingly or recklessly) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly or recklessly,

4. caused bodily injury to another person.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of assault in the third degree (knowingly or recklessly).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of assault in the third degree (knowingly or recklessly).

COMMENT

1. *See* § 18-3-204(1)(a), C.R.S. 2015.

2. *See* Instruction F:36 (defining "bodily injury"); Instruction F:195 (defining "knowingly"); Instruction F:308 (defining "recklessly").

3-2:21 ASSAULT IN THE THIRD DEGREE (NEGLIGENCE AND DEADLY WEAPON)

The elements of the crime of assault in the third degree (negligence and deadly weapon) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with criminal negligence,

4. caused bodily injury to another person,

5. by means of a deadly weapon.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of assault in the third degree (negligence and deadly weapon).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of assault in the third degree (negligence and deadly weapon).

COMMENT

1. *See* § 18-3-204(1)(a), C.R.S. 2015.

2. *See* Instruction F:36 (defining "bodily injury"); Instruction F:79 (defining "criminal negligence"); Instruction F:88 (defining "deadly weapon").

3-2:22 ASSAULT IN THE THIRD DEGREE (EMERGENCY RESPONDERS COMING INTO CONTACT WITH BODILY FLUIDS OR HAZARDOUS MATERIAL)

The elements of the crime of assault in the third degree (emergency responders coming into contact with bodily fluids or hazardous material) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with the intent,

4. to +harass, annoy, threaten, or alarm,

5. a person whom the defendant knew, or reasonably should have known, to be a peace officer, a firefighter, an emergency medical care provider, or an emergency medical service provider,

6. caused the other person to come into contact with blood, seminal fluid, urine, feces, saliva, mucus, vomit, or toxic, caustic, or hazardous material,

7. by any means, including throwing, tossing, or expelling the fluid or material.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of assault in the second degree (emergency responders coming into contact with bodily fluids or hazardous material).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of assault in the second degree (emergency responders coming into contact with bodily fluids or hazardous material).

COMMENT

1. See § 18-3-204(1)(b), C.R.S. 2015.

2. *See* Instruction F:118 (defining "emergency medical care provider"); Instruction F:119 (defining "emergency medical service provider"); Instruction F:123 (defining "engaged in the performance of his [her] duties"); Instruction F:157 (defining "firefighter"); Instruction F:185 (defining "with intent"); Instruction F:263 (defining "peace officer").

3. + In 2015, to reflect a legislative amendment, the Committee deleted the words "infect, injure, harm" from the fourth element. *See* Ch. 337, sec. 3, § 18-3-204(1)(b), 2015 Colo. Sess. Laws 1366, 1367.

3-2:23.INT ASSAULT IN THE THIRD DEGREE - INTERROGATORY (EMERGENCY RESPONDERS ENGAGED IN DUTIES)

If you find the defendant not guilty of assault in the third degree, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of assault in the third degree, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

> Was the victim a peace officer, emergency medical service provider, emergency medical care provider, or firefighter engaged in the performance of his [her] duties? (Answer "Yes" or "No")

The victim was a peace officer, emergency medical service provider, emergency medical care provider, or firefighter engaged in the performance of his [her] duties only if:

1. he [she] was a peace officer, an emergency medical service provider, an emergency medical care provider, or a firefighter, and

2. he [she] was engaged in the performance of his [her] duties.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-1.3-501(1.5)(a), C.R.S. 2015.

2. *See* Instruction F:118 (defining "emergency medical care provider"); Instruction F:119 (defining "emergency medical service provider"); Instruction F:123 (defining "engaged in the performance of his [her] duties"); Instruction F:157 (defining "firefighter"); Instruction F:263 (defining "peace officer"); *see, e.g.*, Instruction E:28 (special verdict form).

3-2:24.INT ASSAULT IN THE THIRD DEGREE - INTERROGATORY (MENTAL HEALTH PROFESSIONAL ENGAGED IN DUTIES)

If you find the defendant not guilty of assault in the third degree, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of assault in the third degree, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

> Was the victim a mental health professional engaged in the performance of his [her] duties? (Answer "Yes" or "No")

The victim was a mental health professional engaged in the performance of his [her] duties only if:

1. he [she] was a "mental health professional,"

2. employed by or under contract with the department of human services,

3. engaged in the performance of his [her] duties.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-1.3-501(1.7)(a), C.R.S. 2015.

2. *See* Instruction F:227 (defining "mental health professional"); *see, e.g.*, Instruction E:28 (special verdict form).

3. Although section 18-1.3-501(1.5)(b), C.R.S. 2015, defines the phrase "engaged in the performance of his [her] duties" for purposes of the enumerated types of first responders, section 18-1.3-501(1.7), C.R.S. 2015, does not include a similar provision indicating how the same phrase is to be defined for purposes of a "mental health professional."

3-2:25.INT ASSAULT IN THE THIRD DEGREE - INTERROGATORY (AT-RISK ADULT OR JUVENILE)

If you find the defendant not guilty of assault in the third degree, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of assault in the third degree, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the victim a person with protected status?
(Answer "Yes" or "No")

The victim was a person with protected status only if:

[1. the victim was seventy years of age or older.]

[1. the victim was eighteen years of age or older, and

2. was a person with a disability.]

[1. the victim was under the age of eighteen years, and

2. was a person with a disability.]

The prosecution has the burden to prove [the] [each] numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-6.5-103(3)(c), C.R.S. 2015.

2. *See* Instruction F:24 (defining "at-risk adult"); Instruction F:26 (defining "at-risk juvenile"); Instruction

F:273 (defining "person with a disability"); *see*, *e.g.*, Instruction E:28 (special verdict form).

3-2:26 VEHICULAR ASSAULT (RECKLESS)

The elements of the crime of vehicular assault (reckless) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. operated or drove a motor vehicle,

4. in a reckless manner, and

5. such conduct was the proximate cause of serious bodily injury to another person.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of vehicular assault (reckless).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of vehicular assault (reckless).

COMMENT

1. *See* § 18-3-205(1)(a), C.R.S. 2015.

2. *See* Instruction F:236 (defining "motor vehicle"); Instruction F:308 (defining "recklessly"); Instruction F:332 (defining "serious bodily injury"); *see also* CJI-Civ. 9:18 (2014) (defining "cause"); CJI-Civ. Ch. 9, § B (Causation) (2014) ("The [Colorado Supreme Court Committee on Civil Jury Instructions] has intentionally eliminated the use of the word 'proximate' when instructing the jury on causation issues because the concept of proximate cause is adequately included in the instructions in this Part B and because the word 'proximate' tends to be confusing to the jury."); *People v. Stewart*, 55 P.3d 107, 116 (Colo. 2002) (discussing the significance of the

different definitions of “cause” and “proximate cause” that appeared in COLJI-Crim. (1983)).

3-2:27 VEHICULAR ASSAULT (UNDER THE INFLUENCE)

The elements of the crime of vehicular assault (under the influence) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. operated or drove a motor vehicle,

4. while under the influence of alcohol or one or more drugs, or a combination of both alcohol and one or more drugs,

5. and such conduct was the proximate cause of serious bodily injury to another person.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of vehicular assault (under the influence).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of vehicular assault (under the influence).

COMMENT

1. *See* § 18-3-205(1)(b)(I), C.R.S. 2015.

2. *See* Instruction F:109 (defining "driving under the influence"); Instruction F:236 (defining "motor vehicle"); Instruction F:252 (defining "one or more drugs"); Instruction F:332 (defining "serious bodily injury"); *see also* CJI-Civ. 9:18 (2014) (defining "cause"); CJI-Civ. Ch. 9, § B (Causation) (2014) ("The [Colorado Supreme Court Committee on Civil Jury Instructions] has intentionally eliminated the use of the word 'proximate' when instructing the jury on causation issues because the concept of proximate cause is adequately included in

the instructions in this Part B and because the word 'proximate' tends to be confusing to the jury."); *People v. Stewart*, 55 P.3d 107, 116 (Colo. 2002) (discussing the significance of the different definitions of "cause" and "proximate cause" that appeared in COLJI-Crim. (1983)).

3. Sections 18-3-106(1)(b)(I), (IV) (vehicular homicide) and 18-3-205(1)(b)(I), (IV)(vehicular assault), apply to a person who "*operates* or drives a motor vehicle while under the influence." (Emphasis added.) By contrast, the traffic offense of driving under the influence (DUI) does not include a reference to operation; rather, the DUI statute specifies that it is unlawful for a person who is under the influence "to *drive* a motor vehicle or vehicle." § 42-4-1301(1)(a), C.R.S. 2015 (emphasis added). Because neither "drive" nor "operate" is defined by statute (either in the criminal code, or in the traffic code), a court exercising its discretion to draft a supplemental definitional instruction should refer to precedent:

> We have held that "drive" means to exercise "actual physical control" over a motor vehicle. *People v. Swain*, 959 P.2d 426, 429, 431 (1998) (so holding in context of a DUI case where defendant's keys were in the ignition and the truck's radio was playing, but defendant was asleep or passed out in the front seat); *Brewer v. Motor Vehicle Div., Dep't of Revenue*, 720 P.2d 564, 566–67 (Colo. 1986) (holding under the express consent statute that driving means being "in actual physical control" of a motor vehicle and is not limited to "placing and controlling a vehicle in motion"). The term "operate" is somewhat broader, connoting the action of causing something "to occur . . . [or] to cause to function usually by direct personal effort." *People v. Gregor*, 26 P.3d 530, 532 (Colo. Ct. App. 2000) (quoting *Webster's Third New International Dictionary* 1580–81 (1986)).

People v. Stewart, 55 P.3d 107, 115 (Colo. 2002).

Further, although the phrase "driving under the influence" is defined identically for purposes of sections 18-3-106(1)(b)(I), (IV) (vehicular homicide) and 18-3-205(1)(b)(I), (IV)(vehicular assault), the wording of that shared definition is slightly different from the definition of "driving under the influence" that appears as part of the traffic code in section 42-4-1301(1)(f), C.R.S. 2015. *Compare* Instruction F:109 (defining "driving under the influence" (vehicular homicide and

vehicular assault)), *with* Instruction F:110 (defining "driving under the influence" (traffic code)). And there are significant differences between the definition of a "motor vehicle" in section 18-1-901(3)(k), C.R.S. 2015, and the definition of that same term that appears in section 42-1-102(58), C.R.S. 2015. *Compare* Instruction F:236 (defining "motor vehicle" for Title 18), *with* Instruction F:239 (defining "motor vehicle" for Title 42).

Finally, there are two internal inconsistencies within the statutory sections that define the criminal offenses of vehicular homicide and vehicular assault.

First, although sections 18-3-106(1)(b)(I) and 18-3-205(1)(b)(I) apply only to *motor* vehicles, the definitions of "driving under the influence" in +sections 18-3-106(1)(b)(IV) and 18-3-205(1)(b)(IV) speak in terms of driving "a vehicle," with no references to motorization. In cases involving vehicles that are indisputably motorized, this discrepancy will be inconsequential. However, in a case where there is a controversy concerning whether the vehicle in question was motorized, the court should add the word "motor" to the statutory definition that appears in Instruction F:109.

Second, as noted above, sections 18-3-106(1)(b)(I) and 18-3-205(1)(b)(I) both apply to a person who "*operates* or drives" (emphasis added) a motor vehicle while under the influence. Yet neither "operate" nor "operating" is included as part of the definition of "driving under the influence" in sections 18-3-106(1)(b)(I) and 18-3-205(1)(b)(I). In cases involving only an allegation of "driving," this discrepancy will be inconsequential. However, in other situations, the statutory definition that appears in Instruction F:109 may need to be modified as follows: (1) in a case involving only an allegation of operation, by substituting "operating" for "driving;" and (2) in a case involving an allegation of operation and/or driving, by adding the word "operating."

4. + In 2015, the Committee corrected two statutory citations in Comment 3 where indicated.

3-2:28.SP VEHICULAR ASSAULT - SPECIAL INSTRUCTION (BLOOD OR BREATH ALCOHOL LEVEL)

As to the charge of vehicular assault, the amount of alcohol in the defendant's blood or breath at the time of the alleged offense, or within a reasonable time thereafter, as shown by analysis of the defendant's blood or breath, gives rise to the following:

(a) Presumption:

It shall be presumed that the defendant was not under the influence of alcohol if there was at such time 0.05 or less grams of alcohol per one hundred milliliters of blood, or if there was at such time 0.05 or less grams of alcohol per two hundred ten liters of breath.

A presumption requires you to find a fact, as if it had been established by evidence, unless the presumption is rebutted by evidence to the contrary.

(b) Evidentiary Consideration:

If there was at such time in excess of 0.05 but less than 0.08 grams of alcohol per one hundred milliliters of blood, or if there was at such time in excess of 0.05 but less than 0.08 grams of alcohol per two hundred ten liters of breath, such fact may be considered with other competent evidence in determining whether or not the defendant was under the influence of alcohol.

(c) Permissible inference:

A permissible inference that the defendant was under the influence of alcohol may be drawn if there was at such time 0.08 or more grams of alcohol per one hundred milliliters of blood, or if there was at such time 0.08 or more grams of alcohol per two hundred ten liters of breath.

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a

reasonable doubt, and that an evidentiary consideration or a permissible inference does not shift that burden to the defendant.

COMMENT

1. *See* § 18-3-205(2)(a-c), C.R.S. 2015.

3-2:29.SP VEHICULAR ASSAULT - SPECIAL INSTRUCTION (DELTA 9-TETRAHYDROCANNABINOL LEVEL)

As to the charge of vehicular assault, a permissible inference that the defendant was under the influence of one or more drugs may be drawn if the amount of delta 9-tetrahydrocannabinol in the defendant's blood at the time of the alleged offense, or within a reasonable time thereafter, as shown by analysis of the defendant's blood, was five nanograms or more per milliliter in whole blood.

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

COMMENT

1. *See* § 18-3-205(2)(d), C.R.S. 2015.

3-2:30 MENACING

The elements of the crime of menacing are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. by any threat or physical action,

5. placed or attempted to place another person in fear of imminent serious bodily injury.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of menacing.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of menacing.

COMMENT

1. *See* § 18-3-206(1), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:332 (defining "serious bodily injury"); +.

3. + In the absence of case law on point, the Committee takes no position on whether the word "attempted" in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

4. + In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 3.

3-2:31.INT MENACING – INTERROGATORY (USE, OR SUGGESTED USE, OF A DEADLY WEAPON)

If you find the defendant not guilty of menacing, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of menacing, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the menacing involve the use or suggested use of a deadly weapon? (Answer "Yes" or "No")

The menacing involved the use or suggested use of a deadly weapon only if:

1. the defendant committed the menacing by the use of a deadly weapon or any article used or fashioned in a manner to cause a person to reasonably believe that the article was a deadly weapon, or by representing verbally or otherwise that he [she] was armed with a deadly weapon.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-3-206(1)(a), (b), C.R.S. 2015.

2. *See* Instruction F:88 (defining "deadly weapon").

3-2:32 EXTORTION (UNLAWFUL ACT)

The elements of the crime of extortion (unlawful act) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. without legal authority, and

4. with the intent,

5. to induce another person against that other person's will to perform an act or to refrain from performing a lawful act,

6. made a substantial threat to confine or restrain, cause economic hardship or bodily injury to, or damage the property or reputation of, the threatened person or another person, and

7. threatened to cause the result[s] by performing or causing an unlawful act to be performed.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of extortion (unlawful act).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of extortion (unlawful act).

COMMENT

1. *See* § 18-3-207(1)(a), (b)(I), C.R.S. 2015.

2. *See* Instruction F:36 (defining "bodily injury"); Instruction F:185 (defining "with intent"); Instruction F:357 (defining "substantial threat").

3-2:33 EXTORTION (THIRD PARTY)

The elements of the crime of extortion (third party) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. without legal authority, and

4. with the intent,

5. to induce another person against that other person's will to perform an act or to refrain from performing a lawful act,

6. made a substantial threat to confine or restrain, cause economic hardship or bodily injury to, or damage the property or reputation of, the threatened person or another person, and

7. threatened to cause the result[s] by invoking action by a third party, including but not limited to, the state or any of its political subdivisions, whose interests were not substantially related to the interests pursued by the defendant.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of extortion (third party).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of extortion (third party).

COMMENT

1. *See* § 18-3-207(1)(a), (b)(II), C.R.S. 2015.

2. *See* Instruction F:36 (defining "bodily injury"); Instruction F:185 (defining "with intent"); Instruction F:357 (defining "substantial threat").

3-2:34 EXTORTION (IMMIGRATION STATUS)

The elements of the crime of extortion (immigration status) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with the intent,

4. to induce another person against that other person's will to give the defendant money or another item of value,

5. threatened to report to law enforcement officials the immigration status of the threatened person or another person.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of extortion (immigration status).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of extortion (immigration status).

COMMENT

1. *See* § 18-3-207(1.5), C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent").

3-2:35 AGGRAVATED EXTORTION

The elements of the crime of aggravated extortion are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. without legal authority, and

4. with the intent,

5. to induce another person against that other person's will to perform an act or refrain from performing a lawful act,

6. made a substantial threat to confine or restrain, cause economic hardship or bodily injury to, or damage the property or reputation of, the threatened person or another person, and

7. threatened to cause the result[s] by means of chemical, biological, or harmful radioactive agents, weapons, or poison.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated extortion.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated extortion.

COMMENT

1. *See* § 18-3-207(2), C.R.S. 2015.

2. *See* Instruction F:36 (defining "bodily injury"); Instruction F:185 (defining "with intent"); Instruction F:357 (defining "substantial threat").

3-2:36 RECKLESS ENDANGERMENT

The elements of the crime of reckless endangerment are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. recklessly,

4. engaged in conduct which created a substantial risk of serious bodily injury to another person.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of reckless endangerment.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of reckless endangerment.

COMMENT

1. *See* § 18-3-208, C.R.S. 2015.

2. *See* Instruction F:308 (defining "recklessly"); Instruction F:332 (defining "serious bodily injury").

3-2:37.INT RECKLESS ENDANGERMENT - INTERROGATORY (MENTAL HEALTH PROFESSIONAL ENGAGED IN DUTIES)

If you find the defendant not guilty of reckless endangerment, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of reckless endangerment, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

> Was the victim a mental health professional engaged in the performance of his [her] duties? (Answer "Yes" or "No")

The victim was a mental health professional engaged in the performance of his [her] duties only if:

1. he [she] was a "mental health professional,"

2. employed by or under contract with the department of human services,

3. engaged in the performance of his [her] duties.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-1.3-501(1.7)(a), C.R.S. 2015.

2. *See* Instruction F:227 (defining "mental health professional"); *see, e.g.*, Instruction E:28 (special verdict form).

3. Although section 18-1.3-501(1.5)(b), C.R.S. 2015, defines the phrase "engaged in the performance of his [her] duties" for purposes of the enumerated types of first responders, section 18-1.3-501(1.7), C.R.S. 2015, does not include a similar provision indicating how the same phrase is to be defined for purposes of a "mental health professional."

CHAPTER 3-3

KIDNAPPING AND RELATED OFFENSES

3-3:01 FIRST DEGREE KIDNAPPING (FORCIBLY SEIZED AND CARRIED)

The elements of the crime of first degree kidnapping (forcibly seized and carried) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with the intent,

4. to force a person to make any concession or give up anything of value in order to secure a release of a person under the defendant's actual or apparent control,

5. forcibly seized and carried any person from one place to another.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of first degree kidnapping (forcibly seized and carried).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of first degree kidnapping (forcibly seized and carried).

COMMENT

1. *See* § 18-3-301(1)(a), C.R.S. 2015.

2. *See* Instruction F:21 (defining "anything of value"); Instruction F:185 (defining "with intent"); Instruction 3-3:05, Comment 4 (discussing decisions addressing the phrase "seized and carried").

3. The term "concession" is not defined by statute. *See People v. San Emerterio*, 839 P.2d 1161, 1165-68 (Colo. 1992)

(the term "concession," as used in first degree kidnapping statute is broad enough to include a promise that has sufficient subjective value to the kidnapper that he would hinge release of a victim upon that promise; it is immaterial that the kidnapper might not have control over the victim after release, and might be unable to secure the victim's performance of the promise on which the kidnapper conditioned release); *see also People v. Weare*, 155 P.3d 527, 529-30 (Colo. App. 2006) (first degree kidnapping does not require proof that the kidnapper intended to release the victim upon obtaining the concession sought; statutory phrase "in order to secure a release" simply describes the purpose of the concession the offender must intend to force the victim to make, and not to add a separate intent requirement).

3-3:02 FIRST DEGREE KIDNAPPING (ENTICED OR PERSUADED)

The elements of the crime of first degree kidnapping (enticed or persuaded) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with the intent,

4. to force a person to make any concession or give up anything of value in order to secure a release of a person under the defendant's actual or apparent control,

5. enticed or persuaded any person to go from one place to another.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of first degree kidnapping (enticed or persuaded).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of first degree kidnapping (enticed or persuaded).

COMMENT

1. *See* § 18-3-301(1)(b), C.R.S. 2015.

2. *See* Instruction F:21 (defining "anything of value"); Instruction F:185 (defining "with intent"); Instruction 3-3:05, Comment 4 (discussing decisions addressing the phrase "seized and carried").

3. *See* Instruction 3-3:01, Comment 3 (discussing the term "concession").

3-3:03 FIRST DEGREE KIDNAPPING (IMPRISONED OR FORCIBLY SECRETED)

The elements of the crime of first degree kidnapping (imprisoned or forcibly secreted) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with the intent,

4. to force a person to make any concession or give up anything of value in order to secure a release of a person under the defendant's actual or apparent control,

5. imprisoned or forcibly secreted any person.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of first degree kidnapping (imprisoned or forcibly secreted).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of first degree kidnapping (imprisoned or forcibly secreted).

COMMENT

1. *See* § 18-3-301(1)(c), C.R.S. 2015.

2. *See* Instruction F:21 (defining "anything of value"); Instruction F:185 (defining "with intent"); Instruction 3-3:05, Comment 4 (discussing decisions addressing the phrase "seized and carried"); *see also Webster's Third New International Dictionary* 2052 (2002) (defining "secret" as meaning "to deposit or conceal in a hiding place").

3. *See* Instruction 3-3:01, Comment 3 (discussing the term "concession").

3-3:04.INT INTERROGATORY - FIRST DEGREE KIDNAPPING (BODILY INJURY)

If you find the defendant not guilty of first degree kidnapping, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of first degree kidnapping, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the victim harmed during the kidnapping?
(Answer "Yes" or "No")

The victim was harmed during the kidnapping only if:

1. the person who was kidnapped suffered bodily injury.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-3-301(2), C.R.S. 2015 ("Whoever commits first degree kidnapping is guilty of a class 1 felony if the person kidnapped shall have suffered bodily injury"); § 18-3-301(3), C.R.S. 2015 ("Whoever commits first degree kidnapping commits a class 2 felony if, prior to his conviction, the person kidnapped was liberated unharmed.").

2. *See* Instruction F:36 (defining "bodily injury"); *see, e.g.*, Instruction E:28 (special verdict form).

3. Because the definition of "bodily injury" encompasses "physical pain, illness or physical or mental impairment,

however slight," *People v. Hines*, 572 P.2d 467, 470 (Colo. 1977) (emphasis added), the interrogatory equates the absence of "bodily injury," under section 18-3-301(2), with the condition of being "unharmed," under section 18-3-301(3). *See Miller v. District Court*, 593 P.2d 1379 (Colo. 1979) ("liberated unharmed" means without having suffered bodily injury); *see also People v. Hines*, 572 P.2d at 470 ("It may be that in some [first degree kidnapping] cases injuries might be so trifling as to be excluded from the category of 'bodily injury' the legislature contemplated. Should such a borderline case arise, the question whether bodily injury occurred would be one of statutory construction."). However, an ambiguity could arise in a case where there is no evidence showing whether the victim suffered bodily injury or was "liberated unharmed" (for example, where the victim's welfare and whereabouts are unknown at the time of trial).

In COLJI-Crim. (1983), the Committee addressed this possible ambiguity by relying on a non-statutory concept of "presumed . . . harm to the victim" if the victim had not been released by the time of trial. *See* COLJI-Crim. Ch. 11, Notes on Chapter Use, 197 (1983). Thus, COLJI-Crim. 11:01 (1983), which was based on the same language of section 18-3-301 that remains in effect today, defined a class one felony offense of first degree kidnapping for which no finding of bodily injury was required if the jury made a finding that "the person kidnapped has not been released." *See* COLJI-Crim. 11:01, Notes on Use (1983).

Thereafter, in COLJI-Crim. 3-3:03 (2008), the Committee abandoned the presumption that a victim who has not been released has been harmed. That interrogatory simply asked the jury to determine whether the prosecution had proved that the person who was kidnapped had suffered "bodily injury."

4. This edition of COLJI-Crim. does not include an interrogatory addressing the following provision of section 18-3-301(2): "no person convicted of first degree kidnapping shall suffer the death penalty if the person kidnapped was liberated alive prior to the conviction of the kidnapper." *See Kennedy v. Louisiana*, 554 U.S. 407 (2008) (the Eighth Amendment categorically bars death sentences for nonhomicide crimes).

3-3:05 SECOND DEGREE KIDNAPPING (SEIZED AND CARRIED)

The elements of the crime of second degree kidnapping (seized and carried) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. seized and carried any person from one place to another,

5. without his [her] consent, and

6. without lawful justification.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of second degree kidnapping (seized and carried).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of second degree kidnapping (seized and carried).

COMMENT

1. *See* § 18-3-302(1), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly").

3. The supreme court has held that the term "without lawful justification" is:

> such a basic concept that the use of explanatory synonyms add little, if anything, to the central core of meaning inherent in the term itself. In the context of the crime of second degree kidnapping,

> therefore, the term "without lawful justification" simply means an act not authorized or permitted by law - in other words, an act performed without lawful authority.

People v. Schuett, 833 P.2d 44, 47 (Colo. 1992).

4. It is within a trial court's discretion to give an instruction defining the term "seized and carried" as meaning "any movement, however short in distance." *People v. Rogers*, 220 P.3d 931, 936 (Colo. App. 2008). Further, if a court elects to define this term, it is not obligated to include language addressing the resulting increased risk of harm:

> [A]s clarified in [*People v. Harlan*, 8 P.3d 448, 476 (Colo. 2000)], a substantial increase in the risk of harm is not a material element of the crime upon which a jury must be instructed. It is, instead, only "a factual circumstance reviewing courts consider in some cases to determine whether there is sufficient evidence to prove that the defendant moved the victim from one place to another."

People v. Owens, 97 P.3d 227, 237 (Colo. App. 2004) (quoting *People v. Harlan*, 8 P.3d at 476).

3-3:06 SECOND DEGREE KIDNAPPING (TAKING, ENTICING, OR DECOYING A MINOR)

The elements of the crime of second degree kidnapping (taking, enticing, or decoying a minor) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to keep or conceal the child from the child's parent or guardian, or to sell, trade, or barter the child for consideration,

5. took, enticed, or decoyed away a child under the age of eighteen,

6. not his [her] own.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of second degree kidnapping (taking, enticing, or decoying a minor).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of second degree kidnapping (taking, enticing, or decoying a minor).

COMMENT

1. *See* § 18-3-302(2), C.R.S. 2015.

2. *See* Instruction F:50 (defining "child"); Instruction F:185 (defining "with intent").

3. *See* Instruction H:36 (defining the affirmative defense of "mistake as to age").

4. The phrase "not his own" is undefined, but the use of the terms "parent" and "guardian" would seem to suggest that the phrase "not his own" was intended to refer to the absence of a custodial relationship. A division of the Court of Appeals has implied as much. *See People v. Woodward*, 631 P.2d 1188, 1190 (Colo. App. 1981) ("The child kidnapping statute prohibits unauthorized interference with a parent's *custodial* right to their [sic] children." (emphasis added)).

5. The term "consideration" is not defined in section 18-3-302. *See*, *e.g.*, *Black's Law Dictionary* 370 (10th ed. 2014) (defining "consideration" as: "Something (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee."). The definition that appears in section 4-3-303(b), C.R.S. 2015, should not be used because it is limited to contracts.

3-3:07.INT SECOND DEGREE KIDNAPPING – INTERROGATORY (VICTIM OF SEXUAL OFFENSE OR ROBBERY)

If you find the defendant not guilty of second degree kidnapping, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of second degree kidnapping, you should sign the verdict form to indicate your finding of guilt and answer the following verdict question on the verdict form:

> Was the person kidnapped also the victim of another specified crime? (Answer "Yes" or "No")

The person kidnapped was also the victim of another specified crime only if:

1. the person kidnapped was the victim of the crime of [insert sexual offense(s)] [robbery].

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-3-302(3), C.R.S. 2015.

2. *See, e.g.*, Instruction E:28 (special verdict form).

3. If the defendant is not separately charged with robbery or a relevant sexual offense, give the jury the elemental instruction for the referenced offense without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable).

In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense.

3-3:08.INT SECOND DEGREE KIDNAPPING – INTERROGATORY (CONSIDERATION)

If you find the defendant not guilty of second degree kidnapping, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of second degree kidnapping, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

> Was the kidnapping committed with the intent to gain something? (Answer "Yes" or "No")

The kidnapping was committed with the intent to gain something only if:

1. the kidnapping was accomplished with intent to sell, trade, or barter the victim for consideration.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-3-302(4)(a)(I), C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent"); *see, e.g.*, Instruction E:28 (special verdict form).

3. The term "consideration" is not defined in section 18-3-302. *See, e.g.*, *Black's Law Dictionary* 370 (10th ed. 2014) (defining "consideration" as: "Something (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee."). The definition that appears in

section 4-3-303(b), C.R.S. 2015, should not be used because it is limited to contracts.

3-3:09.INT SECOND DEGREE KIDNAPPING - INTERROGATORY (USE, OR SUGGESTED USE, OF A DEADLY WEAPON)

If you find the defendant not guilty of second degree kidnapping, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of second degree kidnapping, and you answer "No" to the question of whether the person kidnapped also was the victim of another specified crime, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

> Was the kidnapping committed by the use or suggested use of a deadly weapon? (Answer "Yes" or "No")

The kidnapping was committed by the use or suggested use of a deadly weapon only if:

1. the kidnapping was accomplished by the use of a deadly weapon or any article used or fashioned in a manner to cause a person to reasonably believe that the article was a deadly weapon, or by the kidnapper representing verbally or otherwise that he [she] was armed with a deadly weapon.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-3-302(4)(a)(II), (III), C.R.S. 2015.

2. *See* Instruction F:88 (defining "deadly weapon"); *see, e.g.*, Instruction E:28 (special verdict form).

3-3:10 FALSE IMPRISONMENT

The elements of the crime of false imprisonment are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. confined or detained another person,

5. without the other person's consent, and

6. without proper legal authority.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of false imprisonment.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of false imprisonment.

COMMENT

1. *See* § 18-3-303(1), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly").

3. *See* Instruction H:43 (affirmative defense of "peace officer acting in good faith"); Instruction H:47 (affirmative defense of "theft investigation").

4. In *People v. Reed*, 932 P.2d 842, 844 (Colo. App. 1996), a division of the Court of Appeals observed, in dicta, that "COLJI-Crim. No. 11:08 (1983), the pattern criminal jury instruction for false imprisonment pursuant to § 18-3-303, . . . provides that an element of the prosecution's case is proof that

the defendant is not a peace officer acting in good faith." Although the division in *Reed* endorsed that interpretation of the statute, the Committee is now of the view that the final sentence of section 18-3-303(1) establishes an affirmative defense. *See* Instruction H:43 (affirmative defense of "peace officer acting in good faith").

3-3:11.INT FALSE IMPRISONMENT - INTERROGATORY

If you find the defendant not guilty of false imprisonment, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of false imprisonment, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the false imprisonment involve force and extended detention? (Answer "Yes" or "No")

The false imprisonment involved force and extended detention only if:

1. the defendant used force, or threat of force, to confine or detain the victim, and

2. he [she] confined or detained the victim for twelve hours or longer.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-3-303(2)(a), (b), C.R.S. 2015.

2. *See, e.g.*, Instruction E:28 (special verdict form).

3-3:12 VIOLATION OF CUSTODY (TAKING OR ENTICING)

The elements of the crime of violation of custody (taking or enticing) are:

1. That the defendant, whether or not he [she] was a natural or foster parent of the child,

2. in the State of Colorado, at or about the date and place charged,

3. knowing that he [she] had no privilege to do so or heedless in that regard,

4. took or enticed any child, under the age of eighteen, from the custody or care of the child's parents, guardian, or other lawful custodian or person with parental responsibilities with respect to the child.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of violation of custody (taking or enticing).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of violation of custody (taking or enticing).

COMMENT

1. *See* § 18-3-304(1), C.R.S. 2015.

2. *See* Instruction F:50 (defining "child").

3. *See* Instruction H:36 (defining the affirmative defense of "mistake as to age"); Instruction H:44 (defining the affirmative defenses of "child in danger" and "child not enticed").

4. The term "heedless" is not defined by statute. The Committee recommends using the language of the statute, without elaboration.

3-3:13 VIOLATION OF CUSTODY (COURT ORDER)

The elements of the crime of violation of custody (court order) are:

1. That the defendant, whether or not he [she] was the child's parent,

2. in the State of Colorado, at or about the date and place charged,

3. violated an order of any district or juvenile court of this state, granting the custody of a child or parental responsibilities with respect to a child under the age of eighteen to any person, agency, or institution,

4. with the intent,

5. to deprive the lawful custodian or person with parental responsibilities of the custody or care of a child under the age of eighteen.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of violation of custody (court order).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of violation of custody (court order).

COMMENT

1. *See* § 18-3-304(2), C.R.S. 2015.

2. *See* Instruction F:50 (defining "child"); Instruction F:185 (defining "with intent").

3. Although a trial court has discretion to provide the jury with an instruction defining the term "custody order," such an

instruction should not include any references to noncustodial aspects of the order. *See People v. Sorrendino*, 37 P.3d 501, 505-07 (Colo. App. 2001).

4. The placement of the mens rea is consistent with *People v. Metcalf*, 926 P.2d 133, 137-38 (Colo. App. 1996) (section 18-3-304(2) does not require the prosecution to prove that the defendant knew he was violating a court order; the statutory language requiring intent is limited to the deprivation of custody of the child, and is not extended to the additional elements of the offense).

3-3:14.INT VIOLATION OF CUSTODY - INTERROGATORY

If you find the defendant not guilty of violation of custody, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of violation of custody, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant remove the child from this country? (Answer "Yes" or "No")

The defendant removed the child from this country only if:

1. in the course of committing the offense,

2. the defendant removed the child from this country.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-3-304(2.5), C.R.S. 2015.

2. *See* Instruction F:50 (defining "child"); *see, e.g.*, Instruction E:28 (special verdict form).

3-3:15 ENTICEMENT OF A CHILD

The elements of the crime of enticement of a child are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with the intent,

4. to commit the crime of sexual assault or unlawful sexual contact upon the child,

5. invited, persuaded, or attempted to invite or persuade a child, under the age of fifteen,

6. to enter any vehicle, building, room, or secluded place.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of enticement of a child.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of enticement of a child.

COMMENT

1. *See* § 18-3-305(1), C.R.S. 2015.

2. *See* Instruction F:51 (defining "child"); Instruction F:185 (defining "with intent"); +.

3. If the defendant is not separately charged with a sexual offense, give the jury the elemental instruction for the referenced offense without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above

instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense. Note that the statute does not require that the sexual offense be one that applies exclusively to child-victims.

4. *See* § 18-1-503.5(3), C.R.S. 2015 (affirmative defense based on a reasonable misbelief as to the child's age is unavailable where "the criminality of conduct depends on a child being younger than fifteen years of age").

5. + In the absence of case law on point, the Committee takes no position on whether the word "attempted" in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

6. + In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 5.

3-3:16.SP ATTEMPTED ENTICEMENT OF A CHILD - SPECIAL INSTRUCTION

In a prosecution for enticement of a child based on an alleged attempt, it is not necessary that the prosecution prove that the child perceived the defendant's act of enticement.

COMMENT

1. *See* § 18-3-305(1), C.R.S. 2015.

2. *See* Instruction F:51 (defining "child").

3-3:17.INT ENTICEMENT OF A CHILD - INTERROGATORY

If you find the defendant not guilty of enticement of a child, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of enticement of a child, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the enticement result in bodily injury?
(Answer "Yes" or "No")

The enticement resulted in bodily injury only if:

1. the victim suffered bodily injury,

2. as the result of the defendant's commission of the crime of enticement of a child.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-3-305(2), C.R.S. 2015.

2. *See* Instruction F:36 (defining "bodily injury"); *see, e.g.*, Instruction E:28 (special verdict form).

3-3:18 INTERNET LURING OF A CHILD

The elements of the crime of internet luring of a child are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. communicated by computer or computer network, telephone network, data network, text message or instant message,

5. to a person whom the defendant knew or believed to be under fifteen years of age and,

6. in that communication, or in any subsequent communication by computer, computer network, telephone network, data network, text message, or instant message,

7. described explicit sexual conduct, and

8. in connection with that description, made a statement persuading or inviting the person to meet the defendant for any purpose, and

9. the defendant was more than four years older than the person or the age the defendant believed the person to be.

[10. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of internet luring of a child.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of internet luring of a child.

COMMENT

1. *See* § 18-3-306(1), C.R.S. 2015.

2. *See* Instruction F:181 (defining "in connection with"); Instruction F:195 (defining "knowingly"); *see also* Instructions F:61, F:62 (defining "computer," and "computer network," for purposes of the offense of computer crime in violation of section 18-5.5-102, C.R.S. 2015); Instruction F:132 (defining "explicit sexual conduct" for purposes of sexual exploitation of a child).

3. *See* § 18-1-503.5(3), C.R.S. 2015 (affirmative defense based on a reasonable misbelief as to the child's age is unavailable where "the criminality of conduct depends on a child being younger than fifteen years of age").

3-3:19.SP INTERNET LURING OF A CHILD - SPECIAL INSTRUCTION

In a prosecution for internet luring of a child, it is not a defense that a meeting did not occur.

COMMENT

1. *See* § 18-3-306(2), C.R.S. 2015.

3-3:20.INT INTERNET LURING OF A CHILD - INTERROGATORY

If you find the defendant not guilty of internet luring of a child, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of internet luring of a child, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

> Did the defendant lure the victim for the specific purpose of sexual exploitation or sexual contact?
> (Answer "Yes" or "No")

The defendant lured the victim for the specific purpose of sexual exploitation or sexual contact only if:

1. the defendant committed the offense with the intent to meet,

2. for the purpose of engaging in sexual contact or the crime of sexual exploitation of a child.

The prosecution has the burden to prove each numbered conditions beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-3-306(3), C.R.S.

2. *See, e.g.*, Instruction E:28 (special verdict form).

3. If the defendant is not separately charged with sexual exploitation of a child, give the jury the elemental instruction for the offense without the two concluding paragraphs that

explain the burden of proof. *See* Instructions 6-4:17 to 6-4:21. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense.

CHAPTER 3-4

UNLAWFUL SEXUAL BEHAVIOR

COMMENTS ON CHAPTER USE

1. *See* Instruction E:11 (series of acts in a single count).

3-4:01 SEXUAL ASSAULT (SUBMISSION AGAINST WILL)

The elements of the crime of sexual assault (submission against will) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. inflicted sexual intrusion or penetration on a person, and

5. caused submission of the person by means of sufficient consequence reasonably calculated to cause submission against the person's will.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of sexual assault (submission against will).

After considering all of the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of sexual assault (submission against will).

COMMENT

1. *See* § 18-3-402(1)(a) C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:340 (defining "sexual intrusion"); Instruction F:343 (defining "sexual penetration").

3. *See* Instruction E:01 (bracketed admonition against gender bias).

4. *See People v. Smith*, 638 P.2d 1, 5 n.7 (Colo. 1981) ("[T]he phrase 'of sufficient consequence reasonably calculated' clearly

implies that the actor must be aware that his or her conduct is sufficient in character and degree to be likely to cause nonconsensual submission.”).

3-4:02 SEXUAL ASSAULT (INCAPABLE OF APPRAISING THE NATURE OF CONDUCT)

The elements of the crime of sexual assault (incapable of appraising the nature of conduct) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. inflicted sexual intrusion or penetration on a person,

5. knowing that the person was incapable of appraising the nature of his [her] own conduct.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of sexual assault (incapable of appraising the nature of conduct).

After considering all of the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of sexual assault (incapable of appraising the nature of conduct).

COMMENT

1. *See* § 18-3-402(1)(b) C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:340 (defining "sexual intrusion"); Instruction F:343 (defining "sexual penetration").

3. *See* Instruction E:01 (bracketed admonition against gender bias).

4. In *Platt v. People*, 201 P.3d 545, 548 (Colo. 2009), the supreme court analyzed two subsections of section 18-3-402(1)

and explained: "The fact that [section 18-3-401(3)] lists a sleeping victim as an example of a victim who is physically helpless under subsection (h) [of section 18-3-402(1)] does not mean that same victim cannot be cognitively unable to understand her conduct under subsection (b) [of section 18-3-402(1)]." Reviewing the record, the court held "that there was sufficient evidence to support Platt's conviction under section 18–3–402(1)(b) because the victim was sleeping and therefore unable to understand the nature of her conduct [at the time defendant inflicted sexual intrusion or penetration]." *Id.* at 547.

5. + *See People v. Bertrand*, 2014 COA 142, ¶¶ 17-21, 342 P.3d 582, 585-86 (noting that COLJI-Crim. (2014) does not include an instruction quoting from Platt v. People, 201 P.3d 545, 548 (Colo. 2009), and holding that the trial court committed reversible error by misquoting from that opinion).

6. + In 2015, the Committee added Comment 5, citing to *People v. Bertrand*, *supra*.

3-4:03 SEXUAL ASSAULT (ERRONEOUS BELIEF OF MARRIAGE)

The elements of the crime of sexual assault (erroneous belief of marriage) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. inflicted sexual intrusion or penetration on a person,

5. knowing that the person submitted erroneously, believing the defendant to be his [her] spouse.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of sexual assault (erroneous belief of marriage).

After considering all of the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of sexual assault (erroneous belief of marriage).

COMMENT

1. *See* § 18-3-402(1)(c) C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:340 (defining "sexual intrusion"); Instruction F:343 (defining "sexual penetration").

3. *See* Instruction E:01 (bracketed admonition against gender bias).

3-4:04 SEXUAL ASSAULT (UNDER FIFTEEN)

The elements of the crime of sexual assault (under fifteen) are:

1. That the defendant

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. inflicted sexual intrusion or penetration on a person, and

5. the person was less than fifteen years of age, and

6. the defendant was at least four years older than the person, and

7. the defendant was not the spouse of the person.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of sexual assault (under fifteen).

After considering all of the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of sexual assault (under fifteen).

COMMENT

1. *See* § 18-3-402(1)(d) C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:340 (defining "sexual intrusion"); Instruction F:343 (defining "sexual penetration").

3. *See* Instruction E:01 (bracketed admonition against gender bias).

3-4:05.SP SEXUAL ASSAULT (UNDER FIFTEEN) – SPECIAL INSTRUCTION (IGNORANCE OF THE CHILD'S AGE IS NOT A DEFENSE)

If a child is younger than fifteen, a person charged with sexual assault (under fifteen) cannot assert a defense based on the fact that the person did not know the child's age or reasonably believed the child to be fifteen years of age or older.

COMMENT

1. *See* § 18-1-503.5(3), C.R.S. 2015.

3-4:06 SEXUAL ASSAULT (AT LEAST FIFTEEN, BUT LESS THAN SEVENTEEN)

The elements of the crime of sexual assault (at least fifteen, but less than seventeen) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. inflicted sexual intrusion or penetration on a person, and

5. at the time of the commission of the act,

6. the person was at least fifteen years of age, but less than seventeen years of age, and

7. the defendant was at least ten years older than the person, and

8. the defendant was not the spouse of the person.

[9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of sexual assault (at least fifteen, but less than seventeen).

After considering all of the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of sexual assault (at least fifteen, but less than seventeen).

COMMENT

1. *See* § 18-3-402(1)(e) C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:340 (defining "sexual intrusion"); Instruction F:343 (defining "sexual penetration").

3. *See* Instruction E:01 (bracketed admonition against gender bias).

4. *See* Instruction H:36 (affirmative defense of "mistake as to age").

3-4:07 SEXUAL ASSAULT (IN CUSTODY OR DETAINED)

The elements of the crime of sexual assault (in custody or detained) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. inflicted sexual intrusion or penetration on a person, and

5. the person was in custody of law or detained in a hospital or other institution, and

6. the defendant had supervisory or disciplinary authority over the person, and

7. used that position of authority to coerce the person to submit, and

8. the act was not incident to a lawful search.

[9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of sexual assault (in custody or detained).

After considering all of the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of sexual assault (in custody or detained).

COMMENT

1. *See* § 18-3-402(1)(f) C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:340 (defining "sexual intrusion"); Instruction F:343 (defining "sexual penetration").

3. *See* Instruction E:01 (bracketed admonition against gender bias).

4. In cases where there is a dispute concerning whether the act was "incident to a lawful search," it may be appropriate to draft an instruction explaining relevant Fourth Amendment principles.

3-4:08 SEXUAL ASSAULT (TREATMENT OR EXAMINATION)

The elements of the crime of sexual assault (treatment or examination) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. inflicted sexual intrusion or penetration on a person,

5. while purporting to offer a medical service, and

6. engaging in treatment or examination of the person for other than a bona fide medical purpose or in a manner substantially inconsistent with reasonable medical practices.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of sexual assault (treatment or examination).

After considering all of the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of sexual assault (treatment or examination).

COMMENT

1. *See* § 18-3-402(1)(g) C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:340 (defining "sexual intrusion"); Instruction F:343 (defining "sexual penetration").

3. *See* Instruction E:01 (bracketed admonition against gender bias).

3-4:09 SEXUAL ASSAULT (PHYSICALLY HELPLESS)

The elements of the crime of sexual assault (physically helpless) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. inflicted sexual intrusion or penetration on a person,

5. who was physically helpless, and

6. the defendant knew the person was physically helpless and had not consented.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of sexual assault (physically helpless).

After considering all of the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of sexual assault (physically helpless).

COMMENT

1. *See* § 18-3-402(1)(h) C.R.S. 2015.

2. *See* Instruction F:68 (defining "consent"); Instruction F:195 (defining "knowingly"); Instruction F:278 (defining "physically helpless"); Instruction F:340 (defining "sexual intrusion"); Instruction F:343 (defining "sexual penetration").

3. *See* Instruction E:01 (bracketed admonition against gender bias).

3-4:10.INT SEXUAL ASSAULT – INTERROGATORY (FORCE OR VIOLENCE)

If you find the defendant not guilty of sexual assault, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual assault, you should sign the verdict form to indicate your guilty verdict and then answer the following verdict question on the verdict form:

Did the defendant cause submission through force or violence? (Answer "Yes" or "No")

The defendant caused submission through force or violence only if:

1. the defendant caused submission of the victim through the actual application of physical force or physical violence.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should indicate "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should indicate "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-3-402(4)(a), C.R.S. 2015.

2. *See*, *e.g.*, Instruction E:28 (special verdict form).

3. *See People v. Powell*, 716 P.2d 1096, 1100 (Colo. 1986) (because the word "force" is commonly used, there is no reason to provide the jury with a definitional instruction).

4. *See People v. Santana-Medrano*, 165 P.3d 804, 807 (Colo. App. 2006) (although the substantive offense of sexual assault requires proof that the defendant acted "knowingly," this mens rea does not also apply to the aggravating circumstances set forth in section 18-3-402(4)).

3-4:11.INT SEXUAL ASSAULT – INTERROGATORY (THREAT OF HARM)

If you find the defendant not guilty of sexual assault, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual assault, you should sign the verdict form to indicate your guilty verdict and then answer the following verdict question on the verdict form:

Did the defendant cause submission through threat of harm? (Answer "Yes" or "No")

The defendant caused submission through threat of harm only if:

1. the defendant caused submission of the victim by threat of imminent death, serious bodily injury, extreme pain, or the crime of kidnapping, to be inflicted on anyone, and

2. the victim believed that the defendant had the present ability to execute the threats.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should indicate "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should indicate "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-3-402(4)(b), C.R.S. 2015.

2. *See* Instruction F:332 (defining "serious bodily injury"); Instructions 3-3:01, 3-3:02, 3-3:03, 3-3:05, and 3-3:06

(defining the offense of kidnapping); *see*, *e.g.*, Instruction E:28 (special verdict form).

3. *See People v. Santana-Medrano*, 165 P.3d 804, 807 (Colo. App. 2006) (although the substantive offense of sexual assault requires proof that the defendant acted "knowingly," this mens rea does not also apply to the aggravating circumstances set forth in section 18-3-402(4)).

3-4:12.INT SEXUAL ASSAULT – INTERROGATORY (RETALIATION)

If you find the defendant not guilty of sexual assault, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual assault, you should sign the verdict form to indicate your guilty verdict and then answer the following verdict question on the verdict form:

> Did the defendant cause submission through threat of retaliation? (Answer "Yes" or "No")

The defendant caused submission through threat of retaliation only if:

1. the defendant caused submission of the victim by threatening to retaliate in the future against the victim, or any other person, and

2. the victim reasonably believed that the defendant would execute this threat.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should indicate "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should indicate "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-3-402(4)(c), C.R.S. 2015.

2. *See* Instruction F:323 (defining "retaliate"); *see, e.g.*, Instruction E:28 (special verdict form).

3. *See People v. Santana-Medrano*, 165 P.3d 804, 807 (Colo. App. 2006) (although the substantive offense of sexual assault

requires proof that the defendant acted "knowingly," this mens rea does not also apply to the aggravating circumstances set forth in section 18-3-402(4)).

3-4:13.INT SEXUAL ASSAULT – INTERROGATORY (SUBSTANTIAL IMPAIRMENT)

If you find the defendant not guilty of sexual assault, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual assault, you should sign the verdict form to indicate your guilty verdict and then answer the following verdict question on the verdict form:

> Did the defendant cause submission through substantial impairment? (Answer "Yes" or "No")

The defendant caused submission through substantial impairment only if:

1. the defendant substantially impaired the victim's power to appraise or control the victim's conduct by employing,

2. without the victim's consent,

3. any drug, intoxicant, or other means for the purpose of causing submission.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should indicate "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should indicate "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-3-402(4)(d), C.R.S. 2015.

2. *See* Instruction F:68 (defining "consent"); *see, e.g.*, Instruction E:28 (special verdict form).

3. *See People v. Santana-Medrano*, 165 P.3d 804, 807 (Colo. App. 2006) (although the substantive offense of sexual assault requires proof that the defendant acted "knowingly," this mens rea does not also apply to the aggravating circumstances set forth in section 18-3-402(4)).

3-4:14.INT SEXUAL ASSAULT – INTERROGATORY (AIDED BY ANOTHER)

If you find the defendant not guilty of sexual assault, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual assault, you should sign the verdict form to indicate your guilty verdict and then answer the following verdict question on the verdict form:

Was the defendant aided by another? (Answer "Yes" or "No")

The defendant was aided by another only if:

1. in the commission of the sexual assault,

2. the defendant was physically aided or abetted by one or more other persons.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should indicate "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should indicate "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-3-402(5)(a)(I), C.R.S. 2015.

2. *See* Instruction F:14 (defining "aid"); *see, e.g.*, Instruction E:28 (special verdict form).

3. See *Tumentsereg v. People*, 247 P.3d 1015, 1019 (Colo. 2011) ("Physically aiding or abetting therefore necessarily implies physical action in assisting with the commission of the sexual assault, but nothing in the statutory language limits that physical aiding or abetting to physical action directed against

the victim, as distinguished from physical action directed against a rescue attempt.”).

3-4:15.INT SEXUAL ASSAULT – INTERROGATORY (SERIOUS BODILY INJURY)

If you find the defendant not guilty of sexual assault, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual assault, you should sign the verdict form to indicate your guilty verdict and then answer the following verdict question on the verdict form:

Did the victim suffer serious bodily injury?
(Answer "Yes" or "No")

The victim suffered serious bodily injury only if:

1. in the commission of the sexual assault,

2. the victim suffered serious bodily injury.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should indicate "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should indicate "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-3-402(5)(a)(II), C.R.S. 2015.

2. *See* Instruction F:332 (defining "serious bodily injury"); *see, e.g.*, Instruction E:28 (special verdict form).

3-4:16.INT SEXUAL ASSAULT – INTERROGATORY (USE, OR SUGGESTED USE, OF A DEADLY WEAPON)

If you find the defendant not guilty of sexual assault, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual assault, you should sign the verdict form to indicate your guilty verdict and then answer the following verdict question on the verdict form:

Did the sexual assault involve the use, or suggested use, of a deadly weapon? (Answer "Yes" or "No")

The sexual assault involved the use, or suggested use, of a deadly weapon only if:

1. in the commission of the sexual assault,

2. the defendant was armed with a deadly weapon or an article used or fashioned in a manner to cause a person to reasonably believe that the article was a deadly weapon or represented verbally or otherwise that he [she] was armed with a deadly weapon, and

3. he [she] used the deadly weapon, article, or representation to cause submission of the victim.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should indicate "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should indicate "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-3-402(5)(a)(III), C.R.S. 2015.

2. *See* Instruction F:88 (defining "deadly weapon"); *see, e.g.*, Instruction E:28 (special verdict form).

3-4:17.INT SEXUAL ASSAULT – INTERROGATORY (NOTICE OF POSITIVE TEST FOR HIV)

If you find the defendant not guilty of sexual assault, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual assault, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

> Did the defendant commit the sexual assault with notice of a positive test for HIV? (Answer "Yes" or "No")

The defendant committed the sexual assault with notice of a positive test for HIV only if:

1. the sexual assault committed by the defendant involved sexual intercourse or anal intercourse, and

2. prior to committing the sexual assault, defendant had notice that he [she] had tested positive for the human immunodeficiency virus (HIV) that causes acquired immune deficiency syndrome.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-1.3-1004(1)(d), C.R.S. 2015.

2. *See, e.g.*, Instruction E:28 (special verdict form).

3. Although the model interrogatory tracks the language of section 18-1.3-1004(1)(d) by including the words "that causes acquired immune deficiency syndrome," the Committee notes that this causality language does not appear in section 18-3-415.5(5), C.R.S. 2015 ("notice of his or her HIV infection").

3-4:18.INT SEXUAL ASSAULT – INTERROGATORY (SEXUAL INTRUSION OR PENETRATION; CHILD UNDER TWELVE)

If you find the defendant not guilty of sexual assault, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual assault, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

> Did the defendant commit sexual penetration or sexual intrusion of a child under twelve years of age? (Answer "Yes" or "No")

The defendant committed sexual penetration or sexual intrusion of a child under twelve years of age only if:

1. the act of sexual assault committed by the defendant included sexual intrusion or sexual penetration;

2. defendant committed the act against a child who was under twelve years of age at the time of the offense; and

3. the defendant was at least eighteen years of age and at least ten years older than the child.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-1.3-1004(1)(e)(I)(A-C), C.R.S. 2015 (sentence enhancement factor applies to enumerated sex offenses only if committed as a class 2, 3, or 4 felony).

2. *See* Instruction F:340 (defining "sexual intrusion"); Instruction F:343 (defining "sexual penetration"); *see, e.g.*, Instruction E:28 (special verdict form).

3-4:19.INT SEXUAL ASSAULT – INTERROGATORY (AT-RISK VICTIM)

If you find the defendant not guilty of sexual assault, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual assault, you should sign the verdict form to indicate your guilty verdict and then answer the following verdict question on the verdict form:

Was the victim a person with protected status?
(Answer "Yes" or "No")

The victim was a person with protected status only if:

[1. the victim was seventy years of age or older.]

[1. the victim was eighteen years of age or older, and

2. was a person with a disability.]

[1. the victim was under the age of eighteen years, and

2. was a person with a disability.]

The prosecution has the burden to prove [the] [each] numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should indicate "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should indicate "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-6.5-103(7)(a), C.R.S. 2015 (at-risk persons).

2. *See* Instruction F:24 (defining "at-risk adult"); Instruction F:26 (defining "at-risk juvenile"); Instruction

F:273 (defining "person with a disability"); *see, e.g.*, Instruction E:28 (special verdict form).

3-4:20 UNLAWFUL SEXUAL CONTACT (LACK OF CONSENT)

The elements of the crime of unlawful sexual contact (lack of consent) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. subjected a person to any sexual contact,

5. knowing that the person did not consent.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful sexual contact (lack of consent).

After considering all of the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful sexual contact (lack of consent).

COMMENT

1. *See* § 18-3-404(1)(a) C.R.S. 2015.

2. *See* Instruction F:68 (defining "consent"); Instruction F:195 (defining "knowingly"); Instruction F:337 (defining "sexual contact").

3. *See* Instruction E:01 (bracketed admonition against gender bias).

3-4:21 UNLAWFUL SEXUAL CONTACT (INCAPABLE OF APPRAISING NATURE OF CONDUCT)

The elements of the crime of unlawful sexual contact (incapable of appraising nature of conduct) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. subjected a person to any sexual contact,

5. knowing that the person was incapable of appraising the nature of his [her] own conduct.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful sexual contact (incapable of appraising nature of conduct).

After considering all of the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful sexual contact (incapable of appraising nature of conduct).

COMMENT

1. *See* § 18-3-404(1)(b), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:337 (defining "sexual contact").

3. *See* Instruction E:01 (bracketed admonition against gender bias).

3-4:22 UNLAWFUL SEXUAL CONTACT (PHYSICALLY HELPLESS)

The elements of the crime of unlawful sexual contact (physically helpless) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. subjected a person to any sexual contact, and

5. the person was physically helpless, and

6. the defendant knew the person was physically helpless and had not consented.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful sexual contact (physically helpless).

After considering all of the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful sexual contact (physically helpless).

COMMENT

1. *See* § 18-3-404(1)(c) C.R.S. 2015.

2. *See* Instruction F:68 (defining "consent"); Instruction F:195 (defining "knowingly"); Instruction F:278 (defining "physically helpless"); Instruction F:337 (defining "sexual contact").

3. *See* Instruction E:01 (bracketed admonition against gender bias).

3-4:23 UNLAWFUL SEXUAL CONTACT (SUBSTANTIAL IMPAIRMENT)

The elements of the crime of unlawful sexual contact (substantial impairment) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. subjected a person to any sexual contact, and

5. substantially impaired the person's power to appraise or control his [her] own conduct,

6. by employing, without the person's consent, any drug, intoxicant, or other means for the purpose of causing submission.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful sexual contact (substantial impairment).

After considering all of the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful sexual contact (substantial impairment).

COMMENT

1. *See* § 18-3-404(1)(d) C.R.S. 2015.

2. *See* Instruction F:68 (defining "consent"); Instruction F:195 (defining "knowingly"); Instruction F:337 (defining "sexual contact").

3. *See* Instruction E:01 (bracketed admonition against gender bias).

3-4:24 UNLAWFUL SEXUAL CONTACT (IN CUSTODY OR DETAINED)

The elements of the crime of unlawful sexual contact (in custody or detained) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. subjected a person to any sexual contact, and

5. the person was in custody of law or detained in a hospital or other institution, and

6. the defendant had supervisory or disciplinary authority over the person, and

7. used that position of authority to coerce the person to submit, and

8. the act was not incident to a lawful search.

[9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of sexual assault (in custody or detained).

After considering all of the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of sexual assault (in custody or detained).

COMMENT

1. *See* § 18-3-404(1)(f) C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:337 (defining "sexual contact").

3. *See* Instruction E:01 (bracketed admonition against gender bias).

4. In a case where there is a dispute concerning whether the act was "incident to a lawful search," it may be appropriate to draft an instruction explaining relevant Fourth Amendment principles.

3-4:25 UNLAWFUL SEXUAL CONTACT (TREATMENT OR EXAMINATION)

The elements of the crime of unlawful sexual contact (treatment or examination) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. subjected a person to any sexual contact,

5. while engaging in treatment or examination of the person for other than a bona fide medical purpose or in a manner substantially inconsistent with reasonable medical practices.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of sexual assault (treatment or examination).

After considering all of the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of sexual assault (treatment or examination).

COMMENT

1. *See* § 18-3-404(1)(g) C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:337 (defining "sexual contact").

3. *See* Instruction E:01 (bracketed admonition against gender bias).

4. Unlike the corollary sexual assault provision, *see* § 18-3-402(1)(g), C.R.S. 2015, section 18-3-404(1)(g) does not include

the following clause: "while purporting to offer a medical service." Although this variance is reflected in the above model instruction, it is unclear whether the General Assembly intentionally omitted this language from section 18-3-404(1)(g).

3-4:26 UNLAWFUL SEXUAL CONTACT (UNDER EIGHTEEN)

The elements of the crime of unlawful sexual contact (under eighteen) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. with or without sexual contact,

5. induced or coerced a person under the age of eighteen, by [any of] the following means: [insert relevant provision(s) of section 18-3-402, using language from Instructions 3-4:01 to 3-4:09],

6. to expose intimate parts or engage in any sexual contact, intrusion, or penetration with another person,

7. for the purpose of the defendant's own sexual gratification.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful sexual contact (under eighteen).

After considering all of the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful sexual contact (under eighteen).

COMMENT

1. *See* § 18-3-404(1.5), C.R.S. 2015.

2. *See* Instruction F:50 (defining "child"); Instruction F:186 (defining "intimate parts"); Instruction F:195 (defining

"knowingly"); Instruction F:337 (defining "sexual contact"); Instruction F:340 (defining "sexual intrusion"); Instruction F:343 (defining "sexual penetration").

3. *See* Instruction E:01 (bracketed admonition against gender bias).

4. *See* Instruction H:36 (affirmative defense of "mistake as to age").

3-4:27.INT UNLAWFUL SEXUAL CONTACT – INTERROGATORY (FORCE OR VIOLENCE)

If you find the defendant not guilty of unlawful sexual contact, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of unlawful sexual contact, you should sign the verdict form to indicate your guilty verdict and then answer the following verdict question on the verdict form:

> Did the defendant cause submission through force or violence? (Answer "Yes" or "No")

The defendant caused submission through force or violence only if:

1. the defendant caused submission of the victim through the actual application of physical force or physical violence.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should indicate "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should indicate "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-3-404(2)(b), C.R.S. 2015. Because section 18-3-404(2)(b)states that "unlawful sexual contact is a class 4 felony if the actor compels the victim to submit by use of such force, intimidation, or threat as specified in section 18-3-402(4)(a), (4)(b), or (4)(c)," the three model interrogatories for the offense of unlawful sexual contact use the same language that appears in the corresponding model interrogatories for the offense of sexual assault in violation of section 18-3-402. *See* Instructions 3-4:10.INT, 3-4:11.INT, 3-4:12.INT.

2. *See, e.g.*, Instruction E:28 (special verdict form).

3. *See People v. Powell*, 716 P.2d 1096, 1100 (Colo. 1986) (because the word "force" is commonly used, there is no reason to provide the jury with a definitional instruction).

3-4:28.INT UNLAWFUL SEXUAL CONTACT - INTERROGATORY (THREAT OF HARM)

If you find the defendant not guilty of unlawful sexual contact, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of unlawful sexual contact, you should sign the verdict form to indicate your guilty verdict and then answer the following verdict question on the verdict form:

Did the defendant cause submission through threat of harm? (Answer "Yes" or "No")

The defendant caused submission through threat of harm only if:

1. the defendant caused submission of the victim by threat of imminent death, serious bodily injury, extreme pain, or the crime of kidnapping to be inflicted on anyone, and

2. the victim believed that the defendant had the present ability to execute the threats.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should indicate "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should indicate "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-3-404(2)(b), C.R.S. 2015. Because section 18-3-404(2)(b)states that "unlawful sexual contact is a class 4 felony if the actor compels the victim to submit by use of such force, intimidation, or threat as specified in section 18-3-402(4)(a), (4)(b), or (4)(c)," the three model interrogatories

for the offense of unlawful sexual contact use the same language that appears in the corresponding model interrogatories for the offense of sexual assault in violation of section 18-3-402. *See* Instructions 3-4:10.INT, 3-4:11.INT, 3-4:12.INT.

2. *See* Instruction F:332 (defining "serious bodily injury"); Instructions 3-3:01, 3-3:02, 3-3:03, 3-3:05, and 3-3:06 (defining the offense of kidnapping); *see, e.g.*, Instruction E:28 (special verdict form).

3-4:29.INT UNLAWFUL SEXUAL CONTACT - INTERROGATORY (RETALIATION)

If you find the defendant not guilty of unlawful sexual contact, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of unlawful sexual contact, you should sign the verdict form to indicate your guilty verdict and then answer the following verdict question on the verdict form:

> Did the defendant cause submission through threat of retaliation? (Answer "Yes" or "No")

The defendant caused submission through threat of retaliation only if:

1. the defendant caused submission of the victim by threatening to retaliate in the future against him [her], or any other person, and

2. the victim reasonably believed that the defendant would execute this threat.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should indicate "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should indicate "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-3-404(2)(b), C.R.S. 2015. Because section 18-3-404(2)(b)states that "unlawful sexual contact is a class 4 felony if the actor compels the victim to submit by use of such force, intimidation, or threat as specified in section 18-3-402(4)(a), (4)(b), or (4)(c)," the three model interrogatories for the offense of unlawful sexual contact use the same language

that appears in the corresponding model interrogatories for the offense of sexual assault in violation of section 18-3-402. *See* Instructions 3-4:10.INT, 3-4:11.INT, 3-4:12.INT.

2. *See* Instruction F:323 (defining "retaliate"); *see, e.g.*, Instruction E:28 (special verdict form).

3-4:30.INT UNLAWFUL SEXUAL CONTACT – INTERROGATORY (AT-RISK VICTIM)

If you find the defendant not guilty of unlawful sexual contact, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of unlawful sexual contact, you should sign the verdict form to indicate your guilty verdict and then answer the following verdict question on the verdict form:

Was the victim a person with protected status?
(Answer "Yes" or "No")

The victim was a person with protected status only if:

[1. the victim was seventy years of age or older.]

[1. the victim was eighteen years of age or older, and

2. was a person with a disability.]

[1. the victim was under the age of eighteen years, and

2. was a person with a disability.]

The prosecution has the burden to prove [the] [each] numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should indicate "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should indicate "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-6.5-103(7)(c), C.R.S. 2015 (at-risk persons).

2. *See* Instruction F:24 (defining "at-risk adult"); Instruction F:26 (defining "at-risk juvenile"); Instruction

F:273 (defining "person with a disability"); *see, e.g.*, Instruction E:28 (special verdict form).

3-4:31 SEXUAL ASSAULT ON A CHILD

The elements of the crime of sexual assault on a child are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. subjected another person who was not his [her] spouse to any sexual contact, and

5. that person was less than fifteen years of age, and

6. the defendant was at least four years older than the person.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all of the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of sexual assault on a child.

After considering all of the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of sexual assault on a child.

COMMENT

1. *See* § 18-3-405(1), C.R.S. 2015.

2. *See* Instruction F:186 (defining "intimate parts"); Instruction F:195 (defining "knowingly"); Instruction F:337 (defining "sexual contact").

3. *See People v. Vigil*, 127 P.3d 916, 931 (Colo. 2006) (sexual assault on a child is a general intent offense, to which the defense of voluntary intoxication does not apply, notwithstanding the fact that the definition of "sexual contact," in section 18–3–401(4), includes a requirement that

the sexual touching be "for the purposes of sexual arousal, gratification, or abuse").

4. *See Woellhaf v. People*, 105 P.3d 209, 216 (Colo. 2005) (because the statutes defining sexual assault on a child and sexual assault on a child by one in a position of trust prescribe "any sexual contact" as the unit of prosecution, for purposes of double jeopardy, multiple convictions must be supported by factually distinct offenses).

5. *See Quintano v. People*, 105 P.3d 585, 592 (Colo. 2005) (applying *Woellhaf* and holding that "[t]hough the record does not disclose specifically how long each incident lasted, the facts prove that the defendant's conduct was separate in temporal proximity and constituted a new volitional departure in his course of conduct"; further, the due process requirement for jury unanimity was satisfied because the court instructed the jury that: "In order to find the defendant guilty of sexual assault on a child, the jury must unanimously agree that the defendant committed the same act of sexual contact for each separate count, or that the defendant committed all of the acts of sexual contact.").

3-4:32.SP SEXUAL ASSAULT ON A CHILD – SPECIAL INSTRUCTION (IGNORANCE OF THE CHILD'S AGE IS NOT A DEFENSE)

If a child is younger than fifteen, a person charged with sexual assault on a child cannot assert a defense based on the fact that the person did not know the child's age or reasonably believed the child to be fifteen years of age or older.

COMMENT

1. *See* § 18-1-503.5(3), C.R.S. 2015.

3-4:33.INT SEXUAL ASSAULT ON A CHILD - INTERROGATORY (FORCE)

If you find the defendant not guilty of sexual assault on a child, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual assault on a child, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant apply force against the victim?
(Answer "Yes" or "No")

The defendant applied force against the victim only if:

1. in order to accomplish or facilitate sexual contact,

2. the defendant applied force against the victim.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should indicate "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should indicate "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-3-405(2)(a), C.R.S. 2015.

2. *See, e.g.*, Instruction E:28 (special verdict form).

3-4:34.INT SEXUAL ASSAULT ON A CHILD – INTERROGATORY (THREATS)

If you find the defendant not guilty of sexual assault on a child, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual assault on a child, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant threaten harm in order to accomplish or facilitate the sexual contact? (Answer "Yes" or "No")

The defendant threatened harm in order to accomplish or facilitate the sexual contact only if:

1. in order to accomplish or facilitate sexual contact,

2. the defendant threatened imminent death, serious bodily injury, extreme pain, or the crime of kidnapping against the victim or another person, and

3. the victim believed that the defendant had the present ability to execute the threat.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should indicate "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should indicate "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-3-405(2)(b), C.R.S. 2015.

2. *See* Instruction F:332 (defining "serious bodily injury"); Instructions 3-3:01, 3-3:02, 3-3:03, 3-3:05, and 3-3:06

(defining the offense of kidnapping); *see, e.g.*, Instruction E:28 (special verdict form).

3-4:35.INT SEXUAL ASSAULT ON A CHILD - INTERROGATORY (RETALIATION)

If you find the defendant not guilty of sexual assault on a child, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual assault on a child, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

> Did the defendant threaten retaliation in order to accomplish or facilitate the sexual contact?
> (Answer "Yes" or "No")

The defendant threatened retaliation in order to accomplish or facilitate the sexual contact only if:

1. in order to accomplish or facilitate sexual contact,

2. the defendant threatened retaliation by causing in the future death, serious bodily injury, extreme pain, or the crime of kidnapping against the victim or another person, and

3. the victim believed that the defendant would execute the threat.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should indicate "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should indicate "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-3-405(2)(c), C.R.S. 2015.

2. *See* Instruction F:332 (defining "serious bodily injury"); Instructions 3-3:01, 3-3:02, 3-3:03, 3-3:05, and 3-3:06 (defining the offense of kidnapping); *see*, *e.g.*, Instruction E:28 (special verdict form).

3-4:36.INT SEXUAL ASSAULT ON A CHILD - INTERROGATORY (PATTERN)

If you find the defendant not guilty of sexual assault on a child, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual assault on a child, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

> Did the defendant commit the sexual assault on a child as part of a pattern of sexual abuse? (Answer "Yes" or "No")

The defendant committed the sexual assault on a child as part of a pattern of sexual abuse only if:

1. he [she] committed one or more incidents of sexual contact upon the same victim in addition to committing the sexual contact forming the basis for your guilty verdict on the charge of sexual assault on a child.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should indicate "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should indicate "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-3-405(2)(d), C.R.S. 2015.

2. *See* Instruction F:262 (defining "pattern of sexual abuse"); *see, e.g.*, Instruction E:28 (special verdict form).

3. Although section 18-3-405(2)(d) states that a "specific date or time" need not be alleged, this section does not prohibit a court from using an interrogatory that describes the

other incident(s) by referring to the date, location, or other identifying evidence. *See*, *e.g.*, *People v. Melillo*, 25 P.3d 769, 779 (Colo. 2001) (other incidents of sexual contact for pattern of abuse count identified by date).

4. Section 18-3-405(2)(d), states that "the acts constituting the pattern of sexual abuse, whether charged in the information or indictment or committed prior to or at any time after the offense charged in the information or indictment, shall be subject to the provisions of section 16-5-401(1)(a)." However, section 16-5-401(1)(a) states that there is no limitations period applicable to "any sex offense against a child," and section 16-5-401(1)(b)(IV) provides that "'[s]ex offense against a child' means any 'unlawful sexual offense,' as defined in section 18-3-411(1), C.R.S., that is a felony." Thus, it will be the rare case in which there is a dispute concerning the limitations period applicable to the second alleged incident of sexual contact. But if such a case should arise, the court should determine the expiration date of the limitations period and modify the interrogatory in a manner that requires the jury to make a finding indicating whether the other incident of sexual contact occurred on or before that date.

5. *See People v. Simon*, 266 P.3d 1099, 1101 (Colo. 2011) ("each separately charged incident of sexual assault (i.e., sexual assault on a child, or sexual assault on a child by one in a position of trust) [is] elevated to a class 3 felony, where each incident is committed as part of a pattern of sexual abuse").

3-4:37.INT SEXUAL ASSAULT ON A CHILD – INTERROGATORY (NOTICE OF POSITIVE TEST FOR HIV)

If you find the defendant not guilty of sexual assault on a child, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual assault on a child, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant commit the sexual assault on a child with notice of a positive test for HIV? (Answer "Yes" or "No")

The defendant committed the sexual assault on a child with notice of a positive test for HIV only if:

1. the sexual assault on a child committed by the defendant involved sexual intercourse or anal intercourse, and

2. prior to committing the sexual assault on a child, defendant had notice that he [she] had tested positive for the human immunodeficiency virus (HIV) that causes acquired immune deficiency syndrome.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-1.3-1004(1)(d), C.R.S. 2015.

2. *See*, *e.g.*, Instruction E:28 (special verdict form).

3. Although the model interrogatory tracks the language of section 18-1.3-1004(1)(d) by including the words "that causes acquired immune deficiency syndrome," the Committee notes that this causality language does not appear in section 18-3-415.5(5), C.R.S. 2015 ("notice of his or her HIV infection").

3-4:38.INT SEXUAL ASSAULT ON A CHILD - INTERROGATORY (SEXUAL PENETRATION OR INTRUSION; CHILD UNDER TWELVE)

If you find the defendant not guilty of sexual assault on a child, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual assault on a child, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

> Did the defendant commit sexual penetration or sexual intrusion of a child under twelve years of age? (Answer "Yes" or "No")

The defendant committed sexual penetration or sexual intrusion of a child under twelve years of age only if:

1. the act of sexual assault on a child committed by the defendant included sexual intrusion or sexual penetration;

2. defendant committed the act against a child who was under twelve years of age at the time of the offense; and

3. the defendant was at least eighteen years of age and at least ten years older than the child.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-1.3-1004(1)(e)(I)(A-C), C.R.S. 2015 (sentence enhancement factor applies to enumerated sex offenses only if committed as a class 2, 3, or 4 felony).

2. *See* Instruction F:340 (defining "sexual intrusion"); Instruction F:343 (defining "sexual penetration"); *see, e.g.*, Instruction E:28 (special verdict form).

3-4:39.INT SEXUAL ASSAULT ON A CHILD - INTERROGATORY (AT-RISK VICTIM)

If you find the defendant not guilty of sexual assault on a child, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual assault on a child, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the victim a juvenile with protected status?
(Answer "Yes" or "No")

The victim was a juvenile with protected status only if:

1. the victim was under the age of eighteen years, and

2. was a person with a disability.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should indicate "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should indicate "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-6.5-103(7)(d), C.R.S. 2015.

2. *See* Instruction F:26 (defining "at-risk juvenile"); Instruction F:273 (defining "person with a disability"); *see, e.g.*, Instruction E:28 (special verdict form).

3-4:40 SEXUAL ASSAULT ON A CHILD BY ONE IN A POSITION OF TRUST

The elements of the crime of sexual assault on a child by one in a position of trust are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. subjected a child, under eighteen years of age, who was not his [her] spouse to any sexual contact, and

5. the defendant was in a position of trust with respect to the child.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all of the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of sexual assault on a child by one in a position of trust.

After considering all of the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of sexual assault on a child by one in a position of trust.

COMMENT

1. *See* § 18-3-405.3, C.R.S. 2015.

2. *See* Instruction F:50 (defining "child"); Instruction F:195 (defining "knowingly"); Instruction F:280 (defining "position of trust"); Instruction F:337 (defining "sexual contact").

3. Although section 18-3-408 states that the gender bias instruction applies to offenses defined in "sections 18-3-402 to 18-3-405," it is unclear whether the General Assembly intended for the instruction to be given in prosecutions for the three

offenses that are separated from section 18-3-405 by decimal point numeration. *See* 18-3-405.3, C.R.S. 2015 (sexual assault on a child by one in a position of trust); section 18-3-405.4, C.R.S. 2015 (internet sexual exploitation of a child); § 18-3-405.5, C.R.S. 2015 (sexual assault on a client by a psychotherapist). It seems unlikely that the General Assembly would have mandated such an instruction in prosecutions for sexual assault on a child and, at the same time, excluded prosecutions for sexual assault on a child by one in a position of trust. Thus, it is reasonable to read section 18-3-408's reference to "18-3-405" as encompassing the three offenses that are separated by means of decimal point numeration. Irrespective of whether this is a correct construction, because these three offenses proscribe conduct that is so similar to the conduct prohibited by sections 18-3-402 to 18-3-405, the Committee recommends that trial courts give a gender bias instruction as a matter of discretion.

4. *See* Instruction H:36 (affirmative defense of "mistake as to age").

5. *See Pellman v. People*, 252 P.3d 1122, 1125 (Colo. 2011) ("[A] defendant need not be performing a specific supervisory task at the time of the unlawful act in order to occupy a position of trust. Instead, a defendant may assume a position of trust through an ongoing and continuous supervisory relationship with the victim.").

3-4:41.INT SEXUAL ASSAULT ON A CHILD BY ONE IN A POSITION OF TRUST - INTERROGATORY (UNDER FIFTEEN)

If you find the defendant not guilty of sexual assault on a child by one in a position of trust, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual assault on a child by one in a position of trust, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the victim a person with protected status due to his [her] age? (Answer "Yes" or "No")

The victim was a person with protected status due to his [her] age only if:

1. the victim was less than fifteen years of age.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should indicate "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should indicate "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-3-405.3(2)(a), C.R.S. 2015; *see also* § 18-1-503.5(3), C.R.S. 2015 ("If the criminality of conduct depends on a child's being younger than eighteen years of age and the child was in fact younger than fifteen years of age, there shall be no defense that the defendant reasonably believed the child was eighteen years of age or older.").

2. *See*, *e.g.*, Instruction E:28 (special verdict form).

3-4:42.INT SEXUAL ASSAULT ON A CHILD BY ONE IN A POSITION OF TRUST - INTERROGATORY (PATTERN)

If you find the defendant not guilty of sexual assault on a child by one in a position of trust, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual assault on a child by one in a position of trust, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

> Did the defendant commit the sexual assault on a child by one in a position of trust as part of a pattern of sexual abuse? (Answer "Yes" or "No")

The defendant committed the sexual assault on a child by one in a position of trust as part of a pattern of sexual abuse only if:

1. the defendant committed one or more incidents of sexual contact upon the same victim in addition to committing the sexual contact forming the basis for your guilty verdict on the charge of sexual assault on a child by one in a position of trust.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-3-405.3(2)(b), C.R.S. 2015.

2. *See* + Instruction F:262 (defining "pattern of sexual abuse"); *see*, *e.g.*, Instruction E:28 (special verdict form).

3. *See* Instruction 3-4:36.INT, Comment 4 (discussing the statute of limitations provision that applies to the act forming the basis for the pattern enhancement).

4. + In 2015, the Committee revised Comment 2 by adding a citation to Instruction F:262.

3-4:43.INT SEXUAL ASSAULT ON A CHILD BY ONE IN A POSITION OF TRUST – INTERROGATORY (NOTICE OF POSITIVE TEST FOR HIV)

If you find the defendant not guilty of sexual assault on a child by one in a position of trust, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual assault on a child by one in a position of trust, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

> Did the defendant commit the sexual assault on a child by one in a position of trust with notice of a positive test for HIV? (Answer "Yes" or "No")

The defendant committed the sexual assault on a child by one in a position of trust with notice of a positive test for HIV only if:

1. the sexual assault on a child by one in a position of trust committed by the defendant involved sexual intercourse or anal intercourse, and

2. prior to committing the sexual assault on a child by one in a position of trust, defendant had notice that he [she] had tested positive for the human immunodeficiency virus (HIV) that causes acquired immune deficiency syndrome.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-1.3-1004(1)(d), C.R.S. 2015.

2. *See, e.g.*, Instruction E:28 (special verdict form).

3. Although the model interrogatory tracks the language of section 18-1.3-1004(1)(d) by including the words "that causes acquired immune deficiency syndrome," the Committee notes that this causality language does not appear in section 18-3-415.5(5), C.R.S. 2015 ("notice of his or her HIV infection").

3-4:44.INT SEXUAL ASSAULT ON A CHILD BY ONE IN A POSITION OF TRUST - INTERROGATORY (SEXUAL INTRUSION OR PENETRATION; CHILD UNDER TWELVE)

If you find the defendant not guilty of sexual assault on a child by one in a position of trust, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual assault on a child by one in a position of trust, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

> Did the defendant commit sexual penetration or sexual intrusion of a child under twelve years of age? (Answer "Yes" or "No")

The defendant committed sexual penetration or sexual intrusion of a child under twelve years of age only if:

1. the act of sexual assault on a child by one in a position of trust committed by the defendant included sexual intrusion or sexual penetration;

2. defendant committed the act against a child who was under twelve years of age at the time of the offense; and

3. the defendant was at least eighteen years of age and at least ten years older than the child.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-1.3-1004(1)(e)(I)(A-C), C.R.S. 2015 (sentence enhancement factor applies to enumerated sex offenses only if committed as a class 2, 3, or 4 felony).

2. *See* Instruction F:340 (defining "sexual intrusion"); Instruction F:343 (defining "sexual penetration"); *see, e.g.*, Instruction E:28 (special verdict form).

3-4:45.INT SEXUAL ASSAULT ON A CHILD BY ONE IN A POSITION OF TRUST - INTERROGATORY (AT-RISK VICTIM)

If you find the defendant not guilty of sexual assault on a child by one in a position of trust, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual assault on a child by one in a position of trust, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the victim a juvenile with protected status?
(Answer "Yes" or "No")

The victim was a juvenile with protected status only if:

1. the victim was under the age of eighteen years, and

2. was a person with a disability.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-6.5-103(7)(e), C.R.S. 2015.

2. *See* Instruction F:26 (defining "at-risk juvenile"); Instruction F:273 (defining "person with a disability"); *see, e.g.*, Instruction E:28 (special verdict form).

3-4:46 INTERNET SEXUAL EXPLOITATION OF A CHILD (EXPOSE OR TOUCH)

The elements of the crime of internet sexual exploitation of a child (expose or touch) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. importuned, invited, or enticed,

5. through communication via a computer network or system, telephone network, data network, text message, or instant message,

6. a person whom the defendant knew or believed to be under fifteen years of age, and at least four years younger than the defendant,

7. to expose or touch the person's own or another person's intimate parts while communicating with the actor via a computer network or system, telephone network, data network, text message, or instant message.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of internet sexual exploitation of a child (expose or touch).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of internet sexual exploitation of a child (expose or touch).

COMMENT

1. *See* § 18-3-405.4(1)(a), C.R.S. 2015.

2. *See* Instruction F:186 (defining "intimate parts"); Instruction F:195 (defining "knowingly"); *see also* Instruction F:62 (defining "computer network," for purposes of computer crimes); *Webster's Third New International Dictionary* 1135 (2002) (defining "importune" as meaning "to press or urge with frequent or unreasonable requests or troublesome persistence").

3. Under section 18-3-405.4(1), the criminality of conduct does not depend on the actual age of the person with whom the defendant communicates. Therefore, this provision is not subject to section 18-1-503.5(3), C.R.S. 2015 ("If the criminality of conduct depends on a child being younger than fifteen years of age, it shall be no defense that the defendant did not know the child's age or that the defendant reasonably believed the child to be fifteen years of age or older.").

3-4:47 INTERNET SEXUAL EXPLOITATION OF A CHILD (OBSERVE)

The elements of the crime of internet sexual exploitation of a child (observe) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. importuned, invited, or enticed,

5. through communication via a computer network or system, telephone network, data network, text message, or instant message,

6. a person whom the defendant knew or believed to be under fifteen years of age, and at least four years younger than the defendant,

7. to observe the defendant's intimate parts via a computer network or system, telephone network, data network, text message, or instant message.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of internet sexual exploitation of a child (observe).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of internet sexual exploitation of a child (observe).

COMMENT

1. *See* § 18-3-405.4(1)(b), C.R.S. 2015.

2. *See* Instruction F:186 (defining "intimate parts"); Instruction F:195 (defining "knowingly"); *see also* Instruction F:62 (defining "computer network," for purposes of computer crimes); *Webster's Third New International Dictionary* 1135-36 (2002) (defining "importune" as meaning "to press or urge with frequent or unreasonable requests or troublesome persistence"; "to beg, urge, or solicit persistently or troublesomely"; and "to make immoral or lewd advances toward another").

3. Under section 18-3-405.4(1), the criminality of conduct does not depend on the actual age of the person with whom the defendant communicates. Therefore, this provision is not subject to section 18-1-503.5(3), C.R.S. 2015 ("If the criminality of conduct depends on a child being younger than fifteen years of age, it shall be no defense that the defendant did not know the child's age or that the defendant reasonably believed the child to be fifteen years of age or older.").

3-4:48 AGGRAVATED SEXUAL ASSAULT ON A CLIENT BY A PSYCHOTHERAPIST

The elements of aggravated sexual assault on a client by a psychotherapist are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. inflicted sexual intrusion or penetration on another person,

5. when the defendant was a psychotherapist, and

6. when the person was a client of the defendant.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated sexual assault on a client by a psychotherapist.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated sexual assault on a client by a psychotherapist.

COMMENT

1. *See* § 18-3-405.5(1)(a)(I), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:295 (defining "psychotherapist"); Instruction F:296 (defining "psychotherapy"); Instruction F:340 (defining "sexual intrusion"); Instruction F:343 (defining "sexual penetration").

3-4:49 AGGRAVATED SEXUAL ASSAULT ON A CLIENT BY A PSYCHOTHERAPIST (THERAPEUTIC DECEPTION)

The elements of aggravated sexual assault on a client by a psychotherapist (therapeutic deception) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. inflicted sexual penetration or intrusion on another person,

5. when the defendant was a psychotherapist, and

6. the person was a client of the defendant, and

7. the sexual penetration or intrusion occurred by means of therapeutic deception.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated sexual assault on a client by a psychotherapist (therapeutic deception).

After considering all the evidence, if you decide the prosecution has not proven any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated sexual assault on a client by a psychotherapist (therapeutic deception).

COMMENT

1. *See* § 18-3-405.5(1)(a)(II), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:295 (defining "psychotherapist"); Instruction F:296 (defining "psychotherapy"); Instruction F:340 (defining "sexual

intrusion"); Instruction F:343 (defining "sexual penetration"); Instruction F:370 (defining "therapeutic deception").

3. A note to COLJI-Crim. 3-4:34 (2008) stated that there was "no separate instruction for the offense when committed by means of therapeutic deception, set forth in subsections 1(a)(II) and (2)(a)(II); the committee deems the element to be superfluous." However, this is no longer the view of the Committee. *See Montes-Rodriguez v. People*, 241 P.3d 924, 927 (Colo. 2010) (courts should avoid statutory interpretations that would render any words or phrases superfluous).

3-4:50.INT AGGRAVATED SEXUAL ASSAULT ON A CLIENT BY A PSYCHOTHERAPIST – INTERROGATORY (NOTICE OF POSITIVE TEST FOR HIV)

If you find the defendant not guilty of aggravated sexual assault on a client by a psychotherapist, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of aggravated sexual assault on a client by a psychotherapist, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

> Did the defendant commit the aggravated sexual assault on a client by a psychotherapist with notice of a positive test for HIV? (Answer "Yes" or "No")

The defendant committed the aggravated sexual assault on a client by a psychotherapist with notice of a positive test for HIV only if:

1. the act of aggravated sexual assault on a client by a psychotherapist committed by the defendant involved sexual intercourse or anal intercourse, and

2. prior to committing the aggravated sexual assault on a client by a psychotherapist, defendant had notice that he [she] had tested positive for the human immunodeficiency virus (HIV) that causes acquired immune deficiency syndrome.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-1.3-1004(1)(d), C.R.S. 2015.

2. *See, e.g.*, Instruction E:28 (special verdict form).

3. Although the model interrogatory tracks the language of section 18-1.3-1004(1)(d) by including the words "that causes acquired immune deficiency syndrome," the Committee notes that this causality language does not appear in section 18-3-415.5(5), C.R.S. 2015 ("notice of his or her HIV infection").

3-4:51 SEXUAL ASSAULT ON A CLIENT BY A PSYCHOTHERAPIST

The elements of sexual assault on a client by a psychotherapist are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. subjected a person to any sexual contact,

5. when the defendant was a psychotherapist, and

6. the person was a client of the defendant.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of sexual assault on a client by a psychotherapist.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of sexual assault on a client by a psychotherapist.

COMMENT

1. *See* § 18-3-405.5(2)(a)(I), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:295 (defining "psychotherapist"); Instruction F:296 (defining "psychotherapy"); Instruction F:337 (defining "sexual contact").

3-4:52 SEXUAL ASSAULT ON A CLIENT BY A PSYCHOTHERAPIST (THERAPEUTIC DECEPTION)

The elements of sexual assault on a client by a psychotherapist (therapeutic deception) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. subjected a person to any sexual contact,

5. when the defendant was a psychotherapist, and

6. the person was a client of the defendant, and

7. the sexual contact occurred by means of therapeutic deception.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of sexual assault on a client by a psychotherapist (therapeutic deception).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of sexual assault on a client by a psychotherapist (therapeutic deception).

COMMENT

1. *See* § 18-3-405.5(2)(a)(II), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:295 (defining "psychotherapist"); Instruction F:296 (defining "psychotherapy"); Instruction F:337 (defining "sexual contact"); Instruction F:370 (defining "therapeutic deception").

3. A note to COLJI-Crim. 3-4:34 (2008) stated that there was "no separate instruction for the offense when committed by means of therapeutic deception, set forth in subsections (1)(a)(II) and (2)(a)(II); the committee deems the element to be superfluous." However, this is no longer the view of the Committee. *See Montes-Rodriguez v. People*, 241 P.3d 924, 927 (Colo. 2010) (courts should avoid statutory interpretations that would render any words or phrases superfluous).

3-4:53.SP SEXUAL ASSAULT ON A CLIENT BY A PSYCHOTHERAPIST (INCLUDING AGGRAVATED) - SPECIAL INSTRUCTION (CONSENT IS NOT A DEFENSE)

Consent by a client to sexual penetration, intrusion, or contact is not a defense to [aggravated] sexual assault on a client by a psychotherapist.

COMMENT

1. *See* § 18-3-405.5(3), C.R.S. 2015.

2. *See* Instruction F:68 (defining "consent").

3-4:54.INT SEXUAL ASSAULT ON A CLIENT BY A PSYCHOTHERAPIST (INCLUDING AGGRAVATED) – INTERROGATORY (AT-RISK VICTIM)

If you find the defendant not guilty of [aggravated] sexual assault on a client by a psychotherapist, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of [aggravated] sexual assault on a client by a psychotherapist, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the victim a person with protected status?
(Answer "Yes" or "No")

The victim was a person with protected status only if:

[1. the victim was seventy years of age or older.]

[1. the victim was eighteen years of age or older, and

2. was a person with a disability.]

[1. the victim was under the age of eighteen years, and

2. was a person with a disability.]

The prosecution has the burden to prove [the] [each] numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-6.5-103(7)(f), C.R.S. 2015.

2. *See* Instruction F:24 (defining "at-risk adult"); Instruction F:26 (defining "at-risk juvenile"); Instruction F:273 (defining "person with a disability"); *see, e.g.*, Instruction E:28 (special verdict form).

3-4:55 INVASION OF PRIVACY FOR SEXUAL GRATIFICATION

The elements of invasion of privacy for sexual gratification are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. observed or took a photograph of another person's intimate parts,

5. without the person's consent,

6. in a situation where the person observed or photographed had a reasonable expectation of privacy,

7. for the purpose of the observer's own sexual gratification.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of invasion of privacy for sexual gratification.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of invasion of privacy for sexual gratification.

COMMENT

1. *See* § 18-3-405.6(1), C.R.S. 2015.

2. *See* Instruction F:186 (defining "intimate parts"); Instruction F:195 (defining "knowingly"); Instruction F:276 (defining "photograph").

3. In a case where there is a dispute concerning whether the person observed had "a reasonable expectation of privacy," it may be appropriate to draft an instruction explaining relevant Fourth Amendment principles.

3-4:56.INT INVASION OF PRIVACY FOR SEXUAL GRATIFICATION – INTERROGATORY (AGE)

If you find the defendant not guilty of invasion of privacy for sexual gratification, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of invasion of privacy for sexual gratification, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

> Was the victim a person with protected status due to his [her] age? (Answer "Yes" or "No")

The victim was a person with protected status due to his [her] age only if:

1. the victim was under fifteen years of age when the defendant [observed] [photographed] his [her] intimate parts, and

2. the defendant was, at the time of the offense, at least four years older than the victim.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-3-405.6(2)(b)(II), C.R.S. 2015.

2. *See, e.g.*, Instruction E:28 (special verdict form).

3-4:57 FAILURE TO REGISTER AS A SEX OFFENDER (GENERAL)

The elements of the crime of failure to register as a sex offender (general) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was required to register as a sex offender, and

4. knowingly,

5. failed to register with [insert relevant provision from Article 22 of Title 16] or comply with the requirement that a registrant [insert relevant provision from Article 22 of Title 16].

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to register as a sex offender (general).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to register as a sex offender (general).

COMMENT

1. *See* § 18-3-412.5(1)(a), C.R.S. 2015; *see also People v. Poage*, 272 P.3d 1113, 1116 (Colo. App. 2011) ("When the People elected to proceed under section 18-3-412.5(1)(g) and (i), they abandoned their arguments under section 18-3-412.5(1)(a). . . . [W]e reject the People's contention that subsections (a) through (k) of section 18-3-412.5(1) merely delineate acts that provide examples of a registrant's failure to register and do not create or define crimes.").

2. *See* Instruction F:195 (defining "knowingly").

3. In *People v. Lopez*, 140 P.3d 106, 113 (Colo. App. 2005), a divided division of the Court of Appeals held that "failure to register as a sex offender is not a strict liability offense but includes the mental state of 'knowingly.'" The Committee has drafted a model instruction that reflects a narrow reading of *Lopez*, with the imputed mens rea added only to section 18-3-412.5(1)(a), which is the sole provision that the defendant in *Lopez* was convicted of violating. *See People v. Lopez*, 140 P.3d at 114 (Russel, J., concurring in part and dissenting in part) (noting the inclusion of a mens rea in sections 18-3-412.5(1)(c) and (e), and observing that "the legislature chose to require proof of culpability for certain acts and to dispense with this requirement for other types of violations").

4. The Colorado Sex Offender Registration Act (CSRA) includes definitions for numerous terms. *See* § 16-22-102, C.R.S. 2015. Because those terms do not appear in section 18-3-412.5, the statutory definitions are not included in Chapter F. Accordingly, when necessary, refer to section 16-22-102 and draft definitional instructions for any terms that are relevant to the particular requirement(s) of the CSRA that the defendant is charged with violating.

5. *See* Instruction H:45 (affirmative defense of "uncontrollable circumstances").

6. *See People v. Allman*, 2012 COA 212, ¶¶ 21-29, 321 P.3d 557, 564-66 (for purposes of the offense of failure to register as a sex offender in violation of section 18–3–412.5(1)(a), a motor vehicle may qualify as "residence," within the meaning of § 16–22–102(5.7), because that definition does not require that there be an address).

3-4:58 FAILURE TO REGISTER AS A SEX OFFENDER (SUBMISSION OF FORM)

The elements of the crime of failure to register as a sex offender (submission of form) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was required to register as a sex offender, and

4. submitted a registration form containing false information or an incomplete registration form.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to register as a sex offender (submission of form).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to register as a sex offender (submission of form).

COMMENT

1. *See* § 18-3-412.5(1)(b), C.R.S. 2015; *see also People v. Poage*, 272 P.3d 1113, 1116 (Colo. App. 2011) ("When the People elected to proceed under section 18–3–412.5(1)(g) and (i), they abandoned their arguments under section 18–3–412.5(1)(a). . . . [W]e reject the People's contention that subsections (a) through (k) of section 18–3–412.5(1) merely delineate acts that provide examples of a registrant's failure to register and do not create or define crimes.").

2. *See* Instruction F:195 (defining "knowingly").

3. The Colorado Sex Offender Registration Act (CSRA) includes definitions for numerous terms. *See* § 16-22-102, C.R.S. 2015.

Because those terms do not appear in section 18-3-412.5, the statutory definitions are not included in Chapter F. Accordingly, when necessary, refer to section 16-22-102 and draft definitional instructions for any terms that are relevant to the particular requirement(s) of the CSRA that the defendant is charged with violating.

4. *See* Instruction H:45 (affirmative defense of "uncontrollable circumstances").

3-4:59 FAILURE TO REGISTER AS A SEX OFFENDER (INFORMATION)

The elements of the crime of failure to register as a sex offender (information) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was required to register as a sex offender, and

4. failed to provide information or knowingly provided false information,

5. to a probation department employee, a community corrections administrator or his [her] designee, or to a judge or magistrate when receiving notice [insert relevant provision from section 16-22-106(1),(2), or (3), describing the relevant context] of the duty to register].

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to register as a sex offender (information).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to register as a sex offender (information).

COMMENT

1. *See* § 18-3-412.5(1)(c), C.R.S. 2015; *see also People v. Poage*, 272 P.3d 1113, 1116 (Colo. App. 2011) ("When the People elected to proceed under section 18–3–412.5(1)(g) and (i), they abandoned their arguments under section 18–3–412.5(1)(a). . . . [W]e reject the People's contention that subsections (a) through (k) of section 18–3–412.5(1) merely delineate acts that provide

examples of a registrant's failure to register and do not create or define crimes.").

2. *See* Instruction F:195 (defining "knowingly").

3. The Colorado Sex Offender Registration Act (CSRA) includes definitions for numerous terms. *See* § 16-22-102, C.R.S. 2015. Because those terms do not appear in section 18-3-412.5, the statutory definitions are not included in Chapter F. Accordingly, when necessary, refer to section 16-22-102 and draft definitional instructions for any terms that are relevant to the particular requirement(s) of the CSRA that the defendant is charged with violating.

4. *See* Instruction H:45 (affirmative defense of "uncontrollable circumstances").

3-4:60 FAILURE TO REGISTER AS A SEX OFFENDER (FAILURE TO PROVIDE NOTICE UPON RELEASE)

The elements of the crime of failure to register as a sex offender (failure to provide notice upon release) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was required to register as a sex offender, and

4. having been sentenced to a county jail, otherwise incarcerated, or committed due to conviction of or disposition or adjudication for the crime of [insert the relevant offense specified in section 16-22-103],

5. failed to provide notice of the address where he [she] intended to reside upon release as required by [insert either the word "law" (if using a separate instruction to describe the applicable provision), or a brief description of the relevant provision from section 16-22-106 or 16-22-107].

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to register as a sex offender (failure to provide notice upon release).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to register as a sex offender (failure to provide notice upon release).

COMMENT

1. *See* § 18-3-412.5(1)(d), C.R.S. 2015; *see also People v. Poage*, 272 P.3d 1113, 1116 (Colo. App. 2011) ("When the People elected to proceed under section 18-3-412.5(1)(g) and (i), they

abandoned their arguments under section 18–3–412.5(1)(a). . . . [W]e reject the People's contention that subsections (a) through (k) of section 18–3–412.5(1) merely delineate acts that provide examples of a registrant's failure to register and do not create or define crimes.").

2. The Colorado Sex Offender Registration Act (CSRA) includes definitions for numerous terms. *See* § 16-22-102, C.R.S. 2015. Because those terms do not appear in section 18-3-412.5, the statutory definitions are not included in Chapter F. Accordingly, when necessary, refer to section 16-22-102 and draft definitional instructions for any terms that are relevant to the particular requirement(s) of the CSRA that the defendant is charged with violating.

3. *See* Instruction H:45 (affirmative defense of "uncontrollable circumstances").

3-4:61 FAILURE TO REGISTER AS A SEX OFFENDER (PROVIDING FALSE INFORMATION UPON RELEASE)

The elements of the crime of failure to register as a sex offender (providing false information upon release) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was required to register as a sex offender, and

4. knowingly,

5. provided false information, including but not limited to information about [insert relevant provision from section 16-22-107(4)(b), as incorporated from section 16-22-107(4)(a)],

6. to a sheriff, his [her] designee, department of corrections personnel, or department of human services personnel,

7. concerning the address where he [she] intended to reside upon release from the county jail, the department of corrections, or the department of human services.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to register as a sex offender (providing false information upon release).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to register as a sex offender (providing false information upon release).

COMMENT

1. *See* § 18-3-412.5(1)(e), C.R.S. 2015; *see also People v. Poage*, 272 P.3d 1113, 1116 (Colo. App. 2011) ("When the People elected to proceed under section 18–3–412.5(1)(g) and (i), they abandoned their arguments under section 18–3–412.5(1)(a). . . . [W]e reject the People's contention that subsections (a) through (k) of section 18–3–412.5(1) merely delineate acts that provide examples of a registrant's failure to register and do not create or define crimes.").

2. *See* Instruction F:195 (defining "knowingly").

3. The Colorado Sex Offender Registration Act (CSRA) includes definitions for numerous terms. *See* § 16-22-102, C.R.S. 2015. Because those terms do not appear in section 18-3-412.5, the statutory definitions are not included in Chapter F. Accordingly, when necessary, refer to section 16-22-102 and draft definitional instructions for any terms that are relevant to the particular requirement(s) of the CSRA that the defendant is charged with violating.

4. *See* Instruction H:45 (affirmative defense of "uncontrollable circumstances").

3-4:62 FAILURE TO REGISTER AS A SEX OFFENDER (NAMES)

The elements of the crime of failure to register as a sex offender (names) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was required to register as a sex offender, and

4. when registering, failed to provide his [her] current name and any former names.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to register as a sex offender (names).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to register as a sex offender (names).

COMMENT

1. *See* § 18-3-412.5(1)(f), C.R.S. 2015; *see also People v. Poage*, 272 P.3d 1113, 1116 (Colo. App. 2011) ("When the People elected to proceed under section 18–3–412.5(1)(g) and (i), they abandoned their arguments under section 18–3–412.5(1)(a). . . . [W]e reject the People's contention that subsections (a) through (k) of section 18–3–412.5(1) merely delineate acts that provide examples of a registrant's failure to register and do not create or define crimes.").

2. The Colorado Sex Offender Registration Act (CSRA) includes definitions for numerous terms. *See* § 16-22-102, C.R.S. 2015. Because those terms do not appear in section 18-3-412.5, the statutory definitions are not included in Chapter F. Accordingly, when necessary, refer to section 16-22-102 and draft definitional instructions for any terms that are relevant

to the particular requirement(s) of the CSRA that the defendant is charged with violating.

3. *See* Instruction H:45 (affirmative defense of "uncontrollable circumstances").

3-4:63 FAILURE TO REGISTER AS A SEX OFFENDER (LOCAL AGENCY)

The elements of the crime of failure to register as a sex offender (local agency) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was required to register as a sex offender, and

4. failed to register with the local law enforcement agency in each jurisdiction in which he [she] resided upon changing an address, establishing an additional residence, or legally changing names.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to register as a sex offender (local agency).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to register as a sex offender (local agency).

COMMENT

1. *See* § 18-3-412.5(1)(g), C.R.S. 2015; *see also People v. Poage*, 272 P.3d 1113, 1116 (Colo. App. 2011) ("When the People elected to proceed under section 18–3–412.5(1)(g) and (i), they abandoned their arguments under section 18–3–412.5(1)(a). . . . [W]e reject the People's contention that subsections (a) through (k) of section 18–3–412.5(1) merely delineate acts that provide examples of a registrant's failure to register and do not create or define crimes.").

2. The Colorado Sex Offender Registration Act (CSRA) includes definitions for numerous terms. *See* § 16-22-102, C.R.S. 2015. Because those terms do not appear in section 18-3-412.5, the

statutory definitions are not included in Chapter F. Accordingly, when necessary, refer to section 16-22-102 and draft definitional instructions for any terms that are relevant to the particular requirement(s) of the CSRA that the defendant is charged with violating.

3. *See* Instruction H:45 (affirmative defense of "uncontrollable circumstances").

3-4:64 FAILURE TO REGISTER AS A SEX OFFENDER (IDENTIFYING INFORMATION)

The elements of the crime of failure to register as a sex offender (identifying information) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was required to register as a sex offender, and

4. failed to provide his [her] correct date of birth, to sit for or otherwise provide a current photograph or image, to provide a current set of fingerprints, or to provide his [her] correct address.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to register as a sex offender (identifying information).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to register as a sex offender (identifying information).

COMMENT

1. *See* § 18-3-412.5(1)(h), C.R.S. 2015; *see also People v. Poage*, 272 P.3d 1113, 1116 (Colo. App. 2011) ("When the People elected to proceed under section 18–3–412.5(1)(g) and (i), they abandoned their arguments under section 18–3–412.5(1)(a). . . . [W]e reject the People's contention that subsections (a) through (k) of section 18–3–412.5(1) merely delineate acts that provide examples of a registrant's failure to register and do not create or define crimes.").

2. The Colorado Sex Offender Registration Act (CSRA) includes definitions for numerous terms. *See* § 16-22-102, C.R.S. 2015.

Because those terms do not appear in section 18-3-412.5, the statutory definitions are not included in Chapter F. Accordingly, when necessary, refer to section 16-22-102 and draft definitional instructions for any terms that are relevant to the particular requirement(s) of the CSRA that the defendant is charged with violating.

3. *See* Instruction H:45 (affirmative defense of "uncontrollable circumstances").

3-4:65 FAILURE TO REGISTER AS A SEX OFFENDER (CANCELLATION)

The elements of the crime of failure to register as a sex offender (cancellation) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was required to register as a sex offender, and

4. failed to complete a cancellation of registration form and file the form with the local law enforcement agency of the jurisdiction in which he [she] would no longer reside.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to register as a sex offender (cancellation).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to register as a sex offender (cancellation).

COMMENT

1. *See* § 18-3-412.5(1)(i), C.R.S. 2015; *see also People v. Poage*, 272 P.3d 1113, 1116 (Colo. App. 2011) ("When the People elected to proceed under section 18–3–412.5(1)(g) and (i), they abandoned their arguments under section 18–3–412.5(1)(a). . . . [W]e reject the People's contention that subsections (a) through (k) of section 18–3–412.5(1) merely delineate acts that provide examples of a registrant's failure to register and do not create or define crimes.").

2. The Colorado Sex Offender Registration Act (CSRA) includes definitions for numerous terms. *See* § 16-22-102, C.R.S. 2015. Because those terms do not appear in section 18-3-412.5, the statutory definitions are not included in Chapter F.

Accordingly, when necessary, refer to section 16-22-102 and draft definitional instructions for any terms that are relevant to the particular requirement(s) of the CSRA that the defendant is charged with violating.

3. *See* Instruction H:45 (affirmative defense of "uncontrollable circumstances").

3-4:66 FAILURE TO REGISTER AS A SEX OFFENDER (MOTOR HOME)

The elements of the crime of failure to register as a sex offender (motor home) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was required to register as a sex offender,

4. when his [her] place of residence was a trailer or motor home, and

5. failed to register an address at which the trailer or motor home was lawfully located, and the vehicle identification number, license tag number, registration number, and description (including the color scheme) of the trailer or motor home.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to register as a sex offender (motor home).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to register as a sex offender (motor home).

COMMENT

1. *See* § 18-3-412.5(1)(j), C.R.S. 2015; *see also People v. Poage*, 272 P.3d 1113, 1116 (Colo. App. 2011) ("When the People elected to proceed under section 18–3–412.5(1)(g) and (i), they abandoned their arguments under section 18–3–412.5(1)(a). . . . [W]e reject the People's contention that subsections (a) through (k) of section 18–3–412.5(1) merely delineate acts that provide examples of a registrant's failure to register and do not create or define crimes.").

2. The Colorado Sex Offender Registration Act (CSRA) includes definitions for numerous terms. *See* § 16-22-102, C.R.S. 2015. Because those terms do not appear in section 18-3-412.5, the statutory definitions are not included in Chapter F. Accordingly, when necessary, refer to section 16-22-102 and draft definitional instructions for any terms that are relevant to the particular requirement(s) of the CSRA that the defendant is charged with violating.

3. *See* Instruction H:45 (affirmative defense of "uncontrollable circumstances").

3-4:67 FAILURE TO REGISTER AS A SEX OFFENDER (E-MAIL)

The elements of the crime of failure to register as a sex offender (e-mail) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was required to register as a sex offender, and

4. having been convicted of a child sex crime,

5. failed to register an e-mail address (other than an e-mail address that the defendant's employer – which was an entity not owned or operated by the defendant – provided for use primarily in the course of the defendant's employment, which identified the employer by name, initials, or other commonly recognized identifier), instant-messaging identity, or chat room identity prior to using the address or identity.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to register as a sex offender (e-mail).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to register as a sex offender (e-mail).

COMMENT

1. *See* § 18-3-412.5(1)(k), C.R.S. 2015 (incorporating the employer e-mail exception of section 16-22-108(2.5)(b)(I-III)); *see also People v. Poage*, 272 P.3d 1113, 1116 (Colo. App. 2011) ("When the People elected to proceed under section 18-3-412.5(1)(g) and (i), they abandoned their arguments under section 18-3-412.5(1)(a). . . . [W]e reject the People's contention that subsections (a) through (k) of section 18-3-

412.5(1) merely delineate acts that provide examples of a registrant's failure to register and do not create or define crimes.").

2. The Colorado Sex Offender Registration Act (CSRA) includes definitions for numerous terms. *See* § 16-22-102, C.R.S. 2015. Because those terms do not appear in section 18-3-412.5, the statutory definitions are not included in Chapter F. Accordingly, when necessary, refer to section 16-22-102 and draft definitional instructions for any terms that are relevant to the particular requirement(s) of the CSRA that the defendant is charged with violating.

3. *See* Instruction H:45 (affirmative defense of "uncontrollable circumstances").

3-4:68.SP FAILURE TO REGISTER AS A SEX OFFENDER - SPECIAL INSTRUCTION (REQUIRED TO REGISTER; CONVICTED OF A "CHILD SEX CRIME")

The defendant was required to register as a sex offender on [insert relevant date] if: [insert a description of the factual issue(s) that the jury is to determine; use numbered enumeration for multiple issues].

[Further, the defendant was convicted of a "child sex crime" if: [insert a description of the factual issue(s) that the jury is to determine; use numbered enumeration for multiple issues]].

COMMENT

1. Under section 18-3-412.5(1), the question of whether the defendant was required to register may involve issues of law for the court to determine. For example, it seems clear that it is the court's role to analyze the statutory definition of an offense for which a defendant was previously convicted in order to determine, as a preliminary matter of law, whether, under section 16-22-103(2)(c)(I)(A), C.R.S. 2015, the prior conviction was for "an offense that requires proof of unlawful sexual behavior as an element of the offense." However, once a court has made that initial determination and concluded that a prior conviction satisfies that statutory definition, the court must submit to the jury the question of whether, in fact, it was the defendant who was convicted as alleged. *See also, e.g.*, *People v. Brooks*, 2012 COA 52, ¶¶ 10-18, 296 P.3d 216, 217-19 (reversing a conviction for failure to register as a sex offender based on a determination that, as a matter of law, defendant's prior out-of-state conviction for "indecency with a child by exposure" was not a conviction that triggered a requirement to register as a sex offender pursuant to section 16–22–103(1)(b)).

Likewise, the court may need to determine whether a prior conviction was for a "child sex crime" under the definition in section 16-22-108(2.5)(c), which is incorporated into section 18-3-412.5(1)(k), C.R.S. 2015 (registration of an online identity). But, here again, once the court has determined that a prior conviction so qualifies, the court must have the jury make a factual determination as to whether the defendant was the person who was convicted as alleged.

3-4:69 FAILURE TO VERIFY LOCATION AS A SEX OFFENDER

The elements of the crime of failure to verify location as a sex offender are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was required to register as a sex offender, and

4. lacked a fixed residence, and

5. failed to report the location[s] where he [she] remained without a fixed residence, at least every [three] month[s], to each local law enforcement agency in whose jurisdiction he [she] was registered as a sex offender.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to verify location as a sex offender.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to verify location as a sex offender.

COMMENT

1. *See* § 18-3-412.6(1), C.R.S. 2015 (incorporating the requirements set forth in section 16-22-109(3.5)(c)(I), (II)).

2. *See* Instruction H:45 (affirmative defense of "uncontrollable circumstances").

3. It is unclear whether the court or the jury is to determine the date on which the defendant first "lacked a fixed residence." *See* § 16-22-102(4.3), C.R.S. 2015 (defining "lacks a fixed residence" with reference to the definition of a

"residence" in section 16-22-102(5.7)); § 16-22-108(3), C.R.S. 2015 (enumerating events that trigger a requirement to register within five business days).

4. Nor is it apparent whether (or how) the court is to instruct the jury concerning the deadlines for any reporting procedures that had been established by the local jurisdiction(s) to whom the defendant was obligated to report (though it is evident that the initial question of whether the defendant was subject to quarterly or annual reporting is an issue of law for the court to resolve). *See* § 16-22-109(3.5)(c)(I), (II), C.R.S. 2015) (giving local law enforcement agencies latitude to establish reporting schedules, provided that the schedules are within the parameters of the annual or quarterly reporting requirements). Accordingly, in a case that implicates either or both of these issues, the Committee recommends that the trial court draft a special instruction reflecting its ruling(s).

Similarly, it may be necessary to draft a special instruction specifying what information the defendant was obligated to include in the report. *Compare* § 16-22-109(3.5)(c)(I), C.R.S. 2015 ("The person shall be required to verify his or her location or locations and verify any and all information required to be reported pursuant to this section."), *with* § 16-22-109(3.5)(c)(II), C.R.S. 2015 ("The person shall be required to verify his or her location or locations and verify any and all information required to be reported pursuant to this section.").

3-4:70.SP FAILURE TO VERIFY LOCATION AS A SEX OFFENDER - SPECIAL INSTRUCTION (REQUIRED TO REGISTER)

The defendant was required to register as a sex offender on [insert relevant date] if: [insert a description of the factual issue(s) that the jury is to determine; use numbered enumeration for multiple issues].

COMMENT

1. *See* Instruction 3-4:68.SP, Comment 1 (discussing the legal and factual issues related to the registration requirement).

+ CHAPTER 3-5

HUMAN TRAFFICKING AND SLAVERY

COMMENTS ON CHAPTER USE

1. + The Committee added this chapter in 2015.

3-5:01 HUMAN TRAFFICKING FOR INVOLUNTARY SERVITUDE

The elements of the crime of human trafficking for involuntary servitude are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. sold, recruited, harbored, transported, transferred, isolated, enticed, provided, received, or obtained by any means,

5. another person,

6. for the purpose of coercing the other person to perform labor or services.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of human trafficking for involuntary servitude.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of human trafficking for involuntary servitude.

COMMENT

1. *See* § 18-3-503(1), C.R.S. 2015.

2. *See* Instruction F:56.5 (defining "coercing"); Instruction F:195 (defining "knowingly").

3-5:02.INT HUMAN TRAFFICKING FOR INVOLUNTARY SERVITUDE – INTERROGATORY (MINOR)

If you find the defendant not guilty of human trafficking for involuntary servitude, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of human trafficking for involuntary servitude, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question:

Was the trafficked person a minor? (Answer "Yes" or "No")

The trafficked person was a minor only if:

1. the trafficked person was less than eighteen years of age.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-3-502(8), § 18-3-503(2), C.R.S. 2015.

2. *Cf. People v. Cardenas*, 2014 COA 35, ¶ 39, 338 P.3d 430, 436 (holding, under a version of the trafficking in children statute that was repealed in 2014, that "[i]f the legislature intended for the trafficking in children statute to apply to services, it would have said so").

3-5:03 HUMAN TRAFFICKING FOR SEXUAL SERVITUDE

The elements of the crime of human trafficking for sexual servitude are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. sold, recruited, harbored, transported, transferred, isolated, enticed, provided, received, or obtained by any means,

5. another person,

6. for the purpose of coercing the person to engage in commercial sexual activity.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of human trafficking for sexual servitude.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of human trafficking for sexual servitude.

COMMENT

1. *See* § 18-3-504(1)(a), C.R.S. 2015.

2. *See* Instruction F:57.5 (defining "commercial sexual activity"); Instruction F:195 (defining "knowingly").

3-5:04 HUMAN TRAFFICKING OF A MINOR FOR SEXUAL SERVITUDE

The elements of the crime of human trafficking of a minor for sexual servitude are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. sold, recruited, harbored, transported, transferred, isolated, enticed, provided, received, obtained by any means, maintained, or made available

5. a person less than eighteen years of age,

6. for the purpose of commercial sexual activity.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of human trafficking of a minor for sexual servitude.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of human trafficking of a minor for sexual servitude.

COMMENT

1. *See* § 18-3-504(2)(a), C.R.S. 2015.

2. *See* Instruction F:57.5 (defining "commercial sexual activity"); Instruction F:195 (defining "knowingly"); Instruction F:203.5 (defining "maintain"); Instruction F:204.5 (defining "makes available"); *see also* § 18-3-502(8), C.R.S. 2015 (defining "minor," as incorporated in the fifth element above).

3-5:05.SP HUMAN TRAFFICKING OF A MINOR FOR SEXUAL SERVITUDE – SPECIAL INSTRUCTION (UNAVAILABLE DEFENSES)

In any prosecution for human trafficking of a minor for sexual servitude, it is not a defense that the person less than eighteen years of age consented to being sold, recruited, harbored, transported, transferred, isolated, enticed, provided, received, obtained, or maintained by the defendant for the purpose of engaging in commercial sexual activity; the minor consented to participating in commercial sexual activity; the defendant did not know the minor's age or reasonably believed the minor to be eighteen years of age or older; or the minor or another person represented the minor to be eighteen years of age or older.

COMMENT

1. *See* § 18-3-504(2)(c), C.R.S. 2015.

3-5:06.SP HUMAN TRAFFICKING FOR SEXUAL SERVITUDE (INCLUDING OF A MINOR) – SPECIAL INSTRUCTION (RECEIPT OF PROCEEDS UNNECESSARY)

A person does not need to receive any of the proceeds of any commercial sexual activity to commit human trafficking [of a minor] for sexual servitude.

COMMENT

1. *See* § 18-3-504(3), C.R.S. 2015.

CHAPTER 3-6

STALKING

3-6:01 STALKING (CREDIBLE THREAT AND CONDUCT)

The elements of the crime of stalking (credible threat and conduct) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. made a credible threat to another person, either directly, or indirectly through a third person, and

5. in connection with the threat, repeatedly followed, approached, contacted, or placed under surveillance that person, a member of that person's immediate family, or someone with whom that person was having or previously had a continuing relationship.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of stalking (credible threat and conduct).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of stalking (credible threat and conduct).

COMMENT

1. *See* § 18-3-602(1)(a), C.R.S. 2015.

2. *See* Instruction F:67 (defining "conduct 'in connection with' a credible threat"); Instruction F:77 (defining "credible threat"); Instruction F:178 (defining "immediate family"); Instruction F:195 (defining "knowingly"); Instruction F:312 (defining "repeated" or "repeatedly").

3-6:02 STALKING (CREDIBLE THREAT AND REPEATED COMMUNICATION)

The elements of the crime of stalking (credible threat and repeated communication) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. made a credible threat to another person, either directly, or indirectly through a third person, and

5. in connection with the threat, repeatedly made any form of communication with that person, a member of that person's immediate family, or someone with whom that person was having or previously had a continuing relationship, regardless of whether a conversation ensued.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of stalking (credible threat and repeated communication).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of stalking (credible threat and repeated communication).

COMMENT

1. *See* § 18-3-602(1)(b), C.R.S. 2015.

2. *See* Instruction F:67 (defining "conduct 'in connection with' a credible threat"); Instruction F:77 (defining "credible threat"); Instruction F:178 (defining "immediate family"); Instruction F:195 (defining "knowingly"); Instruction F:312 (defining "repeated" or "repeatedly").

3-6:03 STALKING (SERIOUS EMOTIONAL DISTRESS)

The elements of the crime of stalking (serious emotional distress) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly+ repeatedly followed, approached, contacted, placed under surveillance, or made any form of communication with another person, either directly, or indirectly through a third person,

4. in a manner that would cause a reasonable person to suffer serious emotional distress, and

5. which did cause that person, a member of that person's immediate family, or someone with whom that person was having or previously had a continuing relationship to suffer serious emotional distress.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of stalking (serious emotional distress).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of stalking (serious emotional distress).

COMMENT

1. *See* § 18-3-602(1)(c), C.R.S. 2015.

2. *See* Instruction F:67 (defining "conduct 'in connection with' a credible threat"); Instruction F:77 (defining "credible threat"); Instruction F:178 (defining "immediate family"); Instruction F:195 (defining "knowingly"); Instruction F:312 (defining "repeated" or "repeatedly").

3. Section 18-3-602 does not define "serious emotional distress." *See People v. Yascavage*, 80 P.3d 899, 901 (Colo. App. 2003) (holding that the provision defining stalking, then codified as section 18-9-111(4)(b)(III), "prohibits contact that inflicts 'serious emotional distress' and provides an objective 'reasonable person' standard to measure whether the emotional distress inflicted upon the victim was 'serious'"), *aff'd on other grounds*, 101 P.3d 1090 (Colo. 2004).

4. *See People v. Cross*, 127 P.3d 71, 77 (Colo. 2006) (holding that the mens rea of "knowingly" for stalking – then codified as section 18-9-111(4)(a) – does "not apply to require that a perpetrator be aware that his or her acts would cause a reasonable person to suffer serious emotional distress").

5. Although section 18-3-602(1)(c) twice lists the types of persons to whom the provision applies (once with regard to the defendant's conduct, and once with regard to the actual effect of that conduct), the Committee is of the view that the meaning of the statute is not altered by using only the term "another person" in the fourth element (because the sixth element makes clear that the infliction of serious emotional distress can be proved either with respect to "that person," or with respect to any person who has a specified connection to "that person").

6. + In 2015, the Committee combined the third and fourth elements and renumbered the subsequent elements. This corrected format does not reflect a change in the Committee's thinking. Rather, this is the version that the Committee approved in 2014 based on *People v. Cross*, *supra*, However, due to an oversight, the third and fourth elements were not consolidated in COLJI-Crim. 3-6:03 (2014).

3-6:04.SP STALKING (SERIOUS EMOTIONAL DISTRESS) – SPECIAL INSTRUCTION (EVIDENCE OF TREATMENT NOT REQUIRED)

For purposes of the crime of stalking (serious emotional distress), the prosecution need not show that a person received professional treatment or counseling to prove that he [she] suffered serious emotional distress.

COMMENT

1. *See* § 18-3-602(1)(c), C.R.S. 2015.

3-6:05.INT STALKING – INTERROGATORY (VIOLATION OF ORDER OR CONDITION)

If you find the defendant not guilty of stalking, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of stalking, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question:

Was the stalking in violation of an existing order? (Answer "Yes" or "No")

The stalking was in violation of an existing order only if:

1. a temporary or permanent protection order, injunction, or condition of bond, probation, or parole, or any other court order had issued against the defendant, and

2. that temporary or permanent protection order, injunction, or condition of bond, probation, or parole, or any other court order was in effect at the time the defendant committed the stalking offense of which you found him [her] guilty, and

3. that temporary or permanent protection order, injunction, or condition of bond, probation, or parole, or any other court order prohibited [insert description of behavior constituting stalking].

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-3-602(5), C.R.S. 2015.

2. *See, e.g.*, Instruction E:28 (special verdict form).

+ CHAPTER 3.5

OFFENSES AGAINST PREGNANT WOMEN

CHAPTER COMMENTS

1. Section 18-3.5-110, C.R.S. 2015, provides as follows: "Nothing in this article shall be construed to confer the status of 'person' upon a human embryo, fetus, or unborn child at any stage of development prior to live birth."

2. + The Committee added this chapter in 2015.

3.5:01 UNLAWFUL TERMINATION OF PREGNANCY IN THE FIRST DEGREE

The elements of the crime of unlawful termination of pregnancy in the first degree are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with the intent,

4. to terminate unlawfully the pregnancy of a woman,

5. unlawfully terminated the woman's pregnancy.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful termination of pregnancy in the first degree.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful termination of pregnancy in the first degree.

COMMENT

1. *See* § 18-3.5-103(1), C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent"); Instruction F:282.5 (defining "pregnancy); Instruction F:381.5 (defining "unlawful termination of pregnancy").

3. *See* Instruction H:45.3 (affirmative defense of "medical care or service"); Instruction H:45.5 (affirmative defense of "defendant's own pregnancy").

3.5:02.INT UNLAWFUL TERMINATION OF PREGNANCY IN THE FIRST DEGREE – INTERROGATORY (DEATH)

If you find the defendant not guilty of unlawful termination of pregnancy in the first degree, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of unlawful termination of pregnancy in the first degree, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question:

Did the unlawful termination cause the woman's death? (Answer "Yes" or "No")

The unlawful termination caused the woman's death only if:

1. the woman died as a result of the defendant's unlawful termination of her pregnancy.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-3.5-103(2), C.R.S. 2015.

3.5:03 UNLAWFUL TERMINATION OF PREGNANCY IN THE SECOND DEGREE

The elements of the crime of unlawful termination of pregnancy in the second degree are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. caused the unlawful termination of the pregnancy of a woman.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful termination of pregnancy in the second degree.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful termination of pregnancy in the second degree.

COMMENT

1. *See* § 18-3.5-104(1), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:282.5 (defining "pregnancy); Instruction F:381.5 (defining "unlawful termination of pregnancy"); *see also* CJI-Civ. 9:18 (2014) (defining "cause").

3. *See* Instruction H:45.3 (affirmative defense of "medical care or service"); Instruction H:45.5 (affirmative defense of "defendant's own pregnancy").

3.5:04.INT UNLAWFUL TERMINATION OF PREGNANCY IN THE SECOND DEGREE - INTERROGATORY (PROVOKED AND SUDDEN HEAT OF PASSION)

If you find the defendant not guilty of unlawful termination of pregnancy in the second degree, you should disregard this instruction and fill out the verdict form indicating your not guilty verdict.

If, however, you find the defendant guilty of unlawful termination of pregnancy in the second degree, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question:

Was the defendant acting upon a provoked and sudden heat of passion? (Answer "Yes" or "No")

The defendant was acting upon a provoked and sudden heat of passion only if:

1. the act causing the unlawful termination of pregnancy was performed upon a sudden heat of passion,

2. caused by a serious and highly provoking act of the intended victim,

3. affecting the defendant sufficiently to excite an irresistible passion in a reasonable person, and

4. between the provocation and the act causing the unlawful termination of pregnancy, there was an insufficient interval of time for the voice of reason and humanity to be heard.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant was not acting upon a provoked and sudden heat of passion. In order to meet this burden, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should find that the defendant was acting upon a provoked and sudden heat of passion, mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has met this burden, you should find that the defendant was not acting upon a provoked and sudden heat of passion, mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-3.5-104(2)(b), C.R.S. 2015.

2. *See* Instruction E:28 (special verdict form).

3. *See* Instruction 3-1:08.INT, Comments 3-4 (evidentiary threshold for giving a heat of passion instruction; jury unanimity and deadlock).

3.5:05 UNLAWFUL TERMINATION OF PREGNANCY IN THE THIRD DEGREE

The elements of the crime of unlawful termination of pregnancy in the third degree are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. under circumstances manifesting extreme indifference to the value of human life,

5. engaged in conduct which created a grave risk of death to another person, and

6. thereby caused the unlawful termination of the pregnancy of a woman.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful termination of pregnancy in the third degree.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful termination of pregnancy in the third degree.

COMMENT

1. *See* § 18-3.5-105(1), C.R.S. 2015.

2. *See* Instruction F:282.5 (defining "pregnancy); Instruction F:381.5 (defining "unlawful termination of pregnancy").

3. *See* Instruction H:45.3 (affirmative defense of "medical care or service"); Instruction H:45.5 (affirmative defense of "defendant's own pregnancy").

3.5:06 UNLAWFUL TERMINATION OF PREGNANCY IN THE FOURTH DEGREE

The elements of the crime of unlawful termination of pregnancy in the fourth degree are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. recklessly,

4. caused the unlawful termination of the pregnancy of a woman,

5. when the defendant knew, or reasonably should have known, that the woman was pregnant.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful termination of pregnancy in the fourth degree.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful termination of pregnancy in the fourth degree.

COMMENT

1. *See* § 18-3.5-106(1), C.R.S. 2015.

2. *See* Instruction F:282.5 (defining "pregnancy); Instruction F:308 (defining "recklessly"); Instruction F:381.5 (defining "unlawful termination of pregnancy"); *see also* CJI-Civ. 9:18 (2014) (defining "cause").

3. *See* Instruction H:45.3 (affirmative defense of "medical care or service"); Instruction H:45.5 (affirmative defense of "defendant's own pregnancy").

3.5:07.INT UNLAWFUL TERMINATION OF PREGNANCY IN THE FOURTH DEGREE (UNLAWFUL TERMINATION OF PREGNANCY DURING SPECIFIED FELONY)

If you find the defendant not guilty of unlawful termination of pregnancy in the fourth degree, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of unlawful termination of pregnancy in the fourth degree, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question:

Was the pregnancy of a non-participant unlawfully terminated? (Answer "Yes" or "No")

The pregnancy of a non-participant was unlawfully terminated only if:

1. the pregnancy of [insert name of woman] was unlawfully terminated,

2. during the commission or attempted commission of or flight from the commission or attempted commission of [insert name(s) of qualifying offense(s) enumerated in section 18-3.5-106(2)(b)], and

3. [insert name of woman] was not a participant in [insert name(s) of qualifying offense(s)], and

4. the defendant was a principal in the criminal act or attempted criminal act.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-3.5-106(2)(b), C.R.S. 2015.

2. *See* Instructions G1:06, G1:07 (complicity); Instruction G2:01 (criminal attempt); Instruction 3-1:02, Comment 7 (discussing "immediate flight").

3. Section 18-3.5-106(2)(b) references section 18-1-603 to "describe[]" the term "principal." However, section 18-1-603 defines complicitor liability. The model instruction uses the language of section 18-3.5-106(2)(b) even though the term "principal" is not defined in section 18-1-603.

3.5:08 VEHICULAR UNLAWFUL TERMINATION OF PREGNANCY

The elements of the crime of vehicular unlawful termination of pregnancy are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. operated or drove a motor vehicle,

4. in a reckless manner, and

5. such conduct was the proximate cause of the unlawful termination of the pregnancy of a woman.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of vehicular unlawful termination of pregnancy.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of vehicular unlawful termination of pregnancy.

COMMENT

1. *See* § 18-3.5-107(1), C.R.S. 2015.

2. *See* Instruction F:236 (defining "motor vehicle"); Instruction F:282.5 (defining "pregnancy); Instruction F:308 (defining "recklessly"); Instruction F:381.5 (defining "unlawful termination of pregnancy"); *see also* CJI-Civ. 9:18 (2014)(defining "cause"); CJI-Civ. Ch. 9, § B (Causation) (2014) ("The [Colorado Supreme Court Committee on Civil Jury Instructions] has intentionally eliminated the use of the word 'proximate' when instructing the jury on causation issues because the concept of proximate cause is adequately included in the instructions in this Part B and because the word 'proximate' tends to be confusing to the jury."); *People v. Stewart*, 55 P.3d

107, 116 (Colo. 2002) (discussing the significance of the different definitions of "cause" and "proximate cause" that appeared in COLJI-Crim. (1983)).

3. *See* Instruction 3-1:13, Comment 3 (discussing how to define the terms "operated" and "drove").

3.5:09 AGGRAVATED VEHICULAR UNLAWFUL TERMINATION OF PREGNANCY

The elements of the crime of aggravated vehicular unlawful termination of pregnancy are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. operated or drove a motor vehicle,

4. while under the influence of alcohol or one or more drugs, or a combination of both alcohol and one or more drugs, and

5. such conduct was the proximate cause of the unlawful termination of the pregnancy of a woman.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated vehicular unlawful termination of pregnancy.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated vehicular unlawful termination of pregnancy.

COMMENT

1. *See* § 18-3.5-108(1)(a), C.R.S. 2015.

2. *See* Instruction F:109 (defining "driving under the influence" (vehicular homicide and vehicular assault)); Instruction F:236 (defining "motor vehicle"); Instruction F:252.5 (defining "one or more drugs"); Instruction F:282.5 (defining "pregnancy); *see also* CJI-Civ. 9:18 (2014) (defining "cause"); CJI-Civ. Ch. 9, § B (Causation) (2012) ("The [Colorado Supreme Court Committee on Civil Jury Instructions] has

intentionally eliminated the use of the word 'proximate' when instructing the jury on causation issues because the concept of proximate cause is adequately included in the instructions in this Part B and because the word 'proximate' tends to be confusing to the jury."); *People v. Stewart*, 55 P.3d 107, 116 (Colo. 2002) (discussing the significance of the different definitions of "cause" and "proximate cause" that appeared in COLJI-Crim. (1983)).

3. *See* Instruction 3-1:13, Comment 3 (discussing "operate").

4. The third Comment to Instruction 3-1:13 notes that there appears to be an internal inconsistency involving the use of the terms "motor vehicle" and "vehicle" in sections 18-3-106(1)(b)(I) and 18-3-106(1)(b)(IV). That inconsistency is replicated in sections 18-3.5-108(1)(a) and 18-3.5-108(1)(b)(I). *See also* Instruction 3-2:27 (vehicular assault (under the influence)), Comment 3.

3.5:10.SP AGGRAVATED VEHICULAR UNLAWFUL TERMINATION OF PREGNANCY - SPECIAL INSTRUCTION (BLOOD OR BREATH ALCOHOL LEVEL)

As to the charge of aggravated vehicular unlawful termination of pregnancy, the amount of alcohol in the defendant's blood or breath at the time of the alleged offense, or within a reasonable time thereafter, as shown by analysis of the defendant's blood or breath, gives rise to the following:

(a) Presumption:

It shall be presumed that the defendant was not under the influence of alcohol if there was at such time 0.05 or less grams of alcohol per one hundred milliliters of blood, or if there was at such time 0.05 or less grams of alcohol per two hundred ten liters of breath.

A presumption requires you to find a fact, as if it had been established by evidence, unless the presumption is rebutted by evidence to the contrary.

(b) Evidentiary Consideration:

If there was at such time more than 0.05 but less than 0.08 grams of alcohol per one hundred milliliters of blood, or if there was at such time more than 0.05 but less than 0.08 grams of alcohol per two hundred ten liters of breath, such fact may be considered with other competent evidence in determining whether or not the defendant was under the influence of alcohol.

(c) Permissible inference:

A permissible inference that the defendant was under the influence of alcohol may be drawn if there was at such time 0.08 or more grams of alcohol per one hundred milliliters of blood, or if there was at such time 0.08 or more grams of alcohol per two hundred ten liters of breath.

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that an evidentiary consideration or a permissible inference does not shift that burden to the defendant.

COMMENT

1. *See* § 18-3.5-108(3)(a-c), C.R.S. 2015.

2. Although the statute speaks in terms of a presumption, the concept should be explained as a permissible inference. *See Jolly v. People*, 742 P.2d 891, 897 (Colo. 1987) (unlike a mandatory presumption, the use of a permissible inference in a criminal case does not violate due process).

3.5:11 CARELESS DRIVING RESULTING IN UNLAWFUL TERMINATION OF PREGNANCY

The elements of the crime of careless driving resulting in unlawful termination of pregnancy are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. drove a [motor vehicle] [bicycle] [electrical assisted bicycle] [low-power scooter],

4. in a careless and imprudent manner, without due regard for the width, grade, curves, corners, traffic, and use of the streets and highways and all other attendant circumstances, and

5. caused the unlawful termination of a pregnancy of a woman.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of careless driving resulting in unlawful termination of pregnancy.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of careless driving resulting in unlawful termination of pregnancy.

COMMENT

1. *See* § 18-3.5-109(1), C.R.S. 2015.

2. *See* Instruction F:32 (defining "bicycle"); Instruction F:115 (defining "electrical assisted bicycle"); Instruction F:202 (defining "low-power scooter"); Instruction F:236 (defining "motor vehicle"); Instruction F:282.5 (defining "pregnancy); Instruction F:381.5 (defining "unlawful termination

of pregnancy"); see also CJI-Civ. 9:18 (2014) (defining "cause").

3. *See People v. Zweygardt*, 2012 COA 119, ¶ 34, 298 P.3d 1018, 1025 ("Criminal negligence requires a gross deviation from the standard of care. § 18-1-501(3). Careless driving requires that the defendant drive without due regard. A person who grossly deviates from the standard of care that a reasonable person would exercise and fails to perceive a substantial and unjustified risk that a result will occur or that a circumstance exists, has necessarily acted without due regard for safety.").

CHAPTER 4-1

ARSON

4-1:01 FIRST DEGREE ARSON

The elements of the crime of first degree arson are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. set fire to, burned, caused to be burned, or by the use of any explosive damaged or destroyed, or caused to be damaged or destroyed,

5. any building or occupied structure,

6. of another,

7. without that person's consent.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of first degree arson.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of first degree arson.

COMMENT

1. *See* § 18-4-102(1), C.R.S. 2015.

2. *See* Instruction F:40 (defining "building"); Instruction F:41 (defining "building of another"); Instruction F:248 (defining "occupied structure"); Instruction F:291 (defining property "of another").

3. The term "any explosive" is not defined in Article 4. Previously, a note to COLJI-Crim. 4-1(2) (2008) suggested that

the term was synonymous with the term "explosive or incendiary device," as defined by section 18-12-109(1)(a)(I), C.R.S. 2015. Under that interpretation, a defendant could not be convicted of first degree arson for committing the offense by means of ammunition or ammunition components (e.g., gunpowder, primers, etc.). *Cf.* § 18-12-109(1)(a)(II), C.R.S. 2015 (excluding such substances from the definition of an "explosive or incendiary device"). However, the Committee is now of the view that the General Assembly may have intended for the term "any explosive" to have a broader meaning. Accordingly, the Committee has concluded that, because the term "any explosive" is one of common understanding, the better practice is not to define it.

4. *See People v. LeFebre*, 546 P.2d 952 (Colo. 1976) (upholding a conviction for conspiracy to commit first degree arson despite the defendant's claims of legal impossibility and insufficient evidence, and observing that the terms "burn" or "set fire to," require an "ignition of or an alteration or destruction of the fiber or texture of the materials composing the 'building' or 'structure,'" and not merely "scorching or discoloration").

4-1:02.INT FIRST DEGREE ARSON - INTERROGATORY (EXPLOSIVE)

If you find the defendant not guilty of first degree arson, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of first degree arson, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

> Did the defendant commit the offense of first degree arson by the use of an explosive? (Answer "Yes" or "No")

The defendant committed the offense of first degree arson by the use of an explosive only if:

1. the defendant committed the offense of first degree arson of which you found him [her] guilty, by using any explosive.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-4-102(3), C.R.S. 2015.

2. *See*, *e.g.*, Instruction E:28 (special verdict form).

3. *See* Instruction 4-1:01, Comment 3 (discussing the meaning of the term "any explosive").

4. Give this interrogatory only if, in the elemental instruction defining the offense, the jury is instructed in the alternative as to the method.

4-1:03 SECOND DEGREE ARSON

The elements of the crime of second degree arson are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. set fire to, burned, or caused to be burned, or by the use of any explosive damaged or destroyed, or caused to be damaged or destroyed,

5. any property of another, other than a building or occupied structure,

6. without that person's consent.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of second degree arson.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of second degree arson.

COMMENT

1. *See* § 18-4-103(1), C.R.S. 2015.

2. *See* Instruction F:40 (defining "building"); Instruction F:41 (defining "building of another"); Instruction F:248 (defining "occupied structure"); Instruction F:291 (defining property "of another").

3. *See* Instruction 4-1:01, Comment 3 (discussing the meaning of the term "any explosive").

4-1:04.INT SECOND DEGREE ARSON - INTERROGATORY (SUBSTANTIAL PROPERTY DAMAGE)

If you find the defendant not guilty of second degree arson, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of second degree arson, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the arson result in substantial property damage? (Answer "Yes" or "No")

The arson resulted in substantial property damage only if:

1. the damage caused by the defendant's commission of the offense of second degree arson of which you found him [her] guilty amounted to one hundred dollars or more.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-4-103(2), C.R.S. 2015.

2. *See, e.g.*, Instruction E:28 (special verdict form).

4-1:05 THIRD DEGREE ARSON

The elements of the crime of third degree arson are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. intentionally,

4. damaged any property,

5. by means of fire or explosives,

6. with intent to defraud.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of third degree arson.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of third degree arson.

COMMENT

1. *See* § 18-4-104(1), C.R.S. 2015.

2. *See* Instruction F:185 (defining "intentionally" and "with intent").

3. *See* Instruction 4-1:01, Comment 3 (discussing the meaning of the term "any explosive").

4-1:06 FOURTH DEGREE ARSON

The elements of the crime of fourth degree arson are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly or recklessly started or maintained a fire or caused an explosion, on his [her] own property or that of another, and

4. by so doing, placed another in danger of death or serious bodily injury or placed any building or occupied structure of another in danger of damage.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of fourth degree arson.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of fourth degree arson.

COMMENT

1. *See* § 18-4-105(1), C.R.S. 2015.

2. *See* Instruction F:41 (defining "building of another"); Instruction F:195 (defining "knowingly"); Instruction F:291 (defining property "of another"); Instruction F:308 (defining "recklessly"); Instruction F:332 (defining "serious bodily injury").

3. *See Copeland v. People*, 2 P.3d 1283, 1286-87 (Colo. 2000) (mental state required for fourth-degree arson is that fire be started or maintained knowingly or recklessly, and prosecution need not prove intent to endanger; a firefighter responding to

extinguish a fire falls within the meaning of an endangered person).

4. *See* Instruction H:46 (affirmative defense of "controlled agricultural burn").

4-1:07.INT FOURTH DEGREE ARSON - INTERROGATORY (ENDANGERMENT OF A PERSON)

If you find the defendant not guilty of fourth degree arson, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of fourth degree arson, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

> Was the fourth degree arson committed by endangering a person? (Answer "Yes" or "No")

The fourth degree arson was committed by endangering a person only if:

1. the defendant placed another person in danger of death or serious bodily injury in the commission of the fourth degree arson of which you found him [her] guilty.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-4-105(2), C.R.S. 2015.

2. *See*, *e.g.*, Instruction E:28 (special verdict form).

3. *See* Instruction F:332 (defining "serious bodily injury").

4. Give this interrogatory only if, in the fourth element of the instruction defining the offense, the jury is instructed in the alternative as to the consequences.

4-1:08.INT FOURTH DEGREE ARSON - INTERROGATORY (ENDANGERMENT OF VALUABLE PROPERTY)

If you find the defendant not guilty of fourth degree arson, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of fourth degree arson, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

> Was the fourth degree arson committed by endangering valuable property? (Answer "Yes" or "No")

The fourth degree arson was committed by endangering valuable property only if:

1. the defendant placed any building or occupied structure of another in danger of damage in the commission of the fourth degree arson of which you have found him [her] guilty, and

2. the value of the property was one hundred dollars or more.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-4-105(3), C.R.S. 2015.

2. *See*, *e.g.*, Instruction E:28 (special verdict form).

3. Section 18-4-105 does not include a sentence enhancement provision for placing another person in danger of bodily injury that does not rise to the level of serious bodily injury. It is unclear whether section 18-4-105(3)'s statement that it applies "if only property is thus endangered" should be understood as meaning that it applies if no person was placed in danger of *serious* bodily injury (or death). Under a contrary construction, a defendant who endangered property worth more than one hundred dollars could avoid application of section 18-4-105(3) by asserting that he or she also placed a person in danger of simple bodily injury.

Likewise, this same issue of statutory construction could arise with respect to section 18-4-105(4), for which no interrogatory is necessary (because the provision describes the base level of the offense, where only property worth less than one hundred dollars was endangered).

CHAPTER 4-2

BURGLARY

4-2:01 FIRST DEGREE BURGLARY

The elements of the crime of first degree burglary are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. entered unlawfully, or remained unlawfully after a lawful or unlawful entry,

5. in a building or occupied structure,

6. with intent,

7. to commit therein the crime[s] of [insert name(s) of offense(s)], + against another person or property, and

8. in effecting entry or while in the building or occupied structure or in immediate flight from the building or occupied structure,

[9. the defendant or another participant in the crime committed the crime of assault or the crime of menacing against any person.]

[9. the defendant or another participant in the crime was armed with explosives.]

[9. the defendant or another participant in the crime used a deadly weapon or possessed and threatened the use of a deadly weapon.]

[10. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of first degree burglary.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements

beyond a reasonable doubt, you should find the defendant not guilty of first degree burglary.

COMMENT

1. *See* § 18-4-202(1), C.R.S. 2015.

2. *See* Instruction F:40 (defining "building"); Instruction F:88 (defining "deadly weapon"); Instruction F:126 (defining "enters unlawfully" and "remains unlawfully"); Instruction F:195 (defining "knowingly"); Instruction F:248 (defining "occupied structure"); *see also* Chapter 3-2 (defining assaults and menacing); *see also* Instruction 4-1:01, Comment 3 (discussing the meaning of the term "any explosive").

3. *See People v. Palmer*, 87 P.3d 137, 140 (Colo. App. 2003) (although a jury must unanimously agree that a defendant charged with first degree burglary intended to commit a specific underlying crime, it need not unanimously agree on the evidence or theory by which a particular element of the underlying crime is established).

4. In 2013, both the provision of the first degree burglary statute relating to deadly weapons and the definition of a "deadly weapon" were amended, following the supreme court's decision in *Montez v. People*, 2012 CO 6, ¶¶ 3-22, 269 P.3d 1228, 1229-32 (the General Assembly has not classified firearms as per se deadly weapons for purposes of the first degree burglary statute; the legislature did not intend theft of a firearm from a building to constitute first degree burglary regardless of the manner the burglar used or intended to use the firearm).

5. If the defendant is not separately charged with a referenced offense, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense.

6. *See* Instruction 3-1:02, Comment 7 (discussing the supreme court's interpretation of the term "immediate flight," for purposes of the felony-murder statute, in *Auman v. People*, 109 P.3d 647, 650–51 (Colo. 2005)); *People v. Fuentes*, 258 P.3d 320, 327 (Colo. App. 2011) (applying the immediate flight standard of

Auman and holding that "[T]he first degree burglary statute requires that the entry, the assault, and the flight be close in time and that the assault occur while fleeing from the building or occupied structure. A person therefore commits an assault in immediate flight from a building where the assault is part of a continuous integrated attempt to get away from the building.").

7. + In 2015, the Committee corrected the seventh element by adding the following statutory language which was inadvertently omitted in COLJI-Crim. 4-2:01 (2014): "against another person or property,".

4-2:02.INT FIRST DEGREE BURGLARY – INTERROGATORY (CONTROLLED SUBSTANCE)

If you find the defendant not guilty of first degree burglary, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of first degree burglary, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the burglary involve a controlled substance? (Answer "Yes" or "No")

The burglary involved a controlled substance only if:

1. the property involved in the [insert name(s) of property offense(s) from element 7] was a controlled substance,

2. within a pharmacy or other place having lawful possession of it.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-4-202(3), C.R.S. 2015.

2. *See* Instruction F:73 (defining "controlled substance" by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S. 2015); Instruction F:275 (defining "pharmacy"); *see, e.g.*, Instruction E:28 (special verdict form).

4-2:03 SECOND DEGREE BURGLARY

The elements of the crime of second degree burglary are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. broke an entrance into, entered unlawfully in, or remained unlawfully after a lawful or unlawful entry in,

5. a building or occupied structure,

6. with intent to commit therein the crime[s] of [insert name(s) of offense(s)] against another person or property.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of second degree burglary.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of second degree burglary.

COMMENT

1. *See* § 18-4-203(1), C.R.S. 2015.

2. *See* Instruction F:40 (defining "building"); Instruction F:126 (defining "enters unlawfully" and "remains unlawfully"); Instruction F:195 (defining "knowingly"); Instruction F:248 (defining "occupied structure").

3. It may be appropriate to draft a special instruction explaining that: "Intent to commit a crime against another

person or property while in the dwelling can be formed either before or after [an] unlawful entry." *People v. Oram*, 217 P.3d 883, 892 (Colo. App. 2009), *aff'd on other grounds*, *Oram v. People*, 255 P.3d 1032 (Colo. 2011). Likewise, it may be appropriate to draft a special instruction explaining that such an intent also can be formed after entering lawfully and remaining unlawfully. *See People v. Larkins*, 109 P.3d 1003, 1004-05 (Colo. App. 2004) ("In *Cooper v. People*, 973 P.2d 1234, 1240 (Colo. 1999), . . . the supreme court held that 'the intent to commit a crime must coexist with the initial point of unlawful entry or remaining.' However, *Cooper* was decided under the version of § 18–4–203 applicable to offenses committed before July 1, 1999. Soon after the *Cooper* decision was announced, the General Assembly amended the second degree burglary statute by adding the 'after a lawful or unlawful entry' language . . . above, thus removing the requirement that intent to commit a crime exist at the time of entry."); *see also People v. Wartena*, 2012 COA 12, ¶¶ 20-24, 296 P.3d 136, 140 (explaining that, although "in *People v. Fuentes*, 258 P.3d 320, 323 (Colo. App. 2011), a division of [the Court of Appeals] cited *Cooper* for the proposition that '[t]he intent to commit a crime must be present at the very moment that the person trespasses,' . . . we reject the contention that *Fuentes* somehow revived the *Cooper* court's holding with respect to intent and implicitly disapproved of the more recent interpretations of section 18–4–203 noted in *Larkins* and [*Oram v. People*, 255 P.3d 1032, 1033 (Colo. 2011)].").

4. If the defendant is not separately charged with a referenced offense, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense.

4-2:04.INT SECOND DEGREE BURGLARY – INTERROGATORY (DWELLING)

If you find the defendant not guilty of second degree burglary, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of second degree burglary, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the burglary of a dwelling? (Answer "Yes" or "No")

The burglary was of a dwelling only if:

1. the structure burglarized by the defendant was a dwelling.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-4-203(2)(a), C.R.S. 2015.

2. *See* Instruction F:40 (defining "building"); Instruction F:114 (defining "dwelling"); Instruction F:248 (defining "occupied structure"); *see, e.g.*, Instruction E:28 (special verdict form).

3. In COLJI-Crim. (2008), the Committee stated that, because it was unclear whether a mens rea applied to the sentence enhancement factor concerning burglary of a dwelling, it had drafted three alternative instructions. *See* COLJI-Crim. 4-2:04.1, 4-2:04.2, 4-2:04.3 (2008). However, this question has

not yet been resolved through appellate litigation. *Cf. People v. Santana-Medrano*, 165 P.3d 804, 807 (Colo. App. 2006) (although the substantive offense of sexual assault requires proof that the defendant acted "knowingly," this mens rea does not also apply to the aggravating circumstances set forth in section 18-3-402(4)).

4-2:05.INT SECOND DEGREE BURGLARY – INTERROGATORY (THEFT OF A CONTROLLED SUBSTANCE)

If you find the defendant not guilty of second degree burglary, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of second degree burglary, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

> Was the objective of the burglary the theft of a controlled substance? (Answer "Yes" or "No")

The objective of the burglary was the theft of a controlled substance only if:

1. the objective of the burglary was to commit theft of a controlled substance,

2. that was lawfully kept within any building or occupied structure.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-4-203(2)(b), C.R.S. 2015.

2. *See* Instruction F:73 (defining "controlled substance" by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S. 2015); Instruction 4-4:01 (theft); *see, e.g.*, Instruction E:28 (special verdict form).

3. If the defendant is not separately charged with theft, give the jury the elemental instruction defining theft without the two concluding paragraphs that explain the burden of proof. *See* Instruction 4-4:01. Place the elemental instruction defining theft immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the theft offense.

4-2:06 THIRD DEGREE BURGLARY

The elements of the crime of third degree burglary are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to commit the crime[s] of [insert name of offense(s)],

5. entered or broke into,

6. any vault, safe, cash register, coin vending machine, product dispenser, money depository, safety deposit box, coin telephone, coin box, or other apparatus or equipment whether or not coin operated.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of third degree burglary.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of third degree burglary.

COMMENT

1. *See* § 18-4-204(1), C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent").

3. In *People v. Geyer*, 942 P.2d 1297, 1300 (Colo. App. 1996), a division of the Court of Appeals accepted the People's concession that an instruction defining third degree burglary should have included the elements of "knowingly" and "unlawful entry" (though the division held that the omissions did not constitute plain error). However, the instruction at issue in

Geyer was patterned on COLJI-Crim. 14:05 (1983), which, unlike the above model instruction, did not list "with intent" as a separate element modifying all subsequent elements. *See* § 18-1-503(3), C.R.S. 2015 ("If acting knowingly suffices to establish an element, that element also is established if a person acts intentionally."); *People v. Rivas*, 77 P.3d 882, 889 (Colo. App. 2003) (observing, with respect to a second degree assault instruction, that "the better practice [is] to offset the mens rea requirement [of 'with intent'] so that it modifies all the conduct elements").

4. *See Winter v. People*, 126 P.3d 192, 196 (Colo. 2006) ("We find that an unsecured and unlocked locker which does not have the appearance of being employed for the safekeeping of valuables is not within the class of items contemplated by section 18-4-204(1).").

4-2:07.INT THIRD DEGREE BURGLARY – INTERROGATORY (THEFT OF A CONTROLLED SUBSTANCE)

If you find the defendant not guilty of third degree burglary, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of third degree burglary, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

> Was the objective of the burglary to commit theft of a controlled substance? (Answer "Yes" or "No")

The objective of the burglary was to commit theft of a controlled substance only if:

1. the objective of the burglary was to commit the theft of a controlled substance,

2. that was lawfully kept in or upon the property burglarized.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-4-204(2), C.R.S. 2015.

2. *See* Instruction F:73 (defining "controlled substance" by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S. 2015); Instruction 4-4:01 (theft); *see, e.g.*, Instruction E:28 (special verdict form).

3. If the defendant is not separately charged with theft, give the jury the elemental instruction defining theft without the two concluding paragraphs that explain the burden of proof. *See* Instruction 4-4:01. Place the elemental instruction defining theft immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the theft offense.

4-2:08 POSSESSION OF BURGLARY TOOLS

The elements of the crime of possession of burglary tools are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. possessed any explosive, tool, instrument, or other article adapted, designed, or commonly used for committing or facilitating the commission of an offense involving forcible entry into premises or theft by a physical taking, and

4. intended to use the thing possessed, or knew that some person intended to use the thing possessed, in the commission of such an offense.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of possession of burglary tools.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of possession of burglary tools.

COMMENT

1. *See* § 18-4-205(1), C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent"); Instruction F:281 (defining "possession"); *see also* Instruction 4-1:01, Comment 3 (discussing the meaning of the term "any explosive").

3. *See People v. Ridgeway*, 2013 COA 17, ¶¶ 16-19, 307 P.3d 126, 129-30 (jury instruction on elements of the crime of possession of burglary tools violated defendant's constitutional right to have the People prove every element of a charged crime

beyond a reasonable doubt; as instructed, the jury was only required to find that defendant had the "intent to use" the tools for some purpose, whether it be for the commission of a burglary or for some other, innocent purpose, and nothing in the instruction required the jury to find that defendant possessed a burglary tool with an intent to use it to commit a burglary or theft by a physical taking).

CHAPTER 4-3

ROBBERY

4-3:01 ROBBERY

The elements of the crime of robbery are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. took anything of value,

5. from the person or presence of another,

6. by the use of force, threats, or intimidation.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of robbery.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of robbery.

COMMENT

1. *See* § 18-4-301(1), C.R.S. 2015.

2. *See* Instruction F:21 (equating "anything of value" with any "thing of value," as defined in Instruction F:371); Instruction F:195 (defining "knowingly").

3. *See People v. Benton*, 829 P.2d 451, 452 (Colo. App. 1991) (noting that the term "presence" is not defined by the robbery statutes and approving an instruction using language from *People v. Bartowsheski*, 661 P.2d 235, 244 (Colo. 1983)).

4-3:02.INT ROBBERY – INTERROGATORY (AT-RISK ADULT OR JUVENILE)

If you find the defendant not guilty of robbery, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of robbery, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the victim a person with protected status?
(Answer "Yes" or "No")

The victim was a person with protected status only if:

[1. the victim was seventy years of age or older.]

[1. the victim was eighteen years of age or older, and

2. was a person with a disability.]

[1. the victim was under the age of eighteen years, and

2. was a person with a disability.]

The prosecution has the burden to prove [each] [the] numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-6.5-103(4), C.R.S. 2015.

2. *See* Instruction F:24 (defining "at-risk adult"); Instruction F:26 (defining "at-risk juvenile"); Instruction

F:273 (defining "person with a disability"); *see*, *e.g.*, Instruction E:28 (special verdict form).

3. *See People v. Lovato*, 179 P.3d 208, 212 (Colo. App. 2007) (robbery of an at-risk adult is an enhanced form of robbery, and not a separate offense).

4-3:03 AGGRAVATED ROBBERY (KILL, MAIM, OR WOUND)

The elements of the crime of aggravated robbery (kill, maim, or wound) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. took anything of value,

5. from the person or presence of another,

6. by the use of force, threats, or intimidation, and

7. during the act of robbery or immediate flight therefrom,

8. was armed with a deadly weapon,

9. with intent, if resisted, to kill, maim, or wound any person.

[10. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated robbery (kill, maim, or wound).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated robbery (kill, maim, or wound).

COMMENT

1. *See* § 18-4-302(1)(a), C.R.S. 2015.

2. *See* Instruction F:21 (equating "anything of value" with any "thing of value," as defined in Instruction F:371); Instruction

F:88 (defining "deadly weapon"); Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly").

3. *See People v. Benton*, 829 P.2d 451, 452 (Colo. App. 1991) (noting that the term "presence" is not defined by the robbery statutes and approving an instruction using language from *People v. Bartowsheski*, 661 P.2d 235, 244 (Colo. 1983)).

4. *See* Instruction 3-1:02, Comment 7 (discussing the supreme court's interpretation of the term "immediate flight," for purposes of the felony-murder statute, in *Auman v. People*, 109 P.3d 647, 650–51 (Colo. 2005)); *see also People v. Fuentes*, 258 P.3d 320, 327 (Colo. App. 2011) (applying the immediate flight standard of *Auman* to the first degree burglary statute).

4-3:04 AGGRAVATED ROBBERY (WOUND, STRIKE, OR PUT IN FEAR)

The elements of the crime of aggravated robbery (wound, strike, or put in fear) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. took anything of value,

5. from the person or presence of another,

6. by the use of force, threats, or intimidation, and

7. during the act of robbery or immediate flight therefrom,

8. knowingly,

[9. wounded or struck any person,

10. with a deadly weapon.]

[9. by the use of force, threats, or intimidation,

10. with a deadly weapon,

11. put any person in reasonable fear of death or bodily injury.]

[__. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated robbery (wound, strike, or put in fear).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements

beyond a reasonable doubt, you should find the defendant not guilty of aggravated robbery (wound, strike, or put in fear).

COMMENT

1. *See* § 18-4-302(1)(b), C.R.S. 2015.

2. *See* Instruction F:21 (equating "anything of value" with any "thing of value," as defined in Instruction F:371); Instruction F:36 (defining "bodily injury"); Instruction F:88 (defining "deadly weapon"); Instruction F:195 (defining "knowingly").

3. *See People v. Benton*, 829 P.2d 451, 452 (Colo. App. 1991) (noting that the term "presence" is not defined by the robbery statutes and approving an instruction using language from *People v. Bartowsheski*, 661 P.2d 235, 244 (Colo. 1983)).

4. *See* Instruction 3-1:02, Comment 7 (discussing the supreme court's interpretation of the term "immediate flight," for purposes of the felony-murder statute, in *Auman v. People*, 109 P.3d 647, 650–51 (Colo. 2005)); *see also People v. Fuentes*, 258 P.3d 320, 327 (Colo. App. 2011) (applying the immediate flight standard of *Auman* to the first degree burglary statute).

4-3:05 AGGRAVATED ROBBERY (CONFEDERATE)

The elements of the crime of aggravated robbery (confederate) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. took anything of value,

5. from the person or presence of another,

6. by the use of force, threats, or intimidation, and

7. during the act of robbery or immediate flight therefrom,

8. had present a confederate,

9. aiding or abetting the perpetration of the robbery,

10. armed with a deadly weapon,

11. with the intent, either on the part of the defendant or the confederate, if resistance was offered, to kill, maim, or wound any person, or by the use of force, threats, or intimidation put any person in reasonable fear of death or bodily injury.

[12. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated robbery (confederate).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated robbery (confederate).

COMMENT

1. *See* § 18-4-302(1)(c), C.R.S. 2015.

2. *See* Instruction F:21 (equating "anything of value" with any "thing of value," as defined in Instruction F:371); Instruction F:36 (defining "bodily injury"); Instruction F:88 (defining "deadly weapon"); Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly"); *see also People v. Wilford*, 111 P.3d 512, 517 (Colo. App. 2004) ("The term 'confederate' is not a highly technical one and is well within the comprehension of the jury.").

3. *See People v. Benton*, 829 P.2d 451, 452 (Colo. App. 1991) (noting that the term "presence" is not defined by the robbery statutes and approving an instruction using language from *People v. Bartowsheski*, 661 P.2d 235, 244 (Colo. 1983)).

4. The Committee perceives an ambiguity in section 18-4-302(1)(c). Specifically, it is unclear whether the final clause (beginning with "or by the use of force") refers exclusively to the conduct of the armed confederate, or whether it also encompasses the conduct of the defendant. Accordingly, the model instruction quotes the entire statutory provision. This should not be understood as the Committee's recommendation. It will be up to the trial court to determine how to best instruct the jury on this aspect of the offense. Users should exercise care when making any modifications.

5. *See* Instruction 3-1:02, Comment 7 (discussing the supreme court's interpretation of the term "immediate flight," for purposes of the felony-murder statute, in *Auman v. People*, 109 P.3d 647, 650–51 (Colo. 2005)); *see also People v. Fuentes*, 258 P.3d 320, 327 (Colo. App. 2011) (applying the immediate flight standard of *Auman* to the first degree burglary statute).

4-3:06 AGGRAVATED ROBBERY (SUGGESTION OR REPRESENTATION OF A DEADLY WEAPON)

The elements of the crime of aggravated robbery (suggestion or representation of a deadly weapon) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. took anything of value,

5. from the person or presence of another,

6. by the use of force, threats, or intimidation, and

7. during the act of robbery or immediate flight therefrom,

8. possessed any article used or fashioned in a manner to lead any person who was present reasonably to believe it was a deadly weapon or represented verbally or otherwise that he [she] was then and there armed with a deadly weapon.

[9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated robbery (suggestion or representation of a deadly weapon).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated robbery (suggestion or representation of a deadly weapon).

COMMENT

1. *See* § 18-4-302(1)(d), C.R.S. 2015.

2. *See* Instruction F:21 (equating "anything of value" with any "thing of value," as defined in Instruction F:371); Instruction F:88 (defining "deadly weapon"); Instruction F:195 (defining "knowingly").

3. *See People v. Benton*, 829 P.2d 451, 452 (Colo. App. 1991) (noting that the term "presence" is not defined by the robbery statutes and approving an instruction using language from *People v. Bartowsheski*, 661 P.2d 235, 244 (Colo. 1983)).

4. *See* Instruction 3-1:02, Comment 7 (discussing the supreme court's interpretation of the term "immediate flight," for purposes of the felony-murder statute, in *Auman v. People*, 109 P.3d 647, 650–51 (Colo. 2005)); *see also People v. Fuentes*, 258 P.3d 320, 327 (Colo. App. 2011) (applying the immediate flight standard of *Auman* to the first degree burglary statute).

4-3:07 AGGRAVATED ROBBERY OF CONTROLLED SUBSTANCES (KILL, MAIM, OR WOUND)

The elements of the crime of aggravated robbery of a controlled substance (kill, maim, or wound) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. took any controlled substance,

5. from the person or presence of any pharmacy, pharmacist, place, or person having lawful possession thereof,

6. by the use of force, threats, or intimidation, and

7. during the act of robbery or immediate flight therefrom,

8. was armed with a deadly weapon,

9. with intent, if resisted, to kill, maim, or wound any person.

[10. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated robbery of a controlled substance (kill, maim, or wound).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated robbery of a controlled substance (kill, maim, or wound).

COMMENT

1. *See* § 18-4-303(1), C.R.S. 2015.

2. *See* Instruction F:73 (defining "controlled substance" by referring users to the statutory schedules in section § 18-18-102(5), C.R.S. 2015); Instruction F:88 (defining "deadly weapon"); Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly"); Instruction F:275 (defining "pharmacy").

3. *See Ramirez v. People*, 682 P.2d 1181, 1183 (Colo. 1984) (section 18-4-303 establishes a separate offense; it is not a sentence enhancement provision for aggravated robbery).

4. The supreme court has made clear that the mens rea of "knowingly" applies to this offense. *See People v. Mascarenas*, 666 P.2d 101, 107 (Colo. 1983) ("because aggravated robbery of drugs [in violation of section 18-4-303] is merely a variant of the common law crime of aggravated robbery, a culpable mental state is a requisite element of the crime"; the trial court committed reversible error by instructing the jury that the defendant must have "knowingly" placed the victim in reasonable fear of death or bodily injury without also making clear that this culpable mental state applied to the "taking element").

However, the Committee has identified a significant ambiguity in the language of section 18-4-303(1), which provides, in its entirety, as follows:

> A person who takes any controlled substance, as defined in section 18-18-102(5), from any pharmacy or other place having lawful possession thereof or from any pharmacist or other person having lawful possession thereof *under the aggravating circumstances defined in section 18-4-302* is guilty of aggravated robbery of controlled substances.

(Emphasis added.) Specifically, it is unclear whether the reference to "the aggravating circumstances defined in section 18-4-302" was intended to incorporate: (1) all elements of aggravated robbery (which would, by extension, incorporate all elements of simple robbery); or (2) only those factors set forth in subsections a through d of section 18-4-302(1). Although the above model instruction utilizes the first approach by including all elements of aggravated robbery (and, thus, all elements of simple robbery), the Committee takes no position concerning the

correctness of this construction. The Committee adopted this approach because it is mindful of the rule of lenity, "which requires a narrow construction of ambiguous criminal statutes in favor of the accused." *People v. Dist. Court*, 711 P.2d 666, 671 (Colo. 1985). In drafting an elemental jury instruction based on section 18-4-303(1), the trial judge, in consultation with counsel, will have to determine how to proceed.

5. *See* Instruction 3-1:02, Comment 7 (discussing the supreme court's interpretation of the term "immediate flight," for purposes of the felony-murder statute, in *Auman v. People*, 109 P.3d 647, 650–51 (Colo. 2005)); *see also People v. Fuentes*, 258 P.3d 320, 327 (Colo. App. 2011) (applying the immediate flight standard of *Auman* to the first degree burglary statute).

4-3:08 AGGRAVATED ROBBERY OF CONTROLLED SUBSTANCES (WOUND, STRIKE, OR PUT IN FEAR)

The elements of the crime of aggravated robbery of a controlled substance (wound, strike, or put in fear) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. took any controlled substance,

5. from the person or presence of any pharmacy, pharmacist, place, or person having lawful possession thereof,

6. by the use of force, threats, or intimidation, and

7. during the act of robbery or immediate flight therefrom,

8. knowingly,

[9. wounded or struck any person,

10. with a deadly weapon.]

[9. by the use of force, threats, or intimidation,

10. with a deadly weapon,

11. put any person in reasonable fear of death or bodily injury.]

[__. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated robbery of a controlled substance (wound, strike, or put in fear).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated robbery of a controlled substance (wound, strike, or put in fear).

COMMENT

1. *See* § 18-4-303(1), C.R.S. 2015.

2. *See* Instruction F:36 (defining "bodily injury"); Instruction F:73 (defining "controlled substance" by referring users to the statutory schedules in section § 18-18-102(5), C.R.S. 2015); Instruction F:88 (defining "deadly weapon"); Instruction F:195 (defining "knowingly"); Instruction F:275 (defining "pharmacy").

3. *See Ramirez v. People*, 682 P.2d 1181, 1183 (Colo. 1984) (section 18-4-303 establishes a separate offense; it is not a sentence enhancement provision for aggravated robbery).

4. *See* Instruction 4-3:07, Comment 4 (explaining the Committee's drafting decision with respect to this offense).

5. *See* Instruction 3-1:02, Comment 7 (discussing the supreme court's interpretation of the term "immediate flight," for purposes of the felony-murder statute, in *Auman v. People*, 109 P.3d 647, 650–51 (Colo. 2005)); *see also People v. Fuentes*, 258 P.3d 320, 327 (Colo. App. 2011) (applying the immediate flight standard of *Auman* to the first degree burglary statute).

4-3:09 AGGRAVATED ROBBERY OF CONTROLLED SUBSTANCES (CONFEDERATE)

The elements of the crime of aggravated robbery of a controlled substance (confederate) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. took any controlled substance,

5. from the person or presence of any pharmacy, pharmacist, place, or person having lawful possession thereof,

6. by the use of force, threats, or intimidation, and

7. during the act of robbery or immediate flight therefrom,

8. had present a confederate,

9. aiding or abetting the perpetration of the robbery,

10. armed with a deadly weapon,

11. with the intent, either on the part of the defendant or the confederate, if resistance was offered, to kill, maim, or wound any person, or by the use of force, threats, or intimidation put any person in reasonable fear of death or bodily injury.

[12. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated robbery of a controlled substance (confederate).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements

beyond a reasonable doubt, you should find the defendant not guilty of aggravated robbery of a controlled substance (confederate).

COMMENT

1. *See* § 18-4-303(1), C.R.S. 2015.

2. *See* Instruction F:36 (defining "bodily injury"); Instruction F:73 (defining "controlled substance" by referring users to the statutory schedules in section § 18-18-102(5), C.R.S. 2015); Instruction F:88 (defining "deadly weapon"); Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly"); Instruction F:275 (defining "pharmacy"); *see also People v. Wilford*, 111 P.3d 512, 517 (Colo. App. 2004) ("The term 'confederate' is not a highly technical one and is well within the comprehension of the jury.").

3. *See Ramirez v. People*, 682 P.2d 1181, 1183 (Colo. 1984) (section 18-4-303 establishes a separate offense; it is not a sentence enhancement provision for aggravated robbery).

4. *See* Instruction 4-3:05, Comment 4 (noting an ambiguity in section 18-4-302(1)(c)).

5. See Instruction 4-3:07, Comment 4 (explaining the Committee's drafting decision with respect to this offense).

6. *See* Instruction 3-1:02, Comment 7 (discussing the supreme court's interpretation of the term "immediate flight," for purposes of the felony-murder statute, in *Auman v. People*, 109 P.3d 647, 650–51 (Colo. 2005)); *see also People v. Fuentes*, 258 P.3d 320, 327 (Colo. App. 2011) (applying the immediate flight standard of *Auman* to the first degree burglary statute).

4-3:10 AGGRAVATED ROBBERY OF CONTROLLED SUBSTANCES (SUGGESTION OR REPRESENTATION OF A DEADLY WEAPON)

The elements of the crime of aggravated robbery of a controlled substance (suggestion or representation of a deadly weapon) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. took any controlled substance,

5. from the person or presence of any pharmacy, pharmacist, place, or person having lawful possession thereof,

6. by the use of force, threats, or intimidation, and

7. during the act of robbery or immediate flight therefrom,

8. possessed any article used or fashioned in a manner to lead any person who was present reasonably to believe it was a deadly weapon or represented verbally or otherwise that he [she] was then and there armed with a deadly weapon.

[9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated robbery of a controlled substance (suggestion or representation of a deadly weapon).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated robbery of a controlled substance (suggestion or representation of a deadly weapon).

COMMENT

1. *See* § 18-4-303(1), C.R.S. 2015.

2. *See* Instruction F:73 (defining "controlled substance" by referring users to the statutory schedules in section § 18-18-102(5), C.R.S. 2015); Instruction F:88 (defining "deadly weapon"); Instruction F:195 (defining "knowingly"); Instruction F:275 (defining "pharmacy").

3. *See Ramirez v. People*, 682 P.2d 1181, 1183 (Colo. 1984) (section 18-4-303 establishes a separate offense; it is not a sentence enhancement provision for aggravated robbery).

4. *See* Instruction 3-1:02, Comment 7 (discussing the supreme court's interpretation of the term "immediate flight," for purposes of the felony-murder statute, in *Auman v. People*, 109 P.3d 647, 650–51 (Colo. 2005)); *see also People v. Fuentes*, 258 P.3d 320, 327 (Colo. App. 2011) (applying the immediate flight standard of *Auman* to the first degree burglary statute).

5. *See* Instruction 4-3:07, Comment 4 (explaining the Committee's drafting decision with respect to this offense).

CHAPTER 4-4

THEFT

COMMENTS ON CHAPTER USE

1. If the defendant is charged with more than one count of theft, identify the counts in the elemental instructions, interrogatories, and special verdict forms with descriptive parentheticals (e.g., "theft (count 4)" and "theft (count 6)," or "theft (from 7-11)" and "theft (from Target)").

4-4:01 THEFT (INTENT TO PERMANENTLY DEPRIVE)

The elements of the crime of theft (intent to permanently deprive) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

[4. obtained, retained, or exercised control over anything of value of another,

5. without authorization or by threat or deception, and]

[4. received, loaned money by pawn or pledge on, or disposed of,

5. anything of value or belonging to another that he [she] knew or believed to have been stolen, and]

6. intended to deprive the other person permanently of the use or benefit of the thing of value.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of theft (intent to permanently deprive).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of theft (intent to permanently deprive).

COMMENT

1. *See* § 18-4-401(1)(a), C.R.S. 2015.

2. *See* Instruction F:18 (defining "another"); Instruction F:30 (defining "benefit"); Instruction F:185 (defining

"intentionally"); Instruction F:195 (defining "knowingly"); Instruction F:371 (defining "thing of value").

3. *See Auman v. People*, 109 P.3d 647, 663-64 (Colo. 2005) (theft instruction was erroneous because the culpable mental state of "knowingly" was listed as the third numbered element in a manner that indicated it modified only its lettered sub-elements – "(a) obtained or exercised control over, (b) anything of value, (c) which is the property of another" – and not the fourth numbered element: "without authorization").

4-4:02 THEFT (KNOWING USE, CONCEALMENT, OR ABANDONMENT)

The elements of the crime of theft (knowing use, concealment, or abandonment) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

[4. obtained, retained, or exercised control over anything of value of another,

5. without authorization or by threat or deception, and]

[4. received, loaned money by pawn or pledge on, or disposed of,

5. anything of value or belonging to another that he [she] knew or believed to have been stolen, and]

6. knowingly,

7. used, concealed, or abandoned the thing of value,

8. in such manner as to deprive the other person permanently of its use or benefit.

[9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of theft (knowing use, concealment, or abandonment).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of theft (knowing use, concealment, or abandonment).

COMMENT

1. *See* § 18-4-401(1)(b), C.R.S. 2015.

2. *See* Instruction F:18 (defining "another"); Instruction F:30 (defining "benefit"); Instruction F:195 (defining "knowingly"); Instruction F:371 (defining "thing of value").

3. *See Auman v. People*, 109 P.3d 647, 663-64 (Colo. 2005) (theft instruction was erroneous because the culpable mental state of "knowingly" was listed as the third numbered element in a manner that indicated it modified only its lettered sub-elements – "(a) obtained or exercised control over, (b) anything of value, (c) which is the property of another" – and not the fourth numbered element: "without authorization").

4-4:03 THEFT (INTENTIONAL USE, CONCEALMENT, OR ABANDONMENT)

The elements of the crime of theft (intentional use, concealment, or abandonment) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

[4. obtained, retained, or exercised control over anything of value of another,

5. without authorization or by threat or deception, and]

[4. received, loaned money by pawn or pledge on, or disposed of,

5. anything of value or belonging to another that he [she] knew or believed to have been stolen, and]

6. used, concealed, or abandoned the thing of value,

7. intending that such use, concealment, or abandonment would deprive the other person permanently of its use or benefit.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of theft (intentional use, concealment, or abandonment).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of theft (intentional use, concealment, or abandonment).

COMMENT

1. *See* § 18-4-401(1)(c), C.R.S. 2015.

2. *See* Instruction F:18 (defining "another"); Instruction F:30 (defining "benefit"); Instruction F:185 (defining "intentionally"); Instruction F:195 (defining "knowingly"); Instruction F:371 (defining "thing of value").

3. *See Auman v. People*, 109 P.3d 647, 663-64 (Colo. 2005) (theft instruction was erroneous because the culpable mental state of "knowingly" was listed as the third numbered element in a manner that indicated it modified only its lettered sub-elements – "(a) obtained or exercised control over, (b) anything of value, (c) which is the property of another" – and not the fourth numbered element: "without authorization").

4-4:04 THEFT (DEMANDING CONSIDERATION)

The elements of the crime of theft (demanding consideration) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

[4. obtained, retained, or exercised control over anything of value of another,

5. without authorization or by threat or deception, and]

[4. received, loaned money by pawn or pledge on, or disposed of,

5. anything of value or belonging to another that he [she] knew or believed to have been stolen, and]

6. demanded any consideration to which he [she] was not legally entitled,

7. as a condition of restoring the thing of value to the other person.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of theft (demanding consideration).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of theft (demanding consideration).

COMMENT

1. *See* § 18-4-401(1)(d), C.R.S. 2015.

2. *See* Instruction F:18 (defining "another"); Instruction F:185 (defining "intentionally" and "with intent"); Instruction F:195 (defining "knowingly"); Instruction F:371 (defining "thing of value").

3. *See Auman v. People*, 109 P.3d 647, 663-64 (Colo. 2005) (theft instruction was erroneous because the culpable mental state of "knowingly" was listed as the third numbered element in a manner that indicated it modified only its lettered sub-elements – "(a) obtained or exercised control over, (b) anything of value, (c) which is the property of another" – and not the fourth numbered element: "without authorization").

4. The term "consideration" is not defined in section 18-4-401. *See*, *e.g.*, *Black's Law Dictionary* 370 (10th ed. 2014) (defining "consideration" as: "Something (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee."). The definition that appears in section 4-3-303(b), C.R.S. 2015, should not be used because it is limited to contracts.

4-4:05 THEFT (RETAINING)

The elements of the crime of theft (retaining) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

[4. obtained, retained, or exercised control over anything of value of another,

5. without authorization or by threat or deception, and]

[4. received, loaned money by pawn or pledge on, or disposed of,

5. anything of value or belonging to another that he [she] knew or believed to have been stolen, and]

6. knowingly retained the thing of value more than seventy-two hours after the agreed-upon time of return in any lease or hire agreement.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of theft (retaining).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of theft (retaining).

COMMENT

1. *See* § 18-4-401(1)(e), C.R.S. 2015.

2. *See* Instruction F:18 (defining "another"); Instruction F:185 (defining "intentionally" and "with intent"); Instruction

F:195 (defining "knowingly"); Instruction F:371 (defining "thing of value").

3. *See Auman v. People*, 109 P.3d 647, 663-64 (Colo. 2005) (theft instruction was erroneous because the culpable mental state of "knowingly" was listed as the third numbered element in a manner that indicated it modified only its lettered sub-elements – "(a) obtained or exercised control over, (b) anything of value, (c) which is the property of another" – and not the fourth numbered element: "without authorization").

4-4:06.INT THEFT – INTERROGATORY (VALUE)

If you find the defendant not guilty of theft, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of theft, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question[s] on the verdict form. [Although you may answer "No" to more than one question, you may not answer "Yes" to more than one question. Further, if you answer "Yes" to any question, you should not answer the other question[s].]

1. Was the value of the thing involved in the theft [insert a description of the amount(s) from section 18-4-401(2) or section 18-6.5-103(5), (5.5)(at-risk persons)]? (Answer "Yes" or "No")

[2. Was the value of the thing involved in the theft [insert a description of the amount(s) from section 18-4-401(2)]? (Answer "Yes" or "No")]

[3. Was the value of the thing involved in the theft [insert a description of the amount(s) from section 18-4-401(2)]? (Answer "Yes" or "No")]

The prosecution has the burden to prove the value of the thing involved beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* 18-4-401(2), C.R.S. 2015; § 18-6.5-103(5), (5.5), C.R.S. 2015 (at-risk adults, elders, and juveniles); *see also People v. McKinney*, 99 P.3d 1038, 1043 (Colo. 2004) ("Section 18-6.5-103(5) enhances the penalties for general theft when the

theft is committed against an at-risk adult; it does not create a separate offense."); *People v. Jamison*, 220 P.3d 992, 995 (Colo. App. 2009)("the value of property taken is . . . a sentence enhancer rather than an element of the crime of theft").

2. *See, e.g.*, Instruction E:28 (special verdict form).

3. In cases where value is a disputed issue, one or both of the parties may assert that there is an evidentiary basis for submitting more than one valuation question as part of the interrogatory. Accordingly, the above interrogatory includes bracketed examples for two lesser valuation questions. In a case involving more than three questions about valuation, repeat the format of the bracketed questions.

4. Where more than one valuation question is included as part of the interrogatory, use a special verdict form with a corresponding format that repeats the admonition that the jury cannot answer "Yes" to more than one valuation question.

For example, in a case involving an interrogatory with three valuation questions (and no separate interrogatories asking about other sentence enhancement factors), the relevant portion of the special verdict form would read as follows:

> I. We, the jury, find the defendant, [insert name], NOT GUILTY of Count No. [ ], theft.
>
> _____
> FOREPERSON*
>
> II. We, the jury, find the defendant, [insert name], GUILTY of Count No. [ ], theft.
>
> _____
> FOREPERSON*
>
> We further find, with respect to the verdict question[s] for this count, as follows:
>
> **1. Was the value of the thing involved [insert a description of the amount(s) from section 18-4-401(2)]?
>
> [___] Yes [___] No

**2. Was the value of the thing involved [insert a description of the amount(s) from section 18-4-401(2)]?

[___] Yes [___] No

**3. Was the value of the thing involved [insert a description of the amount(s) from section 18-4-401(2)]?

[___] Yes [___] No

_____
FOREPERSON*

* The foreperson should use ink to sign on one of the two lines indicating a verdict of "not guilty" or "guilty." If the verdict is "guilty," the foreperson should use ink to mark the appropriate space indicating the answer to the verdict question, and then sign on the line following the verdict question[s].

** Although you may answer "No" to more than one question, you may not answer "Yes" to more than one question. Further, if you answer "Yes" to any question, you should not answer the other question[s].

5. In a case involving a theft from an at-risk person, it may be necessary to use separate interrogatories and special verdict forms for the at-risk valuation provisions of section 18-6.5-103(5), (5.5)(five hundred dollars or more), and the valuation provision of section 18-4-401(2)(d)(three hundred dollars or more, but less than seven hundred fifty dollars). As noted in the parentheticals, the two sections do not dovetail.

4-4:07.INT THEFT – INTERROGATORY (FROM THE PERSON OF ANOTHER)

If you find the defendant not guilty of theft, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of theft, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the theft from the person of another?
(Answer "Yes" or "No")

The theft was from the person of another only if:

1. the theft was from the person of another,

2. by means other than the use of force, threat, or intimidation.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-4-401(5), C.R.S. 2015.

2. *See, e.g.*, Instruction E:28 (special verdict form).

3. *See People v. Warner*, 801 P.2d 1187, 1191 (Colo. 1990) ("Reading the general theft statute together with the robbery statute, we conclude that theft from the person of another is intended to cover those thefts involving an invasion of the victim's person of which the victim is unaware, but which are not accomplished through the use of force, threats, or

intimidation."); *People v. Smith*, 121 P.3d 243, 247-48 (Colo. App. 2005) ("Case law in Colorado and other jurisdictions is consistent in holding that a taking from a shopping cart is a taking from a person if the victim is holding, pushing, or otherwise in control of the cart at the time of the theft. . . . Therefore, because the victim was a substantial distance from her fanny pack, we conclude that defendant's actions do not constitute theft from the person of another as defined in § 18-4-401(5).").

4-4:08.INT THEFT – INTERROGATORY (MORTGAGE LENDING PROCESS)

If you find the defendant not guilty of theft, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of theft, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the theft involve the mortgage lending process? (Answer "Yes" or "No")

The theft involved the mortgage lending process only if:

1. the theft was committed by deception, and

2. the underlying factual basis of the case involved the process through which a person seeks or obtains a residential mortgage loan, including, without limitation, solicitation, application, or origination; negotiation of terms; third-party provider services; underwriting; signing and closing; funding of the loan; and perfecting and releasing the mortgage.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-4-401(9)(a), C.R.S. 2015.

2. *See* Instruction F:233 (defining "mortgage lending process"); *see, e.g.*, Instruction E:28 (special verdict form).

3. Section 18-4-401(9)(a), C.R.S. 2015, requires the court to impose a "fine of the amount of pecuniary harm resulting from" a deceptive theft involving the mortgage lending process. Therefore, in cases where the amount of the fine under this provision may exceed the maximum fine that could otherwise be imposed pursuant to section 18-1.3-401(1)(a)(III)(A), C.R.S. 2015, use an interrogatory to have the jury determine whether the theft "involved the mortgage lending process." *See Southern Union Co. v. United States*, 132 S. Ct. 2344, 2352 (2012) (fines implicate the Sixth Amendment right to a jury trial and are thus subject to the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000)).

4-4:09.INT THEFT – INTERROGATORY (IN THE PRESENCE OF AN AT-RISK PERSON)

If you find the defendant not guilty of theft, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of theft, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant commit the theft in the presence of a person with protected status? (Answer "Yes" or "No")

The defendant committed the theft in the presence of a person with protected status only if:

[1. the victim was seventy years of age or older, and]

[1. the victim was eighteen years of age or older, and

2. was a person with a disability, and]

[1. the victim was under the age of eighteen years, and

2. was a person with a disability, and]

_. the defendant committed any element or portion of the offense in the presence of the victim.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-6.5-103(5), (5.5), C.R.S. 2015 (at-risk adults, elders, and juveniles); *see also People v. McKinney*, 99 P.3d 1038, 1043 (Colo. 2004) ("Section 18–6.5–103(5) enhances the penalties for general theft when the theft is committed against an at-risk adult; it does not create a separate offense.").

2. *See* Instruction F:24 (defining "at-risk adult"); Instruction F:25 (defining "at-risk elder"); Instruction F:26 (defining "at-risk juvenile"); Instruction F:273 (defining "person with a disability"); *see*, *e.g.*, Instruction E:28 (special verdict form).

3. In cases where it is alleged that the value of the thing involved was more than five hundred dollars, also use the valuation interrogatory: Instruction 4-4:06.INT.

4-4:10.INT THEFT – INTERROGATORY (POSITION OF TRUST FOR AN AT-RISK PERSON)

If you find the defendant not guilty of theft, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of theft, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

> Did the defendant commit the theft against a person with protected status for whom he [she] was in a position of trust? (Answer "Yes" or "No")

The defendant committed the theft against a person with protected status for whom he [she] was in a position of trust only if:

[1. the victim was seventy years of age or older, and]

[1. the victim was eighteen years of age or older, and

2. was a person with a disability, and]

[1. the victim was under the age of eighteen years, and

2. was a person with a disability, and]

_. the defendant committed the theft against the victim while acting in a position of trust, whether or not in the presence of the victim.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-6.5-103(5), (5.5), C.R.S. 2015; *see also People v. McKinney*, 99 P.3d 1038, 1043 (Colo. 2004) ("Section 18-6.5-103(5) enhances the penalties for general theft when the theft is committed against an at-risk adult; it does not create a separate offense.").

2. *See* Instruction F:24 (defining "at-risk adult"); Instruction F:25 (defining "at-risk elder"); Instruction F:26 (defining "at-risk juvenile"); Instruction F:273 (defining "person with a disability"); Instruction F:280 (defining "position of trust"); *see*, *e.g.*, Instruction E:28 (special verdict form).

3. In cases where it is alleged that the value of the thing involved was more than five hundred dollars, also use the valuation interrogatory: Instruction 4-4:06.INT.

4-4:11.INT THEFT – INTERROGATORY (FROM THE PERSON OF AN AT-RISK VICTIM)

If you find the defendant not guilty of theft, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of theft, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant commit the theft from the person of a victim with protected status? (Answer "Yes" or "No")

The defendant committed the theft from the person of a victim with protected status only if:

[1. the victim was seventy years of age or older, and]

[1. the victim was eighteen years of age or older, and

2. was a person with a disability, and]

[1. the victim was under the age of eighteen years, and

2. was a person with a disability, and]

_. the defendant committed the theft from the victim's person,

_. by means other than the use of force, threat, or intimidation.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-6.5-103(5), (5.5), C.R.S. 2015 (at-risk adults, elders, and juveniles); *see also People v. McKinney*, 99 P.3d 1038, 1043 (Colo. 2004) ("Section 18–6.5–103(5) enhances the penalties for general theft when the theft is committed against an at-risk adult; it does not create a separate offense.").

2. *See* Instruction F:24 (defining "at-risk adult"); Instruction F:25 (defining "at-risk elder"); Instruction F:26 (defining "at-risk juvenile"); Instruction F:273 (defining "person with a disability"); *see*, *e.g.*, Instruction E:28 (special verdict form).

3. *See People v. Warner*, 801 P.2d 1187, 1191 (Colo. 1990) ("Reading the general theft statute together with the robbery statute, we conclude that theft from the person of another is intended to cover those thefts involving an invasion of the victim's person of which the victim is unaware, but which are not accomplished through the use of force, threats, or intimidation."); *People v. Smith*, 121 P.3d 243, 247-48 (Colo. App. 2005) ("Case law in Colorado and other jurisdictions is consistent in holding that a taking from a shopping cart is a taking from a person if the victim is holding, pushing, or otherwise in control of the cart at the time of the theft. . . . Therefore, because the victim was a substantial distance from her fanny pack, we conclude that defendant's actions do not constitute theft from the person of another as defined in § 18–4–401(5).").

4. In cases where it is alleged that the value of the thing involved was more than five hundred dollars, also use the valuation interrogatory: Instruction 4-4:06.INT.

4-4:12.INT THEFT – INTERROGATORY (KNOWING THE VICTIM IS AN AT-RISK ELDER)

If you find the defendant not guilty of theft, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of theft, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant commit the theft knowing that the victim was an at-risk elder? (Answer "Yes" or "No")

The defendant committed the theft knowing that the victim was an at-risk elder only if:

1. the victim was seventy years of age or older, and

2. the defendant knew that the victim was seventy years of age or older.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-6.5-103(5.5), C.R.S. 2015 (at-risk elders); *see also People v. McKinney*, 99 P.3d 1038, 1043 (Colo. 2004) ("Section 18–6.5–103(5) enhances the penalties for general theft when the theft is committed against an at-risk adult; it does not create a separate offense.").

2. *See* Instruction F:25 (defining "at-risk elder"); *see*, *e.g.*, Instruction E:28 (special verdict form).

3. In cases where it is alleged that the value of the thing involved was more than five hundred dollars, also use the valuation interrogatory: Instruction 4-4:06.INT.

4-4:13.SP THEFT - SPECIAL INSTRUCTION (CONCEALMENT)

If any person willfully conceals unpurchased goods, wares, or merchandise owned or held by and offered or displayed for sale by any store or other mercantile establishment, whether the concealment be on his [her] own person or otherwise and whether on or off the premises of said store or mercantile establishment, such concealment gives rise to a permissible inference that the person intended to commit the crime of theft.

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

COMMENT

1. *See* § 18-4-406, C.R.S. 2015.

2. *See People in re R.M.D.*, 829 P.2d 852 (Colo. 1992) (construing the "prima facie" proof provision of section 18-4-406 as establishing a permissible inference); *see generally Jolly v. People*, 742 P.2d 891, 897 (Colo. 1987) (unlike a mandatory presumption, the use of a permissible inference in a criminal case does not violate due process).

4-4:14 THEFT (MULTIPLE THEFTS; AGGREGATED AND CHARGED IN THE SAME COUNT)

The elements of the crime of theft (multiple thefts) are:

1. That the defendant,

2. in the State of Colorado, at or about the dates and places charged,

3. knowingly,

[4. obtained, retained, or exercised control over anything of value of another,

5. without authorization or by threat or deception, and]

[4. received, loaned money by pawn or pledge on, or disposed of,

5. anything of value or belonging to another that he [she] knew or believed to have been stolen, and]

6. intended to deprive the other person permanently of the use or benefit of the thing of value; or knowingly used, concealed, or abandoned the thing of value in such manner as to deprive the other person permanently of its use or benefit; or used, concealed, or abandoned the thing of value intending that such use, concealment, or abandonment would deprive the other person permanently of its use or benefit; or demanded any consideration to which he [she] was not legally entitled as a condition of restoring the thing of value to the other person; or knowingly retained the thing of value more than seventy-two hours after the agreed-upon time of return in any lease or hire agreement, and

7. committed within a period of six months those thefts charged in the same count.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable

doubt, you should find the defendant guilty of theft (multiple thefts).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of theft (multiple thefts).

COMMENT

1. *See* § 18-4-401(4)(a), C.R.S. 2015.

2. *See* Instruction F:18 (defining "another"); Instruction F:30 (defining "benefit"); Instruction F:185 (defining "intentionally" and "with intent"); Instruction F:195 (defining "knowingly"); Instruction F:371 (defining "thing of value").

3. *See also* Ch. 244, sec. 1, Legislative Declaration, 2009 Colo. Sess. Laws 1099 ("It is the general assembly's intent in adopting this act to clarify that: (a) The general assembly's intent in previously adopting the aggregation provisions of section[] 18-4-401(4) . . . Colorado Revised Statutes, and in amending those provisions from time to time, was to allow, but not require, aggregation of multiple violations of those statutes, committed within a period of six months, into a single offense for the purposes of determining the grade of offense."); *Roberts v. People*, 203 P.3d 513, 516 (Colo. 2009) (holding, approximately two months before the General Assembly amended section 18-4-401(4), that 18-4-401(4) "requires . . . all thefts committed by the same person within a six-month period (except any for which jeopardy had already attached before he committed the others), to be joined and prosecuted as a single felony"); *People v. Gardner*, 250 P.3d 1262, 1267-68 (Colo. App. 2010) (holding, under the pre-amendment version of section 18-4-401(4) that was at issue in *Roberts*, that two charges of theft constituted a single unit of prosecution, but a third theft charge falling outside of the relevant six-month time period did not).

4. In the absence of appellate authority analyzing section 18-4-401(4)(a), the Committee has construed the provision as requiring proof of *all* thefts aggregated in the same count. This determination is reflected in the seventh element of the model instruction. Further, because the aggregated thefts may be committed in different ways, the model instruction lists all methods of committing theft that are set forth in section 18-4-

401(1)(a-e). Accordingly, it will be incumbent upon counsel to object to the inclusion of any surplusage that is without evidentiary support. *See People v. Dunaway*, 88 P.3d 619, 631 (Colo. 2004) ("permitting an instruction on an alternative theory of liability for the same charged offense not supported by sufficient evidence does not rise to the level of a constitutional error where the conviction for that offense is otherwise supported by sufficient proof"); *see also People v. Dunlap*, 124 P.3d 780, 813 (Colo. App. 2004) (relying on *Dunaway* and rejecting "defendant's contention that the trial court committed plain error by not requiring the jury to decide unanimously which of the alternative methods of committing [the offense] was proved").

4-4:15 THEFT (FROM THE SAME PERSON PURSUANT TO ONE SCHEME OR COURSE OF CONDUCT; AGGREGATED AND CHARGED IN THE SAME COUNT)

The elements of the crime of theft (same person; one scheme or course of conduct) are:

1. That the defendant,

2. in the State of Colorado, at or about the dates and places charged,

3. knowingly,

[4. obtained, retained, or exercised control over anything of value of another,

5. without authorization or by threat or deception, and]

[4. received, loaned money by pawn or pledge on, or disposed of,

5. anything of value or belonging to another that he [she] knew or believed to have been stolen, and]

6. intended to deprive the other person permanently of the use or benefit of the thing of value; or knowingly used, concealed, or abandoned the thing of value in such manner as to deprive the other person permanently of its use or benefit; or used, concealed, or abandoned the thing of value intending that such use, concealment, or abandonment would deprive the other person permanently of its use or benefit; or demanded any consideration to which he [she] was not legally entitled as a condition of restoring the thing of value to the other person; or knowingly retained the thing of value more than seventy-two hours after the agreed-upon time of return in any lease or hire agreement, and

7. committed the thefts charged in the same count against the same person pursuant to one scheme or course of conduct.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of theft (same person; one scheme or course of conduct).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of theft (same person; one scheme or course of conduct).

COMMENT

1. *See* § 18-4-401(4)(b), C.R.S. 2015.

2. *See* Instruction F:18 (defining "another"); Instruction F:30 (defining "benefit"); Instruction F:185 (defining "intentionally" and "with intent"); Instruction F:195 (defining "knowingly"); Instruction F:371 (defining "thing of value").

3. In the absence of appellate authority analyzing section 18-4-401(4)(b), the Committee has construed the provision as requiring proof of *all* thefts aggregated in the same count. This determination is reflected in the seventh element of the model instruction. Further, because the aggregated thefts may be committed in different ways, the model instruction lists all methods of committing theft that are set forth in section 18-4-401(1)(a-e). Accordingly, it will be incumbent upon counsel to object to the inclusion of any surplusage that is without evidentiary support. *See People v. Dunaway*, 88 P.3d 619, 631 (Colo. 2004) ("permitting an instruction on an alternative theory of liability for the same charged offense not supported by sufficient evidence does not rise to the level of a constitutional error where the conviction for that offense is otherwise supported by sufficient proof"); *see also People v. Dunlap*, 124 P.3d 780, 813 (Colo. App. 2004) (relying on *Dunaway* and rejecting "defendant's contention that the trial court committed plain error by not requiring the jury to decide unanimously which of the alternative methods of committing [the offense] was proved").

4-4:16.INT THEFT (MULTIPLE THEFTS AGGREGATED AND CHARGED IN THE SAME COUNT; THEFTS FROM THE SAME PERSON PURSUANT TO ONE SCHEME OR COURSE OF CONDUCT AGGREGATED AND CHARGED IN THE SAME COUNT)- INTERROGATORY (AGGREGATE VALUE)

If you find the defendant not guilty of theft ([multiple thefts] [same person; one scheme or course of conduct]), you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of theft ([multiple thefts] [same person; one scheme or course of conduct]), you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question[s] on the verdict form. [Although you may answer "No" to more than one question, you may not answer "Yes" to more than one question. Further, if you answer "Yes" to any question, you should not answer the other question[s].]

1. Was the aggregate value of the things involved in the thefts [insert a description of the amount(s) from section 18-4-401(2)]? (Answer "Yes" or "No")

[2. Was the aggregate value of the things involved in the thefts [insert a description of the amount(s) from section 18-4-401(2)]? (Answer "Yes" or "No")]

[3. Was the aggregate value of the things involved in the thefts [insert a description of the amount(s) from section 18-4-401(2)]? (Answer "Yes" or "No")]

The prosecution has the burden to prove the aggregate value of the things involved beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place(s), and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-4-401(4)(a), (b), C.R.S. 2015; *see also People v. Jamison*, 220 P.3d 992, 995 (Colo. App. 2009) ("the value of property taken is . . . a sentence enhancer rather than an element of the crime of theft").

2. *See, e.g.*, Instruction E:28 (special verdict form).

3. In cases where value is a disputed issue, one or both of the parties may assert that there is an evidentiary basis for submitting more than one valuation question as part of the interrogatory. Accordingly, the above interrogatory includes bracketed examples for two lesser valuation questions. In a case involving more than three questions about valuation, repeat the format of the bracketed questions.

4. Where more than one aggregate value question is included as part of the interrogatory, use a special verdict form with a corresponding format that repeats the admonition that the jury cannot answer "Yes" to more than one aggregate value question. For example, in a case involving an interrogatory with three aggregate value questions (and no separate interrogatories asking about other sentence enhancement factors), the relevant portion of the special verdict form would read as follows:

> I. We, the jury, find the defendant, [insert name], NOT GUILTY of Count No. [ ], theft ([multiple thefts] [same person; one scheme or course of conduct]).
>
> _____
> FOREPERSON*
>
> II. We, the jury, find the defendant, [insert name], GUILTY of Count No. [ ], theft ([multiple thefts] [same person; one scheme or course of conduct]).
>
> _____
> FOREPERSON*
>
> We further find, with respect to the verdict questions for this count, as follows:

**1. Was the aggregate value of the things involved in the thefts [insert a description of the amount(s) from section 18-4-401(2)]?

[___] Yes [___] No

**2. Was the aggregate value of the things involved in the thefts [insert a description of the amount(s) from section 18-4-401(2)]?

[___] Yes [___] No

**3. Was the aggregate value of the things involved in the thefts [insert a description of the amount(s) from section 18-4-401(2)]?

[___] Yes [___] No

_____
FOREPERSON*

* The foreperson should use ink to sign on one of the two lines indicating a verdict of "not guilty" or "guilty." If the verdict is "guilty," the foreperson should use ink to mark the appropriate space(s) indicating the answer(s) to the verdict question(s), and then sign on the line following the verdict questions.

** Although you may answer "No" to more than one question asking about the aggregate value, you may not answer "Yes" to more than one such question. Further, if you answer "Yes" to any question, you should not answer the other questions.

4-4:17 OBTAINING CONTROL OVER ANY STOLEN THING OF VALUE

The elements of the crime of obtaining control over any stolen thing of value are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. obtained control over any stolen thing of value,

4. knowing the thing of value to have been stolen by another.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of obtaining control over any stolen thing of value.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of obtaining control over any stolen thing of value.

COMMENT

1. Section 18-4-404, C.R.S. 2015, provides, in its entirety, as follows: "Every person who obtains control over any stolen thing of value, knowing the thing of value to have been stolen by another, may be tried, convicted, and punished whether or not the principal is charged, tried, or convicted." This section establishes a distinct offense, *see*, *e.g.*, *People v. Boileau*, 538 P.2d 484, 488 (Colo. App. 1975), and it predates the 1975 theft by receiving statute (section 18-4-410, which was repealed in 2013 when the general theft statute was amended to include receiving). However, according to one commentator, it is rarely used:

> The utility of this statute, from the prosecution's point of view, is that a defendant who purchased items known to be stolen can be convicted of theft (by

> receiving), without the need for resort to the principles of accomplice liability, which might require proof that the defendant had agreed in advance to purchase stolen goods. . . . Although . . . section 18-4-404 was not repealed by the enactment of section 18-4-410, it appears seldom to be employed now. Of course, in some cases section 18-4-404 cannot be used because the property in question was not actually stolen, but it would seem that if the property were stolen, section 18-4-404 would afford some prosecutorial advantage, in apparently not requiring proof to deprive permanently. Nevertheless, section 18-4-404 has been largely ignored by prosecutors since section 18-4-410 was enacted.

Marianne Wesson, *Crimes and Defenses in Colorado*, 202 (1989).

Earlier editions of COLJI-Crim. did not include a pattern elemental instruction for the offense defined by section 18-4-404. Although this edition does include such an instruction, the Committee has not drafted an interrogatory asking the jury to determine the value of the stolen property because section 18-4-404 does not specify a penalty based on valuation. Indeed, section 18-4-404 does not contain any penalty provision, and cases decided under the pre-1971 version of the statute are inapposite because the predecessor statute had a penalty provision and was governed by two separate valuation-based penalty provisions that also applied to the general theft statute. Moreover, because the offense is not designated as a felony, it is not subject to section 18-1.3-403, C.R.S. 2015 (penalty for felony not fixed by statute).

One could argue that, because section 18-4-404 appears to establish criminal liability equivalent to the offense of theft, section 18-4-404 impliedly incorporates the valuation-based penalty provisions of 18-4-401. However, the Committee expresses no opinion concerning the correctness of that construction.

4-4:18 THEFT OF TRADE SECRETS

The elements of the crime of theft of trade secrets are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to deprive or withhold from the owner thereof the control of a trade secret, or to appropriate a trade secret to his [her] own use or the use of another,

5. stole or disclosed a trade secret to an unauthorized person, or, without authority, made or caused to be made a copy of an article representing a trade secret.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of theft of trade secrets.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of theft of trade secrets.

COMMENT

1. *See* § 18-4-408(1), C.R.S. 2015.

2. *See* Instruction F:22 (defining "article"); Instruction F:74 (defining "copy"); Instruction F:185 (defining "with intent"); Instruction F:313 (defining "representing"); Instruction F:374 (defining "trade secret"); *see also Webster's Third New International Dictionary* 106 (2002) (defining "appropriate" as meaning "to take without permission").

3. It is unclear whether it is permissible to replace the word "stole" with the phrase "committed the crime of theft." *See*

Black's Law Dictionary 1639 (10th ed. 2014) (defining "steal" as "To take (personal property) illegally with the intent to keep it unlawfully."). If such a substitution is made and the defendant is not separately charged with theft in violation of section 18-4-401, give the jury the elemental instruction defining theft without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense.

4-4:19 AGGRAVATED MOTOR VEHICLE THEFT IN THE FIRST DEGREE (RETAINED)

The elements of the crime of aggravated motor vehicle theft in the first degree (retained) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. obtained or exercised control over the motor vehicle of another,

5. without authorization, or by threat or deception, and

6. retained possession or control of the motor vehicle for more than twenty-four hours.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated motor vehicle theft in the first degree (retained).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated motor vehicle theft in the first degree (retained).

COMMENT

1. *See* § 18-4-409(2)(a), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:237 (defining "motor vehicle"); Instruction F:281 (defining "possession").

4-4:20 AGGRAVATED MOTOR VEHICLE THEFT IN THE FIRST DEGREE (ALTERED OR DISGUISED)

The elements of the crime of aggravated motor vehicle theft in the first degree (altered or disguised) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. obtained or exercised control over the motor vehicle of another,

5. without authorization, or by threat or deception, and

6. attempted to alter or disguise, or altered or disguised, the appearance of the motor vehicle.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated motor vehicle theft in the first degree (altered or disguised).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated motor vehicle theft in the first degree (altered or disguised).

COMMENT

1. *See* § 18-4-409(2)(b), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:237 (defining "motor vehicle").

3. + In the absence of case law on point, the Committee takes no position on whether the word "attempted" in this instruction implicates the inchoate offense of criminal attempt. *See*

Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

4. + In 2015, the Committee added Comment 3.

4-4:21 AGGRAVATED MOTOR VEHICLE THEFT IN THE FIRST DEGREE (VEHICLE IDENTIFICATION NUMBER)

The elements of the crime of aggravated motor vehicle theft in the first degree (vehicle identification number) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. obtained or exercised control over the motor vehicle of another,

5. without authorization, or by threat or deception, and

6. attempted to alter or remove, or altered or removed, the vehicle identification number.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated motor vehicle theft in the first degree (vehicle identification number).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated motor vehicle theft in the first degree (vehicle identification number).

COMMENT

1. *See* § 18-4-409(2)(c), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:237 (defining "motor vehicle"); Instruction F:387 (defining "vehicle identification number").

3. + In the absence of case law on point, the Committee takes no position on whether the word "attempted" in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

4. + In 2015, the Committee added Comment 3.

4-4:22 AGGRAVATED MOTOR VEHICLE THEFT IN THE FIRST DEGREE (USE FOR CRIME)

The elements of the crime of aggravated motor vehicle theft in the first degree (use for crime) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. obtained or exercised control over the motor vehicle of another,

5. without authorization, or by threat or deception, and

6. used the motor vehicle in the commission of a crime other than a traffic offense.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated motor vehicle theft in the first degree (use for crime).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated motor vehicle theft in the first degree (use for crime).

COMMENT

1. *See* § 18-4-409(2)(d), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:237 (defining "motor vehicle").

3. *See People v. Marquez*, 107 P.3d 993, 998 (Colo. App. 2004) ("we conclude that the plain language of § 18-4-409(2)(d) evinces a legislative intent to impose liability for aggravated

motor vehicle theft in the first degree whenever a person who has knowingly stolen a motor vehicle uses that motor vehicle in the commission of a crime other than a traffic offense, regardless of the mens rea associated with the particular crime committed").

4-4:23 AGGRAVATED MOTOR VEHICLE THEFT IN THE FIRST DEGREE (PROPERTY DAMAGE)

The elements of the crime of aggravated motor vehicle theft in the first degree (property damage) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. obtained or exercised control over the motor vehicle of another,

5. without authorization, or by threat or deception, and

6. caused five hundred dollars or more of property damage, including but not limited to property damage to the motor vehicle involved, in the course of obtaining control over, or in the exercise of control of, the motor vehicle.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated motor vehicle theft in the first degree (property damage).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated motor vehicle theft in the first degree (property damage).

COMMENT

1. *See* § 18-4-409(2)(e), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:237 (defining "motor vehicle").

4-4:24 AGGRAVATED MOTOR VEHICLE THEFT IN THE FIRST DEGREE (BODILY INJURY)

The elements of the crime of aggravated motor vehicle theft in the first degree (bodily injury) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. obtained or exercised control over the motor vehicle of another,

5. without authorization, or by threat or deception, and

6. caused bodily injury to another person while exercising control of the motor vehicle.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated motor vehicle theft in the first degree (bodily injury).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated motor vehicle theft in the first degree (bodily injury).

COMMENT

1. *See* § 18-4-409(2)(f), C.R.S. 2015.

2. *See* Instruction F:36 (defining "bodily injury"); Instruction F:195 (defining "knowingly"); Instruction F:237 (defining "motor vehicle").

4-4:25 AGGRAVATED MOTOR VEHICLE THEFT IN THE FIRST DEGREE (REMOVAL)

The elements of the crime of aggravated motor vehicle theft in the first degree (removal) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. obtained or exercised control over the motor vehicle of another,

5. without authorization, or by threat or deception, and

6. removed the motor vehicle from Colorado for a period of time in excess of twelve hours.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated motor vehicle theft in the first degree (removal).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated motor vehicle theft in the first degree (removal).

COMMENT

1. *See* § 18-4-409(2)(g), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:237 (defining "motor vehicle").

4-4:26 AGGRAVATED MOTOR VEHICLE THEFT IN THE FIRST DEGREE (LICENSE PLATES)

The elements of the crime of aggravated motor vehicle theft in the first degree (license plates) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. obtained or exercised control over the motor vehicle of another,

5. without authorization, or by threat or deception, and

6. unlawfully attached or otherwise displayed in or upon the motor vehicle license plates other than those officially issued for the motor vehicle.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated motor vehicle theft in the first degree (license plates).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated motor vehicle theft in the first degree (license plates).

COMMENT

1. *See* § 18-4-409(2)(h), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:237 (defining "motor vehicle").

4-4:27.INT AGGRAVATED MOTOR VEHICLE THEFT IN THE FIRST DEGREE – INTERROGATORY (VALUE)

If you find the defendant not guilty of aggravated motor vehicle theft in the first degree, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of aggravated motor vehicle theft in the first degree, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question[s] on the verdict form. [Although you may answer "No" to more than one question, you may not answer "Yes" to more than one question. Further, if you answer "Yes" to any question, you should not answer the other question[s].]

[_. Was the value of the motor vehicle or motor vehicles involved in the aggravated motor vehicle theft in the first degree more than one hundred thousand dollars? (Answer "Yes" or "No")]

[_. Was the value of the motor vehicle or motor vehicles involved in the aggravated motor vehicle theft in the first degree twenty thousand dollars or more but less than one hundred thousand dollars? (Answer "Yes" or "No")]

The prosecution has the burden to prove the value of the motor vehicle or motor vehicles involved beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-4-409(3)(a-c), C.R.S. 2015.

2. *See*, *e.g.*, Instruction E:28 (special verdict form).

3. Where more than one valuation question is included as part of the interrogatory, use a special verdict form with a corresponding format that repeats the admonition that the jury cannot answer "Yes" to more than one valuation question. *See* Instruction 4-4:06.INT, Comment 4.

4. *See also People v. Hopkins*, 2013 COA 74, ¶ 26, 328 P.3d 253, 258 (proof of defendant's prior conviction, which elevates aggravated motor vehicle theft in the first degree to a class three felony, *see* section 18-4-409(3)(b), is not an element of the offense; "unless the General Assembly makes the fact of a prior conviction an essential element of the crime, thereby defining a crime that can be committed only by those who have a prior conviction, due process does not require that an offender's prior conviction be proved to a jury beyond a reasonable doubt.").

4-4:28 AGGRAVATED MOTOR VEHICLE THEFT IN THE SECOND DEGREE

The elements of the crime of aggravated motor vehicle theft in the second degree are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. obtained or exercised control over the motor vehicle of another,

5. without authorization, or by threat or deception.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated motor vehicle theft in the second degree.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated motor vehicle theft in the second degree.

COMMENT

1. *See* § 18-4-409(4), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:237 (defining "motor vehicle").

4-4:29.INT AGGRAVATED MOTOR VEHICLE THEFT IN THE SECOND DEGREE – INTERROGATORY (HIGH VALUE VEHICLE(S))

If you find the defendant not guilty of aggravated motor vehicle theft in the second degree, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of aggravated motor vehicle theft in the second degree, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question[s] on the verdict form. [Although you may answer "No" to both questions, you may not answer "Yes" to more than one question. Further, if you answer "Yes" to either question, you should not answer the other question.]

[_. Was the value of the motor vehicle[s] involved twenty thousand dollars or more? (Answer "Yes" or No")]

[_. Was the value of the motor vehicle[s] involved one thousand dollars or more, but less than twenty thousand dollars? (Answer "Yes" or No")]

The prosecution has the burden to prove the value of the motor vehicle or motor vehicles involved beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-4-409(4)(a), (b), C.R.S. 2015.

2. *See, e.g.*, Instruction E:28 (special verdict form).

3. Where more than one valuation question is included as part of the interrogatory, use a special verdict form with a corresponding format that repeats the admonition that the jury

cannot answer “Yes” to more than one valuation question. *See* Instruction 4-4:06.INT, Comment 4.

4-4:30.SP THEFT - SPECIAL INSTRUCTION (ENGAGED IN THE BUSINESS)

If a person obtains control over stolen property knowing or believing the property to have been stolen, and the offense involves two or more separate stolen things of value, each of which is the property of a separate owner, such commission of theft gives rise to a permissible inference that the person was engaged in the business of buying, selling, or otherwise disposing of stolen goods for a profit.

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

COMMENT

1. Section 18-4-411, C.R.S. 2015.

2. Although the statute speaks in terms of "prima facie evidence," the concept should be explained to the jury as a permissible inference. *See People in re R.M.D.*, 829 P.2d 852 (Colo. 1992) (construing the "prima facie" proof provision of section 18-4-406 as establishing a permissible inference); *see generally Jolly v. People*, 742 P.2d 891, 897 (Colo. 1987) (unlike a mandatory presumption, the use of a permissible inference in a criminal case does not violate due process).

3. Prior to 2013, section 18-4-411 was limited to the offense of theft by receiving in violation of section 18-4-410. In 2013, section 18-4-410 was repealed and section 18-4-411 was amended to make it applicable to all thefts. However, the effect of this amendment is unclear because section 18-4-410(6) was the only sentence enhancement factor that required a finding that the defendant was "engaged in the business of buying, selling, or otherwise disposing of stolen goods for a profit," and this factor was not relocated to any other theft statute.

4-4:31 THEFT OF MEDICAL RECORDS OR MEDICAL INFORMATION

The elements of the crime of theft of medical records or medical information are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

[4. without proper authorization,

5. obtained a medical record or medical information with the intent to appropriate the medical record or medical information to his [her] own use or to the use of another.]

[4. without proper authorization,

5. stole or disclosed to an unauthorized person a medical record or medical information.]

[4. without authority,

5. made or caused to be made a copy of a medical record or medical information.]

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of theft of medical records or medical information.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of theft of medical records or medical information.

COMMENT

1. *See* § 18-4-412(1), C.R.S. 2015.

2. *See* Instruction F:75 (defining "copy"); Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly"); Instruction F:222 (defining "medical information"); Instruction F:224 (defining "medical record"); Instruction F:288 (defining "proper authorization"); *see also Webster's Third New International Dictionary* 106 (2002) (defining "appropriate" as meaning "to take without permission").

3. The statute includes several exemptions from criminal liability. *See* § 18-4-412(4), (5), C.R.S. 2015 (enumerating purposes related to law enforcement, court proceedings, and the provision of health care services). However, the Committee has not drafted affirmative defense instructions.

4. It is unclear whether it is permissible to replace the word "stole" with the phrase "committed the crime of theft." *See Black's Law Dictionary* 1639 (10th ed. 2014) (defining "steal" as "To take (personal property) illegally with the intent to keep it unlawfully."). If such a substitution is made and the defendant is not separately charged with theft in violation of section 18-4-401, give the jury the elemental instruction defining theft without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense.

4-4:32 THEFT BY RESALE OF A LIFT TICKET OR COUPON

The elements of the crime of theft by resale of a lift ticket or coupon:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. without authorization, and

4. with the intent,

5. to profit therefrom,

6. resold or offered to resell any ticket, pass, badge, pin, coupon, or other device which then entitled the bearer to the use, benefit, or enjoyment of any skiing service or skiing facility.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of theft by resale of a lift ticket or coupon.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of theft by resale of a lift ticket or coupon.

COMMENT

1. *See* § 18-4-416, C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent"); Instruction F:30 (defining "benefit").

4-4:33 MANUFACTURE, DISTRIBUTION, OR SALE OF A THEFT DETECTION SHIELDING OR A THEFT DETECTION DEACTIVATING DEVICE

The elements of the crime of manufacturing, distributing, or selling a theft detection shielding device or a theft detection deactivating device are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. manufactured, distributed, or sold a theft detection shielding device or a theft detection deactivating device,

5. with knowledge that some person intended to use the device in the commission of an offense involving theft.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of manufacturing, distributing, or selling a theft detection shielding device or a theft detection deactivating device.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of manufacturing, distributing, or selling a theft detection shielding device or a theft detection deactivating device.

COMMENT

1. *See* § 18-4-417(1)(a), C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly"); Instruction F:367 (defining "theft

detection deactivating device"); Instruction F:368 (defining "theft detection device"); Instruction F:369 (defining "theft detection shielding device"); Instruction 4-4:01 (defining the offense of theft).

4-4:34 UNLAWFUL POSSESSION OF A THEFT DETECTION SHIELDING DEVICE OR A THEFT DETECTION DEACTIVATING DEVICE

The elements of the crime of unlawful possession of a theft detection shielding device or a theft detection deactivating device are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. possessed a theft detection shielding device or a theft detection deactivating device,

[4. with the intent to use the device possessed in the commission of an offense involving theft.]

[4. with the knowledge that some person intended to use the device possessed in the commission of an offense involving theft.]

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful possession of a theft detection shielding or theft detection deactivating device.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful possession of a theft detection shielding or theft detection deactivating device.

COMMENT

1. *See* § 18-4-417(1)(b), C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly"); Instruction F:281 (defining "possession"); Instruction F:367 (defining "theft detection

deactivating device"); Instruction F:368 (defining "theft detection device"); Instruction F:369 (defining "theft detection shielding device"); Instruction 4-4:01 (defining the offense of theft).

3. If the defendant is not separately charged with theft, give the jury the elemental instruction for that offense without the two concluding paragraphs that explain the burden of proof. *See* Instruction 4-4:01. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense.

4-4:35 DEACTIVATION OR REMOVAL OF A THEFT DETECTION DEVICE

The elements of the crime of deactivation or removal of a theft detection device are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. deactivated or removed a theft detection device, or any component thereof,

5. in a store or mercantile establishment,

6. without authorization,

7. prior to purchase.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of deactivation or removal of a theft detection device.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of deactivation or removal of a theft detection device.

COMMENT

1. *See* § 18-4-417(1)(c), C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly"); Instruction F:368 (defining "theft detection device").

4-4:36 OWNERSHIP OR OPERATION OF A CHOP SHOP (OWNER OR CONSPIRATOR)

The elements of the crime of ownership or operation of a chop shop (owner or conspirator) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. owned or operated a chop shop, knowing that it was a chop shop, or conspired with another person to own or operate a chop shop, knowing that it was a chop shop.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of ownership or operation of a chop shop (owner or conspirator).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of ownership or operation of a chop shop (owner or conspirator).

COMMENT

1. *See* § 18-4-420(1)(a), C.R.S. 2015.

2. *See* Instruction F:53 (defining "chop shop"); Instruction F:195 (defining "knowingly"); Instruction G2:05 (conspiracy).

4-4:37 OWNERSHIP OR OPERATION OF A CHOP SHOP (TRANSPORTING)

The elements of the crime of ownership or operation of a chop shop (transporting) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. transported an unlawfully obtained motor vehicle or major component motor vehicle part to or from a chop shop, knowing that it was a chop shop.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of ownership or operation of a chop shop (transporting).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of ownership or operation of a chop shop (transporting).

COMMENT

1. *See* § 18-4-420(1)(b), C.R.S. 2015.

2. *See* Instruction F:53 (defining "chop shop"); Instruction F:195 (defining "knowingly"); Instruction F:204 (defining "major component motor vehicle part"); Instruction F:238 (defining "motor vehicle"); Instruction F:381 (defining "unlawfully obtained").

4-4:38 OWNERSHIP OR OPERATION OF A CHOP SHOP (SALE, TRANSFER, PURCHASE, RECEIPT)

The elements of the crime of ownership or operation of a chop shop (sale, transfer, purchase, receipt) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. sold or transferred to, or purchased or received from, a chop shop, knowing that it was a chop shop,

5. an unlawfully obtained motor vehicle or major component motor vehicle part.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of ownership or operation of a chop shop (sale, transfer, purchase, receipt).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of ownership or operation of a chop shop (sale, transfer, purchase, receipt).

COMMENT

1. *See* § 18-4-420(1)(c), C.R.S. 2015.

2. *See* Instruction F:53 (defining "chop shop"); Instruction F:195 (defining "knowingly"); Instruction F:204 (defining "major component motor vehicle part"); Instruction F:238 (defining "motor vehicle"); Instruction F:381 (defining "unlawfully obtained").

4-4:39 ALTERING OR REMOVING A VEHICLE IDENTIFICATION NUMBER (WITH INTENT)

The elements of the crime of altering or removing a vehicle identification number (with intent) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. removed, changed, altered, counterfeited, defaced, destroyed, disguised, falsified, forged, or obliterated the vehicle identification number, manufacturer's number, or engine number of a motor vehicle or major component motor vehicle part,

5. with an intent to misrepresent the identity or prevent the identification of a motor vehicle or major component motor vehicle part.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of altering or removing a vehicle identification number (with intent).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of altering or removing a vehicle identification number (with intent).

COMMENT

1. *See* § 18-4-420(3)(a)(I), C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly"); Instruction F:204 (defining "major component motor vehicle part"); Instruction F:238 (defining

"motor vehicle"); *see also* Instruction F:387 (defining "vehicle identification number" for aggravated motor vehicle theft).

3. The statute includes an exemption for persons acting with the authorization of law enforcement. *See* + § 18-4-420(3)(b), C.R.S. 2015 ("This subsection (3) does not apply to a private party or to an agent of a private party that is acting with the authorization of a law enforcement agency to lawfully seize, retain, recycle, transport, or otherwise dispose of a motor vehicle or major component motor vehicle part with a vehicle identification number, manufacturer number, or engine number that is removed, changed, altered, counterfeited, defaced, destroyed, disguised, falsified, forged, or obliterated."). However, the Committee has not drafted a model affirmative defense instruction.

4. + In 2015, the Committee corrected the statutory citation in Comment 3.

4-4:40 ALTERING OR REMOVING A VEHICLE IDENTIFICATION NUMBER (WITH KNOWLEDGE)

The elements of the crime of altering or removing a vehicle identification number (with knowledge) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. possessed, purchased, disposed of, sold, or transferred a motor vehicle or a major component motor vehicle part with knowledge that it contained a removed, changed, altered, counterfeited, defaced, destroyed, disguised, falsified, forged, or obliterated vehicle identification number, manufacturer's number, or engine number unless such motor vehicle or major component motor vehicle part was [insert factors relevant to establish compliance with the provisions of section 42-5-110].

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of altering or removing a vehicle identification number (with knowledge).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of altering or removing a vehicle identification number (with knowledge).

COMMENT

1. *See* § 18-4-420(3)(a)(II), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:204 (defining "major component motor vehicle part"); Instruction F:238 (defining "motor vehicle").

3. The statute includes an exemption for persons acting with the authorization of law enforcement. *See* + § 18-4-420(3)(b), C.R.S. 2015 ("This subsection (3) does not apply to a private party or to an agent of a private party that is acting with the authorization of a law enforcement agency to lawfully seize, retain, recycle, transport, or otherwise dispose of a motor vehicle or major component motor vehicle part with a vehicle identification number, manufacturer number, or engine number that is removed, changed, altered, counterfeited, defaced, destroyed, disguised, falsified, forged, or obliterated."). However, the Committee has not drafted a model affirmative defense instruction.

4. + In 2015, the Committee corrected the statutory citation in Comment 3.

CHAPTER 4-5

TRESPASS, TAMPERING, AND CRIMINAL MISCHIEF

4-5:01 CRIMINAL MISCHIEF

The elements of criminal mischief are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. damaged the real or personal property of one or more other persons, including property owned by the defendant jointly with another person or property owned by the defendant in which, at the time of the damage, another person had a possessory or proprietary interest,

5. in the course of a single criminal episode.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proved each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal mischief.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal mischief.

COMMENT

1. *See* § 18-4-501(1), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly").

3. In *People v. Thoro Products Co.*, 45 P.3d 737, 745 (Colo. App. 2001), *aff'd on other grounds*, 70 P.3d 1188 (Colo. 2003), a division of the court of appeals analyzed the "single criminal episode" language of section 18-4-501 as establishing an *element* of the offense. Further, the division concluded that the trial court was not required to define the phrase for the jury. *See*

id. ("Based upon the textual analysis in these joinder cases and a review of the structure of the criminal mischief statute, we conclude that 'single criminal episode' means essentially the same thing as 'same criminal episode.' In our view, that phrase is one with which reasonable persons of common intelligence would be familiar and is not so technical as to create confusion in jurors' minds as to its meaning. Hence, the trial court was not required to define the phrase for the jury.").

4-5:02.INT CRIMINAL MISCHIEF - INTERROGATORY (AGGREGATE DAMAGE)

If you find the defendant not guilty of criminal mischief, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of criminal mischief, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question[s] on the verdict form. [Although you may answer "No" to more than one question, you may not answer "Yes" to more than one question. Further, if you answer "Yes" to any question, you should not answer the other question[s].]

1. Was the aggregate value of damage to real or personal property [insert a description of the amount(s) from section 18-4-501(4)]? (Answer "Yes" or No")

[2. Was the aggregate value of damage to real or personal property [insert a description of the amount(s) from section 18-4-501(4)]? (Answer "Yes" or No")]

[3. Was the aggregate value of damage to real or personal property [insert a description of the amount(s) from section 18-4-501(4)]? (Answer "Yes" or No")]

The prosecution has the burden to prove the aggregate value of the damaged property beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place[(s)], and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-4-501(1), C.R.S. 2015.

2. *See, e.g.*, Instruction E:28 (special verdict form).

3. In *People v. Cisneros*, 566 P.2d 703, 705 (Colo. 1977), the supreme court stated that "[v]alue is an essential *element* of felony criminal mischief. Unless the property damaged has an aggregate value of one hundred dollars or more, there is no felony offense." *Id.* (emphasis added). However, the court's use of the term "element" appears to be at odds with its more recent decisions, in which it has distinguished elements from sentence enhancement provisions. *See People v. Leske*, 957 P.2d 1030, 1039 (Colo. 1998) (proof of victim's age was a penalty enhancer, not an element). Accordingly, while it is clear that there is a "*damage* element in criminal mischief," *People v. Dunoyair*, 660 P.2d 890, 894 (Colo. 1983) (emphasis added), the sentence enhancement factors based on valuation should be determined by means of interrogatories.

4. In cases where value is a disputed issue, one or both of the parties may assert that there is an evidentiary basis for submitting more than one aggregate value question as part of the interrogatory. Accordingly, the above interrogatory includes bracketed examples for two lesser valuation questions. In a case involving more than three questions about valuation, repeat the format of the bracketed questions.

5. Where more than one aggregate value question is included as part of the interrogatory, use a special verdict form with a corresponding format that repeats the admonition that the jury cannot answer "Yes" to more than one valuation question. For an example of how to prepare such a verdict form, refer to Instruction 4-4:06.INT, Comment 4.

4-5:03 FIRST DEGREE CRIMINAL TRESPASS

The elements of first degree criminal trespass are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly, and

4. unlawfully,

[5. entered or remained in a dwelling of another.]

[5. entered any motor vehicle,

6. with intent to commit the crime of [insert name of offense] therein.]

[_. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of first degree criminal trespass.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of first degree criminal trespass.

COMMENT

1. *See* § 18-4-502, C.R.S. 2015.

2. *See* Instruction F:114 (defining "dwelling"); Instruction F:126 (defining "enters unlawfully" and "remains unlawfully"); Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly"); Instruction F:236 (defining "motor vehicle").

3. *See People v. Williams*, 984 P.2d 56, 59 (Colo. 1999) (holding, in a case involving a charge of first degree criminal

trespass of a motor vehicle, that a count charging first degree criminal trespass should allege the crime that the defendant intended to commit).

4. *See People v. Rodriguez*, 43 P.3d 641, 643 (Colo. App. 2001) ("the 'intent to commit a crime therein' language establishes an element of criminal trespass of a motor vehicle and not an element of criminal trespass of a dwelling"); *People v. Anderson*, 991 P.2d 319, 321 (Colo. App. 1999) (same).

4-5:04 SECOND DEGREE CRIMINAL TRESPASS (ENCLOSED PREMISES)

The elements of second degree criminal trespass (enclosed premises) are:

1. That the defendant

2. in the State of Colorado, at or about the date and place charged,

3. knowingly, and

4. unlawfully,

5. entered or remained,

6. in or upon the premises of another,

7. which were enclosed in a manner designed to exclude intruders or were fenced.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of second degree criminal trespass (enclosed premises).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of second degree criminal trespass (enclosed premises).

COMMENT

1. *See* § 18-4-503(1)(a), C.R.S. 2015.

2. *See* Instruction F:126 (defining "enters unlawfully" and "remains unlawfully"); Instruction F:195 (defining "knowingly"); Instruction F:284 (defining "premises").

3. *See Bollier v. People*, 635 P.2d 543, 546 (Colo. 1981) (construing the provision of section 18-4-503 relating to

enclosed or fenced premises as having an implied mental state of "knowingly").

4-5:05 SECOND DEGREE CRIMINAL TRESPASS (COMMON AREAS)

The elements of second degree criminal trespass (common areas) are:

1. That the defendant

2. in the State of Colorado, at or about the date and place charged,

3. knowingly, and

4. unlawfully,

5. entered or remained,

6. in or upon the common areas of a hotel, motel, condominium, or apartment building.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of second degree criminal trespass (common areas).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of second degree criminal trespass (common areas).

COMMENT

1. *See* § 18-4-503(1)(b), C.R.S. 2015.

2. *See* Instruction F:40 (defining "building"); Instruction F:126 (defining "enters unlawfully" and "remains unlawfully"); Instruction F:195 (defining "knowingly").

4-5:06 SECOND DEGREE CRIMINAL TRESPASS (MOTOR VEHICLE)

The elements of second degree criminal trespass (motor vehicle) are:

1. That the defendant

2. in the State of Colorado, at or about the date and place charged,

3. knowingly, and

4. unlawfully,

5. entered or remained,

6. in a motor vehicle of another.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of second degree criminal trespass (motor vehicle).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of second degree criminal trespass (motor vehicle).

COMMENT

1. *See* § 18-4-503(1)(c), C.R.S. 2015.

2. *See* Instruction F:126 (defining "enters unlawfully" and "remains unlawfully"); Instruction F:195 (defining "knowingly"); Instruction F:236 (defining "motor vehicle").

4-5:07.INT SECOND DEGREE CRIMINAL TRESPASS - INTERROGATORY (AGRICULTURAL LAND)

If you find the defendant not guilty of second degree criminal trespass, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of second degree criminal trespass, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant trespass on agricultural land?
(Answer "Yes" or "No")

The defendant trespassed on agricultural land only if:

1. the premises had been classified as agricultural land by the county assessor for the county in which the land was situated.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-4-503(2)(a), C.R.S. 2015.

2. *See, e.g.*, Instruction E:28 (special verdict form).

3. Although the statute specifies that the assessor must have classified the land as "agricultural" pursuant to section § 39-1-102(1.6), C.R.S. 2015, it is the existence of the classification, and not its legal correctness, that the jury is to determine. Accordingly, absent evidence that the assessor classified the land as "agricultural" pursuant to some other

authority, there is no need to refer to the method of classification.

4-5:08.INT SECOND DEGREE CRIMINAL TRESPASS - INTERROGATORY (AGRICULTURAL LAND; INTENT TO COMMIT A FELONY)

If you find the defendant not guilty of second degree criminal trespass, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of second degree criminal trespass, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant trespass on agricultural land to commit a crime? (Answer "Yes" or "No")

The defendant trespassed on agricultural land to commit a crime only if:

1. the premises had been classified as agricultural land by the county assessor for the county in which the land was situated, and

2. the defendant committed the trespass with the intent to commit the crime[s] of [insert name(s) of felony offense(s)] thereon.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-4-503(2)(b), C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent"); *see, e.g.*, Instruction E:28 (special verdict form).

3. Although the statute specifies that the assessor must have classified the land as "agricultural" pursuant to section § 39-1-102(1.6), C.R.S. 2015, it is the existence of the classification, and not its legal correctness, that the jury is to determine. Accordingly, absent evidence that the assessor classified the land as "agricultural" pursuant to some other authority, there is no need to refer to the method of classification.

4-5:09 THIRD DEGREE CRIMINAL TRESPASS

The elements of third degree criminal trespass are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. unlawfully,

4. entered or remained,

5. in or upon any premises of another.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of third degree criminal trespass.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of third degree criminal trespass.

COMMENT

1. *See* § 18-4-504(1), C.R.S. 2015.

2. *See* Instruction F:126 (defining "enters unlawfully" and "remains unlawfully"); Instruction F:284 (defining "premises"); *see also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

3. Section 18-4-515, C.R.S. 2015, establishes an exemption from criminal liability for professional land surveyors who comply with the enumerated notice requirements. However, the

Committee has not drafted a model affirmative defense instruction.

4-5:10.INT THIRD DEGREE CRIMINAL TRESPASS - INTERROGATORY (AGRICULTURAL LAND)

If you find the defendant not guilty of third degree criminal trespass, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of third degree criminal trespass, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant trespass on agricultural land?
(Answer "Yes" or "No")

The defendant trespassed on agricultural land only if:

1. the premises had been classified as agricultural land by the county assessor for the county in which the land was situated.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-4-504(2)(a), C.R.S. 2015.

2. *See, e.g.*, Instruction E:28 (special verdict form).

3. Although the statute specifies that the assessor must have classified the land as "agricultural" pursuant to section § 39-1-102(1.6), C.R.S. 2015, it is the existence of the classification, and not its legal correctness, that the jury is to determine. Accordingly, absent evidence that the assessor classified the land as "agricultural" pursuant to some other

authority, there is no need to refer to the method of classification.

4-5:11.INT THIRD DEGREE CRIMINAL TRESPASS - INTERROGATORY (AGRICULTURAL LAND; INTENT TO COMMIT A FELONY)

If you find the defendant not guilty of third degree criminal trespass, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of third degree criminal trespass, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant trespass on agricultural land to commit a crime? (Answer "Yes" or "No")

The defendant trespassed on agricultural land to commit a crime only if:

1. the premises had been classified as agricultural land by the county assessor for the county in which the land was situated, and

2. the defendant committed the trespass with the intent to commit the crime[s] of [insert name(s) of felony offense(s)].

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-4-504(2)(b), C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent"); *see, e.g.*, Instruction E:28 (special verdict form).

3. Although the statute specifies that the assessor must have classified the land as "agricultural" pursuant to section § 39-1-102(1.6), C.R.S. 2015, it is the existence of the classification, and not its legal correctness, that the jury is to determine. Accordingly, absent evidence that the assessor classified the land as "agricultural" pursuant to some other authority, there is no need to refer to the method of classification.

4-5:12 FIRST DEGREE CRIMINAL TAMPERING

The elements of first degree criminal tampering are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to cause interruption or impairment of a service rendered to the public by a utility or by an institution providing health or safety protection,

5. tampered with property of a utility or institution, and

6. his [her] conduct did not constitute the crime of tampering with equipment associated with oil or gas gathering operations, or the crime of tampering with a utility meter.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of first degree criminal tampering.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of first degree criminal tampering.

COMMENT

1. *See* § 18-4-505, C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent"); Instruction F:360 (defining "tamper"); Instruction F:384 (defining "utility"); Instructions 4-5:15, 4-5:16 (defining the offense of tampering with equipment associated with oil or gas gathering

operations); Instructions 4-5:17, 4-5:18 (defining the offense of tampering with a utility meter).

3. Give the jury elemental instructions for the two offenses referenced in the sixth element (if those offenses are not charged, remove the two concluding paragraphs that explain the burden of proof). Place the elemental instructions for the referenced offenses immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offenses.

4-5:13 SECOND DEGREE CRIMINAL TAMPERING (PROPERTY OF ANOTHER)

The elements of second degree criminal tampering (property of another) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to cause injury, inconvenience, or annoyance to any person,

5. tampered with property of another, and

6. his [her] conduct did not constitute the offense of tampering with equipment associated with oil or gas gathering operations, or the crime of tampering with a utility meter.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of second degree criminal tampering (property of another).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of second degree criminal tampering (property of another).

COMMENT

1. *See* § 18-4-506, C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent"); Instruction F:360 (defining "tamper"); Instruction F:384 (defining "utility"); Instructions 4-5:15, 4-5:16 (defining the offense of

tampering with equipment associated with oil or gas gathering operations); Instructions 4-5:17, 4-5:18 (defining the offense of tampering with a utility meter).

3. Give the jury elemental instructions for the two offenses referenced in the sixth element (if those offenses are not charged, remove the two concluding paragraphs that explain the burden of proof). Place the elemental instructions for the referenced offenses immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offenses.

4-5:14 SECOND DEGREE CRIMINAL TAMPERING (UNAUTHORIZED CONNECTION)

The elements of second degree criminal tampering are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. made an unauthorized connection with property of a utility, and

5. his [her] conduct did not constitute the crime of tampering with equipment associated with oil or gas gathering operations or the crime of tampering with a utility meter.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of second degree criminal tampering.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of second degree criminal tampering.

COMMENT

1. *See* § 18-4-506, C.R.S. 2015.

2. *See* Instruction F:384 (defining "utility"); Instructions 4-5:15, 4-5:16 (defining the offense of tampering with equipment associated with oil or gas gathering operations); Instructions 4-5:17, 4-5:18 (defining the offense of tampering with a utility meter).

3. Give the jury elemental instructions for the two offenses referenced in the sixth element (if those offenses are not

charged, remove the two concluding paragraphs that explain the burden of proof). Place the elemental instructions for the referenced offenses immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offenses.

4-5:15 TAMPERING WITH EQUIPMENT ASSOCIATED WITH OIL OR GAS GATHERING OPERATIONS

The elements of the crime of tampering with equipment associated with oil or gas gathering operations are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. in any manner,

4. knowingly,

5. destroyed, broke, removed, or otherwise tampered with, or attempted to destroy, break, remove, or otherwise tamper with,

6. any equipment associated with oil or gas gathering operations.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of tampering with equipment associated with oil or gas gathering operations.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of tampering with equipment associated with oil or gas gathering operations.

COMMENT

1. *See* § 18-4-506.3(1), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:360 (defining "tamper"); +.

3. The term "oil or gas gathering operations" is not defined by statute.

4. + In the absence of case law on point, the Committee takes no position on whether the word "attempted" in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

5. + In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 4.

4-5:16 TAMPERING WITH EQUIPMENT ASSOCIATED WITH OIL OR GAS GATHERING OPERATIONS (ACTION OF EQUIPMENT)

The elements of the crime of tampering with the action of equipment associated with oil or gas gathering operations are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. in any manner,

4. knowingly,

5. without the consent of the owner or operator,

6. altered, obstructed, interrupted, interfered with, or attempted to alter, obstruct, interrupt, or interfere with, the action of any equipment used or associated with oil or gas gathering operations.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of tampering with the action of equipment associated with oil or gas gathering operations.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of tampering with the action of equipment associated with oil or gas gathering operations.

COMMENT

1. *See* § 18-4-506.3(2), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); +.

3. The term "oil or gas gathering operations" is not defined by statute.

4. + In the absence of case law on point, the Committee takes no position on whether the word "attempted" in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

5. + In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 4.

4-5:17 TAMPERING WITH A UTILITY METER (CONNECTION)

The elements of the crime of tampering with a utility meter (connection) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. connected any pipe, tube, stopcock, wire, cord, socket, motor, or other instrument or contrivance,

4. with any main, service pipe, or other medium supplying or conducting gas, water, or electricity to any building,

5. without the knowledge and consent of the person supplying such gas, water, or electricity.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of tampering with a utility meter (connection).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of tampering with a utility meter (connection).

COMMENT

1. *See* § 18-4-506.5(1), C.R.S. 2015.

2. *See* Instruction F:384 (defining "utility"); *see also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

3. The statute includes an exemption from criminal liability. *See* § 18-4-506.5(3), C.R.S. 2015 ("Nothing in this section shall be construed to apply to any licensed electrical or plumbing contractor while performing usual and ordinary services in accordance with recognized customs and standards."). However, the Committee has not drafted a model affirmative defense instruction.

4-5:18 TAMPERING WITH A UTILITY METER (ACTION)

The elements of the crime of tampering with a utility meter (action) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. in any manner altered, obstructed, or interfered with the action of any meter provided for measuring or registering the quantity of gas, water, or electricity passing through said meter,

4. without the knowledge and consent of the person owning said meter.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of tampering with a utility meter (action).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of tampering with a utility meter (action).

COMMENT

1. *See* § 18-4-506.5(2), C.R.S. 2015.

2. *See also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

3. The statute includes an exemption from criminal liability. *See* § 18-4-506.5(3), C.R.S. 2015 ("Nothing in this section shall be construed to apply to any licensed electrical or plumbing

contractor while performing usual and ordinary services in accordance with recognized customs and standards.”). However, the Committee has not drafted a model affirmative defense instruction.

4-5:19 DEFACING OR DESTRUCTION OF A WRITTEN INSTRUMENT

The elements of the crime of defacing or destruction of a written instrument are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to defraud,

5. defaced or destroyed,

6. any written instrument evidencing a property right, whether vested or contingent.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of defacing or destruction of a written instrument.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of defacing or destruction of a written instrument.

COMMENT

1. *See* § 18-4-507, C.R.S. 2015.

2. *See* Instruction F:90 (defining "deface"); Instruction F:185 (defining "with intent"); *see also* Instruction F:394 (defining "written instrument" pursuant to section 18-5-101(9), C.R.S. 2015, which applies to forgery and impersonation offenses in sections 18-5-101 to 18-5-110).

4-5:20 KNOWINGLY DEFACING, DESTROYING, OR REMOVING A BOUNDARY TREE; INTENTIONALLY DEFACING, DESTROYING OR REMOVING A LANDMARK, MONUMENT OR ACCESSORY

The elements of the crime of [knowingly defacing, destroying, or removing a boundary tree] [intentionally defacing, destroying, or removing a landmark, monument or accessory] are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

[3. knowingly,

4. cut, felled, altered, or removed,

5. any certain boundary tree,

6. knowing such was a boundary tree, monument, or other allowed landmark,

7. to the damage of any person.]

[3. intentionally,

4. defaced, removed, pulled down, injured, or destroyed any location stake, side post, corner post, landmark, monument, or any other legal land boundary monument, designating, or which was intended to designate, the location, boundary, or name of any mining claim, lode, or vein of mineral, or the name of the discoverer, or the date of discovery, thereof.]

[_. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of [knowingly defacing, destroying, or removing a boundary tree] [intentionally defacing, destroying, or removing a landmark, monument or accessory].

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of [knowingly defacing, destroying or removing a boundary tree] [intentionally defacing, destroying or removing a landmark, monument or accessory].

COMMENT

1. *See* 18-4-508(1), C.R.S. 2015.

2. *See* Instruction F:05 (defining "accessory"); Instruction F:90 (defining "deface"); Instruction F:185 (defining "intentionally"); Instruction F:195 (defining "knowingly"); Instruction F:302 (defining "public land survey monument").

3. The term "boundary tree" is not defined by statute.

4-5:21 REMOVING A LANDMARK, MONUMENT, OR ACCESSORY

The elements of the crime of removing a landmark, monument, or accessory are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. removed, or caused to removed,

5. any public land survey monument, control corner, or restoration of any such monument, or bearing tree, knowing such was a bearing tree or other accessory, even if said person had title to the land on which said monument or accessory was located.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of removing a landmark, monument, or accessory.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of removing a landmark, monument, or accessory.

COMMENT

1. *See* 18-4-508(2), C.R.S. 2015.

2. *See* F:05 (defining "accessory"); Instruction F:71 (defining "control corner"); Instruction F:195 (defining "knowingly"); Instruction F:302 (defining "public land survey monument").

3. The statute includes an exemption from criminal liability. *See* § 18-4-508(2), C.R.S. 2015 (no criminal liability if, "prior to such removal, said person has caused a Colorado professional land surveyor to establish at least two witness corners or

reference marks for each such monument or accessory removed and has filed or caused to be filed a monument record pursuant to article 53 of title 38, C.R.S.”). However, the Committee has not drafted a model affirmative defense instruction.

4. The term “bearing tree” is not defined by statute.

4-5:22 DEFACING PROPERTY (HISTORICAL MONUMENT)

The elements of the crime of defacing property (historical monument) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. destroyed, defaced, removed, or damaged,

4. any historical monument.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of defacing property (historical monument).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of defacing property (historical monument).

COMMENT

1. *See* § 18-4-509(1)(a), C.R.S. 2015.

2. *See* Instruction F:90 (defining "deface"); *see also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

4-5:23 DEFACING PROPERTY (ANY METHOD)

The elements of the crime of defacing property (any method) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. defaced, or caused, aided in, or permitted the defacing of,

4. public or private property,

5. without the consent of the owner,

6. by any method of defacement, including but not limited to painting, drawing, writing, or otherwise marring the surface of the property by use of paint, spray paint, ink, or any other substance or object.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of defacing property (any method).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of defacing property (any method).

COMMENT

1. *See* § 18-4-509(1)(b), C.R.S. 2015.

2. *See* Instruction F:90 (defining "deface"); *see also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of

the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

4-5:24 DEFACING PROPERTY (CAVES)

The elements of the crime of defacing property (caves) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. with regard to a cave that was public property or the property of another,

5. without the consent of the owner,

6. broke or damaged any lock, fastening, door, or structure designed to enclose or protect the cave, or defaced or damaged any cave resource, or broke any cave resource from any part of the cave, or removed any cave resource from the cave.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of defacing property (caves).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of defacing property (caves).

COMMENT

1. *See* § 18-4-509(1)(c), C.R.S. 2015.

2. *See* Instruction F:46 (defining "cave"); Instruction F:47 (defining "cave resource"); Instruction F:90 (defining "deface").

4-5:25 DEFACING PROPERTY (MULTIPLE ACTS OF DEFACEMENT; AGGREGATED AND CHARGED IN THE SAME COUNT)

The elements of the crime of defacing property (multiple acts) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. defaced, or caused, aided in, or permitted the defacing of,

4. public or private property,

5. without the consent of the owner,

6. by any method of defacement, including but not limited to painting, drawing, writing, or otherwise marring the surface of the property by use of paint, spray paint, ink, or any other substance or object, and

7. committed within a period of six months those acts of defacement charged in the same count.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of defacing property (multiple acts).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of defacing property (multiple acts).

COMMENT

1. *See* § 18-4-509(2)(a)(I)(B), C.R.S. 2015.

2. *See* Instruction F:90 (defining "deface"); *see also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is

expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

3. In the absence of appellate authority analyzing section 18-4-509(2)(a)(I)(B), the Committee has construed the provision as requiring proof of *all* acts of defacement aggregated in the same count. This determination is reflected in the seventh element of the model instruction. Further, because the aggregated acts of defacement may be committed in different ways, the model instruction lists all methods of defacement set forth in section 18-4-509(1)(b). Accordingly, it will be incumbent upon counsel to object to the inclusion of any surplusage that is without evidentiary support. *See People v. Dunaway*, 88 P.3d 619, 631 (Colo. 2004) ("permitting an instruction on an alternative theory of liability for the same charged offense not supported by sufficient evidence does not rise to the level of a constitutional error where the conviction for that offense is otherwise supported by sufficient proof"); *see also People v. Dunlap*, 124 P.3d 780, 813 (Colo. App. 2004) (relying on *Dunaway* and rejecting "defendant's contention that the trial court committed plain error by not requiring the jury to decide unanimously which of the alternative methods of committing [the offense] was proved").

4-5:26.INT DEFACING PROPERTY (MULTIPLE ACTS OF DEFACEMENT; AGGREGATED AND CHARGED IN THE SAME COUNT) - INTERROGATORY (AGGREGATE VALUE)

If you find the defendant not guilty of defacing property (multiple acts), you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of defacing property (multiple acts), you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Were the aggregate damages five hundred dollars or more? (Answer "Yes" or "No")

The prosecution has the burden to prove the aggregate value of the damages beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place(s), and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-4-509(2)(a)(I)(B), C.R.S. 2015.

2. *See, e.g.*, Instruction E:28 (special verdict form).

4-5:27 DEFACING A POSTED NOTICE

The elements of the crime of defacing a posted notice are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. marred, destroyed, or removed any posted notice authorized by law.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of defacing a posted notice.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of defacing a posted notice.

COMMENT

1. *See* § 18-4-510, C.R.S. 2015.

2. *See* Instruction F:90 (defining "deface"); Instruction F:195 (defining "knowingly").

3. If the legal authorization for a posted notice is at issue, the court may be able to resolve the issue as a matter of law. Where that is the case, the court should so advise the jury. But if the court determines that the question of whether the notice was authorized depends on the existence of one or more predicate facts, the court should draft a supplemental instruction advising the jury that it should find the notice was authorized by law if, and only if, it finds that the prosecution has carried its burden with respect to the specified fact(s).

4-5:28 LITTERING

The elements of the crime of littering are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. deposited, threw, or left any litter,

4. on any public or private property, or in any waters.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of littering.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of littering.

COMMENT

1. *See* § 18-4-511(1), C.R.S. 2015.

2. *See* Instruction F:197 (defining "litter"); Instruction F:301 (defining "public or private property"); *see also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

3. The statute includes affirmative defenses. *See* § 18-4-511(2), C.R.S. 2015 (enumerating exceptions for authorized disposal of litter). However, the Committee has not drafted model affirmative defense instructions.

4-5:29.SP LITTERING – SPECIAL INSTRUCTION (OPERATOR OF A MOTOR VEHICLE)

If litter is unlawfully thrown, deposited, dropped, or dumped from any motor vehicle, such evidence gives rise to a permissible inference that the operator of the motor vehicle caused or permitted the litter to be so thrown, deposited, dropped, or dumped.

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

COMMENT

1. *See* § 18-4-511(6), C.R.S. 2015

2. Although the statute speaks in terms of a presumption, the concept should be explained as a permissible inference. *See Jolly v. People*, 742 P.2d 891, 897 (Colo. 1987) (unlike a mandatory presumption, the use of a permissible inference in a criminal case does not violate due process).

4-5:30 ABANDONMENT OF A MOTOR VEHICLE

The elements of the crime of abandonment of a motor vehicle are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. abandoned any motor vehicle,

4. upon a street, highway, or right-of-way, or any other public property, or upon any private property, without the express consent of the owner or person in lawful charge of that private property.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of abandonment of a motor vehicle.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of abandonment of a motor vehicle.

COMMENT

1. *See* § 18-4-512(1), C.R.S. 2015.

2. *See* Instruction F:02 (defining "abandon" as including an intentional act); Instruction F:236 (defining "motor vehicle").

3. Be aware the elemental instruction does not expressly contain a mens rea. The court should consider whether one needs to be imputed, *see* § 18-1-503(2), C.R.S. 2015, or whether the definition of "abandon" contains a mens rea. *See* Instruction F:02 ("'Abandon' means to leave a thing with the intention not to retain possession of or assert ownership over it. The intent need not coincide with the act of leaving."). If the court decides that the definition of "abandon" includes a mens rea,

the court should define "intentionally." *See* Instruction F:185 (defining "with intent").

4-5:31.SP ABANDONMENT OF A MOTOR VEHICLE – SPECIAL INSTRUCTION (INDICIA OF INTENT TO ABANDON)

Evidence of [any of] the following gives rise to a permissible inference of an intention not to retain possession of, or assert ownership over, a motor vehicle:

[The motor vehicle had been left for more than seven days unattended and unmoved.]

[License plates or other identifying marks were removed from the motor vehicle.]

[The motor vehicle had been damaged or was deteriorated so extensively that it had value only for junk or salvage.]

[The owner had been notified by a law enforcement agency to remove the motor vehicle, and had not removed it within three days after notification.]

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

COMMENT

1. *See* § 18-4-512(3), C.R.S. 2015.

2. Although the statute speaks in terms of "prima facie evidence," the concept should be explained as a permissible inference. *See People in re R.M.D.*, 829 P.2d 852 (Colo. 1992) (construing a "prima facie" proof provision as establishing a permissible inference); *see generally Jolly v. People*, 742 P.2d 891, 897 (Colo. 1987) (unlike a mandatory presumption, the use of a permissible inference in a criminal case does not violate due process).

4-5:32 CRIMINAL USE OF A NOXIOUS SUBSTANCE

The elements of criminal use of a noxious substance are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with the intent,

4. to interfere with another's use or enjoyment of land, a building, or a vehicle,

5. deposited on the land, or in the building or vehicle of another,

6. without his [her] consent,

7. any stink bomb or device, irritant, or offensive-smelling substance.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal use of a noxious substance.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal use of a noxious substance.

COMMENT

1. *See* § 18-4-513(1), C.R.S. 2015.

2. *See* Instruction F:41 (defining "building of another"); Instruction F:185 (defining "with intent").

3. The statute includes an exemption from criminal liability for a peace officer who is performing his or her duties. *See*

§ 18-4-513(2), C.R.S. 2015. However, the Committee has not drafted a model affirmative defense instruction.

4-5:33 CRIMINAL OPERATION OF A DEVICE IN A MOTION PICTURE THEATER

The elements of criminal operation of a device in a motion picture theater are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4 while within a motion picture theater,

5. operated an audiovisual recording function of a device,

6. for the purpose of recording a motion picture,

7. while a motion picture was being exhibited,

8. without the consent of the owner or lessee of the motion picture theater.

[9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal operation of a device in a motion picture theater.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty criminal operation of a device in a motion picture theater.

COMMENT

1. *See* § 18-4-516(1), C.R.S. 2015.

2. *See* Instruction F:27 (defining "audiovisual recording function"); Instruction F:195 (defining "knowingly"); Instruction F:235 (defining "motion picture theater").

3. The statute includes an exemption from criminal liability for lawful investigative activities. *See* + § 18-4-516(4), C.R.S. 2015. However, the Committee has not drafted a model affirmative defense instruction.

4. + In 2015, the Committee corrected Comment 3 by replacing the citation to section 18-4-601(4) with a citation to section 18-4-516(4).

CHAPTER 5-1

FORGERY, SIMULATION, IMPERSONATION, AND RELATED OFFENSES

5-1:01 FORGERY (GOVERNMENTAL INSTRUMENTS)

The elements of the crime of forgery (governmental instruments) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to defraud,

5. falsely made, completed, altered, or uttered a written instrument,

6. which was, or which purported to be, or which was calculated to become or to represent if completed,

7. part of an issue of money, stamps, securities, or other valuable instruments issued by a government or government agency.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of forgery (governmental instruments).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of forgery (governmental instruments).

COMMENT

1. *See* § 18-5-102(1)(a), C.R.S. 2015.

2. *See* Instruction F:139 (defining "falsely alter"); Instruction F:141 (defining "falsely complete"); Instruction F:144 (defining "falsely make"); Instruction F:163 (defining

"government"); Instruction F:385 (defining "utter"); Instruction F:394 (defining "written instrument").

3. The term "defraud" is not defined by statute.

5-1:02 FORGERY (INSTRUMENTS RELATING TO A CORPORATION OR ORGANIZATION)

The elements of the crime of forgery (instruments relating to a corporation or organization) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to defraud,

5. falsely made, completed, altered, or uttered a written instrument,

6. which was, or which purported to be, or which was calculated to become or to represent if completed,

7. part of an issue of stock, bonds, or other instruments representing interests in or claims against a corporate or other organization or its property.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of forgery (instruments relating to a corporation or organization).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of forgery (instruments relating to a corporation or organization).

COMMENT

1. *See* § 18-5-102(1)(b), C.R.S. 2015.

2. *See* Instruction F:139 (defining "falsely alter"); Instruction F:141 (defining "falsely complete"); Instruction

F:144 (defining "falsely make"); Instruction F:385 (defining "utter"); Instruction F:394 (defining "written instrument").

3. The term "defraud" is not defined by statute.

5-1:03 FORGERY (LEGAL RIGHT, INTEREST, OBLIGATION, OR STATUS)

The elements of the crime of forgery (legal right, interest, obligation, or status) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to defraud,

5. falsely made, completed, altered, or uttered a written instrument,

6. which was, or which purported to be, or which was calculated to become or to represent if completed,

7. a deed, will, codicil, contract, assignment, commercial instrument, promissory note, check, or other instrument which did or might evidence, create, transfer, terminate, or otherwise affect a legal right, interest, obligation, or status.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of forgery (legal right, interest, obligation, or status).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of forgery (legal right, interest, obligation, or status).

COMMENT

1. *See* § 18-5-102(1)(c), C.R.S. 2015.

2. *See* Instruction F:139 (defining "falsely alter"); Instruction F:141 (defining "falsely complete"); Instruction F:144 (defining "falsely make"); Instruction F:385 (defining "utter"); Instruction F:394 (defining "written instrument").

3. *See People v. Cunefare*, 102 P.3d 302, 308 (Colo. 2004) (noting that the "general assembly has not defined legal right, interest, obligation, or status under section 18-5-102," and holding that the section "is not limited to the objectives of property transfer or monetary gain through the use of false instruments," and thus "applies to any legal right, interest, obligation or status—including a letter forged with the intent to secure dismissal of pending criminal charges").

4. The term "defraud" is not defined by statute.

5-1:04 FORGERY (PUBLIC RECORD OR INSTRUMENT)

The elements of the crime of forgery (public record or instrument) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to defraud,

5. falsely made, completed, altered, or uttered a written instrument,

6. which was, or which purported to be, or which was calculated to become or to represent if completed,

7. a public record or an instrument filed or required by law to be filed or legally fileable in or with a public office or public servant.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of forgery (public record or instrument).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of forgery (public record or instrument).

COMMENT

1. *See* § 18-5-102(1)(d), C.R.S. 2015.

2. *See* Instruction F:139 (defining "falsely alter"); Instruction F:141 (defining "falsely complete"); Instruction F:144 (defining "falsely make"); Instruction F:385 (defining "utter"); Instruction F:394 (defining "written instrument").

3. The term “defraud” is not defined by statute.

5-1:05 FORGERY (OFFICIALLY ISSUED OR CREATED)

The elements of the crime of forgery (officially issued or created) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to defraud,

5. falsely made, completed, altered, or uttered a written instrument,

6. which was, or which purported to be, or which was calculated to become or to represent if completed,

7. a written instrument officially issued or created by a public office, public servant, or government agency.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of forgery (officially issued or created).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of forgery (officially issued or created).

COMMENT

1. *See* § 18-5-102(1)(e), C.R.S. 2015.

2. *See* Instruction F:139 (defining "falsely alter"); Instruction F:141 (defining "falsely complete"); Instruction F:144 (defining "falsely make"); Instruction F:163 (defining "government"); Instruction F:385 (defining "utter"); Instruction F:394 (defining "written instrument").

3. The term "defraud" is not defined by statute.

5-1:06 FORGERY (PUBLIC CONVEYANCES OR COMPENSATION)

The elements of the crime of forgery (public conveyances or compensation) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to defraud,

5. falsely made, completed, altered, or uttered a written instrument,

6. which was, or which purported to be, or which was calculated to become or to represent if completed,

7. part of an issue of tokens, transfers, certificates, or other articles manufactured and designed for use in transportation fees upon public conveyances, or as symbols of value usable in place of money for the purchase of property or services available to the public for compensation.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of forgery (public conveyances or compensation).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of forgery (public conveyances or compensation).

COMMENT

1. *See* § 18-5-102(1)(f), C.R.S. 2015.

2. *See* Instruction F:139 (defining "falsely alter"); Instruction F:141 (defining "falsely complete"); Instruction F:144 (defining "falsely make"); Instruction F:299 (defining "public conveyance"); Instruction F:385 (defining "utter"); Instruction F:394 (defining "written instrument").

3. The term "defraud" is not defined by statute.

5-1:07 FORGERY (LOTTERY)

The elements of the crime of forgery (lottery) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to defraud,

5. falsely made, completed, altered, or uttered a written instrument,

6. which was, or which purported to be, or which was calculated to become or to represent if completed,

7. part of an issue of lottery tickets or shares designed for use in the state lottery.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of forgery (lottery).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of forgery (lottery).

COMMENT

1. *See* § 18-5-102(1)(g), C.R.S. 2015.

2. *See* Instruction F:139 (defining "falsely alter"); Instruction F:141 (defining "falsely complete"); Instruction F:144 (defining "falsely make"); Instruction F:385 (defining "utter"); Instruction F:394 (defining "written instrument").

3. *See* § 24-35-208, C.R.S. 2015 (defining the Colorado Lottery Commission's rule-making authority for conducting lotteries).

4. The term "defraud" is not defined by statute.

5-1:08 FORGERY (DOCUMENT-MAKING IMPLEMENT)

The elements of the crime of forgery (document-making implement) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to defraud,

5. falsely made, completed, altered, or uttered a written instrument,

6. which was, or which purported to be, or which was calculated to become or to represent if completed,

7. a document-making implement that might be used or was used in the production of a false identification document or in the production of another document-making implement to produce false identification documents.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of forgery (document-making implement).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of forgery (document-making implement).

COMMENT

1. *See* § 18-5-102(1)(h), C.R.S. 2015.

2. *See* Instruction F:105 (defining "document-making implement"); Instruction F:139 (defining "falsely alter");

Instruction F:141 (defining "falsely complete"); Instruction F:144 (defining "falsely make"); Instruction F:174 (defining "identification document"); Instruction F:286 (defining "produce"); Instruction F:385 (defining "utter"); Instruction F:394 (defining "written instrument").

3. The term "defraud" is not defined by statute.

5-1:09.SP FORGERY - SPECIAL INSTRUCTION (PEACE OFFICER)

Uttering a forged document to a peace officer gives rise to a permissible inference that that the person intended to defraud the peace officer.

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

COMMENT

1. *See* § 18-5-102(3), C.R.S. 2015.

2. Although the statute speaks in terms of a presumption, the concept should be explained as a permissible inference. *See Jolly v. People*, 742 P.2d 891, 897 (Colo. 1987) (unlike a mandatory presumption, the use of a permissible inference in a criminal case does not violate due process).

3. Although the term "forged document" is not defined by statute, section 18-5-101(5), C.R.S. 2015, defines a "forged instrument" as "a written instrument which has been falsely made, completed, or altered." Accordingly, it appears reasonable to infer that a document which has been "falsely made, completed, or altered," would, similarly, constitute a "forged document."

4. The term "defraud" is not defined by statute.

5-1:10 SECOND DEGREE FORGERY

The elements of the crime of second degree forgery are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to defraud,

5. falsely made, completed, altered, or uttered a written instrument,

6. that was not a [list those items enumerated in sections 18-5-102 and 18-5-104.5 that bear a resemblance to the written instrument forming the basis for the charge].

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of second degree forgery.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of second degree forgery.

COMMENT

1. *See* § 18-5-104(1), C.R.S. 2015.

2. *See* Instruction F:139 (defining "falsely alter"); Instruction F:141 (defining "falsely complete"); Instruction F:144 (defining "falsely make"); Instruction F:385 (defining "utter"); Instruction F:394 (defining "written instrument").

3. The term "defraud" is not defined by statute.

5-1:11 USE OF A FORGED ACADEMIC RECORD

The elements of the crime of use of a forged academic record are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to seek employment, or to seek admission to a public or private institution of higher education in this state, or to secure a scholarship or other form of financial assistance from the institution itself or from other public or private sources of financial assistance,

5. falsely made, completed, altered, or uttered a written instrument which was or purported to be, or was calculated to become or to represent if completed, a bona fide academic record of an institution of secondary or higher education.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of use of a forged academic record.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of use of a forged academic record.

COMMENT

1. *See* § 18-5-104.5(1), C.R.S. 2015.

2. *See* Instruction F:04 (defining "academic record"); Instruction F:139 (defining "falsely alter"); Instruction F:141 (defining "falsely complete"); Instruction F:144 (defining

"falsely make"); Instruction F:149 (defining "financial assistance"); Instruction F:385 (defining "utter"); Instruction F:394 (defining "written instrument").

5-1:12 CRIMINAL POSSESSION OF A FORGED INSTRUMENT

The elements of criminal possession of a forged instrument are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. possessed any forged written instrument,

4. with knowledge that it was forged, and

5. with intent to use it to defraud, and

[6. the written instrument was part of an issue of money, stamps, securities, or other valuable instruments issued by a government or government agency.]

[6. the written instrument was part of an issue of stock, bonds, or other instruments representing interests in or claims against a corporate or other organization or its property.]

[6. the written instrument was a deed, will, codicil, contract, assignment, commercial instrument, promissory note, check, or other instrument which did or might evidence, create, transfer, terminate, or otherwise affect a legal right, interest, obligation, or status.]

[6. the written instrument was a public record or an instrument filed or required by law to be filed or legally fileable in or with a public office or public servant.]

[6. the written instrument was a written instrument officially issued or created by a public office, public servant, or government agency.]

[6. the written instrument was part of an issue of tokens, transfers, certificates, or other articles manufactured and designed for use in transportation fees upon public conveyances, or as symbols of value usable in place of money for the purchase of property or services available to the public for compensation.]

[6. the written instrument was part of an issue of lottery tickets or shares designed for use in the state lottery.]

[6. the written instrument was a document-making implement that might be used or was used in the production of a false identification document or in the production of another document-making implement to produce false identification documents.]

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal possession of a forged instrument.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal possession of a forged instrument.

COMMENT

1. *See* § 18-5-105, C.R.S. 2015.

2. *See* Instruction F:105 (defining "document-making implement"); Instruction F:139 (defining "falsely alter"); Instruction F:141 (defining "falsely complete"); Instruction F:144 (defining "falsely make"); Instruction F:158 (defining "forged instrument"); Instruction F:163 (defining "government"); Instruction F:174 (defining "identification document"); Instruction F:185 (defining "with intent"); Instruction F:281 (defining "possession"); Instruction F:286 (defining "produce"); Instruction F:299 (defining "public conveyance"); Instruction F:385 (defining "utter"); Instruction F:394 (defining "written instrument").

3. *See People v. Miralda*, 981 P.2d 676, 679 (Colo. App. 1999) (mere possession is insufficient to sustain a conviction for criminal possession of a forged instrument; a defendant's intent to defraud must be proven through evidence of his or her status (e.g., as a fugitive, in possession of a false identification

document), other circumstances surrounding the possession, or the manner in which the defendant actually used the document).

4. The term "defraud" is not defined by statute.

5-1:13 CRIMINAL POSSESSION OF A SECOND DEGREE FORGED INSTRUMENT

The elements of criminal possession of a second degree forged instrument are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. possessed any forged written instrument,

4. with knowledge that it was forged, and

5. with intent to use it to defraud, and

6. the written instrument was not a [list those items enumerated in sections 18-5-102 and 18-5-104.5 that bear a resemblance to the written instrument forming the basis for the charge].

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal possession of a second degree forged instrument.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal possession of a second degree forged instrument.

COMMENT

1. *See* § 18-5-107, C.R.S. 2015.

2. *See* Instruction F:158 (defining "forged instrument"); Instruction F:185 (defining "with intent"); Instruction F:281 (defining "possession"); Instruction F:394 (defining "written instrument").

3. The term "defraud" is not defined by statute.

5-1:14 CRIMINAL POSSESSION OF A FORGERY DEVICE (KNOWLEDGE)

The elements of criminal possession of a forgery device (knowledge) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. made or possessed,

4. with knowledge of its character,

5. any plate, die, or other device, apparatus, equipment, or article specifically designed for use in counterfeiting, unlawfully simulating, or otherwise forging written instruments or counterfeit marks.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal possession of a forgery device (knowledge).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal possession of a forgery device (knowledge).

COMMENT

1. *See* § 18-5-109(1)(a), C.R.S. 2015.

2. *See* Instruction F:76 (defining "counterfeit mark"); Instruction F:281 (defining "possession"); Instruction F:394 (defining "written instrument").

5-1:15 CRIMINAL POSSESSION OF A FORGERY DEVICE (INTENT)

The elements of criminal possession of a forgery device (intent) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. made or possessed any device, apparatus, equipment, or article capable of or adaptable for use in counterfeiting, unlawfully simulating, or otherwise forging written instruments or counterfeit marks,

4. with intent to use it, or to aid or permit another to use it, for purposes of forgery or the production of counterfeit marks.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal possession of a forgery device (intent).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal possession of a forgery device (intent).

COMMENT

1. *See* § 18-5-109(1)(b), C.R.S. 2015.

2. *See* Instruction F:76 (defining "counterfeit mark"); Instruction F:185 (defining "with intent"); Instruction F:281 (defining "possession"); Instruction F:394 (defining "written instrument").

5-1:16 CRIMINAL POSSESSION OF A FORGERY DEVICE (GENUINE DEVICE)

The elements of criminal possession of a forgery device (genuine device) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. illegally possessed a genuine plate, die, or other device used in the production of written instruments or counterfeit marks,

4. with intent to fraudulently use it.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal possession of a forgery device (genuine device).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal possession of a forgery device (genuine device).

COMMENT

1. *See* § 18-5-109(1)(c), C.R.S. 2015.

2. *See* Instruction F:76 (defining "counterfeit mark"); Instruction F:185 (defining "with intent"); Instruction F:281 (defining "possession"); Instruction F:394 (defining "written instrument").

3. The third element of the instruction includes the word "illegally" because it appears in the statute. However, it is unclear whether the illegality is: (1) possessing a device without proper legal authority; or (2) obtaining a device by commission of a separate criminal act (e.g., theft).

5-1:17 CRIMINAL POSSESSION OF A FORGERY DEVICE (DOCUMENT-MAKING IMPLEMENT)

The elements of criminal possession of a forgery device (document-making implement) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. unlawfully made, produced, possessed, or uttered a document-making implement,

4. knowing that such document-making implement might be used, or was used, in the production of a false identification document or counterfeit mark or another implement for the production of false identification documents or counterfeit marks.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal possession of a forgery device (document-making implement).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal possession of a forgery device (document-making implement).

COMMENT

1. *See* § 18-5-109(1)(d), C.R.S.

2. *See* Instruction F:76 (defining "counterfeit mark"); Instruction F:105 (defining "document-making implement"); Instruction F:174 (defining "identification document"); Instruction F:281 (defining "possession"); Instruction F:385 (defining "utter").

3. The third element of the instruction includes the word "unlawfully" because it appears in the statute. However, it is unclear whether this unlawfulness requires that the manufacturing, producing, possessing, or uttering of a document-making implement also constitute a separate criminal act (e.g., theft).

5-1:18 CRIMINAL SIMULATION (INTENT TO DEFRAUD)

The elements of criminal simulation (intent to defraud) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to defraud,

5. made, altered, or represented any object in such fashion that it appeared to have an antiquity, rarity, source or authorship, ingredient, or composition which it did not in fact have.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal simulation (intent to defraud).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal simulation (intent to defraud).

COMMENT

1. *See* § 18-5-110(1)(a), C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly"); Instruction F:385 (defining "utter").

3. The term "defraud" is not defined by statute.

5-1:19 CRIMINAL SIMULATION (KNOWLEDGE OF TRUE CHARACTER)

The elements of criminal simulation (knowledge of true character) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with knowledge of an object's true character, and

4. with intent,

5. to use to defraud,

6. uttered, misrepresented, or possessed any object that was made or altered in such fashion that it appeared to have an antiquity, rarity, source or authorship, ingredient, or composition which it did not in fact have.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal simulation (knowledge of true character).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal simulation (knowledge of true character).

COMMENT

1. *See* § 18-5-110(1)(b), C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent"); Instruction F:281 (defining "possession"); Instruction F:385 (defining "utter").

3. The term "defraud" is not defined by statute.

5-1:20 TRADEMARK COUNTERFEITING

The elements of the crime of trademark counterfeiting are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. intentionally,

4. manufactured, displayed, advertised, distributed, offered for sale, sold, or possessed with intent to sell or distribute,

5. marks, goods, or services,

6. that the defendant knew were, bore, or were identified by one or more counterfeit marks, and

7. had possession, custody, or control of more than twenty-five items bearing a counterfeit mark.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of trademark counterfeiting.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of trademark counterfeiting.

COMMENT

1. *See* § 18-5-110.5(1), C.R.S. 2015.

2. *See* Instruction F:76 (defining "counterfeit mark"); Instruction F:185 (defining "intentionally"); Instruction F:195 (defining "knowingly"); Instruction F:281 (defining "possession"); Instruction F:394 (defining "written instrument").

5-1:21.INT TRADEMARK COUNTERFEITING – INTERROGATORY (LARGE NUMBER OF ITEMS)

If you find the defendant not guilty of trademark counterfeiting, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of trademark counterfeiting, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the offense involve a large number of items?
(Answer "Yes" or "No")

The offense involved a large number of items only if:

1. the aggregate quantity of items that were, bore, or were identified by a counterfeit mark was one hundred or more.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-5-110.5(2)(a)(II)(B), (3)(b)(III), C.R.S. 2015.

2. *See* Instruction F:322 (defining "retail value"); *see, e.g.*, Instruction E:28 (special verdict form).

5-1:22.INT TRADEMARK COUNTERFEITING – INTERROGATORY (HIGHLY VALUABLE ITEMS)

If you find the defendant not guilty of trademark counterfeiting, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of trademark counterfeiting, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the offense involve highly valuable items?
(Answer "Yes" or "No")

The offense involved highly valuable items only if:

1. the total retail value of all goods or services that were, bore, or were identified by a counterfeit mark was one thousand dollars or more.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-5-110(2)(a)(II)(B), C.R.S. 2015.

2. *See* Instruction F:322 (defining "retail value"); *see*, *e.g.*, Instruction E:28 (special verdict form).

5-1:23 UNLAWFULLY USING SLUGS (INTENT TO DEFRAUD)

The elements of the crime of unlawfully using slugs (intent to defraud) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to defraud the vendor of property or a service sold by means of a coin machine,

5. knowingly,

6. inserted, deposited, or used a slug in such a machine, or caused such a machine to be operated by any unauthorized means.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawfully using slugs (intent to defraud).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawfully using slugs (intent to defraud).

COMMENT

1. *See* § 18-5-111(1)(a), C.R.S. 2015.

2. *See* Instruction F:57 (defining "coin machine"); Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly"); Instruction F:346 (defining "slug").

3. The term "defraud" is not defined by statute.

5-1:24 UNLAWFULLY USING SLUGS (INTENT TO ENABLE)

The elements of the crime of unlawfully using slugs (intent to enable) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to enable a person to use [a] slug[s] fraudulently in a coin machine,

5. made, possessed, or disposed of [a] slug[s].

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawfully using slugs (intent to enable).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawfully using slugs (intent to enable).

COMMENT

1. *See* § 18-5-111(1)(b), C.R.S. 2015.

2. *See* Instruction F:57 (defining "coin machine"); Instruction F:185 (defining "with intent"); Instruction F:346 (defining "slug").

5-1:25 OBTAINING A SIGNATURE BY DECEPTION

The elements of the crime of obtaining a signature by deception are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to defraud or to acquire a benefit for himself [herself] or another,

5. caused another to sign or execute a written instrument by,

6. knowingly,

7. creating or confirming another's impression which was false, and which the defendant did not believe to be true; or failing to correct a false impression held by another which the defendant previously had created or confirmed; or preventing another from acquiring information pertinent to any matter material to a proper understanding of any transaction in which the signature of such person was procured.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of obtaining a signature by deception.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of obtaining a signature by deception.

COMMENT

1. *See* § 18-5-112(1), C.R.S. 2015.

2. *See* Instruction F:30 (defining "benefit"); + Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly"); Instruction F:394 (defining "written instrument").

3. Section 18-5-112(2) states that a person acts "by deception" if he or she acts "knowingly" in one of three ways enumerated in section 18-5-112(2)(a-c). Accordingly, this definition is reflected in the sixth and seventh elements of the model instruction.

4. The term "defraud" is not defined by statute.

5. + In 2015, the Committee added a cross-reference to Instruction F:185 in Comment 2.

5-1:26 CRIMINAL IMPERSONATION (MARRIAGE)

The elements of criminal impersonation (marriage) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. assumed a false or fictitious identity or legal capacity,

5. and in such identity or capacity,

6. married, pretended to marry, or sustained the marriage relation toward another without the connivance of the latter.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal impersonation (marriage).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal impersonation (marriage).

COMMENT

1. *See* § 18-5-113(1)(a)(I), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); *see also Webster's Third New International Dictionary* 481 (2002) (defining "connivance" as "the act of conniving: intentional failure to notice or discover a wrongdoing: passive consent or cooperation").

5-1:27 CRIMINAL IMPERSONATION (BAIL OR SURETY)

The elements of criminal impersonation (bail or surety) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. assumed a false or fictitious identity or legal capacity,

5. and in such identity or capacity,

6. became bail or surety for a party in an action or proceeding, civil or criminal, before a court or officer authorized to take the bail or surety.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal impersonation (bail or surety).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal impersonation (bail or surety).

COMMENT

1. *See* § 18-5-113(1)(a)(II), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly").

5-1:28 CRIMINAL IMPERSONATION (JUDGMENT OR INSTRUMENT)

The elements of criminal impersonation (judgment or instrument) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. assumed a false or fictitious identity or legal capacity,

5. and in such identity or capacity,

6. confessed a judgment, or subscribed, verified, published, acknowledged, or proved a written instrument which by law may be recorded, with the intent that the same might be delivered as true.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal impersonation (judgment or instrument).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal impersonation (judgment or instrument).

COMMENT

1. *See* § 18-5-113(1)(a)(III), C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly").

5-1:29 CRIMINAL IMPERSONATION (IMPERILING AN IMPERSONATED PERSON)

The elements of criminal impersonation (imperiling an impersonated person) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. assumed a false or fictitious identity or capacity, legal or other,

5. and in such identity or capacity,

6. performed an act that, if done by the person falsely impersonated, might subject that person to an action or special proceeding, civil or criminal, or to liability, charge, forfeiture, or penalty.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal impersonation (imperiling an impersonated person).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal impersonation (imperiling an impersonated person).

COMMENT

1. *See* § 18-5-113(1)(b)(I), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly").

5-1:30 CRIMINAL IMPERSONATION (PERFORMING AN ACT WITH INTENT)

The elements of criminal impersonation (performing an act with intent) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. assumed a false or fictitious identity or capacity, legal or other,

5. and in such identity or capacity,

6. performed any other act with intent to unlawfully gain a benefit for himself [herself] or another, or to injure or defraud another.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal impersonation (performing an act with intent).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal impersonation (performing an act with intent).

COMMENT

1. *See* § 18-5-113(1)(b)(II), C.R.S. 2015.

2. *See* Instruction F:30 (defining "benefit"); Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly").

3. Although a 2011 amendment changed the format of section 18-5-113 and added language in 18-5-113(1)(b) distinguishing a "legal" capacity from "other" types of capacities, it does not appear that this amendment disturbed the core of the supreme court's holding in *Alvarado v. People*, 132 P.3d 1205, 1208 (Colo. 2006) (interpreting the statute as proscribing a single act of criminal impersonation that involves a requirement for the prosecution to prove two culpable mental states, but rejecting the argument that the statute requires proof of an act of impersonation and a separate act from which the defendant intended to receive a benefit).

4. The term "defraud" is not defined by statute.

5-1:31.SP CRIMINAL IMPERSONATION – SPECIAL INSTRUCTION (FALSE OR FICTITIOUS PERSONAL IDENTIFYING INFORMATION)

For purposes of the crime of criminal impersonation, using false or fictitious personal identifying information constitutes the assumption of a false or fictitious identity or capacity.

"Personal identifying information" means information that may be used, alone or in conjunction with any other information, to identify a specific individual, including but not limited to a name; a date of birth; a social security number; a password; a pass code; an official, government-issued driver's license or identification card number; a government passport number; biometric data; or an employer, student, or military identification number.

COMMENT

1. *See* § 18-5-113(3), C.R.S. 2015.

2. The enactment of section 18-5-113(3), in 2011, effectively overruled the supreme court's decision in *Montes-Rodriguez v. People*, 241 P.3d 924, 927 (Colo. 2010) (providing a false social security number on an application for car loan did not constitute the assumption of a false of fictitious identity or capacity).

3. *See* Instruction F:272 (defining "personal identifying information").

5-1:32 OFFERING A FALSE INSTRUMENT FOR RECORDING IN THE FIRST DEGREE

The elements of the crime of offering a false instrument for recording in the first degree are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowing that a written instrument relating to or affecting real or personal property or directly affecting contractual relationships contained a material false statement or material false information, and

4. with intent,

5. to defraud,

6. presented or offered it to a public office or a public employee,

7. with the knowledge or belief that it would be registered, filed, or recorded, or become a part of the records of that public office or public employee.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of offering a false instrument for recording in the first degree.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of inducing consumption of offering a false instrument for recording in the first degree.

COMMENT

1. *See* § 18-5-114(1), C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent"); *see also* Instruction F:141 (defining "materially false statement" as part of the definition of "falsely complete" (forgery and impersonation offenses)).

3. *See People v. Cohn*, 160 P.3d 336 (Colo. App. 2007) (because "the crime of offering a false instrument for recording is completed when the document containing the materially false statement is presented to the public office with intent to defraud and with knowledge or belief it will be recorded," it is immaterial whether the victim was actually defrauded).

4. The term "defraud" is not defined by statute.

5-1:33 OFFERING A FALSE INSTRUMENT FOR RECORDING IN THE SECOND DEGREE

The elements of the crime of offering a false instrument for recording in the second degree are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowing that a written instrument relating to or affecting real or personal property or directly affecting contractual relationships contained a material false statement or material false information,

4. presented or offered it to a public office or public employee,

5. with the knowledge or belief that it would be registered, filed, or recorded or become a part of the records of the public office or public employee.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of offering a false instrument for recording in the second degree.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of offering a false instrument for recording in the second degree.

COMMENT

1. *See* § 18-5-114(3), C.R.S. 2015.

2. *See also* Instruction F:141 (defining "materially false statement" as part of the definition of "falsely complete" (forgery and impersonation offenses)).

5-1:34 INDUCING CONSUMPTION OF CONTROLLED SUBSTANCES BY FRAUDULENT MEANS

The elements of the crime of inducing consumption of controlled substances by fraudulent means are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. surreptitiously or by means of fraud, misrepresentation, suppression of truth, deception, or subterfuge,

4. caused another person to unknowingly consume or receive the direct administration of any controlled substance.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of inducing consumption of controlled substances by fraudulent means.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of inducing consumption of controlled substances by fraudulent means.

COMMENT

1. *See* § 18-5-116(1), C.R.S. 2015.

2. *See* Instruction F:73 (defining "controlled substance" by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S. 2015).

3. The statute includes an exemption from criminal liability. *See* § 18-5-116(1), C.R.S. 2015 ("nothing in this section shall diminish the scope of health care authorized by law"). However,

the Committee has not drafted a model affirmative defense instruction.

+ CHAPTER 5-2

FRAUD IN OBTAINING PROPERTY OR SERVICES

COMMENTS ON CHAPTER USE

1. + The Committee added this chapter in 2015.

5-2:01 FRAUD BY CHECK (INSUFFICIENT FUNDS)

The elements of the crime of fraud by check (insufficient funds) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowing he [she] had insufficient funds with the drawee,

4. with intent,

5. to defraud,

6. issued one or more checks for the payment of services, wages, salary, commissions, labor, rent, money, property, or other thing of value.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of fraud by check (insufficient funds).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of fraud by check (insufficient funds).

COMMENT

1. *See* § 18-5-205(2), C.R.S. 2015.

2. *See* Instruction F:48.5 (defining "check"); Instruction F:107.5 (defining "drawee"); Instruction F:183.5 (defining "insufficient funds"); Instruction F:185 (defining "with intent"); Instruction F:371 (defining "thing of value").

3. *See People v. Gutierrez*, 1 P.3d 241, 242 (Colo. App. 1999) (holding that the issuance of an insufficient funds check in

payment, or partial payment, of a pre-existing debt can constitute fraud by check pursuant to section 18-5-205(2)); *People v. Kunzelman*, 649 P.2d 340 (Colo. App. 1982) (issuance of a check with insufficient funds for the purpose of retaining possession of personal property obtained on credit can form the predicate for a conviction under the statute).

5-2:02.INT FRAUD BY CHECK (INSUFFICIENT FUNDS) - INTERROGATORY (VALUE)

If you find the defendant not guilty of fraud by check (insufficient funds), you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of fraud by check (insufficient funds), you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question[s] on the verdict form. [Although you may answer "No" to more than one question, you may not answer "Yes" to more than one question. Further, if you answer "Yes" to any question, you should not answer the other question[s].]

1. Did you find the defendant guilty of fraud by check (insufficient funds) for issuing either one fraudulent check, or two or more fraudulent checks within a sixty-day period, for a total sum of two thousand dollars or more? (Answer "Yes" or "No")

[2. Did you find the defendant guilty of fraud by check (insufficient funds) for issuing either one fraudulent check, or two or more fraudulent checks within a sixty-day period, for a total sum of seven hundred fifty dollars or more but less than two thousand dollars? (Answer "Yes" or "No")]

[3. Did you find the defendant guilty of fraud by check (insufficient funds) for issuing either one fraudulent check, or two or more fraudulent checks within a sixty-day period, for a total sum of three hundred dollars or more but less than seven hundred fifty dollars? (Answer "Yes" or "No")]

[4. Did you find the defendant guilty of fraud by check (insufficient funds) for issuing either one fraudulent check, or two or more fraudulent checks within a sixty-day period, for a total sum of fifty dollars or more but less than three hundred dollars? (Answer "Yes" or "No")]

The prosecution has the burden to prove beyond a reasonable doubt the total sum of the fraudulent check, or checks issued within a sixty-day period. Your calculation of the total sum of the fraudulent check or checks may include only the monetary amount of checks as to which you unanimously agree the

prosecution has proved beyond a reasonable doubt both the defendant's guilt and issuance within sixty days of each other.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place[(s)], and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-5-205(3)(a.7-d), C.R.S. 2015.

2. *See*, *e.g.*, Instruction E:28 (special verdict form).

5-2:03.INT FRAUD BY CHECK (INSUFFICIENT FUNDS) - INTERROGATORY (NONEXISTENT OR CLOSED ACCOUNT)

If you find the defendant not guilty of fraud by check (insufficient funds), you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of fraud by check (insufficient funds), you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question:

Did the defendant use a nonexistent or closed account? (Answer "Yes" or "No")

The defendant used a nonexistent or closed account only if:

1. the fraudulent check was drawn on an account which did not exist or which had been closed for a period of thirty days or more prior to the issuance of the check[s].

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-5-205(3)(e), C.R.S. 2015.

2. *See*, *e.g.*, Instruction E:28 (special verdict form).

5-2:04.SP FRAUD BY CHECK (INSUFFICIENT FUNDS) - SPECIAL INSTRUCTION (KNOWLEDGE)

Except in the case of a postdated check or order, the following evidence gives rise to a permissible inference that the issuer had knowledge of his [her] insufficient funds:

He [she] had no account upon which the check or order was drawn with the bank or other drawee at the time he [she] issued the check or order; or he [she] had insufficient funds upon deposit with the bank or other drawee to pay the check or order, on presentation within thirty days after issue.

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

COMMENT

1. Section 18-5-205(8), C.R.S. 2015.

2. Although the statute speaks in terms of a presumption, the concept should be explained as a permissible inference. *See People v. Felgar*, 58 P.3d 1122, 1125 (Colo. App. 2002) (construing section 18-5-205(8) as creating a permissible inference, and holding that the trial court committed reversible error by instructing the jury, in the language of the statute, that if certain circumstances existed it could presume that the defendant had knowledge of insufficient funds in his account); *see generally Jolly v. People*, 742 P.2d 891, 897 (Colo. 1987) (unlike a mandatory presumption, the use of a permissible inference in a criminal case does not violate due process).

5-2:05 FRAUD BY CHECK (OPENING AN ACCOUNT)

The elements of the crime of fraud by check (opening an account) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. opened a checking account, negotiable order of withdrawal account, or share draft account,

4. using false identification or an assumed name,

5. for the purpose of issuing fraudulent checks.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of fraud by check (opening an account).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of fraud by check (opening an account).

COMMENT

1. *See* § 18-5-205(5), C.R.S. 2015.

2. *See* Instruction F:48.5 (defining "check"); Instruction F:241.7 (defining "negotiable order of withdrawal account" and "share draft account").

5-2:06 DEFRAUDING A SECURED CREDITOR

The elements of the crime of defrauding a secured creditor are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to defraud a creditor,

5. by defeating, impairing, or rendering worthless or unenforceable any security interest,

6. sold, assigned, transferred, conveyed, pledged, encumbered, concealed, destroyed, or disposed of any collateral subject to a security interest.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of defrauding a secured creditor.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of defrauding a secured creditor.

COMMENT

1. *See* § 18-5-206(1), C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent"); *see also Black's Law Dictionary*, 318 (10th ed. 2014) (defining "collateral" as "Property that is pledged as security against a debt; the property subject to a security interest or agricultural lien."); § 4-9-102(12), C.R.S. 2015 (defining "collateral," for purposes of the Uniform Commercial Code, as meaning "the property subject to a security interest or

agricultural lien," including "[p]roceeds to which a security interest attaches," "[a]ccounts, chattel paper, payment intangibles, and promissory notes that have been sold," and "[g]oods that are the subject of a consignment.").

3. The term "security interest" is not defined in section 18-5-206. In *People v. Armijo*, 589 P.2d 935, 938 (Colo. 1979), the supreme court analyzed the meaning of the term, for purposes of section 18-5-206, by referring to the definition in the Uniform Commercial Code. *See* § 4-1-201(35), C.R.S. 2015 ("'Security interest' means an interest in personal property or fixtures that secures payment or performance of an obligation.").

5-2:07.INT DEFRAUDING A SECURED CREDITOR - INTERROGATORY (VALUE OF COLLATERAL)

If you find the defendant not guilty of defrauding a secured creditor, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of defrauding a secured creditor, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question[s] on the verdict form. [Although you may answer "No" to more than one question, you may not answer "Yes" to more than one question. Further, if you answer "Yes" to any question, you should not answer the other question[s].]:

1. Was the value of the collateral [insert a description of the amount(s) from section 18-5-206(1)(c-j)]? (Answer "Yes" or No")

[2. Was the value of the collateral [insert a description of the amount(s) from section 18-5-206(1)(c-j)]? (Answer "Yes" or No")]

[3. Was the value of the collateral [insert a description of the amount(s) from section 18-5-206(1)(c-j)]? (Answer "Yes" or No")]

The prosecution has the burden to prove the value of the collateral beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-5-206(1)(c-j), C.R.S. 2015.

2. *See*, *e.g.*, Instruction E:28 (special verdict form).

5-2:08 DEFRAUDING A DEBTOR

The elements of the crime of defrauding a debtor are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was a creditor, and

4. with intent,

5. to defraud a debtor,

5. sold, assigned, transferred, conveyed, pledged, bought, or encumbered a promissory note or contract signed by the debtor.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of defrauding a debtor.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of defrauding a debtor.

COMMENT

1. *See* § 18-5-206(2), C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent").

3. The terms "promissory note" and "contract" are not defined in section 18-5-206. Although the terms are defined elsewhere, it is unclear whether those definitions should be utilized here. *See, e.g.*, § 4-1-201(11), C.R.S. 2015 ("'Contract' means the total legal obligation that results from the parties' agreement as determined by this title as supplemented by any other applicable laws."); § 4-9-102(68), C.R.S. 2015 ("'Promissory

note’ means an instrument that evidences a promise to pay a monetary obligation, does not evidence an order to pay, and does not contain an acknowledgment by a bank that the bank has received for deposit a sum of money or funds.”); § 7-106-202, C.R.S. 2015 (“For the purposes of this subsection (5), [,having to do with issuance of shares in a corporation, the term] ‘promissory note’ means a negotiable instrument on which there is an obligation to pay independent of collateral and does not include a nonrecourse note.”); *see also* § 18-5-501, C.R.S. 2015 (“The definitions set forth in the “Uniform Commercial Code”, title 4, C.R.S., shall apply to sections 18-5-502 to 18-5-511.”).

5-2:09.INT DEFRAUDING A DEBTOR – INTERROGATORY (AMOUNT OWING ON NOTE OR CONTRACT)

If you find the defendant not guilty of defrauding a debtor, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of defrauding a debtor, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question[s] on the verdict form. [Although you may answer "No" to more than one question, you may not answer "Yes" to more than one question. Further, if you answer "Yes" to any question, you should not answer the other question[s].]:

1. Was the amount owing on the note or contract [insert a description of the amount(s) from section 18-5-206(2)(c-j)]? (Answer "Yes" or No")

[2. Was the amount owing on the note or contract [insert a description of the amount(s) from section 18-5-206(2)(c-j)]? (Answer "Yes" or No")]

[3. Was the amount owing on the note or contract [insert a description of the amount(s) from section 18-5-206(2)(c-j)]? (Answer "Yes" or No")]

The prosecution has the burden to prove the amount owing on the note or contract beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-5-206(2)(c-j), C.R.S. 2015.

2. *See*, *e.g.*, Instruction E:28 (special verdict form).

5-2:10 PURCHASE ON CREDIT TO DEFRAUD

The elements of the crime of purchase on credit to defraud are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to defraud the seller or vendor,

5. purchased any personal property on credit and, thereafter, before paying for it,

6. sold, hypothecated, pledged, or disposed of it,

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of purchase on credit to defraud.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of purchase on credit to defraud.

COMMENT

1. *See* § 18-5-207, C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent").

3. The word "hypothecate" is not defined by statute. *See, e.g., Black's Law Dictionary* 811 (10th ed. 2014) (defining "hypothecate" as meaning: "To pledge (property) as security or collateral for a debt, without delivery of title or possession.").

5-2:11 DUAL CONTRACTS TO INDUCE LOAN

The elements of the crime of dual contracts to induce loan are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. made, issued, delivered, or received dual contracts,

5. for the purchase or sale of real property.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of dual contracts to induce loan.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of dual contracts to induce loan.

COMMENT

1. *See* § 18-5-208, C.R.S. 2015.

2. *See* Instruction F:113.5 (defining "dual contracts"); Instruction F:195 (defining "knowingly").

5-2:12 ISSUING A FALSE FINANCIAL STATEMENT (MAKING OR UTTERING)

The elements of the crime of issuing a false financial statement (making or uttering) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to defraud,

5. knowingly,

6. made or uttered a written instrument which purported to describe the financial condition or ability to pay of himself [herself] or another person, and

7. which was false in some material respect and reasonably relied upon.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of issuing a false financial statement (making or uttering).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of issuing a false financial statement (making or uttering).

COMMENT

1. *See* § 18-5-209(1)(a), C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly"); *see also* Instruction F:394 (defining "written instrument" for forgery and other offenses in

Article 5, Part 1); Instruction F:385 (defining "utter" for purposes of forgery and other offenses in Article 5, Part 1).

5-2:13 ISSUING A FALSE FINANCIAL STATEMENT (REPRESENTING IN WRITING)

The elements of the crime of issuing a false financial statement (representing in writing) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to defraud,

5. represented in writing that a written instrument purporting to describe another person's financial condition or ability to pay as of a prior date was accurate with respect to that person's current financial condition or ability to pay,

6. knowing the instrument was materially false in that respect and reasonably relied upon.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of issuing a false financial statement (representing in writing).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of issuing a false financial statement (representing in writing).

COMMENT

1. *See* § 18-5-209(1)(b), C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly"); *see also* Instruction F:394 (defining "written instrument" for forgery and other offenses in Article 5, Part 1).

5-2:14 ISSUING A FALSE FINANCIAL STATEMENT (OBTAINING A FINANCIAL TRANSACTION DEVICE)

The elements of the crime of issuing a false financial statement (obtaining a financial transaction device) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to defraud,

5. upon filing one or more applications for a financial transaction device with an issuer,

[6. knowingly made or caused to be made a false statement or report, which was false in some material respect and reasonably relied upon, relative to his [her] name, occupation, financial condition, assets, or liabilities]

[6. willfully and substantially overvalued any assets or willfully omitted or substantially undervalued any indebtedness for the purpose of influencing the issuer to issue a financial transaction device], and

7. used one or more financial transaction devices issued in reliance upon such application(s) to obtain property or services or money.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of issuing a false financial statement (obtaining a financial transaction device).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of issuing a false financial statement (obtaining a financial transaction device).

COMMENT

1. *See* § 18-5-209(3), (4), C.R.S. 2015.

2. *See* Instruction F:153 (defining "financial transaction device"); Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly" or "willfully").

3. This model instruction reflects the Committee's view that section 18-5-209(3) does not fully define an offense without inclusion of the additional element (of usage to obtain property or services or money) that appears in section 18-5-209(4). Significantly, section 18-5-209(3) does not contain a penalty provision, and it does not state that a violation constitutes a "felony," "misdemeanor," or "petty offense." Therefore, none of the sentencing provisions for unclassified offenses can be utilized to ascertain the applicable punishment. *See* § 18-1.3-403, C.R.S. 2015 ("In all cases where an offense is denominated by statute as being a felony and no penalty is fixed in the statute therefor, the punishment shall be imprisonment for not more than five years in a correctional facility . . . or a fine of not more than fifteen thousand dollars, or both such imprisonment and fine."); § 18-1.3-504(1), C.R.S. 2015 ("Any misdemeanor or petty offense defined by state statute without specification of its class shall be punishable as provided in the statute defining it."); § 18-1.3-505(1), C.R.S. 2015 ("In all cases where an offense is denominated a misdemeanor and no penalty is fixed in the statute therefor, the punishment shall be imprisonment for not more than one year in the county jail, or a fine of not more than one thousand dollars, or both such imprisonment and fine."). Accordingly, the Committee has concluded that the offense is a class 1 misdemeanor, *see* § 18-5-209(4), which can be elevated to a class 6 felony if the prosecution carries its burden of proof with respect to the sentencing enhancement provision in section 18-5-209(5), C.R.S. 2015. *See* Instruction 5-2:15.INT (issuing a false financial statement (obtaining a financial transaction device) – interrogatory (use of two or more devices)).

5-2:15.INT ISSUING A FALSE FINANCIAL STATEMENT (OBTAINING A FINANCIAL TRANSACTION DEVICE) – INTERROGATORY (USE OF TWO OR MORE DEVICES)

If you find the defendant not guilty of issuing a false financial statement (obtaining a financial transaction device), you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of issuing a false financial statement (obtaining a financial transaction device), you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question:

> Did the defendant use multiple financial transaction devices issued in reliance upon multiple false financial statements to obtain something of value?
> (Answer "Yes" or "No")

The defendant used multiple financial transaction devices issued in reliance upon multiple false financial statements to obtain something of value only if:

1. he [she] committed the offense of false financial statement by obtaining two or more financial transaction devices by making two or more false financial statements and using those financial transaction devices to obtain property or services or money.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you unanimously decide the prosecution has met this burden with regard to the same two or more financial transaction devices, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden with regard to the same two or more financial transaction devices, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-5-209(5), C.R.S. 2015.

5-2:16 RECEIVING DEPOSITS IN A FAILING FINANCIAL INSTITUTION

The elements of the crime of receiving deposits in a failing financial institution are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. was an officer, manager, or other person participating in the direction of a financial institution, and

5. received or permitted the receipt of a deposit or investment,

6. knowing that the institution was insolvent.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of receiving deposits in a failing financial institution.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of receiving deposits in a failing financial institution.

COMMENT

1. *See* § 18-5-210, C.R.S. 2015.

2. *See* Instruction F:183.3 (defining "insolvent"); Instruction F:195 (defining "knowingly").

3. *See* Op. Colo. Att'y Gen. File No. ORL8805828/AQX, Dec. 12, 1988, 1988 WL 410731 ("The management of an insolvent federally-chartered savings and loan association may not be prosecuted by the State under section 18-5-210 . . . because Congress has

impliedly preempted this type of state regulation of such institutions through a pervasive scheme of legislation. The management of an insolvent state-chartered savings and loan association which is operating (and accepting deposits) under a binding supervisory agreement, entered into with the [Federal Savings and Loan Insurance Corporation (FSLIC)] pursuant to federal law, is also shielded from prosecution by the State under § 18–5–210, due to a conflicting, superseding federal regulatory scheme. However, the management of an insolvent state-chartered savings and loan association which is not operating under a federally authorized supervisory agreement with the FSLIC and continues to accept deposits would be subject to the provisions of § 18–5–210.”).

5-2:17 INSURANCE FRAUD (APPLICATION)

The elements of the crime of insurance fraud (application) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with an intent,

4. to defraud,

5. presented or caused to be presented an application for the issuance or renewal of an insurance policy, which application, or documentation in support of such application or renewal, contained false material information or withheld material information that was requested by the insurer and resulted in the issuance of an insurance policy or insurance coverage for the applicant or another.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of insurance fraud (application).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of insurance fraud (application).

COMMENT

1. *See* § 18-5-211(1)(a), C.R.S. 2015.

2. *See* Instruction F:183.7 (defining "insurance"); Instruction F:185 (defining "with intent"); Instruction F:219.5 (defining "material information").

5-2:18 INSURANCE FRAUD (CLAIM)

The elements of the crime of insurance fraud (claim) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with an intent,

4. to defraud,

5. presented or caused to be presented any claim for a loss or injury, which claim contained false material information or withheld material information.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of insurance fraud (claim).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of insurance fraud (claim).

COMMENT

1. *See* § 18-5-211(1)(b), C.R.S. 2015.

2. *See* Instruction F:54.5 (defining "claim"); Instruction F:185 (defining "with intent"); Instruction F:219.5 (defining "material information").

5-2:19 INSURANCE FRAUD (VEHICULAR)

The elements of the crime of insurance fraud (vehicular) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with an intent,

4. to defraud,

5. for the purpose of presenting any false or fraudulent insurance claim,

6. caused or participated, or purported to be involved, in a vehicular collision, or any other vehicular accident.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of insurance fraud (vehicular).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of insurance fraud (vehicular).

COMMENT

1. *See* § 18-5-211(1)(c), C.R.S. 2015.

2. *See* Instruction F:54.5 (defining "claim"); Instruction F:183.7 (defining "insurance"); Instruction F:185 (defining "with intent").

5-2:20 INSURANCE FRAUD (PREEXISTING)

The elements of the crime of insurance fraud (preexisting) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with an intent,

4. to defraud,

5. presented or caused to be presented a claim for the payment of a loss where the loss or damage claimed preexisted the execution of the applicable contract of insurance unless otherwise permitted under the contract of insurance or policy,

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of insurance fraud (preexisting).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of insurance fraud (preexisting).

COMMENT

1. *See* § 18-5-211(1)(d), C.R.S. 2015.

2. *See* Instruction F:54.5 (defining "claim"); Instruction F:183.7 (defining "insurance"); Instruction F:185 (defining "with intent").

5-2:21 INSURANCE FRAUD (CLAIM SUPPORT OR OPPOSITION)

The elements of the crime of insurance fraud (claim support or opposition) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with an intent,

4. to defraud,

5. presented or caused to be presented any written, oral, or electronic material or statement as part of, in support of or in opposition to, a claim for payment or other benefit pursuant to an insurance policy,

6. knowing that the statement contained false material information or withheld material information.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of insurance fraud (claim support or opposition).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of insurance fraud (claim support or opposition).

COMMENT

1. *See* § 18-5-211(1)(e), C.R.S. 2015.

2. *See* Instruction F:54.5 (defining "claim"); Instruction F:183.7 (defining "insurance"); Instruction F:185 (defining "with intent"); Instruction F:219.5 (defining "material information").

5-2:22 INSURANCE FRAUD (INSURANCE PRODUCER OR AGENT; PREMIUM FUNDS)

The elements of the crime of insurance fraud (insurance producer or agent; premium funds) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. was an insurance producer or agent of an insurance producer, and

5. moved, diverted, or misappropriated premium funds belonging to an insurer or unearned premium funds belonging to an insured or applicant for insurance from a producer's trust or other account without the authorization of the owner of the funds or other lawful justification.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of insurance fraud (insurance producer or agent; premium funds).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of insurance fraud (insurance producer or agent; premium funds).

COMMENT

1. *See* § 18-5-211(2), C.R.S. 2015.

2. *See* Instruction F:54.5 (defining "claim"); Instruction F:183.7 (defining "insurance"); Instruction F:183.8 (defining "insurance producer"); Instruction F:195 (defining "knowingly").

5-2:23 INSURANCE FRAUD (INSURANCE PRODUCER OR AGENT; FALSE INFORMATION)

The elements of the crime of insurance fraud (insurance producer or agent; false information) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with an intent,

4. to defraud,

5. was an insurance producer or agent of an insurance producer, and

6. created, uttered, or presented a certificate or any other evidence of insurance containing false information to any person or entity.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of insurance fraud (insurance producer or agent; false information).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of insurance fraud (insurance producer or agent; false information).

COMMENT

1. *See* § 18-5-211(3), C.R.S. 2015.

2. *See* Instruction F:54.5 (defining "claim"); Instruction F:183.7 (defining "insurance"); Instruction F:183.8 (defining "insurance producer"); Instruction F:185 (defining "with intent"); *see also* Instruction F:385 (defining "utter" for purposes of forgery and other offenses in Article 5, Part 1).

+ CHAPTER 5-3

FRAUDULENT AND DECEPTIVE SALES AND BUSINESS PRACTICES

COMMENTS ON CHAPTER USE

1. + The Committee added this chapter in 2015.

5-3:01 FRAUD IN EFFECTING SALES (FALSE WEIGHT OR MEASURE)

The elements of the crime of fraud in effecting sales (false weight or measure) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. in the course of business,

5. used or possessed for use a false weight or measure, or any other device for falsely determining or recording any quality or quantity.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of fraud in effecting sales (false weight or measure).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of fraud in effecting sales (false weight or measure).

COMMENT

1. *See* § 18-5-301(1)(a), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:281 (defining "possession").

5-3:02 FRAUD IN EFFECTING SALES (LESS THAN REPRESENTED QUANTITY)

The elements of the crime of fraud in effecting sales (less than represented quantity) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. in the course of business,

5. sold, offered, or exposed for sale or delivered less than the represented quantity of any commodity or service.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of fraud in effecting sales (less than represented quantity).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of fraud in effecting sales (less than represented quantity).

COMMENT

1. *See* § 18-5-301(1)(b), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly").

5-3:03 FRAUD IN EFFECTING SALES (MORE THAN REPRESENTED QUANTITY)

The elements of the crime of fraud in effecting sales (more than represented quantity) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. in the course of business,

5. took or attempted to take more than the represented quantity of any commodity or service,

6. when as buyer he [she] furnished the weight or measure.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of fraud in effecting sales (more than represented quantity).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of fraud in effecting sales (more than represented quantity).

COMMENT

1. *See* § 18-5-301(1)(c), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly").

3. In the absence of case law on point, the Committee takes no position on whether the word "attempted" in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should

provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

5-3:04 FRAUD IN EFFECTING SALES (ADULTERATED OR MISLABELED)

The elements of the crime of fraud in effecting sales (adulterated or mislabeled) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. in the course of business,

5. sold, offered, or exposed for sale,

6. an adulterated or mislabeled commodity.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of fraud in effecting sales (adulterated or mislabeled).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of fraud in effecting sales (adulterated or mislabeled).

COMMENT

1. *See* § 18-5-301(1)(d), C.R.S. 2015.

2. *See* Instruction F:09.5 (defining "adulterated"); Instruction F:195 (defining "knowingly"); Instruction F:229.5 (defining "mislabeled").

5-3:05 FRAUD IN EFFECTING SALES (FALSE OR MISLEADING)

The elements of the crime of fraud in effecting sales (false or misleading) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. in the course of business,

5. made a false or misleading statement,

6. in any advertisement addressed to the public or to a substantial segment thereof,

7. for the purpose of promoting the purchase or sale of property or services.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of fraud in effecting sales (false or misleading).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of fraud in effecting sales (false or misleading).

COMMENT

1. *See* § 18-5-301(1)(e), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly").

3. Section 18-5-303(2), C.R.S. 2015, provides as follows:

> It shall be an affirmative defense that a television or radio broadcasting station or a publisher or

> printer of a newspaper, magazine, or other form of printed advertising which broadcasted, published, or printed a false advertisement prohibited by section 18-5-301(1)(e) or a bait advertisement prohibited by subsection (1) of this section or a telephone company which furnished service to a subscriber did so without knowledge of the advertiser's or subscriber's intent, plan, or purpose.

However, the Committee has not drafted a model affirmative defense instruction.

5-3:06 SELLING LAND TWICE

The elements of the crime of selling land twice are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to defraud,

5. after once selling, bartering, or disposing of any land, or executing any bond or agreement for sale of any land,

6. again sold, bartered, or disposed of the same tract of land or any part thereof, or executed any bond or agreement to sell or barter or dispose of the same land or any part thereof,

7. to any other person,

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of selling land twice.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of selling land twice.

COMMENT

1. *See* § 18-5-302(1), C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent").

3. The term "defraud" is not defined by statute.

5-3:07 FALSE REPRESENTATION CONCERNING OWNERSHIP OF LAND

The elements of the crime of false representation concerning ownership of land are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. made a false representation concerning the existence of an ownership interest in land which he [she] had as a seller or which his [her] principal had, and

5. which was relied upon.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of false representation concerning ownership of land.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of false representation concerning ownership of land.

COMMENT

1. *See* § 18-5-302(2), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly").

3. *See People v. Alexander*, 663 P.2d 1024, 1028-30 (Colo. 1983) (section 18-5-302(2) requires proof of actual reliance by the victim, without regard to what a reasonable person would have done).

5-3:08 NONCOMPLIANCE WITH A LIEN WAIVER FOR A CONSTRUCTION LOAN

The elements of the crime of noncompliance with a lien waiver for a construction loan are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. signed a lien waiver for a construction loan [that contained a statement, by the defendant, providing in substance that all debts owed to any third party by the defendant, and relating to the goods or services covered by the waiver of lien rights, had been paid or would be timely paid], and

5. failed to timely pay any debt resulting from a construction agreement covered by the waiver.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of noncompliance with a lien waiver for a construction loan.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of noncompliance with a lien waiver for a construction loan.

COMMENT

1. *See* § 18-5-302(3), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly").

3. Because section 18-5-302(3) specifies that the lien waiver for a construction loan must have been one "under section 38-22-

119," the requirements of section 38-22-119 are reflected in the fourth element.

4. Section 18-5-302(3) includes the following excepting language after the provision establishing the offense as a class one misdemeanor: "unless there is a bona fide dispute as to the existence or amount of the debt." However, the Committee has not drafted a model affirmative defense instruction.

5-3:09 BAIT ADVERTISING

The elements of the crime of bait advertising are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with the intent, plan, or purpose,

4. not to sell or provide the advertised property or services at all, or not at the price at which he [she] offered them, or not in a quantity sufficient to meet the reasonable expected public demand, unless the quantity was specifically stated in the advertisement,

5. offered property or services as part of a scheme or plan,

6. in any manner, including advertising or any other means of communication.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of bait advertising.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of bait advertising.

COMMENT

1. *See* § 18-5-303(1), C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent").

3. Section 18-5-303(2), C.R.S. 2015, provides as follows:

> It shall be an affirmative defense that a television or radio broadcasting station or a publisher or

> printer of a newspaper, magazine, or other form of printed advertising which broadcasted, published, or printed a false advertisement prohibited by section 18-5-301(1)(e) or a bait advertisement prohibited by subsection (1) of this section or a telephone company which furnished service to a subscriber did so without knowledge of the advertiser's or subscriber's intent, plan, or purpose.

However, the Committee has not drafted a model affirmative defense instruction.

5-3:10 FALSE STATEMENTS AS TO CIRCULATION

The elements of the crime of false statements as to circulation are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. engaged in the publication of any newspaper, magazine, periodical, or other advertising medium published in the state of Colorado [, or was an employee of any such publisher], and

5. made any statement concerning the circulation of the newspaper, magazine, periodical, or other advertising medium which was untrue or misleading,

6. where such publisher fixed his [her] charges for advertising space in the publication on the amount of its circulation.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of false statements as to circulation.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of false statements as to circulation.

COMMENT

1. *See* § 18-5-304, C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly").

5-3:11 ALTERING AN IDENTIFICATION NUMBER

The elements of the crime of altering an identification number are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. that identification of an article be hindered or prevented,

5. obscured an identification number or in the course of business sold, offered for sale, leased, or otherwise disposed of an article,

6. knowing that an identification number thereon was obscured.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of altering an identification number.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of altering an identification number.

COMMENT

1. *See* § 18-5-305(1), C.R.S. 2015.

2. *See* Instruction F:174.7 (defining "identification number"); Instruction F:185 (defining "with intent"); Instruction F:246.5 (defining "obscure").

5-3:12.SP ALTERING AN IDENTIFICATION NUMBER - SPECIAL INSTRUCTION (POSSESSION OF AN ARTICLE WITH AN OBSCURED IDENTIFICATION NUMBER)

Evidence that the defendant possessed an article on which an identification number was obscured gives rise to a permissible inference that the defendant obscured the number with intent to hinder or prevent identification of the article, and that he [she] knew that the identification number was obscured [, unless, prior to his [her] arrest or the issuance of a warrant for a search of the premises where the article was kept, whichever was earlier, he [she] had reported possession of the article to the police or other appropriate law enforcement agency].

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

COMMENT

1. *See* § 18-5-305(4), C.R.S. 2015.

2. *See People in re R.M.D.*, 829 P.2d 852 (Colo. 1992) (construing the "prima facie" proof provision of section 18-4-406 as establishing a permissible inference); *see generally Jolly v. People*, 742 P.2d 891, 897 (Colo. 1987) (unlike a mandatory presumption, the use of a permissible inference in a criminal case does not violate due process).

5-3:13 PROHIBITED PRACTICES BY PRIVATE EMPLOYMENT AGENCIES (FICTITIOUS JOB OR FALSE REPRESENTATION)

The elements of the crime of prohibited practice by a private employment agency (fictitious job or false representation) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. was a private employment agency, or an employee of such agency, and

5. sent an applicant, or caused an applicant to be sent, to any fictitious job or position; or made any false representation, or caused any false representation to be made, concerning the availability of employment.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prohibited practice by a private employment agency (fictitious job or false representation).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prohibited practice by a private employment agency (fictitious job or false representation).

COMMENT

1. *See* § 18-5-307(5.5)(a), C.R.S. 2015.

2. *See* Instruction F:21.5 (defining "applicant"); Instruction F:121.5 (defining "employment"); Instruction F:195 (defining "knowingly"); Instruction F:285.5 (defining "private employment agency").

5-3:14 PROHIBITED PRACTICES BY PRIVATE EMPLOYMENT AGENCIES (STRIKE OR LOCKOUT)

The elements of the crime of prohibited practice by a private employment agency (strike or lockout) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. was a private employment agency, or an employee of such agency, and

5. sent an applicant, or caused an applicant to be sent, to any place where a strike or lockout existed or was impending,

6. without notifying the applicant of the circumstances.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prohibited practice by a private employment agency (strike or lockout).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prohibited practice by a private employment agency (strike or lockout).

COMMENT

1. *See* § 18-5-307(5.5)(b), C.R.S. 2015.

2. *See* Instruction F:21.5 (defining "applicant"); Instruction F:121.5 (defining "employment"); Instruction F:195 (defining "knowingly"); Instruction F:285.5 (defining "private employment agency").

5-3:15 PROHIBITED PRACTICES BY PRIVATE EMPLOYMENT AGENCIES (CONDUCT WITH EMPLOYER)

The elements of the crime of prohibited practice by a private employment agency (conduct with employer) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. was a private employment agency, or an employee of such agency, and

5. conspired or arranged with any employer to secure the discharge of an employee; or gave or received any gratuity or divided or shared with an employer any fee, charge, or remuneration received from any applicant for employment; or caused any of the foregoing acts to be done.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prohibited practice by a private employment agency (conduct with employer).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prohibited practice by a private employment agency (conduct with employer).

COMMENT

1. *See* § 18-5-307(5.5)(c), C.R.S. 2015.

2. *See* Instruction F:21.5 (defining "applicant"); Instruction F:121.5 (defining "employment"); Instruction F:195 (defining "knowingly"); Instruction F:285.5 (defining "private employment agency"); *see also* Instruction G2:05 (conspiracy).

5-3:16 PROHIBITED PRACTICES BY PRIVATE EMPLOYMENT AGENCIES (CIRCULATION OR PUBLICATION)

The elements of the crime of prohibited practice by a private employment agency (circulation or publication) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. was a private employment agency, or an employee of such agency, and

5. circulated or published, by advertisement or otherwise, any false statements or representations to persons seeking employment or to employers seeking employees; or caused any of the foregoing acts to be done.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prohibited practice by a private employment agency (circulation or publication).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prohibited practice by a private employment agency (circulation or publication).

COMMENT

1. *See* § 18-5-307(5.5)(d), C.R.S. 2015.

2. *See* Instruction F:21.5 (defining "applicant"); Instruction F:121.5 (defining "employment"); Instruction F:195 (defining "knowingly"); Instruction F:285.5 (defining "private employment agency").

5-3:17 PROHIBITED PRACTICES BY PRIVATE EMPLOYMENT AGENCIES (FAILURE TO REFUND)

The elements of the crime of prohibited practice by a private employment agency (failure to refund) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. was a private employment agency, or an employee of such agency, and

5. failed to refund, or caused a failure to refund, fees to an applicant where such refund was due pursuant to law.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prohibited practice by a private employment agency (failure to refund).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prohibited practice by a private employment agency (failure to refund).

COMMENT

1. *See* § 18-5-307(5.5)(e), C.R.S. 2015.

2. *See* Instruction F:21.5 (defining "applicant"); Instruction F:121.5 (defining "employment"); Instruction F:195 (defining "knowingly"); Instruction F:285.5 (defining "private employment agency").

3. The court should draft a special instruction explaining the relevant portion(s) of the refund provisions in section 18-5-307(5), C.R.S. 2015.

5-3:18 PROHIBITED PRACTICES BY PRIVATE EMPLOYMENT AGENCIES (FEE-PAID POSITION)

The elements of the crime of prohibited practice by a private employment agency (fee-paid position) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. was a private employment agency, or an employee of such agency, and

5. advertised or represented the availability of fee-paid positions where no cost would accrue to the applicant if hired in such a manner as to confuse such position with other available positions which were not available on a fee-paid basis; or caused any of the foregoing acts to be done.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prohibited practice by a private employment agency (fee-paid position).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prohibited practice by a private employment agency (fee-paid position).

COMMENT

1. *See* § 18-5-307(5.5)(f), C.R.S. 2015.

2. *See* Instruction F:21.5 (defining "applicant"); Instruction F:121.5 (defining "employment"); Instruction F:146.5 (defining "fee-paid position"); Instruction F:195 (defining "knowingly"); Instruction F:285.5 (defining "private employment agency").

5-3:19 PROHIBITED PRACTICES BY PRIVATE EMPLOYMENT AGENCIES (NO FEE BASIS)

The elements of the crime of prohibited practice by a private employment agency (no fee basis) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. was a private employment agency, or an employee of such agency, and

5. advertised or represented that an available position was available on a free or no fee basis or otherwise indicated that no charge or cost would accrue to anyone when in fact the employer was obligated to pay a fee contingent upon the acceptance of employment of the applicant; or caused any of the foregoing acts to be done.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prohibited practice by a private employment agency (no fee basis).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prohibited practice by a private employment agency (no fee basis).

COMMENT

1. *See* § 18-5-307(5.5)(g), C.R.S. 2015.

2. *See* Instruction F:21.5 (defining "applicant"); Instruction F:121.5 (defining "employment"); Instruction F:195 (defining "knowingly"); Instruction F:285.5 (defining "private employment

agency"); *see also* Instruction F:146.5 (defining "fee-paid position").

5-3:20 PROHIBITED PRACTICES BY PRIVATE EMPLOYMENT AGENCIES (ADVERTISING FOR SELF)

The elements of the crime of prohibited practice by a private employment agency (advertising for self) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. was a private employment agency, or an employee of such agency, and

5. advertised for, or caused the advertising of, any position, including personnel for its own staff,

6. without identifying in the advertisement that it was a private employment agency.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prohibited practice by a private employment agency (advertising for self).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prohibited practice by a private employment agency (advertising for self).

COMMENT

1. *See* § 18-5-307(5.5)(h), C.R.S. 2015.

2. *See* Instruction F:21.5 (defining "applicant"); Instruction F:121.5 (defining "employment"); Instruction F:195 (defining "knowingly"); Instruction F:285.5 (defining "private employment agency").

5-3:21 ELECTRONIC MAIL FRAUD (ACCESSING A PROTECTED COMPUTER WITHOUT AUTHORIZATION)

The elements of the crime of electronic mail fraud (accessing a protected computer without authorization) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. accessed a protected computer without authorization, and

5. intentionally initiated the transmission of multiple commercial electronic mail messages from or through such computer [, or conspired to do so].

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of electronic mail fraud (accessing a protected computer without authorization).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of electronic mail fraud (accessing a protected computer without authorization).

COMMENT

1. This instruction is patterned on 18 U.S.C. § 1037(a)(1), which is incorporated into section 18-5-308(1), C.R.S. 2015 ("A person commits electronic mail fraud if he [she] violates any provision of 18 U.S.C. sec. 1037(a)."). However, users should be aware of one deliberate omission from the model instruction.

Although 18 U.S.C. § 1037(a) requires proof that the fraud "affect[ed] interstate or foreign commerce," the General Assembly declared "that the intent of . . . section 18-5-308,

C.R.S., is to exercise state authority in a manner consistent with, and to the maximum extent permissible under, the federal preemption provisions of 15 U.S.C. sec. 7707(b)." § 6-1-702.5, C.R.S. 2015. And 15 U.S.C. § 7707(b) states, in relevant part, that it:

> supersedes any statute, regulation, or rule of a State or political subdivision of a State that expressly regulates the use of electronic mail to send commercial messages, except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto.

Therefore, because 15 U.S.C. § 7707(b) does not purport to preempt state statutes that criminalize false or deceptive electronic mail messages affecting *intrastate* commerce, it appears the General Assembly did not intend to incorporate the interstate and foreign commerce language of 15 U.S.C. § 7707(b) into section 18-5-308(1). Accordingly, this language, which relates to the establishment of federal jurisdiction, is not included in the above instruction.

2. *See* Instruction F:57.3 (defining "commercial electronic mail message"); Instruction F:195 (defining "knowingly"); Instruction F:239.5 (defining "multiple"); *see also* 18 U.S.C. § 1037(4) (2014) ("Any other term has the meaning given that term by [Section 3 of the CAN-SPAM Act of 2003, which is codified as 15 U.S.C. § 7702].").

3. Section 18-5-308(2), C.R.S. 2015, establishes an exemption from criminal liability: "This section shall not apply to a provider of internet access service, as defined in 47 U.S.C. sec. 231, who does not initiate the commercial electronic mail message." However, the Committee has not drafted a model affirmative defense instruction.

5-3:22 ELECTRONIC MAIL FRAUD (USING A PROTECTED COMPUTER)

The elements of the crime of electronic mail fraud (using a protected computer) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. used a protected computer to relay or retransmit multiple commercial electronic mail messages,

5. with the intent to deceive or mislead recipients, or any internet access service, as to the origin of such messages.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of electronic mail fraud (using a protected computer).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of electronic mail fraud (using a protected computer).

COMMENT

1. This instruction is patterned on 18 U.S.C. § 1037(a)(2), which is incorporated into section 18-5-308(1), C.R.S. 2015 ("A person commits electronic mail fraud if he [she] violates any provision of 18 U.S.C. sec. 1037(a)."). *See* Instruction 5-3:21, Comment 1 (discussing interstate and intrastate commerce).

2. *See* Instruction F:57.3 (defining "commercial electronic mail message"); Instruction F:239.5 (defining "multiple"); *see also* 18 U.S.C. § 1037(4) (2014) ("Any other term has the meaning

given that term by [Section 3 of the CAN-SPAM Act of 2003, which is codified as 15 U.S.C. § 7702].").

3. It is unclear whether the term "knowingly," which is incorporated from 18 U.S.C. § 1037(a), is to be defined according to federal or state law.

4. Section 18-5-308(2), C.R.S. 2015, establishes an exemption from criminal liability: "This section shall not apply to a provider of internet access service, as defined in 47 U.S.C. sec. 231, who does not initiate the commercial electronic mail message." However, the Committee has not drafted a model affirmative defense instruction.

5-3:23 ELECTRONIC MAIL FRAUD (FALSIFIED HEADER)

The elements of the crime of electronic mail fraud (falsified header) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. materially falsified header information in multiple commercial electronic mail messages, and

5. intentionally initiated the transmission of such messages.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of electronic mail fraud (falsified header).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of electronic mail fraud (falsified header).

COMMENT

1. This instruction is patterned on 18 U.S.C. § 1037(a)(3), which is incorporated into section 18-5-308(1), C.R.S. 2015 ("A person commits electronic mail fraud if he [she] violates any provision of 18 U.S.C. sec. 1037(a)."). *See* Instruction 5-3:21, Comment 1 (discussing interstate and intrastate commerce).

2. *See* Instruction F:57.3 (defining "commercial electronic mail message"); Instruction F:219.7 (defining "materially"); Instruction F:239.5 (defining "multiple"); *see also* 18 U.S.C. § 1037(4) (2014) ("Any other term has the meaning given that term by [Section 3 of the CAN-SPAM Act of 2003, which is codified as 15 U.S.C. § 7702].").

3. It is unclear whether the term "knowingly," which is incorporated from 18 U.S.C. § 1037(a), is to be defined according to federal or state law.

4. Section 18-5-308(2), C.R.S. 2015, establishes an exemption from criminal liability: "This section shall not apply to a provider of internet access service, as defined in 47 U.S.C. sec. 231, who does not initiate the commercial electronic mail message." However, the Committee has not drafted a model affirmative defense instruction.

5-3:24 ELECTRONIC MAIL FRAUD (FALSIFIED REGISTRATION)

The elements of the crime of electronic mail fraud (falsified registration) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. registered, using information that materially falsified the identity of the actual registrant, for five or more electronic mail accounts or online user accounts or two or more domain names, and

5. intentionally initiated the transmission of multiple commercial electronic mail messages from any combination of such accounts or domain names.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of electronic mail fraud (falsified registration).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of electronic mail fraud (falsified registration).

COMMENT

1. This instruction is patterned on 18 U.S.C. § 1037(a)(4), which is incorporated into section 18-5-308(1), C.R.S. 2015 ("A person commits electronic mail fraud if he [she] violates any provision of 18 U.S.C. sec. 1037(a)."). *See* Instruction 5-3:21, Comment 1 (discussing interstate and intrastate commerce).

2. *See* Instruction F:57.3 (defining "commercial electronic mail message"); Instruction F:219.7 (defining "materially"); Instruction F:239.5 (defining "multiple"); *see also* 18 U.S.C.

§ 1037(4) (2014) ("Any other term has the meaning given that term by [Section 3 of the CAN-SPAM Act of 2003, which is codified as 15 U.S.C. § 7702].").

3. It is unclear whether the term "knowingly," which is incorporated from 18 U.S.C. § 1037(a), is to be defined according to federal or state law.

4. Section 18-5-308(2), C.R.S. 2015, establishes an exemption from criminal liability: "This section shall not apply to a provider of internet access service, as defined in 47 U.S.C. sec. 231, who does not initiate the commercial electronic mail message." However, the Committee has not drafted a model affirmative defense instruction.

5-3:25 ELECTRONIC MAIL FRAUD (FALSE REPRESENTATION AS TO REGISTRANT)

The elements of the crime of electronic mail fraud (false representation as to registrant) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. falsely represented himself [herself] to be the registrant or the legitimate successor in interest to the registrant of five or more internet protocol addresses, and

5. intentionally initiated the transmission of multiple commercial electronic mail messages from such addresses [, or conspired to do so].

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of electronic mail fraud (false representation as to registrant).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of electronic mail fraud (false representation as to registrant).

COMMENT

1. This instruction is patterned on 18 U.S.C. § 1037(a)(5), which is incorporated into section 18-5-308(1), C.R.S. 2015 ("A person commits electronic mail fraud if he [she] violates any provision of 18 U.S.C. sec. 1037(a)."). *See* Instruction 5-3:21, Comment 1 (discussing interstate and intrastate commerce).

2. *See* Instruction F:57.3 (defining "commercial electronic mail message"); Instruction F:195 (defining "knowingly"); Instruction F:239.5 (defining "multiple"); *see also* 18 U.S.C. § 1037(4) (2014) ("Any other term has the meaning given that term by [Section 3 of the CAN-SPAM Act of 2003, which is codified as 15 U.S.C. § 7702].").

3. Section 18-5-308(2), C.R.S. 2015, establishes an exemption from criminal liability: "This section shall not apply to a provider of internet access service, as defined in 47 U.S.C. sec. 231, who does not initiate the commercial electronic mail message." However, because the applicability of this exemption will rarely depend on the resolution of a disputed factual issue, the Committee has not drafted a model affirmative defense instruction.

5-3:26 MONEY LAUNDERING (CONDUCTING OR ATTEMPTING)

The elements of the crime of money laundering (conducting or attempting) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with the intent to promote the commission of a criminal offense; or with knowledge or a belief that the transaction was designed in whole or in part to conceal or disguise the nature, location, source, ownership, or control of the proceeds of a criminal offense; or with knowledge or a belief that the transaction was designed in whole or in part to avoid a transaction reporting requirement under [insert description of relevant federal law],

4. conducted or attempted to conduct a financial transaction that involved money or any other thing of value that he [she] knew or believed to be the proceeds, in any form, of a criminal offense.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of money laundering (conducting or attempting).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of money laundering (conducting or attempting).

COMMENT

1. *See* § 18-5-309(1)(a), C.R.S. 2015.

2. *See* Instruction F:67.5 (defining "conducts or attempts to conduct a financial transaction"); Instruction F:152.5 (defining

"financial transaction"); Instruction F:185 (defining "with intent").

3. In the absence of case law on point, the Committee takes no position on whether the word "attempted" in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

5-3:27 MONEY LAUNDERING (TRANSPORTED, TRANSMITTED, OR TRANSFERRED)

The elements of the crime of money laundering (transported, transmitted, or transferred) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with the intent to promote the commission of a criminal offense; or with knowledge or a belief that the monetary instrument or moneys represented the proceeds of a criminal offense and that the transportation, transmission, or transfer was designed, in whole or in part, to conceal or disguise the nature, location, source, ownership, or control of the proceeds of a criminal offense; or with knowledge or a belief that the transaction was designed in whole or in part to avoid a transaction reporting requirement under [insert description of relevant federal law],

4. transported, transmitted, or transferred a monetary instrument or moneys.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of money laundering (transported, transmitted, or transferred).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of money laundering (transported, transmitted, or transferred).

COMMENT

1. *See* § 18-5-309(1)(b), C.R.S. 2015.

2. *See* Instruction F:152.5 (defining "financial transaction"); Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly"); Instruction F:232.5 (defining "monetary instrument"); Instruction F:312.5 (defining "represent"); Instruction F:374.5 (defining "transaction").

5-3:28 MONEY LAUNDERING (PROPERTY)

The elements of the crime of money laundering (property) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. intentionally,

4. conducted a financial transaction involving property that was represented to be the proceeds of a criminal offense, or involving property that the defendant knew or believed to have been used to conduct or facilitate a criminal offense, to promote the commission of a criminal offense; conceal or disguise the nature, location, source, ownership, or control of property that the defendant believed to be the proceeds of a criminal offense; or avoid a transaction reporting requirement under [insert description of relevant federal law].

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of money laundering (property).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of money laundering (property).

COMMENT

1. *See* § 18-5-309(1)(c), C.R.S. 2015.

2. *See* Instruction F:67.5 (defining "conducts or attempts to conduct a financial transaction"); Instruction F:152.5 (defining "financial transaction"); Instruction F:185 (defining "intentionally"); Instruction F:232.5 (defining "monetary

instrument”); Instruction F:312.5 (defining “represent”); Instruction F:374.5 (defining “transaction”).

+ CHAPTER 5-4

BRIBERY AND RIGGING OF CONTESTS

COMMENTS ON CHAPTER USE

1. + The Committee added this chapter in 2015.

5-4:01 COMMERCIAL BRIBERY – BREACH OF A DUTY OF FIDELITY

The elements of the crime of commercial bribery (breach of a duty of fidelity) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. solicited, accepted, or agreed to accept any benefit as consideration for,

5. violating or agreeing to violate a duty of fidelity to which he [she] was subject,

6. as agent or employee; or trustee, guardian, or other fiduciary; or lawyer, physician, accountant, appraiser, or other professional adviser; or officer, director, partner, manager, or other participant in the direction of the affairs of an incorporated or unincorporated association; or duly elected or appointed representative or trustee of a labor organization or employee welfare trust fund; or arbitrator or other purportedly disinterested adjudicator or referee.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of commercial bribery (breach of a duty of fidelity).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of commercial bribery (breach of a duty of fidelity).

COMMENT

1. *See* § 18-5-401(1), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly").

3. The term "consideration" is not defined in section 18-5-401. *See, e.g., Black's Law Dictionary* 370 (10th ed. 2014) (defining "consideration" as: "Something (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee.").

4. *See People v. Lee*, 717 P.2d 493, 496 (Colo. 1986) (the commercial bribery statute does not unconstitutionally delegate legislative power to private persons in violation of the distribution of powers doctrine contained in Article III of the Colorado Constitution, notwithstanding the absence of a definition of the term "duty of fidelity"; because the term is synonymous with the term "duty of loyalty," which has been "defined through years of common law interpretation," the statute does not "allow the person to whom the duty is owed unfettered discretion in defining the term").

5-4:02 COMMERCIAL BRIBERY — BREACH OF A DUTY TO ACT DISINTERESTEDLY

The elements of the crime of commercial bribery (breach of a duty to act disinterestedly) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. held himself [herself] out to the public as being engaged in the business of making disinterested selection, appraisal, or criticism of commodities, property, or services, and

5. solicited, accepted, or agreed to accept any benefit to alter, modify, or change his [her] selection, appraisal, or criticism.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of commercial bribery (breach of a duty to act disinterestedly).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of commercial bribery (breach of a duty to act disinterestedly).

COMMENT

1. *See* § 18-5-401(2), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly").

5-4:03 COMMERCIAL BRIBERY — BRIBING ANOTHER AS TO A DUTY OF FIDELITY

The elements of the crime of commercial bribery (bribing another as to a duty of fidelity) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. conferred or offered or agreed to confer any benefit the acceptance of which would have been consideration for another person knowingly violating or agreeing to violate a duty of fidelity to which he [she] was subject,

4. as agent or employee; or trustee, guardian, or other fiduciary; or lawyer, physician, accountant, appraiser, or other professional adviser; or officer, director, partner, manager, or other participant in the direction of the affairs of an incorporated or unincorporated association; or duly elected or appointed representative or trustee of a labor organization or employee welfare trust fund; or arbitrator or other purportedly disinterested adjudicator or referee.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of commercial bribery (bribing another as to a duty of fidelity).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of commercial bribery (bribing another as to a duty of fidelity).

COMMENT

1. *See* § 18-5-401(1), (3), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); *see also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

3. The term "consideration" is not defined in section 18-13-125. *See*, *e.g.*, *Black's Law Dictionary* 370 (10th ed. 2014) (defining "consideration" as: "Something (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee.").

5-4:04 COMMERCIAL BRIBERY — BRIBING ANOTHER AS TO A DUTY TO ACT DISINTERESTEDLY

The elements of the crime of commercial bribery (bribing another as to a duty to act disinterestedly) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. conferred or offered agreed to confer any benefit,

4. to a person who held himself [herself] out to the public as being engaged in the business of making disinterested selection, appraisal, or criticism of commodities, property, or services to knowingly alter, modify, or change his [her] selection, appraisal, or criticism.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of commercial bribery (bribing another as to a duty to act disinterestedly).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of commercial bribery (bribing another as to a duty to act disinterestedly).

COMMENT

1. *See* § 18-5-401(2), (3), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); *see also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

3. The term "consideration" is not defined in section 18-13-125. *See, e.g., Black's Law Dictionary* 370 (10th ed. 2014) (defining "consideration" as: "Something (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee.").

5-4:05 RIGGING A PUBLICLY EXHIBITED CONTEST (BENEFIT OR THREAT)

The elements of the crime of rigging a publicly exhibited contest (benefit or threat) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with the intent to prevent a publicly exhibited or advertised contest from being conducted in accordance with the rules and usages purporting to govern it,

4. conferred or offered or agreed to confer any benefit upon, or threatened any detriment to,

5. a participant, official, or other person associated with the contest or exhibition.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of rigging a publicly exhibited contest (benefit or threat).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of rigging a publicly exhibited contest (benefit or threat).

COMMENT

1. *See* § 18-5-402(1)(a), C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent").

5-4:06 RIGGING A PUBLICLY EXHIBITED CONTEST (TAMPERING)

The elements of the crime of rigging a publicly exhibited contest (tampering) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with the intent to prevent a publicly exhibited or advertised contest from being conducted in accordance with the rules and usages purporting to govern it,

4. tampered with any person, animal, or thing.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of rigging a publicly exhibited contest (tampering).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of rigging a publicly exhibited contest (tampering).

COMMENT

1. *See* § 18-5-402(1)(b), C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent"); Instruction F:360 (defining "tamper").

5-4:07 RIGGING A PUBLICLY EXHIBITED CONTEST (SOLICITING OR ACCEPTING)

The elements of the crime of rigging a publicly exhibited contest (soliciting or accepting) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with the intent,

4. to prevent a publicly exhibited or advertised contest from being conducted in accordance with the rules and usages purporting to govern it,

5. knowingly,

6. solicited, accepted, or agreed to accept any benefit,

7. the conferring of which would have constituted the offense of rigging a publicly exhibited contest (benefit).

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of rigging a publicly exhibited contest (soliciting or accepting).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of rigging a publicly exhibited contest (soliciting or accepting).

COMMENT

1. *See* § 18-5-402(1)(c), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly").

3. When using this model instruction, provide the jury with a copy of Instruction 5-4:05 (rigging a publicly exhibited contest (benefit)) that does not include the two final paragraphs describing the prosecution's burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense.

5-4:08 RIGGING A PUBLICLY EXHIBITED CONTEST (KNOWLEDGE OF RIGGING)

The elements of the crime of rigging a publicly exhibited contest (knowledge of rigging) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. engaged in, sponsored, produced, judged, or otherwise participated in a publicly exhibited or advertised contest,

5. knowing that the contest was not being conducted in compliance with the rules and usages purporting to govern it, by reason of any person committing the offense of rigging a publicly exhibited contest ([benefit or threat] [tampering] [soliciting or accepting]).

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of rigging a publicly exhibited contest (knowledge of rigging).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of rigging a publicly exhibited contest (knowledge of rigging).

COMMENT

1. *See* § 18-5-402(1), (2), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly").

3. When using this model instruction, provide the jury with instruction(s) defining the relevant offense(s) without

including the two final paragraphs describing the prosecution's burden of proof. *See* Instructions 5-4:05 to 5-4:07. Place the elemental instruction(s) for the referenced offense(s) immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense(s).

5-4:09 BRIBERY IN SPORTS (BENEFIT OR THREAT; SPORTS PARTICIPANT)

The elements of the crime of bribery in sports (benefit or threat; sports participant) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to influence a sports participant not to give his [her] best efforts in a sports contest,

5. conferred or offered or agreed to confer, any benefit upon or threatened any detriment to,

6. a sports participant.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of bribery in sports (benefit or threat; sports participant).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of bribery in sports (benefit or threat; sports participant).

COMMENT

1. *See* § 18-5-403(2)(a), C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent"); Instruction F:350.3 (defining "sports contest"); Instruction F:350.7 (defining "sports participant").

5-4:10 BRIBERY IN SPORTS (BENEFIT OR THREAT; SPORTS OFFICIAL)

The elements of the crime of bribery in sports (benefit or threat; sports official) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to influence a sports official to perform his [her] duties improperly,

5. conferred or offered or agreed to confer, any benefit upon or threatened any detriment to,

6. a sports official.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of bribery in sports (benefit or threat; sports official).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of bribery in sports (benefit or threat; sports official).

COMMENT

1. *See* § 18-5-403(2)(b), C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent"); Instruction F:350.3 (defining "sports contest"); Instruction F:350.5 (defining "sports official").

5-4:11 BRIBERY IN SPORTS (SOLICITING OR ACCEPTING; SPORTS PARTICIPANT)

The elements of the crime of bribery in sports (soliciting or accepting; sports participant) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. was a sports participant, and

5. accepted, agreed to accept, or solicited any benefit from another person,

6. upon an understanding that the defendant would thereby be influenced not to give his [her] best efforts in a sports contest.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of bribery in sports (soliciting or accepting; sports participant).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of bribery in sports (soliciting or accepting; sports participant).

COMMENT

1. *See* § 18-5-403(2)(c), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:350.3 (defining "sports contest"); Instruction F:350.7 (defining "sports participant").

5-4:12 BRIBERY IN SPORTS (SOLICITING OR ACCEPTING; SPORTS OFFICIAL)

The elements of the crime of bribery in sports (soliciting or accepting; sports official) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. was a sports official, and

5. accepted, agreed to accept, or solicited any benefit from another person,

6. upon an understanding that the defendant would thereby be influenced to perform his [her] duties improperly.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of bribery in sports (soliciting or accepting; sports official).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of bribery in sports (soliciting or accepting; sports official).

COMMENT

1. *See* § 18-5-403(2)(d), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:350.3 (defining "sports contest"); Instruction F:350.5 (defining "sports official").

5-4:13 BRIBERY IN SPORTS (TAMPERING)

The elements of the crime of bribery in sports (tampering) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to influence the outcome of a sports contest,

5. tampered with any sports participant, sports official, or any animal or equipment or other thing involved in the conduct or operation of a sports contest in a manner contrary to the rules and usages purporting to govern such a contest.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of bribery in sports (tampering).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of bribery in sports (tampering).

COMMENT

1. *See* § 18-5-403(2)(e), C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent"); Instruction F:350.3 (defining "sports contest"); Instruction F:350.5 (defining "sports official"); Instruction F:350.7 (defining "sports participant"); Instruction F:360 (defining "tamper").

+ CHAPTER 5-5

OFFENSES RELATING TO THE UNIFORM COMMERCIAL CODE

CHAPTER COMMENTS

1. Many of the terms that appear in this chapter have special statutory definitions. *See* § 18-5-501, C.R.S. 2015 ("The definitions set forth in the 'Uniform Commercial Code', title 4, C.R.S., shall apply to sections 18-5-502 to 18-5-511."). The Committee recommends that users review any relevant official comments when drafting definitional instructions tailored to the evidence at trial. *See* § 4-9-102, cmts. 2-26, C.R.S. 2015.

2. + The Committee added this chapter in 2015.

5-5:01 FAILURE TO PAY OVER ASSIGNED ACCOUNTS

The elements of the crime of failure to pay over assigned accounts are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. willfully and wrongfully,

4. was, under the terms of an assignment of an account, as that term is defined in these instructions, an assignor who was permitted to collect the proceeds from the debtor to pay over any proceeds to the assignee, and

5. after collection of the proceeds,

6. failed to pay over the proceeds to the assignee.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to pay over assigned accounts.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of failure to pay over assigned accounts.

COMMENT

1. *See* § 18-5-502, C.R.S. 2015.

2. *See* Instruction F:195 (defining "willfully"); *see also* § 4-9-102(a)(2), C.R.S. 2015 (defining "account"); § 4-9-102(a)(3), C.R.S. 2015 (defining "account debtor").

3. The terms "assignor" and "assignee" are not defined by statute. *See*, *e.g.*, *Black's Law Dictionary*, 142, 144 (10th ed. 2014) (defining an "assignee" as "[o]ne to whom property rights or powers are transferred by another," and an "assignor" as "[s]omeone who transfers property rights or powers to another.").

5-5:02.INT FAILURE TO PAY OVER ASSIGNED ACCOUNTS – INTERROGATORY (AMOUNT)

If you find the defendant not guilty of failure to pay over assigned accounts, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of failure to pay over assigned accounts, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question:

> Was the amount of the proceeds withheld one thousand dollars or more? (Answer "Yes" or "No")

The prosecution has the burden to prove the amount of the proceeds beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-5-502, C.R.S. 2015.

5-5:03 CONCEALMENT OR REMOVAL OF SECURED PROPERTY

The elements of the crime of concealment or removal of secured property are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. gave a security interest in personal property, or had actual knowledge of a security interest in personal property given by another person, and

5. during the existence of the security interest,

6. concealed the encumbered property or removed the encumbered property from Colorado,

7. without written consent of the secured creditor.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of concealment or removal of secured property.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of concealment or removal of secured property.

COMMENT

1. *See* § 18-5-504, C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); § 4-1-201(b)(12),(35), (43), C.R.S. 2015 (defining "creditor," "security interest," and "writing").

3. *See People v. Armijo*, 589 P.2d 935, 938 (Colo. 1979) (the statute does not require that the security interest be perfected and applies to any valid security interest, perfected or not).

5-5:04.INT CONCEALMENT OR REMOVAL OF SECURED PROPERTY – INTERROGATORY (VALUE)

If you find the defendant not guilty of concealment or removal of secured property, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of concealment or removal of secured property, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question:

> Was the value of the property concealed or removed one thousand dollars or more? (Answer "Yes" or "No")

The prosecution has the burden to prove the value of the property beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-5-504, C.R.S. 2015.

5-5:05 FAILURE TO PAY OVER PROCEEDS

The elements of the crime of failure to pay over proceeds are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. gave a security interest in personal property, and

4. retained possession of that property, and

5. according to the terms creating such security interest, was required to account to the secured creditor for the proceeds of any sale or disposition of the encumbered property, and

6. willfully and wrongfully failed to pay to the secured creditor the amounts due from the sale or disposition.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to pay over proceeds.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to pay over proceeds.

COMMENT

1. *See* § 18-5-505, C.R.S. 2015.

2. *See* Instruction F:195 (defining "willfully"); § 4-1-201(b)(12),(35), C.R.S. 2015 (defining "creditor" and "security interest").

5-5:06.INT FAILURE TO PAY OVER PROCEEDS – INTERROGATORY (AMOUNT)

If you find the defendant not guilty of failure to pay over proceeds, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of failure to pay over proceeds, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question:

1. Was the amount of the proceeds the defendant wrongfully withheld one thousand dollars or more? (Answer "Yes" or "No")

The prosecution has the burden to prove the amount of the proceeds beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-5-505, C.R.S. 2015.

5-5:07 ISSUANCE OF A FRAUDULENT RECEIPT

The elements of the crime of issuance of a fraudulent receipt are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was a warehouse, or an officer, agent, or servant of a warehouse, and

4. issued or aided in issuing a receipt,

5. knowing that the goods for which the receipt had been issued had not been actually received by the warehouse, or were not under the warehouse's actual control at the time of issuing the receipt.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of issuance of a fraudulent receipt.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of issuance of a fraudulent receipt.

COMMENT

1. *See* § 18-5-506, C.R.S. 2015.

2. *See* Instruction 161.5 (defining "goods"); Instruction F:391.5 (defining "warehouse").

5-5:08 FALSE STATEMENT IN RECEIPT

The elements of the crime of false statement in receipt are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was a warehouse, or an officer, agent, or servant of a warehouse, and

4. fraudulently issued or aided in fraudulently issuing a receipt for goods knowing that it contained any false statement.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of false statement in receipt.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of false statement in receipt.

COMMENT

1. *See* § 18-5-507, C.R.S. 2015.

2. *See* Instruction 161.5 (defining "goods"); Instruction F:391.5 (defining "warehouse").

5-5:09 ISSUANCE OF A DUPLICATE RECEIPT NOT MARKED

The elements of the crime of issuance of a duplicate receipt not marked are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was a warehouse, or an officer, agent, or servant of a warehouse, and

4. issued or aided in issuing a duplicate or additional negotiable receipt for goods knowing that a former negotiable receipt for the same goods or any part of them was outstanding and uncancelled,

5. without placing upon the face thereof the word "duplicate."

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of issuance of a duplicate receipt not marked.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of issuance of a duplicate receipt not marked.

COMMENT

1. *See* § 18-5-508, C.R.S. 2015.

2. *See* Instruction 161.5 (defining "goods"); Instruction F:391.5 (defining "warehouse"); *see also* § 4-7-501, C.R.S. 2015 ("Form of negotiation and requirements for due negotiation.").

3. Section 18-5-508 includes an exception for cases involving "a lost or destroyed receipt after proceedings as provided for

in section 4-7-601, C.R.S." However, the Committee has not drafted a model affirmative defense instruction.

5-5:10 WAREHOUSE'S GOODS MINGLED

The elements of the crime of warehouse's goods mingled are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was a warehouse, or an officer, agent, or servant of a warehouse, and

4. knowing that goods deposited with or held by the warehouse were goods of which the warehouse was the owner, either solely or jointly or in common with others,

5. issued or aided in issuing a negotiable receipt for the goods that did not state such ownership.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of warehouse's goods mingled.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of warehouse's goods mingled.

COMMENT

1. *See* § 18-5-509, C.R.S. 2015.

2. *See* Instruction 161.5 (defining "goods"); Instruction F:391.5 (defining "warehouse"); *see also* § 4-7-501, C.R.S. 2015 ("Form of negotiation and requirements for due negotiation.").

5-5:11 DELIVERY OF GOODS WITHOUT RECEIPT

The elements of the crime of delivery of goods without receipt are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was a warehouse, or an officer, agent, or servant of a warehouse, and

4. delivered goods out of the possession of such warehouse,

5. knowing that a negotiable receipt, the negotiation of which would transfer the right of the possession of those goods, was outstanding and uncancelled,

6. without obtaining the possession of that receipt at or before the time of the delivery.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of delivery of goods without receipt.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of delivery of goods without receipt.

COMMENT

1. *See* § 18-5-510, C.R.S. 2015.

2. *See* Instruction 161.5 (defining "goods"); Instruction F:391.5 (defining "warehouse"); *see also* § 4-7-501, C.R.S. 2015 ("Form of negotiation and requirements for due negotiation.").

3. Section 18-5-510 includes an exception for "cases provided for in section 4-7-601, C.R.S." However, the Committee has not drafted a model affirmative defense instruction.

5-5:12 NEGOTIATING A RECEIPT WITH INTENT TO DECEIVE

The elements of the crime of negotiating a receipt with intent to deceive:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. deposited goods to which he [she] did not have title, or upon which there was a security interest in personal property, and

4. took for such goods a negotiable receipt, and

5. afterwards negotiated that receipt for value,

6. with intent to deceive, and

7. without disclosing his [her] want of title or the existence of such security interest.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of negotiating a receipt with intent to deceive.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of negotiating a receipt with intent to deceive.

COMMENT

1. *See* § 18-5-511, C.R.S. 2015.

2. *See* Instruction 161.5 (defining "goods"); Instruction F:185 (defining "with intent"); § 4-1-201(b)(35), C.R.S. 2015 (defining "security interest"); *see also* § 4-7-501, C.R.S. 2015 ("Form of negotiation and requirements for due negotiation.").

5-5:13 ISSUANCE OF A BAD CHECK

The elements of the crime of issuance of a bad check are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. other than by committing the offense of fraud by check (insufficient funds),

4. issued or passed a check or similar sight order for the payment of money,

5. knowing that [he] [she] [the issuer] did not have sufficient funds in or on deposit with the bank or other drawee for the payment in full of the check or order as well as all other checks or orders outstanding at the time of issuance.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of issuance of a bad check.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of issuance of a bad check.

COMMENT

1. *See* § 18-5-512(3), C.R.S. 2015.

2. *See* Instruction F:183.6 (defining "insufficient funds").

3. Do not use the definition of "issuer" in Instruction F:189. That definition is derived from section 18-5-701(4), C.R.S. 2015, which applies to financial transaction device crimes. *See* § 18-5-701(3), C.R.S. 2015 (excluding a "check" from the

definition of a "financial transaction device"); *see also* Instruction F:153 (defining "financial transaction device").

4. If the defendant is not charged with fraud by check, give the jury the elemental instruction for that offense without the two concluding paragraphs that explain the burden of proof. *See* Instruction 5-2:01 (fraud by check – insufficient funds). Place the elemental instruction for that offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for fraud by check.

5-5:14.SP ISSUANCE OF A BAD CHECK – SPECIAL INSTRUCTION (KNOWLEDGE OF INSUFFICIENT FUNDS)

Except in the case of a postdated check or order, the following evidence gives rise to a permissible inference that the issuer had knowledge of his [her] insufficient funds: he [she] had no account with the bank or other drawee at the time he [she] issued the check or order; or he [she] had insufficient funds upon deposit with the bank or other drawee to pay the check or order, on presentation within thirty days after issue.

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

COMMENT

1. Section 18-5-512(4), C.R.S. 2015.

2. Although the statute speaks in terms of a presumption, the concept should be explained to the jury as a permissible inference. *See People v. Felgar*, 58 P.3d 1122, 1125 (Colo. App. 2002) (construing a parallel provision, in section 18-5-205(8), as creating a permissible inference, and holding that the trial court committed reversible error by instructing the jury, in the language of the statute, that if certain circumstances existed it could presume that the defendant had knowledge of insufficient funds in his account); *see generally Jolly v. People*, 742 P.2d 891, 897 (Colo. 1987) (unlike a mandatory presumption, the use of a permissive inference in a criminal case does not violate due process).

CHAPTER 5-7

FINANCIAL TRANSACTION DEVICE CRIMES

5-7:01 UNAUTHORIZED USE OF A FINANCIAL TRANSACTION DEVICE

The elements of the crime of unauthorized use of a financial transaction device are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to defraud,

5. used a financial transaction device for the purpose of obtaining cash, credit, property, or services, or for making financial payment,

6. with notice that the financial transaction device had expired, had been revoked, or had been cancelled, or with notice that his [her] use of the financial transaction device was, for any reason, unauthorized by the issuer thereof or the account holder.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unauthorized use of a financial transaction device.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unauthorized use of a financial transaction device.

COMMENT

1. *See* § 18-5-702(1), C.R.S. 2015.

2. *See* Instruction F:153 (defining "financial transaction device"); Instruction F:242 (defining "notice"); Instruction

F:185 (defining "with intent"); Instruction F:189 (defining "issuer").

3. The term "defraud" is not defined by statute.

4. *See People v. Novitskiy*, 81 P.3d 1070, 1073 (Colo. App. 2003) (" we construe § 18-5-702 to require that a defendant in fact obtain possession or use of cash, credit, property, or services through the unauthorized use of a financial transaction device"); *People v. Pipkin*, 762 P.2d 736, 737 (Colo. App. 1988) ("the statutory requirement that notice be given in person or in writing applies to the account holder or to one in possession of the card with permission of the account holder and not to one using an allegedly lost or stolen card").

5-7:02.INT UNAUTHORIZED USE OF A FINANCIAL TRANSACTION DEVICE – INTERROGATORY (VALUE)

If you find the defendant not guilty of unauthorized use of a financial transaction device, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of unauthorized use of a financial transaction device, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question[s] on the verdict form. [Although you may answer "No" to more than one question, you may not answer "Yes" to more than one question. Further, if you answer "Yes" to any question, you should not answer the other question[s].]

1. Was the value of the cash, credit, property, or services obtained or of the financial payments made by unauthorized use of a single financial transaction device within a six-month period from the date of the first unauthorized use [insert value(s) from section 18-5-702(3)]? (Answer "Yes" or "No")

[2. Was the value of the cash, credit, property, or services obtained or of the financial payments made by unauthorized use of a single financial transaction device within a six-month period from the date of the first unauthorized use [insert value(s) from section 18-5-702(3)]? (Answer "Yes" or "No")]

The prosecution has the burden to prove the value of the thing involved beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-5-702(3), (4), C.R.S. 2015.

2. *See, e.g.*, Instruction E:28 (special verdict form).

3. In cases where value is a disputed issue, one or both of the parties may assert that there is an evidentiary basis for submitting more than one valuation question as part of the interrogatory. Accordingly, the above interrogatory includes a bracketed example of a lesser valuation question.

4. Where more than one valuation question is included as part of the interrogatory, use a special verdict form with a corresponding format that repeats the admonition that the jury cannot answer "Yes" to more than one valuation question. *See* Instruction 4-4:06.INT, Comment 4.

5-7:03.SP UNAUTHORIZED USE OF A FINANCIAL TRANSACTION DEVICE – SPECIAL INSTRUCTION (NOTICE)

The sending of a notice in writing by registered or certified mail, return receipt requested, duly stamped and addressed to such account holder at his [her] last address known to the issuer, evidenced by a signed returned receipt signed by the account holder, gives rise to a permissible inference that the notice was received.

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

COMMENT

1. *See* Section 18-5-702(2), C.R.S. 2015.

2. This concept should be explained as a permissible inference. *See People in re R.M.D.*, 829 P.2d 852 (Colo. 1992) (construing "prima facie" proof provision as establishing a permissible inference); *see generally Jolly v. People*, 742 P.2d 891, 897 (Colo. 1987) (unlike a mandatory presumption, the use of a permissible inference in a criminal case does not violate due process).

5-7:04 CRIMINAL POSSESSION OR SALE OF A BLANK FINANCIAL TRANSACTION DEVICE

The elements of criminal possession or sale of a blank financial transaction device are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. without the authorization of the issuer or manufacturer,

4. had in his [her] possession or under his [her] control or received from another person, with intent to use, deliver, circulate, or sell it or with intent to cause the use, delivery, circulation, or sale of it, or sold,

5. any financial transaction device which had at least one or more characteristics of a financial transaction device but did not contain all of the characteristics of a completed financial transaction device because it had not been embossed or magnetically encoded with the name of the account holder, personal identification code, expiration date, or other proprietary institutional information.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal possession or sale of a blank financial transaction device.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal possession or sale of a blank financial transaction device.

COMMENT

1. *See* § 18-5-705(1), (6), C.R.S. 2015.

2. *See* Instruction F:06 (defining "account holder"); Instruction F:34 (defining "blank financial transaction device," as incorporated into the fifth element above); Instruction F:153 (defining "financial transaction device"); Instruction F:185 (defining "with intent"); Instruction F:189 (defining "issuer"); Instruction F:270 (defining "personal identification code"); Instruction F:281 (defining "possession").

5-7:05.INT CRIMINAL POSSESSION OR SALE OF A BLANK FINANCIAL TRANSACTION DEVICE – INTERROGATORY (POSSESSION OF MULTIPLE DEVICES)

If you find the defendant not guilty of criminal possession or sale of a blank financial transaction device, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of criminal possession or sale of a blank financial transaction device, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant possess multiple devices?
(Answer "Yes" or "No")

The defendant possessed multiple devices only if:

1. the defendant possessed two or more blank financial transaction devices.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-5-705(3), C.R.S. 2015.

2. *See* Instruction F:34 (defining "blank financial transaction device"); *see*, *e.g.*, Instruction E:28 (special verdict form).

5-7:06.INT CRIMINAL POSSESSION OR SALE OF A BLANK FINANCIAL TRANSACTION DEVICE – INTERROGATORY (DELIVERY, CIRCULATION, OR SALE OF A SINGLE DEVICE)

If you find the defendant not guilty of criminal possession or sale of a blank financial transaction device, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of criminal possession or sale of a blank financial transaction device, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant deliver, circulate, or sell a device? (Answer "Yes" or "No")

The defendant delivered, circulated, or sold a device only if:

1. the defendant delivered, circulated, or sold one blank financial transaction device.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-5-705(4), C.R.S. 2015.

2. *See* Instruction F:34 (defining "blank financial transaction device"); *see, e.g.*, Instruction E:28 (special verdict form).

5-7:07.INT CRIMINAL POSSESSION OR SALE OF A BLANK FINANCIAL TRANSACTION DEVICE – INTERROGATORY (DELIVERY, CIRCULATION, OR SALE OF MULTIPLE DEVICES)

If you find the defendant not guilty of criminal sale of a blank financial transaction device, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of criminal sale of a blank financial transaction device, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

> Did the defendant deliver, circulate, or sell multiple devices? (Answer "Yes" or "No")

The defendant delivered, circulated, or sold multiple devices only if:

1. the defendant delivered, circulated, or sold two or more blank financial transaction devices.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-5-705(5), C.R.S. 2015.

2. *See* Instruction F:34 (defining "blank financial transaction device"); *see, e.g.*, Instruction E:28 (special verdict form).

5-7:08 CRIMINAL POSSESSION OF FORGERY DEVICES

The elements of criminal possession of forgery devices are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. possessed any tools, photographic equipment, printing equipment, or any other device adapted, designed, or commonly used for committing or facilitating the commission of a crime involving the unauthorized manufacture, printing, embossing, or magnetic encoding of a financial transaction device or the altering or addition of any uniform product codes, optical characters, or holographic images to a financial transaction device, and

4. intended to use the thing possessed, or knew that some person intended to use the thing possessed, in the commission of such a crime.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal possession of forgery devices.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal possession of forgery devices.

COMMENT

1. *See* § 18-5-706, C.R.S. 2015.

2. *See* Instruction F:153 (defining "financial transaction device"); Instruction F:185 (defining "intentionally" and "with intent"); Instruction F:281 (defining "possession").

3. If the defendant is not separately charged with unlawful manufacture of a financial transaction device in violation of section 18-5-707, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense.

5-7:09 UNLAWFUL MANUFACTURE OF A FINANCIAL TRANSACTION DEVICE (MADE OR MANUFACTURED)

The elements of the crime of unlawful manufacture of a financial transaction device (made or manufactured) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to defraud,

5. falsely made or manufactured a financial transaction device,

6. by printing, embossing, or magnetically encoding.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful manufacture of a financial transaction device (made or manufactured).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful manufacture of a financial transaction device (made or manufactured).

COMMENT

1. *See* § 18-5-707(1)(a), C.R.S. 2015.

2. *See* Instruction F:145 (defining "falsely make"); Instruction F:185 (defining "with intent").

3. The term "defraud" is not defined by statute.

5-7:10 UNLAWFUL MANUFACTURE OF A FINANCIAL TRANSACTION DEVICE (ALTERATION OR ADDITION)

The elements of the crime of unlawful manufacture of a financial transaction device (alteration or addition) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to defraud,

5. falsely altered or added uniform product codes, optical characters, or holographic images to a device which was or purported to be, or which was calculated to become or to represent if completed, a financial transaction device.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful manufacture of a financial transaction device (alteration or addition).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful manufacture of a financial transaction device (alteration or addition).

COMMENT

1. *See* § 18-5-707(1)(b), C.R.S. 2015.

2. *See* Instruction F:140 (defining "falsely alter"); Instruction F:185 (defining "with intent").

3. The term "defraud" is not defined by statute.

5-7:11 UNLAWFUL MANUFACTURE OF A FINANCIAL TRANSACTION DEVICE (COMPLETION)

The elements of the crime of unlawful manufacture of a financial transaction device (completion) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to defraud,

5. falsely completed a financial transaction device by adding to an incomplete device to make it a complete one.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful manufacture of a financial transaction device (completion).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful manufacture of a financial transaction device (completion).

COMMENT

1. *See* § 18-5-707(1)(c), C.R.S. 2015.

2. *See* Instruction F:142 (defining "falsely complete"); Instruction F:185 (defining "with intent").

3. The term "defraud" is not defined by statute.

+ CHAPTER 5-8

EQUITY SKIMMING AND RELATED OFFENSES

COMMENTS ON CHAPTER USE

1. + The Committee added this chapter in 2015.

5-8:01 EQUITY SKIMMING OF REAL PROPERTY

The elements of the crime of equity skimming of real property are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. acquired an interest in real property that was encumbered by a loan secured by a mortgage or deed of trust, and

5. the loan was [in arrears at the time the defendant acquired the interest] [placed in default within eighteen months after the defendant acquired the interest], and

6. [failed to apply all rent derived from the person's interest in the real property first toward the satisfaction of all outstanding payments due on the loan and second toward any fees due to any association of real property owners that charges such fees for the upkeep of the housing facility, or common area including buildings and grounds thereof, of which the real property was a part before appropriating the remainder of such rent or any part thereof for any other purpose except for the purpose of repairs necessary to prevent waste of the real property]

   [after a foreclosure in which title had vested, collected rent on behalf of any person other than the owner of the real property].

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of equity skimming of real property.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of equity skimming of real property.

COMMENT

1. *See* § 18-5-802(1), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:307.5 (defining "real property"); Instruction F:311.5 (defining "rent"); Instruction F:329.5 (defining "security interest").

3. *See* Instruction H:47.5 (affirmative defense of "full payment"). *But see* § 18-5-802(4)(a), C.R.S. 2015 (specifying that this affirmative defense is unavailable where the defendant is charged with violating section 18-5-802(1)(b)(II), C.R.S. 2015 (collecting rent on behalf of any person other than the owner of the real property after a foreclosure in which title has vested)).

4. Sections 18-5-802(5), (6), C.R.S. 2015, state that section 18-5-802(1) is inapplicable to a bona fide lender who accepts a deed in lieu of foreclosure or who forecloses on property, or to a bona fide purchaser who complies with prescribed notice and disclosure provision. However, the Committee has not drafted model affirmative defense instructions.

5. If necessary, draft a special instruction to explain the vesting of title upon expiration of the redemption period under section 38-38-501, C.R.S. 2015.

5-8:02 EQUITY SKIMMING OF A VEHICLE (CONTROL)

The elements of the crime of equity skimming of a vehicle (control) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowing that a vehicle was subject to a security interest, lien, or lease,

4. accepted possession of or exercised any control over the vehicle,

5. in exchange for consideration in the form of a verbal assurance or otherwise, and

6. obtained or exercised control over the vehicle of another, and

7. then sold or leased the vehicle to a third party,

8. without first obtaining written authorization from the secured creditor, lessor, or lienholder for the transaction of the sale or lease to the third party.

[9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of equity skimming of a vehicle (control).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of equity skimming of a vehicle (control).

COMMENT

1. *See* § 18-5-803(1)(a), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:196.5 (defining "lease") Instruction F:329.5 (defining "security interest"); Instruction F:385.5 (defining "vehicle").

3. Section 18-5-803(1)(a) includes excepting language where full payment is made within thirty days. However, the Committee takes no position concerning whether this provision establishes an element of the offense or an affirmative defense.

5-8:03 EQUITY SKIMMING OF A VEHICLE (ARRANGING)

The elements of the crime of equity skimming of a vehicle (arranging) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowing that a vehicle was subject to a security interest, lien, or lease,

4. accepted possession of or exercised any control over the vehicle,

5. in exchange for consideration in the form of a verbal assurance or otherwise, and

6. arranged the sale or lease of the vehicle of another to a third party,

7. without first obtaining written authorization from the secured creditor, lessor, or lienholder for the transaction of the sale or lease to the third party, and

8. exercised control over any part of the funds received.

[9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of equity skimming of a vehicle (arranging).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of equity skimming of a vehicle (arranging).

COMMENT

1. *See* § 18-5-803(1)(b), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:196.5 (defining "lease") Instruction F:329.5 (defining "security interest"); Instruction F:385.5 (defining "vehicle").

3. Section 18-5-803(1)(b) includes excepting language where full payment is made within thirty days. However, the Committee takes no position concerning whether this provision establishes an element of the offense or an affirmative defense.

5-8:04 EQUITY SKIMMING OF A VEHICLE (MONTHLY PAYMENTS)

The elements of the crime of equity skimming of a vehicle (monthly payments) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowing that a vehicle was subject to a security interest, lien, or lease,

4. accepted possession of or exercised any control over the vehicle,

5. in exchange for consideration in the form of a verbal assurance or otherwise, and

6. knowingly,

7. failed to ascertain on a monthly basis whether payments were due to the secured creditor, lienholder, or lessor, and

8. failed to apply all funds he [she] received for any lease or sale of the vehicle toward the satisfaction of any outstanding payment due to the secured creditor, lienholder, or lessor in a timely manner.

[9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of equity skimming of a vehicle (monthly payments).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of equity skimming of a vehicle (monthly payments).

COMMENT

1. *See* § 18-5-803(1)(c), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:196.5 (defining "lease") Instruction F:329.5 (defining "security interest"); Instruction F:385.5 (defining "vehicle").

CHAPTER 5-9

IDENTIFY THEFT AND RELATED OFFENSES

5-9:01 IDENTITY THEFT (USE)

The elements of the crime of identity theft (use) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. used the personal identifying information, financial identifying information, or financial device of another,

5. without permission or lawful authority, and

6. with the intent,

7. to obtain cash, credit, property, services, or any other thing of value or to make a financial payment.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of identity theft (use).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of identity theft (use).

COMMENT

1. *See* § 18-5-902(1)(a), C.R.S. 2015.

2. *See* Instruction F:150 (defining "financial device"); Instruction F:151 (defining "financial identifying information"); Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly"); Instruction F:249 (defining "of another"); Instruction F:272 (defining "personal identifying information").

3. *See People v. Beck*, 187 P.3d 1125, 1128-29 (Colo. App. 2008) ("Section 18-5-902(1) uses the phrase 'thing of value,' but does not explicitly incorporate the definition found in section 18-1-901(3)(r). . . . The list of things in the identity theft statute includes items such as cash and things that can be lawfully exchanged for cash, or financial payments. They all have financial or economic value and can be lawfully obtained, or made in the case of a financial payment, through the use of a financial device or personal or financial identifying information. None is a public right, duty, or entitlement that cannot be lawfully obtained in exchange for payment. Accordingly, we reject the People's contention that, for purposes of the identity theft statute, the phrase 'to obtain . . . any other thing of value' includes the nonpecuniary benefits of misleading and influencing the actions of a police officer, such as obtaining the use of another person's driving record.").

5-9:02 IDENTITY THEFT (POSSESSION)

The elements of the crime of identity theft (possession) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. possessed the personal identifying information, financial identifying information, or financial device of another,

5. without permission or lawful authority, and

6. with the intent,

7. to use or to aid or permit some other person to use such information or device to obtain cash, credit, property, services, or any other thing of value or to make a financial payment.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of identity theft (possession).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of identity theft (possession).

COMMENT

1. *See* § 18-5-902(1)(b), C.R.S. 2015.

2. *See* Instruction F:150 (defining "financial device"); Instruction F:151 (defining "financial identifying information"); Instruction F:185 (defining "with intent");

Instruction F:195 (defining "knowingly"); Instruction F:249 (defining "of another"); Instruction F:272 (defining "personal identifying information"); Instruction F:281 (defining "possession").

3. *See People v. Beck*, 187 P.3d 1125, 1128-29 (Colo. App. 2008) ("Section 18-5-902(1) uses the phrase 'thing of value,' but does not explicitly incorporate the definition found in section 18-1-901(3)(r). . . . The list of things in the identity theft statute includes items such as cash and things that can be lawfully exchanged for cash, or financial payments. They all have financial or economic value and can be lawfully obtained, or made in the case of a financial payment, through the use of a financial device or personal or financial identifying information. None is a public right, duty, or entitlement that cannot be lawfully obtained in exchange for payment. Accordingly, we reject the People's contention that, for purposes of the identity theft statute, the phrase 'to obtain . . . any other thing of value' includes the nonpecuniary benefits of misleading and influencing the actions of a police officer, such as obtaining the use of another person's driving record.").

5-9:03 IDENTITY THEFT (FALSELY MADE, COMPLETED, ALTERED, OR UTTERED)

The elements of the crime of identity theft (falsely made, completed, altered, or uttered) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with the intent,

4. to defraud,

5. falsely made, completed, altered, or uttered a written instrument or financial device containing any personal identifying information or financial identifying information of another.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of identity theft (falsely made, completed, altered, or uttered).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of identity theft (falsely made, completed, altered, or uttered).

COMMENT

1. *See* § 18-5-902(1)(c), C.R.S. 2015.

2. *See* Instruction F:140.5 (defining "falsely alter"); Instruction F:143 (defining "falsely complete"); Instruction F:146 (defining "falsely make"); Instruction F:150 (defining "financial device"); Instruction F:151 (defining "financial identifying information"); Instruction F:185 (defining "with intent"); Instruction F:249 (defining "of another"); Instruction F:272 (defining "personal identifying information"); Instruction

F:395 (defining "written instrument"); *see also* Instruction F:385 (defining "utter" based on section 18-5-101(8), C.R.S. 2015, which defines the term for purposes of forgery and impersonation offenses in sections 18-5-101 to 18-5-110).

3. The term "defraud" is not defined by statute.

5-9:04 IDENTITY THEFT (FINANCIAL DEVICE OR EXTENSION OF CREDIT)

The elements of the crime of identity theft ([financial device] [extension of credit]) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. possessed the personal identifying information or financial identifying information of another,

5. without permission or lawful authority,

6. to use in applying for or completing an application for a financial device or other extension of credit.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of identity theft ([financial device] [extension of credit]).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of identity theft ([financial device] [extension of credit]).

COMMENT

1. *See* § 18-5-902(1)(d), C.R.S. 2015.

2. *See* Instruction F:136 (defining "extension of credit"); Instruction F:150 (defining "financial device"); Instruction F:151 (defining "financial identifying information"); Instruction F:195 (defining "knowingly"); Instruction F:249 (defining "of another"); Instruction F:272 (defining "personal

identifying information"); Instruction F:281 (defining "possession").

5-9:05 IDENTITY THEFT (GOVERNMENT-ISSUED DOCUMENT)

The elements of the crime of identity theft (government-issued document) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. used or possessed the personal identifying information of another,

5. without permission or lawful authority,

6. with the intent to obtain a government-issued document.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of identity theft (government-issued document).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of identity theft (government-issued document).

COMMENT

1. *See* § 18-5-902(1)(e), C.R.S. 2015.

2. *See* Instruction F:164 (defining "government"); Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly"); Instruction F:249 (defining "of another"); Instruction F:272 (defining "personal identifying information"); Instruction F:281 (defining "possession").

5-9:06 CRIMINAL POSSESSION OF A FINANCIAL DEVICE

The elements of criminal possession of a financial device are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. had in his [her] possession or under his [her] control,

4. any financial device,

5. that he [she] knew, or reasonably should have known, to be lost, stolen, or delivered under mistake as to the identity or address of the account holder.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal possession of a financial device.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal possession of a financial device.

COMMENT

1. *See* § 18-5-903(1), C.R.S. 2015.

2. *See* Instruction F:07 (defining "account holder"); Instruction F:150 (defining "financial device"); Instruction F:281 (defining "possession").

3. *See People v. Stevenson*, 881 P.2d 383 (Colo. App. 1994) (holding, at a time when the offense was codified at section 18-5-703(1)), that:

> A person who finds a lost or stolen credit device commits no crime in temporarily taking it into possession for delivery to its lawful owner or other appropriate authority. Possession becomes criminal only if the actor is aware that the device is lost, stolen, or misdelivered and voluntarily maintains possession "for a sufficient period to have been able to terminate it." *See* § 18-1-501(9).

Stevenson, 881 P.2d at 384.

5-9:07.INT CRIMINAL POSSESSION OF A FINANCIAL DEVICE – INTERROGATORY (MULTIPLE DEVICES)

If you find the defendant not guilty of criminal possession of a financial device, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of criminal possession of a financial device, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant possess multiple devices?
(Answer "Yes" or "No")

The defendant possessed multiple devices only if:

1. the defendant possessed two or more financial devices.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-5-903(2)(b), C.R.S. 2015.

2. *See*, *e.g.*, Instruction E:28 (special verdict form).

5-9:08.INT CRIMINAL POSSESSION OF A FINANCIAL DEVICE – INTERROGATORY (DIFFERENT ACCOUNT HOLDERS)

If you find the defendant not guilty of criminal possession of a financial device, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of criminal possession of a financial device, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

> Did the defendant possess devices of different account holders? (Answer "Yes" or "No")

The defendant possessed devices of different account holders only if:

1. the defendant possessed four or more financial devices,

2. of which at least two were issued to different account holders.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-5-903(2)(c), C.R.S. 2015.

2. *See*, *e.g.*, Instruction E:28 (special verdict form).

5-9:09 CRIMINAL POSSESSION OF AN IDENTIFICATION DOCUMENT

The elements of criminal possession of an identification document are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4, had in his [her] possession or under his [her] control,

5. another person's actual driver's license, actual government-issued identification card, actual social security card, or actual passport,

6. knowing that he [she] did so without permission or lawful authority.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal possession of an identification document.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal possession of an identification document.

COMMENT

1. *See* § 18-5-903.5(1), C.R.S. 2015.

2. *See* Instruction F:164 (defining "government"); Instruction F:195 (defining "knowingly"); Instruction F:281 (defining "possession").

5-9:10.INT CRIMINAL POSSESSION OF AN IDENTIFICATION DOCUMENT – INTERROGATORY (DIFFERENT PERSONS)

If you find the defendant not guilty of criminal possession of an identification document, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of criminal possession of an identification document, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant possess documents of different persons? (Answer "Yes" or "No")

The defendant possessed documents of different persons only if:

1. the defendant possessed two or more identification documents,

2. of which at least two were issued to different persons.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-5-903.5(2)(b), C.R.S. 2015.

2. *See, e.g.*, Instruction E:28 (special verdict form).

5-9:11 GATHERING IDENTITY INFORMATION BY DECEPTION

The elements of the crime of gathering identity information by deception are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. made or conveyed a materially false statement,

5. without permission or lawful authority,

6. with the intent to obtain, record, or access the personal identifying information or financial identifying information of another.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of gathering identity information by deception.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of gathering identity information by deception.

COMMENT

1. *See* § 18-5-904, C.R.S. 2015.

2. *See* Instruction F:151 (defining "financial identifying information"); Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly"); Instruction F:249 (defining "of another"); Instruction F:272 (defining "personal identifying information"); *see also* Instruction F:143 (defining "materially false statement" as part of the definition of "falsely complete" (identity theft and related offenses)).

5-9:12 POSSESSION OF IDENTITY THEFT TOOLS

The elements of the crime of possession of identity theft tools are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. possessed any tools, equipment, computer, computer network, scanner, printer, or other article adapted, designed, or commonly used for committing or facilitating the commission of the crime of identity theft, and

4. intended to use the thing possessed, or knew that a person intended to use the thing possessed, in the commission of the crime of identity theft.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of possession of identity theft tools.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of possession of identity theft tools.

COMMENT

1. *See* § 18-5-905, C.R.S. 2015.

2. *See* Instruction F:185 (defining "intentionally" and "with intent"); Instruction F:281 (defining "possession"); Instructions 5-9:01 to 5-9:05 (identity theft); *see also* Instruction F:61 (defining "computer," for purposes of the computer crime statute); Instruction F:62 (defining "computer network," for purposes of the computer crime statute).

3. If the defendant is not separately charged with identity theft, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense.

CHAPTER 5.5

COMPUTER CRIME

5.5:01 COMPUTER CRIME (AUTHORIZATION)

The elements of computer crime (authorization) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. accessed a computer, computer network, or computer system or any part thereof without authorization; exceeded authorized access to a computer, computer network, or computer system or any part thereof; or used a computer, computer network, or computer system or any part thereof without authorization or in excess of authorized access.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of computer crime (authorization).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of computer crime (authorization).

COMMENT

1. *See* § 18-5.5-102(1)(a), C.R.S. 2015.

2. *See* Instruction F:28 (defining "authorization"); Instruction F:61 (defining "computer"); Instruction F:62 (defining "computer network"); Instruction F:65 (defining "computer system"); Instruction F:130 (defining "exceed authorized access"); Instruction F:383 (defining "use").

3. *See also People v. Rice*, 198 P.3d 1241, 1243-44 (Colo. App. 2008) (defendant "accessed" a computer or computer system, within the meaning of section 18-5.5-102(1)(c-d), by submitting

false information through an automated phone system to make fraudulent claims for unemployment benefits; the evidence established that the phone system was a computerized system which used an interactive voice response technology).

5.5:02 COMPUTER CRIME (DEFRAUD)

The elements of computer crime (defraud) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. accessed any computer network, computer system, or any part thereof,

5. for the purpose of devising or executing any scheme or artifice to defraud.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of computer crime (defraud).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of computer crime (defraud).

COMMENT

1. *See* § 18-5.5-102(1)(b), C.R.S. 2015.

2. *See* Instruction F:61 (defining "computer"); Instruction F:62 (defining "computer network"); Instruction F:65 (defining "computer system").

3. *See also People v. Rice*, 198 P.3d 1241, 1243-44 (Colo. App. 2008) (defendant "accessed" a computer or computer system, within the meaning of section 18-5.5-102(1)(c-d), by submitting false information through an automated phone system to make fraudulent claims for unemployment benefits; the evidence established that the phone system was a computerized system which used an interactive voice response technology).

4. The term "defraud" is not defined by statute.

5.5:03 COMPUTER CRIME (PRETENSES)

The elements of computer crime (pretenses) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. accessed any computer, computer network, or computer system, or any part thereof,

5. to obtain, by means of false or fraudulent pretenses, representations, or promises,

6. money; property; services; passwords or similar information through which a computer, computer network, or computer system or any part thereof may be accessed; or other thing of value.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of computer crime (pretenses).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of computer crime (pretenses).

COMMENT

1. *See* § 18-5.5-102(1)(c), C.R.S. 2015.

2. *See* Instruction F:61 (defining "computer"); Instruction F:62 (defining "computer network"); Instruction F:65 (defining "computer system"); Instruction F:335 (defining "services"); Instruction F:371 (defining "thing of value").

3. *See People v. Rice*, 198 P.3d 1241, 1243-44 (Colo. App. 2008) (defendant "accessed" a computer or computer system, within the meaning of section 18-5.5-102(1)(c-d), by submitting false information through an automated phone system to make fraudulent claims for unemployment benefits; the evidence established that the phone system was a computerized system which used an interactive voice response technology).

5.5:04 COMPUTER CRIME (THEFT)

The elements of computer crime (theft) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. accessed any computer, computer network, or computer system, or any part thereof, to commit the crime of theft.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of computer crime (theft).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of computer crime (theft).

COMMENT

1. *See* § 18-5.5-102(1)(d), C.R.S. 2015.

2. *See* Instruction F:61 (defining "computer"); Instruction F:62 (defining "computer network"); Instruction F:65 (defining "computer system"); Chapter 4-4 (theft).

3. *See People v. Rice*, 198 P.3d 1241, 1243-44 (Colo. App. 2008) (defendant "accessed" a computer or computer system, within the meaning of section 18-5.5-102(1)(c-d), by submitting false information through an automated phone system to make fraudulent claims for unemployment benefits; the evidence established that the phone system was a computerized system which used an interactive voice response technology).

4. If the defendant is not separately charged with theft, give the jury the elemental instruction for that offense without the two concluding paragraphs that explain the burden of proof. *See* Instruction 4-4:01. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense.

5.5:05 COMPUTER CRIME (ALTERATION OR DAMAGE)

The elements of computer crime (alteration or damage) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. without authorization or in excess of authorized access,

5. altered, damaged, interrupted, or caused the interruption or impairment of the proper functioning of, or caused any damage to,

6. any computer, computer network, computer system, computer software, program, application, documentation, or data contained in such computer, computer network, or computer system or any part thereof.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of computer crime (alteration or damage).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of computer crime (alteration or damage).

COMMENT

1. *See* § 18-5.5-102(1)(e), C.R.S. 2015.

2. *See* Instruction F:28 (defining "authorization"); Instruction F:61 (defining "computer"); Instruction F:62 (defining "computer network"); Instruction F:63 (defining "computer program"); Instruction F:64 (defining "computer

software”); Instruction F:65 (defining “computer system”); Instruction F:83 (defining “damage”); Instruction F:130 (defining “exceed authorized access”).

5.5:06 COMPUTER CRIME (TRANSMISSION)

The elements of computer crime (transmission) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. caused the transmission of a computer program, software, information, code, data, or command by means of a computer, computer network, or computer system or any part thereof,

5. with the intent to cause damage to or cause the interruption or impairment of the proper functioning of, any computer, computer network, computer system, or part thereof; or that actually caused damage to or the interruption or impairment of the proper functioning of, any computer, computer network, computer system, or part thereof.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of computer crime (transmission).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of computer crime (transmission).

COMMENT

1. *See* § 18-5.5-102(1)(f), C.R.S. 2015.

2. *See* Instruction F:61 (defining "computer"); Instruction F:62 (defining "computer network"); Instruction F:63 (defining "computer program"); Instruction F:64 (defining "computer

software”); Instruction F:65 (defining “computer system”); Instruction F:83 (defining “damage”).

5.5:07 COMPUTER CRIME (ON-LINE EVENT TICKET SALE)

The elements of computer crime (on-line event ticket sale) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. used or caused to be used,

5. a software application that ran automated tasks over the internet to access a computer, computer network, or computer system, or any part thereof,

6. that circumvented or disabled any electronic queues, waiting periods, or other technological measure intended by the seller to limit the number of event tickets that may be purchased by any single person in an on-line event ticket sale.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of computer crime (on-line event ticket sale).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of computer crime (on-line event ticket sale).

COMMENT

1. *See* § 18-5.5-102(1)(g), C.R.S. 2015.

2. *See* Instruction F:61 (defining "computer"); Instruction F:62 (defining "computer network"); Instruction F:64 (defining "computer software"); Instruction F:65 (defining "computer

system”); Instruction F:253 (defining “on-line event ticket sale”).

5.5:08.INT COMPUTER CRIME – INTERROGATORY (VALUE)

If you find the defendant not guilty of computer crime, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of computer crime, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form. [Although you may answer "No" to more than one question, you may not answer "Yes" to more than one question. Further, if you answer "Yes" to any question, you should not answer the other question[s].]

1. Was the loss, damage, value of services, or thing of value taken, or cost of restoration or repair caused by the computer crime [insert a description of the amount(s) from section 18-5.5-102(3)].
(Answer "Yes" or "No")

[2. Was the loss, damage, value of services, or thing of value taken, or cost of restoration or repair caused by the computer crime [insert a description of the amount(s) from section 18-5.5-102(3)].
(Answer "Yes" or "No")]

[3. Was the loss, damage, value of services, or thing of value taken, or cost of restoration or repair caused by the computer crime [insert a description of the amount(s) from section 18-5.5-102(3)].
(Answer "Yes" or "No")]

The prosecution has the burden to prove the amount of the loss, damage, value of services, or thing of value taken, or cost of restoration or repair beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-5.5-102(3)(a)(I-IX), C.R.S. 2015.

2. *See, e.g.*, Instruction E:28 (special verdict form).

3. In cases where value is a disputed issue, one or both of the parties may assert that there is an evidentiary basis for submitting more than one valuation question as part of the interrogatory. Accordingly, the above interrogatory includes bracketed examples for two lesser valuation questions.

4. Where more than one valuation question is included as part of the interrogatory, use a special verdict form with a corresponding format that repeats the admonition that the jury cannot answer "Yes" to more than one valuation question. *See* Instruction 4-4:06.INT, Comment 4.

CHAPTER 6-3

INCEST

6-3:01 INCEST (AN ANCESTOR OR DESCENDANT, INCLUDING A NATURAL CHILD TWENTY-ONE YEARS OF AGE OR OLDER, BROTHER, SISTER, UNCLE, AUNT, NEPHEW, OR NIECE)

The elements of the crime of incest ([ancestor] [descendant] [natural child] [brother] [sister] [uncle] [aunt] [nephew] [niece]) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. married, inflicted sexual penetration or sexual intrusion on, or subjected to sexual contact,

5. an ancestor or descendant, including [a natural child twenty-one years of age or older] [a [brother] [sister] of the whole or half blood] [an [uncle] [aunt] [nephew] [niece] of the whole blood].

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of incest ([ancestor] [descendant] [natural child] [brother] [sister] [uncle] [aunt] [nephew] [niece]).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of incest ([ancestor] [descendant] [natural child] [brother] [sister] [uncle] [aunt] [nephew] [niece]).

COMMENT

1. *See* § 18-6-301(1), C.R.S. 2015.

2. *See* Instruction F:92 (defining "descendant"); Instruction F:195 (defining "knowingly"); Instruction F:337 (defining

"sexual contact"); Instruction F:340 (defining "sexual intrusion"); Instruction F:343 (defining "sexual penetration").

3. The term "ancestor" is not defined in Part 3 of Article 6.

4. Where the existence of a common law marriage is at issue, draft a supplemental instruction that defines the essential elements of a common law marriage. *See People v. Lucero*, 747 P.2d 660, 663 (Colo. 1987).

6-3:02 INCEST (ADOPTED CHILD OR STEPCHILD)

The elements of the crime of incest ([adopted child] [stepchild]) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. inflicted sexual penetration or sexual intrusion on, or subjected to sexual contact,

5. a[n] [adopted child] [stepchild],

6. twenty-one years of age or older,

7. to whom the defendant was not legally married.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of incest ([adopted child] [stepchild]).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of incest ([adopted child] [stepchild]).

COMMENT

1. *See* § 18-6-301(1), C.R.S. 2015.

2. *See* Instruction F:92 (defining "descendant," a term which need not be separately defined if the excepting language concerning marriage to an adopted child or stepchild is incorporated into the instruction as shown above); Instruction F:195 (defining "knowingly"); Instruction F:337 (defining "sexual contact"); Instruction F:340 (defining "sexual intrusion"); Instruction F:343 (defining "sexual penetration").

3. Where the existence of a common law marriage is at issue, draft a supplemental instruction that defines the essential elements of a common law marriage. *See People v. Lucero*, 747 P.2d 660, 663 (Colo. 1987).

6-3:03 AGGRAVATED INCEST (NATURAL CHILD UNDER THE AGE OF TWENTY-ONE)

The elements of the crime of aggravated incest (natural child) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. married or inflicted sexual penetration or sexual intrusion on, or subjected to sexual contact,

5. his [her] natural child,

6. who was under twenty-one years of age.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated incest (natural child).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated incest (natural child).

COMMENT

1. *See* § 18-6-302(1)(a), C.R.S. 2015.

2. *See* Instruction F:52 (defining "child," a term which need not be separately defined if the statutory age requirement is incorporated into the instruction as shown above); Instruction F:195 (defining "knowingly"); Instruction F:337 (defining "sexual contact"); Instruction F:340 (defining "sexual intrusion"); Instruction F:343 (defining "sexual penetration").

3. Where the existence of a common law marriage is at issue, draft a supplemental instruction that defines the essential elements of a common law marriage. *See People v. Lucero*, 747 P.2d 660, 663 (Colo. 1987).

6-3:04 AGGRAVATED INCEST (STEPCHILD, OR CHILD BY ADOPTION)

The elements of the crime of aggravated incest ([stepchild] [child by adoption]) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. inflicted sexual penetration or sexual intrusion on, or subjected to sexual contact,

5. his [her] [stepchild] [child by adoption],

6. who was under twenty-one years of age, and

7. to whom the defendant was not legally married.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated incest ([stepchild] [child by adoption]).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated incest ([stepchild] [child by adoption]).

COMMENT

1. *See* § 18-6-302(1)(a), C.R.S. 2015.

2. *See* Instruction F:52 (defining "child," a term which need not be separately defined if the statutory age requirement is incorporated into the instruction as shown above); Instruction F:195 (defining "knowingly"); Instruction F:337 (defining "sexual contact"); Instruction F:340 (defining "sexual intrusion"); Instruction F:343 (defining "sexual penetration").

3. Where the existence of a common law marriage is at issue, draft a supplemental instruction that defines the essential elements of a common law marriage. *See People v. Lucero*, 747 P.2d 660, 663 (Colo. 1987).

6-3:05 AGGRAVATED INCEST (DESCENDANT, BROTHER, SISTER, UNCLE, AUNT, NEPHEW, OR NIECE)

The elements of the crime of aggravated incest ([descendant] [brother] [sister] [uncle] [aunt] [nephew] [niece]) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. married, or inflicted sexual penetration or sexual intrusion on, or subjected to sexual contact,

5. [a descendant] [a [brother] [sister] of the whole or half blood] [an [uncle] [aunt] [nephew] [niece] of the whole blood who is under ten years of age].

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated incest ([descendant] [brother] [sister] [uncle] [aunt] [nephew] [niece]).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated incest ([descendant] [brother] [sister] [uncle] [aunt] [nephew] [niece]).

COMMENT

1. *See* § 18-6-302(1)(b), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:337 (defining "sexual contact"); Instruction F:340 (defining "sexual intrusion"); Instruction F:343 (defining "sexual penetration").

3. Although section 18-6-302(1)(b), C.R.S. 2015, uses the term "descendant," it is not followed by the word "including" and the section does not contain a definition of the term. Further, the definition of "descendant" that appears in section 18-6-301(1), C.R.S. 2015, applies to that "section only."

4. Where the existence of a common law marriage is at issue, draft a supplemental instruction that defines the essential elements of a common law marriage. See *People v. Lucero*, 747 P.2d 660, 663 (Colo. 1987).

CHAPTER 6-4

WRONGS TO CHILDREN

6-4:01 CHILD ABUSE (KNOWINGLY OR RECKLESSLY)

The elements of the crime of child abuse (knowingly or recklessly) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly or recklessly,

4. caused an injury to a child's life or health, or permitted a child to be unreasonably placed in a situation that posed a threat of injury to the child's life or health, or engaged in a continued pattern of conduct that resulted in malnourishment, lack of proper medical care, cruel punishment, mistreatment, or an accumulation of injuries that ultimately resulted in the death of a child or serious bodily injury to a child.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of child abuse (knowingly or recklessly).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of child abuse (knowingly or recklessly).

COMMENT

1. *See* § 18-6-401(1)(a), (7)(a)(I), (III), (V), C.R.S. 2015.

2. *See* Instruction F:49 (defining "child"); Instruction F:195 (defining "knowingly"); Instruction F:308 (defining "recklessly"); Instruction F:332 (defining "serious bodily injury").

3. Section 18-6-401(1)(a) uses the phrase "injury to a child's life or health," rather than the more familiar term: "bodily injury." However, a division of the court of appeals has concluded that the type of "injury" required under section 18-6-401(1)(a) is synonymous with "bodily injury," as defined by section 18-1-901(3)(c), C.R.S. 2015 ("'Bodily injury' means physical pain, illness, or any impairment of physical or mental condition."). *See People v. Sherrod*, 204 P.3d 472, 475 (Colo. App. 2007) ("Section 18-6-401(1)(a) contains no language that would accord the term 'health' something other than its commonly understood meaning. We therefore interpret the term 'health' to include both physical and mental well-being."), *rev'd on other grounds*, 204 P.3d 466 (Colo. 2009); *see also* Instruction F:36 (defining "bodily injury").

4. *See* Instruction H:10 (affirmative defense of "physical force pursuant to a special relationship"); Instruction H:48 (affirmative defense of "safe surrender of a newborn").

5. *See People v. Casias*, 2012 COA 117, ¶ 35, 312 P.3d 208, 215 ("In connection with the child abuse charge, the prosecution had to prove, with respect to the 'knowing' mental state, only that defendant was aware of the abusive nature of his conduct in relation to J.C. or of the circumstances in which he committed an act against her well-being; and with respect to the 'reckless' element, only that defendant was aware of (and consciously chose to disregard) a substantial and unjustifiable risk that his conduct could result in injury to her life or health.").

6-4:02 CHILD ABUSE (CRIMINAL NEGLIGENCE)

The elements of the crime of child abuse (criminal negligence) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with criminal negligence,

4. caused an injury to a child's life or health, or permitted a child to be unreasonably placed in a situation that posed a threat of injury to the child's life or health, or engaged in a continued pattern of conduct that resulted in malnourishment, lack of proper medical care, cruel punishment, mistreatment, or an accumulation of injuries that ultimately resulted in the death of a child or serious bodily injury to a child.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of child abuse (criminal negligence).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of child abuse (criminal negligence).

COMMENT

1. *See* § 18-6-401(1)(a), (7)(a)(II), (IV), (VI), C.R.S. 2015.

2. *See* Instruction F:36 (defining "bodily injury"); Instruction F:49 (defining "child"); Instruction F:79 (defining "criminal negligence"); Instruction F:332 (defining "serious bodily injury").

3. *See* Instruction H:10 (affirmative defense of "physical force pursuant to a special relationship"); Instruction H:48 (affirmative defense of "safe surrender of a newborn").

4. Section 18-6-401(1)(a) uses the phrase "injury to a child's life or health," rather than the more familiar term: "bodily injury." However, a division of the court of appeals has concluded that the type of "injury" required under section 18-6-401(1)(a) is synonymous with "bodily injury," as defined by section 18-1-901(3)(c), C.R.S. 2015 ("'Bodily injury' means physical pain, illness, or any impairment of physical or mental condition."). *See People v. Sherrod*, 204 P.3d 472, 475 (Colo. App. 2007) ("Section 18-6-401(1)(a) contains no language that would accord the term 'health' something other than its commonly understood meaning. We therefore interpret the term 'health' to include both physical and mental well-being."), *rev'd on other grounds*, 204 P.3d 466 (Colo. 2009); *see also* Instruction F:36 (defining "bodily injury").

6-4:03 CHILD ABUSE (KNOWING OR RECKLESS EXCISION OR INFIBULATION OF FEMALE GENITALIA)

The elements of the crime of child abuse (knowing or reckless excision or infibulation of female genitalia) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

[3. knowingly or recklessly,

4. excised or infibulated, in whole or in part,

5. the labia majora, labia minora, vulva, or clitoris of a female child.]

[3. was a parent, guardian, or other person legally responsible for a female child or charged with the care or custody of a female child, and

4. knowingly or recklessly,

5. allowed the excision or infibulation, in whole or in part,

6. of the child's labia majora, labia minora, vulva, or clitoris.]

[_. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of child abuse (knowing or reckless excision or infibulation of female genitalia).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of child abuse (knowing or reckless excision or infibulation of female genitalia).

COMMENT

1. *See* § 18-6-401(1)(b)(I), C.R.S. 2015.

2. *See* Instruction F:49 (defining "child"); Instruction F:195 (defining "knowingly"); Instruction F:308 (defining "recklessly").

3. The statute does not define the terms "clitoris," "excision," "infibulation," "labia majora," "labia minora," or "vulva." *See, e.g.*, *Webster's Third New International Dictionary* 425, 792, 1159, 1259, 2567 (2002) (p. 425, defining "clitoris" as "a small erectile organ at the anterior or ventral part of the vulva homologous to the penis in the male") (p. 792, defining "excise" as "to cut out," and defining "excision" as "the act or procedure of excising") (p. 1159, defining "infibulation" as "an act or practice of fastening by ring, clasp, or stitches, the labia majora in girls and the prepuce in boys in order to prevent sexual intercourse") (p. 1259, defining "labia majora" as "the outer fatty folds bounding the vulva") (p. 1259, defining "labia minora" as "the inner highly vascular largely connective-tissue folds bounding the vulva") (p. 2567, defining "vulva" as "the external part of the female genital organs").

4. Section 18-6-401(b)(II), C.R.S. 2015, provides as follows:

> Belief that the conduct described in subparagraph (I) of this paragraph (b) is required as a matter of custom, ritual, or standard practice or consent to the conduct by the child on whom it is performed or by the child's parent or legal guardian shall not be an affirmative defense to a charge of child abuse under this paragraph (b).

This provision appears to state a proposition of law that governs the trial court's rulings concerning the availability of affirmative defense instructions. Accordingly, the Committee has not drafted a special instruction embodying this concept.

5. Section + 18-6-401(1)(b)(III), C.R.S. 2015, establishes an exemption from criminal liability for certain types of surgical procedures. However, the Committee has not drafted a model affirmative defense instruction.

6. + In 2015, the Committee corrected Comment 5 by adding a reference to a subsection in the citation to section 18-6-401(1)(b)(III).

6-4:04 CHILD ABUSE (CRIMINALLY NEGLIGENT EXCISION OR INFIBULATION OF FEMALE GENITALIA)

The elements of the crime of child abuse (criminally negligent excision or infibulation of female genitalia) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

[3. with criminal negligence,

4. excised or infibulated, in whole or in part,

5. the labia majora, labia minora, vulva, or clitoris of a female child.]

[3. was a parent, guardian, or other person legally responsible for a female child or charged with the care or custody of a female child, and

4. with criminal negligence,

5. allowed the excision or infibulation, in whole or in part,

6. of the child's labia majora, labia minora, vulva, or clitoris.]

[_. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of child abuse (criminally negligent excision or infibulation of female genitalia).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of child abuse (criminally negligent excision or infibulation of female genitalia).

COMMENT

1. *See* § 18-6-401(1)(b)(I), C.R.S. 2015.

2. *See* Instruction F:49 (defining "child"); Instruction F:79 (defining "criminal negligence").

3. *See* Instruction 6-4:03, Comment 3 (discussion of terms not defined by statute), Comment 4 (discussion of affirmative defenses that are unavailable pursuant to statute), Comment 5 (discussion of affirmative defense).

6-4:05 CHILD ABUSE (KNOWING EXPOSURE TO CONTROLLED SUBSTANCE MANUFACTURING ACTIVITIES OR PRECURSOR CHEMICALS)

The elements of the crime of child abuse (knowing exposure to controlled substance manufacturing activities or precursor chemicals) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. in the presence of a child, or on the premises where a child was found, or where a child resided, or in a vehicle containing a child,

[5. engaged in the manufacture or attempted manufacture of a controlled substance.]

[5. possessed ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers,

6. with the intent to use the product as an immediate precursor in the manufacture of a controlled substance.]

[_. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of child abuse (knowing exposure to controlled substance manufacturing activities or precursor chemicals).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of child abuse (knowing exposure to controlled substance manufacturing activities or precursor chemicals).

COMMENT

1. *See* § 18-6-401(c)(I), C.R.S. 2015.

2. *See* Instruction F:49 (defining "child"); Instruction F:73 (defining "controlled substance" by referring users to the statutory schedules that are identified in section § 18-18-102(5), C.R.S. 2015); Instruction F:179 (defining "immediate precursor"); Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly"); Instruction F:281 (defining "possession"); *see also* Instruction F:283 (defining "premises" for purposes of burglary and related offenses).

3. If the defendant is not separately charged with a controlled substance offense, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense. *See* Instruction G2:01 (criminal attempt); Instruction 18:05 (manufacture of a controlled substance).

4. *See* Instruction H:68 (defining the affirmative defense of "medical marijuana," which is unavailable, pursuant to Colo. Const. Art. XVIII, § 14(2)(a), (5)(a)(I), if the defendant "[e]ngaged in the medical use of marijuana in a way that endanger[ed] the health or well-being of any person").

6-4:06.SP CHILD ABUSE - SPECIAL INSTRUCTION (KNOWING EXPOSURE TO CONTROLLED SUBSTANCE MANUFACTURING ACTIVITIES OR PRECURSOR CHEMICALS)

It is no defense to the crime of child abuse (knowing exposure to controlled substance manufacturing activities or precursor chemicals), that the defendant did not know a child was present, a child could be found, a child resided on the premises, or that a vehicle contained a child.

COMMENT

1. Section 18-6-401(1)(c)(I), C.R.S. 2015.

6-4:07 CHILD ABUSE (KNOWINGLY ALLOWING EXPOSURE TO METHAMPHETAMINE MANUFACTURING ACTIVITIES)

The elements of the crime of child abuse (knowingly allowing exposure to methamphetamine manufacturing activities) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. was a parent or lawful guardian or person having the care or custody of a child, and

5. allowed the child to be present at or reside at a premises or to be in a vehicle where the parent, guardian, or person having care or custody of the child knew, or reasonably should have known, that another person was engaged in the manufacture or attempted manufacture of methamphetamine.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of child abuse (knowingly allowing exposure to methamphetamine manufacturing activities).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of child abuse (knowingly allowing exposure to methamphetamine manufacturing activities).

COMMENT

1. *See* § 18-6-401(c)(II), C.R.S. 2015.

2. *See* Instruction F:49 (defining "child"); Instruction F:73 (defining "controlled substance" by referring users to the

statutory schedules that are identified in section § 18-18-102(5), C.R.S. 2015); Instruction F:195 (defining "knowingly"); Instruction F:281 (defining "possession"); *see also* Instruction F:283 (defining "premises" for purposes of burglary and related offenses).

3. If the defendant is not separately charged with a controlled substance offense, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense. *See* Instruction G2:01 (criminal attempt); Instruction 18:05 (manufacture of a controlled substance).

6-4:08 CHILD ABUSE (KNOWINGLY ALLOWING EXPOSURE TO PRECURSOR CHEMICALS)

The elements of the crime of child abuse (knowingly allowing exposure to precursor chemicals) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. was a parent or lawful guardian or person having the care or custody of a child, and

5. allowed the child to be present or reside at a premises or to be in a vehicle where the parent, guardian, or person having care or custody of the child knew, or reasonably should have known, that another person possessed ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers, with the intent to use the product as an immediate precursor in the manufacture of a controlled substance.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of child abuse (knowingly allowing exposure to precursor chemicals).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of child abuse (knowingly allowing exposure to precursor chemicals).

COMMENT

1. *See* § 18-6-401(c)(III), C.R.S. 2015.

2. *See* Instruction F:49 (defining "child"); Instruction F:73 (defining "controlled substance" by referring users to the statutory schedules that are identified in section § 18-18-102(5), C.R.S. 2015); Instruction F:179 (defining "immediate precursor"); Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly"); Instruction F:281 (defining "possession"); *see also* Instruction F:283 (defining "premises" for purposes of burglary and related offenses).

3. If the defendant is not separately charged with a controlled substance offense, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense. *See* Instruction G2:01 (criminal attempt); Instruction 18:05 (manufacture of a controlled substance).

6-4:09.INT CHILD ABUSE – INTERROGATORY (DEATH)

If you find the defendant not guilty of child abuse, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of child abuse, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the child abuse result in death? (Answer "Yes" or "No")

The prosecution has the burden to prove, beyond a reasonable doubt, that the child abuse resulted in death.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-6-401(7)(a)(I), (II), C.R.S. 2015.

2. *See*, *e.g.*, Instruction E:28 (special verdict form).

3. It is not necessary to submit a special interrogatory asking the jury to determine whether the child abuse resulted in death if the instruction defining the offense is drafted in such a manner that, in order to find the defendant guilty, the jury necessarily must find that the abuse resulted in death.

6-4:10.INT CHILD ABUSE – INTERROGATORY (SERIOUS BODILY INJURY)

If you find the defendant not guilty of child abuse, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of child abuse, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the child abuse result in serious bodily injury? (Answer "Yes" or "No")

The prosecution has the burden to prove, beyond a reasonable doubt, that the child abuse resulted in serious bodily injury.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-6-401(7)(a)(III), (IV), C.R.S. 2015.

2. *See, e.g.*, Instruction E:28 (special verdict form).

3. It is not necessary to submit a special interrogatory asking the jury to determine whether the child abuse resulted in serious bodily injury if the instruction defining the offense is drafted in such a manner that, in order to find the defendant guilty, the jury must necessarily find that the abuse resulted in serious bodily injury.

6-4:11.INT CHILD ABUSE – INTERROGATORY (INJURY OTHER THAN SERIOUS BODILY INJURY)

If you find the defendant not guilty of child abuse, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of child abuse, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the abuse cause any injury other than serious bodily injury? (Answer "Yes" or "No")

The abuse caused any injury other than serious bodily injury only if:

1. the child abuse resulted in any injury other than injury which, either at the time of the actual injury or at a later time, involved a substantial risk of death, a substantial risk of serious permanent disfigurement, a substantial risk of protracted loss or impairment of the function of any part or organ of the body, or breaks, fractures, or burns of the second or third degree.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-6-401(7)(a)(V), C.R.S. 2015.

2. *See, e.g.*, Instruction E:28 (special verdict form).

3. It is not necessary to submit a special interrogatory asking the jury to determine whether the child abuse resulted in any injury other than serious bodily injury if the instruction defining the offense is drafted in such a manner that, in order to find the defendant guilty, the jury necessarily must find that the abuse resulted in bodily injury. For example, a jury could not logically find a defendant guilty of child abuse involving mutilation of female genitalia, as defined in section 18-6-401(b)(I), and then make a finding that the child abuse resulted in "no . . . injury" for purposes of section 18-6-401(7)(b).

4. It appears unlikely that the "injury" defined by section 18-6-401(7)(a)(V) could include an injury that does not meet the definition of a "bodily injury" under section 18-1-901(3)(c), C.R.S. 2015. Nevertheless, out of an abundance of caution, the instruction uses the language of the statute and asks whether the child abuse resulted in an injury other than serious bodily injury.

6-4:12.INT CHILD ABUSE – INTERROGATORY (POSITION OF TRUST)

If you find the defendant not guilty of child abuse, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of child abuse, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant violate a position of trust?
(Answer "Yes" or "No")

The defendant violated a position of trust only if:

1. the defendant was in a position of trust in relation to the child, and

2. participated in a continued pattern of conduct that resulted in the child's malnourishment or failed to ensure the child's access to proper medical care.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-6-401(7)(e)(I), C.R.S. 2015.

2. *See* Instruction F:280 (defining "position of trust"); *see, e.g.*, Instruction E:28 (special verdict form).

3. In a case where the defendant has a prior qualifying conviction under section 18-6-401(7)(e), it is unnecessary to

ask the jury to determine any of the circumstances enumerated in section 18-6-401(7)(e)(I-V) if there is no rational basis for the jury to find the defendant guilty without also finding that the child abuse resulted in death or serious bodily injury (because the sentence enhancement factors of section 18-6-401(7)(e)(I-V) apply only to cases that involve either a non-serious injury, or no injury at all). *See* § 18-6-401(7)(a)(I-IV), C.R.S. 2015.

4. + *See People v. Becker*, 2014 COA 36, ¶ 2, 347 P.3d 1168, 1170 ("a prior child abuse conviction, as specified in section 18-6-401(7)(e), C.R.S. 2013, serves as a sentence enhancer — and not as an element — of the child abuse crimes set forth in sections 18-6-401(1)(a)(7)(b)(I)-(II), C.R.S. 2013").

5. + In 2015, the Committee added Comment 4.

6-4:13.INT CHILD ABUSE – INTERROGATORY (CONTINUED PATTERN OF PUNISHMENT, ISOLATION, OR CONFINEMENT)

If you find the defendant not guilty of child abuse, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of child abuse, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant participate in a continued pattern? (Answer "Yes" or "No")

The defendant participated in a continued pattern only if:

1. the defendant participated in a continued pattern of cruel punishment, or unreasonable isolation, or confinement of the child.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-6-401(7)(e)(II), C.R.S. 2015.

2. *See, e.g.*, Instruction E:28 (special verdict form).

3. In a case where the defendant has a prior qualifying conviction under section 18-6-401(7)(e), it is unnecessary to ask the jury to determine any of the circumstances enumerated in section 18-6-401(7)(e)(I-V) if there is no rational basis for the jury to find the defendant guilty without also finding that the child abuse resulted in death or serious bodily injury

(because the sentence enhancement factors of section 18-6-401(7)(e)(I-V) apply only to cases that involve either a non-serious injury, or no injury at all). *See* § 18-6-401(7)(a)(I-IV), C.R.S. 2015.

6-4:14.INT CHILD ABUSE – INTERROGATORY (REPEATED THREATS)

If you find the defendant not guilty of child abuse, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of child abuse, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant make repeated threats?
(Answer "Yes" or "No")

The defendant made repeated threats only if:

1. the defendant made repeated threats of harm or death to the child, or to a significant person in the child's life, and

2. the threats were made in the presence of the child.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-6-401(7)(e)(III), C.R.S. 2015.

2. *See, e.g.*, Instruction E:28 (special verdict form).

3. In a case where the defendant has a prior qualifying conviction under section 18-6-401(7)(e), it is unnecessary to ask the jury to determine any of the circumstances enumerated in section 18-6-401(7)(e)(I-V) if there is no rational basis for

the jury to find the defendant guilty without also finding that the child abuse resulted in death or serious bodily injury (because the sentence enhancement factors of section 18-6-401(7)(e)(I-V) apply only to cases that involve either a non-serious injury, or no injury at all). *See* § 18-6-401(7)(a)(I-IV), C.R.S. 2015.

6-4:15.INT CHILD ABUSE – INTERROGATORY (CONTINUED PATTERN OF ACTS OF DOMESTIC VIOLENCE)

If you find the defendant not guilty of child abuse, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of child abuse, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant commit a continued pattern of domestic violence? (Answer "Yes" or "No")

The defendant committed a continued pattern of domestic violence only if:

1. the defendant committed a continued pattern of acts of domestic violence,

2. in the presence of the child.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-6-401(7)(e)(IV), C.R.S. 2015.

2. *See* Instruction F:108 (defining "domestic violence"); *see, e.g.*, Instruction E:28 (special verdict form).

3. In a case where the defendant has a prior qualifying conviction under section 18-6-401(7)(e), it is unnecessary to ask the jury to determine any of the circumstances enumerated in

section 18-6-401(7)(e)(I-V) if there is no rational basis for the jury to find the defendant guilty without also finding that the child abuse resulted in death or serious bodily injury (because the sentence enhancement factors of section 18-6-401(7)(e)(I-V) apply only to cases that involve either a non-serious injury, or no injury at all). *See* § 18-6-401(7)(a)(I-IV), C.R.S. 2015.

6-4:16.INT CHILD ABUSE – INTERROGATORY (CONTINUED PATTERN OF EXTREME DEPRIVATION)

If you find the defendant not guilty of child abuse, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of child abuse, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

> Did the defendant participate in a continued pattern of extreme deprivation? (Answer "Yes" or "No")

The defendant participated in a continued pattern of extreme deprivation only if:

1. the defendant participated in a continued pattern of extreme deprivation of hygienic or sanitary conditions in the child's daily living environment.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-6-401(7)(e)(V), C.R.S. 2015.

2. *See*, *e.g.*, Instruction E:28 (special verdict form).

3. In a case where the defendant has a prior qualifying conviction under section 18-6-401(7)(e), it is unnecessary to ask the jury to determine any of the circumstances enumerated in section 18-6-401(7)(e)(I-V) if there is no rational basis for the jury to find the defendant guilty without also finding that

the child abuse resulted in death or serious bodily injury (because the sentence enhancement factors of section 18-6-401(7)(e)(I-V) apply only to cases that involve either a non-serious injury, or no injury at all). *See* § 18-6-401(7)(a)(I-IV), C.R.S. 2015.

6-4:17 SEXUAL EXPLOITATION OF A CHILD (EXPLICIT SEXUAL CONDUCT FOR SEXUALLY EXPLOITATIVE MATERIAL)

The elements of the crime of sexual exploitation of a child (explicit sexual conduct for sexually exploitative material) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. for any purpose,

5. caused, induced, enticed, or permitted a child to engage in, or be used for,

6. any explicit sexual conduct for the making of any sexually exploitative material.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of sexual exploitation of a child (explicit sexual conduct for sexually exploitative material).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of sexual exploitation of a child (explicit sexual conduct for sexually exploitative material).

COMMENT

1. *See* § 18-6-403(3)(a), C.R.S. 2015.

2. *See* Instruction F:50 (defining "child"); Instruction F:132 (defining "explicit sexual conduct"); Instruction F:341 (defining "sexually exploitative material").

3. *See* Instruction H:36 (affirmative defense of "mistake as to age").

4. The words "for any purpose" are included as an element because section 18-6-403(3) indicates that this phrase modifies all of the provisions in section 18-6-403(3)(a-d). However, four of those statutory subsections identify the prohibited purpose that must be proved, and the only one that does not – section 18-6-403(3)(b.5) – repeats the "for any purpose" language. Accordingly, except in cases involving a charge under section 18-6-403(3)(b.5), it may be appropriate to eliminate the "for any purpose" element.

6-4:18 SEXUAL EXPLOITATION OF A CHILD (PUBLICATION)

The elements of the crime of sexual exploitation of a child (publication) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. for any purpose,

5. prepared, arranged for, published (including but not limited to publishing through digital or electronic means), produced, promoted, made, sold, financed, offered, exhibited, advertised, dealt in, or distributed (including but not limited to distributing through digital or electronic means),

6. any sexually exploitative material.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of sexual exploitation of a child (publication).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of sexual exploitation of a child (publication).

COMMENT

1. *See* § 18-6-403(3)(b), C.R.S. 2015.

2. *See* Instruction F:50 (defining "child"); Instruction F:341 (defining "sexually exploitative material").

3. *See* Instruction H:36 (affirmative defense of "mistake as to age").

4. The words "for any purpose" are included as an element because section 18-6-403(3) indicates that this phrase modifies all of the provisions in section 18-6-403(3)(a-d). However, four of those statutory subsections identify the prohibited purpose that must be proved, and the only one that does not – section 18-6-403(3)(b.5) – repeats the "for any purpose" language. Accordingly, except in cases involving a charge under section 18-6-403(3)(b.5), it may be appropriate to eliminate the "for any purpose" element.

5. *See People v. Mantos*, 250 P.3d 586, 590 (Colo. App. 2009) (downloading and saving already-existing material in a share-capable computer file is not proscribed by the terms "prepares" and "arranges for" in section 18-6-403(3)(b)).

6. *See People v. Rowe*, 2012 COA 90, ¶ 13, 318 P.3d 57, 60 ("Reading the plain language of [section 18-6-403(3)(b)] and construing the term 'offer' according to its common usage, we hold that a defendant 'offers' sexually exploitative material by making it available or accessible to others. In the context of a peer-to-peer file sharing network, a defendant offers sexually exploitative material by knowingly leaving it in the share folder for other users to download.").

6-4:19 SEXUAL EXPLOITATION OF A CHILD (POSSESSION OR CONTROL)

The elements of the crime of sexual exploitation of a child (possession or control) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. for any purpose,

5. possessed or controlled,

6. any sexually exploitative material.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of sexual exploitation of a child (possession or control).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of sexual exploitation of a child (possession or control).

COMMENT

1. *See* § 18-6-403(3)(b.5), C.R.S. 2015.

2. *See* Instruction F:50 (defining "child"); Instruction F:281 (defining "possession"); Instruction F:341 (defining "sexually exploitative material").

3. *See* Instruction H:36 (affirmative defense of "mistake as to age").

4. Section 18-6-403(3)(b.5), C.R.S. 2015 states that it:

> does not apply to peace officers or court personnel in the performance of their official duties, nor does it apply to physicians, psychologists, therapists, or social workers, so long as such persons are licensed in the state of Colorado and the persons possess such materials in the course of a bona fide treatment or evaluation program at the treatment or evaluation site.

However, the Committee has not drafted a model affirmative defense instruction. *See also People v. Arapahoe Cty. Court*, 74 P.3d 429, 431 (Colo. App. 2003) ("we do not address the argument that the statutory exception in § 18–6–403(3)(b.5) for court personnel does not include defense counsel").

5. The words "for any purpose" are included as an element because section 18-6-403(3) indicates that this phrase modifies all of the provisions in section 18-6-403(3)(a-d). However, four of those statutory subsections identify the prohibited purpose that must be proved, and the only one that does not – section 18-6-403(3)(b.5) – repeats the "for any purpose" language. Accordingly, except in cases involving a charge under section 18-6-403(3)(b.5), it may be appropriate to eliminate the "for any purpose" element.

6. *See Fabiano v. Armstrong*, 141 P.3d 907, 910 (Colo. App. 2006) (section 18-6-403(3)(b.5) does not contain any requirement that the prohibited material be retained for any minimum period of time).

6-4:20 SEXUAL EXPLOITATION OF A CHILD (POSSESSION WITH INTENT)

The elements of the crime of sexual exploitation of a child (possession with intent) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. for any purpose,

5. possessed,

6. with the intent to deal in, sell, or distribute (including but not limited to distributing through digital or electronic means),

7. any sexually exploitative material.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of sexual exploitation of a child (possession with intent).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of sexual exploitation of a child (possession with intent).

COMMENT

1. *See* § 18-6-403(3)(c), C.R.S. 2015.

2. *See* Instruction F:50 (defining "child"); Instruction F:281 (defining "possession"); Instruction F:341 (defining "sexually exploitative material").

3. *See* Instruction H:36 (affirmative defense of "mistake as to age").

4. The words "for any purpose" are included as an element because section 18-6-403(3) indicates that this phrase modifies all of the provisions in section 18-6-403(3)(a-d). However, four of those statutory subsections identify the prohibited purpose that must be proved, and the only one that does not – section 18-6-403(3)(b.5) – repeats the "for any purpose" language. Accordingly, except in cases involving a charge under section 18-6-403(3)(b.5), it may be appropriate to eliminate the "for any purpose" element.

6-4:21 SEXUAL EXPLOITATION OF A CHILD (EXPLICIT SEXUAL CONDUCT FOR A PERFORMANCE)

The elements of the crime of sexual exploitation of a child (explicit sexual conduct for a performance) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. for any purpose,

5. caused, induced, enticed, or permitted a child to engage in, or be used for,

6. any explicit sexual conduct,

7. for the purpose of producing a performance.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of sexual exploitation of a child (explicit sexual conduct for a performance).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of sexual exploitation of a child (explicit sexual conduct for a performance).

COMMENT

1. *See* § 18-6-403(3)(d), C.R.S. 2015.

2. *See* Instruction F:50 (defining "child"); Instruction F:132 (defining "explicit sexual conduct"); Instruction F:281 (defining "possession"); Instruction F:341 (defining "sexually exploitative material").

3. *See* Instruction H:36 (affirmative defense of "mistake as to age").

4. The words "for any purpose" are included as an element because section 18-6-403(3) indicates that this phrase modifies all of the provisions in section 18-6-403(3)(a-d). However, four of those statutory subsections identify the prohibited purpose that must be proved, and the only one that does not – section 18-6-403(3)(b.5) – repeats the "for any purpose" language. Accordingly, except in cases involving a charge under section 18-6-403(3)(b.5), it may be appropriate to eliminate the "for any purpose" element.

6-4:22.INT SEXUAL EXPLOITATION OF A CHILD – INTERROGATORY (MOVING IMAGES)

If you find the defendant not guilty of sexual exploitation of a child, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual exploitation of a child, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant possess moving images?
(Answer "Yes" or "No")

The defendant possessed moving images only if:

1. the defendant's possession of sexually exploitative material was of a video, video tape, or motion picture.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-6-403(5)(b)(II), C.R.S. 2015.

2. *See* Instruction F:234 (defining "motion picture"); Instruction F:389 (defining "video" and "video tape"); *see, e.g.*, Instruction E:28 (special verdict form).

6-4:23.INT SEXUAL EXPLOITATION OF A CHILD – INTERROGATORY (QUANTITY)

If you find the defendant not guilty of sexual exploitation of a child, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual exploitation of a child, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant possess a large number of items? (Answer "Yes" or "No")

The defendant possessed a large number of items only if:

1. the defendant's possession was of more than twenty different items qualifying as sexually exploitative material.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-6-403(5)(b)(II), C.R.S. 2015.

2. *See, e.g.*, Instruction E:28 (special verdict form).

6-4:24 PROCUREMENT OF A CHILD FOR SEXUAL EXPLOITATION

The elements of the crime of procurement of a child for sexual exploitation are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. intentionally,

4. gave, transported, provided, or made available, or offered to give, transport, provide, or make available,

5. a child,

6. to another person,

7. for the purpose of sexual exploitation of a child.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of procurement of a child for sexual exploitation.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of procurement of a child for sexual exploitation.

COMMENT

1. *See* § 18-6-404, C.R.S. 2015.

2. *See* Instruction F:50 (defining "child"); Instruction F:185 (defining "intentionally").

3. If the defendant is not separately charged with sexual exploitation of a child, give the jury the elemental instruction for the offense without the two concluding paragraphs that

explain the burden of proof. *See* Instructions 6-4:17 to 6-4:21. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense.

CHAPTER 6-7

CONTRIBUTING TO DELINQUENCY

6-7:01 CONTRIBUTING TO THE DELINQUENCY OF A MINOR

The elements of the crime of contributing to the delinquency of a minor are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly induced, aided, or encouraged another to violate [insert a reference to the federal or state law, municipal or county ordinance, or court order], and

4. the person who was induced, aided, or encouraged by the defendant was under the age of eighteen years.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of contributing to the delinquency of a minor.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of contributing to the delinquency of a minor.

COMMENT

1. *See* § 18-6-701(1), C.R.S. 2015.

2. If the defendant is not separately charged with violating the referenced law, ordinance, or court order, draft a separate instruction to define it (or include the appropriate elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof). Place the instruction defining the referenced law, ordinance, or court order after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining any relevant terms and theories of criminal liability for the referenced law, ordinance, or court order.

3. In *Gorman v. People*, 19 P.3d 662, 665–67 (Colo. 2000), the supreme court concluded "that the culpable mental state of knowingly applies to the *act* of contributing to the delinquency," but not to the age element. As the court explained, "[i]n order to be convicted of the offense of contributing to the delinquency of a minor, a person must know that he or she is inducing, aiding or encouraging *someone* to violate a 'federal or state law,' a 'municipal or county ordinance,' or a 'court order.'" *Id.* at 665 (emphasis added).

4. *See* § 18-1-503.5(1), C.R.S. 2015 ("If the criminality of conduct depends on a child being younger than eighteen years of age and the child was in fact at least fifteen years of age, it shall be an affirmative defense that the defendant reasonably believed the child to be eighteen years of age or older"); *Gorman v. People*, 19 P.3d, 662, 667-69 (Colo. 2000) (although the culpable mental state of "knowingly" does not apply to the age element of the crime of contributing to the delinquency of a minor, the affirmative defense of section 18-3-406 (now section 18-1-503.5) is applicable to the offense); Instruction H:36 (defining the affirmative defense in section 18-1-503.5(1)).

5. *See People v. Miller*, 830 P.2d 1092, 1093-94 (Colo. App. 1991) (section 18-6-701(1) "does not require that the minor be charged or convicted of a crime nor does it require the minor to be over the age of ten").

CHAPTER 6-8

DOMESTIC VIOLENCE

6-8:01.INT INTERROGATORY – TRIGGERING MISDEMEANOR OFFENSE OF DOMESTIC VIOLENCE (HABITUAL DOMESTIC VIOLENCE OFFENDER)

If you find the defendant not guilty of [insert name of misdemeanor offense(s)], you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of [insert name of misdemeanor offense(s)], you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant commit an act of domestic violence? (Answer "Yes" or "No")

The defendant committed an act of domestic violence only if:

1. the underlying factual basis of [insert name of misdemeanor offense(s)] included [an] act[s] of domestic violence.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-6-801(7), C.R.S. 2015 (habitual domestic violence offender sentence enhancement elevates any qualifying misdemeanor offense to a class five felony).

2. *See* Instruction F:108 (defining the term "domestic violence" pursuant to section 18-6-800.3(1), with reference to an "intimate relationship" (a term that is defined in section

18-6-800.3(2), C.R.S. 2015, and Instruction F:187)); *see*, *e.g.*, Instruction E:28 (special verdict form).

3. Although section 18-6-801(7) states that the trial court is to determine whether "the underlying factual basis of" the triggering offense "include[s] an act of domestic violence," such a finding increases the penalty for a crime beyond the statutory maximum when it is combined with a finding of three prior convictions for offenses involving acts of domestic violence. Therefore, it appears that the determination should be submitted to the jury in order to satisfy due process principles. *See Lewis v. People*, 261 P.3d 480, 483 (Colo. 2011) ("In a line of cases beginning with *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000), and including *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), the Supreme Court held that the Sixth Amendment entitles a criminal defendant to have any fact that increases his penalty beyond the prescribed statutory maximum for the offense of which he stands convicted, other than a prior conviction, submitted to a jury and proved beyond a reasonable doubt. In arriving at this formulation, the Court made clear that for purposes of the Sixth Amendment guarantee of jury determinations, it is inconsequential whether a required fact is organized in a particular statutory proscription as a sentencing factor or as an element . . . .").

Likewise, unless a constitutionally-compliant "domestic violence" finding was made in each proceeding that resulted in a prior conviction (either by means of a jury finding, or through the defendant's explicit waiver of his or her right, under *Apprendi*, to have the jury make such a finding), it appears that it will be necessary to conduct a bifurcated trial because the question of whether a prior conviction involved an act of "domestic violence" implicates issues that extend beyond the "fact of a prior conviction" (thus making the procedure distinguishable from a proceeding under the habitual offender statute, where nothing more than the fact of each prior conviction need be proven). *See Descamps v. United States*, 133 S. Ct. 2276, 2291-93 (2013) (sentencing courts applying recidivist enhancement statutes may not apply the modified categorical approach to identify precisely what prior crime a defendant was convicted of when the prior crime has a single, indivisible set of elements; it is constitutionally impermissible to extend judicial fact-finding beyond the recognition of a prior conviction); *Misenhelter v. People*, 234 P.3d 657, 660 (Colo. 2010) (explaining the scope of the prior conviction exception of *Almendarez-Torres v. United States*, 523

U.S. 224, 241 (1998), within the context of the *Apprendi-Blakely* framework); + *People v. Jaso*, 2014 COA 131, ¶ 23, 347 P.3d 1174, 1179 ("in a case where the prosecution seeks to increase a defendant's misdemeanor to a felony pursuant to the [Habitual Domestic Violence Offender] statute and the jury's verdict does not reflect a finding of domestic violence, the defendant is entitled to have that question submitted to the jury"); *People v. Nunn*, 148 P.3d 222, 224-25 (Colo. App. 2006) (it is constitutionally permissible for an habitual criminal sentence, pursuant to section 18-1.3-801(2), to be based on facts found by a judge rather than a jury; such a determination falls within the "prior conviction" exception recognized in *Apprendi* and *Blakely*). *But see People v. Vigil*, 2013 COA 102, ¶ 35, 328 P.3d 1066, 1073 (given the applicable range of punishment, "the . . . procedural protections required under the state constitution are different to convict a defendant of the underlying offense, which would otherwise be a misdemeanor," but "that does not mean that the prior convictions charged under the [habitual domestic violence offender statute] are no longer *Blakely*-exempt"; these sentence-enhancing convictions "may still be determined by a judge"); *People v. Garcia*, 176 P.3d 872, 873-74 (Colo. App. 2007) (observing, as part of a determination that a defendant charged as an habitual domestic violence offender was not entitled to a preliminary hearing with respect to the enhancement factor, that it is the trial court's responsibility to determine whether the defendant has three prior convictions that involve domestic violence).

4. + In 2015, the Committee modified Comment 3 by adding a citation to *People v. Jaso*, *supra*.

6-8:02 VIOLATION OF A PROTECTION ORDER (PROHIBITED CONDUCT)

The elements of the crime of violation of a protection order (prohibited conduct) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. after having been personally served with a protection order that identified the defendant as a restrained person, or otherwise having acquired from the court or law enforcement personnel actual knowledge of the contents of a protection order that identified the defendant as a restrained person,

4. knowingly,

5. contacted, harassed, injured, intimidated, molested, threatened, or touched the protected person or protected property (including an animal) identified in the protection order; or entered or remained on premises or came within a specified distance of the protected person, protected property (including an animal), or premises; or violated any other provision of the protection order designed to protect the protected person from imminent danger to life or health; and

6. the defendant's conduct was prohibited by the protection order.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of violation of a protection order (prohibited conduct).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of violation of a protection order (prohibited conduct).

COMMENT

1. *See* § 18-6-803.5(1)(a), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:293.5 (defining "protected person"); Instruction F:294 (defining "protection order"); Instruction F:319 (defining "restrained person").

3. In *People v. Coleby*, 34 P.3d 422, 424 (Colo. 2001), the supreme court interpreted an earlier version of the statute and held as follows:

> Since the second portion of the statute requires a knowing violation, which is satisfied either implicitly by personal service of the restraining order or explicitly by actual knowledge of the contents of the order, section 18-1-503(4) requires that the mental state of knowingly apply to every element of the crime, "unless an intent to limit its application clearly appears." An examination of the legislative history underlying section 18-6-803.5 reveals no intent on the part of the General Assembly to limit the application of the culpable mental state of "knowingly" to only one element of the offense. Moreover, the words the General Assembly chose to describe the conduct portion of the offense in section 18-6-803.5 evidence no clear intent to limit the application of the knowledge requirement. Thus, the mental state of "knowingly" applies not only to the second prong of the statute, but also to the first, conduct, prong.

Nothing in the statutory amendments after *Coleby* suggests that the holding in that case has been legislatively overruled. Accordingly, the above instruction applies the mens rea of "knowingly" to the prohibited conduct.

4. It is not necessary to submit an interrogatory asking the jury to make a finding with regard to the sentence enhancement factors in section 18-6-803.5(2)(a), C.R.S. 2015 (repeat offender; violation of restraining order issued pursuant to section 18-1-1001). These issues are matters of law for the court to determine.

6-8:03 VIOLATION OF A PROTECTION ORDER (LOCATING)

The elements of the crime of violation of a protection order (locating) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. after having been personally served with a protection order that identified the defendant as a restrained person, or otherwise having acquired from the court or law enforcement personnel actual knowledge of the contents of a protection order that identified the defendant as a restrained person,

4. knowingly,

5. hired, employed, or otherwise contracted with another person to locate or assist in the location of the protected person.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of violation of a protection order (locating).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of violation of a protection order (locating).

COMMENT

1. *See* § 18-6-803.5(1)(b), C.R.S. 2015.

2. *See* Instruction F:14 (defining "assist"); Instruction F:195 (defining "knowingly"); Instruction F:293.5 (defining "protected person"); Instruction F:294 (defining "protection order"); Instruction F:319 (defining "restrained person").

3. Section 18-6-803.5(1)(b) excepts from criminal liability conduct permitted pursuant to section 18-13-126(1)(b). *See* Instruction H:49 (affirmative defense of "locating a protected person – lawful purpose").

4. *See* Instruction 6-8:02, Comment 3 (discussing *People v. Coleby*, 34 P.3d 422, 424 (Colo. 2001), and the application of the mens rea of "knowingly" to the prohibited conduct).

5. It is not necessary to submit an interrogatory asking the jury to make a finding with regard to the sentence enhancement factors in section 18-6-803.5(2)(a), C.R.S. 2015 (repeat offender; violation of restraining order issued pursuant to section 18-1-1001). These issues are matters of law for the court to determine.

6-8:04 VIOLATION OF A PROTECTION ORDER (FIREARMS OR AMMUNITION)

The elements of the crime of violation of a protection order (firearms or ammunition) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. after having been personally served with a protection order that identified the defendant as a restrained person, or otherwise having acquired from the court or law enforcement personnel actual knowledge of the contents of a protection order that identified the defendant as a restrained person,

4. knowingly,

5. violated a civil protection order,

6. by possessing or attempting to purchase or receive a firearm or ammunition while the protection order was in effect; or failing to timely file a receipt or written statement with the court as required by law.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of violation of a protection order (firearms or ammunition).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of violation of a protection order (firearms or ammunition).

COMMENT

1. *See* § 18-6-803.5(1)(c), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:281 (defining "possession"); Instruction F:294 (defining "protection order"); Instruction F:319 (defining "restrained person").

3. *See* Instruction 6-8:02, Comment 3 (discussing *People v. Coleby*, 34 P.3d 422, 424 (Colo. 2001), and the application of the mens rea of "knowingly" to the prohibited conduct).

4. The question of whether a civil protection order was issued "pursuant to section 13-14-105.5, C.R.S., or pursuant to section 18-1-1001(9)" is a matter of law for the court to determine.

5. In cases under section 18-6-803.5(1)(c)(II), the court should draft a special instruction, tailored to the evidence, explaining the relevant filing requirement(s) of section 13-14-105.5(9), section 18-1-1001(9)(i), or section 18-6-801(8)(i).

6. It is not necessary to submit an interrogatory asking the jury to make a finding with regard to the sentence enhancement factors in section 18-6-803.5(2)(a), C.R.S. 2015 (repeat offender; violation of restraining order issued pursuant to section 18-1-1001). These issues are matters of law for the court to determine.

7. + In the absence of case law on point, the Committee takes no position on whether the word "attempting" in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

8. + In 2015, the Committee added Comment 7.

CHAPTER 6.5

CRIMES AGAINST AT-RISK ADULTS AND JUVENILES

6.5:01 CRIMINAL NEGLIGENCE RESULTING IN THE DEATH OF AN AT-RISK ADULT OR JUVENILE

The elements of criminal negligence resulting in the death of an at-risk [adult] [juvenile] are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. engaged in conduct amounting to criminal negligence,

4. that resulted in the death,

5. of an at-risk [adult] [juvenile].

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal negligence resulting in the death of an at-risk [adult] [juvenile].

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal negligence resulting in the death of an at-risk [adult] [juvenile].

COMMENT

1. *See* § 18-6.5-103(2)(a), C.R.S. 2015.

2. *See* Instruction F:24 (defining "at-risk adult"); Instruction F:26 (defining "at-risk juvenile"); Instruction F:66 (defining "conduct"); Instruction F:79 (defining "criminal negligence").

3. *See People v. Lovato*, 179 P.3d 208, 211 (Colo. App. 2007) (section 18-6.5-103(2) creates a separate substantive offense).

4. *See People v. Davis*, 935 P.2d 79, 86 (Colo. App. 1996) ("Examining §§ 18-6.5-102 and 18-6.5-103 . . . we find no indication that the General Assembly intended to require that a defendant act with knowledge of the age of a victim in order to be charged with a crime against an at-risk adult. The relevant statutes contain no mens rea element. Nor do they provide a defense for those defendants who might make a reasonable mistake as to their victims' ages.").

5. *See also People v. Madison*, 176 P.3d 793, 805 (Colo. App. 2007) ("'Conduct' is defined as 'an act *or omission* and its accompanying state of mind.' Section 18–1–501(2) (emphasis supplied). Therefore, § 18–6.5–103(2)(b) does not require the commission of an act to trigger its requirements.").

6.5:02 CRIMINAL NEGLIGENCE RESULTING IN SERIOUS BODILY INJURY TO AN AT-RISK ADULT OR JUVENILE

The elements of criminal negligence resulting in serious bodily injury to an at-risk [adult] [juvenile] are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. engaged in conduct amounting to criminal negligence,

4. that resulted in serious bodily injury,

5. to an at-risk [adult] [juvenile].

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal negligence resulting in serious bodily injury to an at-risk [adult] [juvenile].

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal negligence resulting in serious bodily injury to an at-risk [adult] [juvenile].

COMMENT

1. *See* § 18-6.5-103(2)(b), C.R.S. 2015.

2. *See* Instruction F:24 (defining "at-risk adult"); Instruction F:26 (defining "at-risk juvenile"); Instruction F:66 (defining "conduct"); Instruction F:79 (defining "criminal negligence"); Instruction F:332 (defining "serious bodily injury").

3. *See People v. Madison*, 176 P.3d 793, 805 (Colo. App. 2007) ("'Conduct' is defined as 'an act *or omission* and its accompanying state of mind.' Section 18–1–501(2) (emphasis

supplied). Therefore, § 18-6.5-103(2)(b) does not require the commission of an act to trigger its requirements.").

4. *See People v. Lovato*, 179 P.3d 208, 211 (Colo. App. 2007) (section 18-6.5-103(2) creates a separate substantive offense).

5. *See People v. Davis*, 935 P.2d 79, 86 (Colo. App. 1996) ("Examining §§ 18-6.5-102 and 18-6.5-103 . . . we find no indication that the General Assembly intended to require that a defendant act with knowledge of the age of a victim in order to be charged with a crime against an at-risk adult. The relevant statutes contain no mens rea element. Nor do they provide a defense for those defendants who might make a reasonable mistake as to their victims' ages.").

6.5:03 CRIMINAL NEGLIGENCE RESULTING IN BODILY INJURY TO AN AT-RISK ADULT OR JUVENILE

The elements of criminal negligence resulting in bodily injury to an at-risk [adult] [juvenile] are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. engaged in conduct amounting to criminal negligence,

4. that resulted in bodily injury,

5. to an at-risk [adult] [juvenile].

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal negligence resulting in bodily injury to an at-risk [adult] [juvenile].

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal negligence resulting in bodily injury to an at-risk [adult] [juvenile].

COMMENT

1. *See* § 18-6.5-103(2)(c), C.R.S. 2015.

2. *See* Instruction F:24 (defining "at-risk adult"); Instruction F:26 (defining "at-risk juvenile"); Instruction F:36 (defining "bodily injury"); Instruction F:66 (defining "conduct"); Instruction F:79 (defining "criminal negligence").

3. *See People v. Lovato*, 179 P.3d 208, 211 (Colo. App. 2007) (section 18-6.5-103(2) creates a separate substantive offense).

4. *See People v. Davis*, 935 P.2d 79, 86 (Colo. App. 1996) ("Examining §§ 18-6.5-102 and 18-6.5-103 . . . we find no indication that the General Assembly intended to require that a defendant act with knowledge of the age of a victim in order to be charged with a crime against an at-risk adult. The relevant statutes contain no mens rea element. Nor do they provide a defense for those defendants who might make a reasonable mistake as to their victims' ages.").

5. *See also People v. Madison*, 176 P.3d 793, 805 (Colo. App. 2007) ("'Conduct' is defined as 'an act *or omission* and its accompanying state of mind.' Section 18–1–501(2) (emphasis supplied). Therefore, § 18–6.5–103(2)(b) does not require the commission of an act to trigger its requirements.").

6.5:04 CARETAKER NEGLECT OR ENDANGERMENT OF AN AT-RISK ADULT, ELDER, OR JUVENILE

The elements of the crime of caretaker neglect or endangerment of an at-risk [adult] [elder] [juvenile] are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. committed caretaker neglect against, or acted in a manner likely to be injurious to the physical or mental welfare of,

5. an at-risk [adult] [elder] [juvenile].

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of caretaker neglect or endangerment of an at-risk [adult] [elder] [juvenile].

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of caretaker neglect or endangerment of an at-risk [adult] [elder] [juvenile].

COMMENT

1. *See* § 18-6.5-103(6), C.R.S. 2015.

2. *See* Instruction F:24 (defining "at-risk adult"); Instruction F:25 (defining "at-risk elder"); Instruction F:26 (defining "at-risk juvenile"); Instruction F:44 (defining "caretaker"); Instruction F:45 (defining "caretaker neglect"); Instruction F:195 (defining "knowingly").

3. Although section 18-6.5-103(6) states that it is unlawful to commit an act of "caretaker neglect against an at-risk adult,

an at-risk elder, *or an at-risk juvenile*" (emphasis added), the definition of "caretaker neglect" in section 18-6.5-102 refers only to "an at-risk adult or an at-risk elder."

6.5:05 CRIMINAL EXPLOITATION OF AN AT-RISK ELDER

The elements of the crime of criminal exploitation of an at-risk elder are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. used deception, harassment, intimidation, or undue influence,

5. to permanently or temporarily deprive an at-risk elder of the use, benefit, or possession of any thing of value.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal exploitation of an at-risk elder.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal exploitation of an at-risk elder.

COMMENT

1. *See* § 18-6.5-103(7.5)(a), C.R.S. 2015.

2. *See* Instruction F:25 (defining "at-risk elder"); Instruction F:30 (defining "benefit"); Instruction F:195 (defining "knowingly"); Instruction F:281 (defining "possession"); Instruction F:379 (defining "undue influence"); *see also* Instructions 9-1:33, 9-1:34, 9-1:35, 9-1:36 (harassment).

6.5:06.INT CRIMINAL EXPLOITATION OF AN AT-RISK ELDER – INTERROGATORY (VALUE)

If you find the defendant not guilty of criminal exploitation of an at-risk elder, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of criminal exploitation of an at-risk elder, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question[s] on the verdict form.

1. Was the value of the thing involved in the defendant's criminal exploitation of an at-risk elder five hundred dollars or more? (Answer "Yes" or "No")

The prosecution has the burden to prove the value of the thing involved beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-6.5-103(7.5)(b), C.R.S. 2015.

2. *See*, *e.g.*, Instruction E:28 (special verdict form).

CHAPTER 7-2

PROSTITUTION

7-2:01 PROSTITUTION

The elements of the crime of prostitution are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. performed or offered or agreed to perform,

4. any act of sexual intercourse, fellatio, cunnilingus, masturbation, or anal intercourse,

5. with any person who was not his [her] spouse,

6. in exchange for money or other thing of value.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prostitution.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prostitution.

COMMENT

1. *See* § 18-7-201(1), C.R.S. 2015.

2. *See* Instruction F:16 (defining "anal intercourse"); Instruction F:81 (defining "cunnilingus"); Instruction F:147 (defining "fellatio"); Instruction F:217 (defining "masturbation"); Instruction F:371 (defining "thing of value").

3. The term "sexual intercourse" is not defined in section 18-7-201.

4. + Section 18-7-201.3(1), C.R.S. 2015, establishes an affirmative defense where the offense "was committed as a direct result of being a victim of human trafficking").

5. + In 2015, the Committee added Comment 4. *See* Ch. 107, sec. 1, § 18-7-201.3(1), 2015 Colo. Sess. Laws 311, 311.

7-2:02 PROSTITUTION WITH KNOWLEDGE OF BEING INFECTED WITH HIV

The elements of the crime of prostitution with knowledge of being infected with HIV are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. performed or offered or agreed to perform,

4. any act of sexual intercourse, fellatio, cunnilingus, masturbation, or anal intercourse,

5. with a person who was not his [her] spouse,

6. in exchange for money or any other thing of value, and

7. the defendant had been tested for acquired immune deficiency syndrome, and the results of such test indicated the presence of the human immunodeficiency virus (HIV) which causes acquired immune deficiency syndrome.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prostitution with knowledge of being infected with HIV.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prostitution with knowledge of being infected with HIV.

COMMENT

1. *See* § 18-7-201.7(1), C.R.S. 2015.

2. *See* Instruction F:16 (defining "anal intercourse"); Instruction F:81 (defining "cunnilingus"); Instruction F:147

(defining "fellatio"); Instruction F:217 (defining "masturbation"); Instruction F:371 (defining "thing of value").

3. Although the title of the offense includes the word "knowledge," the provision defining the offense does not include a requirement that the defendant have known of the test results. *See also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

7-2:03 SOLICITING ANOTHER FOR PROSTITUTION

The elements of the crime of soliciting another for prostitution are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. solicited another for the purpose of prostitution.

[4. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of soliciting another for prostitution.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of soliciting another for prostitution.

COMMENT

1. *See* § 18-7-202(1)(a), C.R.S. 2015.

2. If the defendant is not separately charged with prostitution, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense. *See* Instruction 7-2:01 (prostitution).

7-2:04 SOLICITING FOR PROSTITUTION (ARRANGING)

The elements of the crime of soliciting for prostitution (arranging) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. arranged or offered to arrange a meeting of persons for the purpose of prostitution.

[4. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of soliciting for prostitution (arranging).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of soliciting for prostitution (arranging).

COMMENT

1. *See* § 18-7-202(1)(b), C.R.S. 2015.

2. If the defendant is not separately charged with prostitution, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense. *See* Instruction 7-2:01 (prostitution).

7-2:05 SOLICITING FOR PROSTITUTION (DIRECTING)

The elements of the crime of soliciting for prostitution (directing) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. directed another to a place,

4. knowing such direction was for the purpose of prostitution.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of soliciting for prostitution (directing).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of soliciting for prostitution (directing).

COMMENT

1. *See* § 18-7-202(1)(c), C.R.S. 2015.

2. If the defendant is not separately charged with prostitution, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense. *See* Instruction 7-2:01 (prostitution).

7-2:06 PANDERING (INDUCING)

The elements of the crime of pandering (inducing) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. for money or other thing of value,

4. induced a person by [menacing] [criminal intimidation] to commit prostitution.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of pandering (inducing).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of pandering (inducing).

COMMENT

1. *See* § 18-7-203(1)(a), C.R.S. 2015.

2. *See* Instruction F:371 (defining "thing of value").

3. It is unclear how the term "criminal intimidation" should be defined because there is no offense with that name. The term may be similar to the offense of "criminal extortion." *See Whimbush v. People*, 869 P.2d 1245, 1249 (Colo. 1994) ("The former version of [section 18-3-207] did not expressly prohibit threats to the 'economic well-being' of the threatened person, and the crime was categorized as a class 1 misdemeanor entitled 'criminal intimidation.' Ch. 121, sec. 1, § 40-3-207, 1971 Colo. Sess. Laws 388, 421. In 1975, the statute was amended to include threats to cause economic harm, and the crime was elevated to a class 4 felony entitled 'criminal extortion.' Ch. 167, sec. 8, § 18-3-207, 1975 Colo. Sess. Laws 616, 618.").

4. If the defendant is not separately charged with prostitution or menacing, give the jury the elemental instruction for the offense(s) without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction(s) for the referenced offense(s) immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense(s). *See* Instruction 3-2:30 (menacing); Instruction 7-2:01 (prostitution).

7-2:07 PANDERING (ARRANGING)

The elements of the crime of pandering (arranging) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. for money or other thing of value,

5. arranged or offered to arrange a situation in which a person may practice prostitution.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of pandering (arranging).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of pandering (arranging).

COMMENT

1. *See* § 18-7-203(1)(b), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:371 (defining "thing of value").

3. If the defendant is not separately charged with prostitution, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense. *See* Instruction 7-2:01 (prostitution).

7-2:08 KEEPING A PLACE OF PROSTITUTION (USE)

The elements of the crime of keeping a place of prostitution (use) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. had or exercised control over the use of any place which offered seclusion or shelter for the practice of prostitution, and

4. knowingly,

5. granted or permitted the use of the place for the purpose of prostitution.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of keeping a place of prostitution (use).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of keeping a place of prostitution (use).

COMMENT

1. *See* § 18-7-204(1)(a), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly").

3. If the defendant is not separately charged with prostitution, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of

criminal liability for the referenced offense. *See* Instruction 7-2:01 (prostitution).

7-2:09 KEEPING A PLACE OF PROSTITUTION (CONTINUED USE)

The elements of the crime of keeping a place of prostitution (continued use) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. had or exercised control over the use of any place which offered seclusion or shelter for the practice of prostitution, and

4. permitted the continued use of the place for the purpose of prostitution,

5. after becoming aware of facts or circumstances from which he [she] should reasonably have known that the place was being used for purposes of prostitution.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of keeping a place of prostitution (continued use).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of keeping a place of prostitution (continued use).

COMMENT

1. *See* § 18-7-204(1)(b), C.R.S. 2015.

2. If the defendant is not separately charged with prostitution, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of

criminal liability for the referenced offense. *See* Instruction 7-2:01 (prostitution).

7-2:10 PATRONIZING A PROSTITUTE (ACT)

The elements of the crime of patronizing a prostitute (act) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. engaged in an act of sexual intercourse or deviate sexual conduct,

4. with a prostitute,

5. who was not his [her] spouse.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of patronizing a prostitute (act).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of patronizing a prostitute (act).

COMMENT

1. *See* § 18-7-205(1)(a), C.R.S. 2015.

2. The terms "sexual intercourse" and "deviate sexual conduct" are not defined for purposes of section 18-7-205.

3. Although the term "prostitute" is not defined by statute, a supplemental instruction defining the offense of "prostitution" (without the two concluding paragraphs that explain the burden of proof) should provide sufficient guidance. *See* Instruction 7-2:01 (prostitution).

7-2:11 PATRONIZING A PROSTITUTE (PLACE)

The elements of the crime of patronizing a prostitute (place) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. entered or remained in a place of prostitution,

4. with intent to engage in an act of sexual intercourse or deviate sexual conduct,

5. with a person who was not his [her] spouse.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of patronizing a prostitute (place).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of patronizing a prostitute (place).

COMMENT

1. *See* § 18-7-205(1)(b), C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent").

3. The terms "sexual intercourse" and "deviate sexual conduct" are not defined for purposes of section 18-7-205.

4. Give the jury the elemental instruction for the offense of prostitution and omit the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of

criminal liability for the referenced offense. *See* Instruction 7-2:01 (prostitution).

7-2:12 PATRONIZING A PROSTITUTE WITH KNOWLEDGE OF BEING INFECTED

The elements of the crime of patronizing a prostitute with knowledge of being infected are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. had been tested for acquired immune deficiency syndrome, and the results of such test indicated the presence of the human immunodeficiency virus (HIV) which causes acquired immune deficiency syndrome, and

4. engaged in an act of sexual intercourse or deviate sexual conduct with a prostitute who was not his [her] spouse; or entered or remained in a place of prostitution with intent to engage in an act of sexual intercourse or deviate sexual conduct with a person who was not his [her] spouse.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of patronizing a prostitute with knowledge of being infected.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of patronizing a prostitute with knowledge of being infected.

COMMENT

1. *See* § 18-7-205.7(1), C.R.S. 2015 (incorporating section 18-7-205(1)).

2. *See* Instruction F:185 (defining "with intent").

3. The term "deviate sexual conduct" is not defined by statute.

4. Although the title of the offense includes the word "knowledge," the provision defining the offense does not include a requirement that the defendant have known of the test results. *See also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

5. Give the jury the elemental instruction for the offense of prostitution and omit the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense. *See* Instruction 7-2:01 (prostitution).

6. Although the term "prostitute" is not defined by statute, the supplemental instruction recommended in Comment 5 should provide sufficient guidance.

7-2:13 PIMPING

The elements of the crime of pimping are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. lived on or was supported or maintained in whole or in part by money or other thing of value,

5. earned, received, procured, or realized by any other person,

6. through prostitution.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of pimping.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of pimping.

COMMENT

1. *See* § 18-7-206, C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:371 (defining "thing of value").

3. If the defendant is not separately charged with prostitution, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of

criminal liability for the referenced offense. *See* Instruction 7-2:01 (prostitution).

7-2:14 PROSTITUTE MAKING DISPLAY

The elements of the crime of prostitute making display are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. endeavored by word, gesture, or action,

4. to further the practice of prostitution,

5. in any public place or within public view.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prostitute making display.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prostitute making display.

COMMENT

1. *See* § 18-7-207, C.R.S. 2015.

2. *See* Instruction F:303 (defining "public place").

3. If the defendant is not separately charged with prostitution, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense. *See* Instruction 7-2:01 (prostitution).

CHAPTER 7-3

PUBLIC INDECENCY

7-3:01 PUBLIC INDECENCY (SEXUAL INTERCOURSE)

The elements of the crime of public indecency (sexual intercourse) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. performed an act of sexual intercourse,

4. in a public place or where the conduct may reasonably have been expected to be viewed by members of the public.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of public indecency (sexual intercourse).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of public indecency (sexual intercourse).

COMMENT

1. *See* § 18-7-301(1)(a), C.R.S. 2015.

2. *See* Instruction F:303 (defining "public place").

3. *See People v. Hoskay*, 87 P.3d 194, 198 (Colo. App. 2003) (trial court did not err by refusing to instruct the jury that, in order to commit the offense of public indecency, a person must know that he is in a public place; "superimposing a requirement that an offender must know that he or she is in a 'public place' within the meaning of § 18-1-901(3)(n) would frustrate the clear intent of the General Assembly").

7-3:02 PUBLIC INDECENCY (LEWD EXPOSURE)

The elements of the crime of public indecency (lewd exposure) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. in a public place or where the conduct may reasonably have been expected to be viewed by members of the public,

4. performed a lewd exposure of an intimate part of the body, other than the genitals,

5. with intent to arouse or to satisfy the sexual desire of any person.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of public indecency (lewd exposure).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of public indecency (lewd exposure).

COMMENT

1. *See* § 18-7-301(1)(c), C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent"); Instruction F:186 (defining "intimate parts"); Instruction F:303 (defining "public place").

3. The term "lewd" is not defined by statute. *See Webster's Third New International Dictionary* 1301 (2002) (defining "lewd," in relevant part, as: "inciting to sensual desire or imagination").

4. *See People v. Hoskay*, 87 P.3d 194, 198 (Colo. App. 2003) (trial court did not err by refusing to instruct the jury that, in order to commit the offense of public indecency, a person must know that he is in a public place; "superimposing a requirement that an offender must know that he or she is in a 'public place' within the meaning of § 18-1-901(3)(n) would frustrate the clear intent of the General Assembly").

7-3:03 PUBLIC INDECENCY (LEWD FONDLING OR CARESS)

The elements of the crime of public indecency (lewd fondling or caress) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. in a public place or where the conduct may reasonably have been expected to be viewed by members of the public,

4. performed a lewd fondling or caress of the body of another person.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of public indecency (lewd fondling or caress).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of public indecency (lewd fondling or caress).

COMMENT

1. *See* § 18-7-301(1)(d), C.R.S. 2015.

2. *See* Instruction F:186 (defining "intimate parts"); Instruction F:303 (defining "public place").

3. The term "lewd" is not defined by statute. *See Webster's Third New International Dictionary* 1301 (2002) (defining "lewd," in relevant part, as: "inciting to sensual desire or imagination").

4. *See People v. Hoskay*, 87 P.3d 194, 198 (Colo. App. 2003) (trial court did not err by refusing to instruct the jury that, in order to commit the offense of public indecency, a person

must know that he is in a public place; "superimposing a requirement that an offender must know that he or she is in a 'public place' within the meaning of § 18-1-901(3)(n) would frustrate the clear intent of the General Assembly").

7-3:04 PUBLIC INDECENCY (KNOWING EXPOSURE)

The elements of the crime of public indecency (knowing exposure) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. in a public place or where the conduct might reasonably have been expected to be viewed by members of the public,

4. knowingly,

5. exposed his [her] genitals to the view of a person,

6. under circumstances in which such conduct was likely to cause affront or alarm to the other person.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of public indecency (knowing exposure).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of public indecency (knowing exposure).

COMMENT

1. *See* § 18-7-301(1)(e), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:303 (defining "public place").

3. *See People v. Hoskay*, 87 P.3d 194, 198 (Colo. App. 2003) (trial court did not err by refusing to instruct the jury that, in order to commit the offense of public indecency, a person must know that he is in a public place; "superimposing a

requirement that an offender must know that he or she is in a 'public place' within the meaning of § 18-1-901(3)(n) would frustrate the clear intent of the General Assembly").

7-3:05 INDECENT EXPOSURE (KNOWING EXPOSURE)

The elements of the crime of indecent exposure (knowing exposure) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. exposed his [her] genitals to the view of any person,

5. under circumstances in which such conduct was likely to cause affront or alarm to the other person,

6. with the intent to arouse or satisfy the sexual desire of any person.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of indecent exposure (knowing exposure).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of indecent exposure (knowing exposure).

COMMENT

1. *See* § 18-7-302(1)(a), C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly").

3. *See People v. Barrus*, 232 P.3d 264, 271 (Colo. App. 2009) ("to satisfy the elements of the crime of indecent exposure, a person must do something that would make his or her genitals visible to another person"; however, the prosecution is not

required to prove that another person was "subjectively affronted or alarmed").

7-3:06 INDECENT EXPOSURE (MASTURBATION)

The elements of the crime of indecent exposure (masturbation) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. performed an act of masturbation in a manner which exposed the act to the view of any person,

5. under circumstances in which such conduct was likely to cause affront or alarm to the other person.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of indecent exposure (masturbation).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of indecent exposure (masturbation).

COMMENT

1. *See* § 18-7-302(1)(b), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:218 (broadly defining "masturbation," for purposes of this offense only, in a manner that does not require exposure of the genitals).

CHAPTER 7-4

CHILD PROSTITUTION

7-4:01 SOLICITING FOR CHILD PROSTITUTION (ANOTHER)

The elements of the crime of soliciting for child prostitution (another) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. solicited another,

4. for the purpose of prostitution of a child or by a child.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of soliciting for child prostitution (another).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of soliciting for child prostitution (another).

COMMENT

1. *See* § 18-7-402(1)(a), C.R.S. 2015.

2. *See* Instruction F:50 (defining "child"); Instruction F:292 (defining "prostitution by a child"); Instruction F:293 (defining "prostitution of a child").

3. The Committee is of the view that section 18-7-402(1)(a) describes a culpable mental state by requiring that the solicitation be for the purpose of child prostitution. Accordingly, unlike COLJI-Crim. 24:03 (1983), the above model instruction does not supplement the statutory language by imputing the mens rea of "knowingly." However, there is authority holding that it is not plain error to add the term "knowingly." *See People v. Emerterio*, 819 P.2d 516, 518-19

(Colo. App. 1991), *rev'd on other grounds*, *People v. San Emerterio*, 839 P.2d 1161 (Colo. 1992).

4. *See People v. Jacobs*, 91 P.3d 438, 441 (Colo. App. 2003) ("the statutory elements of the general inchoate offense of solicitation do not apply to the separate substantive offense of soliciting for child prostitution"; abandonment and renunciation is not an affirmative defense to soliciting for child prostitution).

7-4:02 SOLICITING FOR CHILD PROSTITUTION (ARRANGING)

The elements of the crime of soliciting for child prostitution (arranging) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. arranged or offered to arrange a meeting of persons,

4. for the purpose of prostitution of a child or by a child.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of soliciting for child prostitution (arranging).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of soliciting for child prostitution (arranging).

COMMENT

1. *See* § 18-7-402(1)(b), C.R.S. 2015.

2. *See* Instruction F:50 (defining "child"); Instruction F:292 (defining "prostitution by a child"); Instruction F:293 (defining "prostitution of a child").

3. The Committee is of the view that section 18-7-402(1)(a) describes a mental state by requiring that the arranging or offering to arrange be for the purpose of child prostitution. Accordingly, unlike COLJI-Crim. 24:03 (1983), the above model instruction does not supplement the statutory language by imputing the mens rea of "knowingly." However, there is authority holding that it is not plain error to add the term "knowingly." *See People v. Emerterio*, 819 P.2d 516, 518-19

(Colo. App. 1991), *rev'd on other grounds, People v. San Emerterio*, 839 P.2d 1161 (Colo. 1992).

4. *See People v. Jacobs*, 91 P.3d 438, 441 (Colo. App. 2003) ("the statutory elements of the general inchoate offense of solicitation do not apply to the separate substantive offense of soliciting for child prostitution"; abandonment and renunciation is not an affirmative defense to soliciting for child prostitution).

7-4:03 SOLICITING FOR CHILD PROSTITUTION (DIRECTING)

The elements of the crime of soliciting for child prostitution (directing) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. directed another to a place,

4. knowing such direction was for the purpose of prostitution of a child or by a child.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of soliciting for child prostitution (directing).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of soliciting for child prostitution (directing).

COMMENT

1. *See* § 18-7-402(1)(c), C.R.S. 2015.

2. *See* Instruction F:50 (defining "child"); Instruction F:195 (defining "knowingly"); Instruction F:292 (defining "prostitution by a child"); Instruction F:293 (defining "prostitution of a child").

3. *See People v. Jacobs*, 91 P.3d 438, 441 (Colo. App. 2003) ("the statutory elements of the general inchoate offense of solicitation do not apply to the separate substantive offense of soliciting for child prostitution"; abandonment and renunciation is not an affirmative defense to soliciting for child prostitution).

7-4:04 PANDERING OF A CHILD (INDUCING)

The elements of the crime of pandering of a child (inducing) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. for money or other thing of value,

4. induced a child by menacing or criminal intimidation,

5. to commit prostitution.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of pandering of a child (inducing).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of pandering of a child (inducing).

COMMENT

1. *See* § 18-7-403(1)(a), C.R.S. 2015.

2. *See* Instruction F:50 (defining "child"); Instruction F:195 (defining "knowingly"); Instruction F:371 (defining "thing of value"); *see also* Instruction F:292 (defining "prostitution by a child"); Instruction F:293 (defining "prostitution of a child").

3. Section 18-7-403(1)(a) refers to "prostitution" rather than "prostitution by a child" or "prostitution by a child" (phrases which are defined, for purposes of Part 4 of Article 7, in section 18-7-401(6), (7)). Thus, it is unclear whether "prostitution" should be defined based on sections 18-7-401(6), (7), or on the general definition in section 18-7-201(1).

4. It is unclear how the term "criminal intimidation" should be defined because there is no offense with that name. The term may be synonymous with the offense of "criminal extortion." *See Whimbush v. People*, 869 P.2d 1245, 1249 (Colo. 1994) ("The former version of [section 18-3-207] did not expressly prohibit threats to the 'economic well-being' of the threatened person, and the crime was categorized as a class 1 misdemeanor entitled 'criminal intimidation.' Ch. 121, sec. 1, § 40-3-207, 1971 Colo. Sess. Laws 388, 421. In 1975, the statute was amended to include threats to cause economic harm, and the crime was elevated to a class 4 felony entitled 'criminal extortion.' Ch. 167, sec. 8, § 18-3-207, 1975 Colo. Sess. Laws 616, 618.").

5. If the defendant is not separately charged with menacing, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense. *See* Instruction 3-2:30 (menacing).

7-4:05 PANDERING OF A CHILD (ARRANGING)

The elements of the crime of pandering of a child (arranging) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. for money or other thing of value,

4. knowingly,

5. arranged or offered to arrange a situation in which a child may practice prostitution.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of pandering of a child (arranging).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of pandering of a child (arranging).

COMMENT

1. *See* § 18-7-403(1)(b), C.R.S. 2015.

2. *See* Instruction F:50 (defining "child"); Instruction F:195 (defining "knowingly"); Instruction F:371 (defining "thing of value"); *see also* Instruction F:292 (defining "prostitution by a child"); Instruction F:293 (defining "prostitution of a child").

3. Section 18-7-403(1)(b) refers to "prostitution" rather than "prostitution by a child" or "prostitution by a child" (phrases which are defined, for purposes of Part 4 of Article 7, in section 18-7-401(6), (7)). Thus, it is unclear whether "prostitution" should be defined based on sections 18-7-401(6), (7), or on the general definition in section 18-7-201(1).

7-4:06 PROCUREMENT OF A CHILD

The elements of the crime of procurement of a child are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. intentionally,

4. gave, transported, provided, or made available, or offered to give, transport, provide, or make available,

5. a child,

6. to another person,

7. for the purpose of prostitution of the child.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of procurement of a child.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of procurement of a child.

COMMENT

1. *See* § 18-7-403.5, C.R.S. 2015.

2. *See* Instruction F:50 (defining "child"); Instruction F:185 (defining "intentionally"); Instruction F:195 (defining "knowingly"); Instruction F:293 (defining "prostitution of a child").

7-4:07 KEEPING A PLACE OF CHILD PROSTITUTION (USE)

The elements of the crime of keeping a place of child prostitution (use) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. had or exercised control over the use of any place which offered seclusion or shelter for the practice of prostitution, and

4. knowingly,

5. granted or permitted the use of the place for the purpose of prostitution of a child or by a child.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of keeping a place of child prostitution (use).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of keeping a place of child prostitution (use).

COMMENT

1. *See* § 18-7-404(1)(a), C.R.S. 2015.

2. *See* Instruction F:50 (defining "child"); Instruction F:195 (defining "knowingly"); Instruction F:292 (defining "prostitution by a child"); Instruction F:293 (defining "prostitution of a child").

7-4:08 KEEPING A PLACE OF CHILD PROSTITUTION (CONTINUED USE)

The elements of the crime of keeping a place of child prostitution (continued use) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. had or exercised control over the use of any place which offered seclusion or shelter for the practice of prostitution, and

4. permitted the continued use of the place for the purpose of prostitution of a child or by a child,

5. after becoming aware of facts or circumstances from which he [she] should reasonably have known that the place was being used for purposes of such prostitution.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of keeping a place of child prostitution (continued use).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of keeping a place of child prostitution (continued use).

COMMENT

1. *See* § 18-7-404(1)(b), C.R.S. 2015.

2. *See* Instruction F:50 (defining "child"); Instruction F:292 (defining "prostitution by a child"); Instruction F:293 (defining "prostitution of a child").

7-4:09 PIMPING OF A CHILD

The elements of the crime of pimping of a child are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. lived on or was supported or maintained in whole or in part by money or other thing of value,

5. earned, received, procured, or realized by a child,

6. through prostitution.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of pimping of a child.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of pimping of a child.

COMMENT

1. *See* § 18-7-405, C.R.S. 2015.

2. *See* Instruction F:50 (defining "child"); Instruction F:195 (defining "knowingly"); Instruction F:371 (defining "thing of value"); *see also* Instruction F:292 (defining "prostitution by a child"); Instruction F:293 (defining "prostitution of a child").

7-4:10 INDUCEMENT OF CHILD PROSTITUTION

The elements of the crime of inducement of child prostitution are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. by word or action, other than by menacing or criminal intimidation,

4. induced a child,

5. to engage in an act of prostitution by a child.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of inducement of child prostitution.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of inducement of child prostitution.

COMMENT

1. *See* § 18-7-405.5, C.R.S. 2015.

2. *See* Instruction F:50 (defining "child"); Instruction F:195 (defining "knowingly"); Instruction F:292 (defining "prostitution by a child").

3. If the defendant is not separately charged with menacing, provide the jury with a supplemental instruction that defines "menacing" without the two concluding paragraphs that explain the burden of proof. *See* Instruction 3-2:30 (menacing). Place the elemental instruction for menacing immediately after the above instruction (or as close to it as practicable). In

addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for menacing.

4. It is unclear how the term "criminal intimidation" should be defined because there is no offense with that name. The term may be synonymous with the offense of "criminal extortion." *See Whimbush v. People*, 869 P.2d 1245, 1249 n.5 (Colo. 1994) ("The former version of [section 18-3-207] did not expressly prohibit threats to the 'economic well-being' of the threatened person, and the crime was categorized as a class 1 misdemeanor entitled 'criminal intimidation.' Ch. 121, sec. 1, § 40–3–207, 1971 Colo. Sess. Laws 388, 421. In 1975, the statute was amended to include threats to cause economic harm, and the crime was elevated to a class 4 felony entitled 'criminal extortion.' Ch. 167, sec. 8, § 18–3–207, 1975 Colo. Sess. Laws 616, 618.").

5. *See People v. Hansen*, 708 P.2d 468, 470 (Colo. App. 1985) ("if a defendant's attempts at persuasion do not induce the child to perform, or to agree to perform, a sexual act in exchange for money or other thing of value, he is not guilty of inducement of child prostitution"; "[h]owever, the crime of attempt to induce child prostitution requires neither that a sexual act be performed nor that an agreement to perform be made").

7-4:11 PATRONIZING A PROSTITUTED CHILD (ACT)

The elements of the crime of patronizing a prostituted child (act) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. engaged in an act of prostitution of a child or by a child,

4. with a child who was not his [her] spouse.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of patronizing a prostituted child (act).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of patronizing a prostituted child (act).

COMMENT

1. *See* § 18-7-406(1)(a), C.R.S. 2015.

2. *See* Instruction F:50 (defining "child"); Instruction F:292 (defining "prostitution by a child"); Instruction F:293 (defining "prostitution of a child").

3. *See People v. Madden*, 111 P.3d 452, 459-60 (Colo. 2005) (the General Assembly did not intend to remove the commercial aspect of prostitution when it enacted the definition of "prostitution of a child" in section 18-7-401(7); "the crime of 'patronizing a prostituted child' requires an exchange of something of value, a commercial transaction. Such a commercial transaction must occur between the patron — i.e., the person having the sexual contact with the child — or between the patron and the one inducing the child to participate in the sexual act,

the pimp. It is precisely this exchange of something of value between the patron and either the pimp or the child that distinguishes this crime from that of sexual assault.").

4. + *See People v. Houser*, 2013 COA 11, ¶¶ 14-27, 337 P.3d 1238, 1244-47 (holding, as a matter of first impression, that a reasonable belief that a child was at least eighteen years old is not defense to charge of patronizing a prostituted child).

5. + In 2015, the Committee added Comment 4, citing to *People v. Houser*, *supra*.

7-4:12 PATRONIZING A PROSTITUTED CHILD (PLACE)

The elements of the crime of patronizing a prostituted child (place) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. entered or remained in a place of prostitution,

4. with intent,

5. to engage in an act of prostitution of a child or by a child,

6. with a child who was not his [her] spouse.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of patronizing a prostituted child (place).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of patronizing a prostituted child (place).

COMMENT

1. *See* § 18-7-406(1)(b), C.R.S. 2015.

2. *See* Instruction F:50 (defining "child"); Instruction F:185 (defining "with intent"); Instruction F:292 (defining "prostitution by a child"); Instruction F:293 (defining "prostitution of a child").

3. *See People v. Madden*, 111 P.3d 452, 459-60 (Colo. 2005) (the General Assembly did not intend to remove the commercial aspect of prostitution when it enacted the definition of "prostitution of a child" in section 18-7-401(7); "the crime of

'patronizing a prostituted child' requires an exchange of something of value, a commercial transaction. Such a commercial transaction must occur between the patron — i.e., the person having the sexual contact with the child — or between the patron and the one inducing the child to participate in the sexual act, the pimp. It is precisely this exchange of something of value between the patron and either the pimp or the child that distinguishes this crime from that of sexual assault.").

7-4:13.SP CHILD PROSTITUTION CRIMES – SPECIAL INSTRUCTION (IGNORANCE OR REASONABLE BELIEF IS NOT A DEFENSE)

It is no defense to a charge of [insert name(s) of offense(s) from Article 7, Part 4] that the defendant did not know the child's age, or that he [she] reasonably believed the child to be eighteen years of age or older.

COMMENT

1. *See* 18-7-407, C.R.S. 2015 (applicable to "any criminal prosecution under sections 18-7-402 to 18-7-407").

+ CHAPTER 7-7

SEXUAL CONDUCT IN A CORRECTIONAL INSTITUTION

COMMENTS ON CHAPTER USE

1. + The Committee added this chapter in 2015.

7-7:01 SEXUAL CONDUCT IN A CORRECTIONAL INSTITUTION

The elements of the crime of sexual conduct in a correctional institution are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was an employee, contract employee, or volunteer of a correctional institution or an individual who performed work or volunteer functions in a correctional institution, and

4. engaged in sexual conduct,

5. with a person who was in lawful custody in a correctional institution.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of sexual conduct in a correctional institution.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of sexual conduct in a correctional institution.

COMMENT

1. *See* § 18-7-701(1), C.R.S. 2015.

2. *See* Instruction F:75.5 (defining "correctional institution"); Instruction F:336.5 (defining "sexual conduct"); *see also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

3. The statute provides for different classifications of offense depending on two separate criteria. The first is the type of sexual conduct, i.e., whether it involved (a) either sexual intrusion or sexual penetration, or (b) solely sexual contact. *See* § 18-7-701(3–5), C.R.S. 2015. The second is the defendant's work status, i.e., whether the defendant was an employee of the correctional institution or was instead a volunteer. *See id.* The Committee has drafted separate interrogatories to address these issues. *See* Instruction 7-7:02.INT; Instruction 7-7:03.INT. The court, however, should only issue one or both of these interrogatories if the respective issues are subject to dispute. Additionally, the statute provides for the most severe form of punishment if both (a) the sexual conduct involved sexual intrusion and/or penetration, and (b) the defendant was an employee. § 18-7-701(3). It provides for an intermediate level of punishment if either (a) the sexual conduct involved solely sexual contact, but the defendant was an employee, § 18-7-701(4)(a), or (b) the sexual conduct involved sexual intrusion and/or penetration, but the defendant was a volunteer, § 18-7-701(4)(b). Finally, it provides for the least severe form of punishment if the sexual conduct involved solely sexual contact and the defendant was a volunteer. § 18-7-701(5).

4. The statute does not define "lawful custody." If there is a dispute whether the alleged victim was "in lawful custody," the court should consider whether the issue is a legal or factual matter. If the latter, the court should draft a supplemental instruction to guide the jury. *Cf. People v. Lanzieri*, 25 P.3d 1170, 1173 (Colo. 2001) ("Informalities or irregularities in a defendant's confinement do not by themselves make custody unlawful for the purposes of" Colorado's escape statute.); *People v. West*, 603 P.2d 967, 968 (Colo. App. 1979) (rejecting the defendant's argument that the trial court erred "in not instructing the jury on the lawfulness of his confinement at a detention facility" because there was "no express requirement that persons convicted under [the statute at issue] be lawfully confined").

7-7:02.INT SEXUAL CONDUCT IN A CORRECTIONAL INSTITUTION – INTERROGATORY (TYPE OF CONDUCT)

If you find the defendant not guilty of sexual conduct in a correctional institution, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual conduct in a correctional institution, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the sexual conduct involve more than simply sexual contact? (Answer "Yes" or "No")

The sexual conduct involved more than simply sexual contact only if:

1. the sexual conduct included sexual intrusion or sexual penetration.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-7-701(3-5), C.R.S. 2015.

2. *See* Instruction F:336.5 (defining "sexual conduct"); Instruction F:337 (defining "sexual contact"); Instruction F:340 (defining "sexual intrusion"); Instruction F:343 (defining "sexual penetration").

3. If there is no dispute regarding the type of sexual conduct at issue, the court should not issue this interrogatory. *See* Instruction 7-7:01, Comment 3.

7-7:03.INT SEXUAL CONDUCT IN A CORRECTIONAL INSTITUTION – INTERROGATORY (WORK STATUS)

If you find the defendant not guilty of sexual conduct in a correctional institution, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual conduct in a correctional institution, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant work in a correctional institution, other than as a volunteer? (Answer "Yes" or "No")

The defendant worked in a correctional institution, other than as a volunteer, only if:

1. the defendant was an employee or contract employee of a correctional institution or was an employee, contract employee, or individual who performed work functions in a correctional institution.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-7-701(3-5), C.R.S. 2015.

2. *See* Instruction F:75.5 (defining "correctional institution").

3. If there is no dispute regarding the defendant's work status, the court should not issue this interrogatory. *See* Instruction 7-7:01, Comment 3.

4. The statutory subsections prompting this interrogatory provide for a more severe classification of offense if the sexual conduct "is committed by an employee or contract employee of a correctional institution or by an employee, contract employee, or individual who performs work functions in a correctional institution *or for the department of corrections, the department of human services, or a community corrections program*." § 18-7-701(3), (4)(a) (emphasis added). Although the majority of this language appears in the statutory subsection that defines the actual crime of "sexual conduct in a correctional institution," *see* § 18-7-701(1), that subsection makes no reference to an individual who performs work functions "for the department of corrections, the department of human services, or a community corrections program." For this reason, the Committee has not included such language in its model interrogatory.

+ CHAPTER 7-8

CRIMINAL INVASION OF PRIVACY

7-8:01 CRIMINAL INVASION OF PRIVACY

COMMENTS ON CHAPTER USE

1. + The Committee added this chapter in 2015.

7-8:01 CRIMINAL INVASION OF PRIVACY

The elements of the crime of criminal invasion of privacy are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. observed or took a photograph of another person's intimate parts, in a situation where the person observed or photographed had a reasonable expectation of privacy,

5. without that person's consent.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal invasion of privacy.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal invasion of privacy.

COMMENT

1. *See* § 18-7-801(1), C.R.S. 2015.

2. *See* Instruction F:186 (defining "intimate parts"); Instruction F:195 (defining "knowingly"); Instruction F:276.5 (defining "photograph" (criminal invasion of privacy)).

CHAPTER 8-1

OBSTRUCTION OF PUBLIC JUSTICE

8-1:01 OBSTRUCTING GOVERNMENTAL OPERATIONS

The elements of the crime of obstructing governmental operations are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. intentionally,

4. obstructed, impaired, or hindered,

5. the performance of a governmental function by a public servant,

6. by using or threatening to use violence, force, or physical interference or obstacle.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of obstructing governmental operations.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of obstructing governmental operations.

COMMENT

1. *See* § 18-8-102(1), C.R.S. 2015.

2. *See* Instruction F:165 (defining "governmental function"); Instruction F:185 (defining "intentionally"); Instruction F:306 (defining "public servant").

3. *See* Instruction H:50 (affirmative defenses of "public servant," "arrest," and "labor dispute").

8-1:02 RESISTING ARREST (FORCE OR VIOLENCE)

The elements of the crime of resisting arrest (force or violence) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. prevented or attempted to prevent a peace officer, acting under color of his [her] official authority, from effecting an arrest of the defendant or another,

5. by using or threatening to use physical force or violence against the peace officer or another.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of resisting arrest (force or violence).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of resisting arrest (force or violence).

COMMENT

1. *See* § 18-8-103(1)(a), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:264 (defining "peace officer"); Instruction F:377 (defining "under color of his [her] official authority"); +.

3. *See People v. Fuller*, 781 P.2d 647, 650 (Colo. 1989) ("The general self-defense provision in section 18-1-704 therefore permits a person to defend himself when he reasonably believes that unreasonable or excessive force, as proscribed by section 18-1-707(1)(a), is being used by law enforcement officers or

that its use is imminent. Section 18-8-103(2), concerning resisting arrest, simply establishes that this same rule applies when an arrest is unlawful, thus rejecting the common law tradition that a person could resist an unlawful arrest even when excessive force was not used." (footnote omitted)).

4. + In the absence of case law on point, the Committee takes no position on whether the word "attempted" in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

5. + In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 4.

8-1:03 RESISTING ARREST (ANY MEANS)

The elements of the crime of resisting arrest are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. prevented or attempted to prevent a peace officer, acting under color of his [her] official authority, from effecting an arrest of the defendant or another,

5. using any means, other than using or threatening to use physical force or violence against the peace officer or another, which created a substantial risk of causing bodily injury to the peace officer or another.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of resisting arrest.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of resisting arrest.

COMMENT

1. *See* § 18-8-103(1)(b), C.R.S. 2015.

2. *See* Instruction F:36 (defining "bodily injury"); Instruction F:195 (defining "knowingly"); Instruction F:264 (defining "peace officer"); Instruction F:377 (defining "under color of his [her] official authority"); +.

3. *See* Instruction 8-1:02, Comment 3 (discussing self-defense as an affirmative defense to a charge of resisting arrest).

4. + In the absence of case law on point, the Committee takes no position on whether the word "attempted" in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

5. + In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 4.

8-1:04.SP RESISTING ARREST – SPECIAL INSTRUCTION (UNLAWFUL ARREST NOT A DEFENSE)

It is no defense to a charge of resisting arrest that the peace officer was attempting to make an arrest which in fact was unlawful, if he [she] was acting under color of his [her] official authority, and in attempting to make the arrest he [she] was not resorting to unreasonable or excessive force giving rise to the right of self-defense.

A peace officer acts "under color of his [her] official authority" when, in the regular course of assigned duties, he [she] is called upon to make, and does make, a judgment in good faith based upon surrounding facts and circumstances that an arrest should be made by him [her].

COMMENT

1. *See* § 18-8-103(2), C.R.S. 2015.

2. *See People v. Fuller*, 781 P.2d 647, 650 (Colo. 1989) ("The general self-defense provision in section 18–1–704 therefore permits a person to defend himself when he reasonably believes that unreasonable or excessive force, as proscribed by section 18–1–707(1)(a), is being used by law enforcement officers or that its use is imminent. Section 18–8–103(2), concerning resisting arrest, simply establishes that this same rule applies when an arrest is unlawful, thus rejecting the common law tradition that a person could resist an unlawful arrest even when excessive force was not used." (footnote omitted)).

8-1:05 OBSTRUCTING A PEACE OFFICER, FIREFIGHTER, EMERGENCY MEDICAL SERVICES PROVIDER, RESCUE SPECIALIST, OR VOLUNTEER

The elements of the crime of obstructing a [peace officer] [firefighter] [emergency medical services provider] [rescue specialist] [volunteer] are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. by using or threatening to use violence, force, physical interference, or an obstacle,

5. obstructed, impaired, or hindered,

6. the enforcement of the penal law or the preservation of the peace by a peace officer, acting under color of his [her] official authority; the prevention, control, or abatement of fire by a firefighter, acting under color of his [her] official authority; the administration of medical treatment or emergency assistance by an emergency medical service provider or rescue specialist, acting under color of his [her] official authority; or the administration of emergency care or emergency assistance by a volunteer, acting in good faith to render such care or assistance without compensation at the place of an emergency or accident.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of obstructing a [peace officer] [firefighter] [emergency medical services provider] [rescue specialist] [volunteer].

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not

guilty of obstructing a [peace officer] [firefighter] [emergency medical services provider] [rescue specialist] [volunteer].

COMMENT

1. *See* § 18-8-104(1)(a), C.R.S. 2015.

2. *See* Instruction F:120 (defining "emergency medical service provider"); Instruction F:195 (defining "knowingly"); Instruction F:264 (defining "peace officer"); Instruction F:314 (defining "rescue specialist"); Instruction F:378 (defining "under color of his [her] official authority"); *see also* F:157 (defining "firefighter," for purposes of assault offenses).

3. *Compare Dempsey v. People*, 117 P.3d 800, 811 (Colo. 2005) (evidence sufficient to support conviction for obstructing; "although mere verbal opposition alone may not suffice, a combination of statements and acts by the defendant, including threats of physical interference or interposition of an obstacle can form the crime of obstruction"), *with Kaufman v. Higgs*, 697 F.3d 1297, 1302 (10th Cir. 2012) (distinguishing *Dempsey*, and holding that defendant could not be arrested for obstructing merely because he simply refused to speak to a police officer).

8-1:06 OBSTRUCTING A PEACE OFFICER OR FIREFIGHTER (ANIMAL USED IN LAW ENFORCEMENT OR FIRE PREVENTION ACTIVITIES)

The elements of the crime of obstructing a peace officer or firefighter (animal used in law enforcement or fire prevention activities) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. by using or threatening to use violence, force, physical interference, or an obstacle,

5. obstructed, impaired, or hindered,

6. any animal being used in law enforcement or fire prevention activities.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of obstructing a peace officer or firefighter (animal used in law enforcement or fire prevention activities).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of obstructing a peace officer or firefighter (animal used in law enforcement or fire prevention activities).

COMMENT

1. *See* § 18-8-104(1)(b), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:264 (defining "peace officer"); *see also* F:157 (defining "firefighter," for purposes of assault offenses).

8-1:07.SP OBSTRUCTING A PEACE OFFICER – SPECIAL INSTRUCTION (OFFICER'S ILLEGAL ACTION NOT A DEFENSE)

It is not a defense to a charge of obstructing a peace officer that the peace officer was acting in an illegal manner, if he [she] was acting under color of his [her] official authority.

A peace officer acts "under color of his or her official authority" if, in the regular course of assigned duties, he [she] makes a judgment in good faith based on surrounding facts and circumstances that he [she] must act to enforce the law or preserve the peace.

COMMENT

1. *See* § 18-8-104(2), C.R.S. 2015.

2. *See People v. Barrus*, 232 P.3d 264, 269 (Colo. App. 2009) ("self-defense is an available defense against the charge of obstructing a peace officer when a defendant reasonably believes that unreasonable or excessive force is being used by the peace officer"); *see also People v. Fuller*, 781 P.2d 647, 650 (Colo. 1989) ("The general self-defense provision in section 18–1–704 therefore permits a person to defend himself when he reasonably believes that unreasonable or excessive force, as proscribed by section 18–1–707(1)(a), is being used by law enforcement officers or that its use is imminent. Section 18–8–103(2), concerning resisting arrest, simply establishes that this same rule applies when an arrest is unlawful, thus rejecting the common law tradition that a person could resist an unlawful arrest even when excessive force was not used." (footnote omitted)).

8-1:08 ACCESSORY TO CRIME

The elements of the crime of accessory to crime are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to hinder, delay, or prevent the discovery, detection, apprehension, prosecution, conviction, or punishment of another for the commission of a crime,

5. rendered assistance to the other person.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of accessory to crime.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of accessory to crime.

COMMENT

1. *See* § 18-8-105(1), C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent"); Instruction F:311 (defining "render assistance").

3. *See People v. Young*, 555 P.2d 1160, 1162 (Colo. 1976) ("The relevant standard for knowledge in regard to the accessory statute is whether defendant knew the principal had committed a crime. It is not necessary for the defendant to have known that the crime committed was of a particular class.").

4. *See Barreras v. People*, 636 P.2d 686, 689 (Colo. 1981) (section 18-8-105 applies to crimes that are defined outside of the criminal code).

8-1:09.INT ACCESSORY – INTERROGATORY (KNOWLEDGE OF CLASS ONE OR TWO FELONY OFFENSE OR CHARGE)

If you find the defendant not guilty of accessory to crime, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of accessory to crime, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

> Did the defendant know that the person had committed, been charged with, or been convicted of the crime[s] of [insert name(s) of class one or two felony offense(s); if more than one, list in the disjunctive]? (Answer "Yes" or "No")

The defendant knew that the person had committed, had been charged with, or had been convicted of the crime[s] of [insert name(s) of felony offense(s); if more than one, list in the disjunctive] only if:

1. the defendant knew that the person being assisted had committed, or had been convicted of, or was charged by pending information, indictment, or complaint with the crime[s] of [insert name(s) of class one or two felony offense(s); if more than one, list in the disjunctive].

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-8-105(3), C.R.S. 2015.

2. *See, e.g.*, Instruction E:28 (special verdict form).

8-1:10.INT ACCESSORY – INTERROGATORY (KNOWLEDGE THAT THE PERSON WAS SUSPECTED OF OR WANTED FOR A CLASS ONE OR TWO FELONY)

If you find the defendant not guilty of accessory to crime, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of accessory to crime, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

> Did the defendant know that the person was suspected of or wanted for the crime[s] of [insert name(s) of class one or two felony offense(s); if more than one, list in the disjunctive]? (Answer "Yes" or "No")

The defendant knew the person was a suspected of or wanted for the crime[s] of [insert name(s) of class one or two felony offense(s); if more than one, list in the disjunctive] only if:

1. the defendant knew that the person being assisted was suspected of or wanted for the crime[s] of [insert name of class one or two felony offense(s) ; if more than one, list in the disjunctive].

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-8-105(4), C.R.S. 2015.

2. *See*, *e.g.*, Instruction E:28 (special verdict form).

8-1:11.INT ACCESSORY – INTERROGATORY (KNOWLEDGE OF FELONY OFFENSE OR CHARGE, OR KNOWLEDGE THAT THE PERSON WAS SUSPECTED OF OR WANTED FOR A FELONY)

If you find the defendant not guilty of accessory to crime, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of accessory to crime, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

> Did the defendant know that the person had committed, been charged with, been convicted of, or was suspected or wanted for the crime[s] of [insert the name(s) of the relevant felony offense(s)]? (Answer "Yes" or "No")

The defendant knew that the person had committed, been charged with, been convicted of, or was suspected or wanted for the crime[s] of [insert the name(s) of the relevant felony offense(s)] only if:

1. the defendant knew that the person being assisted had committed, or had been convicted of, or was charged by pending information, indictment, or complaint with, or was suspected or wanted for the crime[s] of [insert the name(s) of the relevant felony offense(s) ; if more than one, list in the disjunctive].

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-8-105(5), C.R.S. 2015 (being an accessory to any felony other than a class one or two felony is a class five felony, except that being an accessory to a class six felony is a class six felony).

2. *See, e.g.*, Instruction E:28 (special verdict form).

3. This interrogatory is suitable for use with any charge of being an accessory to crime in violation of section 18-8-105(5). However, because the offense level for being an accessory to a class three, class four, or class five felony is different from the offense level for being an accessory to a class six felony, use a separate interrogatory for the determination with respect to a class six felony in any case where the defendant is charged with being an accessory *both* to a class six felony *and* to a class three, class four, or class five felony.

8-1:12.INT ACCESSORY – INTERROGATORY (KNOWLEDGE OF MISDEMEANOR OFFENSE OR CHARGE, OR KNOWLEDGE THAT THE PERSON WAS SUSPECTED OF OR WANTED FOR A MISDEMEANOR)

If you find the defendant not guilty of accessory to crime, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of accessory to crime, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

> Did the defendant know that the person had committed, been charged with, been convicted of, or was suspected or wanted for the crime[s] of [insert name(s) of misdemeanor offense(s); if more than one, list in the disjunctive]? (Answer "Yes" or "No")

The defendant knew that the person had committed, been charged with, been convicted of, or was suspected or wanted for the crime[s] of [insert name(s) of misdemeanor offense(s); if more than one, list in the disjunctive] only if:

1. the defendant knew that the person being assisted had committed, or had been convicted of, or was charged by pending information, indictment, or complaint with, or was suspected or wanted for the crime[s] of [insert name(s) misdemeanor offense(s); if more than one, list in the disjunctive].

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-8-105(6), C.R.S. 2015.

2. *See, e.g.*, Instruction E:28 (special verdict form).

8-1:13 REFUSAL TO PERMIT INSPECTION (REFUSAL TO PRODUCE OR MAKE AVAILABLE)

The elements of the crime of refusal to permit inspection (refusal to produce or make available) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowing that a public servant was legally authorized to inspect property,

4. refused to produce or make available the property for inspection at a reasonable hour.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of refusal to permit inspection (refusal to produce or make available).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of refusal to permit inspection (refusal to produce or make available).

COMMENT

1. *See* § 18-8-106(1)(a), C.R.S. 2015.

2. *See* Instruction F:290 (defining "property"); Instruction F:306 (defining "public servant"); *see also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

3. Section 18-8-106(2), C.R.S. 2015, defines a "legally authorized inspection" as "any lawful search, sampling, testing, or other examination of property, in connection with the regulation of a business or occupation, that is authorized by statute or lawful regulatory provision." Accordingly, in cases where there is a dispute concerning the lawfulness of the inspection, the court should resolve the issue(s) of law and draft a supplemental instruction explaining its conclusion(s).

8-1:14 REFUSAL TO PERMIT INSPECTION (REFUSAL WHEN AVAILABLE FOR INSPECTION)

The elements of the crime of refusal to permit inspection (refusal when available for inspection) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowing that a public servant was legally authorized to inspect property,

4. when the property was available for inspection,

5. refused to permit the inspection of at a reasonable hour.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of refusal to permit inspection (refusal when available for inspection).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of refusal to permit inspection (refusal when available for inspection).

COMMENT

1. *See* § 18-8-106(1)(b), C.R.S. 2015.

2. *See* Instruction F:290 (defining "property"); Instruction F:306 (defining "public servant"); *see also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

3. Section 18-8-106(2), C.R.S. 2015, defines a "legally authorized inspection" as "any lawful search, sampling, testing, or other examination of property, in connection with the regulation of a business or occupation, that is authorized by statute or lawful regulatory provision." Accordingly, in cases where there is a dispute concerning the lawfulness of the inspection, the court should resolve the issue(s) of law and draft a supplemental instruction explaining its conclusion(s).

8-1:15 REFUSING TO AID A PEACE OFFICER

The elements of the crime of refusing to aid a peace officer are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was eighteen years of age or older, and

4. was commanded, by a person known to him [her] to be a peace officer,

5. to aid the peace officer in effecting or securing an arrest or preventing the commission of any offense by another, and

6. unreasonably refused or failed to aid the peace officer.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of refusing to aid a peace officer.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of refusing to aid a peace officer.

COMMENT

1. *See* § 18-8-107, C.R.S. 2015.

2. *See* Instruction F:263 (defining "peace officer").

8-1:16 COMPOUNDING (PROSECUTION)

The elements of the crime of compounding (prosecution) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. accepted or agreed to accept,

4. any pecuniary benefit,

5. as consideration,

6. for refraining from seeking prosecution of an offender.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of compounding (prosecution).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of compounding (prosecution).

COMMENT

1. *See* § 18-8-108(1)(a), C.R.S. 2015.

2. *See* Instruction F:265.5 (defining "pecuniary benefit"); *see also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

3. *See* Instruction H:51 (affirmative defense of "restitution or indemnification").

4. The term "consideration" is not defined in section 18-8-108. *See, e.g., Black's Law Dictionary* 370 (10th ed. 2014) (defining "consideration" as: "Something (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee."). The definition that appears in section 4-3-303(b), C.R.S. 2015, should not be used because it is limited to contracts.

8-1:17 COMPOUNDING (REPORTING)

The elements of the crime of compounding (reporting) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. accepted or agreed to accept,

4. any pecuniary benefit,

5. as consideration for,

6. refraining from reporting to law enforcement authorities the commission or suspected commission of any crime or information relating to a crime.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of compounding (reporting).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of compounding (reporting).

COMMENT

1. *See* § 18-8-108(1)(b), C.R.S. 2015.

2. *See* Instruction F:265.5 (defining "pecuniary benefit"); *see also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

3. *See* Instruction H:51 (affirmative defense of "restitution or indemnification").

4. The term "consideration" is not defined in section 18-8-108. *See, e.g., Black's Law Dictionary* 370 (10th ed. 2014) (defining "consideration" as: "Something (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee."). The definition that appears in section 4-3-303(b), C.R.S. 2015, should not be used because it is limited to contracts.

8-1:18 CONCEALING DEATH

The elements of the crime of concealing death are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. concealed the death of another person, [including a fetus born dead,] and

4. thereby prevented a determination of the cause or circumstances of death.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of concealing death.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of concealing death.

COMMENT

1. *See* § 18-8-109, C.R.S. 2015.

2. *See* Instruction F:20 (defining "another person"); *see also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

8-1:19 FALSE REPORT OF EXPLOSIVES, WEAPONS, OR HARMFUL SUBSTANCES

The elements of the crime of false report of explosives, weapons, or harmful substances are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. reported to any other person that a bomb or other explosive, any chemical or biological agent, any poison or weapon, or any harmful radioactive substance had been placed in any public or private place or vehicle designed for the transportation of persons or property,

4. knowing that the report was false.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of false report of explosives, weapons, or harmful substances.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of false report of explosives, weapons, or harmful substances.

COMMENT

1. *See* § 18-8-110, C.R.S. 2015.

2. *See* Instruction F:38 (defining "bomb"); Instruction F:303 (defining "public place").

8-1:20 FALSE REPORTING TO AUTHORITIES (CAUSING A FALSE ALARM)

The elements of the crime of false reporting to authorities (causing a false alarm) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. caused by any means, including but not limited to activation,

5. a false alarm of fire or other emergency or other a false emergency exit alarm to sound or to be transmitted to or within an official or volunteer fire department, ambulance service, law enforcement agency, or any other government agency which deals with emergencies involving danger to life or property.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of false reporting to authorities (causing a false alarm).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of false reporting to authorities (causing a false alarm).

COMMENT

1. *See* § 18-8-111(1)(a)(I), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly").

8-1:21.INT FALSE REPORTING TO AUTHORITIES (CAUSING A FALSE ALARM)- INTERROGATORY (DURING COMMISSION OF A CRIME)

If you find the defendant not guilty of false reporting to authorities (causing a false alarm), you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of false reporting to authorities (causing a false alarm), you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the false reporting committed during another crime? (Answer "Yes" or "No")

The false reporting was committed during another crime only if:

1. the defendant committed the false reporting to authorities during the commission of [insert the name(s) of the other criminal offense(s) if alleged in the charging document; if not, use the statutory phrase: "another criminal offense"].

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-8-111(2), C.R.S. 2015 (specifying that this sentence enhancement provision applies only to violations of the false alarm provisions in section 18-8-111(1)(a), C.R.S. 2015).

2. *See, e.g.*, Instruction E:28 (special verdict form).

3. Although section 18-8-111(2) does not require that the other criminal offense(s) be specified, the Committee recommends that the offense(s) be identified if named in the charging document.

8-1:22 FALSE REPORTING TO AUTHORITIES (PREVENTING ALARM)

The elements of the crime of false reporting to authorities (preventing alarm) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. prevented by any means, including but not limited to deactivation,

5. a legitimate fire alarm, emergency exit alarm, or other emergency alarm from sounding or from being transmitted to or within an official or volunteer fire department, ambulance service, law enforcement agency, or any other government agency that deals with emergencies involving danger to life or property.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of false reporting to authorities (preventing alarm).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of false reporting to authorities (preventing alarm).

COMMENT

1. *See* § 18-8-111(1)(a)(II), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly").

8-1:23 FALSE REPORTING TO AUTHORITIES (DID NOT OCCUR)

The elements of the crime of false reporting to authorities (did not occur) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. made a report or caused the transmission of a report to law enforcement authorities,

5. of a crime or other incident within their official concern,

6. when he [she] knew the crime or other incident did not occur.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of false reporting to authorities (did not occur).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of false reporting to authorities (did not occur).

COMMENT

1. *See* § 18-8-111(1)(b), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly").

8-1:24 FALSE REPORTING TO AUTHORITIES (PRETENDING)

The elements of the crime of false reporting to authorities (pretending) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. made a report or caused the transmission of a report to law enforcement authorities,

5. pretending to furnish information relating to an offense or other incident within their official concern,

6. when he [she] knew that he [she] had no such information, or knew that the information was false.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of false reporting to authorities (pretending).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of false reporting to authorities (pretending).

COMMENT

1. *See* § 18-8-111(1)(c), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly").

8-1:25 FALSE REPORTING TO AUTHORITIES (FALSE IDENTIFYING INFORMATION)

The elements of the crime of false reporting to authorities (false identifying information) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. provided false identifying information,

5. to law enforcement authorities.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of false reporting to authorities (false identifying information).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of false reporting to authorities (false identifying information).

COMMENT

1. *See* § 18-8-111(1)(d), C.R.S. 2015.

2. *See* Instruction F:175 (defining "identifying information"); Instruction F:195 (defining "knowingly").

3. *See also* § 18-8-802(2), C.R.S. 2015 (false reporting to authorities – excessive force); § 18-9-209(3), C.R.S. 2015 (false reporting of animal cruelty).

8-1:26 IMPERSONATING A PEACE OFFICER

The elements of the crime of impersonating a peace officer are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. falsely pretended to be a peace officer, and

4. performed an act in that pretended capacity.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of impersonating a peace officer.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of impersonating a peace officer.

COMMENT

1. *See* § 18-8-112(1), C.R.S. 2015.

2. *See* Instruction F:263 (defining "peace officer").

8-1:27 IMPERSONATING A PUBLIC SERVANT

The elements of the crime of impersonating a public servant are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. falsely pretended to be a public servant, other than a peace officer, and

4. performed any act in that pretended capacity.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of impersonating a public servant.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of impersonating a public servant.

COMMENT

1. *See* § 18-8-113(1), C.R.S. 2015.

2. *See* Instruction F:263 (defining "peace officer"); Instruction F:306 (defining "public servant").

8-1:28.SP IMPERSONATING A PUBLIC SERVANT – SPECIAL INSTRUCTION (FICTITIOUS OFFICE)

It is no defense to a charge of impersonating a public servant that the office the defendant pretended to hold did not in fact exist.

COMMENT

1. *See* § 18-8-113(2), C.R.S. 2015.

8-1:29 ABUSE OF PUBLIC RECORDS (FALSITY)

The elements of the crime of abuse of public records (falsity) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. made a false entry in or falsely altered any public record.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of abuse of public records (falsity).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of abuse of public records (falsity).

COMMENT

1. *See* § 18-8-114(1)(a), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:304 (defining "public record").

8-1:30 ABUSE OF PUBLIC RECORDS (IMPAIRMENT)

The elements of the crime of abuse of public records (impairment) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowing that he [she] lacked the authority to do so,

4. knowingly,

5. destroyed, mutilated, concealed, removed, or impaired the availability of any public record.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of abuse of public records (impairment).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of abuse of public records (impairment).

COMMENT

1. *See* § 18-8-114(1)(b), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:304 (defining "public record").

8-1:31 ABUSE OF PUBLIC RECORDS (REFUSAL)

The elements of the crime of abuse of public records (refusal) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowing that he [she] lacked the authority to retain the record,

4. refused to deliver up a public record in his [her] possession upon proper request of any person lawfully entitled to receive such record.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of abuse of public records (refusal).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of abuse of public records (refusal).

COMMENT

1. *See* § 18-8-114(1)(c), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:281 (defining "possession"); Instruction F:304 (defining "public record"); *see also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

8-1:32 ABUSE OF PUBLIC RECORDS (ALTERATION)

The elements of the crime of abuse of public records (alteration) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowing that he [she] had not been authorized by the custodian of the public record to do so,

4. knowingly,

5. altered any public record.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of abuse of public records (alteration).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of abuse of public records (alteration).

COMMENT

1. *See* § 18-8-114(1)(d), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:304 (defining "public record").

8-1:33 DISARMING A PEACE OFFICER

The elements of the crime of disarming a peace officer are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. without justification, and

5. without consent,

6. removed the firearm or self-defense electronic control device, direct-contact stun device, or other similar device,

7. of a peace officer,

8. who was acting under color of his [her] official authority.

[9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of disarming a peace officer.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of disarming a peace officer.

COMMENT

1. *See* § 18-8-116(1), C.R.S. 2015.

2. *See* Instruction F:265 (defining "peace officer"); *see also* Instruction F:378 (defining "under color of his [her] official authority" for purposes of the offense of obstructing a peace officer).

3. *See People v. Fuller*, 781 P.2d 647, 651 (Colo. 1989) (the defense of self-defense applies to the offense of attempting to disarm a peace officer).

CHAPTER 8-2

ESCAPE AND OFFENSES RELATING TO CUSTODY

8-2:22	ATTEMPT TO ESCAPE (FOLLOWING CONVICTION; COMMUNITY CORRECTIONS OR INTENSIVE SUPERVISION PAROLE)
8-2:23	ATTEMPT TO ESCAPE (HELD OR CHARGED)
8-2:24.SP	ATTEMPT TO ESCAPE – SPECIAL INSTRUCTION (CONDITIONAL RELEASE; STAFF SECURE FACILITY)
8-2:25	ACTIVE PARTICIPATION IN A RIOT
8-2:26.INT	ACTIVE PARTICIPATION IN A RIOT – INTERROGATORY (DEADLY WEAPON OR DESTRUCTIVE DEVICE)
8-2:27	DISOBEYING AN ORDER RELATED TO A RIOT IN A DETENTION FACILITY
8-2:28	VIOLATION OF BAIL BOND CONDITIONS
8-2:29	UNAUTHORIZED RESIDENCY BY AN ADULT OFFENDER FROM ANOTHER STATE (NON-RESIDENT)
8-2:30	UNAUTHORIZED RESIDENCY BY AN ADULT OFFENDER FROM ANOTHER STATE (RESIDENT)

8-2:01 AIDING ESCAPE

The elements of the crime of aiding escape are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. aided, abetted, or assisted another person to escape, or to attempt to escape, from custody or confinement.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aiding escape.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aiding escape.

COMMENT

1. *See* § 18-8-201(1), C.R.S. 2015.

2. *See* Instruction F:23 (defining "assist" by referring to the definition of "render assistance" in Instruction F:311); Instruction F:129 (defining "escape" for purposes of this offense); Instruction F:195 (defining "knowingly"); +.

3. The penalty provisions of section 18-8-201(4-6), C.R.S. 2015, are based on the level of offense for which the defendant was held or convicted. This determination is a matter of law for the court to resolve.

4. + In the absence of case law on point, the Committee takes no position on whether the word "attempt" in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should

provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

5. + In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 4.

8-2:02 AIDING ESCAPE FROM AN INSTITUTION FOR THE CARE AND TREATMENT OF PERSONS WITH MENTAL ILLNESS

The elements of the crime of aiding escape from an institution for the care and treatment of persons with mental illness are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. aided the escape of a person who was an inmate of an institution for the care and treatment of persons with mental illness, and

5. knew that the person aided was confined in the institution pursuant to a commitment under [insert the name of the relevant type of insanity or incompetency proceeding from Article 8 of Title 16].

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aiding escape from an institution for the care and treatment of persons with mental illness.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aiding escape from an institution for the care and treatment of persons with mental illness.

COMMENT

1. *See* § 18-8-201.1, C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly").

8-2:03 INDUCING PRISONERS TO ABSENT SELVES

The elements of the crime of inducing prisoners to absent selves are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. invited, enticed, solicited, or induced any prisoner in custody or confinement to absent himself [herself] from his [her] work, or substantially delayed or hindered a prisoner in his [her] work.

[4. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of inducing prisoners to absent selves.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of inducing prisoners to absent selves.

COMMENT

1. *See* § 18-8-202, C.R.S. 2015.

2. *See also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

8-2:04 INTRODUCING CONTRABAND IN THE FIRST DEGREE (INTRODUCTION INTO)

The elements of the crime of introducing contraband in the first degree (introduction into) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly and unlawfully,

4. introduced, or attempted to introduce, a dangerous instrument, malt, vinous, or spirituous liquor, fermented malt beverage, controlled substance, or marijuana or marijuana concentrate,

5. into a detention facility or at any location where an inmate was or was likely to be located,

6. while the inmate was in the custody and under the jurisdiction of a political subdivision of the state of Colorado or the department of corrections, but not on parole.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of introducing contraband in the first degree (introduction into).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of introducing contraband in the first degree (introduction into).

COMMENT

1. *See* § 18-8-203(1)(a), C.R.S. 2015.

2. *See* Instruction F:69 (defining "contraband"); Instruction F:85 (defining "dangerous instrument"); Instruction F:96 (defining "detention facility"); Instruction F:148 (defining "fermented malt beverage"); Instruction F:195 (defining "knowingly"); Instruction F:205 (defining "malt liquor"); Instruction F:208 (defining "marijuana"); Instruction F:210 (defining "marijuana concentrate"); Instruction F:390 (defining "vinous liquors"); +.

3. *See People v. Iversen*, 2013 COA 40, ¶ 25, 321 P.3d 573, 578 ("[W]e interpret section 18-8-203 as requiring only that a defendant know that he or she is introducing, or attempting to introduce, contraband into the detention facility; he or she need not know, in addition, that his or her conduct in introducing, or attempting to introduce, contraband into the detention facility, is unlawful (i.e., without legal excuse, justification, or authorization).").

4. + In the absence of case law on point, the Committee takes no position on whether the word "attempted" in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

5. + In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 4.

8-2:05 INTRODUCING CONTRABAND IN THE FIRST DEGREE (MAKING WHILE CONFINED)

The elements of the crime of introducing contraband in the first degree (making while confined) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly and unlawfully,

4. while confined in a detention facility,

5. made any dangerous instrument, controlled substance, marijuana, or marijuana concentrate, or alcohol.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of introducing contraband in the first degree (making while confined).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of introducing contraband in the first degree (making while confined).

COMMENT

1. *See* § 18-8-203(1)(b), C.R.S. 2015.

2. *See* Instruction F:85 (defining "dangerous instrument"); Instruction F:96 (defining "detention facility"); Instruction F:195 (defining "knowingly"); Instruction F:208 (defining "marijuana"); Instruction F:210 (defining "marijuana concentrate").

8-2:06 INTRODUCING CONTRABAND IN THE SECOND DEGREE (INTRODUCTION INTO)

The elements of the crime of introducing contraband in the second degree (introduction into) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly and unlawfully,

4. introduced or attempted to introduce contraband,

5. into a detention facility.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of introducing contraband in the second degree (introduction into).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of introducing contraband in the second degree (introduction into).

COMMENT

1. *See* § 18-8-204(1)(a), C.R.S. 2015.

2. *See* Instruction F:70 (defining "contraband"); Instruction F:96 (defining "detention facility"); Instruction F:195 (defining "knowingly"); +.

3. + In the absence of case law on point, the Committee takes no position on whether the word "attempted" in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should

provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

4. + In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 3.

8-2:07 INTRODUCING CONTRABAND IN THE SECOND DEGREE (MAKING WHILE CONFINED)

The elements of the crime of introducing contraband in the second degree (making while confined) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly and unlawfully,

4. while confined in a detention facility,

5. made any contraband.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of introducing contraband in the second degree (making while confined).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of introducing contraband in the second degree (making while confined).

COMMENT

1. *See* § 18-8-204(1)(b), C.R.S. 2015.

2. *See* Instruction F:70 (defining "contraband"); Instruction F:96 (defining "detention facility"); Instruction F:195 (defining "knowingly").

8-2:08 INTRODUCING CONTRABAND IN THE SECOND DEGREE (INTRODUCING WHILE CONFINED)

The elements of the crime of introducing contraband in the second degree (introducing while confined) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly and unlawfully,

4. while confined in a detention facility,

5. introduced or attempted to introduce contraband into a detention facility or at any location where an inmate was likely to be located,

6. while such inmate was in the custody and under the jurisdiction of a political subdivision of the state of Colorado or the department of corrections, but not on parole.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of introducing contraband in the second degree (introducing while confined).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of introducing contraband in the second degree (introducing while confined).

COMMENT

1. *See* § 18-8-204(1.5) C.R.S. 2015.

2. *See* Instruction F:70 (defining "contraband"); Instruction F:96 (defining "detention facility"); Instruction F:195 (defining "knowingly"); +.

3. + In the absence of case law on point, the Committee takes no position on whether the word "attempted" in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

4. + In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 3.

8-2:09 POSSESSION OF CONTRABAND IN THE FIRST DEGREE

The elements of the crime of possession of contraband in the first degree are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. while confined in a detention facility,

4. knowingly,

5. obtained or had in his [her] possession contraband or alcohol.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of possession of contraband in the first degree.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of possession of contraband in the first degree.

COMMENT

1. *See* § 18-8-204.1, C.R.S. 2015.

2. *See* Instruction F:69 (defining "contraband"); Instruction F:96 (defining "detention facility"); Instruction F:195 (defining "knowingly"); Instruction F:281 (defining "possession").

3. Although section 18-8-204.1 incorporates the definition of contraband in section 18-8-203(1)(a), the definition based on that section that appears in Instruction F:69 must be modified when it is used for this offense because the definition includes a "controlled substance," whereas section 18-8-204.1 specifically excludes "contraband specified in section 18-18-

405” (unlawful distribution, manufacturing, dispensing or sale of a controlled substance).

8-2:10.INT POSSESSION OF CONTRABAND IN THE FIRST DEGREE (DANGEROUS INSTRUMENT) – INTERROGATORY

If you find the defendant not guilty of possession of contraband in the first degree (dangerous instrument), you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of possession of contraband in the first degree (dangerous instrument), you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the contraband a dangerous instrument?
(Answer "Yes" or "No")

The contraband was a dangerous instrument only if:

1. the contraband was a firearm, explosive device or substance (including ammunition), knife or sharpened instrument, poison, acid, bludgeon, or projective device, or any other device, instrument, material, or substance which was readily capable of causing or inducing fear of death or bodily injury, the use of which was not specifically authorized.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* §§ 18-8-203(4), 18-8-204.1(2), (3), C.R.S. 2015.

2. *See* Instruction F:85 (defining "dangerous instrument"); *see, e.g.*, Instruction E:28 (special verdict form).

8-2:11 POSSESSION OF CONTRABAND IN THE SECOND DEGREE

The elements of the crime of possession of contraband in the second degree are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. while confined in a detention facility,

4. knowingly,

5. obtained or possessed contraband.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of possession of contraband in the second degree.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of possession of contraband in the second degree.

COMMENT

1. *See* § 18-8-204.2(1), C.R.S. 2015.

2. *See* Instruction F:70 (defining "contraband"); Instruction F:96 (defining "detention facility"); Instruction F:195 (defining "knowingly"); Instruction F:281 (defining "possession").

3. Section 18-8-204.2(1) excludes possession that "is authorized by rule or regulation promulgated by the administrative head of the detention facility." However, the Committee has not drafted a model affirmative defense instruction. In a case where there is a dispute concerning whether the possession was "authorized," the court may be able to resolve this issue as a matter of law and provide the jury

with a supplemental instruction explaining its determination. However, if the issue of law turns on a factual issue, the factual question must be submitted to the jury by means of an interrogatory.

8-2:12 AIDING ESCAPE FROM CIVIL PROCESS

The elements of the crime of aiding escape from civil process are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. aided, abetted, or assisted,

4. the escape of a person,

5. who was in legal custody under civil process.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aiding escape from civil process.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aiding escape from civil process.

COMMENT

1. See § 18-8-205, C.R.S. 2015.

2. *See also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

8-2:13 ASSAULT DURING ESCAPE

The elements of the crime of assault during escape are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was confined in any lawful place of confinement within the state, and

4. while escaping or attempting to escape,

5. committed an assault,

6. with intent,

7. to commit bodily injury upon the person of another,

8. with a deadly weapon, or by any means of force likely to produce serious bodily injury.

[9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of assault during escape.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of assault during escape.

COMMENT

1. *See* § 18-8-206(1), C.R.S. 2015.

2. *See* Instruction F:36 (defining "bodily injury"); Instruction F:88 (defining "deadly weapon"); Instruction F:185 (defining "with intent"); Instruction F:332 (defining "serious bodily injury"); +Instruction 8-2:15 (escape).

3. The felony classification levels for this offense are based on the classification level of the underlying offense for which the defendant was being held. *See* § 18-8-206(1)(a-d), C.R.S. 2015; *see also* § 18-8-210, C.R.S. 2015 (persons in custody or confinement for unclassified offenses). This determination is a matter of law for the court to resolve. *See Massey v. People*, 649 P.2d 1070 (Colo. 1982) ("The classification of the defendant's past offense was a question of law, and the court is justified in taking judicial notice when the facts upon which the legal conclusion is based are unchallenged."). However, "[e]vidence of a prior conviction is an essential element of the offense of escape." *People v. McKnight*, 626 P.2d 678, 683 (Colo. 1981).

4. + In the absence of case law on point, the Committee takes no position on whether the word "attempting" in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

5. + In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 4.

8-2:14 HOLDING HOSTAGES

The elements of the crime of holding hostages are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was in lawful custody or confinement within the state, and

4. while escaping or attempting to escape,

5. held any person hostage or by force or threat of force held any person against his [her] will.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of holding hostages.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of holding hostages.

COMMENT

1. *See* § 18-8-207, C.R.S. 2015.

+2. *See People v. Williams*, 611 P.2d 973, 975 (Colo. 1980) ("The crime of 'holding hostages' includes as an essential element the general intent crime of 'escape.' No additional mental state is specified for the crime of 'holding hostages.' That crime, as well as the crime of 'escape,' is one of general rather than specific intent.").

3. In a case where there is a dispute concerning whether the "custody or confinement" was "lawful," the court should resolve this question of law and provide the jury with a supplemental instruction explaining its determination. However, if the issue

of law turns on a factual question, the factual determination must be submitted to the jury by means of an interrogatory.

4. + In the absence of case law on point, the Committee takes no position on whether the word "attempting" in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

5. + In 2015, the Committee removed Comment 2 (which had cited to Instruction G2:01), renumbered the subsequent elements, and added Comment 4.

8-2:15 ESCAPE (FOLLOWING CONVICTION)

The elements of the crime of escape (following conviction) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was in custody or confinement,

4. following conviction for the crime of [insert name of offense(s)], and

5. knowingly,

6. escaped from custody or confinement.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of escape (following conviction).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of escape (following conviction).

COMMENT

1. *See* § 18-8-208(1), (2), (4), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly").

3. The felony classification levels for this offense are based on the classification level of the underlying offense for which the defendant was being held. *See* § 18-8-208(1), (2), (4), C.R.S. 2015; *see also* § 18-8-210 (persons in custody or confinement for unclassified offenses). This determination is a matter of law for the court to resolve. *See Massey v. People*, 649 P.2d 1070 (Colo. 1982) ("The classification of the

defendant's past offense was a question of law, and the court is justified in taking judicial notice when the facts upon which the legal conclusion is based are unchallenged."). However, "[e]vidence of a prior conviction is an essential element of the offense of escape." *People v. McKnight*, 626 P.2d 678, 683 (Colo. 1981).

4. *See People v. Benzor*, 100 P.3d 542, 543 (Colo. App. 2004) ("the placement of the mental state 'knowingly' after the element of 'following a conviction of a felony' and before the element of 'escapes from custody or confinement' evidences the General Assembly's intent to limit the culpable mental state only to the conduct element of the offense").

5. Section 18-8-208(11), C.R.S. 2015, which was enacted in 2013, provides as follows: "A person who is placed in a community corrections program for purposes of obtaining residential treatment as a condition of probation pursuant to section 18-1.3-204(2.2) or 18-1.3-301(4)(b) is not in custody or confinement for purposes of this section." It appears that the question of whether this section applies to a particular defendant is a matter of law for the court to resolve. Therefore, the Committee has not drafted a special instruction to explain the concept to the jury.

8-2:16 ESCAPE (HELD OR CHARGED)

The elements of the crime of escape (held or charged) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was in custody or confinement,

4. while being held for or charged with, but not convicted of [insert name(s) of offense(s)], and

5. knowingly,

6. escaped from custody or confinement.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of escape (held or charged).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of escape (held or charged).

COMMENT

1. *See* § 18-8-208(3), (5), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly").

3. The classification levels for this offense are based on the classification level of the underlying offense for which the defendant was being held. *See* § 18-8-208(3), (5) C.R.S. 2015; *see also* § 18-8-210, C.R.S. 2015 (persons in custody or confinement for unclassified offenses). This determination is a matter of law for the court to resolve. *See Massey v. People*, 649 P.2d 1070 (Colo. 1982) ("The classification of the defendant's past offense was a question of law, and the court is

justified in taking judicial notice when the facts upon which the legal conclusion is based are unchallenged."). However, "[e]vidence of a prior conviction is an essential element of the offense of escape." *People v. McKnight*, 626 P.2d 678, 683 (Colo. 1981).

4. *See also People v. Benzor*, 100 P.3d 542, 543 (Colo. App. 2004) ("the placement of the mental state 'knowingly' after the element of 'following a conviction of a felony' and before the element of 'escapes from custody or confinement' evidences the General Assembly's intent to limit the culpable mental state only to the conduct element of the offense").

5. *See People v. Thornton*, 929 P.2d 729, 733 (Colo. 1996) ("effecting an arrest, in the sense of establishing physical control over the arrestee, is required before a person is 'in custody' for the purposes of [section 18-8-208(3) of] the escape statute").

6. Section 18-8-208(11), C.R.S. 2015, which was enacted in 2013, provides as follows: "A person who is placed in a community corrections program for purposes of obtaining residential treatment as a condition of probation pursuant to section 18-1.3-204(2.2) or 18-1.3-301(4)(b) is not in custody or confinement for purposes of this section." It appears that the question of whether this section applies to a particular defendant is a matter of law for the court to resolve. Therefore, the Committee has not drafted a special instruction to explain the concept to the jury.

8-2:17 ESCAPE (STAFF SECURE FACILITY)

The elements of the crime of escape (staff secure facility) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. had been committed to the division of youth corrections in the department of human services for a delinquent act, and

4. was over eighteen years of age, and

5. escaped from a staff secure facility, other than a state-operated locked facility.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of escape (staff secure facility).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of escape (staff secure facility).

COMMENT

1. See § 18-8-208(4.5), C.R.S. 2015.

2. *See* Instruction F:352 (defining "staff secure facility").

3. Section 18-8-208(4.5), enacted in 2013, is the only provision of the escape statute that does not include as an element the mens rea of "knowingly." *See generally People v. Lanzieri*, 25 P.3d 1170, 1172 (Colo. 2001) ("Thus, the crime of escape consists of the following essential elements: (1) a voluntary act; (2) which constitutes a departure from one of the forms of lawful custody or confinement specified in the escape

statute; (3) by a prisoner; and (4) committed 'knowingly,' i.e., with an awareness on the part of the prisoner that his or her conduct is of the nature proscribed."). Although the model instruction tracks the language of the statute, it may be appropriate to impute a mens rea. *See* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

8-2:18 ESCAPE (COMMITMENT)

The elements of the crime of escape (commitment) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. while being confined pursuant to a[n] [insert the name of the relevant type of insanity or incompetency proceeding from Article 8 of Title 16] commitment that had been ordered at a proceeding in which the defendant had been charged with [insert name of offense(s)], and

4. knowingly,

5. escaped from confinement.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of escape (commitment).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of escape (commitment).

COMMENT

1. *See* § 18-8-208(6), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly").

3. The classification levels for this offense are based on the classification level of the underlying offense for which the defendant was being held. *See* § 18-8-208(6)(a-c), C.R.S. 2015; *see also* § 18-8-210, C.R.S. 2015 (persons in custody or confinement for unclassified offenses). This determination is a matter of law for the court to resolve. *See Massey v. People*,

649 P.2d 1070 (Colo. 1982) ("The classification of the defendant's past offense was a question of law, and the court is justified in taking judicial notice when the facts upon which the legal conclusion is based are unchallenged."). However, "[e]vidence of a prior conviction is an essential element of the offense of escape." *People v. McKnight*, 626 P.2d 678, 683 (Colo. 1981).

4. *See also People v. Benzor*, 100 P.3d 542, 543 (Colo. App. 2004) ("the placement of the mental state 'knowingly' after the element of 'following a conviction of a felony' and before the element of 'escapes from custody or confinement' evidences the General Assembly's intent to limit the culpable mental state only to the conduct element of the offense").

5. *See* Instruction H:52 (defining the affirmative defense of "voluntary return," which is available only as against a charge of escape from commitment in violation of section 18-8-208(6)).

6. Section 18-8-208(11), C.R.S. 2015, which was enacted in 2013, provides as follows: "A person who is placed in a community corrections program for purposes of obtaining residential treatment as a condition of probation pursuant to section 18-1.3-204(2.2) or 18-1.3-301(4)(b) is not in custody or confinement for purposes of this section." It appears that the question of whether this section applies to a particular defendant is a matter of law for the court to resolve. Therefore, the Committee has not drafted a special instruction to explain the concept to the jury.

8-2:19.INT ESCAPE (COMMITMENT) - INTERROGATORY (LEAVING COLORADO)

If you find the defendant not guilty of escape (commitment), you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of escape (commitment), you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant leave Colorado? (Answer "Yes" or "No")

The defendant left Colorado only if:

1. in the escape the defendant traveled outside of Colorado.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-8-208(6), C.R.S. 2015.

2. *See*, *e.g.*, Instruction E:28 (special verdict form).

8-2:20 ESCAPE (EXTRADITION)

The elements of the crime of escape (extradition) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was in custody or confinement,

4. pursuant to [insert a description of the relevant fugitive extradition proceeding, from Article 19 of Title 16], and

5. knowingly,

6. escaped from custody or confinement.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of escape (extradition).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of escape (extradition).

COMMENT

1. *See* § 18-8-208(8), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly").

3. *See also People v. Benzor*, 100 P.3d 542, 543 (Colo. App. 2004) ("the placement of the mental state 'knowingly' after the element of 'following a conviction of a felony' and before the element of 'escapes from custody or confinement' evidences the General Assembly's intent to limit the culpable mental state only to the conduct element of the offense").

4. *See People v. Thornton*, 929 P.2d 729, 733 (Colo. 1996) ("effecting an arrest, in the sense of establishing physical control over the arrestee, is required before a person is 'in custody' for the purposes of the escape statute").

5. Section 18-8-208(11), C.R.S. 2015, which was enacted in 2013, provides as follows: "A person who is placed in a community corrections program for purposes of obtaining residential treatment as a condition of probation pursuant to section 18-1.3-204(2.2) or 18-1.3-301(4)(b) is not in custody or confinement for purposes of this section." It appears that the question of whether this section applies to a particular defendant is a matter of law for the court to resolve. Therefore, the Committee has not drafted a special instruction to explain the concept to the jury.

8-2:21 ATTEMPT TO ESCAPE (FOLLOWING CONVICTION)

The elements of the crime of attempt to escape (following conviction) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was in custody or confinement,

4. following conviction of [insert name(s) of offense(s)], and

5. knowingly,

6. attempted to escape from custody or confinement.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of attempt to escape (following conviction).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of attempt to escape (following conviction).

COMMENT

1. *See* § 18-8-208.1(1), (3), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction G2:01 (criminal attempt).

3. *See also People v. Benzor*, 100 P.3d 542, 543 (Colo. App. 2004) ("the placement of the mental state 'knowingly' after the element of 'following a conviction of a felony' and before the element of 'escapes from custody or confinement' evidences the General Assembly's intent to limit the culpable mental state only to the conduct element of the offense").

8-2:22 ATTEMPT TO ESCAPE (FOLLOWING CONVICTION; COMMUNITY CORRECTIONS OR INTENSIVE SUPERVISION PAROLE)

The elements of the crime of attempt to escape (following conviction; community corrections or intensive supervision parole) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was in custody or confinement,

4. following conviction of [insert name of felony offense(s)], and

5. was serving a direct sentence to a community corrections program, or had been placed in an intensive supervision parole program, and

6. knowingly,

7. attempted to escape from custody or confinement.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of attempt to escape (following conviction; community corrections or intensive supervision parole).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of attempt to escape (following conviction; community corrections or intensive supervision parole).

COMMENT

1. *See* § 18-8-208.1(1.5), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction G2:01 (criminal attempt).

3. Although this offense requires that the defendant have been convicted of "a felony," do not label the conviction as a felony when identifying it for the jury.

4. *See also People v. Benzor*, 100 P.3d 542, 543 (Colo. App. 2004) ("the placement of the mental state 'knowingly' after the element of 'following a conviction of a felony' and before the element of 'escapes from custody or confinement' evidences the General Assembly's intent to limit the culpable mental state only to the conduct element of the offense").

5. The terms "community corrections program" and "intensive supervision parole program" are not defined in Article 8. *See* § 17-27-102(3), C.R.S. 2015 ("'Community corrections program' means a community-based or community-oriented program that provides supervision of offenders pursuant to this article. Such program shall be operated by a unit of local government, the department, or any private individual, partnership, corporation, or association. Such program may provide residential or nonresidential services for offenders, monitoring of the activities of offenders, oversight of victim restitution and community service by offenders, programs and services to aid offenders in obtaining and holding regular employment, programs and services to aid offenders in enrolling in and maintaining academic courses, programs and services to aid offenders in participating in vocational training programs, programs and services to aid offenders in utilizing the resources of the community, meeting the personal and family needs of such offenders, programs and services to aid offenders in obtaining appropriate treatment for such offenders, programs and services to aid offenders in participating in whatever specialized programs exist within the community, day reporting programs, and such other services and programs as may be appropriate to aid in offender rehabilitation and public safety."); § 18-1.3-1005(1), C.R.S. 2015 ("The department shall establish an intensive supervision parole program for sex offenders sentenced to incarceration and subsequently released on parole pursuant to this part 10."); § 17-27.5-101 et seq., C.R.S. 2015 (intensive supervision programs); Instruction F:59 (defining "community corrections program").

8-2:23 ATTEMPT TO ESCAPE (HELD OR CHARGED)

The elements of the crime of attempt to escape (held or charged) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was in custody or confinement,

4. while being held for or charged with, but not convicted of [insert name(s) of offense(s)], and

5. knowingly,

6. attempted to escape from custody or confinement.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of attempt to escape (held or charged).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of attempt to escape (held or charged).

COMMENT

1. *See* § 18-8-208.1(2), (4), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction G2:01 (criminal attempt).

3. *See also People v. Benzor*, 100 P.3d 542, 543 (Colo. App. 2004) ("the placement of the mental state 'knowingly' after the element of 'following a conviction of a felony' and before the element of 'escapes from custody or confinement' evidences the General Assembly's intent to limit the culpable mental state only to the conduct element of the offense").

8-2:24.SP ATTEMPT TO ESCAPE – SPECIAL INSTRUCTION (CONDITIONAL RELEASE; STAFF SECURE FACILITY)

[A person who participates in a work release program, a home detention program, a furlough, an intensive supervision program, or any other similar authorized supervised or unsupervised absence from a detention facility, and who is required to report back to the detention facility at a specified time is deemed to be in custody.]

[A person held in a staff secure facility is deemed to be in custody or confinement.]

COMMENT

1. *See* § 18-8-208.1(6), (7), C.R.S. 2015.

2. *See* Instruction F:96 (defining "detention facility"); Instruction F:173 (defining "home detention"); Instruction F:352 (defining "staff secure facility").

3. The terms "work release program," "furlough" and "intensive supervision program" are not defined in Article 8, Part 2. *See* § 17-27.5-101 et seq., C.R.S. 2015 (intensive supervision programs); § 18-1.3-207, C.R.S. 2015 (work release programs).

8-2:25 ACTIVE PARTICIPATION IN A RIOT

The elements of the crime of active participation in a riot are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was confined in any detention facility within the state, and

4. with two or more other persons,

5. actively participated in violent conduct that created grave danger of, or did cause, damage to property or injury to other persons, and

6. substantially obstructed the performance of institutional functions, or commanded, induced, entreated, or otherwise attempted to persuade others to engage in such conduct.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of active participation in a riot.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of active participation in a riot.

COMMENT

1. *See* § 18-8-211(1), C.R.S. 2015.

2. *See* Instruction F:97 (defining "detention facility"); *see also* Instruction F:36 (defining "bodily injury"); +; *see also Webster's Third New International Dictionary* 759 (2002)

(defining "entreat" as meaning "beg" or "prevail upon by pleading").

3. + In the absence of case law on point, the Committee takes no position on whether the word "attempted" in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

4. + In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 3.

8-2:26.INT ACTIVE PARTICIPATION IN A RIOT (DEADLY WEAPON OR DESTRUCTIVE DEVICE) – INTERROGATORY

If you find the defendant not guilty of active participation in a riot, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of active participation in a riot, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

> Did the defendant's participation involve the use or represented use of a deadly weapon or destructive device? (Answer "Yes" or "No")

The defendant's participation involved the use or represented use of a deadly weapon or destructive device only if:

1. he [she] employed, in the course of such participation, a deadly weapon, destructive device, or any article used or fashioned in a manner to cause a person to reasonably believe that the article was a deadly weapon, or, in the course of such participation, he [she] represented verbally or otherwise that he [she] was armed with a deadly weapon.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-8-211(2)(a), C.R.S. 2015.

2. *See* Instruction F:88 (defining "deadly weapon"); Instruction F:94 (defining "destructive device"); *see, e.g.*, Instruction E:28 (special verdict form).

8-2:27 DISOBEYING AN ORDER RELATED TO A RIOT IN A DETENTION FACILITY

The elements of the crime of disobeying an order related to a riot in a detention facility are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was confined in any detention facility within the state, and

4. during a riot, or when a riot was impending,

5. intentionally,

6. disobeyed an order of a detention officer to move, disperse, or refrain from specified activities in the immediate vicinity of the riot or impending riot.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of disobeying an order related to a riot in a detention facility.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of disobeying an order related to a riot in a detention facility.

COMMENT

1. *See* § 18-8-211(3), C.R.S. 2015.

2. *See* Instruction F:97 (defining "detention facility"); Instruction F:185 (defining "intentionally").

8-2:28 VIOLATION OF BAIL BOND CONDITIONS

The elements of the crime of violation of bail bond conditions are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was released on a bail bond of any kind, and

4. before, during, or after the time that he [she] was released, he [she] was accused by complaint, information, indictment, or delinquency petition of [insert name(s) of offense(s)] arising from the conduct for which he [she] was arrested, and

5. knowingly,

6. failed to appear for trial or other proceedings in the case in which the bail bond was filed, or violated a condition of the bail bond.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of violation of bail bond conditions.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of violation of bail bond conditions.

COMMENT

1. *See* § 18-8-212(1), (2), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly").

3. *See People v. Luna*, 2013 COA 67, ¶ 17, __ P.3d __ ("in order to prove that a defendant violated section 18-8-212(1),

the prosecution must prove beyond a reasonable doubt that the terms of the bond were in effect at the time of the alleged illegal conduct").

8-2:29 UNAUTHORIZED RESIDENCY BY AN ADULT OFFENDER FROM ANOTHER STATE (NON-RESIDENT)

The elements of the crime of unauthorized residency by an adult offender from another state (non-resident) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. in order to stay in Colorado, was required to have the permission of the compact administrator, or a designated deputy of the compact administrator, of the interstate compact for adult offender supervision, and

4. was not a resident of Colorado, and

5. had not been accepted by the compact administrator of the interstate compact for adult offender supervision, and

6. was found residing in Colorado.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unauthorized residency by an adult offender from another state (non-resident).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unauthorized residency by an adult offender from another state (non-resident).

COMMENT

1. *See* § 18-8-213(1)(a), C.R.S. 2015.

8-2:30 UNAUTHORIZED RESIDENCY BY AN ADULT OFFENDER FROM ANOTHER STATE (RESIDENT)

The elements of the crime of unauthorized residency by an adult offender from another state (resident) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. in order to stay in Colorado, was required to have the permission of the compact administrator, or a designated deputy of the compact administrator, of the interstate compact for adult offender supervision, and

4. was a resident of Colorado, and

5. had not been accepted by the compact administrator of the interstate compact for adult offender supervision, and

6. was found residing in Colorado more than ninety days after his [her] transfer from the receiving state.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unauthorized residency by an adult offender from another state (resident).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unauthorized residency by an adult offender from another state (resident).

COMMENT

1. *See* § 18-8-213(1)(b), C.R.S. 2015.

+ CHAPTER 8-3

BRIBERY AND CORRUPT INFLUENCES

COMMENTS ON CHAPTER USE

1. + The Committee added this chapter in 2015.

8-3:01 BRIBERY (OFFERING OR CONFERRING A PECUNIARY BENEFIT)

The elements of the crime of bribery (offering or conferring a pecuniary benefit) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. offered, conferred, or agreed to confer any pecuniary benefit upon a public servant,

4. with the intent,

5. to influence the public servant's vote, opinion, judgment, exercise of discretion, or other action in his [her] official capacity.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of bribery (offering or conferring a pecuniary benefit).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of bribery (offering or conferring a pecuniary benefit).

COMMENT

1. *See* § 18-8-302(1)(a), C.R.S. 2015.

2. *See* Instruction F:265.7 (defining "pecuniary benefit" (bribery and corrupt influences)); Instruction F:306.5 (defining "public servant" (bribery and corrupt influences)).

8-3:02 BRIBERY (SOLICITING OR ACCEPTING A PECUNIARY BENEFIT)

The elements of the crime of bribery (soliciting or accepting a pecuniary benefit) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. while a public servant,

4. solicited, accepted, or agreed to accept any pecuniary benefit,

5. upon an agreement or understanding that his [her] vote, opinion, judgment, exercise of discretion, or other action as a public servant would thereby be influenced.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of bribery (soliciting or accepting a pecuniary benefit).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of bribery (soliciting or accepting a pecuniary benefit).

COMMENT

1. *See* § 18-8-302(1)(b), C.R.S. 2015.

2. *See* Instruction F:265.7 (defining "pecuniary benefit" (bribery and corrupt influences)); Instruction F:306.5 (defining "public servant" (bribery and corrupt influences)); *see also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of

the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

8-3:03.SP BRIBERY – SPECIAL INSTRUCTION (LACK OF QUALIFICATION NOT A DEFENSE)

It is not a defense to a bribery charge that the person sought to be influenced was not qualified to act in the desired way, whether because he [she] had not yet assumed office, lacked jurisdiction, or for any other reason.

COMMENT

1. *See* § 18-8-302(2), C.R.S. 2015.

8-3:04 COMPENSATION FOR PAST OFFICIAL BEHAVIOR (SOLICITING OR ACCEPTING A PECUNIARY BENEFIT)

The elements of the crime of compensation for past official behavior (soliciting or accepting a pecuniary benefit) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. solicited, accepted, or agreed to accept any pecuniary benefit,

4. as compensation for giving, as a public servant, a decision, opinion, recommendation, or vote favorable to another or for otherwise exercising a discretion in his [her] favor,

5. whether or not he [she] in so doing violated his [her] duty.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of compensation for past official behavior (soliciting or accepting a pecuniary benefit).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of compensation for past official behavior (soliciting or accepting a pecuniary benefit).

COMMENT

1. *See* § 18-8-303(1)(a), C.R.S. 2015.

2. *See* Instruction F:265.7 (defining "pecuniary benefit" (bribery and corrupt influences)); Instruction F:306.5 (defining "public servant" (bribery and corrupt influences)); *see also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state

is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

3. The Committee has included the fifth element because its language appears in the statute. *See* § 18-8-303(1)(a). The Committee notes, however, that this "whether or not" language is arguably superfluous, as the prosecution will never need to introduce evidence to prove this element. Rather, this language presumably clarifies that a defendant may not claim that he did not violate any of his duties as an affirmative defense.

8-3:05 COMPENSATION FOR PAST OFFICIAL BEHAVIOR (OFFERING OR CONFERRING A PECUNIARY BENEFIT)

The elements of the crime of compensation for past official behavior (offering or conferring a pecuniary benefit) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. offered, conferred, or agreed to confer any pecuniary benefit upon a public servant,

4. as compensation to that public servant for giving a decision, opinion, recommendation, or vote favorable to another or for exercising a discretion in that other person's favor,

5. whether or not that public servant in so doing violated his [her] duty.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of compensation for past official behavior (offering or conferring a pecuniary benefit).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of compensation for past official behavior (offering or conferring a pecuniary benefit).

COMMENT

1. *See* § 18-8-303(1)(b), C.R.S. 2015.

2. *See* Instruction F:265.7 (defining "pecuniary benefit" (bribery and corrupt influences)); Instruction F:306.5 (defining "public servant" (bribery and corrupt influences)); *see also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state

is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

3. The Committee has included the fifth element because its language appears in the statute. *See* § 18-8-303(1)(a)–(b). The Committee notes, however, that this "whether or not" language is arguably superfluous, as the prosecution will never need to introduce evidence to prove this element. Rather, this language presumably clarifies that a defendant may not claim that the public servant did not violate any of his duties as an affirmative defense.

8-3:06 SOLICITING UNLAWFUL COMPENSATION

The elements of the crime of soliciting unlawful compensation are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was a public servant, and

4. requested a pecuniary benefit for the performance of an official action,

5. knowing that he [she] was required to perform without compensation or at a level of compensation lower than that requested.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of soliciting unlawful compensation.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of soliciting unlawful compensation.

COMMENT

1. *See* § 18-8-304, C.R.S. 2015.

2. *See* Instruction F:265.7 (defining "pecuniary benefit" (bribery and corrupt influences)); Instruction F:306.5 (defining "public servant" (bribery and corrupt influences)).

8-3:07 TRADING IN PUBLIC OFFICE (OFFERING OR CONFERRING A PECUNIARY BENEFIT)

The elements of the crime of trading in public office (offering or conferring a pecuniary benefit) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. offered, conferred, or agreed to confer any pecuniary benefit upon a public servant or party officer,

4. upon an agreement or understanding that he [she] or a particular person would or might be appointed to a public office or designated or nominated as a candidate for public office.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of trading in public office (offering or conferring a pecuniary benefit).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of trading in public office (offering or conferring a pecuniary benefit).

COMMENT

1. *See* § 18—8-305(1)(a), C.R.S. 2015.

2. *See* Instruction F:258.5 (defining "party officer"); Instruction F:265.7 (defining "pecuniary benefit" (bribery and corrupt influences)); Instruction F:306.5 (defining "public servant" (bribery and corrupt influences)); *see also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of

the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. *See* Instruction H:52.3 (affirmative defense of “customary contribution”).

8-3:08 TRADING IN PUBLIC OFFICE (SOLICITING OR ACCEPTING A PECUNIARY BENEFIT)

The elements of the crime of trading in public office (soliciting or accepting a pecuniary benefit) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. while a public servant or party officer,

4. solicited, accepted, or agreed to accept any pecuniary benefit from another,

5. upon an agreement or understanding that a particular person would or might be appointed to a public office or designated or nominated as a candidate for public office.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of trading in public office (soliciting or accepting a pecuniary benefit).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of trading in public office (soliciting or accepting a pecuniary benefit).

COMMENT

1. *See* § 18—8-305(1)(b), C.R.S. 2015.

2. *See* Instruction F:258.5 (defining "party officer"); Instruction F:265.7 (defining "pecuniary benefit" (bribery and corrupt influences)); Instruction F:306.5 (defining "public servant" (bribery and corrupt influences)); *see also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a

culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

3. *See* Instruction H:52.3 (affirmative defense of "customary contribution").

8-3:09 ATTEMPT TO INFLUENCE A PUBLIC SERVANT

The elements of the crime of attempt to influence a public servant are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. attempted to influence any public servant by means of deceit or by threat of violence or economic reprisal against any person or property,

4. with the intent,

5. to alter or affect the public servant's decision, vote, opinion, or action concerning any matter which is to be considered or performed by him [her] or the agency or body of which he [she] is a member.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of attempt to influence a public servant.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of attempt to influence a public servant.

COMMENT

1. *See* § 18-8-306, C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent"); Instruction F:306.5 (defining "public servant" (bribery and corrupt influences)).

3. In the absence of case law on point, the Committee takes no position on whether the word "attempted" in this instruction implicates the inchoate offense of criminal attempt. *See*

Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

4. *See People v. Janousek*, 871 P.2d 1189, 1196 (Colo. 1994) ("[N]either 'deceit' nor 'economic reprisal' is defined in [section 18-8-306]. Both words, however, are terms of common usage, and people of ordinary intelligence need not guess at their meaning."); *People v. Beck*, 187 P.3d 1125, 1128 (Colo. App. 2008) ("Actual influence is not required. Rather, [section 18-8-306] is aimed at attempts to influence public servants in their official capacities to improperly alter or affect the performance of their official duties."); *People v. Stanley*, 170 P.3d 782, 786-87 (Colo. App. 2007) (Pursuant to First Amendment jurisprudence, section 18–8–306 "must be interpreted to limit criminal culpability to statements constituting 'true threats.'").

8-3:10 DESIGNATION OF SUPPLIER

The elements of the crime of designation of supplier are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was a public servant, and

4. required or directed a bidder or contractor to deal with a particular person,

5. in procuring any goods or service required in submitting a bid to or fulfilling a contract with any government.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of designation of supplier.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of designation of supplier.

COMMENT

1. *See* § 18-8-307(1), C.R.S. 2015.

2. *See* Instruction F:162 (defining "government"); Instruction F:165 (defining "governmental function"); Instruction F:306.5 (defining "public servant" (bribery and corrupt influences)); *see also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

3. *See* Instruction H:52.5 (affirmative defense of "scope of authority").

8-3:11 FAILING TO DISCLOSE A CONFLICT OF INTEREST

The elements of the crime of failing to disclose a conflict of interest are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was a public servant, and

4. exercised any substantial discretionary function in connection with a government contract, purchase, payment, or other pecuniary transaction,

5. without having given seventy-two hours' actual advance written notice to the secretary of state and to the governing body of the government which employed the public servant of the existence of a known potential conflicting interest of the public servant in the transaction with reference to which he [she] was about to act in his [her] official capacity.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failing to disclose a conflict of interest.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failing to disclose a conflict of interest.

COMMENT

1. *See* § 18-8-308(1), C.R.S. 2015.

2. *See* Instruction F:162 (defining "government"); Instruction F:281.5 (defining "potential conflicting interest"); Instruction F:306.5 (defining "public servant" (bribery and corrupt influences)); *see also* § 18-1-503(2), C.R.S. 2015 ("Although no

culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

CHAPTER 8-5

PERJURY AND RELATED OFFENSES

8-5:01 PERJURY IN THE FIRST DEGREE

The elements of the crime of perjury in the first degree are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. in any official proceeding,

5. made a materially false statement,

6. which he [she] did not believe to be true,

7. under an oath required or authorized by law.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of perjury in the first degree.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of perjury in the first degree.

COMMENT

1. *See* § 18-8-502(1), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:220 (defining "materially false statement"); Instruction F:245 (defining "oath" and "required or authorized by law"); Instruction F:250 (defining "official proceeding").

3. *See* Instruction H:53 (affirmative defense of retraction).

4. *See People v. Ellsworth*, 15 P.3d 1111, 1116 (Colo. App. 2000) (defendant charged with perjury in the first degree was not entitled to a jury instruction explaining the "two-witness" rule established by section 18-8-506, C.R.S. 2015; the applicability of the rule is a question of law to be decided by the trial court upon a motion for acquittal or for a directed verdict, or by an appellate court upon review for sufficiency of the evidence).

8-5:02.SP PERJURY IN THE FIRST DEGREE - SPECIAL INSTRUCTION (KNOWLEDGE OF MATERIALITY NOT AN ELEMENT; MISTAKEN BELIEF NOT A DEFENSE)

Knowledge of the materiality of the statement is not an element of perjury in the first degree, and a mistaken belief that the statement was not material is not a defense.

COMMENT

1. *See* § 18-8-502(2), C.R.S. 2015.

8-5:03 PERJURY IN THE SECOND DEGREE

The elements of the crime of perjury in the second degree are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. other than in an official proceeding,

4. with an intent,

5. to mislead a public servant in the performance of his [her] duty,

6. made a materially false statement,

7. which he [she] did not believe to be true,

8. under an oath required or authorized by law.

[9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of perjury in the second degree.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of perjury in the second degree.

COMMENT

1. *See* § 18-8-503(1), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:220 (defining "materially false statement"); Instruction F:245 (defining "oath" and "required or authorized by law"); Instruction F:250 (defining "official proceeding"); Instruction F:306 (defining "public servant").

8-5:04 FALSE SWEARING

The elements of the crime of false swearing are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. made a materially false statement,

5. which he [she] did not believe to be true,

6. under an oath required or authorized by law.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of false swearing.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of false swearing.

COMMENT

1. *See* § 18-8-504(1), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:220 (defining "materially false statement"); Instruction F:245 (defining "oath" and "required or authorized by law").

8-5:05.SP PERJURY AND FALSE SWEARING – SPECIAL INSTRUCTION (INCONSISTENT STATEMENTS)

Where a person charged with perjury or false swearing has made inconsistent material statements under oath, it is not necessary for the prosecution to prove which statement was false provided that it proves that one or the other statement was false, and not believed by the defendant to be true.

COMMENT

1. *See* § 18-8-505(1), C.R.S. 2015 (specifying that both statements must have "been made within the period of statute of limitations").

2. The question of whether a statement was made within the statute of limitations will, in most cases, be an issue of law for the court to resolve. However, it may be necessary to draft an interrogatory if the applicability of the statute of limitations depends on the resolution of a factual dispute concerning the date on which a statement was allegedly made.

8-5:06.SP PERJURY AND FALSE SWEARING – SPECIAL INSTRUCTION (IRREGULARITIES NO DEFENSE)

It is no defense to the charge of [perjury in the first degree] [perjury in the second degree] [false swearing] that:

[the defendant was not competent, for reasons other than mental disability or immaturity, to make the false statement alleged.]

[the statement was inadmissible under the law of evidence.]

[the oath was administered or taken in an irregular manner.]

[the person administering the oath lacked authority to do so, if the taking of the oath was required by law.]

COMMENT

1. *See* § 18-8-509(1), C.R.S. 2015.

2. If necessary, the court should draft a supplemental instruction explaining its resolution of any threshold legal issue(s) related to the above factors.

CHAPTER 8-6

OFFENSES RELATING TO JUDICIAL AND OTHER PROCEEDINGS

8-6:01 BRIBE-RECEIVING BY A WITNESS (FALSE OR WITHHELD TESTIMONY)

The elements of the crime of witness bribery (false or withheld testimony) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was a witness or believed that he [she] was to be called as a witness in any official proceeding, and

4. intentionally,

5. solicited, accepted, agreed to accept,

6. any benefit,

7. upon an agreement or understanding that he [she] would testify falsely or unlawfully withhold testimony.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of witness bribery (false or withheld testimony).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of witness bribery (false or withheld testimony).

COMMENT

1. *See* § 18-8-603(1)(a), C.R.S. 2015.

2. *See* Instruction F:31 (defining "benefit"); Instruction F:185 (defining "intentionally"); Instruction F:250 (defining "official proceeding"); Instruction F:365 (defining "testimony").

3. Although the caption of the statutory section labels the offense "bribe-receiving by a witness," this is a misnomer because receipt of a bribe is not an element of the offense when the charge is based on the solicitation of a bribe, or an agreement to accept a bribe. Accordingly, the instruction refers to the offense as "witness bribery."

8-6:02 BRIBE-RECEIVING BY A WITNESS (ATTEMPT TO AVOID LEGAL PROCESS)

The elements of the crime of witness bribery (attempt to avoid legal process) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was a witness or believed that he [she] was to be called as a witness in any official proceeding, and

4. intentionally,

5. solicited, accepted, agreed to accept,

6. any benefit,

7. upon an agreement or understanding that he [she] would attempt to avoid legal process summoning him [her] to testify.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of witness bribery (attempt to avoid legal process).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of witness bribery (attempt to avoid legal process).

COMMENT

1. *See* § 18-8-603(1)(b), C.R.S. 2015.

2. *See* Instruction F:31 (defining "benefit"); Instruction F:185 (defining "intentionally"); Instruction F:250 (defining "official proceeding"); Instruction F:365 (defining "testimony"); +.

3. Although the caption of the statutory section labels the offense "bribe-receiving by a witness," this is a misnomer because receipt of a bribe is not an element of the offense when the charge is based on the solicitation of a bribe, or an agreement to accept a bribe. Accordingly, the instruction refers to the offense as "witness bribery."

4. The term "legal process" is not defined by statute. *See Black's Law Dictionary* 1399 (10th ed. 2014) (defining "process" as "A summons or writ, esp. to appear or respond in court.").

5. + In the absence of case law on point, the Committee takes no position on whether the word "attempt" in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

6. + In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 5.

8-6:03 BRIBE-RECEIVING BY A WITNESS (ABSENTING)

The elements of the crime of witness bribery (absenting) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was a witness or believed that he [she] was to be called as a witness in any official proceeding, and

4. intentionally,

5. solicited, accepted, agreed to accept,

6. any benefit,

7. upon an agreement or understanding that he [she] would attempt to absent himself [herself] from an official proceeding to which he [she] had been legally summoned.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of witness bribery (absenting).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of witness bribery (absenting).

COMMENT

1. *See* § 18-8-603(1)(c), C.R.S. 2015.

2. *See* Instruction F:31 (defining "benefit"); Instruction F:185 (defining "intentionally"); Instruction F:250 (defining "official proceeding").

3. Although the caption of the statutory section labels the offense "bribe-receiving by a witness," this is a misnomer because receipt of a bribe is not an element of the offense when the charge is based on the solicitation of a bribe, or an agreement to accept a bribe. Accordingly, the instruction refers to the offense as "witness bribery."

4. + In the absence of case law on point, the Committee takes no position on whether the word "attempt" in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

5. + In 2015, the Committee added Comment 4.

8-6:04 BRIBING A JUROR

The elements of the crime of bribing a juror are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to influence a juror's vote, opinion, decision, or other action as a juror,

5. offered, conferred, or agreed to confer,

6. any benefit,

7. upon a juror.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of bribing a juror.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of bribing a juror.

COMMENT

1. *See* § 18-8-606(1), C.R.S. 2015.

2. *See* Instruction F:31 (defining "benefit"); Instruction F:185 (defining "with intent"); Instruction F:192 (defining "juror").

8-6:05 BRIBE-RECEIVING BY A JUROR

The elements of the crime of juror bribery are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. intentionally,

4. solicited, accepted, or agreed to accept,

5. any benefit,

6. upon an agreement or understanding that his [her] vote, opinion, decision, or other action as a juror would thereby be influenced.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of juror bribery.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of juror bribery.

COMMENT

1. *See* § 18-8-607(1), C.R.S. 2015.

2. *See* Instruction F:30 (defining "benefit"); Instruction F:185 (defining "intentionally"); Instruction F:192 (defining "juror").

3. Although the caption of the statutory section labels the offense "bribe-receiving by a juror," this is a misnomer because receipt of a bribe is not an element of the offense when the charge is based on the solicitation of a bribe, or an agreement to accept a bribe. Accordingly, the instruction refers to the offense as "juror bribery."

8-6:06 INTIMIDATING A JUROR

The elements of the crime of intimidating a juror are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. intentionally,

4. attempted,

5. by use of a threat of harm or injury to any person or property,

6. to influence a juror's vote, opinion, decision, or other action as a juror.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of intimidating a juror.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of intimidating a juror.

COMMENT

1. *See* § 18-8-608(1), C.R.S. 2015.

2. *See* Instruction F:185 (defining "intentionally"); Instruction F:192 (defining "juror"); +.

3. + In the absence of case law on point, the Committee takes no position on whether the word "attempted" in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should

provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

4. + In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 3.

8-6:07 JURY-TAMPERING (INFLUENCE)

The elements of the crime of jury-tampering (influence) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to influence a juror's vote, opinion, decision, or other action in a case,

5. attempted, directly or indirectly, to communicate with a juror,

6. other than as a part of the proceedings in the trial of the case.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of jury-tampering (influence).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of jury-tampering (influence).

COMMENT

1. *See* § 18-8-609(1), C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent"); Instruction F:192 (defining "juror"); +.

3. + In the absence of case law on point, the Committee takes no position on whether the word "attempted" in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the

Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

4. + In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 3.

8-6:08 JURY-TAMPERING (SELECTION)

The elements of the crime of jury-tampering (selection) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. participated in the fraudulent processing or selection of jurors or prospective jurors.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of jury-tampering (selection).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of jury-tampering (selection).

COMMENT

1. *See* § 18-8-609(1.5) C.R.S. 2015.

2. *See* Instruction F:192 (defining "juror"); Instruction F:195 (defining "knowingly").

8-6:09.INT JURY-TAMPERING (CLASS ONE FELONY)

If you find the defendant not guilty of jury-tampering, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of jury-tampering, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the jury-tampering in a class one felony trial? (Answer "Yes" or "No")

The jury-tampering was in a class one felony trial only if:

1. The defendant committed the jury-tampering in a trial for [insert name(s) of class one felony offense(s)].

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-8-609(2), C.R.S. 2015.

2. *See*, *e.g.*, Instruction E:28 (special verdict form).

8-6:10 TAMPERING WITH PHYSICAL EVIDENCE (IMPAIR)

The elements of the crime of tampering with physical evidence (impair) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. believed that an official proceeding was pending or was about to be instituted, and

4. acting without legal right or authority,

5. destroyed, mutilated, concealed, removed, or altered physical evidence,

6. with intent to impair its verity or availability in the pending or prospective official proceeding.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of tampering with physical evidence (impair).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of tampering with physical evidence (impair).

COMMENT

1. *See* § 18-8-610(1)(a), C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent"); Instruction F:250 (defining "official proceeding"); Instruction F:277 (defining "physical evidence").

8-6:11 TAMPERING WITH PHYSICAL EVIDENCE (INTRODUCE)

The elements of the crime of tampering with physical evidence (introduce) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. believed that an official proceeding was pending or was about to be instituted, and

4. acting without legal right or authority,

5. knowingly,

6. made, presented or offered any false or altered physical evidence,

7. with intent that it be introduced in the pending or prospective official proceeding.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of tampering with physical evidence (introduce).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of tampering with physical evidence (introduce).

COMMENT

1. *See* § 18-8-610(1)(b), C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly"); Instruction F:250 (defining "official proceeding"); Instruction F:277 (defining "physical evidence").

8-6:12 SIMULATING LEGAL PROCESS

The elements of the crime of simulating legal process are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. delivered or caused to be delivered to another,

5. a request for the payment of money on behalf of any creditor including himself [herself] which in form and substance simulated any legal process issued by any court of this state.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of simulating legal process.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of simulating legal process.

COMMENT

1. *See* § 18-8-611(1), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly").

3. The term "legal process" is not defined by statute. *See Black's Law Dictionary* 1399 (10th ed. 2014) (defining "process" as "A summons or writ, esp. to appear or respond in court.").

8-6:13 FAILURE TO OBEY A JURY SUMMONS

The elements of the crime of failure to obey a juror summons are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. received a summons to serve as a [trial] [grand] juror, and

5. failed to obey the summons,

6. without justifiable excuse.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to obey a juror summons.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to obey a juror summons.

COMMENT

1. *See* § 18-8-612(1), C.R.S. 2015.

2. *See* Instruction F:192 (defining "juror"); Instruction F:195 (defining "knowingly").

8-6:14 WILLFUL MISREPRESENTATION OF MATERIAL FACT ON A JUROR QUESTIONNAIRE

The elements of the crime of willful misrepresentation of material fact on a juror questionnaire are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. willfully,

4. made a misrepresentation of a material fact,

5. when he [she] provided information on a juror questionnaire.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of willful misrepresentation of material fact on a juror questionnaire.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of willful misrepresentation of material fact on a juror questionnaire.

COMMENT

1. *See* § 18-8-613(1), C.R.S. 2015.

2. *See* Instruction F:192 (defining "juror"); Instruction F:195 (defining "willfully").

8-6:15 WILLFUL HARASSMENT OF A JUROR BY AN EMPLOYER

The elements of the crime of willful harassment of a juror by an employer are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. willfully,

4. deprived an employed juror of employment or any incidents or benefits of employment, or harassed, threatened, or coerced an employee because the employee received a juror summons, responded to a juror summons, performed any obligation or election of juror service as a trial juror or grand juror, or exercised his [her] her right to [insert description of right exercised under the "Colorado Uniform Jury Selection and Service Act", Article 71 of Title 13].

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of willful harassment of a juror by an employer.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of willful harassment of a juror by an employer.

COMMENT

1. *See* § 18-8-614(1), C.R.S. 2015.

2. *See* Instruction F:30 (defining "benefit"); Instruction F:192 (defining "juror"); Instruction F:195 (defining "willfully").

8-6:16 RETALIATION AGAINST A JUDGE

The elements of the crime of retaliation against a judge are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. made a credible threat directly to a judge, or to another person if the defendant intended that the communication would be relayed to the judge, or to a person whom the defendant knew was required by statute or ethical rule to report the communication to the judge; or committed an act constituting the crime of harassment, or an act of harm or injury upon a person or property, which action was directed against or committed upon the judge, a member of the judge's family, a person in close relationship to the judge, or a person residing in the same household with the judge,

4. as retaliation or retribution against a judge who was serving in a legal matter assigned to the judge that involved the defendant or a person on whose behalf the defendant was acting.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of retaliation against a judge.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of retaliation against a judge.

COMMENT

1. *See* § 18-8-615(1), C.R.S. 2015.

2. *See* Instruction F:77 (defining "credible threat"); Instruction F:191 (defining "judge"); Instructions 9-1:33, 9-1:34, 9-1:35, 9-1:36 (harassment).

3. It may be necessary to draft a supplemental instruction explaining the relevant principles of law related to a person's duty to report. *See People v. Berry*, 292 P.3d 954, 958 (Colo. App. 2011) ("to violate [section 18-8-615(1)(b)(II)(B)] by making a threat to a person who has the duty to report that threat to the judge, an individual making a threat must know that that person is under such a duty").

3. The reference to the "crime of harassment" is necessary to satisfy the constitutional requirement recognized in *People v. Hickman*, 988 P.2d 628, 643 (Colo. 1999) (holding that the phrase "act of harassment," as it appeared in section 18-8-706 before that statute was amended to include an explicit reference to the offense of harassment, was unconstitutionally overbroad).

4. If the defendant is not charged with harassment, give the jury the elemental instruction for that offense without the two concluding paragraphs that explain the burden of proof. *See* Instructions 9-1:33, 9-1:34, 9-1:35, 9-1:36 (harassment). Place the elemental instruction for harassment immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for harassment.

+ 8-6:17 RETALIATION AGAINST A PROSECUTOR (CREDIBLE THREAT)

The elements of the crime of retaliation against a prosecutor (credible threat) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. as retaliation or retribution against a prosecutor,

5. made a credible threat,

6. [directly to the prosecutor] [to a person other than the prosecutor whom the defendant intended to relay the communication to the prosecutor] [to a person who was required by statute or ethical rule to report the communication to the prosecutor or to the court], and

7. the threat was directed against [an elected district attorney] [a prosecutor who had served or was serving in a legal matter assigned to the prosecutor involving the defendant or a person on whose behalf the defendant was acting] [a member of the prosecutor's family, a person in close relationship to the prosecutor, or a person residing in the same household with the prosecutor].

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of retaliation against a prosecutor (credible threat).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of retaliation against a prosecutor (credible threat).

COMMENT

1. *See* § 18-8-616(1)(a–b), C.R.S. 2015.

2. *See* Instruction F:77 (defining "credible threat"); Instruction F:185 (defining "intentionally"); Instruction F:195 (defining "knowingly"); Instruction F:291.5 (defining "prosecutor").

3. It may be necessary to draft a supplemental instruction explaining the relevant principles of law related to a person's duty to report. *See People v. Berry*, 292 P.3d 954, 958 (Colo. App. 2011) (interpreting the statute prohibiting retaliation against a judge, section 18-8-615, C.R.S. 2011, and holding that, "to violate the statute by making a threat to a person who has the duty to report that threat to the judge, an individual making a threat must know that that person is under such a duty").

4. + The Committee added this instruction in 2015. *See* Ch. 239, sec. 1, § 18-8-616(1)(a–b), 2015 Colo. Sess. Laws 884, 884–85.

+ 8-6:18 RETALIATION AGAINST A PROSECUTOR (ACT OF HARM OR INJURY)

The elements of the crime of retaliation against a prosecutor (act of harm or injury) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. committed an act of harm or injury upon a person or property,

4. as retaliation or retribution against a prosecutor, and

5. the act of harm or injury was directed against or committed upon [an elected district attorney] [a prosecutor who had served or was serving in a legal matter assigned to the prosecutor involving the defendant or a person on whose behalf the defendant was acting] [a member of the prosecutor's family, a person in close relationship to the prosecutor, or a person residing in the same household with the prosecutor].

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of retaliation against a prosecutor (act of harm or injury).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of retaliation against a prosecutor (act of harm or injury).

COMMENT

1. *See* § 18-8-616(1)(a), C.R.S. 2015.

2. *See* Instruction F:291.5 (defining "prosecutor"); *see also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

3. + The Committee added this instruction in 2015. *See* Ch. 239, sec. 1, § 18-8-616(1)(a), 2015 Colo. Sess. Laws 884, 884.

CHAPTER 8-7

VICTIMS AND WITNESSES PROTECTION

8-7:01 BRIBING A WITNESS OR VICTIM (TESTIMONY)

The elements of the crime of bribing a witness or victim (testimony) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. offered, conferred, or agreed to confer,

4. any benefit upon a witness, or a victim, or a person the defendant believed was to be called to testify as a witness or victim in any official proceeding, or upon a member of the witness's family, a member of the victim's family, a person in close relationship to the witness or victim, or a person residing in the same household as the witness or victim,

5. with intent,

6. to influence the witness or victim to testify falsely or unlawfully withhold any testimony.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of bribing a witness or victim (testimony).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of bribing a witness or victim (testimony).

COMMENT

1. *See* § 18-8-703(1)(a), C.R.S. 2015.

2. *See* Instruction F:31 (defining "benefit"); Instruction F:185 (defining "with intent"); Instruction F:250 (defining

"official proceeding"); Instruction F:388 (defining "victim"); Instruction F:393 (defining "witness").

8-7:02 BRIBING A WITNESS OR VICTIM (PROCESS)

The elements of the crime of bribing a witness or victim (process) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. offered, conferred, or agreed to confer,

4. any benefit upon a witness, or a victim, or a person the defendant believed was to be called to testify as a witness or victim in any official proceeding, or upon a member of the witness's family, a member of the victim's family, a person in close relationship to the witness or victim, or a person residing in the same household as the witness or victim,

5. with intent,

6. to induce the witness or victim to avoid legal process summoning him [her] to testify.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of bribing a witness or victim (process).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of bribing a witness or victim (process).

COMMENT

1. *See* § 18-8-703(1)(b), C.R.S. 2015.

2. *See* Instruction F:31 (defining "benefit"); Instruction F:185 (defining "with intent"); Instruction F:250 (defining

"official proceeding"); Instruction F:388 (defining "victim"); Instruction F:393 (defining "witness").

3. The term "legal process" is not defined by statute. *See Black's Law Dictionary* 1399 (10th ed. 2014) (defining "process" as "[a] summons or writ, esp. to appear or respond in court.").

8-7:03 BRIBING A WITNESS OR VICTIM (ABSENTING)

The elements of the crime of bribing a witness or victim (absenting) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. offered, conferred, or agreed to confer,

4. any benefit upon a witness, or a victim, or a person the defendant believed was to be called to testify as a witness or victim in any official proceeding, or upon a member of the witness's family, a member of the victim's family, a person in close relationship to the witness or victim, or a person residing in the same household as the witness or victim,

5. with intent,

6. to induce the witness or victim to absent himself [herself] from an official proceeding.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of bribing a witness or victim (absenting).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of bribing a witness or victim (absenting).

COMMENT

1. *See* § 18-8-703(1)(c), C.R.S. 2015.

2. *See* Instruction F:31 (defining "benefit"); Instruction F:185 (defining "with intent"); Instruction F:250 (defining

"official proceeding"); Instruction F:388 (defining "victim"); Instruction F:393 (defining "witness").

8-7:04 INTIMIDATING A WITNESS OR VICTIM

The elements of the crime of intimidating a witness or victim are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. by use of a threat, or by committing the crime of harassment, or by committing an act of harm or injury to any person or property,

4. directed to or committed upon a witness or a victim to any crime, a person the defendant believed had been or was to be called or who would have been called to testify as a witness or a victim, a member of the witness' family, a member of the victim's family, a person in close relationship to the witness or victim, a person residing in the same household with the witness or victim, or any person who had reported a crime or who might have been called to testify as a witness to or victim of any crime,

5. intentionally,

6. attempted to, or did: influence the witness or victim to testify falsely or unlawfully withhold any testimony; induce the witness or victim to avoid legal process summoning him [her] to testify; induce the witness or victim to absent himself [herself] from an official proceeding; or inflict such harm or injury prior to such testimony or expected testimony.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of intimidating a witness or victim.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements

beyond a reasonable doubt, you should find the defendant not guilty of intimidating a witness or victim.

COMMENT

1. *See* § 18-8-704(1), C.R.S. 2015.

2. *See* Instruction F:185 (defining "intentionally"); Instruction F:388 (defining "victim"); Instruction F:393 (defining "witness"); +; Instructions 9-1:33, 9-1:34, 9-1:35, 9-1:36 (harassment).

3. In *People v. Rester*, 36 P.3d 98, 101 (Colo. App. 2001), a division of the court of appeals held that the trial court acted within its discretion, and in accordance with the supreme court's holding in *People v. Proctor*, 570 P.2d 540 (Colo. 1977), by providing the jury with a supplemental instruction explaining that, for purposes of section 18-8-704(1)(a), the term "unlawfully" referred only to: "the time when the testimony is to be actually withheld, not to the time of the contact. That is, there is no requirement under the law that the victim is under legal summons or subpoena at the time the contact is made."

4. The reference to the "crime of harassment" is included to comply with *People v. Hickman*, 988 P.2d 628, 643 (Colo. 1999) (holding that the phrase "act of harassment," as it appeared in section 18-8-706 before that statute was amended to include an explicit reference to the offense of harassment, was unconstitutionally overbroad).

5. If the defendant is not charged with harassment, give the jury the elemental instruction for that offense without the two concluding paragraphs that explain the burden of proof. *See* Instructions 9-1:33, 9-1:34, 9-1:35, 9-1:36 (harassment). Place the elemental instruction for harassment immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for harassment.

6. The term "legal process" is not defined by statute. *See Black's Law Dictionary* 1399 (10th ed. 2014) (defining "process" as "[a] summons or writ, esp. to appear or respond in court.").

7. + In the absence of case law on point, the Committee takes no position on whether the word "attempted" in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

8. + In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 7.

8-7:05 AGGRAVATED INTIMIDATION OF A WITNESS OR VICTIM (ARMED WITH A DEADLY WEAPON)

The elements of the crime of aggravated intimidation of a witness or victim (armed with a deadly weapon) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. by use of a threat, or by committing the crime of harassment, or by committing an act of harm or injury to any person or property,

4. directed to or committed upon a witness or a victim to any crime, a person the defendant believed had been or was to be called or who would have been called to testify as a witness or a victim, a member of the witness' family, a member of the victim's family, a person in close relationship to the witness or victim, a person residing in the same household with the witness or victim, or any person who had reported a crime or who might have been called to testify as a witness to or victim of any crime,

5. intentionally,

6. attempted to, or did: influence the witness or victim to testify falsely or unlawfully withhold any testimony; induce the witness or victim to avoid legal process summoning him [her] to testify; induce the witness or victim to absent himself [herself] from an official proceeding; or inflict such harm or injury prior to such testimony or expected testimony, and

7. during the act of intimidating, he [she] was armed with a deadly weapon with the intent, if resisted, to kill, maim, or wound the person being intimidated or any other person.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable

doubt, you should find the defendant guilty of aggravated intimidation of a witness or victim (armed with a deadly weapon).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated intimidation of a witness or victim (armed with a deadly weapon).

COMMENT

1. *See* § 18-8-705(1)(a), C.R.S. 2015 (incorporating section 18-8-704(1), C.R.S. 2015).

2. *See* Instruction F:88 (defining "deadly weapon"); Instruction F:185 (defining "intentionally"); Instruction F:250 (defining "official proceeding"); Instruction F:388 (defining "victim"); Instruction F:393 (defining "witness"); +.

3. The reference to the "crime of harassment" is included to comply with *People v. Hickman*, 988 P.2d 628, 643 (Colo. 1999) (holding that the phrase "act of harassment," as it appeared in section 18-8-706 before that statute was amended to include an explicit reference to the offense of harassment, was unconstitutionally overbroad).

4. If the defendant is not charged with harassment, give the jury the elemental instruction for that offense without the two concluding paragraphs that explain the burden of proof. *See* Instructions 9-1:33, 9-1:34, 9-1:35, 9-1:36 (harassment). Place the elemental instruction for harassment immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for harassment.

5. The term "legal process" is not defined by statute. *See Black's Law Dictionary* 1399 (10th ed. 2014) (defining "process" as "A summons or writ, esp. to appear or respond in court.").

6. + In the absence of case law on point, the Committee takes no position on whether the word "attempted" in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should

provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

7. + In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 6.

8-7:06 AGGRAVATED INTIMIDATION OF A WITNESS OR VICTIM (USE OF A DEADLY WEAPON)

The elements of the crime of aggravated intimidation of a witness or victim (use of a deadly weapon) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. by use of a threat, or by committing the crime of harassment, or by committing an act of harm or injury to any person or property,

4. directed to or committed upon a witness or a victim to any crime, a person the defendant believed had been or was to be called or who would have been called to testify as a witness or a victim, a member of the witness' family, a member of the victim's family, a person in close relationship to the witness or victim, a person residing in the same household with the witness or victim, or any person who had reported a crime or who might have been called to testify as a witness to or victim of any crime,

5. intentionally,

6. attempted to, or did, influence the witness or victim to testify falsely or unlawfully withhold any testimony; induce the witness or victim to avoid legal process summoning him [her] to testify; induce the witness or victim to absent himself [herself] from an official proceeding; or inflict such harm or injury prior to such testimony or expected testimony, and

7. during the act of intimidating, he [she] knowingly wounded the person being intimidated or any other person with a deadly weapon, or by the use of force, threats, or intimidation with a deadly weapon knowingly put the person being intimidated or any other person in reasonable fear of death or bodily injury.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated intimidation of a witness or victim (use of a deadly weapon).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated intimidation of a witness or victim (use of a deadly weapon).

COMMENT

1. *See* § 18-8-705(1)(b), C.R.S. 2015 (incorporating section 18-8-704(1), C.R.S. 2015).

2. *See* Instruction F:88 (defining "deadly weapon"); Instruction F:185 (defining "intentionally"); Instruction F:195 (defining "knowingly"); Instruction F:250 (defining "official proceeding"); Instruction F:388 (defining "victim"); Instruction F:393 (defining "witness"); +.

3. The reference to the "crime of harassment" is included to comply with *People v. Hickman*, 988 P.2d 628, 643 (Colo. 1999) (holding that the phrase "act of harassment," as it appeared in section 18-8-706 before that statute was amended to include an explicit reference to the offense of harassment, was unconstitutionally overbroad).

4. If the defendant is not charged with harassment, give the jury the elemental instruction for that offense without the two concluding paragraphs that explain the burden of proof. *See* Instructions 9-1:33, 9-1:34, 9-1:35, 9-1:36 (harassment). Place the elemental instruction for harassment immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for harassment.

5. The term "legal process" is not defined by statute. *See Black's Law Dictionary* 1399 (10th ed. 2014) (defining "process" as "A summons or writ, esp. to appear or respond in court.").

6. + In the absence of case law on point, the Committee takes no position on whether the word "attempted" in this instruction

implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

7. + In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 6.

8-7:07.SP AGGRAVATED INTIMIDATION OF A WITNESS OR VICTIM - SPECIAL INSTRUCTION (DEADLY WEAPON)

Possession of any article used or fashioned in a manner to lead any person reasonably to believe it to be a deadly weapon, or any verbal or other representation by the person that he [she] was so armed, gives rise to a permissible inference that the person was armed with a deadly weapon.

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

COMMENT

1. *See* § 18-8-705(2), C.R.S. 2015.

2. *See* Instruction F:88 (defining "deadly weapon").

3. Although the statute speaks in terms of "prima facie evidence," the concept should be explained as a permissible inference. *See People in re R.M.D.*, 829 P.2d 852 (Colo. 1992) (construing a "prima facie" proof provision as establishing a permissible inference); *see generally Jolly v. People*, 742 P.2d 891, 897 (Colo. 1987) (unlike a mandatory presumption, the use of a permissible inference in a criminal case does not violate due process).

8-7:08 RETALIATION AGAINST A WITNESS OR VICTIM

The elements of the crime of retaliation against a witness or victim are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. used a threat, an act constituting the crime of harassment, or an act of harm or injury upon any person or property,

4. directed to, or committed upon, a witness or victim to any crime, an individual whom the defendant believed had been or would be called to testify as a witness or victim, a member of the witness's family, a member of the victim's family, an individual in close relationship to the witness or victim, or an individual residing in the same household with the witness or victim,

5. as retaliation or retribution against the witness or victim.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of retaliation against a witness or victim.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of retaliation against a witness or victim.

COMMENT

1. *See* § 18-8-706(1), C.R.S. 2015.

2. *See* Instruction F:388 (defining "victim"); Instruction F:393 (defining "witness"); Instructions 9-1:33, 9-1:34, 9-1:35, 9-1:36 (harassment).

3. The term "threat" is not defined by statute. *See People v. Hickman*, 988 P.2d 628, 637 (Colo. 1999) ("Colorado caselaw defines threat and provides a basis for presuming that the General Assembly intended to use this definition, and we find support for this definition in other sources. Our analysis of the constitutionality of section 18–8–706 also suggests that threat should be interpreted in a narrow fashion. Thus, we construe threat in section 18–8–706 to mean an expression of an intent or statement of purpose to commit harm or injury to another's person, property, or rights through the commission of unlawful acts.").

4. The reference to the "crime of harassment" is included to comply with *People v. Hickman*, 988 P.2d 628, 643 (Colo. 1999) (holding that the phrase "act of harassment," as it appeared in section 18-8-706 before that statute was amended to include an explicit reference to the offense of harassment, was unconstitutionally overbroad).

5. If the defendant is not charged with harassment, give the jury the elemental instruction for that offense without the two concluding paragraphs that explain the burden of proof. *See* Instructions 9-1:33, 9-1:34, 9-1:35, 9-1:36 (harassment). Place the elemental instruction for harassment immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for harassment.

8-7:09 RETALIATION AGAINST A JUROR

The elements of the crime of retaliation against a juror are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. used a threat, an act constituting the crime of harassment, or an act of harm or injury upon any person or property,

4. directed to, or committed upon, a juror who had served for a criminal or civil trial involving the defendant or a person or persons on whose behalf the defendant was acting, a member of the juror's family, an individual in close relationship to the juror, or an individual residing in the same household with the juror,

5. as retaliation or retribution against the juror.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of retaliation against a juror.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of retaliation against a juror.

COMMENT

1. *See* § 18-8-706.5, C.R.S. 2015.

2. *See* Instruction F:192 (defining "juror"); Instructions 9-1:33, 9-1:34, 9-1:35, 9-1:36 (harassment).

3. The term "threat" is not defined by statute. *See People v. Hickman*, 988 P.2d 628, 637 (Colo. 1999) ("Colorado caselaw defines threat and provides a basis for presuming that the General Assembly intended to use this definition, and we find support for this definition in other sources. Our analysis of the constitutionality of section 18–8–706 also suggests that threat should be interpreted in a narrow fashion. Thus, we construe threat in section 18–8–706 to mean an expression of an intent or statement of purpose to commit harm or injury to another's person, property, or rights through the commission of unlawful acts.").

4. The reference to the "crime of harassment" is included to comply with *People v. Hickman*, 988 P.2d 628, 643 (Colo. 1999) (holding that the phrase "act of harassment," as it appeared in section 18-8-706 before that statute was amended to include an explicit reference to the offense of harassment, was unconstitutionally overbroad).

5. If the defendant is not charged with harassment, give the jury the elemental instruction for that offense without the two concluding paragraphs that explain the burden of proof. *See* Instructions 9-1:33, 9-1:34, 9-1:35, 9-1:36 (harassment). Place the elemental instruction for harassment immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for harassment.

8-7:10 TAMPERING WITH A WITNESS OR VICTIM (TESTIMONY)

The elements of the crime of tampering with a witness or victim (testimony) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. intentionally,

4. attempted,

5. without bribery or threats,

6. to induce a witness, a victim, a person the defendant believed was to be called to testify as a witness or victim in any official proceeding, or a person the defendant believed might be called to testify as a witness or victim of any crime,

7. to testify falsely or unlawfully withhold any testimony.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of tampering with a witness or victim (testimony).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of tampering with a witness or victim (testimony).

COMMENT

1. *See* § 18-8-707(1)(a), C.R.S. 2015.

2. *See* Instruction F:185 (defining "intentionally"); Instruction F:250 (defining "official proceeding"); Instruction

F:388 (defining "victim"); Instruction F:393 (defining "witness"); +.

3. *See People v. Cunefare*, 102 P.3d 302, 306-07 (Colo. 2004) ("Because the language of the intimidation statute is substantially similar to the language [of section 18-8-707], we hold that the same principles apply here. Reading the introductory portion of the statute together with subsection (1)(a), we interpret 'testimony' and 'unlawfully withhold' to protect statements that may be offered in the future, not just those already sworn or received as evidence. Accordingly, under subsection (1)(a), the witness or victim need not be under subpoena or legal summons at the time of the contact, and the defendant need not succeed in interfering with actual testimony of the victim or witness."); *see also* Instruction 8-7:04, Comment 3 (discussing precedent interpreting the term "unlawfully" for purposes of the offense of intimidating a witness or victim).

4. + In the absence of case law on point, the Committee takes no position on whether the word "attempted" in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

5. + In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 4.

8-7:11 TAMPERING WITH A WITNESS OR VICTIM (ABSENTING)

The elements of the crime of tampering with a witness or victim (absenting) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. intentionally,

4. attempted,

5. without bribery or threats,

6. to induce a witness, a victim, a person the defendant believed was to be called to testify as a witness or victim in any official proceeding, or a person the defendant believed might be called to testify as a witness or victim of any crime,

7. to absent himself [herself] from any official proceeding to which he [she] had been legally summoned.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of tampering with a witness or victim (absenting).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of tampering with a witness or victim (absenting).

COMMENT

1. *See* § 18-8-707(1)(b), C.R.S. 2015.

2. *See* Instruction F:185 (defining "intentionally"); Instruction F:250 (defining "official proceeding"); Instruction

F:388 (defining "victim"); Instruction F:393 (defining "witness"); +.

3. *See People v. Yascavage*, 101 P.3d 1090, 1096 (Colo. 2004) (the term "legally summoned," as used in section 18-8-707(1)(b), "means some action taken by the official tribunal that obligates a witness to appear at an official proceeding"; "neither subsection (1)(a) nor subsection (1)(c) require such legal process in order to trigger the crime. Only subsection (1)(b) requires that element.").

4. + In the absence of case law on point, the Committee takes no position on whether the word "attempted" in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

5. + In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 4.

8-7:12 TAMPERING WITH A WITNESS OR VICTIM (PROCESS)

The elements of the crime of tampering with a witness or victim (process) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. intentionally,

4. attempted,

5. without bribery or threats,

6. to induce a witness, a victim, a person the defendant believed was to be called to testify as a witness or victim in any official proceeding, or a person the defendant believed might be called to testify as a witness or victim of any crime,

7. to avoid legal process summoning him [her] to testify.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of tampering with a witness or victim (process).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of tampering with a witness or victim (process).

COMMENT

1. *See* § 18-8-707(1)(c), C.R.S. 2015.

2. *See* Instruction F:185 (defining "intentionally"); Instruction F:250 (defining "official proceeding"); Instruction F:388 (defining "victim"); Instruction F:393 (defining "witness"); +.

3. The term "legal process" is not defined by statute. *See Black's Law Dictionary* 1399 (10th ed. 2014) (defining "process" as "A summons or writ, esp. to appear or respond in court.").

4. + In the absence of case law on point, the Committee takes no position on whether the word "attempted" in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

5. + In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 4.

CHAPTER 8-8

OFFENSES RELATING TO USE OF FORCE BY PEACE OFFICERS

CHAPTER COMMENTS

1. Section 18-8-803(1), C.R.S. 2015, provides as follows:

> Subject to the provisions of section 18-1-707, a peace officer who uses excessive force in pursuance of such officer's law enforcement duties shall be subject to the criminal laws of this state to the same degree as any other citizen, including the provisions of part 1 of article 3 of this title concerning homicide and related offenses and the provisions of part 2 of said article 3 concerning assaults.

The Committee views this provision as stating a principle of law for the court to apply. Accordingly, the Committee has not drafted a model instruction embodying it.

8-8:01 FAILURE TO REPORT EXCESSIVE FORCE

The elements of the crime of failure to report excessive force are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was a peace officer, and

4. in pursuance of his [her] law enforcement duties,

5. witnessed another peace officer, in pursuance of the other peace officer's law enforcement duties in carrying out an arrest of any person, placing any person under detention, taking any person into custody, booking any person, or in the process of crowd control or riot control,

6. use physical force which exceeded the degree of physical force permitted, and

7. the defendant did not, within ten days of the occurrence of the use of such force, submit a written report, to his [her] immediate supervisor, that included the date, time, and place of the occurrence, the identity (if known) and description of the participants, and a description of the events and the force used.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to report excessive force.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to report excessive force.

COMMENT

1. *See* § 18-8-802(1)(a-c), C.R.S. 2015.

2. *See* Instruction F:263 (defining "peace officer").

3. The court should draft a supplemental instruction, tailored to the facts of the case, explaining the relevant principles by which the jury is to make its determination concerning "the degree of physical force permitted." *See* Instructions H:19, H:20, H:25, H:26, H:27.SP, H:28.SP, H:29.SP (affirmative defense instructions, pursuant to section 18-1-707, C.R.S. 2015, that explain when it is lawful for a peace officer to use physical force, including deadly physical force).

4. It may be necessary to draft a supplemental instruction explaining what other types of written reports satisfy the requirements of this statute. *See* § 18-8-802(1)(b), C.R.S. 2015 ("A copy of an arrest report or other similar report required as a part of a peace officer's duties can be substituted for the report required by this section, so long as it includes such information.").

8-8:02 FALSE REPORTING TO AUTHORITIES (EXCESSIVE FORCE)

The elements of the crime of false reporting to authorities (excessive force) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was a peace officer, and

4. knowingly,

5. in pursuance of his [her] law enforcement duties,

6. witnessed another peace officer, in pursuance of the other peace officer's law enforcement duties in carrying out an arrest of any person, placing any person under detention, taking any person into custody, booking any person, or in the process of crowd control or riot control,

7. use physical force which exceeded the degree of physical force permitted, and

8. the defendant made a materially false statement when describing the occurrence in a written report to his [her] immediate supervisor, or in an arrest report or other similar report required as part of his [her] duties.

[9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of false reporting to authorities (excessive force).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of false reporting to authorities (excessive force).

COMMENT

1. *See* § 18-8-802(2), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:220 (defining "materially false statement"); Instruction F:263 (defining "peace officer").

3. The court should draft a supplemental instruction, tailored to the facts of the case, explaining the relevant principles by which the jury is to make its determination concerning "the degree of physical force permitted." *See* Instructions H:19, H:20, H:25, H:26, H:27.SP, H:28.SP, H:29.SP (affirmative defense instructions, pursuant to section 18-1-707, C.R.S. 2015, that explain when it is lawful for a peace officer to use physical force, including deadly physical force).

8-8:03.SP FAILURE TO REPORT EXCESSIVE FORCE AND FALSE REPORTING TO AUTHORITIES (EXCESSIVE FORCE) – SPECIAL INSTRUCTION (EXCESSIVE FORCE; INCAPABLE OF RESISTING)

"Excessive force" means physical force which exceeds the degree of physical force permitted pursuant to these instructions.

Evidence that a peace officer continued to apply physical force in excess of the force permitted by these instructions to a person who had been rendered incapable of resisting arrest gives rise to a permissible inference of excessive force.

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

COMMENT

1. *See* § 18-8-803(2), C.R.S. 2015.

2. The Committee has not drafted a model instruction defining "excessive force." The court should draft a supplemental instruction, tailored to the facts of the case, explaining the relevant provisions of section 18-1-707, C.R.S. 2015. *See* Instructions H:19, H:20, H:25, H:26, H:27.SP, H:28.SP, H:29.SP (affirmative defense instructions, pursuant to section 18-1-707, C.R.S. 2015, that explain when it is lawful for a peace officer to use reasonable physical force, including deadly physical force). *See also* Instructions 8-1:02 and 8-1:03 (resisting arrest).

CHAPTER 9-1

OFFENSES AGAINST PUBLIC PEACE AND ORDER

9-1:22	TARGETED RESIDENTIAL PICKETING (SIGN OR PLACARD)
9-1:23	INTERFERENCE WITH STAFF, FACULTY, OR STUDENTS OF EDUCATIONAL INSTITUTIONS (MOVEMENT, USE, OR INGRESS AND EGRESS)
9-1:24	INTERFERENCE WITH STAFF, FACULTY, OR STUDENTS OF EDUCATIONAL INSTITUTIONS (IMPEDED)
9-1:25	INTERFERENCE WITH STAFF, FACULTY, OR STUDENTS OF EDUCATIONAL INSTITUTIONS (REFUSING OR FAILING TO LEAVE)
9-1:26	INTERFERENCE WITH STAFF, FACULTY, OR STUDENTS OF EDUCATIONAL INSTITUTIONS (CREDIBLE THREAT)
9-1:27	INTERFERENCE AT A PUBLIC BUILDING (DENIED)
9-1:28	INTERFERENCE AT A PUBLIC BUILDING (IMPEDED)
9-1:29	REFUSING OR FAILING TO LEAVE A PUBLIC BUILDING
9-1:30	IMPEDING PROCEEDINGS IN A PUBLIC BUILDING
9-1:31	INTRUSION IN A PUBLIC BUILDING
9-1:32	PICKETING IN A PUBLIC BUILDING
9-1:33	HARASSMENT (PHYSICAL CONTACT)
9-1:34	HARASSMENT (OBSCENE)
9-1:35	HARASSMENT (FOLLOW)
9-1:36	HARASSMENT (COMMUNICATION)
9-1:37.SP	HARASSMENT - SPECIAL INSTRUCTION (LOCATION OF COMMUNICATION)
9-1:38	HARASSMENT (TELEPHONE)
9-1:39	HARASSMENT (REPEATED COMMUNICATION)
9-1:40	HARASSMENT (PROVOCATION)
9-1:41.INT	HARASSMENT - INTERROGATORY
9-1:42	LOITERING
9-1:43	DESECRATION OF A VENERATED OBJECT
9-1:44	DESECRATION OF A PLACE OR WORSHIP OR BURIAL OF HUMAN REMAINS
9-1:45	HINDERING TRANSPORTATION
9-1:46	ENDANGERING PUBLIC TRANSPORTATION (TAMPER)
9-1:47	ENDANGERING PUBLIC TRANSPORTATION (CRIME)
9-1:48	ENDANGERING PUBLIC TRANSPORTATION (THREAT)

9-1:01 INCITING A RIOT (INCITE OR URGE)

The elements of the crime of inciting a riot (incite or urge) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. incited or urged a group of five or more persons,

4. to engage in a current or impending riot.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of inciting a riot (incite or urge).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of inciting a riot (incite or urge).

COMMENT

1. *See* § 18-9-102(1)(a), C.R.S. 2015.

2. *See* Instruction F:324 (defining "riot").

3. *See People v. Mullins*, 209 P.3d 1147, 1150 (Colo. App. 2008) (self-defense is an affirmative defense to inciting a riot).

9-1:02 INCITING A RIOT (FURTHERANCE)

The elements of the crime of inciting a riot (furtherance) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. gave commands, instructions, or signals,

4. to a group of five or more persons,

5. in furtherance of a riot.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of inciting a riot (furtherance).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of inciting a riot (furtherance).

COMMENT

1. *See* § 18-9-102(1)(b), C.R.S. 2015.

2. *See* Instruction F:324 (defining "riot").

3. *See People v. Mullins*, 209 P.3d 1147, 1150 (Colo. App. 2008) (self-defense is an affirmative defense to inciting a riot).

9-1:03.INT INCITING A RIOT – INTERROGATORY (INJURY OR DAMAGE)

If you find the defendant not guilty of inciting a riot, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of inciting a riot, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the inciting cause injury or damage?
(Answer "Yes" or "No")

The inciting caused injury or damage only if:

1. the inciting of a riot resulted in injury to a person or damage to property.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-9-102(3), C.R.S. 2015.

2. *See* Instruction F:36 (defining "bodily injury"); *see, e.g.*, Instruction E:28 (special verdict form).

9-1:04 ARMING RIOTERS (SUPPLY)

The elements of the crime of arming rioters (supply) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. supplied a deadly weapon or destructive device,

5. for use in a riot.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of arming rioters (supply).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of arming rioters (supply).

COMMENT

1. *See* § 18-9-103(1)(a), C.R.S. 2015.

2. *See* Instruction F:88 (defining "deadly weapon"); Instruction F:94 (defining "destructive device"); Instruction F:324 (defining "riot").

9-1:05 ARMING RIOTERS (TEACH)

The elements of the crime of arming rioters (teach) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. taught another to prepare or use a deadly weapon or destructive device,

4. with intent,

5. that any such thing be used in a riot.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of arming rioters (teach).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of arming rioters (teach).

COMMENT

1. *See* § 18-9-103(1)(b), C.R.S. 2015.

2. *See* Instruction F:88 (defining "deadly weapon"); Instruction F:94 (defining "destructive device"); Instruction F:185 (defining "with intent"); Instruction F:324 (defining "riot").

9-1:06 ENGAGING IN A RIOT

The elements of the crime of engaging in a riot are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. engaged in a riot.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of engaging in a riot.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of engaging in a riot.

COMMENT

1. *See* § 18-9-104(1), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:324 (defining "riot"); *see also People v. Bridges*, 620 P.2d 1, 3 (Colo. 1980) ("We conclude that the mental state 'knowingly' is implied by the statute and is required for the offense of engaging in a riot.").

3. *See People v. Mullins*, 209 P.3d 1147, 1150 (Colo. App. 2008) (self-defense is an affirmative defense to engaging in a riot).

9-1:07.INT ENGAGING IN A RIOT - INTERROGATORY

If you find the defendant not guilty of engaging in a riot, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of engaging in a riot, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the defendant's engagement aggravated?
(Answer "Yes" or "No")

The defendant's engagement was aggravated only if:

1. in the course of rioting,

2. the defendant employed a deadly weapon, a destructive device, or any article used or fashioned in a manner to cause a person to reasonably believe that the article was a deadly weapon; or represented verbally or otherwise that he [she] was armed with a deadly weapon.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-9-104(1), C.R.S. 2015.

2. *See* Instruction F:88 (defining "deadly weapon"); Instruction F:94 (defining "destructive device"); *see, e.g.*, Instruction E:28 (special verdict form).

3. *See People v. Rivas*, 77 P.3d 882, 888 (Colo. App. 2003) (the General Assembly did not intend that a culpable mental state apply to the sentence enhancing factors for the offense of engaging in a riot).

9-1:08.SP INCITING OR ENGAGING IN A RIOT - SPECIAL INSTRUCTION (ATTEMPT, CONSPIRACY, AND SOLICITATION)

A person may be convicted of attempt, conspiracy, or solicitation to incite or engage in a riot only if he [she] engaged in the prohibited conduct with respect to a current or impending riot.

COMMENT

1. *See* § 18-9-102(2), C.R.S. 2015.

9-1:09 DISOBEDIENCE OF A PUBLIC SAFETY ORDER UNDER RIOT CONDITIONS

The elements of the crime of disobedience of a public safety order under riot conditions are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. during a riot or when a riot was impending,

5. disobeyed a reasonable public safety order to move, disperse, or refrain from specified activities in the immediate vicinity of the riot.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of disobedience of a public safety order under riot conditions.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of disobedience of a public safety order under riot conditions.

COMMENT

1. *See* § 18-9-105, C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:305 (defining "public safety order"); Instruction F:324 (defining "riot").

3. *See* Instruction H:54 (affirmative defense of "news reporter or media person").

9-1:10 DISORDERLY CONDUCT (COARSE AND OBVIOUSLY OFFENSIVE)

The elements of the crime of disorderly conduct (coarse and obviously offensive) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. intentionally, knowingly, or recklessly,

4. made a coarse and obviously offensive utterance, gesture, or display,

5. in a public place, and

6. the utterance, gesture, or display tended to incite an immediate breach of the peace.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of disorderly conduct (coarse and obviously offensive).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of disorderly conduct (coarse and obviously offensive).

COMMENT

1. *See* § 18-9-106(1)(a), C.R.S. 2015.

2. *See* Instruction F:185 (defining "intentionally"); Instruction F:195 (defining "knowingly"); Instruction F:303 (defining "public place"); Instruction F:308 (defining "recklessly").

9-1:11 DISORDERLY CONDUCT (UNREASONABLE NOISE)

The elements of the crime of disorderly conduct (unreasonable noise) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. intentionally, knowingly, or recklessly,

4. made unreasonable noise,

5. in a public place or near a private residence that he [she] had no right to occupy.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of disorderly conduct (unreasonable noise).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of disorderly conduct (unreasonable noise).

COMMENT

1. *See* § 18-9-106(1)(c), C.R.S. 2015.

2. *See* Instruction F:185 (defining "intentionally"); Instruction F:195 (defining "knowingly"); Instruction F:303 (defining "public place"); Instruction F:308 (defining "recklessly").

9-1:12.INT DISORDERLY CONDUCT (COARSE AND OBVIOUSLY OFFENSIVE; UNREASONABLE NOISE) – INTERROGATORY (FUNERAL)

If you find the defendant not guilty of disorderly conduct ([coarse and obviously offensive] [unreasonable noise]), you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of ([coarse and obviously offensive] [unreasonable noise]), you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the defendant disorderly at a funeral?
(Answer "Yes" or "No")

The defendant was disorderly at a funeral only if:

1. he [she] committed the offense with intent to disrupt, impair, or interfere with a funeral, or with intent to cause severe emotional distress to a person attending a funeral.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-9-106(3)(a), C.R.S. 2015.

2. *See* Instruction F:159 (defining "funeral"); *see, e.g.*, Instruction E:28 (special verdict form).

3. *Cf. Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (picketers near the funeral of a member of the military killed in the line of duty could not be held liable on state-law tort claims alleging intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy; picketers carried signs displaying messages that, for the most part, constituted speech addressing matters of public concern, and they conducted their picketing peacefully, without interfering with the funeral).

9-1:13 DISORDERLY CONDUCT (FIGHTING IN PUBLIC)

The elements of the crime of disorderly conduct (fighting in public) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. intentionally, knowingly, or recklessly,

4. fought with another,

5. in a public place,

6. while not engaged in an amateur or professional contest of athletic skill.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of disorderly conduct (fighting in public).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of disorderly conduct (fighting in public).

COMMENT

1. *See* § 18-9-106(1)(d), C.R.S. 2015.

2. *See* Instruction F:185 (defining "intentionally"); Instruction F:195 (defining "knowingly"); Instruction F:303 (defining "public place"); Instruction F:308 (defining "recklessly").

9-1:14 DISORDERLY CONDUCT (DISCHARGE OF A FIREARM IN A PUBLIC PLACE)

The elements of the crime of disorderly conduct (discharge of a firearm in a public place) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. intentionally, knowingly, or recklessly,

4. discharged a firearm,

5. in a public place, and

6. he [she] was not a peace officer, and was not engaged in lawful target practice, hunting, or the ritual discharge of blank ammunition cartridges as an attendee at a funeral for a deceased person who was a veteran of the armed forces of the United States.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of disorderly conduct (discharge of a firearm in a public place).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of disorderly conduct (discharge of a firearm in a public place).

COMMENT

1. *See* § 18-9-106(1)(e), C.R.S. 2015.

2. *See* Instruction F:154 (defining "firearm"); Instruction F:185 (defining "intentionally"); Instruction F:195 (defining "knowingly"); Instruction F:263 (defining "peace officer");

Instruction F:303 (defining "public place"); Instruction F:308 (defining "recklessly").

9-1:15 DISORDERLY CONDUCT (DEADLY WEAPON; DISPLAY OR REPRESENTATION)

The elements of the crime of disorderly conduct (deadly weapon; display or representation) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. intentionally, knowingly, or recklessly,

4. displayed a deadly weapon, or displayed any article used or fashioned in a manner to cause a person to reasonably believe that the article was a deadly weapon, or represented verbally or otherwise that he [she] was armed with a deadly weapon,

5. in a public place, and

6. in a manner calculated to alarm, and

7. the defendant was not a peace officer.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of disorderly conduct (deadly weapon; display or representation).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of disorderly conduct (deadly weapon; display or representation).

COMMENT

1. *See* § 18-9-106(1)(f), C.R.S. 2015.

2. *See* Instruction F:88 (defining "deadly weapon"); Instruction F:185 (defining "intentionally"); Instruction F:195

(defining "knowingly"); Instruction F:263 (defining "peace officer"); Instruction F:303 (defining "public place"); Instruction F:308 (defining "recklessly").

9-1:16 OBSTRUCTING A HIGHWAY OR OTHER PASSAGEWAY (ACT)

The elements of the crime of obstructing a highway or other passageway (act) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. intentionally, knowingly, or recklessly,

4. without legal privilege,

5. obstructed a highway, street, sidewalk, railway, waterway, building entrance, elevator, aisle, stairway, or hallway to which the public or a substantial group of the public had access, or any other place used for the passage of persons, vehicles, or conveyances, and

6. the obstruction arose from the defendant's acts alone, or the acts of the defendant and the acts of others.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of obstructing a highway or other passageway (act).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of obstructing a highway or other passageway (act).

COMMENT

1. *See* § 18-9-107(1)(a), C.R.S. 2015.

2. *See* Instruction F:185 (defining "intentionally"); Instruction F:195 (defining "knowingly"); Instruction F:247 (defining "obstruct"); Instruction F:308 (defining "recklessly").

9-1:17 OBSTRUCTING A HIGHWAY OR OTHER PASSAGEWAY (DISOBEYING A REASONABLE REQUEST OR ORDER)

The elements of the crime of obstructing a highway or other passageway (disobeying a reasonable request or order to move) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. intentionally, knowingly, or recklessly,

4. without legal privilege,

5. disobeyed a reasonable request or order to move,

6. issued by a person the defendant knew was a peace officer, a firefighter, or a person with authority to control the use of the premises,

7. to prevent obstruction of a highway or passageway, or to maintain public safety by dispersing those gathered in dangerous proximity to a fire, riot, or other hazard.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of obstructing a highway or other passageway (disobeying a reasonable request or order to move).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of obstructing a highway or other passageway (disobeying a reasonable request or order to move).

COMMENT

1. *See* § 18-9-107(1)(b), C.R.S. 2015.

2. *See* Instruction F:157 (defining "firefighter"); Instruction F:185 (defining "intentionally"); Instruction F:195 (defining "knowingly"); Instruction F:247 (defining "obstruct"); Instruction F:263 (defining "peace officer"); Instruction F:308 (defining "recklessly"); Instruction F:324 (defining "riot"); *see also* Instructions F:283, F:284 (alternative definitions of "premises," for purposes of burglary and trespass offenses).

3. Section 18-9-107(1)(b) does not define the term "passageway."

9-1:18.INT OBSTRUCTING A HIGHWAY OR OTHER PASSAGEWAY – INTERROGATORY (FUNERAL)

If you find the defendant not guilty of obstructing a highway or other passageway, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of obstructing a highway or other passageway, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant obstruct a funeral?
(Answer "Yes" or "No")

The defendant obstructed a funeral only if:

1. he [she] knowingly obstructed [the entrance into, or exit from, a funeral or funeral site] [a highway, or other passageway, where a funeral procession was taking place].

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-9-107(3), C.R.S. 2015.

2. *See* Instruction F:159 (defining "funeral"); Instruction F:160 (defining "funeral site"); Instruction F:195 (defining "knowingly"); Instruction F:247 (defining "obstruct"); *see, e.g.*, Instruction E:28 (special verdict form).

3. The term “funeral procession” is not defined by statute.

9-1:19 DISRUPTING A LAWFUL ASSEMBLY

The elements of the crime of disrupting a lawful assembly are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to prevent or disrupt any lawful meeting, procession, or gathering,

5. significantly obstructed or interfered with the meeting, procession, or gathering,

6. by physical action, verbal utterance, or any other means.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of disrupting a lawful assembly.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of disrupting a lawful assembly.

COMMENT

1. *See* § 18-9-108(1), C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent").

3. *See Dempsey v. People*, 117 P.3d 800, 807-08 (Colo. 2005) (holding that the disrupting statute was not unconstitutional, as applied, because it focuses on conduct, not speech).

9-1:20.INT DISRUPTING A LAWFUL ASSEMBLY – INTERROGATORY

If you find the defendant not guilty of disrupting a lawful assembly, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of disrupting a lawful assembly, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

> Did the defendant commit the crime of disrupting a lawful assembly by disrupting a funeral? (Answer "Yes" or "No")

The defendant committed the crime of disrupting a lawful assembly by disrupting a funeral only if:

1. defendant knew the meeting, procession, or gathering was a funeral.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-9-108(2), C.R.S. 2015.

2. *See* Instruction F:159 (defining "funeral"); *see, e.g.*, Instruction E:28 (special verdict form).

9-1:21 TARGETED RESIDENTIAL PICKETING (ROUTE OR LOCATION)

The elements of the crime of targeted residential picketing (route or location) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. engaged in targeted picketing, and

4. did so in a manner other than by marching, without stopping in front or on either side of a residence, over a route that proceeded a distance that extended beyond three adjacent structures to one side of the targeted residence along the one-way length and three adjacent structures to the other side of the targeted residence along the one-way length or three hundred feet to one side of the targeted residence along the one-way length and three hundred feet to the other side of the targeted residence along the one-way length, whichever distance was shorter, and

5. had previously been ordered by a peace officer or law enforcement official to move, disperse, or take other appropriate action, by means of a warning that included an indication of the required distances that persons engaging in picketing must march, and

6. failed to promptly comply with the warning.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of targeted residential picketing (route or location).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of targeted residential picketing (route or location).

COMMENT

1. *See* § 18-9-108.5(3)(a), C.R.S. 2015.

2. *See* Instruction F:316 (defining "residence"); Instruction F:362 (defining "targeted picketing").

3. Section 18-9-108.5(4), C.R.S. 2015, provides as follows:

> Vehicles or trailers used in targeted picketing shall not park within three residences or three hundred feet of a residence that is the subject of targeted picketing. There is a presumption that a vehicle or trailer is used in targeted picketing when signage is affixed to the vehicle containing content related to the targeted picketing.

It appears that, rather that establishing an independent basis for criminal liability, this provision was enacted to provide a basis for a police officer to require that a protestor move his [her] vehicle. Accordingly, the Committee has not drafted a model instruction embodying this provision.

4. *Cf. Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (picketers near the funeral of a member of the military killed in the line of duty could not be held liable on state-law tort claims alleging intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy; picketers carried signs displaying messages that, for the most part, constituted speech addressing matters of public concern, and they conducted their picketing peacefully, without interfering with the funeral).

9-1:22 TARGETED RESIDENTIAL PICKETING (SIGN OR PLACARD)

The elements of the crime of targeted residential picketing (sign or placard) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. engaged in targeted picketing, and

4. held, carried, or otherwise displayed on his [her] person a sign or placard that was greater in size than six square feet, or more than one sign or placard,

5. while he [she] was on a street or sidewalk in a residential area, and

6. had previously been ordered by a peace officer or law enforcement official to move, disperse, or take other appropriate action, by means of a warning that included an indication of the necessary conditions for signs or placards, and

7. failed to promptly comply with the warning.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of targeted residential picketing (sign or placard).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of targeted residential picketing (sign or placard).

COMMENT

1. *See* § 18-9-108.5(3)(b), C.R.S. 2015.

2. *See* Instruction F:316 (defining "residence"); Instruction F:362 (defining "targeted picketing").

3. Section 18-9-108.5(4), C.R.S. 2015, provides as follows:

> Vehicles or trailers used in targeted picketing shall not park within three residences or three hundred feet of a residence that is the subject of targeted picketing. There is a presumption that a vehicle or trailer is used in targeted picketing when signage is affixed to the vehicle containing content related to the targeted picketing.

It appears that, rather that establishing an independent basis for criminal liability, this provision was enacted to provide a basis for a police officer to require that a protestor move his [her] vehicle. Accordingly, the Committee has not drafted a model instruction embodying this provision.

4. *Cf. Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (picketers near the funeral of a member of the military killed in the line of duty could not be held liable on state-law tort claims alleging intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy; picketers carried signs displaying messages that, for the most part, constituted speech addressing matters of public concern, and they conducted their picketing peacefully, without interfering with the funeral).

9-1:23 INTERFERENCE WITH STAFF, FACULTY, OR STUDENTS OF EDUCATIONAL INSTITUTION (MOVEMENT, USE, OR INGRESS AND EGRESS)

The elements of the crime of interference with staff, faculty, or students of educational institutions (movement, use, or ingress and egress) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. willfully,

4. was on or near the premises or facilities of any educational institution, and

5. denied to students, school officials, employees, and invitees,

6. lawful freedom of movement on the premises; or lawful use of the property or facilities of the institution; or the right of lawful ingress and egress to the institution's physical facilities.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of interference with staff, faculty, or students of educational institutions (movement, use, or ingress and egress).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of interference with staff, faculty, or students of educational institutions (movement, use, or ingress and egress).

COMMENT

1. *See* § 18-9-109(1)(a-c), C.R.S. 2015.

2. *See* Instruction F:195 (defining "willfully").

3. *See* Instruction H:55 (affirmative defense of "lawful assembly").

4. The fifth element uses a conjunction in order to be consistent with the language of the statute (i.e., "students, school officials, employees, and invitees"). However, this may be a legislative drafting error since the name of the offense is a disjunctive list.

5. Likewise, the sixth element uses a conjunction in order to be consistent with the language of the statute (i.e., "ingress and egress"). However, it is unclear whether the General Assembly intended to require proof that the defendant's conduct resulted in a denial of both ingress and egress (or it may be the case that the General Assembly was of the view that the denial of either necessarily results in a denial of both).

6. + *See People v. Moore*, 2013 COA 86, ¶ 13, 338 P.3d 348, 350 ("we interpret the phrase 'public official or employee' in section 18-9-110(2) to apply only to a victim who is either an official or an employee of a public entity. Contrary to the trial court's reading, the adjective 'public' modifies both 'official[']and [']employee.'").

7. + In 2015, the Committee added Comment 6 citing to *People v. Moore*, *supra*.

9-1:24 INTERFERENCE WITH STAFF, FACULTY, OR STUDENTS OF EDUCATIONAL INSTITUTIONS (IMPEDED)

The elements of the crime of interference with staff, faculty, or students of educational institutions (impeded) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. willfully,

4. was on the premises of any educational institution, or at or in any building or other facility being used by any educational institution, and

5. impeded the staff or faculty of the institution in the lawful performance of their duties, or impeded a student of the institution in the lawful pursuit of his [her] educational activities,

6. through the use of restraint, abduction, coercion or intimidation, or when force or violence were present or threatened.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of interference with staff, faculty, or students of educational institutions (impeded).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of interference with staff, faculty, or students of educational institutions (impeded).

COMMENT

1. *See* § 18-9-109(2), C.R.S. 2015.

2. *See* Instruction F:195 (defining "willfully").

3. *See* Instruction H:55 (affirmative defense of "lawful assembly").

4. *See People in the Interest of C.F.*, 2012 COA 75, ¶¶ 15–20, 279 P.3d 1231, 1235-36 (holding, in a case involving a bomb threat communicated by telephone, that section 18-9-102(2) requires proof that the defendant was at the institution when he interfered with school operations).

9-1:25 INTERFERENCE WITH STAFF, FACULTY, OR STUDENTS OF EDUCATIONAL INSTITUTIONS (REFUSING OR FAILING TO LEAVE)

The elements of the crime of interference with staff, faculty, or students of educational institutions (refusing or failing to leave) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. willfully,

4. refused or failed to leave the property of or any building or facility used by any educational institution,

5. upon being requested to do so by the chief administrative officer, his [her] designee charged with maintaining order on the school premises and in its facilities, or a dean of the educational institution, and

6. the defendant was committing, threatened to commit, or incited others to commit any act which would disrupt, impair, interfere with, or obstruct the lawful missions, processes, procedures, or functions of the institution.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of interference with staff, faculty, or students of educational institutions (refusing or failing to leave).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of interference with staff, faculty, or students of educational institutions (refusing or failing to leave).

COMMENT

1. *See* § 18-9-109(3), C.R.S. 2015.

2. *See* Instruction F:195 (defining "willfully").

3. *See* Instruction H:55 (affirmative defense of "lawful assembly").

9-1:26 INTERFERENCE WITH STAFF, FACULTY, OR STUDENTS OF EDUCATIONAL INSTITUTIONS (CREDIBLE THREAT)

The elements of the crime of interference with staff, faculty, or students of educational institutions (credible threat) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. made or conveyed to another person a credible threat to cause death, or to cause bodily injury with a deadly weapon,

5. against a person the defendant knew or believed to be a student, school official, employee of an educational institution, or an invitee who was on the premises of an educational institution.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of interference with staff, faculty, or students of educational institutions (credible threat).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of interference with staff, faculty, or students of educational institution (credible threat).

COMMENT

1. *See* § 18-9-109(6)(a), C.R.S. 2015.

2. *See* Instruction F:36 (defining "bodily injury"); Instruction F:78 (defining "credible threat"); Instruction F:88

(defining "deadly weapon"); Instruction F:195 (defining "knowingly").

9-1:27 INTERFERENCE AT A PUBLIC BUILDING (DENIED)

The elements of the crime of interference at a public building (denied) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. willfully,

4. was at or in any public building owned, operated, or controlled by the state, or any of the political subdivisions of the state, or at any building owned, operated, or controlled by the federal government, and

5. denied to any public official, public employee, or invitee on such premises the lawful rights of such official, employee or invitee to enter, to use the facilities of, or to leave any such public building.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of interference at a public building (denied).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of interference at a public building (denied).

COMMENT

1. *See* § 18-9-110(1), C.R.S. 2015.

2. *See* Instruction F:195 (defining "willfully"); Instruction F:298 (defining "public building").

9-1:28 INTERFERENCE AT A PUBLIC BUILDING (IMPEDED)

The elements of the crime of interference at a public building (impeded) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. willfully,

4. was at or in any public building owned, operated, or controlled by the state, or any of the political subdivisions of the state, or at any building owner, operated, or controlled by the federal government, and

5. impeded any public official or public employee in the lawful performance of duties or activities,

6. through the use of restraint, abduction, coercion, or intimidation, or by force and violence or threat thereof.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of interference at a public building (impeded).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of interference at a public building (impeded).

COMMENT

1. *See* § 18-9-110(2), C.R.S. 2015.

2. *See* Instruction F:195 (defining "willfully"); Instruction F:298 (defining "public building").

9-1:29 REFUSING OR FAILING TO LEAVE A PUBLIC BUILDING

The elements of the crime of refusing or failing to leave a public building are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. willfully,

4. was at or in any public building owned, operated, or controlled by the state, or any of the political subdivisions of the state, or at any building owner, operated, or controlled by the federal government, and

5. refused or failed to leave the public building,

6. upon being requested to do so by the chief administrative officer or his [her] designee charged with maintaining order in the public building, and

7. the defendant committed, was committing, threatened to commit, or incited others to commit any act which did, or would have if completed, disrupt, impair, interfere with, or obstruct the lawful missions, processes, procedures, or functions being carried on in the public building.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of refusing or failing to leave a public building.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of refusing or failing to leave a public building.

COMMENT

1. *See* § 18-9-110(3), C.R.S. 2015.

2. *See* Instruction F:195 (defining "willfully"); Instruction F:298 (defining "public building").

9-1:30 IMPEDING PROCEEDINGS IN A PUBLIC BUILDING

The elements of the crime of impeding proceedings in a public building are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. willfully,

4. at any meeting or session conducted by any judicial, legislative, or administrative body or official at or in any public building,

5. impeded, disrupted, or hindered the normal proceedings of such meeting or session,

6. by any act of intrusion into the chamber or other areas designated for the use of the body or official conducting the meeting or session or by any act designed to intimidate, coerce, or hinder any member of such body or official engaged in the performance of duties at such meeting or session.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of impeding proceedings in a public building.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of impeding proceedings in a public building.

COMMENT

1. *See* § 18-9-110(4), C.R.S. 2015.

2. *See* Instruction F:195 (defining "willfully"); Instruction F:298 (defining "public building").

9-1:31 INTRUSION IN A PUBLIC BUILDING

The elements of the crime of intrusion in a public building are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. willfully,

4. intruded into the chamber or other areas designated for the use of any executive body or official at or in any public building, and

5. impeded, disrupted, or hindered the normal proceedings of such body or official.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of intrusion in a public building.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of intrusion in a public building.

COMMENT

1. *See* § 18-9-110(5), C.R.S. 2015.

2. *See* Instruction F:195 (defining "willfully"); Instruction F:298 (defining "public building").

9-1:32 PICKETING IN A PUBLIC BUILDING

The elements of the crime of picketing in a public building are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. picketed, either alone or in concert with another,

4. inside any building in which the chambers, galleries, or offices of the general assembly, or either house thereof, was located, or in which the legislative office of any member of the general assembly was located, or in which a legislative hearing or meeting was being, or was to be, conducted.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of picketing in a public building.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of picketing in a public building.

COMMENT

1. *See* § 18-9-110(6), C.R.S. 2015.

2. *See* Instruction F:298 (defining "public building"); *see also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

3. *Cf. Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (picketers near the funeral of a member of the military killed in the line of duty could not be held liable on state-law tort claims alleging intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy; picketers carried signs displaying messages that, for the most part, constituted speech addressing matters of public concern, and they conducted their picketing peacefully, without interfering with the funeral).

9-1:33 HARASSMENT (PHYSICAL CONTACT)

The elements of the crime of harassment (physical contact) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to harass, annoy, or alarm another person,

5. struck, shoved, kicked, or otherwise touched a person, or subjected him [her] to physical contact.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of harassment (physical contact).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of harassment (physical contact).

COMMENT

1. *See* § 18-9-111(1)(a), C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent").

3. The terms "annoy" and "alarm" are not defined by statute. *See Bolles v. People*, 541 P.2d 80, 82-83 (Colo. 1975) ("According to *Webster's New International Dictionary of the English Language*, (3d ed. Unabridged, 1961), 'annoy' means 'to irritate with a nettling or exasperating effect.' 'Nettling' means 'to arouse displeasure, impatience, or anger in: provoke, vex.' 'Alarm' means 'to arouse to a sense of danger; to put on the alert; to strike with fear; fill with anxiety as to threaten danger or harm.'"); *see also People v. McBurney*, 750 P.2d 916,

919 (Colo. 1988) ("In fact, we found the previous section 18-9-111(1)(e) overbroad in *Bolles* not because of the mere presence of the words 'annoy' and 'alarm,' but because these words were applied to *all* forms of communication, which obviously contained no particularized standards to limit the scope of the offense.").

9-1:34 HARASSMENT (OBSCENE)

The elements of the crime of harassment (obscene) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to harass, annoy, or alarm another person,

5. in a public place,

6. directed obscene language at, or made an obscene gesture to, another person.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of harassment (obscene).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of harassment (obscene).

COMMENT

1. *See* § 18-9-111(1)(b), C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent"); Instruction F:246 (defining "obscene"); Instruction F:303 (defining "public place").

3. The terms "annoy" and "alarm" are not defined by statute. *See Bolles v. People*, 541 P.2d 80, 82-83 (Colo. 1975) ("According to *Webster's New International Dictionary of the English Language*, (3d ed. Unabridged, 1961), 'annoy' means 'to irritate with a nettling or exasperating effect.' 'Nettling' means 'to arouse displeasure, impatience, or anger in: provoke,

vex.' 'Alarm' means 'to arouse to a sense of danger; to put on the alert; to strike with fear; fill with anxiety as to threaten danger or harm.'"); *see also People v. McBurney*, 750 P.2d 916, 919 (Colo. 1988) ("In fact, we found the previous section 18-9-111(1)(e) overbroad in *Bolles* not because of the mere presence of the words 'annoy' and 'alarm,' but because these words were applied to *all* forms of communication, which obviously contained no particularized standards to limit the scope of the offense.").

9-1:35 HARASSMENT (FOLLOW)

The elements of the crime of harassment (follow) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to harass, annoy, or alarm another person,

5. followed a person in or about a public place.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of harassment (follow).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of harassment (follow).

COMMENT

1. *See* § 18-9-111(1)(c), C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent"); Instruction F:303 (defining "public place").

3. The terms "annoy" and "alarm" are not defined by statute. *See Bolles v. People*, 541 P.2d 80, 82-83 (Colo. 1975) ("According to *Webster's New International Dictionary of the English Language*, (3d ed. Unabridged, 1961), 'annoy' means 'to irritate with a nettling or exasperating effect.' 'Nettling' means 'to arouse displeasure, impatience, or anger in: provoke, vex.' 'Alarm' means 'to arouse to a sense of danger; to put on the alert; to strike with fear; fill with anxiety as to threaten danger or harm.'"); *see also People v. McBurney*, 750 P.2d 916, 919 (Colo. 1988) ("In fact, we found the previous section 18-9-

111(1)(e) overbroad in *Bolles* not because of the mere presence of the words 'annoy' and 'alarm,' but because these words were applied to *all* forms of communication, which obviously contained no particularized standards to limit the scope of the offense.").

9-1:36 HARASSMENT (COMMUNICATION)

The elements of the crime of harassment (communication) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to harass, annoy, or alarm another person,

[5. +directly or indirectly initiated communication with a person +or directed language toward another person, anonymously or otherwise,

6. by telephone, telephone network, data network, text message, instant message, computer, computer network, computer system, +or other interactive electronic medium,

7. in a manner intended to harass or threaten bodily injury or property damage.]

[5. made any comment, request, suggestion, or proposal by telephone, computer, computer network, computer system, +or other interactive electronic medium,

6. that was obscene.]

[_. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of harassment (communication).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of harassment (communication).

COMMENT

1. *See* § 18-9-111(1)(e), C.R.S. 2015.

2. *See* Instruction F:36 (defining "bodily injury"); Instruction F:185 (defining "with intent"); Instruction F:246 (defining "obscene"); Instruction F:303 (defining "public place").

3. The terms "annoy" and "alarm" are not defined by statute. *See Bolles v. People*, 541 P.2d 80, 82-83 (Colo. 1975) ("According to *Webster's New International Dictionary of the English Language*, (3d ed. Unabridged, 1961), 'annoy' means 'to irritate with a nettling or exasperating effect.' 'Nettling' means 'to arouse displeasure, impatience, or anger in: provoke, vex.' 'Alarm' means 'to arouse to a sense of danger; to put on the alert; to strike with fear; fill with anxiety as to threaten danger or harm.'"); *see also People v. McBurney*, 750 P.2d 916, 919 (Colo. 1988) ("In fact, we found the previous section 18–9–111(1)(e) overbroad in *Bolles* not because of the mere presence of the words 'annoy' and 'alarm,' but because these words were applied to *all* forms of communication, which obviously contained no particularized standards to limit the scope of the offense.").

4. + In 2015, the Committee modified the fifth and sixth elements to reflect legislative amendments. *See* Ch. 120, sec. 1, § 18-9-111(1)(e), 2015 Colo. Sess. Laws 364, 364.

9-1:37.SP HARASSMENT - SPECIAL INSTRUCTION (LOCATION OF COMMUNICATION)

Any act of harassment involving [insert a description of the relevant language from section 18-9-111(1)(e)] may be deemed to have occurred or to have been committed either at the place at which the telephone call, electronic mail, or other electronic communication was made, or at the place where it was received.

COMMENT

1. *See* § 18-9-111(3), C.R.S. 2015.

9-1:38 HARASSMENT (TELEPHONE)

The elements of the crime of harassment (telephone) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to harass, annoy, or alarm another person,

5. made a telephone call or caused a telephone to ring repeatedly,

6. whether or not a conversation ensued,

7. with no purpose of legitimate conversation.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of harassment (telephone).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of harassment (telephone).

COMMENT

1. *See* § 18-9-111(1)(f), C.R.S. 2015.

2. *See* Instruction F:36 (defining "bodily injury"); Instruction F:185 (defining "with intent"); Instruction F:246 (defining "obscene"); Instruction F:303 (defining "public place").

3. *See People ex rel. VanMeveren v. County Court In and For Larimer County*, 551 P.2d 716, 720 (Colo. 1976) ("'Repeatedly' is a word of such common understanding that its meaning is not

vague. It simply means in the context of this statute that the defendant use insulting, taunting or challenging language more than one time.").

4. The terms "annoy" and "alarm" are not defined by statute. *See Bolles v. People*, 541 P.2d 80, 82-83 (Colo. 1975) ("According to *Webster's New International Dictionary of the English Language*, (3d ed. Unabridged, 1961), 'annoy' means 'to irritate with a nettling or exasperating effect.' 'Nettling' means 'to arouse displeasure, impatience, or anger in: provoke, vex.' 'Alarm' means 'to arouse to a sense of danger; to put on the alert; to strike with fear; fill with anxiety as to threaten danger or harm.'"); *see also People v. McBurney*, 750 P.2d 916, 919 (Colo. 1988) ("In fact, we found the previous section 18-9-111(1)(e) overbroad in *Bolles* not because of the mere presence of the words 'annoy' and 'alarm,' but because these words were applied to *all* forms of communication, which obviously contained no particularized standards to limit the scope of the offense.").

9-1:39 HARASSMENT (REPEATED COMMUNICATION)

The elements of the crime of harassment (repeated communication) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to harass, annoy, or alarm another person,

5. made repeated communications,

6. at inconvenient hours,

7. that invaded the privacy of another and interfered in the use and enjoyment of another's home, private residence, or private property.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of harassment (repeated communication).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of harassment (repeated communication).

COMMENT

1. *See* § 18-9-111(1)(g), C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent").

3. *See People ex rel. VanMeveren v. County Court In and For Larimer County*, 551 P.2d 716, 720 (Colo. 1976) ("'Repeatedly' is a word of such common understanding that its meaning is not vague. It simply means in the context of this statute that the

defendant use insulting, taunting or challenging language more than one time.").

4. The terms "annoy" and "alarm" are not defined by statute. *See Bolles v. People*, 541 P.2d 80, 82-83 (Colo. 1975) ("According to *Webster's New International Dictionary of the English Language*, (3d ed. Unabridged, 1961), 'annoy' means 'to irritate with a nettling or exasperating effect.' 'Nettling' means 'to arouse displeasure, impatience, or anger in: provoke, vex.' 'Alarm' means 'to arouse to a sense of danger; to put on the alert; to strike with fear; fill with anxiety as to threaten danger or harm.'"); *see also People v. McBurney*, 750 P.2d 916, 919 (Colo. 1988) ("In fact, we found the previous section 18-9-111(1)(e) overbroad in *Bolles* not because of the mere presence of the words 'annoy' and 'alarm,' but because these words were applied to *all* forms of communication, which obviously contained no particularized standards to limit the scope of the offense.").

9-1:40 HARASSMENT (PROVOCATION)

The elements of the crime of harassment (provocation) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to harass, annoy, or alarm another person,

5. repeatedly insulted, taunted, challenged, or made communications in offensively coarse language to another,

6. in a manner likely to provoke a violent or disorderly response.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of harassment (provocation).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of harassment (provocation).

COMMENT

1. *See* § 18-9-111(1)(h), C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent").

3. *See People ex rel. VanMeveren v. County Court In and For Larimer County*, 551 P.2d 716, 720 (Colo. 1976) ("'Repeatedly' is a word of such common understanding that its meaning is not vague. It simply means in the context of this statute that the defendant use insulting, taunting or challenging language more than one time.").

4. The terms "annoy" and "alarm" are not defined by statute. *See Bolles v. People*, 541 P.2d 80, 82-83 (Colo. 1975) ("According to *Webster's New International Dictionary of the English Language*, (3d ed. Unabridged, 1961), 'annoy' means 'to irritate with a nettling or exasperating effect.' 'Nettling' means 'to arouse displeasure, impatience, or anger in: provoke, vex.' 'Alarm' means 'to arouse to a sense of danger; to put on the alert; to strike with fear; fill with anxiety as to threaten danger or harm.'"); *see also People v. McBurney*, 750 P.2d 916, 919 (Colo. 1988) ("In fact, we found the previous section 18-9-111(1)(e) overbroad in *Bolles* not because of the mere presence of the words 'annoy' and 'alarm,' but because these words were applied to *all* forms of communication, which obviously contained no particularized standards to limit the scope of the offense.").

9-1:41.INT HARASSMENT - INTERROGATORY

If you find the defendant not guilty of harassment, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of harassment, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

> Did the defendant commit the harassment with prohibited bias? (Answer "Yes" or "No")

The defendant committed the harassment with prohibited bias only if:

1. he [she] committed the harassment with the intent to intimidate or harass another person because of that person's actual or perceived race, color, religion, ancestry, or national origin.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-9-111(2), C.R.S. 2015.

2. *See*, *e.g.*, Instruction E:28 (special verdict form).

9-1:42 LOITERING

The elements of the crime of loitering are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. to interfere with or disrupt the school program or interfere with or endanger schoolchildren,

5. loitered in a school building, on school grounds, or within one hundred feet of school grounds,

6. when persons under the age of eighteen were present in the building or on the grounds,

7. without having any reason or relationship involving custody of, or responsibility for, a pupil, or any other specific, legitimate reason for being there, and

8. after being asked to leave by a school administrator or his [her] representative, or by a peace officer.

[9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of loitering.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of loitering.

COMMENT

1. *See* § 18-9-112(2), C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent"); Instruction F:201 (defining "loiter").

3. *See* Instruction H:56 (affirmative defense of "lawful assembly").

9-1:43 DESECRATION OF VENERATED OBJECTS

The elements of the crime of desecration of venerated objects are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. desecrated any public monument or public structure, or desecrated in a public place any other object of veneration by the public.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of desecration of venerated objects.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of desecration of venerated objects.

COMMENT

1. *See* § 18-9-113(1)(a), C.R.S. 2015.

2. *See* Instruction F:93 (defining "desecrate"); Instruction F:195 (defining "knowingly").

9-1:44 DESECRATION OF A PLACE OR WORSHIP OR BURIAL OF HUMAN REMAINS

The elements of the crime of desecration of a place of worship or burial of human remains are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. desecrated any place of worship or burial of human remains.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of desecration of a place or worship or burial of human remains.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of desecration of a place or worship or burial of human remains.

COMMENT

1. *See* § 18-9-113(1)(b), C.R.S. 2015.

2. *See* Instruction F:93 (defining "desecrate"); Instruction F:195 (defining "knowingly").

3. Section 18-9-113(1)(b) specifies that the disturbance of an unmarked human burial is subject to prosecution under section 24-80-1305, C.R.S. 2015. The Committee has not drafted a model instruction for that offense.

9-1:45 HINDERING TRANSPORTATION

The elements of the crime of hindering transportation are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly and without lawful authority,

4. forcibly stopped and hindered the operation of any vehicle used in providing transportation services of any kind to the public, or to any person, association, or corporation.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of hindering transportation.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of hindering transportation.

COMMENT

1. *See* § 18-9-114, C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly").

9-1:46 ENDANGERING PUBLIC TRANSPORTATION (TAMPER)

The elements of the crime of endangering public transportation (tamper) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. tampered with a facility of public transportation,

5. to cause any damage, malfunction, nonfunction, theft, or unauthorized removal of material,

6. which would result in the creation of a substantial risk of death or serious bodily injury to anyone.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of endangering public transportation (tamper).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of endangering public transportation (tamper).

COMMENT

1. *See* § 18-9-115(1)(a), C.R.S. 2015.

2. *See* Instruction F:137 (defining "facility of public transportation"); Instruction F:185 (defining "with intent"); Instruction F:299 (defining "public conveyance"); Instruction F:332 (defining "serious bodily injury").

3. If the defendant is not charged with theft, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. *See*

Instructions 4-4:01 to 4-4:05. Place the elemental instruction for theft immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for theft.

9-1:47 ENDANGERING PUBLIC TRANSPORTATION (CRIME)

The elements of the crime of endangering public transportation (crime) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with the intent of committing the crime of [insert name(s) of offense(s)] on a public conveyance,

4. stopped or boarded a public conveyance.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of endangering public transportation (crime).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of endangering public transportation (crime).

COMMENT

1. *See* § 18-9-115(1)(b), C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent"); Instruction F:299 (defining "public conveyance").

9-1:48 ENDANGERING PUBLIC TRANSPORTATION (THREAT)

The elements of the crime of endangering public transportation (threat) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. on a public conveyance,

5. threatened any operator, crew member, attendant, or passenger,

6. with death or imminent serious bodily injury; or with a deadly weapon or with words or actions intended to induce belief that he [she] was armed with a deadly weapon.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of endangering public transportation (threat).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of endangering public transportation (threat).

COMMENT

1. *See* § 18-9-115(1)(c), C.R.S. 2015.

2. *See* Instruction F:36 (defining "bodily injury"); Instruction F:88 (defining "deadly weapon"); Instruction F:195 (defining "knowingly"); Instruction F:299 (defining "public conveyance"); Instruction F:332 (defining "serious bodily injury").

9-1:49 ENDANGERING PUBLIC TRANSPORTATION (BODILY INJURY)

The elements of the crime of endangering public transportation (bodily injury) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. on a public conveyance,

[4. knowingly or recklessly,

5. caused bodily injury to another person.]

[4. with criminal negligence,

5. caused bodily injury to another person by means of a deadly weapon.]

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of endangering public transportation (bodily injury).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of endangering public transportation (bodily injury).

COMMENT

1. *See* § 18-9-115(1)(d)(I), (II), C.R.S. 2015.

2. *See* Instruction F:36 (defining "bodily injury"); Instruction F:79 (defining "criminal negligence"); Instruction F:88 (defining "deadly weapon"); Instruction F:195 (defining "knowingly"); Instruction F:299 (defining "public conveyance"); Instruction F:308 (defining "recklessly"); Instruction F:332 (defining "serious bodily injury").

9-1:50 ENDANGERING UTILITY TRANSMISSION

The elements of the crime of endangering utility transmission are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with intent,

4. tampered with a facility of utility transmission,

5. to cause any damage, malfunction, nonfunction, theft, or unauthorized removal of material,

6. which would interrupt performance of utility transmission or result in a creation of a substantial risk of death or serious bodily injury to anyone.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of endangering utility transmission.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of endangering utility transmission.

COMMENT

1. *See* § 18-9-115(1.5), C.R.S. 2015.

2. *See* Instruction F:138 (defining "facility of utility transmission"); Instruction F:185 (defining "with intent"); Instruction F:332 (defining "serious bodily injury"); Instruction F:384 (defining "utility").

3. If the defendant is not charged with theft, give the jury the elemental instruction for the offense without the two

concluding paragraphs that explain the burden of proof. *See* Instructions 4-4:01 to 4-4:05. Place the elemental instruction for theft immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for theft.

9-1:51 VIOLATION OF A RESTRAINING ORDER RELATED TO PUBLIC CONVEYANCES

The elements of the crime of violation of a restraining order related to public conveyances are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. violated a court order specifically restraining him [her] from traveling in or on a particular public conveyance.

[4. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of violation of a restraining order related to public conveyances.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of violation of a restraining order related to public conveyances.

COMMENT

1. *See* § 18-9-115.5, C.R.S. 2015.

2. *See* Instruction F:299 (defining "public conveyance"); *see also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

3. Section 18-9-115.5, C.R.S. 2015, specifies that the statute applies only to restraining orders issued pursuant to C.R.C.P. 65.

9-1:52 PROJECTING MISSILES AT A VEHICLE

The elements of the crime of projecting a missile at a vehicle are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. projected any missile,

5. at or against any vehicle or equipment designed for the transportation of persons or property,

6. other than a bicycle.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of projecting a missile at a vehicle.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of projecting a missile at a vehicle.

COMMENT

1. *See* § 18-9-116(1), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:230 (defining "missile").

3. If the defendant is charged with projecting missiles at both a vehicle and a bicyclist, use a separate instruction for each count (with corresponding separate verdict forms). This is necessary because the offenses have different penalty classifications.

9-1:53 PROJECTING MISSILES AT A BICYCLIST

The elements of the crime of projecting a missile at a bicyclist are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. projected any missile,

5. at or against any bicyclist.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of projecting a missile at a bicyclist.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of projecting a missile at a bicyclist.

COMMENT

1. *See* § 18-9-116(2), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:230 (defining "missile").

3. If the defendant is charged with projecting missiles at both a vehicle and a bicyclist, use a separate instruction for each count (with corresponding separate verdict forms). This is necessary because the offenses have different penalty classifications.

9-1:54 VEHICULAR ELUDING

The elements of the crime of vehicular eluding are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. while operating a motor vehicle,

5. eluded or attempted to elude,

6. a peace officer who was also operating a motor vehicle, and

7. the defendant knew, or reasonably should have known, that he [she] was being pursued by the peace officer, and

8. operated his [her] vehicle in a reckless manner.

[9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of vehicular eluding.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of vehicular eluding.

COMMENT

1. *See* § 18-9-116.5(1), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:236 (defining "motor vehicle"); Instruction F:308 (defining "recklessly"); +.

3. + In the absence of case law on point, the Committee takes no position on whether the word "attempted" in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

4. + In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 3.

9-1:55.INT VEHICULAR ELUDING – INTERROGATORY (BODILY INJURY OR DEATH)

If you find the defendant not guilty of vehicular eluding, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of vehicular eluding, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the eluding result in [bodily injury] [death]? (Answer "Yes" or "No")

The eluding resulted in [bodily injury] [death] only if:

1. the vehicular eluding resulted in [bodily injury] [death] to another person.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-9-116.5(2)(a), C.R.S. 2015.

2. *See* Instruction F:36 (defining "bodily injury"); *see, e.g.*, Instruction E:28 (special verdict form).

3. If the defendant is charged with causing the death of one person and causing injury to another, use separate copies of this interrogatory (with separate places to answer on the verdict form). Similarly, use separate copies of this

interrogatory in cases where there is a dispute concerning whether the eluding caused death, or merely bodily injury.

9-1:56 UNLAWFUL CONDUCT ON PUBLIC PROPERTY

The elements of the crime of unlawful conduct on public property are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. entered or remained in any public building or on any public property, or conducted himself [herself] in or on any public building or on any public property,

4. in violation of any order, rule, or regulation concerning [insert a description of subject matter from section 18-9-117(1)(a-g), or "any authority granted by any other law"], limiting or prohibiting the use or activities or conduct in such public building or on such public property,

5. that was issued by an officer or agency having the power of control, management, or supervision of the building or property, and

6. notice of the limitation or prohibition was prominently posted at all public entrances to the building or property, or defendant was actually first given notice of the limitation or prohibition by the person by the officer or agency, including any agent thereof, or by any law enforcement officer who had jurisdiction or authority for enforcement.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful conduct on public property.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful conduct on public property.

COMMENT

1. *See* § 18-9-117(1), (2), C.R.S. 2015.

2. *See* Instruction F:298 (defining "public building").

3. Section 18-9-117(1) contains a non-exhaustive list of the relevant types of orders, rules, and regulations. In a case in which there is a dispute concerning whether an officer or agency had authority to promulgate a particular order, rule, or regulation, the court should resolve the issue as a matter of law. Accordingly, the current version of the model instruction does not include the "under authority granted by law" language that previously appeared as an element in COLJI-Crim. 30:29 (1983).

9-1:57.INT UNLAWFUL CONDUCT ON PUBLIC PROPERTY - INTERROGATORY

If you find the defendant not guilty of unlawful conduct on public property, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of unlawful conduct on public property, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

> Did the defendant violate an order, rule, or regulation concerning a funeral or funeral procession?
> (Answer "Yes" or "No")

The defendant violated an order, rule, or regulation concerning a funeral or funeral procession only if:

1. the defendant violated an order, rule, or regulation prohibiting activities or conduct within public buildings or on public property which might interfere with, impair, or disrupt a funeral or funeral procession.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-9-117(1)(c), (3)(c), C.R.S. 2015.

2. *See* Instruction F:159 (defining "funeral"); *see, e.g.*, Instruction E:28 (special verdict form).

9-1:58 FIREARMS, EXPLOSIVES, OR INCENDIARY DEVICES IN FACILITIES OF PUBLIC TRANSPORTATION

The elements of the crime of [firearm] [explosive or incendiary device] in a facility of public transportation are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. without legal authority,

4. had any loaded firearm or explosive or incendiary device in his [her] possession in any facility of public transportation, or carried or brought any loaded firearm or explosive or incendiary device into, or caused any loaded firearm or explosive or incendiary device to be carried or brought into, any facility of public transportation.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of [firearm] [explosive or incendiary device] in a facility of public transportation.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of [firearm] [explosive or incendiary device] in a facility of public transportation.

COMMENT

1. *See* § 18-9-118, C.R.S. 2015.

2. *See* Instruction F:134 (defining "explosive or incendiary device"); Instruction F:137 (defining "facility of public transportation"); Instruction F:154 (defining "firearm"); Instruction F:281 (defining "possession"); *see also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is

expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

9-1:59 FAILURE OR REFUSAL TO LEAVE PREMISES OR PROPERTY UPON REQUEST OF A PEACE OFFICER (NONCOMPLIANCE)

The elements of the crime of failure or refusal to leave premises or property upon request of a peace officer (noncompliance) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. barricaded or refused police entry to any premises or property through use of, or threatened use of, force, and

5. refused or failed to leave any premises or property upon being requested to do so by a peace officer,

6. who had probable cause to believe a crime was occurring and that the defendant constituted a danger to himself [herself] or others.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure or refusal to leave premises or property upon request of a peace officer (noncompliance).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure or refusal to leave premises or property upon request of a peace officer (noncompliance).

COMMENT

1. *See* § 18-9-119(2), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:263 (defining "peace officer").

3. Because the statute requires a two-part determination of probable cause, in most cases it will be necessary to draft a supplemental instruction explaining that the prosecution must prove that the facts known to the officer were sufficient to induce a person of ordinary prudence and caution reasonably to believe that: (1) a crime was occurring; and (2) the defendant constituted a danger to himself [herself] or others. *See generally Wigger v. McKee*, 809 P.2d 999, 1005 (Colo. App. 1990) ("In a § 1983 damage suit, the existence of probable cause, when dependent on the resolution of factual questions, is for the determination of the jury. However, if no genuine issue as to any material fact exists and if credibility conflicts are absent, the determination may be made on summary judgment as a matter of law." (citation omitted)).

9-1:60 FAILURE OR REFUSAL TO LEAVE PREMISES OR PROPERTY UPON REQUEST OF A PEACE OFFICER (ANOTHER PERSON; NO DEADLY WEAPON)

The elements of the crime of failure or refusal to leave premises or property upon request of a peace officer (another person; no deadly weapon) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. barricaded or refused police entry to any premises or property through use of, or threatened use of, force, and

5. refused or failed to leave any premises or property upon being requested to do so by a peace officer,

6. who had probable cause to believe a crime was occurring and that defendant constituted a danger to himself [herself] or others, and

7. in the same criminal episode,

8. knowingly,

9. held another person hostage or confined or detained another person without his [her] consent,

10. without proper legal authority, and

11. without the use of a deadly weapon.

[12. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure or refusal to leave premises or property upon request of a peace officer (another person; no deadly weapon).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure or refusal to leave premises or property upon request of a peace officer (another person; no deadly weapon).

COMMENT

1. *See* § 18-9-119(3), C.R.S. 2015.

2. *See* Instruction F:172 (defining "hold hostage"); Instruction F:195 (defining "knowingly"); Instruction F:263 (defining "peace officer").

3. Because the statute requires a two-part determination of probable cause, in most cases it will be necessary to draft a supplemental instruction explaining that the prosecution must prove that the facts known to the officer were sufficient to induce a person of ordinary prudence and caution reasonably to believe that: (1) a crime was occurring; and (2) defendant constituted a danger to himself [herself] or others. *See generally Wigger v. McKee*, 809 P.2d 999, 1005 (Colo. App. 1990) ("In a § 1983 damage suit, the existence of probable cause, when dependent on the resolution of factual questions, is for the determination of the jury. However, if no genuine issue as to any material fact exists and if credibility conflicts are absent, the determination may be made on summary judgment as a matter of law.").

9-1:61 FAILURE OR REFUSAL TO LEAVE PREMISES OR PROPERTY UPON REQUEST OF A PEACE OFFICER (BELIEF AS TO DEADLY WEAPON)

The elements of the crime of failure or refusal to leave premises or property upon request of a peace officer (belief as to deadly weapon) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. barricaded or refused police entry to any premises or property through use of, or threatened use of, force, and

5. refused or failed to leave any premises or property upon being requested to do so by a peace officer,

6. who had probable cause to believe a crime was occurring and that defendant constituted a danger to himself [herself] or others, and

7. in the same criminal episode,

8. recklessly or knowingly,

9. caused a peace officer to believe that he [she] possessed a deadly weapon.

[10. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure or refusal to leave premises or property upon request of a peace officer (belief as to deadly weapon).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not

guilty of failure or refusal to leave premises or property upon request of a peace officer (belief as to deadly weapon).

COMMENT

1. *See* § 18-9-119(4), C.R.S. 2015.

2. *See* Instruction F:88 (defining "deadly weapon"); Instruction F:195 (defining "knowingly"); Instruction F:263 (defining "peace officer"); Instruction F:281 (defining "possession"); Instruction F:308 (defining "recklessly").

3. Although section 18-9-119(4) contains a single element that is to be added to the elements in either section 18-9-119(2) or section 18-9-119(3), section 18-9-119(3), in turn, incorporates and builds on section 18-9-119(2). Therefore, because it would be illogical for a prosecutor charging a violation of section 18-9-119(4) to needlessly assume the burden of proving the three additional elements which section 18-9-119(3) engrafts to section 18-9-119(2), the above model instruction does not include the three additional elements from section 18-9-119(3).

4. Because the statute requires a two-part determination of probable cause, in most cases it will be necessary to draft a supplemental instruction explaining that the prosecution must prove that the facts known to the officer were sufficient to induce a person of ordinary prudence and caution reasonably to believe that: (1) a crime was occurring; and (2) defendant constituted a danger to himself [herself] or others. *See generally Wigger v. McKee*, 809 P.2d 999, 1005 (Colo. App. 1990) ("In a § 1983 damage suit, the existence of probable cause, when dependent on the resolution of factual questions, is for the determination of the jury. However, if no genuine issue as to any material fact exists and if credibility conflicts are absent, the determination may be made on summary judgment as a matter of law.").

9-1:62 FAILURE OR REFUSAL TO LEAVE PREMISES OR PROPERTY UPON REQUEST OF A PEACE OFFICER (ANOTHER PERSON; DEADLY WEAPON)

The elements of the crime of failure or refusal to leave premises or property upon request of a peace officer (another person; deadly weapon) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. barricaded or refused police entry to any premises or property through use of, or threatened use of, force, and

5. refused or failed to leave any premises or property upon being requested to do so by a peace officer,

6. who had probable cause to believe a crime was occurring and that defendant constituted a danger to himself [herself] or others, and

7. in the same criminal episode,

8. knowingly,

9. held another person hostage or confined or detained another person,

10. through the possession, use, or threatened use of a deadly weapon,

11. without the other person's consent, and

12. without proper legal authority.

[13. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure or

refusal to leave premises or property upon request of a peace officer (another person; deadly weapon).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure or refusal to leave premises or property upon request of a peace officer (another person; deadly weapon).

COMMENT

1. *See* § 18-9-119(5), C.R.S. 2015.

2. *See* Instruction F:88 (defining "deadly weapon"); Instruction F:172 (defining "hold hostage"); Instruction F:195 (defining "knowingly"); Instruction F:263 (defining "peace officer"); Instruction F:281 (defining "possession"); Instruction F:308 (defining "recklessly").

3. Because the statute requires a two-part determination of probable cause, in most cases it will be necessary to draft a supplemental instruction explaining that the prosecution must prove that the facts known to the officer were sufficient to induce a person of ordinary prudence and caution reasonably to believe that: (1) a crime was occurring; and (2) defendant constituted a danger to himself [herself] or others. *See generally Wigger v. McKee*, 809 P.2d 999, 1005 (Colo. App. 1990) ("In a § 1983 damage suit, the existence of probable cause, when dependent on the resolution of factual questions, is for the determination of the jury. However, if no genuine issue as to any material fact exists and if credibility conflicts are absent, the determination may be made on summary judgment as a matter of law.").

9-1:63 FAILURE OR REFUSAL TO LEAVE PREMISES OR PROPERTY UPON REQUEST OF A PEACE OFFICER (ANOTHER PERSON; BELIEF AS TO DEADLY WEAPON)

The elements of the crime of failure or refusal to leave premises or property upon request of a peace officer (another person; belief as to deadly weapon) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. barricaded or refused police entry to any premises or property through use, or threatened use, of force, and

5. refused or failed to leave any premises or property upon being requested to do so by a peace officer,

6. who had probable cause to believe a crime was occurring and that defendant constituted a danger to himself [herself] or others, and

7. in the same criminal episode,

8. knowingly,

9. held another person hostage or confined or detained another person,

10. by knowingly causing the other person to reasonably believe that he [she] possessed a deadly weapon.

[11. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure or refusal to leave premises or property upon request of a peace officer (another person; belief as to deadly weapon).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements

beyond a reasonable doubt, you should find the defendant not guilty of failure or refusal to leave premises or property upon request of a peace officer (another person; belief as to deadly weapon).

COMMENT

1. *See* § 18-9-119(7), C.R.S. 2015.

2. *See* Instruction F:88 (defining "deadly weapon"); Instruction F:172 (defining "hold hostage"); Instruction F:195 (defining "knowingly"); Instruction F:263 (defining "peace officer"); Instruction F:281 (defining "possession"); Instruction F:308 (defining "recklessly").

3. Because the statute requires a two-part determination of probable cause, in most cases it will be necessary to draft a supplemental instruction explaining that the prosecution must prove that the facts known to the officer were sufficient to induce a person of ordinary prudence and caution reasonably to believe that: (1) a crime was occurring; and (2) defendant constituted a danger to himself [herself] or others. *See generally Wigger v. McKee*, 809 P.2d 999, 1005 (Colo. App. 1990) ("In a § 1983 damage suit, the existence of probable cause, when dependent on the resolution of factual questions, is for the determination of the jury. However, if no genuine issue as to any material fact exists and if credibility conflicts are absent, the determination may be made on summary judgment as a matter of law.").

9-1:64 TERRORIST TRAINING ACTIVITIES

The elements of the crime of terrorist training activities are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. taught or demonstrated to any person the use, application, or making of any firearm, explosive, or incendiary device, or technique capable of causing injury or death to any person, knowing that it would be unlawfully used in furtherance of a civil disorder; or assembled with one or more other persons for the purpose of training or practicing with, or being instructed in the use of, any firearm, explosive or incendiary device, or technique capable of causing injury or death to any person, with the intent to unlawfully use the same in furtherance of a civil disorder.

[4. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of terrorist training activities.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of terrorist training activities.

COMMENT

1. *See* § 18-9-120(2), C.R.S. 2015.

2. *See* Instruction F:54 (defining "civil disorder"); Instruction F:133 (defining "explosive or incendiary device"); Instruction F:155 (defining "firearm").

3. Section 18-9-120(3), C.R.S. 2015, establishes exemptions from criminal liability for a variety of legitimate weapons training activities, and also for acts that law enforcement officers commit as part of their duties. However, the Committee has not drafted model affirmative defense instructions.

9-1:65 BIAS-MOTIVATED CRIMES (BODILY INJURY)

The elements of bias-motivated crime (bodily injury) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with the intent,

4. to intimidate or harass another person because of that person's actual or perceived race, color, religion, ancestry, national origin, physical or mental disability, or sexual orientation,

5. knowingly,

6. caused bodily injury to another person.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of bias-motivated crime (bodily injury).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of bias-motivated crime (bodily injury).

COMMENT

1. *See* § 18-9-121(2)(a), C.R.S. 2015.

2. *See* Instruction F:36 (defining "bodily injury"); Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly"); Instruction F:273 (defining "person with a disability"); Instruction F:342 (defining "sexual orientation"); *see also* § 18-9-121(5)(a), C.R.S. 2015 ("'Physical or mental disability' refers to a disability as used in the definition of the term 'person with a disability' in section 18-6.5-102(11).").

9-1:66.INT BIAS-MOTIVATED CRIMES – INTERROGATORY (BODILY INJURY; AIDED OR ABETTED BY ANOTHER)

If you find the defendant not guilty of bias-motivated crime (bodily injury), you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of bias-motivated crime (bodily injury), you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the defendant aided or abetted? (Answer "Yes" or "No")

The defendant was aided or abetted only if:

1. he [she] was physically aided or abetted by one or more other persons,

2. during the commission of the bias-motivated crime.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-9-121(2)(a), (3), C.R.S. 2015.

2. *See*, *e.g.*, Instruction E:28 (special verdict form).

9-1:67 BIAS-MOTIVATED CRIMES (FEAR)

The elements of bias-motivated crime (fear) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with the intent,

4. to intimidate or harass another person because of that person's actual or perceived race, color, religion, ancestry, national origin, physical or mental disability, or sexual orientation,

5. knowingly,

6. by words or conduct,

7. placed another person in fear of imminent lawless action directed at that person, or that person's property,

8. and such words or conduct were likely to produce bodily injury to that person or damage to that person's property.

[9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of bias-motivated crime (fear).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of bias-motivated crime (fear).

COMMENT

1. *See* § 18-9-121(2)(b), C.R.S. 2015.

2. *See* Instruction F:36 (defining "bodily injury"); Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly"); Instruction F:273 (defining "person with a disability"); Instruction F:342 (defining "sexual orientation"); *see also* § 18-9-121(5)(a), C.R.S. 2015 ("'Physical or mental disability' refers to a disability as used in the definition of the term 'person with a disability' in section 18-6.5-102(11).").

9-1:68 BIAS-MOTIVATED CRIMES (PROPERTY)

The elements of bias-motivated crime (property) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. with the intent,

4. to intimidate or harass another person because of that person's actual or perceived race, color, religion, ancestry, national origin, physical or mental disability, or sexual orientation,

5. knowingly,

6. caused damage to or destruction of the property of another person.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of bias-motivated crime (property).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of bias-motivated crime (property).

COMMENT

1. *See* § 18-9-121(2)(c), C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly"); Instruction F:273 (defining "person with a disability"); Instruction F:342 (defining "sexual orientation"); *see also* § 18-9-121(5)(a), C.R.S. 2015 ("'Physical or mental disability' refers to a disability as used in the definition of the term 'person with a disability' in section 18-6.5-102(11).").

9-1:69 PREVENTING PASSAGE TO OR FROM A HEALTH CARE FACILITY

The elements of the crime of preventing passage [to] [from] a health care facility are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. obstructed, detained, hindered, impeded, or blocked another person's entry to, or exit from, a health care facility.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of preventing passage [to] [from] a health care facility.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of preventing passage [to] [from] a health care facility.

COMMENT

1. *See* § 18-9-122(2), C.R.S. 2015.

2. *See* Instruction F:169 (defining "health care facility"); Instruction F:195 (defining "knowingly").

9-1:70 ENGAGING IN PROHIBITED ACTIVITIES NEAR A HEALTH CARE FACILITY

The elements of the crime of prohibited activities near a health care facility are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. approached to within eight feet of another person,

5. without that person's consent,

6. for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with that person,

7. in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prohibited activities near a health care facility.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prohibited activities near a health care facility.

COMMENT

1. *See* § 18-9-122(3), C.R.S. 2015.

2. *See* Instruction F:169 (defining "health care facility"); Instruction F:195 (defining "knowingly").

9-1:71 BRINGING AN ALCOHOL BEVERAGE, BOTTLE, OR CAN INTO THE MAJOR LEAGUE BASEBALL STADIUM

The elements of the crime of bringing an alcohol beverage, bottle, or can into the major league baseball stadium are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. carried or brought,

4. into the Denver metropolitan major league baseball stadium district stadium,

5. any alcohol beverage, bottle, or can.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of bringing a[n] [alcohol beverage] [bottle] [can] into the major league baseball stadium.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of bringing a[n] [alcohol beverage] [bottle] [can] into the major league baseball stadium.

COMMENT

1. *See* § 18-9-123(1), C.R.S. 2015.

2. *See* Instruction F:15 (defining "alcohol beverage"); Instruction F:39 (defining "bottle"); Instruction F:43 (defining "can"); Instruction F:195 (defining "knowingly"); Instruction F:351 (defining "stadium"); *see also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or

with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

3. The statute includes exemptions from criminal liability. *See* § 18-9-123(2), C.R.S. 2015 ("Nothing in this section shall be construed to prohibit a person from bringing or carrying into the stadium a beverage, bottle, or can required in connection with the person's practice of religion, the person's medical or physical condition, or food or formula for the person's infant."). However, the Committee has not drafted a model affirmative defense instruction.

9-1:72 HAZING

The elements of the crime of hazing are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. engaged in hazing.

[4. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of hazing.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of hazing.

COMMENT

1. *See* § 18-9-124(2)(a), C.R.S. 2015.

2. *See* Instruction F:36 (defining "bodily injury"); Instruction F:168 (defining "hazing"); Instruction F:308 (defining "recklessly").

9-1:73 INTERFERENCE WITH A FUNERAL (PRIVATE PROPERTY)

The elements of the crime of interference with a funeral (private property) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowing a funeral was being conducted,

4. refused to leave any private property within one hundred feet of the funeral site,

5. upon the request of the owner of the private property, or the owner's agent.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of interference with a funeral (private property).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of interference with a funeral (private property).

COMMENT

1. *See* § 18-9-125(1)(a), C.R.S. 2015.

2. *See* Instruction F:159 (defining "funeral"); Instruction F:195 (defining "knowingly").

9-1:74 INTERFERENCE WITH A FUNERAL (PUBLIC PROPERTY)

The elements of the crime of interference with a funeral (public property) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowing a funeral was being conducted,

4. refused to leave any public property within one hundred feet of the funeral site upon the request of a public official with authority over the property or upon the request of a peace officer, and

5. the public official or peace officer making the request had reasonable grounds to believe that defendant had violated a rule or regulation applicable to that property, or a statute or local ordinance.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of interference with a funeral (public property).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of interference with a funeral (public property).

COMMENT

1. *See* § 18-9-125(1)(b), C.R.S. 2015.

2. *See* Instruction F:159 (defining "funeral"); Instruction F:195 (defining "knowingly").

CHAPTER 9-2

CRUELTY TO ANIMALS

CHAPTER COMMENT

Section 18-9-201.5, C.R.S. 2015, states that the offenses within Article 9, Part 2, do not apply to a variety of circumstances (e.g., accepted animal husbandry practices, conduct permitted by wildlife statutes, legally authorized animal care, and facilities licensed under the federal Animal

Welfare Act). However, the Committee has not drafted model affirmative defense instructions.

9-2:01 CRUELTY TO ANIMALS (PROHIBITED ACTS)

The elements of the crime of cruelty to animals (prohibited acts) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly, recklessly, or with criminal negligence,

4. overdrove, overloaded, overworked, tormented, deprived of necessary sustenance, unnecessarily or cruelly beat, allowed to be housed in a manner that resulted in chronic or repeated serious physical harm, carried or confined in or upon any vehicles in a cruel or reckless manner, engaged in a sexual act with an animal, or otherwise mistreated or neglected any animal, or caused or procured it to be done, or, having the charge or custody of any animal, failed to provide it with proper food, drink, or protection from the weather consistent with the species, breed, and type of animal involved, or abandoned an animal.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of cruelty to animals (prohibited acts).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of cruelty to animals (prohibited acts).

COMMENT

1. *See* § 18-9-202(1)(a), C.R.S. 2015.

2. *See* Instruction F:03 (defining "abandon"); Instruction F:17 (defining "animal"); Instruction F:79 (defining "criminal negligence"); Instruction F:185 (defining "intentionally");

Instruction F:195 (defining "knowingly"); Instruction F:231 (defining "mistreatment"); Instruction F:240 (defining "neglect"); Instruction F:308 (defining "recklessly"); Instruction F:333 (defining "serious physical harm"); Instruction F:336 (defining "sexual act with an animal").

3. *See* Instruction H:57 (affirmative defense of "dog found running, worrying, or injuring sheep, cattle, or other livestock").

4. It appears that knowing or reckless abandonment, as defined by the final clause of section 18-9-202(1)(a), is applicable only to persons who have "charge or custody" of an animal. This is the interpretation that was embodied in COLJI-Crim. 35:12 (1983), and it is maintained in the above model instruction.

9-2:02 CRUELTY TO ANIMALS (INTENTIONAL ABANDONMENT OF A DOG OR CAT)

The elements of the crime of cruelty to animals (intentional abandonment of a dog or cat) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. intentionally,

4. abandoned a dog or cat.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of cruelty to animals (intentional abandonment of a dog or cat).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of cruelty to animals (intentional abandonment of a dog or cat).

COMMENT

1. *See* § 18-9-202(1)(b), C.R.S. 2015.

2. *See* Instruction F:03 (defining "abandon"); Instruction F:185 (defining "intentionally").

3. *See* Instruction H:57 (affirmative defense of "dog found running, worrying, or injuring sheep, cattle, or other livestock").

9-2:03 CRUELTY TO ANIMALS (RECKLESSLY OR NEGLIGENTLY TORTURING, NEEDLESSLY MUTILATING, OR NEEDLESSLY KILLING)

The elements of the crime of cruelty to animals (recklessly or negligently torturing, needlessly mutilating, or needlessly killing) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. recklessly, or with criminal negligence,

4. tortured, needlessly mutilated, or needlessly killed an animal.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of cruelty to animals (recklessly or negligently torturing, needlessly mutilating, or needlessly killing).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of cruelty to animals (recklessly or negligently torturing, needlessly mutilating, or needlessly killing).

COMMENT

1. *See* § 18-9-202(1.5)(a), C.R.S. 2015.

2. *See* Instruction F:17 (defining "animal"); Instruction F:79 (defining "criminal negligence"); Instruction F:308 (defining "recklessly").

3. *See* Instruction H:57 (affirmative defense of "dog found running, worrying, or injuring sheep, cattle, or other livestock").

9-2:04 AGGRAVATED CRUELTY TO ANIMALS

The elements of the crime of aggravated cruelty to animals are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. tortured, needlessly mutilated, or needlessly killed an animal.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated cruelty to animals.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated cruelty to animals.

COMMENT

1. *See* § 18-9-202(1.5)(b), C.R.S. 2015.

2. *See* Instruction F:17 (defining "animal"); Instruction F:195 (defining "knowingly").

3. *See* Instruction H:57 (affirmative defense of "dog found running, worrying, or injuring sheep, cattle, or other livestock").

9-2:05 CRUELTY TO A SERVICE ANIMAL

The elements of the crime of cruelty to a service animal are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

[3. knowingly, recklessly, or with criminal negligence,

4. overdrove, overloaded, overworked, tormented, deprived of necessary sustenance, unnecessarily or cruelly beat, allowed to be housed in a manner that resulted in chronic or repeated serious physical harm, carried or confined in or upon any vehicles in a cruel or reckless manner, engaged in a sexual act with an animal, or otherwise mistreated or neglected any animal, or caused or procured it to be done, or, having the charge or custody of any animal, failed to provide it with proper food, drink, or protection from the weather consistent with the species, breed, and type of animal involved, or abandoned an animal,]

[3. intentionally,

4. abandoned a dog or cat,]

5. and the animal was a service animal, whether or not the service animal was on duty.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of cruelty to a service animal.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of cruelty to a service animal.

COMMENT

1. *See* § 18-9-202(1.5)(c), C.R.S. 2015 (incorporating section 18-1.3-602(3.5)).

2. *See* Instruction F:03 (defining "abandon"); Instruction F:79 (defining "criminal negligence"); Instruction F:185 (defining "intentionally"); Instruction F:195 (defining "knowingly"); Instruction F:231 (defining "mistreatment"); Instruction F:240 (defining "neglect"); Instruction F:308 (defining "recklessly"); Instruction F:333 (defining "serious physical harm"); Instruction F:334 (defining "service animal"); Instruction F:336 (defining "sexual act with an animal").

3. Although it seems highly improbable that a cat would ever qualify as a "service animal" for purposes of section 18-1.3-602(3.5), C.R.S. 2015, the model instruction nevertheless includes language contemplating that possibility because section 18-9-202(1.5)(c) explicitly incorporates all of section 18-9-202(1), and section 18-9-202(1)(b) specifically includes cats.

4. *See* Instruction 9-2:01, Comment 4 (discussing knowing or reckless abandonment, as defined by the final clause of section 18-9-202(1)(a)).

5. *See* Instruction H:57 (affirmative defense of "dog found running, worrying, or injuring sheep, cattle, or other livestock").

9-2:06 ANIMAL FIGHTING

The elements of the crime of animal fighting are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. caused, sponsored, arranged, held, or encouraged a fight between animals,

4. for the purpose of monetary gain or entertainment.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of animal fighting.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of animal fighting.

COMMENT

1. *See* § 18-9-204(1)(a), C.R.S. 2015.

2. *See* Instruction F:17 (defining "animal").

3. The statute includes exemptions from criminal liability for normal hunting practices and animal training. *See* § 18-9-204(3), (4), C.R.S. 2015. However, the Committee has not drafted model affirmative defense instructions.

9-2:07.SP ANIMAL FIGHTING - SPECIAL INSTRUCTION

A person encourages a fight between animals for the purpose of monetary gain or entertainment if he [she]: is knowingly present at or wagers on such a fight; or owns, trains, transports, possesses, breeds, sells, transfers, or equips an animal with the intent that such animal will be engaged in such a fight; or knowingly allows any such fight to occur on any property owned or controlled by him [her]; or knowingly allows any animal used for such a fight to be kept, boarded, housed, or trained on, or transported in, any property owned or controlled by him [her]; or knowingly uses any means of communication for the purpose of promoting such a fight; or knowingly possesses any animal used for such a fight or any device intended to enhance the animal's fighting ability.

COMMENT

1. *See* § 18-9-204(1)(b)(I-VI), C.R.S. 2015.

2. *See* Instruction F:17 (defining "animal"); Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly"); Instruction F:281 (defining "possession").

9-2:08 UNLAWFUL OWNERSHIP OF A DANGEROUS DOG

The elements of the crime of unlawful ownership of a dangerous dog are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. owned, possessed, harbored, kept, had a financial or property interest in, or had custody or control over,

4. a dangerous dog.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful ownership of a dangerous dog.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful ownership of a dangerous dog.

COMMENT

1. *See* § 18-9-204.5(3)(a), C.R.S. 2015.

2. *See* Instruction F:84 (defining "dangerous dog"); Instruction F:256 (defining "owner" or "owns"); Instruction F:281 (defining "possession"); *see also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

3. The above instruction reflects an understanding of the offense as being fully defined by section 18-9-204.5(3)(a), with sentence enhancement provisions defined by section 18-9-

204.5(3)(b), (c), (d), (e)(I), (e)(III)(B.5), C.R.S. 2015. Under this construction, if the dangerous dog does not cause any injury and does not damage any property, the base level offense is unclassified, and the only penalties are those that are set forth in section 18-9-204.5(e.5)(I-VI), C.R.S. 2015. *See* § 18-1.3-504(1), C.R.S. 2015 ("Any . . . petty offense defined by state statute without specification of its class shall be punishable as provided in the statute defining it"). *See also* § 18-9-204.5(e)(III)(B.5), C.R.S. 2015 (establishing the least severe sentence enhancement provision, which makes the offense a class one petty offense if the dog has damaged or destroyed the property of another).

4. *See* Instruction H:58 (affirmative defense of "conduct of the person or animal attacked").

9-2:09.INT UNLAWFUL OWNERSHIP OF A DANGEROUS DOG - INTERROGATORY (BODILY INJURY)

If you find the defendant not guilty of unlawful ownership of a dangerous dog, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of unlawful ownership of a dangerous dog, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant's dog injure a person?
(Answer "Yes" or "No")

The defendant's dog injured a person only if:

1. defendant owned the dog, and

2. the dangerous dog inflicted bodily injury upon any person.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-9-204.5(3)(b), C.R.S. 2015.

2. *See* Instruction F:37 (defining "bodily injury"); Instruction F:84 (defining "dangerous dog"); Instruction F:256 (defining "owner" or "owns"); *see*, *e.g.*, Instruction E:28 (special verdict form).

9-2:10.INT UNLAWFUL OWNERSHIP OF A DANGEROUS DOG - INTERROGATORY (SERIOUS BODILY INJURY)

If you find the defendant not guilty of unlawful ownership of a dangerous dog, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of unlawful ownership of a dangerous dog, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did defendant's dog seriously injure a person?
(Answer "Yes" or "No")

The defendant's dog seriously injured a person only if:

1. defendant owned the dog, and

2. the dog inflicted serious bodily injury upon any person.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-9-204.5(3)(c), C.R.S. 2015.

2. *See* Instruction F:84 (defining "dangerous dog"); Instruction F:256 (defining "owner" or "owns"); Instruction F:332 (defining "serious bodily injury"); *see, e.g.*, Instruction E:28 (special verdict form).

9-2:11.INT UNLAWFUL OWNERSHIP OF A DANGEROUS DOG - INTERROGATORY (DEATH OF A PERSON)

If you find the defendant not guilty of unlawful ownership of a dangerous dog, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of unlawful ownership of a dangerous dog, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did defendant's dog kill a person? (Answer "Yes" or "No")

The defendant's dog killed a person only if:

1. defendant owned the dog, and

2. the dog caused the death of a person.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-9-204.5(3)(d), C.R.S. 2015.

2. *See* Instruction F:84 (defining "dangerous dog"); Instruction F:256 (defining "owner" or "owns"); *see, e.g.*, Instruction E:28 (special verdict form).

9-2:12.INT UNLAWFUL OWNERSHIP OF A DANGEROUS DOG - INTERROGATORY (DOMESTIC ANIMAL)

If you find the defendant not guilty of unlawful ownership of a dangerous dog, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of unlawful ownership of a dangerous dog, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

> Did defendant's dog harm a domestic animal? (Answer "Yes" or "No")
>
> The defendant's dog harmed a domestic animal only if:
>
> 1. defendant owned the dog, and
>
> 2. the dog injured or caused the death of any domestic animal.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-9-204.5(3)(e)(I), C.R.S. 2015.

2. *See* Instruction F:84 (defining "dangerous dog"); Instruction F:107 (defining "domestic animal"); Instruction F:256 (defining "owner" or "owns"); *see, e.g.*, Instruction E:28 (special verdict form).

9-2:13.INT UNLAWFUL OWNERSHIP OF A DANGEROUS DOG - INTERROGATORY (PROPERTY)

If you find the defendant not guilty of unlawful ownership of a dangerous dog, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of unlawful ownership of a dangerous dog, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did defendant's dog harm property? (Answer "Yes" or "No")

The defendant's dog harmed property only if:

1. defendant owned the dog, and

2. the dog damaged or destroyed the property of another person.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-9-204.5(3)(e)(III)(B.5), C.R.S. 2015.

2. *See* Instruction F:84 (defining "dangerous dog"); Instruction F:107 (defining "domestic animal"); Instruction F:256 (defining "owner" or "owns"); *see, e.g.*, Instruction E:28 (special verdict form).

9-2:14 UNAUTHORIZED RELEASE OF AN ANIMAL

The elements of the crime of unauthorized release of an animal are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. intentionally,

4. released any animal which was lawfully confined for scientific, research, commercial, legal sporting, or educational purposes or for public safety purposes because the animal had been determined to be dangerous to people, had an infectious disease, or was quarantined to determine whether or not it had an infectious disease,

5. without the consent of the owner or custodian of the animal.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unauthorized release of an animal.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unauthorized release of an animal.

COMMENT

1. *See* § 18-9-206(1), C.R.S. 2015.

2. *See* Instruction F:185 (defining "intentionally").

3. The definition of an "animal" in section 18-9-201(2), C.R.S. 2015, is not explicitly applicable to this offense.

9-2:15 TAMPERING WITH LIVESTOCK (TAMPER OR SABOTAGE)

The elements of the crime of tampering with livestock (tamper or sabotage) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. tampered with or sabotaged any livestock that had been registered, entered, or exhibited in any exhibition in Colorado.

[4. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of tampering with livestock (tamper or sabotage).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of tampering with livestock (tamper or sabotage).

COMMENT

1. *See* § 18-9-207(2)(a), C.R.S. 2015.

2. *See* Instruction F:131 (defining "exhibition"); Instruction F:198 (defining "livestock"); Instruction F:325 (defining "sabotage"); Instruction F:361 (defining "tamper"); *see also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

9-2:16 TAMPERING WITH LIVESTOCK (UNAPPROVED DRUG OR USAGE)

The elements of the crime of tampering with livestock (unapproved drug or usage) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. administered, dispensed, distributed, manufactured, possessed, sold, or used,

4. any drug to or for livestock,

[5. that was not approved in accordance with the "Federal Food, Drug, and Cosmetic Act" by the United States Food and Drug Administration or the United States Department of Agriculture.]

[5. that had been approved only for investigational use in accordance with the "Federal Food, Drug, and Cosmetic Act" by the United States Food and Drug Administration or the United States Department of Agriculture, and

6. the defendant used the drug for a purpose other than the approved investigational use.]

[_. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of tampering with livestock (unapproved drug or usage).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of tampering with livestock (unapproved drug or usage).

COMMENT

1. *See* § 18-9-207(2)(b), C.R.S. 2015.

2. *See* Instruction F:198 (defining "livestock"); Instruction F:281 (defining "possession"); *see also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

3. In cases brought under section 18-9-207(2)(b), the court should determine the legal question of whether, at the time of the alleged offense, the United States Food and Drug Administration or the United States Department of Agriculture had approved (or had approved for investigational use) the drug(s) at issue. The court should use the bracketed language that reflects its determination and explain its legal ruling in a separate special instruction.

9-2:17 TAMPERING WITH LIVESTOCK (DANGEROUS DRUG)

The elements of the crime of tampering with livestock (dangerous drug) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. administered, distributed, possessed, sold, or used,

4. any dangerous drug to or for livestock,

5. without a prescription for the drug that had been issued by a licensed veterinarian entitled to practice in Colorado.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of tampering with livestock (dangerous drug).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of tampering with livestock (dangerous drug).

COMMENT

1. *See* § 18-9-207(2)(c), C.R.S. 2015.

2. *See* Instruction F:198 (defining "livestock"); Instruction F:281 (defining "possession"); *see also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

9-2:18 FALSE REPORTING OF ANIMAL CRUELTY

The elements of the crime of false reporting of animal cruelty are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. made a false report of animal cruelty,

5. to a local law enforcement agency or to the state bureau of animal protection.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of false reporting of animal cruelty.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of false reporting of animal cruelty.

COMMENT

1. *See* § 18-9-209(3), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly").

3. If the defendant is not separately charged with the offense of cruelty to animals (which, presumably, will usually be the case), provide the jury with the elemental instruction for the offense of cruelty to animals, but omit the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for cruelty to animals immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the

relevant terms and theories of criminal liability. *See* Instructions 9-2:01 to 9-2:05.

CHAPTER 12-1

OFFENSES RELATING TO FIREARMS AND WEAPONS

COMMENTS ON CHAPTER USE

1. Section 18-12-101(2), C.R.S. 2015, states: "It shall be an affirmative defense to any provision of this article that the act was committed by a peace officer in the lawful discharge of his duties." *See* Instruction H:60 (affirmative defense of "peace officer").

2. *See* Instruction H:59 (affirmative defense of "knife - hunting or fishing").

12-1:01 POSSESSION OF A DANGEROUS WEAPON

The elements of the crime of possession of a dangerous weapon are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. possessed a dangerous weapon.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of possession of a dangerous weapon.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of possession of a dangerous weapon.

COMMENT

1. *See* § 18-12-102(3), C.R.S. 2015.

2. *See* Instruction F:86 (defining "dangerous weapon"); Instruction F:195 (defining "knowingly"); Instruction F:281 (defining "possession").

3. *See* Instruction H:61 (affirmative defense based on exceptions for peace officers, members of the armed services, and licensed possession).

12-1:02 POSSESSION OF AN ILLEGAL WEAPON

The elements of the crime of possession of an illegal weapon are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. possessed an illegal weapon.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of possession of an illegal weapon.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of possession of an illegal weapon.

COMMENT

1. *See* § 18-12-102(4), C.R.S. 2015.

2. *See* Instruction F:176 (defining "illegal weapon"); Instruction F:195 (defining "knowingly"); Instruction F:281 (defining "possession").

3. *See* Instruction H:61 (affirmative defense based on exceptions for peace officers, members of the armed services, and licensed possession).

12-1:03 POSSESSION OF A DEFACED FIREARM

The elements of the crime of possession of a defaced firearm are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly and unlawfully,

4. possessed a firearm,

5. the manufacturer's serial number of which, or other distinguishing number or identification mark, had been removed, defaced, altered, or destroyed, except by normal wear and tear.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of possession of a defaced firearm.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of possession of a defaced firearm.

COMMENT

1. *See* § 18-12-103, C.R.S. 2015.

2. *See* Instruction F:154 (defining "firearm"); Instruction F:195 (defining "knowingly"); Instruction F:281 (defining "possession").

12-1:04 DEFACING A FIREARM

The elements of the crime of defacing a firearm are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. removed, defaced, covered, altered, or destroyed,

5. the manufacturer's serial number or any other distinguishing number or identification mark of a firearm.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of defacing a firearm.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of defacing a firearm.

COMMENT

1. *See* § 18-12-104, C.R.S. 2015.

2. *See* Instruction F:154 (defining "firearm"); Instruction F:195 (defining "knowingly").

12-1:05 UNLAWFULLY CARRYING A CONCEALED KNIFE OR FIREARM

The elements of the crime of unlawfully carrying a concealed [knife] [firearm] are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly and unlawfully,

4. carried a [knife] [firearm] concealed on or about his [her] person.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawfully carrying a concealed [knife] [firearm].

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawfully carrying a concealed [knife] [firearm].

COMMENT

1. *See* § 18-12-105(1)(a), (b), C.R.S. 2015.

2. *See* Instruction F:154 (defining "firearm"); Instruction F:194 (defining "knife"); Instruction F:195 (defining "knowingly"); *see also People in the Interest of O.R.*, 220 P.3d 949, 952 (Colo. App. 2008) ("'concealed' for purposes of section 18–12–105(1)(b) means placed out of sight so as not to be discernible or apparent by ordinary observation"); *People in the Interest of R.J.A.*, 556 P.2d 491 (Colo. App. 1976) (holding, in the context of a probation revocation proceeding not subject to standard of proof beyond a reasonable doubt, that a pistol tucked under the edge of the seat on which the juvenile was sitting, within his easy reach, was "concealed on or about his

person" because it was sufficiently close to be readily accessible for immediate use).

3. *See* Instruction H:62 (affirmative defenses based on exceptions for permissible locations or possession of a valid permit).

12-1:06 UNLAWFUL POSSESSION OF A WEAPON (GENERAL ASSEMBLY)

The elements of the crime of unlawful possession of a weapon (general assembly) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. without legal authority,

4. carried, brought, or had in his [her] possession,

5. a firearm, or any explosive, incendiary, or other dangerous device,

6. on the property of or within any building in which the chambers, galleries, or offices of the general assembly, or either house thereof, were located, or in which a legislative hearing or meeting was being or was to be conducted, or in which the official office of any member, officer, or employee of the general assembly was located.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful possession of a weapon (general assembly).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful possession of a weapon (general assembly).

COMMENT

1. *See* § 18-12-105(1)(c), C.R.S. 2015.

2. *See* Instruction F:154 (defining "firearm"); Instruction F:281 (defining "possession").

3. *See* Instruction H:62 (affirmative defenses based on exceptions for permissible locations or possession of a valid permit).

12-1:07 UNLAWFUL POSSESSION OF A WEAPON ON SCHOOL, COLLEGE, OR UNIVERSITY GROUNDS

The elements of the crime of unlawful possession of a weapon on school, college, or university grounds are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly and unlawfully,

4. and without legal authority,

5. carried, brought, or had in his [her] possession,

6. a deadly weapon,

7. in or on the real estate and all improvements erected thereon of any public or private elementary, middle, junior high, high, or vocational school or any public or private college, university, or seminary,

8. other than for the purpose of presenting an authorized public demonstration or exhibition pursuant to instruction in conjunction with an organized school or class, or for the purpose of carrying out the necessary duties and functions of an employee of an educational institution that required the use of a deadly weapon, or for the purpose of participation in an authorized extracurricular activity or on an athletic team.

[9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful possession of a weapon on school, college, or university grounds.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not

guilty of unlawful possession of a weapon on school, college, or university grounds.

COMMENT

1. *See* § 18-12-105.5(1), C.R.S. 2015.

2. *See* Instruction F:88 (defining "deadly weapon"); Instruction F:195 (defining "knowingly"); Instruction F:281 (defining "possession").

3. *See* Instruction H:63 (affirmative defenses based on exceptions for permissible locations and purposes, or possession of a valid permit).

12-1:08 PROHIBITED USE OF A WEAPON (AIMING)

The elements of the crime of prohibited use of a weapon (aiming) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly and unlawfully,

4. aimed a firearm at another person.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prohibited use of a weapon (aiming).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prohibited use of a weapon (aiming).

COMMENT

1. *See* § 18-12-106(1)(a), C.R.S. 2015.

2. *See* Instruction F:154 (defining "firearm"); Instruction F:195 (defining "knowingly").

12-1:09 PROHIBITED USE OF A WEAPON (DISCHARGING OR SHOOTING)

The elements of the crime of prohibited use of a weapon (discharging or shooting) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. recklessly or with criminal negligence,

4. discharged a firearm or shot a bow and arrow.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prohibited use of a weapon (discharging or shooting).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prohibited use of a weapon (discharging or shooting).

COMMENT

1. *See* § 18-12-106(1)(b), C.R.S. 2015.

2. *See* Instruction F:79 (defining "criminal negligence"); Instruction F:154 (defining "firearm"); Instruction F:308 (defining "recklessly").

12-1:10 PROHIBITED USE OF A WEAPON (UNATTENDED)

The elements of the crime of prohibited use of a weapon (unattended) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. set a loaded gun, trap, or device designed to cause an explosion upon being tripped or approached, and

5. left it unattended by a competent person immediately present.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prohibited use of a weapon (unattended).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prohibited use of a weapon (unattended)

COMMENT

1. *See* § 18-12-106(1)(c), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly").

12-1:11 PROHIBITED USE OF A WEAPON (UNDER THE INFLUENCE)

The elements of the crime of prohibited use of a weapon (under the influence) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. had a firearm in his [her] possession,

4. while he [she] was under the influence of intoxicating liquor or of a controlled substance.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prohibited use of a weapon (under the influence).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prohibited use of a weapon (under the influence).

COMMENT

1. *See* § 18-12-106(1)(d), C.R.S. 2015.

2. *See* Instruction F:73 (defining "controlled substance" by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S. 2015); Instruction F:154 (defining "firearm"); Instruction F:281 (defining "possession").

3. + *See People v. Beckett*, 782 P.2d 812, 813 (Colo. App. 1989) (holding that "the failure to define 'under the influence,' if error, was harmless").

4. + In 2015, the Committee added Comment 3.

12-1:12 PROHIBITED USE OF A WEAPON (THROWING STAR OR NUNCHAKU)

The elements of the crime of prohibited use of a weapon (throwing star or nunchaku) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

[4. aimed, swung, or threw,

5. a throwing star or nunchaku,

6. at another person.]

[4. possessed a throwing star or nunchaku,

5. in a public place,

6. other than for the purpose of presenting an authorized public demonstration or exhibition or pursuant to instruction in conjunction with an organized school or class.]

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prohibited use of a weapon (throwing star or nunchaku).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prohibited use of a weapon (throwing star or nunchaku).

COMMENT

1. *See* § 18-12-106(1)(e), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:244 (defining "nunchaku"); Instruction F:281 (defining "possession"); Instruction F:372 (defining "throwing star").

3. In a case involving transportation of throwing stars or nunchaku, draft a special instruction explaining the following limitation: "When transporting throwing stars or nunchaku for a public demonstration or exhibition or for a school or class, they shall be transported in a closed, nonaccessible container." § 18-12-106(1)(e), C.R.S. 2015.

12-1:13.SP PROHIBITED USE OF WEAPONS - SPECIAL INSTRUCTION (POSSESSION OF A PERMIT IS NOT A DEFENSE)

Possession of a concealed weapon permit, handgun permit, or temporary emergency concealed handgun permit is no defense to a charge of prohibited used of a weapon.

COMMENT

1. *See* § 18-12-106(1)(d), C.R.S. 2015.

2. Although this limitation is set forth as part of the subsection criminalizing possession of a firearm while under the influence of an intoxicating liquor or a controlled substance, *see* section 18-12-106(1)(d), it is, by its terms, applicable to any "violation of this subsection (1)." Accordingly, the Committee has placed this special instruction after the last instruction that defines an offense in violation of section 18-12-106(1).

12-1:14 PROHIBITED USE OF A STUN GUN

The elements of the crime of prohibited use of a stun gun are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly and unlawfully,

4. used a stun gun in the commission of the crime of [insert name(s) of offense(s)].

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prohibited use of a stun gun.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prohibited use of a stun gun.

COMMENT

1. *See* § 18-12-106.5, C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:354 (defining "stun gun").

3. If the defendant is not separately charged with a referenced offense, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense.

12-1:15 ILLEGAL DISCHARGE OF A FIREARM

The elements of the crime of illegal discharge of a firearm are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly or recklessly,

4. discharged a firearm into any dwelling or any other building or occupied structure, or into any motor vehicle occupied by any person.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of illegal discharge of a firearm.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of illegal discharge of a firearm.

COMMENT

1. *See* § 18-12-107.5, C.R.S. 2015.

2. *See* Instruction F:114 (defining "dwelling"); Instruction F:154 (defining "firearm"); Instruction F:195 (defining "knowingly"); Instruction F:236 (defining "motor vehicle"); Instruction F:308 (defining "recklessly"); *see also* Instruction F:40 (defining "building" for purposes of Article 4 offenses); Instruction F:248 (defining "occupied structure" for purposes of Article 4 offenses).

3. Section 18-12-107.5(2) provides "[i]t shall not be an offense under this section if the person who discharges a firearm in violation of subsection (1) of this section is a peace officer . . . acting within the scope of such officer's

authority and in the performance of such officer's duties." This language is slightly different from the language in section 18-12-101(2), C.R.S. 2015 ("It shall be an affirmative defense to any provision of this article that the act was committed by a peace officer in the lawful discharge of his duties."). Accordingly, it may be appropriate to modify Instruction H:60 (affirmative defense of "peace officer"), which, as noted in an introductory comment to this chapter, is based on section 18-12-101(2).

12-1:16 POSSESSION OF A WEAPON BY A PREVIOUS OFFENDER

The elements of the crime of possession of a weapon by a previous offender are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

[3. subsequent to being convicted of [insert the name(s) of the qualifying felony offense(s)],]

[3. subsequent to being convicted of attempt or conspiracy to commit [insert the name(s) of the qualifying felony offense(s)],]

[3. subsequent to being adjudicated for [insert the name(s) of the qualifying act(s)],]

[3. subsequent to being adjudicated for attempt or conspiracy to commit [insert the name(s) of the qualifying felony offense(s)],]

4. knowingly,

5. possessed, used, or carried upon his [her] person a [firearm] [insert name(s) of "any other weapon that is subject to the provisions of this article"].

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of possession of a weapon by a previous offender.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of possession of a weapon by a previous offender.

COMMENT

1. *See* § 18-12-108(1), (3), C.R.S. 2015.

2. *See* Instruction F:154 (defining "firearm"); Instruction F:195 (defining "knowingly"); Instruction F:281 (defining "possession").

3. *See People v. DeWitt*, 275 P.3d 728, 735 (Colo. App. 2011) ("We conclude that the plain language of the amended POWPO statute evinces the General Assembly's clear intent for the 'knowingly' mental state to apply only to the possession element of the offense, and not to the prior felony conviction element.").

4. *See* Instruction H:64 (affirmative defense of "possession of a weapon by a previous offender - choice of evils").

12-1:17.INT POSSESSION OF A WEAPON BY A PREVIOUS OFFENDER – INTERROGATORY (DANGEROUS WEAPON)

If you find the defendant not guilty of possession of a weapon by a previous offender, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of possession of a weapon by a previous offender, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant possess a dangerous weapon?
(Answer "Yes" or "No")

The defendant possessed a dangerous weapon only if:

1. he [she] possessed a firearm silencer, machine gun, short shotgun, short rifle, or ballistic knife.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* §18-12-108(2)(b), (4)(b), C.R.S. 2015.

2. *See* Instruction F:29 (defining "ballistic knife"); Instruction F:86 (defining "dangerous weapon"); Instruction F:154 (defining "firearm"); Instruction F:156 (defining "firearm silencer"); Instruction F:203 (defining "machine gun"); Instruction F:345 (defining "short shotgun"); Instruction F:344 (defining "short rifle"); *see, e.g.*, Instruction E:28 (special verdict form).

12-1:18.INT POSSESSION OF A WEAPON BY A PREVIOUS OFFENDER – INTERROGATORY (PREVIOUS CONVICTION FOR BURGLARY, ARSON, OR ANY FELONY INVOLVING THE USE OF FORCE OR A DEADLY WEAPON)

If you find the defendant not guilty of possession of a weapon by a previous offender, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of possession of a weapon by a previous offender, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

> Was the defendant previously convicted of [burglary] [arson] [an offense involving the use of [force] [a deadly weapon]? (Answer "Yes" or "No")

The defendant was previously convicted of [burglary] [arson] [an offense involving the use of [force] [a deadly weapon]] only if:

1. the defendant's previous [conviction] [adjudication] was for [burglary] [arson] [[insert name of other felony offense(s) for which the defendant was convicted or adjudicated delinquent] involving the use of force or a deadly weapon], and

2. the date on which the defendant committed the possession of a weapon by a previous offender occurred within ten years after the date of conviction, if the defendant was not incarcerated; or within ten years after the date the defendant was released from confinement, if the defendant was incarcerated; or, within ten years after the date of release from supervision, if the defendant was subject to supervision imposed as a result of conviction.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-12-108(2)(c), (4)(c), C.R.S. 2015.

2. *See*, *e.g.*, Instruction E:28 (special verdict form).

3. *See People v. Blue*, 544 P.2d 385, 387 (Colo. 1975) (the words "involving" and "use of force or violence" are comprehensible and readily understood).

4. Sections 18-12-108(2)(c) and 18-12-108(4)(c) apply to prior convictions for burglary or arson (or acts committed by a juvenile which would, if committed by an adult, constitute either such offense) without requiring proof that the prior conviction was one "involving the use of force or the use of a deadly weapon." Accordingly, while it is the jury's role to determine whether the defendant was previously convicted as alleged, it appears that, for prior convictions based on offenses other than burglary or arson, it is the trial court's function to determine whether the prior conviction was for a felony. Further, in some cases it may not be necessary to ask the jury whether a prior conviction was one "involving the use of force or the use of a deadly weapon" because the court will be able to answer that question, as a matter of law, by examining the statutory elements of the prior offense for which the defendant was convicted. *See*, *e.g.*, *People v. Allaire*, 843 P.2d 38, 40 (Colo. App. 1992) (it was not error for the trial court to instruct the jury that second degree assault involves force or violence as a matter of law; all of the relevant means by which second degree assault, as a class four felony, can be committed involve the use of force); *see also People v. Gallegos*, 563 P.2d 937, 938 (Colo. 1977) (holding, under the previous version of the POWPO statute, that attempted robbery by threat is a felony involving the use of force).

5. It may be necessary to draft supplemental instructions to help guide the jury's determination of the date that the defendant was "convicted" or "released." *See generally People v. Larson*, 782 P.2d 840, 843 (Colo. App. 1989) (trial court erred by failing to instruct the jury that, in order for

defendant to be found guilty of possession of a weapon by a previous offender, he must have possessed a firearm within ten years after his discharge from incarceration; however, no plain error because the issue was not contested at trial).

12-1:19 POSSESSION OF A HANDGUN BY A JUVENILE

The elements of the crime of possession of a handgun by a juvenile are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. had not attained the age of eighteen years, and

4. knowingly,

5. possessed a handgun.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of possession of a handgun by a juvenile.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of possession of a handgun by a juvenile.

COMMENT

1. *See* § 18-12-108.5(1)(a), C.R.S. 2015.

2. *See* Instruction F:167 (defining "handgun"); Instruction F:195 (defining "knowingly"); Instruction F:281 (defining "possession").

3. *See* Instruction H:65 (affirmative defense of "permissible purpose").

12-1:20 UNLAWFULLY PROVIDING A HANDGUN TO A JUVENILE (PROHIBITED POSSESSION)

The elements of the crime of providing a handgun to a juvenile (prohibited possession) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. intentionally, knowingly, or recklessly,

4. provided a handgun,

5. with or without remuneration,

6. to any person under the age of eighteen years,

7. in violation of the statute that prohibits possession of a handgun by a juvenile.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of providing a handgun to a juvenile (prohibited possession).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of providing a handgun to a juvenile (prohibited possession).

COMMENT

1. *See* § 18-12-108.7(1)(a), C.R.S. 2015.

2. *See* Instruction F:167 (defining "handgun"); Instruction F:185 (defining "intentionally"); Instruction F:195 (defining "knowingly"); Instruction F:308 (defining "recklessly"); Instruction F:310 (defining "remuneration").

3. Because section 18-12-108.7(1)(a) requires proof that the juvenile's possession violated section 18-12-108.5, an adult charged with violating section 18-12-108.7(1)(a) may be entitled to an instruction explaining the affirmative defense that applies to section 18-12-108.5. *See* Instruction H:65 (affirmative defense of "permissible purpose").

4. *See* Instruction H:66 (affirmative defense of "physical harm from attempt to disarm").

5. If the defendant is not charged with possession of a handgun by a juvenile, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. *See* Instruction 12-1:19 (possession of a handgun by a juvenile). Place the elemental instruction immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for possession of a handgun by a juvenile.

12-1:21 UNLAWFULLY PERMITTING A JUVENILE TO POSSESS A HANDGUN (PROHIBITED POSSESSION)

The elements of the crime of permitting a juvenile to possess a handgun (prohibited possession) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knew of a juvenile's conduct which violated the statute that prohibits possession of a handgun by a juvenile, and

4. failed to make reasonable efforts to prevent such violation.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of permitting a juvenile to possess a handgun (prohibited possession).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of permitting a juvenile to possess a handgun (prohibited possession).

COMMENT

1. *See* § 18-12-108.7(1)(a), C.R.S. 2015.

2. *See* Instruction F:167 (defining "handgun"); Instruction F:193 (defining "juvenile").

3. Because section 18-12-108.7(1)(a) requires proof that the juvenile's possession violated section 18-12-108.5, an adult charged with violating section 18-12-108.7(1)(a) may be entitled to an instruction explaining the affirmative defense that applies to section 18-12-108.5. *See* Instruction H:65 (affirmative defense of "permissible purpose").

4. *See* Instruction H:66 (affirmative defense of "physical harm from attempt to disarm").

5. If the defendant is not charged with possession of a handgun by a juvenile, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. *See* Instruction 12-1:19 (possession of a handgun by a juvenile). Place the elemental instruction immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for possession of a handgun by a juvenile.

12-1:22 UNLAWFULLY PROVIDING A HANDGUN TO A JUVENILE OR PERMITTING A JUVENILE TO POSSESS A HANDGUN (SUBSTANTIAL RISK)

The elements of the crime of [unlawfully providing a handgun to a juvenile] [permitting a juvenile to possess a handgun] (substantial risk) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. intentionally, knowingly, or recklessly,

4. provided a handgun to a juvenile or permitted a juvenile to possess a handgun,

5. even though the defendant was aware of a substantial risk that the juvenile would use a handgun to commit [insert name(s) of felony offense(s)].

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of

COMMENT

1. *See* § 18-12-108.7(2)(a), C.R.S. 2015.

2. *See* Instruction F:167 (defining "handgun"); Instruction F:185 (defining "intentionally"); Instruction F:193 (defining "juvenile"); Instruction F:195 (defining "knowingly"); Instruction F:281 (defining "possession"); Instruction F:308 (defining "recklessly").

3. *See* Instruction H:66 (affirmative defense of "physical harm from attempt to disarm").

12-1:23 UNLAWFULLY PERMITTING A JUVENILE TO POSSESS A HANDGUN (FAILURE TO ACT BASED ON A SUBSTANTIAL RISK)

The elements of the crime of unlawfully permitting a juvenile to possess a handgun (failure to act based on a substantial risk) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was aware of a substantial risk that a juvenile would use a handgun to commit [insert name(s) of felony offense(s)], and

4. failed to make reasonable efforts to prevent the commission of the offense.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawfully permitting a juvenile to possess a handgun (failure to act based on a substantial risk).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawfully permitting a juvenile to possess a handgun (failure to act based on a substantial risk).

COMMENT

1. *See* § 18-12-108.7(2)(a), C.R.S. 2015.

2. *See* Instruction F:167 (defining "handgun"); Instruction F:193 (defining "juvenile").

3. Section 18-12-108.7(2)(a) provides as follows:

> A person shall be deemed to have violated this paragraph (a) if such person provides a handgun to or

> permits the possession of a handgun by any juvenile who has been convicted of a crime of violence, as defined in section 18-1.3-406, or any juvenile who has been adjudicated a juvenile delinquent for an offense which would constitute a crime of violence, as defined in section 18-1.3-406, if such juvenile were an adult.

This provision could be interpreted as establishing either: (1) a permissible inference that should be explained to the jury by means of a special instruction, *see generally Jolly v. People*, 742 P.2d 891, 897 (Colo. 1987) (unlike a mandatory presumption, the use of a permissible inference in a criminal case does not violate due process); or (2) a substantive offense with an imputed mens rea of "knowingly." *See* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state."). The Committee takes no position concerning which interpretation is correct.

4. *See* Instruction H:66 (affirmative defense of "physical harm from attempt to disarm").

12-1:24 UNLAWFULLY PERMITTING A JUVENILE TO POSSESS A FIREARM OTHER THAN A HANDGUN

The elements of the crime of unlawfully permitting a juvenile to possess a firearm other than a handgun are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. sold, rented, transferred ownership of, or allowed unsupervised possession of,

4. a firearm other than a handgun,

5. with or without remuneration,

6. to any juvenile,

7. without the consent of the juvenile's parent or legal guardian.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawfully permitting a juvenile to possess a firearm other than a handgun.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawfully permitting a juvenile to possess a firearm other than a handgun.

COMMENT

1. *See* § 18-12-108.7(3), C.R.S. 2015.

2. *See* Instruction F:154 (defining "firearm"); Instruction F:167 (defining "handgun"); Instruction F:193 (defining "juvenile"); Instruction F:281 (defining "possession"); Instruction F:310 (defining "remuneration"); *see also* § 18-1-

503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

3. *See* Instruction H:66 (affirmative defense of "physical harm from attempt to disarm").

12-1:25 POSSESSION OR CONTROL OF AN EXPLOSIVE OR INCENDIARY DEVICE

The elements of the crime of possession or control of an explosive or incendiary device are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. possessed, controlled, manufactured, gave, mailed, sent, or caused to be sent,

5. an explosive or incendiary device.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of possession or control of an explosive or incendiary device.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of possession or control of an explosive or incendiary device.

COMMENT

1. *See* § 18-12-109(2), C.R.S. 2015.

2. *See* Instruction F:134 (defining "explosive or incendiary device"); Instruction F:195 (defining "knowingly"); Instruction F:281 (defining "possession").

3. Section 18-12-109(3), C.R.S. 2015, enumerates several exemptions from criminal liability (e.g., peace officers, National Guard servicepersons, etc.). However, the Committee has not drafted model affirmative defense instructions.

12-1:26 POSSESSION OR CONTROL OF A CHEMICAL, BIOLOGICAL, OR RADIOLOGICAL WEAPON

The elements of the crime of possession or control of a chemical, biological, or radiological weapon are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. possessed, controlled, manufactured, gave, mailed, sent, or caused to be sent,

5. a chemical, biological, or radiological weapon.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of possession of a chemical, biological, or radiological weapon.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of possession of a chemical, biological, or radiological weapon.

COMMENT

1. *See* § 18-12-109(2.5), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:281 (defining "possession").

3. The terms "chemical, biological, or radiological weapon" are not defined by statute.

12-1:27 USE OF AN EXPLOSIVE OR INCENDIARY DEVICE OR A CHEMICAL, BIOLOGICAL, OR RADIOLOGICAL WEAPON IN THE COMMISSION, OR ATTEMPTED COMMISSION, OF A FELONY

The elements of the crime of use of a[n] [explosive or incendiary device] [chemical, biological, or radiological weapon or materials] in the [attempted] commission of a felony are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. used, caused to be used, or gave, mailed, sent, or caused to be sent,

5. a[n] [explosive or incendiary device] [chemical, biological, or radiological weapon or materials],

6. in [the commission of, or in an attempt to commit, [insert name of felony offense(s)].

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of use of a[n] [explosive or incendiary device] [chemical, biological, or radiological weapon or materials] in the [attempted] commission of a felony.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of use of a[n] [explosive or incendiary device] [chemical, biological, or radiological weapon or materials] in the [attempted] commission of a felony.

COMMENT

1. *See* § 18-12-109(4), C.R.S. 2015.

2. *See* Instruction F:134 (defining "explosive or incendiary device"); Instruction F:195 (defining "knowingly"); Instruction G2:01 (criminal attempt).

3. The terms "chemical, biological, or radiological weapon" are not defined by statute.

12-1:28 REMOVAL OF AN EXPLOSIVE OR INCENDIARY DEVICE

The elements of the crime of removal of an explosive or incendiary device are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. removed or caused to be removed, or carried away,

4. any explosive or incendiary device,

5. from the premises where the explosive or incendiary device was kept by the lawful user, vendor, transporter, or manufacturer thereof,

6. without the consent or direction of the lawful possessor.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of removal of an explosive or incendiary device.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of removal of an explosive or incendiary device.

COMMENT

1. *See* § 18-12-109(5), C.R.S. 2015.

2. *See* Instruction F:134 (defining "explosive or incendiary device"); *see also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

12-1:29 REMOVAL OF A CHEMICAL, BIOLOGICAL, OR RADIOLOGICAL WEAPON

The elements of the crime of removal of a chemical, biological, or radiological weapon are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. removed or caused to be removed, or carried away,

4. a chemical, biological, or radiological weapon,

5. from the premises where the chemical, biological, or radiological weapon was kept by the lawful user, vendor, transporter, or manufacturers thereof,

6. without the consent or direction of the lawful possessor.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of removal of a chemical, biological, or radiological weapon.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of removal of a chemical, biological, or radiological weapon.

COMMENT

1. *See* § 18-12-109(5.5), C.R.S. 2015.

2. *See also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or

all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. The terms “chemical, biological, or radiological weapon” are not defined by statute.

12-1:30 POSSESSION OF EXPLOSIVE OR INCENDIARY PARTS

The elements of the crime of possession of explosive or incendiary parts are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. possessed any explosive or incendiary parts.

[4. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of possession of explosive or incendiary parts.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of possession of explosive or incendiary parts.

COMMENT

1. *See* § 18-12-109(6), C.R.S. 2015.

2. *See* Instruction F:135 (defining "explosive or incendiary parts"); Instruction F:281 (defining "possession"); *see also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

12-1:31 POSSESSION OF CHEMICAL, BIOLOGICAL, OR RADIOLOGICAL WEAPON PARTS

The elements of the crime of possession of chemical, biological, or radiological weapon parts are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. possessed any chemical, biological, or radiological weapon parts.

[4. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of possession of chemical, biological, or radiological weapon parts.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of possession of chemical, biological, or radiological weapon parts.

COMMENT

1. *See* § 18-12-109(7), C.R.S. 2015.

2. *See* Instruction F:281 (defining "possession"); *see also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

3. The terms "chemical, biological, or radiological weapon" are not defined by statute.

12-1:32 FALSE, FACSIMILE, OR HOAX DEVICE OR WEAPON

The elements of the crime of false, facsimile, or hoax device or weapon are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

[3. manufactured, possessed, gave, mailed, sent, or caused to be sent,

4. any false, facsimile or hoax [explosive or incendiary device] [chemical, biological, or radiological weapon],

5. to another person.]

[3. placed any false, facsimile or hoax [explosive or incendiary device] [chemical, biological, or radiological weapon],

4. in or upon any real or personal property.]

[_. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of false, facsimile, or hoax device or weapon.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of false, facsimile, or hoax device or weapon.

COMMENT

1. *See* § 18-12-109(7), C.R.S. 2015.

2. *See* Instruction F:134 (defining "explosive or incendiary device"); Instruction F:281 (defining "possession").

3. The terms “chemical, biological, or radiological weapon” are not defined by statute.

12-1:33 UNLAWFULLY DISPENSING, DISTRIBUTING, OR SELLING AN EXPLOSIVE OR INCENDIARY DEVICES

The elements of the crime unlawfully dispensing, distributing, or selling explosive or incendiary devices are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. [possessed a valid [insert description of permit issued under the provisions of article 7 of title 9, C.R.S.] [was an employee of a person who possessed a valid [insert description of permit issued under the provisions of article 7 of title 9, C.R.S.], and was acting within the scope of his [her] employment], and

5. dispensed, distributed, or sold,

6. explosive or incendiary devices,

7. to a person who was not authorized to possess or control such an explosive or incendiary device.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawfully dispensing, distributing, or selling explosive or incendiary devices.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawfully dispensing, distributing, or selling explosive or incendiary devices.

COMMENT

1. *See* § 18-12-109(8), C.R.S. 2015.

2. *See* Instruction F:134 (defining "explosive or incendiary device"); Instruction F:281 (defining "possession").

12-1:34 PURCHASING OR OBTAINING A FIREARM FOR A PERSON WHO IS INELIGIBLE

The elements of the crime of purchasing or obtaining a firearm for a person who is ineligible are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. purchased or otherwise obtained a firearm,

5. on behalf of, or for transfer to, a person whom the transferor knew, or reasonably should have known, was ineligible to possess a firearm pursuant to federal or state law.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of purchasing or obtaining a firearm for a person who is ineligible.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of purchasing or obtaining a firearm for a person who is ineligible.

COMMENT

1. *See* § 18-12-111(1), C.R.S. 2015.

2. *See* Instruction F:154 (defining "firearm"); Instruction F:195 (defining "knowingly").

3. It may be necessary to draft a special instruction to guide the jury's determination of whether the recipient was ineligible to possess a firearm.

12-1:35 FAILURE TO DISPLAY SIGNAGE EXPLAINING THAT IT IS UNLAWFUL TO PURCHASE OR OBTAIN A FIREARM FOR A PERSON WHO IS INELIGIBLE

The elements of the crime of failure to display signage explaining that it is unlawful to purchase or obtain a firearm for a person who is ineligible are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was a licensed dealer, pursuant to [insert a description of the relevant license issued pursuant to Chapter 44 of 18 U.S.C.; *see* 18 U.S.C. 921(a)(11)], and,

4. failed to post a sign displaying that a person commits a felony if he [she] knowingly purchases or otherwise obtains a firearm on behalf of, or for transfer to, a person who the transferor knows or reasonably should know is ineligible to possess a firearm pursuant to federal or state law,

5. in a manner that was easily readable, and

6. in an area that was visible to the public at each location from which the defendant sold firearms to the general public.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to display signage explaining that it is unlawful to purchase or obtain a firearm for a person who is ineligible.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to display signage explaining that it is unlawful to purchase or obtain a firearm for a person who is ineligible.

COMMENT

1. *See* § 18-12-111(2), C.R.S. 2015.

2. *See* Instruction F:154 (defining "firearm"); Instruction F:195 (defining "knowingly").

12-1:36 TRANSFER OF A FIREARM WITHOUT A BACKGROUND CHECK

The elements of the crime of transfer of a firearm without a background check are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was not a licensed gun dealer, and

4. before transferring or attempting to transfer possession of a firearm to a transferee,

5. failed to [require that a background check be conducted of the prospective transferee] [obtain approval of the transfer from the federal bureau of alcohol, tobacco, and firearms after a background check had been requested by a licensed gun dealer in accordance with [insert a description of the procedure, from section 24-33.5-424]].

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of transfer of a firearm without a background check.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of transfer of a firearm without a background check.

COMMENT

1. *See* § 18-12-112(1)(a), (9)(a), C.R.S. 2015.

2. *See* Instruction F:154 (defining "firearm"); Instruction F:375 (defining "transferee").

3. *See* Instruction H:67 (affirmative defense of "permissible transfer").

4. + In the absence of case law on point, the Committee takes no position on whether the word "attempting" in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

5. + In 2015, the Committee added Comment 4.

12-1:37 NONCOMPLIANCE BY A LICENSED GUN DEALER PERFORMING A BACKGROUND CHECK FOR A PROSPECTIVE FIREARM TRANSFEROR WHO IS NOT A LICENSED GUN DEALER

The elements of the crime of noncompliance by a licensed gun dealer performing a background check for a prospective firearm transferor who is not a licensed gun dealer are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was a licensed gun dealer, and

4. obtained a background check on a prospective transferee, for a prospective firearm transferor who was not a licensed gun dealer, and

5. failed to [record the transfer [insert a description of the recording requirement from section 12-26-102] and retain the records [insert a description of the retention requirement from section 12-26-103] in the same manner as when conducting a sale, rental, or exchange at retail] [comply with [insert a description of the relevant state or federal laws, including 18 U.S.C. sec. 922] as if he [she] were transferring the firearm from his [her] inventory to the prospective transferee].

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of noncompliance by a licensed gun dealer performing a background check for a prospective firearm transferor who is not a licensed gun dealer.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of noncompliance by a licensed gun dealer performing a background check for a prospective firearm transferor who is not a licensed gun dealer.

COMMENT

1. *See* § 18-12-112(2)(b), (9)(a), C.R.S. 2015.

2. *See* Instruction F:154 (defining "firearm"); Instruction F:375 (defining "transferee").

3. *See* Instruction H:67 (affirmative defense of "permissible transfer").

12-1:38 FAILURE TO PROVIDE RESULTS OF BACKGROUND CHECK

The elements of the crime of failure to provide results of background check are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was a licensed gun dealer, and

4. obtained a background check for a prospective firearm transferor, and

5. failed to provide the firearm transferor and transferee with a copy of the results of the background check, including the federal bureau of alcohol, tobacco, and firearms' approval or disapproval of the transfer.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to provide results of background check.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to provide results of background check.

COMMENT

1. *See* § 18-12-112(2)(c), (9)(a), C.R.S. 2015.

2. *See* Instruction F:154 (defining "firearm"); Instruction F:375 (defining "transferee").

3. *See* Instruction H:67 (affirmative defense of "permissible transfer").

12-1:39 OVERCHARGING FOR A BACKGROUND CHECK

The elements of the crime of overcharging for a background check are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was a licensed gun dealer, and

4. obtained a background check for a prospective firearm transferor, and

5. charged a fee of more than ten dollars for his [her] services.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of overcharging for a background check.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of overcharging for a background check.

COMMENT

1. *See* § 18-12-112(2)(d), (9)(a), C.R.S. 2015.

2. *See* Instruction F:154 (defining "firearm").

3. The Committee has drafted a model instruction for a violation of section 18-12-112(2)(d) because section 18-12-112(9) states, without limitation, that "[a] person who violates a provision of this section commits a class 1 misdemeanor." However, the Committee acknowledges that section 18-12-112(4) could be construed as setting the maximum fee without also establishing a substantive offense as an enforcement mechanism.

4. *See* Instruction H:67 (affirmative defense of "permissible transfer").

5. Section 18-12-112 does not define the term "transferor."

12-1:40 ACCEPTING POSSESSION OF A FIREARM WITHOUT APPROVAL

The elements of the crime of accepting possession of a firearm without approval are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was a prospective firearm transferee, and

4. accepted possession of a firearm, and

5. the prospective firearm transferor had not obtained approval of the transfer from the federal bureau of alcohol, tobacco, and firearms' after a background check had been requested by a licensed gun dealer.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of accepting possession of a firearm without approval.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of accepting possession of a firearm without approval.

COMMENT

1. See § 18-12-112(3)(a), (9)(a), C.R.S. 2015.

2. See Instruction F:154 (defining "firearm"); Instruction F:375 (defining "transferee"); Instruction F:281 (defining "possession").

3. *See* Instruction H:67 (affirmative defense of "permissible transfer").

4. Section 18-12-112 does not define the term "transferor."

12-1:41 PROVIDING FALSE INFORMATION FOR THE PURPOSE OF ACQUIRING A FIREARM

The elements of the crime of providing false information for the purpose of acquiring a firearm are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. was a prospective firearm transferee, and

5. provided false information to a prospective firearm transferor or to a licensed gun dealer,

6. for the purpose of acquiring a firearm.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of providing false information for the purpose of acquiring a firearm.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of providing false information for the purpose of acquiring a firearm.

COMMENT

1. *See* § 18-12-112(3)(b), (9)(a), C.R.S. 2015.

2. *See* Instruction F:154 (defining "firearm"); Instruction F:195 (defining "knowingly"); Instruction F:375 (defining "transferee").

3. *See* Instruction H:67 (affirmative defense of "permissible transfer").

4. Section 18-12-112 does not define the term "transferor."

12-1:42 TRANSFER AFTER EXPIRATION OF APPROVAL

The elements of the crime of transfer after expiration of approval are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was a prospective firearm transferee or transferor, and

4. completed a transfer of a firearm,

5. more than thirty calendar days after the federal bureau of alcohol, tobacco, and firearms had approved the transfer.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of transfer after expiration of approval.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of transfer after expiration of approval.

COMMENT

1. *See* § 18-12-112(4), (9)(a), C.R.S. 2015.

2. See Instruction F:154 (defining "firearm"); Instruction F:375 (defining "transferee").

3. The Committee has drafted a model instruction for a violation of section 18-12-112(4) because section 18-12-112(9) states, without limitation, that "[a] person who violates a provision of this section commits a class 1 misdemeanor." Moreover, it does not appear that a transfer of a firearm after an approval has expired can be prosecuted under any other

provision of section 18-12-112. However, the Committee acknowledges that section 18-12-112(4) could be construed as setting an expiration period without also establishing a substantive offense as an enforcement mechanism.

4. *See* Instruction H:67 (affirmative defense of "permissible transfer").

5. Section 18-12-112 does not define the term "transferor."

CHAPTER 17

COLORADO ORGANIZED CRIME CONTROL ACT

17:01 COLORADO ORGANIZED CRIME CONTROL ACT (USE OF PROCEEDS)

The elements of the crime of use of proceeds derived from a pattern of racketeering activity or the collection of an unlawful debt are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. received any proceeds derived, directly or indirectly, from a pattern of racketeering activity or through the collection of an unlawful debt, and

5. used or invested, whether directly or indirectly, any part of such proceeds or the proceeds derived from the investment or use thereof in the acquisition of any title to, or any right, interest, or equity in, real property or in the establishment or operation of any enterprise.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of use of proceeds from derived from a pattern of racketeering activity or the collection of an unlawful debt.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of use of proceeds derived from a pattern of racketeering activity or the collection of an unlawful debt.

COMMENT

1. *See* § 18-17-104(1)(a), C.R.S. 2015.

2. *See* Instruction F:125 (defining "enterprise"); Instruction F:195 (defining "knowingly"); Instruction F:261 (defining "pattern of racketeering activity"); Instruction F:307 (defining "racketeering activity"); Instruction F:380 (defining "unlawful debt").

3. Section 18-17-104(4) makes it unlawful to "conspire" to violate section 18-17-104(1). *See* Instruction G2:05 (conspiracy). Section 18-17-104(4) also makes it unlawful to "endeavor" to violate section 18-17-104(1), and a division of the court of appeals has equated an "endeavor" with an "attempt." *See New Crawford Valley, Ltd. v. Benedict*, 877 P.2d 1363, 1373 (Colo. App. 1993); *see also* Instruction G2:01 (criminal attempt).

Thus, there may be cases in which a defendant who is charged with conspiring to violate, conspiring to attempt to violate, or attempting to violate section 18-17-104(1) is not also separately charged with conspiracy, in violation of section 18-2-201, or attempt, in violation of section 18-2-101. In such circumstances, give the jury the elemental instruction for conspiracy and/or attempt (but without the two concluding paragraphs that explain the burden of proof). Place the elemental instruction(s) for conspiracy and/or attempt immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms for conspiracy and/or attempt.

4. Section 18-17-104(1)(b), C.R.S. 2015, includes an exemption from criminal liability for certain types of securities purchases. However, the Committee has not drafted a model affirmative defense instruction.

17:02 COLORADO ORGANIZED CRIME CONTROL ACT (ACQUIRING AN INTEREST)

The elements of the crime of acquiring an interest through a pattern of racketeering activity or through the collection of an unlawful debt are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. through a pattern of racketeering activity or through the collection of an unlawful debt,

5. acquired or maintained, directly or indirectly, any interest in or control of any enterprise or real property.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of acquiring an interest through a pattern of racketeering activity or through the collection of an unlawful debt.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of acquiring an interest through a pattern of racketeering activity or through the collection of an unlawful debt.

COMMENT

1. *See* § 18-17-104(2), C.R.S. 2015.

2. *See* Instruction F:125 (defining "enterprise"); Instruction F:195 (defining "knowingly"); Instruction F:261 (defining "pattern of racketeering activity"); Instruction F:307 (defining

"racketeering activity"); Instruction F:380 (defining "unlawful debt").

3. Section 18-17-104(4) makes it unlawful to "conspire" to violate section 18-17-104(2). *See* Instruction G2:05 (conspiracy). Section 18-17-104(4) also makes it unlawful to "endeavor" to violate section 18-17-104(2), and a division of the court of appeals has equated an "endeavor" with an "attempt." *See New Crawford Valley, Ltd. v. Benedict*, 877 P.2d 1363, 1373 (Colo. App. 1993); *see also* Instruction G2:01 (criminal attempt).

17:03 COLORADO ORGANIZED CRIME CONTROL ACT (EMPLOYED BY, OR ASSOCIATED WITH, AN ENTERPRISE)

The elements of the crime of a pattern of racketeering activity or collection of an unlawful debt (employed by, or associated with, an enterprise) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. was employed by, or associated with, any enterprise, and

5. conducted or participated, directly or indirectly, in such enterprise through a pattern of racketeering activity or through the collection of an unlawful debt.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of a pattern of racketeering activity or the collection of an unlawful debt (employed by, or associated with, an enterprise).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of a pattern of racketeering activity or through the collection of an unlawful debt (employed by, or associated with, an enterprise).

COMMENT

1. *See* § 18-17-104(3), C.R.S. 2015.

2. *See* Instruction F:125 (defining "enterprise"); Instruction F:195 (defining "knowingly"); Instruction F:261 (defining "pattern of racketeering activity"); Instruction F:307 (defining

"racketeering activity"); Instruction F:380 (defining "unlawful debt").

3. Section 18-17-104(4) makes it unlawful to "conspire" to violate section 18-17-104(3). *See* Instruction G2:05 (conspiracy). Section 18-17-104(4) also makes it unlawful to "endeavor" to violate section 18-17-104(3), and a division of the court of appeals has equated an "endeavor" with an "attempt." *See New Crawford Valley, Ltd. v. Benedict*, 877 P.2d 1363, 1373 (Colo. App. 1993); *see also* Instruction G2:01 (criminal attempt).

17:04.INT COLORADO ORGANIZED CRIME CONTROL ACT - INTERROGATORY (TREBLE FINE)

If you find the defendant not guilty of [use of proceeds derived from a pattern of racketeering activity or the collection of an unlawful debt] [acquiring an interest through a pattern of racketeering activity or through the collection of an unlawful debt] [pattern of racketeering activity or the collection of an unlawful debt (employed by, or associated with, an enterprise)], you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of [use of proceeds derived from a pattern of racketeering activity or the collection of an unlawful debt] [acquiring an interest through a pattern of racketeering activity or through the collection of an unlawful debt] [pattern of racketeering activity or the collection of an unlawful debt (employed by, or associated with, an enterprise)], you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question:

Was the gain or loss extraordinarily large?
(Answer "Yes" or "No")

The gain or loss was extraordinarily large only if:

1. the defendant, through commission of [use of proceeds derived from a pattern of racketeering activity or the collection of an unlawful debt] [acquiring an interest through a pattern of racketeering activity or through the collection of an unlawful debt] [pattern of racketeering activity or the collection of an unlawful debt (employed by, or associated with, an enterprise)], derived pecuniary value, or caused personal injury or property damage or other loss, with a gross value gained, or a gross value of loss caused, that was [equal to] [at least] [insert an amount that is greater than $333,333].

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-17-105(2), C.R.S. 2015.

2. *See* Instruction F:266 (defining "pecuniary value"); *see, e.g.*, Instruction E:28 (special verdict form).

3. Section 18-17-105(2), C.R.S. 2015, authorizes a court to impose a fine equal to three times the gross amount of the gain or loss that the defendant caused (plus court costs, and the costs of investigation and prosecution), and section 18-17-105(3), C.R.S. 2015, states that the court "shall hold a hearing to determine the amount of the fine." However, in cases where there is the potential for the trebled amount to exceed the maximum authorized fine, *see* § 18-1.3-401(1)(a)(III)(A), C.R.S. 2015 (the maximum fine for a class two felony conviction is one million dollars), the issue should be submitted to the jury. *See Southern Union Co. v. United States*, 567 U.S. 132 (2012) (fines implicate the Sixth Amendment right to a jury trial and are thus subject to the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000)).

CHAPTER 18

OFFENSES RELATED TO CONTROLLED SUBSTANCES

	(SCHEDULE III OR IV CONTROLLED SUBSTANCE, WITHOUT REMUNERATION)
18:12.INT	UNLAWFUL DISTRIBUTION, MANUFACTURING, DISPENSING, OR SALE OF A CONTROLLED SUBSTANCE – INTERROGATORY (SCHEDULE V CONTROLLED SUBSTANCE)
18:13.INT	UNLAWFUL DISTRIBUTION, MANUFACTURING, DISPENSING, OR SALE OF A CONTROLLED SUBSTANCE – INTERROGATORY (MINOR)
18:14	SELLING, TRANSFERRING, OR DISPENSING MARIJUANA TO A MINOR (MORE THAN TWO AND ONE-HALF POUNDS OF MARIJUANA; OR MORE THAN ONE POUND OF MARIJUANA CONCENTRATE)
18:15	SELLING, TRANSFERRING, OR DISPENSING MARIJUANA TO A MINOR (MORE THAN SIX OUNCES, BUT NOT MORE THAN TWO AND ONE-HALF POUNDS OF MARIJUANA; OR MORE THAN THREE OUNCES, BUT NOT MORE THAN ONE POUND OF MARIJUANA CONCENTRATE)
18:16	SELLING, TRANSFERRING, OR DISPENSING MARIJUANA TO A MINOR (MORE THAN ONE OUNCE, BUT NOT MORE THAN SIX OUNCES OF MARIJUANA; OR MORE THAN ONE-HALF OUNCE, BUT NOT MORE THAN THREE OUNCES OF MARIJUANA CONCENTRATE)
18:17	SELLING, TRANSFERRING, OR DISPENSING MARIJUANA TO A MINOR (NOT MORE THAN ONE OUNCE OF MARIJUANA, OR NOT MORE THAN ONE-HALF OUNCE OF MARIJUANA CONCENTRATE)
18:18	PROCESSING OR MANUFACTURING MARIJUANA OR MARIJUANA CONCENTRATE
18:19	DISPENSING, SELLING, DISTRIBUTING, OR MANUFACTURING OF MARIJUANA OR MARIJUANA CONCENTRATE
18:20.INT	DISPENSING, SELLING, DISTRIBUTING, OR MANUFACTURING OF MARIJUANA OR MARIJUANA CONCENTRATE – INTERROGATORY (SPECIFIED QUANTITY)
18:21	CULTIVATING OR GROWING MARIJUANA

18:22.INT	CULTIVATING OR GROWING MARIJUANA – INTERROGATORY (NUMBER OF PLANTS)
18:23	POSSESSION OF MORE THAN TWELVE OUNCES OF MARIJUANA OR MORE THAN THREE OUNCES OF MARIJUANA CONCENTRATE
18:24	POSSESSION OF MORE THAN SIX OUNCES BUT NOT MORE THAN TWELVE OUNCES OF MARIJUANA, OR POSSESSION OF NOT MORE THAN THREE OUNCES OF MARIJUANA CONCENTRATE
18:25	POSSESSION OF MORE THAN TWO OUNCES BUT NOT MORE THAN SIX OUNCES OF MARIJUANA
18:26	POSSESSION OF MORE THAN ONE OUNCE BUT NOT MORE THAN TWO OUNCES OF MARIJUANA
18:27	OPEN AND PUBLIC DISPLAY, CONSUMPTION, OR USE OF LESS THAN TWO OUNCES OF MARIJUANA
18:28	TRANSFERRING OR DISPENSING NOT MORE THAN TWO OUNCES OF MARIJUANA FOR NO CONSIDERATION
18:29	UNLAWFUL USE OR POSSESSION OF SYNTHETIC CANNABINOIDS OR SALVIA DIVINORUM
18:30	UNLAWFUL MANUFACTURING, DISPENSING, SALE, OR DISTRIBUTION OF SYNTHETIC CANNABINOIDS OR SALVIA DIVINORUM
18:31	UNLAWFUL MANUFACTURING, DISPENSING, SALE, OR DISTRIBUTION OF SYNTHETIC CANNABINOIDS OR SALVIA DIVINORUM (INDUCING, ATTEMPTING, OR CONSPIRING)
18:32	UNLAWFUL CULTIVATION OF SALVIA DIVINORUM
18:33.INT	SYNTHETIC CANNABINOIDS OR SALVIA DIVINORUM OFFENSES – INTERROGATORY (MINOR)
18:34	FRAUDULENT REPRESENTATION OF A MEDICAL CONDITION RELATED TO MEDICAL MARIJUANA
18:35	FRAUDULENT USE OR THEFT OF A MARIJUANA REGISTRY IDENTIFICATION CARD
18:36	FRAUDULENTLY PRODUCING, COUNTERFEITING, OR TAMPERING WITH A MARIJUANA REGISTRY IDENTIFICATION CARD
18:37	UNAUTHORIZED RELEASE OF CONFIDENTIAL INFORMATION PROVIDED TO OR BY THE MEDICAL MARIJUANA REGISTRY

18:38	UNAUTHORIZED RELEASE OF CONFIDENTIAL INFORMATION PROVIDED TO OR BY A LICENSED MEDICAL MARIJUANA BUSINESS
18:39	UNLAWFUL USE OF MARIJUANA IN A DETENTION FACILITY
18:39.5+	MANUFACTURE OF MARIJUANA CONCENTRATE USING AN INHERENTLY HAZARDOUS SUBSTANCE
18:39.7+	ALLOWING MANUFACTURE OF MARIJUANA CONCENTRATE USING AN INHERENTLY HAZARDOUS SUBSTANCE
18:40.INT	ANY FELONY CONTROLLED SUBSTANCE CONVICTION UNDER PART 4 – INTERROGATORY (PATTERN, SUBSTANTIAL SOURCE, AND SPECIAL SKILL)
18:41.INT	ANY FELONY CONTROLLED SUBSTANCE CONVICTION UNDER PART 4 – INTERROGATORY (CONSPIRACY)
18:42.INT	ANY FELONY CONTROLLED SUBSTANCE CONVICTION UNDER PART 4 – INTERROGATORY (INTRODUCING OR IMPORTING OVER A SPECIFIED AMOUNT)
18:43.INT	ANY FELONY CONTROLLED SUBSTANCE CONVICTION UNDER PART 4 – INTERROGATORY (DEADLY WEAPON OR FIREARM)
18:44.INT	UNLAWFUL DISTRIBUTION, MANUFACTURING, DISPENSING, SALE, OR POSSESSION FOR THE PURPOSES OF SALE OF ANY CONTROLLED SUBSTANCE – INTERROGATORY (USE OF A CHILD)
18:45.INT	ANY FELONY CONTROLLED SUBSTANCE CONVICTION UNDER PART 4 – INTERROGATORY (CONTINUING CRIMINAL ENTERPRISE WITH FIVE OR MORE OTHER PERSONS)
18:46.INT	SELLING, DISTRIBUTING, POSSESSING WITH INTENT TO DISTRIBUTE, MANUFACTURING, OR ATTEMPTING TO MANUFACTURE ANY CONTROLLED SUBSTANCE - INTERROGATORY (PROTECTED AREA)
18:47	KEEPING, MAINTAINING, CONTROLLING, RENTING, OR MAKING AVAILABLE PROPERTY FOR UNLAWFUL DISTRIBUTION OR TRANSPORTATION OF CONTROLLED SUBSTANCES
18:48	MAINTAINING A PLACE FOR UNLAWFUL MANUFACTURE OF CONTROLLED SUBSTANCES

COMMENTS ON CHAPTER USE

1. *See* § 18-18-431, C.R.S. 2015 ("The common law defense known as the 'procuring agent defense' is not a defense to any crime in this title."); *see also People v. Farris*, 812 P.2d 654, 656 (Colo. App. 1991) (tracing the demise of the "procuring agent defense" prior to the enactment, in 1992, of section 18-18-431).

2. Section 18-18-302(2), (3)(a-c), C.R.S. 2015, exempts from criminal liability persons who are "registered by the board" as manufacturers or distributers of controlled substances, and it identifies other persons who are exempt from criminal liability without being subject to the registration requirement (such as persons possessing a controlled substance pursuant to a lawful order of a practitioner). However, the Committee has not drafted model affirmative defense instructions for these exemptions.

18:01 UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE

The elements of the crime of unlawful possession of a controlled substance are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. possessed a controlled substance.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful possession of a controlled substance.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful possession of a controlled substance.

COMMENT

1. *See* § 18-18-403.5(2)(a), C.R.S. 2015.

2. *See* Instruction F:73 (defining "controlled substance" by referring users to the statutory schedules referenced in section § 18-18-102(5)), C.R.S. 2015); Instruction F:195 (defining "knowingly"); Instruction F:281 (defining "possession").

3. *See* Instruction H:32 (affirmative defense of "reporting an emergency drug or alcohol overdose event").

4. + Section 18-18-428(1)(b), C.R.S. 2015, establishes an exemption from criminal liability for "any minuscule, residual controlled substance that may be present in a used hypodermic needle or syringe" if the location of the needle or syringe is disclosed in specified circumstances.

5. + In 2015, the Committee added Comment 4. *See* Ch. 76, sec. 1, § 18-18-428(1)(b), 2015 Colo. Sess. Laws 200, 200–01.

18:02.INT UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE – INTERROGATORY (SPECIFIED SUBSTANCE)

If you find the defendant not guilty of unlawful possession of a controlled substance, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of unlawful possession of a controlled substance, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

> Did the defendant unlawfully possess [insert "flunitrazepam," "ketamine," "cathinones" or a "controlled substance listed in schedule I or II"]?
> (Answer "Yes" or "No")

The defendant unlawfully possessed [insert "flunitrazepam," "ketamine," "cathinones" or "a controlled substance listed in schedule I or II"] only if:

1. the controlled substance unlawfully possessed by the defendant was any material, compound, mixture, or preparation that contained any quantity of [insert "flunitrazepam," "ketamine," "cathinones," or "a controlled substance listed in schedule I or II"].

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-18-403.5(2)(a), C.R.S. 2015.

2. *See, e.g.*, Instruction E:28 (special verdict form).

18:03.INT UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE – INTERROGATORY (OTHER SPECIFIED SUBSTANCES)

If you find the defendant not guilty of unlawful possession of a controlled substance, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of unlawful possession of a controlled substance, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

> Did the defendant unlawfully possess a controlled substance listed in schedule III, IV, or V, except flunitrazepam or ketamine? (Answer "Yes" or "No")

The defendant unlawfully possessed a controlled substance listed in schedule III, IV, or V, except flunitrazepam or ketamine only if:

1. the controlled substance unlawfully possessed by the defendant was any material, compound, mixture, or preparation that contained any quantity of a controlled substance listed in schedule III, IV, or V, except flunitrazepam or ketamine.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-18-403.5(2)(c), C.R.S. 2015.

2. *See, e.g.*, Instruction E:28 (special verdict form).

18:04 UNLAWFUL USE OF A CONTROLLED SUBSTANCE

The elements of the crime of unlawful use of a controlled substance are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. used any controlled substance, and

4. the controlled substance was not dispensed by or under the direction of a person licensed or authorized by law to prescribe, administer, or dispense the controlled substance for bona fide medical needs.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful use of a controlled substance.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful use of a controlled substance.

COMMENT

1. *See* § 18-18-404(1)(a), C.R.S. 2015.

2. *See* Instruction F:09 (defining "administer"); Instruction F:73 (defining "controlled substance" by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S. 2015); Instruction F:100 (defining "dispense"); Instruction F:268 (defining "person").

3. *See* Instruction H:32 (affirmative defense of "reporting an emergency drug or alcohol overdose event").

18:05 UNLAWFUL DISTRIBUTION, MANUFACTURING, DISPENSING, OR SALE

The elements of the crime of unlawful distribution, manufacturing, dispensing, or sale are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

[4. manufactured, dispensed, sold, or distributed a controlled substance.]

[4. possessed a controlled substance with intent to manufacture, dispense, sell, or distribute.]

[4. induced, attempted to induce, or conspired with one or more other persons to manufacture, dispense, sell, or distribute a controlled substance.]

[4. induced, attempted to induce, or conspired with one or more other persons to possess a controlled substance with intent to manufacture, dispense, sell, or distribute.]

[4. possessed one or more chemicals or supplies or equipment with intent to manufacture a controlled substance.]

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful distribution, manufacturing, dispensing, or sale.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful distribution, manufacturing, dispensing, or sale.

COMMENT

1. *See* § 18-18-405(1), C.R.S. 2015.

2. *See* Instruction F:73 (defining "controlled substance" by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S. 2015); Instruction F:100 (defining "dispense"); Instruction F:102 (defining "distribute"); Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly"); Instruction F:206 (defining "manufacture"); Instruction F:268 (defining "person"); Instruction F:281 (defining "possession"); Instruction F:327 (defining "sale"); +; Instruction G2:05 (conspiracy).

3. *See People v. Abiodun*, 111 P.3d 462, 466 (Colo. 2005) ("The one-sentence proscription [in section 18-18-405(1)(a)] is structured as a series of acts, with reference to the same controlled substance and governed by a common mens rea. The acts chosen for specific inclusion are not themselves mutually exclusive but overlap in various ways and cover a continuum of conduct from the production of a controlled substance to its delivery to another person, under any of a number of circumstances.").

4. Section 18-18-405(1) excepts from criminal liability acts "authorized by part 1 of article 42.5 of title 12, C.R.S. [(pharmacists and pharmacies)], part 2 of article 80 of title 27, C.R.S. [(alcohol and drug abuse treatment programs)], or part 2 or 3 of this article [(standards, schedules, and regulation)]." However, the Committee has not drafted model affirmative defense instructions.

5. + In the absence of case law on point, the Committee takes no position on whether the word "attempted" in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

6. + In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 5.

18:06.INT UNLAWFUL DISTRIBUTION, MANUFACTURING, DISPENSING, OR SALE – INTERROGATORY (QUANTITY OF A SCHEDULE I OR II CONTROLLED SUBSTANCE)

If you find the defendant not guilty of unlawful distribution, manufacturing, dispensing, or sale, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of unlawful distribution, manufacturing, dispensing, or sale, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form. [Although you may answer "No" to more than one question, you may not answer "Yes" to more than one question. Further, if you answer "Yes" to any question, you should not answer the other question[s].]

[_. Did the unlawful distribution, manufacturing, dispensing, or sale involve any material, compound, mixture, or preparation that weighed more than two hundred twenty-five grams and contained a schedule I or schedule II controlled substance?
+ (Answer "Yes" or "No")]

[_. Did the unlawful distribution, manufacturing, dispensing, or sale involve any material, compound, mixture, or preparation that weighed more than fourteen grams, but not more than two hundred twenty-five grams, and contained a schedule I or schedule II controlled substance? + (Answer "Yes" or "No")]

[_. Did the unlawful distribution, manufacturing, dispensing, or sale involve any material, compound, mixture, or preparation that weighed not more than fourteen grams and contained a schedule I or schedule II controlled substance? + (Answer "Yes" or "No")]

The prosecution has the burden to prove the amount of the schedule I or schedule II controlled substance beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-18-405(2)(a)(I)(A), (b)(I)(A), (c)(I), C.R.S. 2015.

2. *See*, *e.g.*, Instruction E:28 (special verdict form).

3. It may be necessary to modify the model interrogatory in light of the rule of aggregation established by section 18-18-405(5), C.R.S. 2015 ("When a person commits unlawful distribution, manufacture, dispensing, sale, or possession with intent to manufacture, dispense, sell, or distribute any schedule I or schedule II controlled substance, as listed in section 18-18-203 or 18-18-204, flunitrazepam, ketamine, or cathinones, or conspires with one or more persons to commit the offense, pursuant to subsection (1) of this section, twice or more within a period of six months, without having been placed in jeopardy for the prior offense or offenses, the aggregate amount of the schedule I or schedule II controlled substance, flunitrazepam, ketamine, or cathinones involved may be used to determine the level of drug offense."). However, note that this rule of aggregation relates only to sentence enhancement; it does not authorize, or require, the aggregation of multiple acts in a single count. *See*, *e.g.*, § 18-4-401(4)(a), (b), C.R.S. 2015 (aggregation and charging of multiple thefts "in a single count"); Instructions 4-4:14, 4-4:15. Therefore, do not modify the model elemental instruction defining the substantive offense.

4. In cases where the amount of the controlled substance is a disputed issue, one or both of the parties may assert that there is an evidentiary basis for submitting more than one quantity question as part of the interrogatory. Accordingly, the above interrogatory includes bracketed examples for lesser quantity questions.

5. Where more than one quantity question is included as part of the interrogatory, use a special verdict form with a corresponding format that repeats the admonition that the jury cannot answer "Yes" to more than one quantity question.

For example, in a case involving an interrogatory with three quantity questions (and no separate interrogatories asking about other sentence enhancement factors), the relevant portion of the special verdict form would read as follows:

> I. We, the jury, find the defendant, [insert name], NOT GUILTY of Count No. [ ], unlawful distribution, manufacturing, dispensing, or sale.
>
> _____
> FOREPERSON*
>
> II. We, the jury, find the defendant, [insert name], GUILTY of Count No. [ ], unlawful distribution, manufacturing, dispensing, or sale.
>
> _____
> FOREPERSON*
>
> We further find, with respect to the verdict question[s] for this count, as follows:
>
> **1. Did the distribution, manufacturing, dispensing, or sale involve any material, compound, mixture, or preparation that weighed more than two hundred twenty-five grams and contained a schedule I or schedule II controlled substance?
>
> [___] Yes [___] No
>
> **2. Did the distribution, manufacturing, dispensing, or sale involve any material, compound, mixture, or preparation that weighed more than fourteen grams, but not more than two hundred twenty-five grams, and contained a schedule I or schedule II controlled substance].
>
> [___] Yes [___] No
>
> **3. Did the distribution, manufacturing, dispensing, or sale involve any material, compound, mixture, or preparation that weighed fourteen grams or less and contained a schedule I or schedule II controlled substance].

[___] Yes [___] No

_____
FOREPERSON*

* The foreperson should use ink to sign on one of the two lines indicating a verdict of "not guilty" or "guilty." If the verdict is "guilty," the foreperson should use ink to mark the appropriate space indicating the answer to the verdict question, and then sign on the line following the verdict question[s].

** Although you may answer "No" to more than one question, you may not answer "Yes" to more than one question. Further, if you answer "Yes" to any question, you should not answer the other question[s].

6. + In 2015, the Committee appended "Answer 'Yes' or 'No'" parentheticals to each interrogatory.

18:07.INT UNLAWFUL DISTRIBUTION, MANUFACTURING, DISPENSING, OR SALE – INTERROGATORY (QUANTITY OF METHAMPHETAMINE, HEROIN, KETAMINE, OR CATHINONES)

If you find the defendant not guilty of unlawful distribution, manufacturing, dispensing, or sale, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of unlawful distribution, manufacturing, dispensing, or sale, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form. [Although you may answer "No" to more than one question, you may not answer "Yes" to more than one question. Further, if you answer "Yes" to any question, you should not answer the other question[s].]

[_. Did the unlawful distribution, manufacturing, dispensing, or sale involve any material, compound, mixture, or preparation that weighed more than one hundred twelve grams and contained [methamphetamine] [heroin] [ketamine] [cathinones]?
+ (Answer "Yes" or "No")]

[_. Did the unlawful distribution, manufacturing, dispensing, or sale involve any material, compound, mixture, or preparation that weighed more than seven grams, but not more than one hundred twelve grams, and contained [methamphetamine] [heroin] [ketamine] [cathinones]? + (Answer "Yes" or "No")]

[_. Did the unlawful distribution, manufacturing, dispensing, or sale involve any material, compound, mixture, or preparation that weighed not more than seven grams and contained [methamphetamine] [heroin] [ketamine] [cathinones]? + (Answer "Yes" or "No")]

The prosecution has the burden to prove the amount of the [methamphetamine] [heroin] [ketamine] [cathinones] beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-18-405(2)(a)(I)(B), (b)(I)(B), (c)(II), C.R.S. 2015.

2. *See*, *e.g.*, Instruction E:28 (special verdict form).

3. It may be necessary to modify the model interrogatory in light of the rule of aggregation established by section 18-18-405(5), C.R.S. 2015 ("When a person commits unlawful distribution, manufacture, dispensing, sale, or possession with intent to manufacture, dispense, sell, or distribute any schedule I or schedule II controlled substance, as listed in section 18-18-203 or 18-18-204, flunitrazepam, ketamine, or cathinones, or conspires with one or more persons to commit the offense, pursuant to subsection (1) of this section, twice or more within a period of six months, without having been placed in jeopardy for the prior offense or offenses, the aggregate amount of the schedule I or schedule II controlled substance, flunitrazepam, ketamine, or cathinones involved may be used to determine the level of drug offense."). However, note that this rule of aggregation relates only to sentence enhancement; it does not authorize, or require, the aggregation of multiple acts in a single count. *See*, *e.g.*, § 18-4-401(4)(a), (b), C.R.S. 2015 (aggregation and charging of multiple thefts "in a single count"); Instructions 4-4:14, 4-4:15. Therefore, do not modify the model elemental instruction defining the substantive offense.

4. In cases where the amount of methamphetamine, heroin, ketamine, or cathinones is a disputed issue, one or both of the parties may assert that there is an evidentiary basis for submitting more than one quantity question as part of the interrogatory. Accordingly, the above interrogatory includes bracketed examples for lesser quantity questions.

5. Where more than one quantity question is included as part of the interrogatory, use a special verdict form with a corresponding format that repeats the admonition that the jury cannot answer "Yes" to more than one quantity question. *See* 18:06.INT, Comment 5.

6. The Committee has not drafted a model instruction defining "cathinones" because the statutory definition is lengthy. *See* § 18-18-102(3.5), C.R.S. 2015. The court should draft a special instruction based on the relevant portion(s) of the statutory definition.

7. + In 2015, the Committee appended "Answer 'Yes' or 'No'" parentheticals to each interrogatory.

18:08.INT UNLAWFUL DISTRIBUTION, MANUFACTURING, DISPENSING, OR SALE – INTERROGATORY (CONTEMPORANEOUS CONSUMPTION)

If you find the defendant not guilty of unlawful distribution, manufacturing, dispensing, or sale, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of unlawful distribution, manufacturing, dispensing, or sale, and you further find that the distribution, manufacturing, dispensing, or sale was of any material, compound, mixture, or preparation that weighed [not more than fourteen grams and contained a schedule I or schedule II controlled substance] [not more than seven grams and contained [methamphetamine] [heroin] [ketamine] [cathinones]] you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form.

[_. Did the defendant distribute or transfer not more than four grams of a schedule I or II controlled substance for the purpose of consuming all of the controlled substance with another person or persons at a time substantially contemporaneous with the transfer? (Answer "Yes" or "No")]

[_. Did the defendant distribute or transfer not more than two grams of [methamphetamine] [heroin] [ketamine] [cathinones] for the purpose of consuming all of the [methamphetamine] [heroin] [ketamine] [cathinones] with another person or persons at a time substantially contemporaneous with the transfer? (Answer "Yes" or "No")]

The prosecution has the burden to prove, beyond a reasonable doubt, either that the transfer was of [more than four grams of a schedule I or II controlled substance] [more than two grams of [methamphetamine] [heroin] [ketamine] [cathinones]], or that the transfer was not for the purpose of consuming all of the controlled substance with another person or persons at a time substantially contemporaneous with the transfer.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "No" in the

appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-18-405(2)(d)(II), C.R.S. 2015.

2. *See* Instruction F:268 (defining "person"); *see*, *e.g.*, Instruction E:28 (special verdict form).

3. As indicated by means of the "further find" provision in the second paragraph, this instruction is designed to accompany either Instruction 18:06.INT or Instruction 18:07.INT in cases involving the smallest amounts of the specified substances. However, this instruction should not be given without Instruction 18:06.INT or Instruction 18:07.INT because doing so deprives the jury of a way to make a finding that, although the amount of the controlled substance was sufficiently small to meet the statutory requirement, the distribution or transfer was not for the purpose of consuming all of the controlled substance with another person or persons at a time substantially contemporaneous with the transfer.

18:09.INT UNLAWFUL DISTRIBUTION, MANUFACTURING, DISPENSING, OR SALE OF A CONTROLLED SUBSTANCE – INTERROGATORY (QUANTITY OF FLUNITRAZEPAM)

If you find the defendant not guilty of unlawful distribution, manufacturing, dispensing, or sale of a controlled substance, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of unlawful distribution, manufacturing, dispensing, or sale of a controlled substance, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form. [Although you may answer "No" to more than one question, you may not answer "Yes" to more than one question. Further, if you answer "Yes" to any question, you should not answer the other question[s].]

[_. Did the unlawful distribution, manufacturing, dispensing, or sale involve any material, compound, mixture, or preparation that weighed more than fifty milligrams and contained flunitrazepam?
+ (Answer "Yes" or "No")]

[_. Did the unlawful distribution, manufacturing, dispensing, or sale involve any material, compound, mixture, or preparation that weighed more than ten milligrams, but not more than fifty milligrams, and contained flunitrazepam? + (Answer "Yes" or "No")]

[_. Did the unlawful distribution, manufacturing, dispensing, or sale involve any material, compound, mixture, or preparation that weighed not more than ten milligrams and contained flunitrazepam?
+ (Answer "Yes" or "No")]

The prosecution has the burden to prove the amount of the flunitrazepam beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No"

in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-18-405(2)(a)(I)(C), (b)(I)(C), (c)(III), C.R.S. 2015.

2. *See, e.g.*, Instruction E:28 (special verdict form).

3. It may be necessary to modify the model interrogatory in light of the rule of aggregation established by section 18-18-405(5), C.R.S. 2015 ("When a person commits unlawful distribution, manufacture, dispensing, sale, or possession with intent to manufacture, dispense, sell, or distribute any schedule I or schedule II controlled substance, as listed in section 18-18-203 or 18-18-204, flunitrazepam, ketamine, or cathinones or conspires with one or more persons to commit the offense, pursuant to subsection (1) of this section, twice or more within a period of six months, without having been placed in jeopardy for the prior offense or offenses, the aggregate amount of the schedule I or schedule II controlled substance, flunitrazepam, ketamine, or cathinones involved may be used to determine the level of drug offense."). However, note that this rule of aggregation relates only to sentence enhancement; it does not authorize, or require, the aggregation of multiple acts in a single count. *See, e.g.*, § 18-4-401(4)(a), (b), C.R.S. 2015 (aggregation and charging of multiple thefts "in a single count"); Instructions 4-4:14, 4-4:15. Therefore, do not modify the model elemental instruction defining the substantive offense.

4. In cases where the amount of flunitrazepam is a disputed issue, one or both of the parties may assert that there is an evidentiary basis for submitting more than one quantity question as part of the interrogatory. Accordingly, the above interrogatory includes bracketed examples for lesser quantity questions.

5. Where more than one quantity question is included as part of the interrogatory, use a special verdict form with a corresponding format that repeats the admonition that the jury cannot answer "Yes" to more than one quantity question. *See* 18:06.INT, Comment 5.

6. + In 2015, the Committee appended "Answer 'Yes' or 'No'" parentheticals to each interrogatory.

18:10.INT UNLAWFUL DISTRIBUTION, MANUFACTURING, DISPENSING, OR SALE OF A CONTROLLED SUBSTANCE – INTERROGATORY (QUANTITY OF A SCHEDULE III OR IV CONTROLLED SUBSTANCE)

If you find the defendant not guilty of unlawful distribution, manufacturing, dispensing, or sale of a controlled substance, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of unlawful distribution, manufacturing, dispensing, or sale of a controlled substance, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form. [Although you may answer "No" to more than one question, you may not answer "Yes" to more than one question. Further, if you answer "Yes" to any question, you should not answer the other question[s].]

[_. Did the unlawful distribution, manufacturing, dispensing, or sale involve any material, compound, mixture, or preparation that weighed more than four grams and contained a schedule III or IV controlled substance? + (Answer "Yes" or "No")]

[_. Did the unlawful the distribution, manufacturing, dispensing, or sale involve any material, compound, mixture, or preparation that weighed not more than four grams and contained a schedule III or IV controlled substance? + (Answer "Yes" or "No")]

The prosecution has the burden to prove the amount of the schedule III or IV controlled substance beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-18-405(2)(c)(IV), (2)(d)(I), (e)(II), C.R.S. 2015.

2. *See, e.g.*, Instruction E:28 (special verdict form).

3. In cases where the amount of schedule III or IV controlled substance(s) is a disputed issue, one or both of the parties may assert that there is an evidentiary basis for submitting more than one quantity question as part of the interrogatory. Accordingly, the above interrogatory includes a bracketed example for a lesser quantity question.

4. Where more than one quantity question is included as part of the interrogatory, use a special verdict form with a corresponding format that repeats the admonition that the jury cannot answer "Yes" to more than one quantity question. *See* 18:06.INT, Comment 5.

5. + In 2015, the Committee appended "Answer 'Yes' or 'No'" parentheticals to each interrogatory.

18:11.INT UNLAWFUL DISTRIBUTION, MANUFACTURING, DISPENSING, OR SALE – INTERROGATORY (SCHEDULE III OR IV CONTROLLED SUBSTANCE, WITHOUT REMUNERATION)

If you find the defendant not guilty of unlawful distribution, manufacturing, dispensing, or sale of a controlled substance, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of unlawful distribution, manufacturing, dispensing, or sale of a controlled substance, and you further find that the distribution, manufacturing, dispensing, or sale was of any material, compound, mixture, or preparation that weighed not more than four grams and contained a schedule III or IV controlled substance, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form.

1. Did the defendant transfer, with no remuneration, not more than four grams of a schedule III or IV controlled substance? (Answer "Yes" or "No")

The prosecution has the burden to prove, beyond a reasonable doubt, either that the transfer was of more than four grams of a schedule III or IV controlled substance, or that the transfer was with remuneration.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-18-405(2)(e)(II), C.R.S. 2015.

2. *See* Instruction F:310 (defining "remuneration"); *see, e.g.*, Instruction E:28 (special verdict form).

3. As indicated by means of the "further find" provision in the second paragraph, this instruction is designed to accompany Instruction 18:10.INT. This instruction should not be given without Instruction 18:10.INT, because doing so deprives the jury of a way to make a finding that, although the amount of the controlled substance was sufficiently small to meet the statutory requirement, the transfer was with remuneration.

18:12.INT UNLAWFUL DISTRIBUTION, MANUFACTURING, DISPENSING, OR SALE – INTERROGATORY (SCHEDULE V CONTROLLED SUBSTANCE)

If you find the defendant not guilty of unlawful distribution, manufacturing, dispensing, or sale of a controlled substance, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of unlawful distribution, manufacturing, dispensing, or sale of a controlled substance, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the offense involve a schedule V controlled substance? (Answer "Yes" or "No")

The offense involved a schedule V controlled substance only if:

1. the defendant unlawfully distributed, manufactured, dispensed, or sold a schedule V controlled substance.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-18-405(2)(e)(I), C.R.S. 2015.

2. *See, e.g.*, Instruction E:28 (special verdict form).

18:13.INT UNLAWFUL DISTRIBUTION, MANUFACTURING, DISPENSING, OR SALE – INTERROGATORY (MINOR)

If you find the defendant not guilty of unlawful distribution, manufacturing, dispensing, or sale of a controlled substance, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of unlawful distribution, manufacturing, dispensing, or sale of a controlled substance, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the offense involve a minor? (Answer "Yes" or "No")

The offense involved a minor only if:

1. the defendant was an adult, and

[2. he [she] sold, dispensed, distributed, or otherwise transferred any quantity of a schedule I or schedule II controlled substance or any material, compound, mixture, or preparation that contained any amount of a schedule I or schedule II controlled substance, other than marijuana or marijuana concentrate, to a minor, and]

[2. he [she] sold, dispensed, distributed, or otherwise transferred any quantity of a schedule III or schedule IV controlled substance or any material, compound, mixture, or preparation that contained any amount of a schedule III or schedule IV controlled substance to a minor, and]

3. the minor was at least two years younger than the defendant.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-18-405(2)(a)(II), (b)(II), C.R.S. 2015.

2. *See* Instruction F:208 (defining "marijuana"); Instruction F:210 (defining "marijuana concentrate"); *see, e.g.*, Instruction E:28 (special verdict form).

3. Article 18 does not define the terms "adult" and "minor."

18:14 SELLING, TRANSFERRING, OR DISPENSING MARIJUANA TO A MINOR (MORE THAN TWO AND ONE-HALF POUNDS OF MARIJUANA; OR MORE THAN ONE POUND OF MARIJUANA CONCENTRATE)

The elements of the crime of selling, transferring, or dispensing marijuana to a minor (more than two and one-half pounds of marijuana, or more than one pound of marijuana concentrate) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was an adult, and

4. sold, transferred, or dispensed more than two and one half pounds of marijuana, or more than one pound of marijuana concentrate,

5. to a minor who was at least two years younger than the defendant.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of selling, transferring, or dispensing marijuana to a minor (more than two and one-half pounds of marijuana, or more than one pound of marijuana concentrate).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of selling, transferring, or dispensing marijuana to a minor (more than two and one-half pounds of marijuana, or more than one pound of marijuana concentrate).

COMMENT

1. *See* § 18-18-406(1)(a), C.R.S. 2015.

2. *See* Instruction F:100 (defining "dispense"); Instruction F:208 (defining "marijuana"); Instruction F:210 (defining "marijuana concentrate"); Instruction F:327 (defining "sale").

3. Article 18 does not define the terms "adult" and "minor." *Cf.* Colo. Const. Art. XVIII, § 14(6)(a-i) (defining the conditions that must be met in order for a person under eighteen to be a medical marijuana patient); Colo. Const. Art. XVIII, § 16, (6)(c) ("Nothing in this section is intended to permit the transfer of marijuana, with or without remuneration, to a person under the age of twenty-one or to allow a person under the age of twenty-one to purchase, possess, use, transport, grow, or consume marijuana.").

18:15 SELLING, TRANSFERRING, OR DISPENSING MARIJUANA TO A MINOR (MORE THAN SIX OUNCES, BUT NOT MORE THAN TWO AND ONE-HALF POUNDS OF MARIJUANA; OR MORE THAN THREE OUNCES, BUT NOT MORE THAN ONE POUND OF MARIJUANA CONCENTRATE)

The elements of the crime of selling, transferring, or dispensing marijuana to a minor (more than six ounces, but not more than two and one-half pounds of marijuana, or more than three ounces, but not more than one pound of marijuana concentrate) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was an adult, and

4. sold, transferred, or dispensed more than six ounces, but not more than two and one-half pounds of marijuana, or more than three ounces, but not more than one pound of marijuana concentrate,

5. to a minor who was at least two years younger than the defendant.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of selling, transferring, or dispensing marijuana to a minor (more than six ounces, but not more than two and one-half pounds of marijuana, or more than three ounces, but not more than one pound of marijuana concentrate).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of selling, transferring, or dispensing marijuana to a minor (more than six ounces, but not more than two and one-half pounds of marijuana, or more than three ounces, but not more than one pound of marijuana concentrate).

COMMENT

1. *See* § 18-18-406(1)(b), C.R.S. 2015.

2. *See* Instruction F:100 (defining "dispense"); Instruction F:208 (defining "marijuana"); Instruction F:210 (defining "marijuana concentrate"); Instruction F:327 (defining "sale").

3. Article 18 does not define the terms "adult" and "minor." *Cf.* Colo. Const. Art. XVIII, § 14(6)(a-i) (defining the conditions that must be met in order for a person under eighteen to be a medical marijuana patient); Colo. Const. Art. XVIII, § 16, (6)(c) ("Nothing in this section is intended to permit the transfer of marijuana, with or without remuneration, to a person under the age of twenty-one or to allow a person under the age of twenty-one to purchase, possess, use, transport, grow, or consume marijuana.").

18:16 SELLING, TRANSFERRING, OR DISPENSING MARIJUANA TO A MINOR (MORE THAN ONE OUNCE, BUT NOT MORE THAN SIX OUNCES OF MARIJUANA; OR MORE THAN ONE-HALF OUNCE, BUT NOT MORE THAN THREE OUNCES OF MARIJUANA CONCENTRATE)

The elements of the crime of selling, transferring, or dispensing marijuana to a minor (more than one ounce, but not more than six ounces of marijuana, or more than one-half ounce, but not more than three ounces of marijuana concentrate) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was an adult, and

4. sold, transferred, or dispensed more than one ounce, but not more than six ounces of marijuana, or more than one-half ounce, but not more than three ounces of marijuana concentrate,

5. to a minor who was at least two years younger than the defendant.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of selling, transferring, or dispensing marijuana to a minor (more than one ounce, but not more than six ounces of marijuana, or more than one-half ounce, but not more than three ounces of marijuana concentrate).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of selling, transferring, or dispensing marijuana to a minor (more than one ounce, but not more than six ounces of marijuana, or more than one-half ounce, but not more than three ounces of marijuana concentrate).

COMMENT

1. *See* § 18-18-406(1)(c), C.R.S. 2015.

2. *See* Instruction F:100 (defining "dispense"); Instruction F:208 (defining "marijuana"); Instruction F:210 (defining "marijuana concentrate"); Instruction F:327 (defining "sale").

3. Article 18 does not define the terms "adult" and "minor." *Cf.* Colo. Const. Art. XVIII, § 14(6)(a-i) (defining the conditions that must be met in order for a person under eighteen to be a medical marijuana patient); Colo. Const. Art. XVIII, § 16, (6)(c) ("Nothing in this section is intended to permit the transfer of marijuana, with or without remuneration, to a person under the age of twenty-one or to allow a person under the age of twenty-one to purchase, possess, use, transport, grow, or consume marijuana.").

18:17 SELLING, TRANSFERRING, OR DISPENSING MARIJUANA TO A MINOR (NOT MORE THAN ONE OUNCE OF MARIJUANA, OR NOT MORE THAN ONE-HALF OUNCE OF MARIJUANA CONCENTRATE)

The elements of the crime of selling, transferring, or dispensing marijuana to a minor (not more than one ounce of marijuana or not more than one-half ounce of marijuana concentrate) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was an adult, and

4. sold, transferred, or dispensed not more than one ounce of marijuana or not more than one-half ounce of marijuana concentrate,

5. to a minor who was at least two years younger than the defendant.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of selling, transferring, or dispensing marijuana to a minor (not more than one ounce of marijuana or not more than one-half ounce of marijuana concentrate).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of selling, transferring, or dispensing marijuana to a minor (not more than one ounce of marijuana or not more than one-half ounce of marijuana concentrate).

COMMENT

1. *See* § 18-18-406(1)(d), C.R.S. 2015.

2. *See* Instruction F:100 (defining "dispense"); Instruction F:208 (defining "marijuana"); Instruction F:210 (defining "marijuana concentrate"); Instruction F:327 (defining "sale").

3. Article 18 does not define the terms "adult" and "minor." *Cf*. Colo. Const. Art. XVIII, § 14(6)(a-i) (defining the conditions that must be met in order for a person under eighteen to be a medical marijuana patient); Colo. Const. Art. XVIII, § 16, (6)(c) ("Nothing in this section is intended to permit the transfer of marijuana, with or without remuneration, to a person under the age of twenty-one or to allow a person under the age of twenty-one to purchase, possess, use, transport, grow, or consume marijuana.").

18:18 PROCESSING OR MANUFACTURING MARIJUANA OR MARIJUANA CONCENTRATE

The elements of the crime of processing or manufacturing marijuana or marijuana concentrate are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. processed or manufactured any marijuana or marijuana concentrate or allowed marijuana or marijuana concentrate to be processed or manufactured on land owned, occupied, or controlled by him [her].

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of processing or manufacturing marijuana or marijuana concentrate.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of processing or manufacturing marijuana or marijuana concentrate.

COMMENT

1. *See* § 18-18-406(2)(a)(I), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:206 (defining "manufacture"); Instruction F:208 (defining "marijuana"); Instruction F:210 (defining "marijuana concentrate").

3. *See* Instruction H:68 (affirmative defense of "medical marijuana"); Instruction H:69 (affirmative defense of "recreational marijuana").

4. Section 18-18-406(2)(a)(I) excepts from criminal liability acts "authorized pursuant to part 1 of article 42.5 of title 12, C.R.S., [(pharmacists and pharmacies)], or part 2 of article 80 of title 27 C.R.S. [(alcohol and drug abuse treatment programs)]." However, the Committee has not drafted model affirmative defense instructions.

5. Sections 18-18-406(6), (7), C.R.S. 2015, establish exemptions based on "group C guidelines of the national cancer institute" and "dronabinol (synthetic) in sesame oil and encapsulated in a soft gelatin capsule in a federal food and drug administration approved drug product." However, the Committee has not drafted model affirmative defense instructions.

6. Article 18 does not define the term "process."

18:19 DISPENSING, SELLING, DISTRIBUTING, OR MANUFACTURING MARIJUANA OR MARIJUANA CONCENTRATE

The elements of the crime of dispensing, selling, distributing, or manufacturing marijuana or marijuana concentrate are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

[4. dispensed, sold, distributed, or possessed with intent to manufacture, dispense, sell, or distribute marijuana or marijuana concentrate.]

[4. attempted, induced, attempted to induce, or conspired with one or more other persons, to dispense, sell, distribute, or possess with intent to manufacture, dispense, sell, or distribute marijuana or marijuana concentrate.]

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of dispensing, selling, distributing, or manufacturing marijuana or marijuana concentrate.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of dispensing, selling, distributing, or manufacturing marijuana or marijuana concentrate.

COMMENT

1. *See* § 18-18-406(2)(b)(I), C.R.S. 2015.

2. *See* Instruction F:100 (defining "dispense"); Instruction F:102 (defining "distribute"); Instruction F:185 (defining "with

intent"); Instruction F:195 (defining "knowingly"); Instruction F:206 (defining "manufacture"); Instruction F:208 (defining "marijuana"); Instruction F:210 (defining "marijuana concentrate"); Instruction F:268 (defining "person"); Instruction F:281 (defining "possession"); Instruction F:327 (defining "sale"); +; Instruction G2:05 (conspiracy).

3. *See* Instruction H:68 (affirmative defense of "medical marijuana"); Instruction H:69 (affirmative defense of "recreational marijuana").

4. Section 18-18-406(2)(b)(I) excepts from criminal liability acts "authorized by part 1 of article 42.5 of title 12, C.R.S. [(pharmacists and pharmacies)], part 2 of article 80 of title 27, C.R.S. [(alcohol and drug abuse treatment programs)], or part 2 or 3 of this article [(standards, schedules, and regulation)]." However, the Committee has not drafted model affirmative defense instructions.

5. Sections 18-18-406(6), (7), C.R.S. 2015, establish exemptions based on "group C guidelines of the national cancer institute" and "dronabinol (synthetic) in sesame oil and encapsulated in a soft gelatin capsule in a federal food and drug administration approved drug product." However, the Committee has not drafted model affirmative defense instructions.

6. Article 18 does not define the term "process."

7. + In the absence of case law on point, the Committee takes no position on whether the word "attempted" in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

8. + In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 7.

18:20.INT DISPENSING, SELLING, DISTRIBUTING, OR MANUFACTURING MARIJUANA OR MARIJUANA CONCENTRATE – INTERROGATORY (SPECIFIED QUANTITY)

If you find the defendant not guilty of dispensing, selling, distributing, or manufacturing marijuana or marijuana concentrate, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of dispensing, selling, distributing, or manufacturing marijuana or marijuana concentrate, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form. [Although you may answer "No" to more than one question, you may not answer "Yes" to more than one question. Further, if you answer "Yes" to any question, you should not answer the other question[s].]

[_. Did the unlawful dispensing, selling, distributing, or manufacturing involve more than fifty pounds of marijuana or more than twenty-five pounds of marijuana concentrate? + (Answer "Yes" or "No")]

[_. Did the unlawful dispensing, selling, distributing, or manufacturing involve more than five pounds but not more than fifty pounds of marijuana or more than two and one-half pounds but not more than twenty-five pounds of marijuana concentrate?
+ (Answer "Yes" or "No")]

[_. Did the unlawful dispensing, selling, distributing, or manufacturing involve more than twelve ounces but not more than five pounds of marijuana or more than six ounces but not more than two and one-half pounds of marijuana concentrate? + (Answer "Yes" or "No")]

[_. Did the unlawful dispensing, selling, distributing, or manufacturing involve more than four ounces but not more than twelve ounces of marijuana, or more than two ounces but not more than six ounces of marijuana concentrate? + (Answer "Yes" or "No")]

The prosecution has the burden to prove the amount of the marijuana or marijuana concentrate beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the

appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-18-406(2)(b)(III)(A-D), C.R.S. 2015.

2. *See, e.g.*, Instruction E:28 (special verdict form).

3. In cases where the amount of marijuana or marijuana concentrate is a disputed issue, one or both of the parties may assert that there is an evidentiary basis for submitting more than one quantity question as part of the interrogatory. Accordingly, the above interrogatory includes bracketed examples for lesser quantity questions.

4. Where more than one quantity question is included as part of the interrogatory, use a special verdict form with a corresponding format that repeats the admonition that the jury cannot answer "Yes" to more than one quantity question.

For example, in a case involving an interrogatory with three quantity questions (and no separate interrogatories asking about other sentence enhancement factors), the relevant portion of the special verdict form would read as follows:

> I. We, the jury, find the defendant, [insert name], NOT GUILTY of Count No. [ ], dispensing, selling, distributing, or manufacturing marijuana or marijuana concentrate.
>
> _____
> FOREPERSON*
>
> II. We, the jury, find the defendant, [insert name], GUILTY of Count No. [ ], dispensing, selling, distributing, or manufacturing marijuana or marijuana concentrate.
>
> _____
> FOREPERSON*

We further find, with respect to the verdict question[s] for this count, as follows:

**1. Did the dispensing, selling, distributing, or manufacturing involve more than fifty pounds of marijuana or more than twenty-five pounds of marijuana concentrate?]

[___] Yes [___] No

**2. Did the dispensing, selling, distributing, or manufacturing involve more than five pounds but not more than fifty pounds of marijuana, or more than two and one-half pounds but not more than twenty-five pounds of marijuana concentrate?

[___] Yes [___] No

**3. Did the dispensing, selling, distributing, or manufacturing involve more than twelve ounces but not more than five pounds of marijuana or more than six ounces but not more than two and one-half pounds of marijuana concentrate?

[___] Yes [___] No

_____
FOREPERSON*

* The foreperson should use ink to sign on one of the two lines indicating a verdict of "not guilty" or "guilty." If the verdict is "guilty," the foreperson should use ink to mark the appropriate space indicating the answer to the verdict question, and then sign on the line following the verdict question[s].

** Although you may answer "No" to more than one question, you may not answer "Yes" to more than one question. Further, if you answer "Yes" to any question, you should not answer the other question[s].

5. + In 2015, the Committee appended "Answer 'Yes' or 'No'" parentheticals to each interrogatory.

18:21 CULTIVATING OR GROWING MARIJUANA

The elements of the crime of cultivating or growing marijuana are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. cultivated, grew, or produced a marijuana plant or allowed a marijuana plant to be cultivated, grown, or produced on land that he [she] owned, occupied, or controlled.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of cultivating or growing marijuana.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of cultivating or growing marijuana.

COMMENT

1. See § 18-18-406(3)(a), C.R.S. 2015.

2. See Instruction F:195 (defining "knowingly"); Instruction F:206 (defining "manufacture"); Instruction F:208 (defining "marijuana").

3. *See* Instruction H:68 (affirmative defense of "medical marijuana"); Instruction H:69 (affirmative defense of "recreational marijuana").

4. Sections 18-18-406(6), (7), C.R.S. 2015, establish exemptions based on "group C guidelines of the national cancer institute" and "dronabinol (synthetic) in sesame oil and

encapsulated in a soft gelatin capsule in a federal food and drug administration approved drug product." However, the Committee has not drafted model affirmative defense instructions.

18:22.INT CULTIVATING OR GROWING MARIJUANA – INTERROGATORY (NUMBER OF PLANTS)

If you find the defendant not guilty of cultivating or growing marijuana, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of cultivating or growing marijuana, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form. [Although you may answer "No" to more than one question, you may not answer "Yes" to more than one question. Further, if you answer "Yes" to any question, you should not answer the other question[s].]

[_. Did the unlawful cultivating or growing of marijuana involve more than thirty plants?
+ (Answer "Yes" or "No")]

[_. Did the unlawful cultivating or growing of marijuana involve more than six but not more than thirty plants?
+ (Answer "Yes" or "No")]

The prosecution has the burden to prove the number of plants beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-18-406(3)(a)(I), (II), C.R.S. 2015.

2. *See*, *e.g.*, Instruction E:28 (special verdict form).

3. In cases where the number of marijuana plants is a disputed issue, one or both of the parties may assert that there is an evidentiary basis for submitting more than one quantity question as part of the interrogatory. Accordingly, the above

interrogatory includes a bracketed example for a lesser quantity question.

4. Where more than one quantity question is included as part of the interrogatory, use a special verdict form with a corresponding format that repeats the admonition that the jury cannot answer "Yes" to more than one quantity question. *See* Instruction 18:06.INT, Comment 5.

5. + In 2015, the Committee appended "Answer 'Yes' or 'No'" parentheticals to each interrogatory.

18:23 POSSESSION OF MORE THAN TWELVE OUNCES OF MARIJUANA OR MORE THAN THREE OUNCES OF MARIJUANA CONCENTRATE

The elements of the crime of possession of more than twelve ounces of marijuana or more than three ounces of marijuana concentrate are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. possessed more than twelve ounces of marijuana or more than three ounces of marijuana concentrate.

[4. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of possession of more than twelve ounces of marijuana or more than three ounces of marijuana concentrate.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of possession of more than twelve ounces of marijuana or more than three ounces of marijuana concentrate.

COMMENT

1. *See* § 18-18-406(4)(a), C.R.S. 2015.

2. *See* Instruction F:208 (defining "marijuana"); Instruction F:210 (defining "marijuana concentrate"); Instruction F:281 (defining "possession"); *see also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

3. *See* Instruction H:68 (affirmative defense of "medical marijuana"); Instruction H:69 (affirmative defense of "recreational marijuana").

4. Sections 18-18-406(6), (7), C.R.S. 2015, establish exemptions based on "group C guidelines of the national cancer institute" and "dronabinol (synthetic) in sesame oil and encapsulated in a soft gelatin capsule in a federal food and drug administration approved drug product." However, the Committee has not drafted model affirmative defense instructions.

18:24 POSSESSION OF MORE THAN SIX OUNCES BUT NOT MORE THAN TWELVE OUNCES OF MARIJUANA, OR POSSESSION OF NOT MORE THAN THREE OUNCES OF MARIJUANA CONCENTRATE

The elements of the crime of possession of more than six ounces but not more than twelve ounces of marijuana, or possession of not more than three ounces of marijuana concentrate are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. possessed more than six ounces but not more than twelve ounces of marijuana or not more than three ounces of marijuana concentrate.

[4. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of possession of more than six ounces but not more than twelve ounces of marijuana, or possession of not more than three ounces of marijuana concentrate.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of possession of more than six ounces but not more than twelve ounces of marijuana, or possession of not more than three ounces of marijuana concentrate.

COMMENT

1. *See* § 18-18-406(4)(b), C.R.S. 2015.

2. *See* Instruction F:208 (defining "marijuana"); Instruction F:210 (defining "marijuana concentrate"); Instruction F:281 (defining "possession"); *see also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or

with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

3. *See* Instruction H:32 (affirmative defense of "reporting an emergency drug or alcohol overdose event"); Instruction H:68 (affirmative defense of "medical marijuana"); Instruction H:69 (affirmative defense of "recreational marijuana").

4. Sections 18-18-406(6), (7), C.R.S. 2015, establish exemptions based on "group C guidelines of the national cancer institute" and "dronabinol (synthetic) in sesame oil and encapsulated in a soft gelatin capsule in a federal food and drug administration approved drug product." However, the Committee has not drafted model affirmative defense instructions.

18:25 POSSESSION OF MORE THAN TWO OUNCES BUT NOT MORE THAN SIX OUNCES OF MARIJUANA

The elements of the crime of possession of more than two ounces but not more than six ounces of marijuana are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. possessed more than two ounces but not more than six ounces of marijuana.

[4. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of possession of more than two ounces but not more than six ounces of marijuana.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of possession of more than two ounces but not more than six ounces of marijuana.

COMMENT

1. *See* § 18-18-406(4)(c), C.R.S. 2015.

2. *See* Instruction F:208 (defining "marijuana"); Instruction F:210 (defining "marijuana concentrate"); Instruction F:281 (defining "possession"); *see also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

3. *See* ; Instruction H:32 (affirmative defense of "reporting an emergency drug or alcohol overdose event"); Instruction H:68

(affirmative defense of "medical marijuana"); Instruction H:69 (affirmative defense of "recreational marijuana").

4. *See also* § 18-18-406(5)(b)(II), C.R.S. 2015 ("Open and public display, consumption, or use of more than two ounces of marijuana or any amount of marijuana concentrate is deemed possession thereof, and violations shall be punished as provided for in subsection (4) of this section.").

18:26 POSSESSION OF MORE THAN ONE OUNCE BUT NOT MORE THAN TWO OUNCES OF MARIJUANA

The elements of the crime of possession of more than one ounce but not more than two ounces of marijuana are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. possessed more than one ounce but not more than two ounces of marijuana.

[4. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of possession of more than one ounce but not more than two ounces of marijuana.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of possession of more than one ounce but not more than two ounces of marijuana.

COMMENT

1. *See* § 18-18-406(5)(a)(I), C.R.S. 2015; *see also* Colo. Const. Art. XVIII, § 16, (3)(a) (possession of one ounce or less of marijuana by an adult is not unlawful, notwithstanding any other provision of law).

2. *See* Instruction F:208 (defining "marijuana"); Instruction F:210 (defining "marijuana concentrate"); Instruction F:281 (defining "possession"); *see also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

3. *See* Instruction H:32 (affirmative defense of "reporting an emergency drug or alcohol overdose event"); Instruction H:68 (affirmative defense of "medical marijuana"); Instruction H:69 (affirmative defense of "recreational marijuana").

4. *See also* § 18-18-406(5)(b)(III), C.R.S. 2015 ("Except as otherwise provided for in subparagraph (I) of this paragraph (b)[(openly and publicly displaying, consuming, or using two ounces or less of marijuana)], consumption or use of marijuana or marijuana concentrate is deemed possession thereof, and violations must be punished as provided for in paragraph (a) of this subsection (5) and subsection (4) of this section.").

18:27 OPEN AND PUBLIC DISPLAY, CONSUMPTION, OR USE OF LESS THAN TWO OUNCES OF MARIJUANA

The elements of the crime of open and public display, consumption, or use of less than two ounces of marijuana are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. openly and publicly displayed, consumed, or used,

4. two ounces or less of marijuana.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of open and public display, consumption, or use of less than two ounces of marijuana.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of open and public display, consumption, or use of less than two ounces of marijuana.

COMMENT

1. *See* § 18-18-406(5)(b)(I), C.R.S. 2015.

2. *See* Instruction F:208 (defining "marijuana").

3. *See* Instruction H:32 (affirmative defense of "reporting an emergency drug or alcohol overdose event"); *see also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

18:28 TRANSFERRING OR DISPENSING NOT MORE THAN TWO OUNCES OF MARIJUANA FOR NO CONSIDERATION

The elements of the crime of transferring or dispensing not more than two ounces of marijuana for no consideration are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. transferred or dispensed,

4. not more than two ounces of marijuana to another person,

5. for no consideration.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of transferring or dispensing not more than two ounces of marijuana for no consideration.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of transferring or dispensing not more than two ounces of marijuana for no consideration.

COMMENT

1. *See* § 18-18-406(5)(c), C.R.S. 2015.

2. *See* Instruction F:208 (defining "marijuana"); Instruction F:268 (defining "person"); *see also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

3. *See* Instruction H:32 (affirmative defense of "reporting an emergency drug or alcohol overdose event"); Instruction H:68 (affirmative defense of "medical marijuana"); Instruction H:69 (affirmative defense of "recreational marijuana").

4. In cases where both the defendant and the recipient were at least twenty-one years old at the time of the transfer or dispensing, the court should modify the third element as follows: "more than ounce but not more than two ounces of marijuana to another person." *See* Colo. Const. Art. XVIII, § 16(3)(c) ("Notwithstanding any other provision of law, the following acts are not unlawful and shall not be an offense under Colorado law or the law of any locality within Colorado or be a basis for seizure or forfeiture of assets under Colorado law for persons twenty-one years of age or older: . . . [t]ransfer of one ounce or less of marijuana without remuneration to a person who is twenty-one years of age or older.").

5. The term "consideration" is not defined in Article 18. *See, e.g., Black's Law Dictionary* 370 (10th ed. 2014) (defining "consideration" as: "Something (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee."). The definition that appears in section 4-3-303(b), C.R.S. 2015, should not be used because it is limited to contracts.

18:29 UNLAWFUL USE OR POSSESSION OF SYNTHETIC CANNABINOIDS OR SALVIA DIVINORUM

The elements of the crime of unlawful use or possession of synthetic cannabinoids or salvia divinorum are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. used or possessed any amount of any synthetic cannabinoid or salvia divinorum.

[4. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful use or possession of synthetic cannabinoids or salvia divinorum.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful use or possession of synthetic cannabinoids or salvia divinorum.

COMMENT

1. *See* § 18-18-406.1(1), C.R.S. 2015.

2. *See* Instruction F:281 (defining "possession"); Instruction F:328 (defining "salvia divinorum"); Instruction F:359 (defining "synthetic cannabinoid"); *see also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

3. See Instruction H:32 (affirmative defense of "reporting an emergency drug or alcohol overdose event").

18:30 UNLAWFUL MANUFACTURING, DISPENSING, SALE, OR DISTRIBUTION OF SYNTHETIC CANNABINOIDS OR SALVIA DIVINORUM

The elements of the crime of unlawful manufacturing, dispensing, sale, or distribution of synthetic cannabinoids or salvia divinorum are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. manufactured, dispensed, sold, or distributed, or possessed with intent to manufacture, dispense, sell, or distribute,

5. any amount of any synthetic cannabinoid or salvia divinorum.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful manufacturing, dispensing, sale, or distribution of synthetic cannabinoids or salvia divinorum.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful manufacturing, dispensing, sale, or distribution of synthetic cannabinoids salvia divinorum.

COMMENT

1. *See* § 18-18-406.2(1)(a), C.R.S. 2015.

2. *See* Instruction F:100 (defining "dispense"); Instruction F:102 (defining "distribute"); Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly"); Instruction F:206 (defining "manufacture"); Instruction F:281 (defining

"possession"); Instruction F:327 (defining "sale"); Instruction F:328 (defining "salvia divinorum"); Instruction F:359 (defining "synthetic cannabinoid").

18:31 UNLAWFUL MANUFACTURING, DISPENSING, SALE, OR DISTRIBUTION OF SYNTHETIC CANNABINOIDS OR SALVIA DIVINORUM (INDUCING, ATTEMPTING, OR CONSPIRING)

The elements of the crime of unlawful manufacturing, dispensing, sale, or distribution of synthetic cannabinoids or salvia divinorum (inducing, attempting, or conspiring) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. induced, attempted to induce, or conspired with one or more other persons,

5. to manufacture, dispense, sell, or distribute, or possess with intent to manufacture, dispense, sell, or distribute,

6. any amount of any synthetic cannabinoid or salvia divinorum.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful manufacturing, dispensing, sale, or distribution of synthetic cannabinoids or salvia divinorum (inducing, attempting, or conspiring).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful manufacturing, dispensing, sale, or distribution of synthetic cannabinoids or salvia divinorum (inducing, attempting, or conspiring).

COMMENT

1. *See* § 18-18-406.2(1)(b), C.R.S. 2015.

2. *See* Instruction F:100 (defining "dispense"); Instruction F:102 (defining "distribute"); Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly"); Instruction F:206 (defining "manufacture"); Instruction F:268 (defining "person"); Instruction F:281 (defining "possession"); Instruction F:328 (defining "salvia divinorum"); Instruction F:359 (defining "synthetic cannabinoid"); +; Instruction G2:05 (conspiracy).

3. + In the absence of case law on point, the Committee takes no position on whether the word "attempted" in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

4. + In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 3.

18:32 UNLAWFUL CULTIVATION OF SALVIA DIVINORUM

The elements of the crime of unlawful cultivation of salvia divinorum are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. cultivated salvia divinorum,

5. with intent to dispense, sell, or distribute any amount of the salvia divinorum.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful cultivation of salvia divinorum.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful cultivation of salvia divinorum.

COMMENT

1. *See* § 18-18-406.2(1)(c), C.R.S. 2015.

2. *See* Instruction F:100 (defining "dispense"); Instruction F:102 (defining "distribute"); Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly"); Instruction F:327 (defining "sale"); Instruction F:328 (defining "salvia divinorum").

18:33.INT SYNTHETIC CANNABINOIDS OR SALVIA DIVINORUM OFFENSES – INTERROGATORY (MINOR)

If you find the defendant not guilty of [insert name of offense relating to synthetic cannabinoids or salvia divinorum from section 18-18-406.2(1)(a-c)], you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of [insert name of offense relating to synthetic cannabinoids or salvia divinorum from section 18-18-406.2(1)(a-c)], you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant dispense, sell, or distribute to a minor? (Answer "Yes" or "No")

The defendant dispensed, sold, or distributed to a minor only if:

1. the defendant dispensed, sold, or distributed synthetic cannabinoid or salvia divinorum to a minor who was less than eighteen years of age, and

2. the defendant was at least eighteen years of age and at least two years older than the minor.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-18-406.2(3)(a), (b), C.R.S. 2015.

2. *See, e.g.*, Instruction E:28 (special verdict form).

18:34 FRAUDULENT REPRESENTATION OF A MEDICAL CONDITION RELATED TO MEDICAL MARIJUANA

The elements of the crime of fraudulent representation of a medical condition related to medical marijuana are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. fraudulently,

4. represented a medical condition to a physician, the Department of Public Health and Environment, or a state or local law enforcement official,

5. for the purpose of falsely obtaining a marijuana registry identification card from the Department of Public Health and Environment, or for the purpose of avoiding arrest and prosecution for a marijuana-related offense.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of fraudulent representation of a medical condition related to medical marijuana.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of fraudulent representation of a medical condition related to medical marijuana.

COMMENT

1. *See* §§ 18-18-406.3(2)(a), C.R.S. 2015.

2. *See also* Colo. Const. Art. XVIII, § 14(1)(h) (defining "state health agency" in a manner that is consistent with the

use of the term “the department” in section 18-18-406.3, C.R.S. 2015.)

18:35 FRAUDULENT USE OR THEFT OF A MARIJUANA REGISTRY IDENTIFICATION CARD

The elements of the crime of fraudulent use or theft of a marijuana registry identification card are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. fraudulently used, or committed theft of,

4. any person's marijuana registry identification card [(including any card that was required to be returned to the Department of Public Health and Environment)].

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of fraudulent use or theft of a marijuana registry identification card.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of fraudulent use or theft of a marijuana registry identification card.

COMMENT

1. *See* § 18-18-406.3(3), C.R.S. 2015.

2. *See* Instruction F:268 (defining "person"); Instruction F:308.5 (defining "registry identification card"); Instruction 4-4:01 (theft); *see also* Colo. Const. Art. XVIII, § 14(1)(h) (defining "state health agency" in a manner that is consistent with the use of the term "the department" in section 18-18-406.3, C.R.S. 2015.).

3. If the defendant is not separately charged with theft, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. *See*

Instruction 4-4:01. Place the elemental instruction for theft immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for theft.

4. It may be necessary to draft a special instruction explaining when a marijuana registry identification card must be returned. *See* Colo. Const. Art. XVIII, § 14.

18:36 FRAUDULENTLY PRODUCING, COUNTERFEITING, OR TAMPERING WITH A MARIJUANA REGISTRY IDENTIFICATION CARD

The elements of the crime of fraudulently producing, counterfeiting, or tampering with a marijuana registry identification card are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. fraudulently,

4. produced, counterfeited, or tampered with,

5. a marijuana registry identification card.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of fraudulently producing, counterfeiting, or tampering with a marijuana registry identification card.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of fraudulently producing, counterfeiting, or tampering with a marijuana registry identification card.

COMMENT

1. *See* § 18-18-406.3(4), C.R.S. 2015.

2. *See* Instruction F:308.5 (defining "registry identification card").

18:37 UNAUTHORIZED RELEASE OF CONFIDENTIAL INFORMATION PROVIDED TO OR BY THE MEDICAL MARIJUANA REGISTRY

The elements of the crime of unauthorized release of confidential information provided to or by the marijuana registry are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. released or made public,

4. any confidential record or any confidential information contained in any such record that was provided to or by the marijuana registry +or primary caregiver registry of the Department of Public Health and Environment,

5. without the written authorization of the marijuana registry patient.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unauthorized release of confidential information provided to or by the marijuana registry.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unauthorized release of confidential information provided to or by the marijuana registry.

COMMENT

1. *See* § 18-18-406.3(5), C.R.S. 2015.

2. *See* Instruction F:259 (defining "patient"); *see also* Colo. Const. Art. XVIII, § 14(1)(h) (defining "state health agency" in

a manner that is consistent with the use of the term "the department" in section 18-18-406.3, C.R.S. 2015.).

3. It may be necessary to draft a special instruction explaining that section 18-18-406.3(5) applies to "[a]ny person including, but not limited to, any officer, employee, or agent of the department, or any officer, employee, or agent of any state or local law enforcement agency."

4. + In 2015, the Committee added the words "or primary caregiver registry" to the fourth element. *See* Ch. 199, sec. 6, § 18-18-406.3(5), 2015 Colo. Sess. Laws 681, 688.

18:38 UNAUTHORIZED RELEASE OF CONFIDENTIAL INFORMATION PROVIDED TO OR BY A LICENSED MEDICAL MARIJUANA BUSINESS

The elements of the crime of unauthorized release of confidential information provided to or by a licensed medical marijuana business are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was an owner, officer, employee of a business licensed pursuant to the Colorado Medical Marijuana Code, or an employee of the state medical marijuana licensing authority, a local medical marijuana licensing authority, or the Department of Public Health and Environment, and

4. released or made public,

5. a patient's medical record or any confidential information contained in any patient's medical record that was provided to or by a business licensed pursuant to the Colorado Medical Marijuana Code],

6. without the written authorization of the patient.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unauthorized release of confidential information provided to or by a licensed medical marijuana business.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unauthorized release of confidential information provided to or by a licensed medical marijuana business.

COMMENT

1. *See* § 18-18-406.3(7), C.R.S. 2015.

2. *See* Instruction F:259 (defining "patient"); *see also* Colo. Const. Art. XVIII, § 14(1)(h) (defining "state health agency" in a manner that is consistent with the use of the term "the department" in section 18-18-406.3, C.R.S. 2015.).

3. The statute includes exceptions from criminal liability. *See* § 18-18-406.3(7), C.R.S. 2015 ("except that the owner, officer, or employee shall release the records or information upon request by the state or local medical marijuana licensing authority. The records or information produced for review by the state or local licensing authority shall not become public records by virtue of the disclosure and may be used only for a purpose authorized by article 43.3 of title 12, C.R.S., or for another state or local law enforcement purpose. The records or information shall constitute medical data as defined by section 24-72-204(3)(a)(I), C.R.S. The state or local medical marijuana licensing authority may disclose any records or information so obtained only to those persons directly involved with any investigation or proceeding authorized by article 43.3 of title 12, C.R.S., or for any state or local law enforcement purpose."). However, the Committee has not drafted model affirmative defense instructions.

18:39 UNLAWFUL USE OF MARIJUANA IN A DETENTION FACILITY

The elements of the crime of unlawful use of marijuana in a detention facility are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was confined in any detention facility in Colorado, and

4. possessed or used marijuana.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful use of marijuana in a detention facility.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful use of marijuana in a detention facility.

COMMENT

1. *See* § 18-18-406.5(1), C.R.S. 2015.

2. *See* Instruction F:97 (defining "detention facility"); Instruction F:208 (defining "marijuana"); Instruction F:281 (defining "possession"); *see also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

+ 18:39.5 MANUFACTURE OF MARIJUANA CONCENTRATE USING AN INHERENTLY HAZARDOUS SUBSTANCE

The elements of the crime of manufacture of marijuana concentrate using an inherently hazardous substance are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. manufactured marijuana concentrate using an inherently hazardous substance, and

5. was not a licensed manufacturer pursuant to the Colorado Medical Marijuana Code or the Colorado Retail Marijuana Code.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of manufacture of marijuana concentrate using an inherently hazardous substance.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of manufacture of marijuana concentrate using an inherently hazardous substance.

COMMENT

1. *See* § 18-18-406.6(1), C.R.S. 2015.

2. *See* Instruction F:181.5 (defining "inherently hazardous substance"); Instruction F:210 (defining "marijuana concentrate").

3. + The Committee added this instruction in 2015. *See* Ch. 242, sec. 2, § 18-18-406.6(1), 2015 Colo. Sess. Laws 895, 896.

+ 18:39.7 ALLOWING MANUFACTURE OF MARIJUANA CONCENTRATE USING AN INHERENTLY HAZARDOUS SUBSTANCE

The elements of the crime of manufacture of allowing marijuana concentrate using an inherently hazardous substance are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. allowed marijuana concentrate to be manufactured on any premises using an inherently hazardous substance, and

5. owned, managed, operated, or otherwise controlled the use of the premises, and

6. was not a licensed manufacturer pursuant to the Colorado Medical Marijuana Code or the Colorado Retail Marijuana Code.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of allowing manufacture of marijuana concentrate using an inherently hazardous substance.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of allowing manufacture of marijuana concentrate using an inherently hazardous substance.

COMMENT

1. *See* § 18-18-406.6(2), C.R.S. 2015.

2. *See* Instruction F:181.5 (defining "inherently hazardous substance"); Instruction F:195 (defining "knowingly"); Instruction F:210 (defining "marijuana concentrate").

3. + The Committee added this instruction in 2015. *See* Ch. 242, sec. 2, § 18-18-406.6(2), 2015 Colo. Sess. Laws 895, 896.

18:40.INT ANY FELONY CONTROLLED SUBSTANCE CONVICTION UNDER PART 4 – INTERROGATORY (PATTERN, SUBSTANTIAL SOURCE, AND SPECIAL SKILL)

If you find the defendant not guilty of [insert name(s) of felony offense(s) from Article 18, Part 4], you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of [insert name(s) of felony offense(s) from Article 18, Part 4], you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant commit the offense as part of a pattern? (Answer "Yes" or "No")

The defendant committed the offense as part of a pattern only if:

1. the defendant committed the offense of [insert name(s) of felony offense(s) from Article 18, Part 4] as part of a pattern of manufacturing, sale, dispensing, or distributing controlled substances,

2. which constituted a substantial source of his [her] income, and

3. in which he [she] manifested special skill or expertise.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-18-407(1)(a), C.R.S. 2015.

2. *See* Instruction F:260 (defining "pattern"); Instruction F:347 (defining "special skill or expertise"); Instruction F:355 (defining "substantial source of that person's income"); *see, e.g.*, Instruction E:28 (special verdict form).

3. Section 18-18-407(2)(a), C.R.S. 2015, provides as follows: "In support of the findings under paragraph (a) of subsection (1) of this section, it may be shown that the defendant has had in his or her own name or under his or her control income or property not explained as derived from a source other than such manufacture, sale, dispensing, or distribution of controlled substances." However, nothing in this provision suggests that the admission of such evidence gives rise to a permissible inference of illicit activity.

18:41.INT ANY FELONY CONTROLLED SUBSTANCE CONVICTION UNDER PART 4 – INTERROGATORY (CONSPIRACY)

If you find the defendant not guilty of [insert name(s) of felony offense(s) from Article 18, Part 4], you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of [insert name(s) of felony offense(s) from Article 18, Part 4], you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

> Did the defendant commit the offense as part of a conspiracy? (Answer "Yes" or "No")

The defendant committed the offense as part of a conspiracy only if:

1. the defendant committed the [insert name(s) of felony offense(s) from Article 18, Part 4] in the course of, or in furtherance of, a conspiracy with one or more persons to engage in a pattern of unlawful manufacturing, sale, dispensing, or distributing a controlled substance, and

2. did, or agreed that he [she] would, initiate, organize, plan, finance, direct, manage, or supervise all or part of the conspiracy, manufacture, sale, dispensing, distributing, or give or receive a bribe, or use force in connection with the manufacture, sale, dispensing, or distribution.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-18-407(1)(b), C.R.S. 2015.

2. *See* Instruction F:260 (defining "pattern"); Instruction F:268 (defining "person"); Instruction G2:05 (conspiracy); *see, e.g.*, Instruction E:28 (special verdict form).

18:42.INT ANY FELONY CONTROLLED SUBSTANCE CONVICTION UNDER PART 4 – INTERROGATORY (INTRODUCING OR IMPORTING OVER A SPECIFIED AMOUNT)

If you find the defendant not guilty of [insert name(s) of felony offense(s) from Article 18, Part 4], you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of [insert name(s) of felony offense(s) from Article 18, Part 4], you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

> Did the defendant introduce or import more than [fourteen grams of any schedule I or II controlled substance] [seven grams of [methamphetamine] [heroin] [ketamine] [cathinones]] [ten milligrams of flunitrazepam]? (Answer "Yes" or "No")

The defendant introduced or imported more than [insert quantity and name of controlled substance] only if:

1. in the course of committing [insert name(s) of felony offense(s) from Article 18, Part 4], the defendant introduced or imported into the state of Colorado more than [fourteen grams of any schedule I or II controlled substance] [seven grams of methamphetamine] [heroin] [ketamine] [cathinones]] [ten milligrams of flunitrazepam].

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-18-407(1)(c), C.R.S. 2015.

2. *See, e.g.*, Instruction E:28 (special verdict form).

18:43.INT ANY FELONY CONTROLLED SUBSTANCE CONVICTION UNDER PART 4 – INTERROGATORY (DEADLY WEAPON OR FIREARM)

If you find the defendant not guilty of [insert name(s) of felony offense(s) from Article 18, Part 4], you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of [insert name(s) of felony offense(s) from Article 18, Part 4], you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the offense involve a deadly weapon or firearm? (Answer "Yes" or "No")

The offense involved a deadly weapon or firearm only if:

[1. the defendant used, displayed, or possessed on his [her] person or within his [her] immediate reach, a deadly weapon, as that term is defined in your instructions, at the time of the commission of [insert name(s) of felony offense(s) from Article 18, Part 4].]

[1. the defendant or a confederate of the defendant possessed a firearm, as that term is defined in your instructions, to which the defendant or confederate had access in a manner that posed a risk to others or in a vehicle the defendant was occupying at the time of the commission of [insert name(s) of felony offense(s) from Article 18, Part 4].]

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-18-407(1)(d)(I), (II), C.R.S. 2015.

2. *See* Instruction F:88 (defining "deadly weapon"); Instruction F:154 (defining "firearm"); *see*, *e.g.*, Instruction E:28 (special verdict form).

18:44.INT UNLAWFUL DISTRIBUTION, MANUFACTURING, DISPENSING, SALE, OR POSSESSION FOR THE PURPOSES OF SALE OF ANY CONTROLLED SUBSTANCE – INTERROGATORY (USE OF A CHILD)

If you find the defendant not guilty of [insert name(s) of felony offense(s) from Article 18, Part 4], you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of [insert name(s) of felony offense(s) from Article 18, Part 4], you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the offense involve use of a child?
(Answer "Yes" or "No")

The offense involved use of a child only if:

1. the defendant solicited, induced, encouraged, intimidated, employed, hired, or procured a child under the age of eighteen, whether or not the defendant knew the age of the child, to act as his [her] agent to assist in the unlawful distribution, manufacturing, dispensing, sale, or possession for the purposes of sale of any controlled substance at the time of the commission of [insert name(s) of felony offense(s) from Article 18, Part 4].

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-18-407(1)(e), C.R.S. 2015.

2. *See* Instruction F:13 (defining "agent"); Instruction F:14 (defining "assist"); *see*, *e.g.*, Instruction E:28 (special verdict form).

18:45.INT ANY FELONY CONTROLLED SUBSTANCE CONVICTION UNDER PART 4 – INTERROGATORY (CONTINUING CRIMINAL ENTERPRISE WITH FIVE OR MORE OTHER PERSONS)

If you find the defendant not guilty of [insert name(s) of felony offense(s) from Article 18, Part 4], you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of [insert name(s) of felony offense(s) from Article 18, Part 4], you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the offense involve a criminal enterprise?
(Answer "Yes" or "No")

The offense involved a criminal enterprise only if:

1. the defendant engaged in a continuing criminal enterprise by committing [insert name of felony offense from Article 18, Part 4], and

2. the [repeat name of offense] was part of a continuing series, in which, on separate occasions, two or more of the following offenses were committed: [insert name(s) of felony offense(s) from Article 18, Part 4], and

3. the continuing series of offenses was undertaken by the defendant in concert with five or more other persons with respect to whom the defendant occupied a position of organizer, supervisor, or any other position of management, and

4. the defendant obtained substantial income or resources from the continuing series of offenses.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-18-407(1)(f), C.R.S. 2015.

2. *See* Instruction F:268 (defining "person"); *see, e.g.*, Instruction E:28 (special verdict form).

18:46.INT – SELLING, DISTRIBUTING, POSSESSING WITH INTENT TO DISTRIBUTE, MANUFACTURING, OR ATTEMPTING TO MANUFACTURE ANY CONTROLLED SUBSTANCE - INTERROGATORY (PROTECTED AREA)

If you find the defendant not guilty of [insert name(s) of felony offense(s) from Article 18, Part 4], you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of [insert name(s) of felony offense(s) from Article 18, Part 4], you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant commit the offense in a protected area? (Answer "Yes" or "No")

The defendant committed the offense in a protected area only if:

1. the defendant committed the selling, distributing, possessing with intent to distribute, manufacturing, or attempt to manufacture any controlled substance, [within or upon the grounds of any public or private elementary school, middle school, junior high school, high school, vocational school, or public housing development] [within one thousand feet of the perimeter of any such school or public housing development grounds on any street, alley, parkway, sidewalk, public park, playground, or other area or premises that was accessible to the public] [within any private dwelling that was accessible to the public for the purpose of the unlawful sale, distribution, use, exchange, manufacture, or attempted manufacture of any controlled substance] [in any school vehicle, while the school vehicle was engaged in the transportation of students].

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-18-407(1)(g), C.R.S. 2015.

2. *See* Instruction F:185 (defining "with intent"); Instruction F:300 (defining "public housing development"); *see, e.g.*, Instruction E:28 (special verdict form).

3. The term "school vehicle" is defined in section 42-1-102(88.5), C.R.S. 2015.

18:47 KEEPING, MAINTAINING, CONTROLLING, RENTING, OR MAKING AVAILABLE PROPERTY FOR UNLAWFUL DISTRIBUTION OR TRANSPORTATION OF CONTROLLED SUBSTANCES

The elements of the crime of keeping, maintaining, controlling, renting, or making available property for unlawful distribution or transportation of controlled substances are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly or intentionally,

4. kept, maintained, controlled, rented, leased, or made available for use any store, shop, warehouse, dwelling, building, vehicle, vessel, aircraft, room, enclosure, or other structure or place,

5. which he [she] knew was resorted to for the purpose of unlawfully keeping for distribution, transporting for distribution, or distributing controlled substances.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of keeping, maintaining, controlling, renting, or making available property for unlawful distribution or transportation of controlled substances.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of keeping, maintaining, controlling, renting, or making available property for unlawful distribution or transportation of controlled substances.

COMMENT

1. *See* § 18-18-411(1), C.R.S. 2015.

2. *See* Instruction F:73 (defining "controlled substance" by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S. 2015); Instruction F:102 (defining "distribute"); Instruction F:185 (defining "intentionally"); Instruction F:195 (defining "knowingly").

3. *See* Instruction H:70 (defining the affirmative defenses of "lack of knowledge" and "reported conduct").

4. If the defendant is not charged with one of the referenced controlled substance offenses, give the jury the elemental instruction for the referenced offense(s) without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction(s) for the referenced offense(s) immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense(s).

18:48 MAINTAINING A PLACE FOR UNLAWFUL MANUFACTURE OF CONTROLLED SUBSTANCES

The elements of the crime of maintaining a place for unlawful manufacture of controlled substances are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly or intentionally,

4. opened or maintained any place,

5. knowing that it was resorted to for the purpose of unlawfully manufacturing a controlled substance.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of maintaining a place for unlawful manufacture of controlled substances.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of maintaining a place for unlawful manufacture of controlled substances.

COMMENT

1. *See* § 18-18-411(2)(a), C.R.S. 2015.

2. *See* Instruction F:73 (defining "controlled substance" by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S. 2015); Instruction F:185 (defining "intentionally"); Instruction F:195 (defining "knowingly"); Instruction F:206 (defining "manufacture").

3. *See* Instruction H:70 (defining the affirmative defenses of "lack of knowledge" and "reported conduct").

4. If the defendant is not charged with unlawful manufacture of a controlled substance, give the jury the elemental instruction for that offense without the two concluding paragraphs that explain the burden of proof. *See* Instruction 18:05 (unlawful manufacture of a controlled substance). Place the elemental instruction for that offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for unlawfully manufacturing a controlled substance.

18:49 PROVIDING A PLACE FOR UNLAWFUL MANUFACTURE OF CONTROLLED SUBSTANCES

The elements of the crime of providing a place for unlawful manufacture of controlled substances are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly or intentionally,

4. managed or controlled any building, room, or enclosure, either as an owner, lessee, agent, employee, or mortgagee, and

5. rented, leased, or made available for use, with or without compensation, the building, room, or enclosure,

6. knowing that it was resorted to for the purpose of unlawfully manufacturing a controlled substance.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of providing a place for unlawful manufacture of controlled substances.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of providing a place for unlawful manufacture of controlled substances.

COMMENT

1. *See* § 18-18-411(2)(b), C.R.S. 2015.

2. *See* Instruction F:73 (defining "controlled substance" by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S. 2015); Instruction F:185 (defining

"intentionally"); Instruction F:195 (defining "knowingly"); Instruction F:206 (defining "manufacture").

3. *See* Instruction H:70 (defining the affirmative defenses of "lack of knowledge" and "reported conduct").

4. If the defendant is not charged with unlawfully manufacturing a controlled substance, give the jury the elemental instruction for that offense without the two concluding paragraphs that explain the burden of proof. *See* Instruction 18:05 (unlawful manufacture of a controlled substance). Place the elemental instruction for that offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for unlawfully manufacturing a controlled substance.

18:50 ABUSING TOXIC VAPORS

The elements of the crime of abusing toxic vapors are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. smelled or inhaled the fumes of toxic vapors; or possessed, bought, or used the fumes of toxic vapors; or aided any other person to use the fumes of toxic vapors,

5. for the purpose of causing a condition of euphoria, excitement, exhilaration, stupefaction, or dulled senses of the nervous system.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of abusing toxic vapors.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of abusing toxic vapors.

COMMENT

1. *See* § 18-18-412(1), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:268 (defining "person"); Instruction F:281 (defining "possession").

3. The Committee has not drafted a model instruction defining "toxic vapors" because the list of qualifying substances is lengthy. *See* § 18-18-412(3), C.R.S. 2015. The court should

draft an instruction based on the relevant portion(s) of the statutory definition.

4. The statute includes an exemption from criminal liability. *See* § 18-18-412(1), C.R.S. 2015 ("This subsection (1) shall not apply to the inhalation of anesthesia or other substances for medical or dental purposes."). However, the Committee has not drafted a model affirmative defense instruction.

18:51 UNLAWFUL POSSESSION OF MATERIALS TO MAKE METHAMPHETAMINE AND AMPHETAMINE

The elements of the crime of unlawful possession of materials to make methamphetamine and amphetamine are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. possessed ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers,

4. with the intent to use the product as an immediate precursor in the manufacture of any controlled substance.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful possession of materials to make methamphetamine and amphetamine.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful possession of materials to make methamphetamine and amphetamine.

COMMENT

1. *See* § 18-18-412.5, C.R.S. 2015.

2. *See* Instruction F:179 (defining "immediate precursor"); Instruction F:185 (defining "with intent"); Instruction F:281 (defining "possession").

18:52 SALE OR DISTRIBUTION OF MATERIALS TO MANUFACTURE CONTROLLED SUBSTANCES

The elements of the crime of sale or distribution of materials to manufacture controlled substances are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. sold or distributed,

4. chemicals, supplies, or equipment, and

5. knew, or reasonably should have known or believed, that a person intended to use the chemicals, supplies, or equipment to illegally manufacture a controlled substance.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of sale or distribution of materials to manufacture controlled substances.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of sale or distribution of materials to manufacture controlled substances.

COMMENT

1. *See* § 18-18-412.7(1), C.R.S. 2015.

2. *See* Instruction F:73 (defining "controlled substance" by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S. 2015); Instruction F:102 (defining "distribute"); Instruction F:327 (defining "sale").

3. If the defendant is not charged with unlawful manufacture of a controlled substance, give the jury the elemental

instruction for that offense without the two concluding paragraphs that explain the burden of proof. *See* Instruction 18:05 (unlawful manufacture of a controlled substance). Place the elemental instruction for that offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for unlawfully manufacturing a controlled substance.

18:53 RETAIL SALE OF METHAMPHETAMINE PRECURSOR DRUGS (DELIVERY OF AN EXCESS AMOUNT WITHIN TWENTY-FOUR HOURS)

The elements of the crime of retail sale of methamphetamine precursor drugs (delivery of an excess amount within twenty-four hours) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. delivered in or from a store,

5. to the same individual,

6. during any twenty-four-hour period,

7. more than three and six-tenths grams of a methamphetamine precursor drug or a combination of two or more methamphetamine precursor drugs.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of retail sale of methamphetamine precursor drugs (delivery of an excess amount within twenty-four hours).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of retail sale of methamphetamine precursor drugs (delivery of an excess amount within twenty-four hours).

COMMENT

1. *See* § 18-18-412.8(2)(a), C.R.S. 2015.

2. *See* Instruction F:91 (defining "deliver"); Instruction F:195 (defining "knowingly"); Instruction F:229 (defining

"methamphetamine precursor drug"); Instruction F:353 (defining "store"); *see also* Instruction F:269 (defining "person," as used in section 18-18-412.8(2)(a)).

3. *See* Instruction H:72 (affirmative defense of "lack of knowledge and participation").

18:54 PURCHASE OF AN EXCESS AMOUNT OF METHAMPHETAMINE PRECURSOR DRUGS WITHIN TWENTY-FOUR HOURS

The elements of the crime purchase of an excess amount methamphetamine precursor drugs within twenty-four hours are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. purchased more than three and six-tenths grams of a methamphetamine precursor drug or a combination of two or more methamphetamine precursor drugs,

5. during any twenty-four-hour period.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of retail sale of purchase of an excess amount methamphetamine precursor drugs within twenty-four hours.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of purchase of an excess amount methamphetamine precursor drugs within twenty-four hours.

COMMENT

1. *See* § 18-18-412.8(2)(b), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:229 (defining "methamphetamine precursor drug"); *see also* Instruction F:269 (defining "person," as used in section 18-18-412.8(2)(b)).

18:55 RETAIL SALE OF METHAMPHETAMINE PRECURSOR DRUGS (IMPROPER DISPLAY)

The elements of the crime of retail sale of methamphetamine precursor drugs (improper display) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. offered for retail sale,

5. in or from a store,

6. a methamphetamine precursor drug,

7. that was offered for sale or stored or displayed prior to sale in an area of the store to which the public was allowed access.

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of retail sale of methamphetamine precursor drugs (improper display).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of retail sale of methamphetamine precursor drugs (improper display).

COMMENT

1. *See* § 18-18-412.8(2)(c), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:229 (defining "methamphetamine precursor drug"); Instruction F:353 (defining "store").

3. *See* Instruction H:72 (affirmative defense of "lack of knowledge and participation").

18:56 RETAIL DELIVERY OF METHAMPHETAMINE PRECURSOR DRUGS TO A MINOR

The elements of the crime of retail delivery of methamphetamine precursor drugs to a minor are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. delivered in a retail sale in or from a store,

5. a methamphetamine precursor drug,

6. to a minor under eighteen years of age.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of retail delivery of methamphetamine precursor drugs to a minor.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of retail delivery of methamphetamine precursor drugs to a minor.

COMMENT

1. *See* § 18-18-412.8(2.5)(a), (3)(a), C.R.S. 2015.

2. *See* Instruction F:91 (defining "deliver"); Instruction F:195 (defining "knowingly"); Instruction F:229 (defining "methamphetamine precursor drug"); Instruction F:327 (defining "sale"); Instruction F:353 (defining "store"); *see also* Instruction F:269 (defining "person," as used in section 18-18-412.8(2.5)(a)).

3. *See* Instruction H:71 (affirmative defense of "reasonable reliance on identification"); Instruction H:72 (affirmative defense of "lack of knowledge and participation").

18:57 UNAUTHORIZED POSSESSION OF A PRESCRIBED OR DISPENSED CONTROLLED SUBSTANCE

The elements of the crime of unauthorized possession of a prescribed or dispensed controlled substance are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. possessed any controlled substance that had been prescribed or dispensed by a practitioner,

4. other than in the container in which it was delivered to him [her], and

5. was not the legal owner, or a person acting at the direction of the legal owner of the controlled substance.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unauthorized possession of a prescribed or dispensed controlled substance.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unauthorized possession of a prescribed or dispensed controlled substance.

COMMENT

1. *See* § 18-18-413, C.R.S. 2015.

2. *See* Instruction F:73 (defining "controlled substance" by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S. 2015); Instruction F:100 (defining "dispense"); Instruction F:268 (defining "person"); Instruction F:282 (defining "practitioner").

18:58 UNAUTHORIZED POSSESSION OR DISPENSING OF A SCHEDULE I CONTROLLED SUBSTANCE

The elements of the crime of unauthorized possession or dispensing of a schedule I controlled substance are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. dispensed or possessed a schedule I controlled substance, and

4. was not a researcher who was registered under federal law to conduct research with that schedule I controlled substance.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unauthorized possession or dispensing of a schedule I controlled substance

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unauthorized possession or dispensing of a schedule I controlled substance.

COMMENT

1. *See* § 18-18-414(1)(a), C.R.S. 2015.

2. *See* Instruction F:100 (defining "dispense"); Instruction F:281 (defining "possession"); Instruction F:282 (defining "practitioner"); Instruction F:315 (defining "researcher"); *see also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

3. Section 18-18-414(1) excepts from criminal liability acts authorized by "this article or in article 42.5 of title 12 [(pharmacists and pharmacies)]," and section 18-18-418, C.R.S. 2015, lists numerous exemptions (e.g., governmental officials acting pursuant to their official duties, teachers and students of chemistry classes, and persons using peyote in religious ceremonies). However, the Committee has not drafted model affirmative defense instructions.

18:59 UNAUTHORIZED DISPENSING OF A SCHEDULE II CONTROLLED SUBSTANCE

The elements of the crime of unauthorized dispensing of a schedule II controlled substance are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. dispensed any schedule II controlled substance,

4. other than from a pharmacy pursuant to a written order or an order electronically transmitted in accordance with [insert description of relevant provision(s) from 21 CFR 1311], by any practitioner in the course of his [her] professional practice, or by a pharmacist in an emergency situation who [insert a description of relevant requirements from section 18-18-414(2)].

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unauthorized dispensing of a schedule II controlled substance.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unauthorized dispensing of a schedule II controlled substance.

COMMENT

1. *See* § 18-18-414(1)(b), (2), C.R.S. 2015.

2. *See* Instruction F:100 (defining "dispense"); Instruction F:255 (defining "order"); Instruction F:275 (defining "pharmacy"); Instruction F:282 (defining "practitioner").

3. Section 18-18-414(1) excepts from criminal liability acts authorized by "this article or in article 42.5 of title 12

[(pharmacists and pharmacies)],” and section 18-18-418, C.R.S. 2015, lists numerous exemptions (e.g., governmental officials acting pursuant to their official duties, teachers and students of chemistry classes, and persons using peyote in religious ceremonies). However, the Committee has not drafted model affirmative defense instructions.

18:60 UNAUTHORIZED DISPENSING OF A SCHEDULE III, IV, OR V CONTROLLED SUBSTANCE

The elements of the crime of unauthorized dispensing of a schedule III, IV, or V controlled substance are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. dispensed any schedule III, IV, or V controlled substance,

4. other than from a pharmacy pursuant to a written, oral, mechanically produced, computer generated, electronically transmitted, or facsimile transmitted order or as a practitioner in the course of his [her] professional practice.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unauthorized dispensing of a schedule III, IV, or V controlled substance.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unauthorized dispensing of a schedule III, IV, or V controlled substance.

COMMENT

1. *See* § 18-18-414(1)(c), C.R.S. 2015.

2. *See* Instruction F:100 (defining "dispense"); Instruction F:255 (defining "order"); Instruction F:275 (defining "pharmacy"); Instruction F:282 (defining "practitioner").

3. Section 18-18-414(1) excepts from criminal liability acts authorized by "this article or in article 42.5 of title 12 [(pharmacists and pharmacies)]," and section 18-18-418, C.R.S.

2015, lists numerous exemptions (e.g., governmental officials acting pursuant to their official duties, teachers and students of chemistry classes, and persons using peyote in religious ceremonies). However, the Committee has not drafted model affirmative defense instructions.

18:61 DISPENSING MARIJUANA OR MARIJUANA CONCENTRATE

The elements of the crime of dispensing marijuana or marijuana concentrate are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. dispensed any marijuana or marijuana concentrate.

[4. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of dispensing marijuana or marijuana concentrate.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of dispensing marijuana or marijuana concentrate.

COMMENT

1. *See* § 18-18-414(1)(d), C.R.S. 2015.

2. *See* Instruction F:100 (defining "dispense"); Instruction F:208 (defining "marijuana"); Instruction F:210 (defining "marijuana concentrate").

3. *See* Instruction H:68 (affirmative defense of "medical marijuana"); Instruction H:69 (affirmative defense of "recreational marijuana"); *see also* Colo. Const. Art. XVIII, § 16, (4) ("Lawful operation of marijuana-related facilities"); § 18–18–433, C.R.S. 2015 ("The provisions of this part 4 do not apply to a person twenty-one years of age or older acting in conformance with section 16 of article XVIII of the state constitution and do not apply to a person acting in conformance with section 14 of article XVIII of the state constitution).

4. Section 18-18-414(1) excepts from criminal liability acts authorized by "this article or in article 42.5 of title 12

[(pharmacists and pharmacies)],” and section 18-18-418, C.R.S. 2015, lists numerous exemptions (e.g., governmental officials acting pursuant to their official duties, teachers and students of chemistry classes, and persons using peyote in religious ceremonies). However, the Committee has not drafted model affirmative defense instructions.

18:62 EXCESSIVE REFILLING

The elements of the crime of excessive refilling are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. refilled a prescription for any schedule III, IV, or V controlled substance,

4. more than six months after the date on which the prescription had been issued or more than five times.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of excessive refilling.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of excessive refilling.

COMMENT

1. *See* § 18-18-414(1)(e), C.R.S. 2015.

2. *See also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

3. Section 18-18-414(1) excepts from criminal liability acts authorized by "this article or in article 42.5 of title 12 [(pharmacists and pharmacies)]," and section 18-18-418, C.R.S. 2015, lists numerous exemptions (e.g., governmental officials acting pursuant to their official duties, teachers and students of chemistry classes, and persons using peyote in religious

ceremonies). However, the Committee has not drafted model affirmative defense instructions.

18:63 FAILURE TO FILE AND RETAIN A PRESCRIPTION

The elements of the crime of failure to file and retain a prescription are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was a pharmacy, and

4. failed to file and retain a prescription as required in [insert a description of the relevant requirement(s) from section 12-42.5-131].

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to file and retain a prescription.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to file and retain a prescription.

COMMENT

1. *See* § 18-18-414(1)(f), C.R.S. 2015.

2. *See* Instruction F:275 (defining "pharmacy").

3. Section 18-18-414(1) excepts from criminal liability acts authorized by "this article or in article 42.5 of title 12 [(pharmacists and pharmacies)]," and section 18-18-418, C.R.S. 2015, lists numerous exemptions (e.g., governmental officials acting pursuant to their official duties, teachers and students of chemistry classes, and persons using peyote in religious ceremonies). However, the Committee has not drafted model affirmative defense instructions.

18:64 FAILURE TO RECORD AND MAINTAIN A RECORD OF HOSPITAL DISPENSING

The elements of the crime of failure to record and maintain a record of hospital dispensing are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was a hospital, and

4. failed to record and maintain a record of dispensing as provided in [insert a description of the relevant requirement(s) from section 12-42.5-131 or 27-80-210].

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to record and maintain a record of hospital dispensing.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to record and maintain a record of hospital dispensing.

COMMENT

1. *See* § 18-18-414(1)(g), C.R.S. 2015.

2. *See* Instruction F:100 (defining "dispense").

3. Section 18-18-414(1) excepts from criminal liability acts authorized by "this article or in article 42.5 of title 12 [(pharmacists and pharmacies)]," and section 18-18-418, C.R.S. 2015, lists numerous exemptions (e.g., governmental officials acting pursuant to their official duties, teachers and students of chemistry classes, and persons using peyote in religious ceremonies). However, the Committee has not drafted model affirmative defense instructions.

18:65 REFUSAL TO MAKE A RECORD OR FILE AVAILABLE FOR INSPECTION

The elements of the crime of refusal to make a record or file available for inspection are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was a [insert description from article 18 of title 18; part 1 of article 42.5 of title 12; or part 2 of article 80 of title 27], and

4. refused to make available for inspection and to accord full opportunity to check,

5. any record or file of [insert description from article 18 of title 18; part 1 of article 42.5 of title 12; or part 2 of article 80 of title 27].

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of refusal to make a record or file available for inspection.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of refusal to make a record or file available for inspection.

COMMENT

1. *See* § 18-18-414(1)(h), C.R.S. 2015.

2. Section 18-18-414(1) excepts from criminal liability acts authorized by "this article or in article 42.5 of title 12 [(pharmacists and pharmacies)]," and section 18-18-418, C.R.S. 2015, lists numerous exemptions (e.g., governmental officials acting pursuant to their official duties, teachers and students

of chemistry classes, and persons using peyote in religious ceremonies). However, the Committee has not drafted model affirmative defense instructions.

18:66 FAILURE TO KEEP RECORDS

The elements of the crime of failure to keep records are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was a [insert description from article 18 of title 18; part 1 of article 42.5 of title 12; or part 2 of article 80 of title 27], and

4. failed to keep records of [insert description of requirement(s) from article 18 of title 18; part 1 of article 42.5 of title 12; or part 2 of article 80 of title 27].

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to keep records.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to keep records.

COMMENT

1. *See* § 18-18-414(1)(i), C.R.S. 2015.

2. Section 18-18-414(1) excepts from criminal liability acts authorized by "this article or in article 42.5 of title 12 [(pharmacists and pharmacies)]," and section 18-18-418, C.R.S. 2015, lists numerous exemptions (e.g., governmental officials acting pursuant to their official duties, teachers and students of chemistry classes, and persons using peyote in religious ceremonies). However, the Committee has not drafted model affirmative defense instructions.

18:67 FAILURE TO OBTAIN A LICENSE OR REGISTRATION

The elements of the crime of failure to obtain a license or registration are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was a [insert description from article 18 of title 18; part 1 of article 42.5 of title 12; or part 2 of article 80 of title 27], and

4. failed to obtain a license or registration to [insert description of requirement(s) from article 18 of title 18; part 1 of article 42.5 of title 12; or part 2 of article 80 of title 27].

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to obtain a license or registration.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to obtain a license or registration.

COMMENT

1. *See* § 18-18-414(1)(j), C.R.S. 2015.

2. Section 18-18-414(1) excepts from criminal liability acts authorized by "this article or in article 42.5 of title 12 [(pharmacists and pharmacies)]," and section 18-18-418, C.R.S. 2015, lists numerous exemptions (e.g., governmental officials acting pursuant to their official duties, teachers and students of chemistry classes, and persons using peyote in religious ceremonies). However, the Committee has not drafted model affirmative defense instructions.

18:68 DISPENSING WITHOUT LABELING

The elements of the crime of dispensing without labeling are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. dispensed a controlled substance,

4. other than as a practitioner for direct administration in the course of his [her] practice or for administration to [a] hospital inpatient[s], and

5. failed to affix to the immediate container a label stating the name and address of the person from whom the controlled substance was dispensed; the date on which the controlled substance was dispensed; the number of the prescription as filed in the prescription files of the pharmacy which dispensed the prescription; the name of the prescribing practitioner; the directions for use of the controlled substance as contained in the prescription; and the name of the patient, and, if for an animal, the name of the owner.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of dispensing without labeling.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of dispensing without labeling.

COMMENT

1. *See* § 18-18-414(1)(k), C.R.S. 2015.

2. *See* Instruction F:73 (defining "controlled substance" by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S. 2015); Instruction F:100 (defining "dispense"); Instruction F:268 (defining "person"); Instruction F:282 (defining "practitioner").

3. Section 18-18-414(1) excepts from criminal liability acts authorized by "this article or in article 42.5 of title 12 [(pharmacists and pharmacies)]," and section 18-18-418, C.R.S. 2015, lists numerous exemptions (e.g., governmental officials acting pursuant to their official duties, teachers and students of chemistry classes, and persons using peyote in religious ceremonies). However, the Committee has not drafted model affirmative defense instructions.

18:69 DISPENSING WITHOUT LABELING BY A PRACTITIONER

The elements of the crime of dispensing without labeling by a practitioner are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was a practitioner, and

4. dispensed a controlled substance,

5. other than by direct administration in the course of his [her] practice,

6. without affixing to the immediate container a label bearing directions for use of the controlled substance, the practitioner's name and registry number, the name of the patient, the date, and, if for an animal, the name of the owner.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of dispensing without labeling by a practitioner.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of dispensing without labeling by a practitioner.

COMMENT

1. *See* § 18-18-414(1)(l), C.R.S. 2015.

2. *See* Instruction F:09 (defining "administer"); Instruction F:73 (defining "controlled substance" by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S. 2015); Instruction F:100 (defining "dispense"); Instruction F:282 (defining "practitioner").

3. Section 18-18-414(1) excepts from criminal liability acts authorized by "this article or in article 42.5 of title 12 [(pharmacists and pharmacies)]," and section 18-18-418, C.R.S. 2015, lists numerous exemptions (e.g., governmental officials acting pursuant to their official duties, teachers and students of chemistry classes, and persons using peyote in religious ceremonies). However, the Committee has not drafted model affirmative defense instructions.

18:70 UNLAWFUL ADMINISTRATION OF A CONTROLLED SUBSTANCE

The elements of the crime of unlawful administration of a controlled substance are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. administered a controlled substance,

4. other than to the patient for whom it was prescribed.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful administration of a controlled substance.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful administration of a controlled substance.

COMMENT

1. *See* § 18-18-414(1)(m), C.R.S. 2015.

2. *See* Instruction F:09 (defining "administer"); Instruction F:73 (defining "controlled substance" by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S. 2015).

3. Section 18-18-414(1) excepts from criminal liability acts authorized by "this article or in article 42.5 of title 12 [(pharmacists and pharmacies)]," and section 18-18-418, C.R.S. 2015, lists numerous exemptions (e.g., governmental officials acting pursuant to their official duties, teachers and students of chemistry classes, and persons using peyote in religious ceremonies). However, the Committee has not drafted model affirmative defense instructions.

18:71 UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE BY A PRACTITIONER OR PHARMACY

The elements of the crime of unlawful possession of a controlled substance by a practitioner or pharmacy are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

[3. was a practitioner, and

4. possessed a controlled substance,

5. which was not obtained from a pharmacy and which was received from a person who was not licensed as a manufacturer, distributor, or practitioner.]

[3. was a pharmacy, and

4. possessed a controlled substance,

5. which was received from any person who was not licensed as a manufacturer or distributor, and which was not bought from another pharmacy.]

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful possession of a controlled substance by a practitioner or pharmacy.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful possession of a controlled substance by a practitioner or pharmacy.

COMMENT

1. *See* § 18-18-414(1)(n), C.R.S. 2015.

2. *See* Instruction F:73 (defining "controlled substance" by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S. 2015); Instruction F:104 (defining "distributor"); Instruction F:268 (defining "person"); Instruction F:275 (defining "pharmacy"); Instruction F:281 (defining "possession"); Instruction F:282 (defining "practitioner"); *see also* § 18-1-503(2), C.R.S. 2015 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

3. The term "manufacture" is defined by § 18-18-102(17), C.R.S. 2015. *See* Instruction F:206 (defining "manufacture"). However, the term "manufacturer" is not separately defined for purposes of Article 18 of title 18.

18:72 UNLAWFUL TRANSFER OF DRUG PRECURSORS

The elements of the crime of unlawful transfer of drug precursors are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. transferred drug precursors,

5. to any person who used them for an unlawful activity.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful transfer of drug precursors.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful transfer of drug precursors.

COMMENT

1. *See* § 18-18-414(1)(o), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:269 (defining "person").

3. The term "drug precursors" is not defined by statute.

4. Section 18-18-414(1) excepts from criminal liability acts authorized by "this article or in article 42.5 of title 12 [(pharmacists and pharmacies)]," and section 18-18-418, C.R.S. 2015, lists numerous exemptions (e.g., governmental officials acting pursuant to their official duties, teachers and students of chemistry classes, and persons using peyote in religious

ceremonies). However, the Committee has not drafted model affirmative defense instructions.

18:73 UNLAWFULLY OBTAINING DRUG PRECURSORS

The elements of the crime of unlawfully obtaining drug precursors are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. acquired or obtained, or attempted to acquire or obtain, possession of a drug precursor,

5. by misrepresentation, fraud, forgery, deception, or subterfuge.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawfully obtaining drug precursors.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawfully obtaining drug precursors.

COMMENT

1. *See* § 18-18-414(1)(q), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:281 (defining "possession"); +.

3. The term "drug precursors" is not defined by statute.

4. Section 18-18-414(1) excepts from criminal liability acts authorized by "this article or in article 42.5 of title 12 [(pharmacists and pharmacies)]," and section 18-18-418, C.R.S. 2015, lists numerous exemptions (e.g., governmental officials acting pursuant to their official duties, teachers and students

of chemistry classes, and persons using peyote in religious ceremonies). However, the Committee has not drafted model affirmative defense instructions.

5. + In the absence of case law on point, the Committee takes no position on whether the word "attempted" in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

6. + In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 5.

18:74 UNLAWFULLY FURNISHING OR OMITTING MATERIAL INFORMATION

The elements of the crime of unlawfully furnishing or omitting material information are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. furnished false or fraudulent material information in, or omitted any material information from,

5. a[n] [insert description of application, report, or other document required to be kept or filed under article 18 of title 18; part 1 of article 42.5 of title 12; part 2 of article 80 of title 27; or any record required to be kept by article 18 of title 18; part 1 of article 42.5 of title 12; or part 2 of article 80 of title 27].

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawfully furnishing or omitting material information.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawfully furnishing or omitting material information.

COMMENT

1. *See* § 18-18-414(1)(r), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly").

3. Section 18-18-414(1) excepts from criminal liability acts authorized by "this article or in article 42.5 of title 12 [(pharmacists and pharmacies)]," and section 18-18-418, C.R.S. 2015, lists numerous exemptions (e.g., governmental officials acting pursuant to their official duties, teachers and students of chemistry classes, and persons using peyote in religious ceremonies). However, the Committee has not drafted model affirmative defense instructions.

18:75 REFUSAL OF ENTRY FOR AN INSPECTION

The elements of the crime of refusal of entry for an inspection are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was a [insert description from article 18 of title 18; part 1 of article 42.5 of title 12; or part 2 of article 80 of title 27], and

4. refused entry into any premises,

5. for an inspection authorized by [insert description from article 18 of title 18; part 1 of article 42.5 of title 12; or part 2 of article 80 of title 27].

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of refusal of entry for an inspection.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of refusal of entry for an inspection.

COMMENT

1. *See* § 18-18-414(1)(t), C.R.S. 2015.

2. Section 18-18-414(1) excepts from criminal liability acts authorized by "this article or in article 42.5 of title 12 [(pharmacists and pharmacies)]," and section 18-18-418, C.R.S. 2015, lists numerous exemptions (e.g., governmental officials acting pursuant to their official duties, teachers and students of chemistry classes, and persons using peyote in religious ceremonies). However, the Committee has not drafted model affirmative defense instructions.

18:76 OBTAINING A CONTROLLED SUBSTANCE BY FRAUD OR DECEIT

The elements of the crime of obtaining a controlled substance by fraud or deceit are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. obtained a controlled substance or procured the administration of a controlled substance,

4. by fraud, deceit, misrepresentation, or subterfuge; or by the forgery or alteration of an order; or by the concealment of a material fact; or by the use of a false name or the giving of a false address.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of obtaining a controlled substance by fraud or deceit.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of obtaining a controlled substance by fraud or deceit.

COMMENT

1. *See* § 18-18-415(1)(a), C.R.S. 2015.

2. *See* Instruction F:09 (defining "administer"); Instruction F:73 (defining "controlled substance" by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S. 2015); Instruction F:255 (defining "order").

18:77 MAKING A FALSE STATEMENT RELATED TO A CONTROLLED SUBSTANCE

The elements of the crime of making a false statement related to a controlled substance are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. willfully,

4. made a false statement in any required order, report, or record of [insert a description of the requirement, from article 18 of title 18].

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of making a false statement related to a controlled substance.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of making a false statement related to a controlled substance.

COMMENT

1. *See* § 18-18-415(1)(c), C.R.S. 2015.

2. *See* Instruction F:73 (defining "controlled substance" by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S. 2015); Instruction F:195 (defining "willfully"); Instruction F:255 (defining "order").

18:78 FALSE ACT FOR THE PURPOSE OF OBTAINING A CONTROLLED SUBSTANCE

The elements of the crime of false act for the purpose of obtaining a controlled substance are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. for the purpose of obtaining a controlled substance,

4. falsely assumed the title of, or represented himself [herself] to be, a manufacturer, distributor, practitioner, or other person authorized by law to obtain a controlled substance.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of false act for the purpose of obtaining a controlled substance.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of false act for the purpose of obtaining a controlled substance.

COMMENT

1. *See* § 18-18-415(1)(d), C.R.S. 2015.

2. *See* Instruction F:73 (defining "controlled substance" by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S. 2015); Instruction F:104 (defining "distributor"); Instruction F:282 (defining "practitioner").

3. The term "manufacture" is defined by § 18-18-102(17), C.R.S. 2015. *See* Instruction F:206 (defining "manufacture"). However, the term "manufacturer" is not separately defined for purposes of Article 18 of title 18.

18:79 MAKING OR UTTERING A FALSE OR FORGED ORDER

The elements of the crime of making or uttering a false or forged order are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. made or uttered,

4. any false or forged order.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of making or uttering a false or forged order.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of making or uttering a false or forged order.

COMMENT

1. *See* § 18-18-415(1)(e), C.R.S. 2015.

2. *See* Instruction F:255 (defining "order"); *see also* Instruction F:385 (defining "utter," for purposes of forgery and impersonation offenses).

18:80 AFFIXING A FALSE OR FORGED LABEL

The elements of the crime of affixing a false or forged label are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. affixed any false or forged label,

4. to a package or receptacle containing a controlled substance.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of affixing a false or forged label.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of affixing a false or forged label.

COMMENT

1. *See* § 18-18-415(1)(f), C.R.S. 2015.

2. *See* Instruction F:73 (defining "controlled substance" by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S. 2015).

18:81 INDUCING CONSUMPTION BY FRAUDULENT MEANS

The elements of the crime of inducing consumption by fraudulent means are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. surreptitiously, or by means of fraud, misrepresentation, suppression of truth, deception, or subterfuge,

4. caused any other person to unknowingly consume or receive the direct administration of any controlled substance.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of inducing consumption by fraudulent means.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of inducing consumption by fraudulent means.

COMMENT

1. *See* § 18-18-416(1), C.R.S. 2015.

2. *See* Instruction F:09 (defining "administer"); Instruction F:73 (defining "controlled substance" by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S. 2015).

3. The statute includes an exemption from criminal liability. *See* § 18-18-416(1), C.R.S. 2015 ("except that nothing in this section shall diminish the scope of health care authorized by law"). However, the Committee has not drafted a model affirmative defense instruction.

18:82 MANUFACTURING OR DISTRIBUTING AN IMITATION CONTROLLED SUBSTANCE, OR POSSESSING AN IMITATION CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE

The elements of the crime of manufacturing or distributing an imitation controlled substance, or possessing an imitation controlled substance with intent to distribute are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. manufactured, distributed, or possessed with intent to distribute an imitation controlled substance.

[4. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of manufacturing or distributing an imitation controlled substance, or possessing an imitation controlled substance with intent to distribute.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of manufacturing or distributing an imitation controlled substance, or possessing an imitation controlled substance with intent to distribute.

COMMENT

1. *See* § 18-18-422(1)(a), C.R.S. 2015.

2. *See* Instruction F:103 (defining "distribute"); Instruction F:177 (defining "imitation controlled substance," and incorporating the considerations enumerated in section 18-18-421(1)); Instruction F:207 (defining "manufacture"); Instruction F:281 (defining "possession"); Instruction F:185 (defining "with intent").

3. Section 18-18-424, C.R.S. 2015, establishes exemptions from criminal liability for persons who are licensed, registered, or

otherwise authorized. However, the Committee has not drafted model affirmative defense instructions.

4. Section 18-18-421(1), C.R.S. 2015, lists five factors that the trier of fact may consider, in addition to all other relevant factors, in determining whether a substance is an imitation controlled substance. Rather than include these factors in a special instruction, the Committee has included them in Instruction F:177 (defining "imitation controlled substance").

5. In *People v. Moore*, 674 P.2d 354, 358 (Colo. 1984), and *People v. Pharr*, 696 P.2d 235, 236 (Colo. 1984), the supreme court held, under an earlier version of the imitation controlled substances statute, that a mens rea of "knowingly" was implied. However, in *People v. Taylor*, 131 P.3d 1158, 1163 (Colo. App. 2005), a division of the court of appeals held that, because "the General Assembly amended the statute to eliminate any reference to express or implied representations concerning the nature of the imitation controlled substance," there no longer is a "requirement that a defendant knowingly purport that a substance is a controlled substance."

18:83 DISTRIBUTING AN IMITATION CONTROLLED SUBSTANCE TO A MINOR

The elements of the crime of distributing an imitation controlled substance to a minor are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. was an adult, and

4. distributed an imitation controlled substance to a minor who was at least two years younger than the defendant.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of distributing an imitation controlled substance to a minor.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of distributing an imitation controlled substance to a minor.

COMMENT

1. *See* § 18-18-422(2)(a), C.R.S. 2015.

2. *See* Instruction F:103 (defining "distribute"); Instruction F:177 (defining "imitation controlled substance," and incorporating the considerations enumerated in section 18-18-421(1)).

3. *See* Instruction 18:82, Comments 3-5.

4. Article 18 does not define the terms "adult" and "minor."

18:84 ADVERTISING AN IMITATION CONTROLLED SUBSTANCE

The elements of the crime of advertising an imitation controlled substance are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. placed in a newspaper, magazine, handbill, or other publication or posted or distributed in any public place,

4. an advertisement or solicitation which he [she] knew would promote the distribution of imitation controlled substances.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of advertising an imitation controlled substance.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of advertising an imitation controlled substance.

COMMENT

1. *See* § 18-18-422(3)(a), C.R.S. 2015.

2. *See* Instruction F:103 (defining "distribute"); Instruction F:177 (defining "imitation controlled substance," and incorporating the considerations enumerated in section 18-18-421(1)).

3. *See* Instruction 18:82, Comments 3-5.

18:85.SP IMITATION CONTROLLED SUBSTANCE OFFENSES – SPECIAL INSTRUCTION (ERRONEOUS BELIEF NO DEFENSE)

A defendant's belief that an imitation controlled substance was a genuine controlled substance is not a defense to [insert name(s) of imitation controlled substance offense(s)].

COMMENT

1. *See* § 18-18-422(4), C.R.S. 2015.

18:86 MANUFACTURING OR DELIVERING A COUNTERFEIT CONTROLLED SUBSTANCE, OR POSSESSING A COUNTERFEIT CONTROLLED SUBSTANCE WITH INTENT TO MANUFACTURE OR DELIVER

The elements of the crime of manufacturing or delivering a counterfeit controlled substance, or possessing a counterfeit controlled substance with intent to manufacture or deliver, are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly or intentionally,

4. manufactured, delivered, or possessed with intent to manufacture or deliver,

5. a controlled substance which, or the container or labeling of which, without authorization, bore the trademark, trade name, or other identifying mark, imprint, number, or device, or any likeness thereof, of a manufacturer, distributor, or dispenser, other than the person who in fact manufactured, distributed, or dispensed the substance.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of manufacturing or delivering a counterfeit controlled substance, or possessing a counterfeit controlled substance with intent to manufacture or deliver.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of manufacturing or delivering a counterfeit controlled substance, or possessing a counterfeit controlled substance with intent to manufacture or deliver.

COMMENT

1. *See* § 18-18-423(1), C.R.S. 2015.

2. *See* Instruction F:101 (defining "dispenser"); Instruction F:73 (defining "controlled substance" by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S. 2015); Instruction F:185 (defining "intentionally" and "with intent"); Instruction F:195 (defining "knowingly"); Instruction F:206 (defining "manufacture"); Instruction F:281 (defining "possession"); Instruction F:373 (defining "trademark").

3. Section 18-18-424, C.R.S. 2015, establishes exemptions from criminal liability for persons who are licensed, registered, or otherwise authorized. However, the Committee has not drafted model affirmative defense instructions.

18:87 MAKING, DISTRIBUTING, OR POSSESSING A COUNTERFEIT DRUG IMPLEMENT

The elements of the crime of making, distributing, or possessing a counterfeit drug implement are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly or intentionally,

4. made, distributed, or possessed a punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling thereof.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of making, distributing, or possessing a counterfeit drug implement.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of making, distributing, or possessing a counterfeit drug implement.

COMMENT

1. *See* § 18-18-423(2), C.R.S. 2015.

2. *See* Instruction F:112 (defining "drug"); Instruction F:185 (defining "intentionally"); Instruction F:195 (defining "knowingly"); Instruction F:281 (defining "possession"); Instruction F:373 (defining "trademark").

3. Section 18-18-424, C.R.S. 2015, establishes exemptions from criminal liability for persons who are licensed, registered, or

otherwise authorized. However, the Committee has not drafted model affirmative defense instructions.

18:88 POSSESSION OF DRUG PARAPHERNALIA

The elements of the crime of possession of drug paraphernalia are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. possessed drug paraphernalia, and

5. knew or reasonably should have known that the drug paraphernalia could be used under circumstances to commit the offense[s] of [insert name(s) of controlled substance offense(s)].

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of possession of drug paraphernalia.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of possession of drug paraphernalia.

COMMENT

1. *See* § 18-18-428(1), C.R.S. 2015.

2. *See* Instruction F:113 (defining "drug paraphernalia"); Instruction F:195 (defining "knowingly"); Instruction F:281 (defining "possession").

3. *See Lee v. Smith*, 772 P.2d 82, 87 (Colo. 1989) (construing the offense of possession of drug paraphernalia, then codified at section 12-22-504, as requiring a culpable mental state of "knowingly").

4. + Section 18-18-428(1)(b), C.R.S. 2015, establishes an exemption from criminal liability for "any minuscule, residual controlled substance that may be present in a used hypodermic needle or syringe" if the location of the needle or syringe is disclosed in specified circumstances. However, the Committee has not drafted a model affirmative defense instruction.

5. Section 18-18-430.5, C.R.S. 2015, establishes an exemption for any person "participating as an employee, volunteer, or participant in an approved syringe exchange program created pursuant to section 25-1-520, C.R.S." However, the Committee has not drafted a model affirmative defense instruction.

6. Section 18-18-427(1), C.R.S. 2015, enumerates several factors that a court may consider in determining whether an object is drug paraphernalia. And section 18-18-427(2), C.R.S. 2015, states that: "In the event a case brought pursuant to sections 18-18-425 to 18-18-430 is tried before a jury, the court shall hold an evidentiary hearing on issues raised pursuant to this section. Such hearing shall be conducted in camera."

7. *See* § 18-18-426(2), C.R.S. 2015 ("'Drug paraphernalia'" does not include any marijuana accessories as defined in section 16(2)(g) of article XVIII of the state constitution.").

8. *See* Instruction H:32 (affirmative defense of "reporting an emergency drug or alcohol overdose event").

9. If the defendant is not charged with the referenced controlled substance offense(s), give the jury the elemental instruction(s) for the controlled substance offense(s) without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction(s) for the controlled substance offense(s) immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the controlled substance offense(s).

10. + In 2015, the Committee added Comment 4 and renumbered the remaining comments. *See* Ch. 76, sec. 1, § 18-18-428(1)(b), 2015 Colo. Sess. Laws 200, 200–01.

18:89 MANUFACTURE, SALE, OR DELIVERY OF DRUG PARAPHERNALIA

The elements of the crime of manufacture, sale, or delivery of drug paraphernalia are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. sold or delivered, or possessed or manufactured with intent to sell or deliver,

5. equipment, products, or materials,

6. knowing, or under circumstances where one reasonably should have known, that the equipment, products, or materials could be used as drug paraphernalia.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of manufacture, sale, or delivery of drug paraphernalia.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of manufacture, sale, or delivery of drug paraphernalia.

COMMENT

1. *See* § 18-18-429, C.R.S. 2015.

2. *See* Instruction F:113 (defining "drug paraphernalia"); Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly"); "); Instruction F:206 (defining "manufacture"); Instruction F:281 (defining "possession"); Instruction F:327 (defining "sale").

3. *See* Instruction 18:88, Comments 3-6.

18:90 ADVERTISEMENT OF DRUG PARAPHERNALIA

The elements of the crime of advertisement of drug paraphernalia are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. placed an advertisement in any newspaper, magazine, handbill, or other publication, and

4. intended thereby to promote the sale in Colorado of equipment, products, or materials designed and intended for use as drug paraphernalia.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of advertisement of drug paraphernalia.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of advertisement of drug paraphernalia.

COMMENT

1. *See* § 18-18-430, C.R.S. 2015.

2. *See* Instruction F:113 (defining "drug paraphernalia"); Instruction F:185 (defining "intentionally" and "with intent").

3. *See* Instruction 18:88, Comments 5–7.

CHAPTER 42

VEHICLE AND TRAFFIC OFFENSES

CHAPTER COMMENTS

1. The Committee has drafted model instructions for selected motor vehicle and traffic offenses that are regularly tried to juries (either independently, or in conjunction with more serious charges that are defined in the criminal code, such as vehicular homicide and vehicular eluding). Because Title 42 defines hundreds of other offenses for which the Committee has not prepared model instructions, the Committee recommends using the model instructions in this chapter as templates when drafting instructions for other vehicle or traffic offenses.

2. Determining what culpable mental state, if any, applies to a traffic offense that does not expressly designate a culpable mental state element can be complicated. *See People v. Manzo*, 144 P.3d 551, 559 (Colo. 2006) ("Leaving the Scene of an Accident with Serious Injury [in violation of section 42-4-1601] is a strict liability offense because the plain language of the statute does not require or imply a culpable mental state."); *People v. Caddy*, 540 P.2d 1089, 1091 (Colo. 1975) ("speeding is

an offense of strict liability"). Accordingly, unlike the chapters of elemental instructions that define offenses from Title 18, *see* Chapter A, "Culpable Mental States," this chapter does not raise the question of whether it may be appropriate to impute a culpable mental state of "knowingly" to an offense that does not expressly designate a culpable mental state. Even when a traffic offense expressly designates a culpable mental state, instructing the jury on that element may require caution. *See, e.g.*, *People v. Zweygardt*, 2012 COA 119, ¶ 34, 298 P.3d 1018, 1025 ("Criminal negligence requires a gross deviation from the standard of care. § 18–1–501(3). Careless driving requires that the defendant drive without due regard. A person who grossly deviates from the standard of care that a reasonable person would exercise and fails to perceive a substantial and unjustified risk that a result will occur or that a circumstance exists, has necessarily acted without due regard for safety."); *People v. Pena*, 962 P.2d 285, 289 (Colo. App. 1997) (the type of recklessness in 42-4-1401(1) is indistinguishable from the definition of "recklessly" in section 18-1-501(8), C.R.S. 2015).

42:01 DRIVING WITHOUT A VALID LICENSE

The elements of the crime of driving without a valid license are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. drove a motor vehicle,

4. upon a highway in this state, and

5. had not been issued a currently valid driver's license, minor driver's license, or an instruction permit by the Department of Revenue.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of driving without a valid license.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of driving without a valid license.

COMMENT

1. *See* § 42-2-101(1), C.R.S. 2015.

2. *See* Instruction F:171 (defining "highway"); Instruction F:239 (defining "motor vehicle").

3. *See* Instruction H:73 (affirmative defense of "emergency or exemption").

4. The introductory clause of section 42-2-101(1) provides as follows: "Except as otherwise provided in part 4 of this article for commercial drivers." Accordingly, in a case where the

validity of the defendant's license or conduct as a commercial driver is at issue, refer to Part 4 of Article 2.

5. Subsections two through five of section 42-2-101 define other ways of committing this offense. However, as in COLJI-Crim. (2008), the Committee has not drafted model instructions for these variants.

42:02 DRIVING UNDER RESTRAINT (GENERAL)

The elements of the crime of driving under restraint are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. drove a motor vehicle or off-highway vehicle,

4. upon any highway of this state,

5. with knowledge that his [her] license or privilege to drive, either as a resident or a nonresident, was under restraint for any reason.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of driving under restraint.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of driving under restraint.

COMMENT

1. *See* § 42-2-138(1)(a), C.R.S. 2015.

2. *See* Instruction F:171 (defining "highway"); Instruction F:196 (defining "knowledge"); Instruction F:239 (defining "motor vehicle"); Instruction F:249.5 (defining "off-highway vehicle"); Instruction F:320 (defining "restraint" and "restrained").

42:03 DRIVING UNDER RESTRAINT (RESTRAINT BASED ON A CONVICTION OR ADMINISTRATIVE ACTION RELATED TO ALCOHOL OR DRUGS)

The elements of the crime of driving under restraint (restraint based on a conviction or administrative action related to alcohol or drugs) are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. drove a motor vehicle or off-highway vehicle,

4. upon any highway of this state,

5. with knowledge that his [her] license or privilege to drive, either as a resident or a nonresident, was under restraint,

6. [because of [insert description of restraint(s) from section 42-2-126(3)]]

   [solely or partially because of a conviction of driving under the influence, driving with excessive alcohol content, driving while ability impaired, or underage drinking and driving]

   [in another state, solely or partially because of an alcohol-related driving offense].

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of driving under restraint (restraint based on a conviction or administrative action related to alcohol or drugs).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of driving under restraint (restraint based on a

conviction or administrative action related to alcohol or drugs).

COMMENT

1. *See* § 42-2-138(1)(d)(I), C.R.S. 2015.

2. *See* Instruction F:171 (defining "highway"); Instruction F:196 (defining "knowledge"); Instruction F:239 (defining "motor vehicle"); Instruction F:249.5 (defining "off-highway vehicle"); Instruction F:320 (defining "restraint" and "restrained"); *see also* § 42-1-102(109.7), C.R.S. 2015 ("'UDD' means underage drinking and driving, and use of the term shall incorporate by reference the offense described in section 42-4-1301(2)(a.5).").

3. *See* Instruction H:75 (affirmative defense of "valid license issued subsequent to restraint").

4. *See Griego v. People*, 19 P.3d 1, 5 (Colo. 2001) ("After our decision in [*Jolly v. People*, 742 P.2d 891, 897 (Colo. 1987)] held the culpable mental state of 'knowingly' applicable to the misdemeanor driving under restraint statute, the legislature amended that statute to require a degree of mental culpability less than 'knowingly.'").

42:04.SP DRIVING UNDER RESTRAINT - SPECIAL INSTRUCTION (NOTICE)

The following circumstances give rise to a permissible inference that the defendant received personal notice that his [her] license or privilege to drive was under restraint:

1. certification that a notice was mailed, postpaid, by first-class mail to the last-known address of the defendant shown by the records of the Department of Revenue; or

2. delivery of such notice to the last-known address of the defendant shown by the records of the Department of Revenue; or

3. personal service of such notice upon the defendant, or upon any attorney appearing on the defendant's behalf; or

4. certification that notice was given in another state in compliance with such state's law.

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

COMMENT

1. *See* §§ 42-2-119(2), 42-2-138(2)(a), C.R.S. 2015.

2. Unlike COLJI-Crim. 42:02 (2008) ("proof of knowledge"), the above model instruction does not authorize the jury to draw a permissible inference that the defendant had *knowledge* of the revocation. Rather, the instruction now describes how proof of a specified circumstance can give rise to a permissible inference that the defendant had *notice* of the restraint.

It appears that COLJI-Crim. 42:02 (2008) was based on *Jolly v. People*, 742 P.2d 891, 897 (Colo. 1987), in which the supreme court relied on the relevant provision for establishing the fact of revocation (then-codified as section 42-2-130(2)) as a basis for holding that: (1) knowledge of the fact of a license revocation was an essential element of the crime of driving while license revoked (then-codified as section 42-2-130(1)); and (2) the giving of notice by registered mail in accordance with section 42-2-130(2) gave rise to a permissible inference that the defendant had knowledge of the revocation. However, *Jolly* was decided under the pre-1994 driving under restraint statute, section 42-2-130(1), which, unlike the current section 42-2-138(1)(a), (d)(I), did not explicitly include knowledge of the restraint as an element of the offense. *See Jolly v. People*, 742 P.2d at 894 (quoting 42-2-130(1)(a)); *see also* Ch. 337, sec. 1, § 42-2-138(1)(a), (d)(I), 1994 Colo. Sess. Laws 2155 (enacting section 42-2-138 to replace section 42-2-130, as part of a complete recodification of Title 42). Accordingly, the Committee has revised the model instruction so that it is in accord with the definition of "knowledge" in section 42-2-138(4)(a), C.R.S. 2015 ("'Knowledge' means actual knowledge of any restraint from whatever source or knowledge of circumstances sufficient to cause a reasonable person to be aware that such person's license or privilege to drive was under restraint. 'Knowledge' does not mean knowledge of a particular restraint or knowledge of the duration of restraint."), and the supreme court's explanation of that definition:

> The second part of this definition involves in part the use of an objective reasonable person standard. However, this definition requires that the particular defendant possess knowledge of those circumstances that would trigger a reasonable person to believe his license was under restraint. Under this definition, a defendant could not be punished for acting without actual subjective knowledge of these circumstances. Thus, knowledge, as defined, combines both a subjective and an objective component. It requires the defendant to be actually aware of specific circumstances. These specific circumstances are defined by using an objective reasonable person standard. For example, if, after being convicted of numerous traffic offenses, a defendant sees mail from the Division of Motor Vehicles (DMV) and then refuses to open the letter, he might be found to have been aware of circumstances that would lead a reasonable person to believe his license to drive was under

> restraint and his claim that he drove without knowledge of the restraint might fail. In contrast, if we were to accept as true that a defendant unwittingly threw out the DMV letter with his junk mail and that he never saw the DMV letter addressed to him, then he might be found not to have possessed the subjective knowledge of the circumstances that would lead a reasonable person to believe his license was under restraint.[FN5] This defendant, although perhaps negligent in sorting his mail, might not have driven with the required "knowledge" of the restraint.
>
> > FN5. This example assumes that the hypothetical defendant did not act deliberately to disregard the DMV letter and, further, that awareness of having been convicted of numerous traffic offenses would not alone lead a reasonable person to believe his license was under restraint.

People v. Ellison, 14 P.3d 1034, 1037, n.5 (Colo. 2000); *see also Griego v. People*, 19 P.3d 1, 5 (Colo. 2001) ("After our decision in [*Jolly v. People*, 742 P.2d 891, 897 (Colo. 1987)] held the culpable mental state of 'knowingly' applicable to the misdemeanor driving under restraint statute, the legislature amended that statute to require a degree of mental culpability less than 'knowingly.'").

In summary, under the current statutory scheme: (1) it is permissible for the jury to draw an inference that the defendant had *notice* of a restraint based on evidence satisfying section 42-2-119(2) or section 42-2-138(2)(a); and (2) an inference that the defendant had such notice may, depending on the surrounding circumstances, support a finding that the defendant also had *knowledge*, within the meaning of section 42-2-138(4)(a).

42:05 DRIVING AFTER REVOCATION PROHIBITED

The elements of the crime of driving after revocation prohibited are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. having had his [her] license to drive revoked by the Department of Revenue based on a finding that he [she] was an habitual offender,

5. operated a motor vehicle in this state,

6. while the revocation prohibiting such operation was in effect.

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of driving after revocation prohibited.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of driving after revocation prohibited.

COMMENT

1. *See* § 42-2-206(1)(a)(I), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:239 (defining "motor vehicle").

3. *See Griego v. People*, 19 P.3d 1, 5 (Colo. 2001) ("When the General Assembly amended the culpable mental state requirement for driving under restraint but did not amend the culpable mental state for driving after revocation prohibited, we must

presume that it did so with awareness of our decisions in [*People v. Lesh*, 668 P.2d 1362, 1365 (Colo. 1983), *Ault v. Department of Revenue*, 697 P.2d 24, 27 (Colo. 1985), and *Jolly v. People*, 742 P.2d 891, 896 (Colo. 1987)], and therefore chose to retain 'knowingly' as the culpable mental state for driving after revocation prohibited.").

4. The term "operate" is not defined in section 42-2-206. *See People v. Stewart*, 55 P.3d 107, 115 (Colo. 2002) ("The term 'operate' is somewhat broader [than the term 'drive'], connoting the action of causing something 'to occur . . . [or] to cause to function usually by direct personal effort.' *People v. Gregor*, 26 P.3d 530, 532 (Colo. App. 2000) (quoting *Webster's Third New International Dictionary* 1580–81 (1986))."); *People v. Gregor*, 26 P.3d 530, 532 (Colo. App. 2000) ("the trial court did not err in failing to define 'operate' as requiring actual movement of the vehicle").

In *People v. VanMatre*, 190 P.3d 770, 772 (Colo. App. 2008), a division of the Court of Appeals analyzed an instruction that defined the term "operate," for purposes of the offense of aggravated driving with a revoked license in violation of section 42-2-206(1)(b), as "exercising actual physical control of a vehicle, which was to be determined by considering the totality of the circumstances."

> The instruction further provided a nonexclusive list of factors for the jury to consider in determining the issue of actual physical control. The factors included the vehicle's operability, the vehicle's location, defendant's location in the vehicle, the location of the ignition keys, whether the motor was running, whether defendant had the apparent ability to start the vehicle, whether defendant was conscious, whether the heater or air conditioner was running, whether the windows were up or down, and any other factor which tended to indicate that defendant exercised bodily influence or direction over the vehicle based on the jury's everyday experience.

Id. Although the division held that this instruction was adequate based on the facts of the case, it endorsed the "reasonably capable of being rendered operable" standard:

> [W]hen considering whether a defendant exercised actual physical control over a vehicle or caused it to function, that is, drove or operated a vehicle, a jury

> may consider the totality of the circumstances, including the factors listed in the jury instruction here. Furthermore, when there is evidence indicating that the vehicle may not have been reasonably capable of being rendered operable, the jury must be instructed that it must find the vehicle was either operable, reasonably capable of being rendered operable, in motion (whether by coasting or pushing), or at risk of being put in motion before finding the defendant guilty of driving or operating a vehicle under the DUI and [driving after revocation prohibited] statutes.

Id. at 773.

42:06 AGGRAVATED DRIVING AFTER REVOCATION PROHIBITED

The elements of the crime of driving after revocation prohibited are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. having had his [her] license to drive revoked by the Department of Revenue based on a finding that he [she] was an habitual offender,

5. operated a motor vehicle in this state,

6. while the revocation prohibiting such operation was in effect, and

7. as a part of the same criminal episode, committed [any of] the following crime[s]: [insert the name(s) of the relevant offense(s) enumerated in section 42-2-206(b)(I)(+ C-F)].

[8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of driving after revocation prohibited.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of driving after revocation prohibited.

COMMENT

1. *See* § 42-2-206(1)(a)(I), C.R.S. 2015.

2. *See* Instruction F:195 (defining "knowingly"); Instruction F:239 (defining "motor vehicle").

3. If the defendant is not separately charged with a referenced offense, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense.

4. Aggravated driving with a revoked license is not a sentence enhancement provision for the offense of driving after revocation prohibited; it is a separate crime. *See Griego v. People*, 19 P.3d 1, 6, n.6 (Colo. 2001) ("The 1999 amendment . . . created the new offense of aggravated driving with a revoked license. . . ."); *People v. Wilson*, 114 P.3d 19, 26 (Colo. App. 2004) ([Section] 42-2-206(1)(b) clearly sets forth the elements of the crime of aggravated driving with a revoked license, which include six different offenses committed 'as part of the same criminal episode.' Thus, the aggravating offenses listed in § 42-2-206(1)(b) are essential elements of the crime.").

5. *See* Instruction 42:05 (driving after revocation prohibited), Comment 3 (discussing the imputed mens rea of "knowingly"), and Comment 4 (discussing cases defining the term "operate").

6. + In 2015, the Committee modified the bracketed statutory citation in the seventh element, where indicated by the "+" symbol. *See* Ch. 262, sec. 4, § 42-2-206, 2015 Colo. Sess. Laws 990, 996.

42:07 SPEEDING

The elements of the crime of speeding are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. drove a motor vehicle,

4. on a highway,

5. at a speed greater than was reasonable and prudent under the conditions then existing.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of speeding.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of speeding.

COMMENT

1. *See* § 42-4-1101(1), C.R.S. 2015.

2. *See* Instruction F:171 (defining "highway"); Instruction F:239 (defining "motor vehicle").

3. *See People v. Caddy*, 540 P.2d 1089, 1091 (Colo. 1975) ("speeding is an offense of strict liability"); Instruction G1:02 (strict liability crimes).

4. *See* Instruction H:74 (affirmative defense of "emergency").

42:08.SP SPEEDING - SPECIAL INSTRUCTION (SPEED IN EXCESS OF DESIGNATED SPEED LIMIT)

Evidence that the defendant was driving at any speed in excess of [insert the lawful designated speed pursuant to section 42-4-1101(2)] gives rise to a permissible inference that such speed was not reasonable or prudent under the conditions then existing.

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

COMMENT

1. *See* § 42-4-1101(4), C.R.S. 2015.

2. *See Jolly v. People*, 742 P.2d 891, 897 (Colo. 1987) (provision of statute proscribing driving while license revoked authorized only a permissible inference that defendant had knowledge of fact of revocation from proof of registered mailing of notice, rather than creating a conclusive presumption or mandatory burden-shifting presumption with respect to that element of the offense; the statutory term "prima facie proof" is functionally equivalent to a permissible inference); *Barnes v. People*, 735 P.2d 869, 872-74 (Colo. 1987) ("a mandatory presumption may not be constitutionally used against a criminal defendant if a reasonable jury could construe it as conclusive or shifting the burden of persuasion on an essential element of a crime"; driving while under the influence statute, which provided that it shall be presumed that defendant was under influence of alcohol if there was 0.10 or more grams of alcohol per 100 milliliters of blood, as shown by chemical analysis of defendant's blood, authorized only permissible inference that defendant was under the influence of alcohol); *People v. Felgar*, 58 P.3d 1122, 1124-25 (Colo. App. 2002) (instruction establishing presumption concerning the defendant's knowledge

violated due process, even though the instruction tracked the statutory language).

42:09 DRIVING UNDER THE INFLUENCE

The elements of the crime driving under the influence are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. drove a motor vehicle or vehicle,

4. while under the influence of alcohol or one or more drugs, or a combination of both alcohol and one or more drugs.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of driving under the influence.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of driving under the influence.

COMMENT

1. *See* § 42-4-1301(1)(a), C.R.S. 2015.

2. *See* Instruction F:110 (defining "driving under the influence"); Instruction F:239 (defining "motor vehicle"); Instruction F:252 (defining "one or more drugs"); Instruction F:386 (defining "vehicle").

3. In *People v. Swain*, 959 P.2d 426, 431 (Colo. 1998), the supreme court held that, for purposes of section 42-4-1301, the term "drive" means "actual physical control of a vehicle." In so holding, the court extended the definition it had developed in the license revocation context, *see Brewer v. Motor Vehicle Division, Department of Revenue*, 720 P.2d 564 (Colo. 1986), without endorsing the trial court's instruction that enumerated five factors for the jury to "consider in deciding whether or

not a person was in actual physical control of a motor vehicle." *People v. Swain*, 959 P.2d at 428; *see also People v. VanMatre*, 190 P.3d 770, 773 (Colo. App. 2008) ("a vehicle must be reasonably capable of being rendered operable before a person can be convicted of 'driving' . . . the vehicle while intoxicated").

42:10 DRIVING WHILE ABILITY IMPAIRED

The elements of the crime driving while ability impaired are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. drove a motor vehicle or vehicle,

4. while impaired by alcohol or by one or more drugs, or by a combination of alcohol and one or more drugs.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of driving while ability impaired.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of driving while ability impaired.

COMMENT

1. *See* § 42-4-1301(1)(b), C.R.S. 2015.

2. *See* Instruction F:111 (defining "driving while ability impaired"); Instruction F:239 (defining "motor vehicle"); Instruction F:252 (defining "one or more drugs"); Instruction F:386 (defining "vehicle").

3. *See* Instruction 42:09, Comment 3 (discussing the meaning of the term "drive").

42:11.SP DRIVING UNDER THE INFLUENCE OR WHILE ABILITY IMPAIRED - SPECIAL INSTRUCTION (BLOOD OR BREATH ALCOHOL LEVEL)

As to the charge of [driving under the influence] [driving while ability impaired], the amount of alcohol in the defendant's blood or breath at the time of the alleged offense, or within a reasonable time thereafter, as shown by analysis of the defendant's blood or breath, gives rise to the following:

(a) Presumption:

It shall be presumed that the defendant was not under the influence of alcohol if there was at such time 0.05 or less grams of alcohol per one hundred milliliters of blood, or if there was at such time 0.05 or less grams of alcohol per two hundred ten liters of breath.

A presumption requires you to find a fact, as if it had been established by evidence, unless the presumption is rebutted by evidence to the contrary.

(b) Permissible inferences:

A permissible inference that the defendant's ability to operate a motor vehicle or vehicle was impaired by the consumption of alcohol may be drawn if there was at such time in excess of 0.05 but less than 0.08 grams of alcohol per one hundred milliliters of blood, or if there was at such time in excess of 0.05 but less than 0.08 grams of alcohol per two hundred ten liters of breath, and such fact may also be considered with other competent evidence in determining whether or not the defendant was under the influence of alcohol.

A permissible inference that the defendant was under the influence of alcohol may be drawn if there was at such time 0.08 or more grams of alcohol per one hundred milliliters of blood, or if there was at such time 0.08 or more grams of alcohol per two hundred ten liters of breath.

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

COMMENT

1. *See* § 42-4-1301(6)(a)(I-III), C.R.S. 2015.

2. The similar provisions relating to vehicular homicide and vehicular assault do not establish a permissible inference for a B.A.C. in excess of .05, but less than .08. This is because those offenses require proof that the defendant was "under the influence," and not merely "impaired." *See* § 18-3-106(2)(b), C.R.S. 2015 (stating that the B.A.C. "may be considered with other competent evidence"); § 18-3-205(2)(b), C.R.S. 2015 (same). Accordingly, where a charge of DUI is submitted as a lesser-included offense of one of these felonies, it may be necessary to use separate special instructions to guide the jury's consideration of the B.A.C. evidence.

42:12.SP DRIVING UNDER THE INFLUENCE OR WHILE ABILITY IMPAIRED - SPECIAL INSTRUCTION (DELTA 9-TETRAHYDROCANNABINOL LEVEL)

As to the charge of [driving under the influence] [driving while ability impaired], a permissible inference that the defendant was under the influence of one or more drugs may be drawn if the amount of delta 9-tetrahydrocannabinol in the defendant's blood at the time of the alleged offense, or within a reasonable time thereafter, as shown by analysis of the defendant's blood, was five nanograms or more per milliliter in whole blood.

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

COMMENT

1. *See* § 42-4-1301(6)(a)(IV), C.R.S. 2015.

42:13 DRIVING WITH EXCESSIVE ALCOHOL CONTENT

The elements of the crime of driving with excessive alcohol content are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. drove a motor vehicle or vehicle, and

4. at the time of driving, or within two hours after driving,

5. he [she] had a blood alcohol content of 0.08 or more grams of alcohol per one hundred milliliters of blood, or a breath alcohol content of 0.08 or more grams of alcohol per two hundred ten liters of breath.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of driving with excessive alcohol content.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of driving with excessive alcohol content.

COMMENT

1. *See* § 42-4-1301(2)(a), C.R.S. 2015.

2. *See* Instruction F:239 (defining "motor vehicle"); Instruction F:386 (defining "vehicle"); *see also* Instruction 42:09, Comment 3 (discussing the meaning of the term "drive").

3. *See* Instruction H:76 (affirmative defense of "subsequent consumption of alcohol").

42:14 RECKLESS DRIVING

The elements of the crime of reckless driving are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. drove a [motor vehicle] [bicycle] [electrical assisted bicycle] [low-power scooter],

4. in such a manner as to indicate either a wanton or a willful disregard for the safety of persons or property.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of reckless driving.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of reckless driving.

COMMENT

1. *See* § 42-4-1401(1), C.R.S. 2015.

2. *See* Instruction F:32 (defining "bicycle"); Instruction F:115 (defining "electrical assisted bicycle"); Instruction F:202 (defining "low-power scooter"); Instruction F:239 (defining "motor vehicle").

3. *See People v. Pena*, 962 P.2d 285, 289 (Colo. App. 1997) (the type of recklessness in 42-4-1401(1) is indistinguishable from the definition of "recklessly" in section 18-1-501(8), C.R.S. 2015).

42:15 CARELESS DRIVING

The elements of the crime of careless driving are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. drove a [motor vehicle] [bicycle] [electrical assisted bicycle] [low-power scooter],

4. in a careless and imprudent manner, without due regard for the width, grade, curves, corners, traffic, and use of the streets and highways and all other attendant circumstances.

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of careless driving.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of careless driving.

COMMENT

1. *See* § 42-4-1402(1), C.R.S. 2015.

2. *See* Instruction F:32 (defining "bicycle"); Instruction F:115 (defining "electrical assisted bicycle"); Instruction F:202 (defining "low-power scooter"); Instruction F:239 (defining "motor vehicle").

3. *See People v. Zweygardt*, 2012 COA 119, ¶ 34, 298 P.3d 1018, 1025 ("Criminal negligence requires a gross deviation from the standard of care. § 18-1-501(3). Careless driving requires that the defendant drive without due regard. A person who grossly deviates from the standard of care that a reasonable person would exercise and fails to perceive a substantial and

unjustified risk that a result will occur or that a circumstance exists, has necessarily acted without due regard for safety.”).

42:16.INT CARELESS DRIVING – INTERROGATORY (BODILY INJURY)

If you find the defendant not guilty of careless driving, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of careless driving, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question:

Did the careless driving result in bodily injury? (Answer "Yes" or "No")

The careless driving resulted in bodily injury only if:

1. the defendant's actions were the proximate cause of bodily injury to another.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 42-4-1402(2)(b), C.R.S. 2015.

2. *See* Instruction F:36 (defining "bodily injury"); *see*, *e.g.*, Instruction E:28 (special verdict form); *see also* CJI-Civ. 9:18 (2014) (defining "cause"); CJI-Civ. Ch. 9, § B (Causation) (2014) ("The [Colorado Supreme Court Committee on Civil Jury Instructions] has intentionally eliminated the use of the word 'proximate' when instructing the jury on causation issues because the concept of proximate cause is adequately included in the instructions in this Part B and because the word 'proximate'

tends to be confusing to the jury."); *People v. Stewart*, 55 P.3d 107, 116 (Colo. 2002) (discussing the significance of the different definitions of "cause" and "proximate cause" that appeared in COLJI-Crim. (1983)).

42:17.INT CARELESS DRIVING – INTERROGATORY (DEATH)

If you find the defendant not guilty of careless driving, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of careless driving, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question:

Did the careless driving result in death?
(Answer "Yes" or "No")

The careless driving resulted in death only if:

1. the defendant's actions were the proximate cause of death to another.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 42-4-1402(2)(c), C.R.S. 2015.

2. *See, e.g.*, Instruction E:28 (special verdict form); *see also* CJI-Civ. 9:18 (2014) (defining "cause"); CJI-Civ. Ch. 9, § B (Causation)(2014) ("The [Colorado Supreme Court Committee on Civil Jury Instructions] has intentionally eliminated the use of the word 'proximate' when instructing the jury on causation issues because the concept of proximate cause is adequately included in the instructions in this Part B and because the word 'proximate' tends to be confusing to the jury."); *People v. Stewart*, 55 P.3d 107, 116 (Colo. 2002) (discussing the

significance of the different definitions of “cause” and “proximate cause” that appeared in COLJI-Crim. (1983)).

42:18 OPERATION WITHOUT INSURANCE

The elements of the crime of operation without insurance are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. operated a [motor vehicle] [low-power scooter],

4. on a public highway of this state,

5. without a complying policy or certificate of self-insurance in full force and effect as required by law.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of operation without insurance.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of operation without insurance.

COMMENT

1. *See* § 42-4-1409(2), C.R.S. 2015.

2. *See* Instruction F:202 (defining "low-power scooter"); Instruction F:239 (defining "motor vehicle").

3. *See* Instruction 42:05 (driving after revocation prohibited), Comment 4 (discussing the meaning of the term "operate").

42:19.SP SPECIAL INSTRUCTION - OPERATION WITHOUT INSURANCE (FAILURE TO PRESENT)

As to the charge of operation without insurance, testimony that an operator of a [motor vehicle] [low-power scooter] failed to immediately present evidence of a complying policy or certificate of self-insurance in full force and effect as required by law, when requested to do so by a peace officer, gives rise to a permissible inference that the defendant did not have such a policy or certificate.

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

COMMENT

1. *See* § 42-4-1409(5), C.R.S. 2015.

2. Although the statute speaks in terms of "prima facie evidence," the concept should be explained to the jury as a permissible inference. *See People in re R.M.D.*, 829 P.2d 852 (Colo. 1992) (construing the "prima facie" proof provision of section 18-4-406 as establishing a permissible inference); *see generally Jolly v. People*, 742 P.2d 891, 897 (Colo. 1987) (unlike a mandatory presumption, the use of a permissible inference in a criminal case does not violate due process).

42:20 ELUDING OR ATTEMPTING TO ELUDE A POLICE OFFICER

The elements of the crime of eluding or attempting to elude a police officer are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. operated a motor vehicle, and

4. received from a police officer a visual or audible signal directing him [her] to bring the vehicle to a stop (such as a red light or a siren from a police officer driving a marked vehicle showing the same to be an official police, sheriff, or Colorado State Patrol car),

5. when the officer had reasonable grounds to believe that defendant had violated a state law or municipal ordinance, and

6. after receiving such signal, defendant

7. willfully,

8. increased his [her] speed or extinguished his [her] lights in an attempt to elude the police officer, or attempted in any other manner to elude the police officer, or did in fact elude the police officer.

[9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of eluding or attempting to elude a police officer.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of eluding or attempting to elude a police officer.

COMMENT

1. *See* § 42-4-1413, C.R.S. 2015.

2. *See* Instruction F:195 (defining "willfully"); Instruction F:239 (defining "motor vehicle").

3. *See* Instruction 42:05 (driving after revocation prohibited), Comment 4 (discussing the meaning of the term "operate").

4. An unnumbered comment to COLJI-Crim. 42:20 (2008) stated as follows: "The 'probable cause' [sic] issue in this statute is a question for the court on a motion for judgment of acquittal. It is not a jury question." However, the Committee is now of the view that the question of whether the officer had "reasonable grounds" to make a stop is, at least in part, subject to jury determination. Therefore, the court should identify any factual questions relevant to the "reasonable grounds" inquiry and draft a special instruction advising the jury that it can find that the officer had reasonable grounds to make the stop only if it first finds that the prosecution has proven, beyond a reasonable doubt, certain threshold facts (as identified by the court).

42:21 FAILURE TO FULFILL DUTIES AFTER INVOLVEMENT IN AN ACCIDENT INVOLVING INJURY, SERIOUS BODILY INJURY, OR DEATH

The elements of the crime of failure to fulfill duties after involvement in an accident involving injury, serious bodily injury, or death are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. drove a vehicle that was directly involved in an accident,

4. resulting in injury to, serious bodily injury to, or the death of any person, and

5. failed to do the following, without obstructing traffic more than was necessary: immediately stop his [her] vehicle at the scene of the accident, or as close to the accident scene as possible, and immediately return to the scene of the accident and remain at the scene of the accident until he [she] had fulfilled the legal requirements of giving notice, information, and aid.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to fulfill duties after involvement in an accident involving injury, serious bodily injury, or death.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to fulfill duties after involvement in an accident involving injury, serious bodily injury, or death.

COMMENT

1. *See* § 42-4-1601(1), C.R.S. 2015.

2. *See* Instruction F:182 (defining "injury"); Instruction F:332 (defining "serious bodily injury"); Instruction F:386 (defining "vehicle").

3. *See People v. Manzo*, 144 P.3d 551, 559 (Colo. 2006) ("Leaving the Scene of an Accident with Serious Injury [in violation of section 42-4-1601] is a strict liability offense because the plain language of the statute does not require or imply a culpable mental state."); Instruction G1:02 (strict liability crimes).

42:22.SP SPECIAL INSTRUCTION - FAILURE TO FULFILL DUTIES AFTER INVOLVEMENT IN AN ACCIDENT INVOLVING INJURY, SERIOUS BODILY INJURY, OR DEATH (LEGAL REQUIREMENTS OF GIVING NOTICE, INFORMATION, AND AID)

The driver of any vehicle involved in an accident resulting in injury to, serious bodily injury to, or death of any person or damage to any vehicle which was driven or attended by any person shall give the driver's name, the driver's address, and the registration number of the vehicle he [she] was driving and shall upon request exhibit his [her] driver's license to the person struck or the driver or occupant of or person attending any vehicle collided with and where practical shall render to any person injured in such accident reasonable assistance, including the carrying, or the making of arrangements for the carrying, of such person to a physician, surgeon, or hospital for medical or surgical treatment if it is apparent that such treatment is necessary or if the carrying is requested by the injured person.

A driver does not commit the crime of failure to fulfill duties after involvement in an accident involving injury or death if, after fulfilling the requirements set forth above, he [she] leaves the scene of the accident for the purpose of reporting the accident to a duly authorized police authority.

In the event that none of the persons specified above are in condition to receive the information to which they otherwise would be entitled and no police officer is present, the driver of any vehicle involved in such accident after fulfilling all other requirements, insofar as possible on the driver's part to be performed, shall immediately report the accident to the nearest office of a duly authorized police authority and give that authority notice of the location of the accident, as well as all information specified above.

COMMENT

1. *See* § 42-4-1601(1.5), C.R.S. 2015*;* § 42-4-1603(1), (2), C.R.S. 2015 (incorporating section 42-4-1606(1), C.R.S. 2015).

2. *See People v. Hernandez*, 250 P.3d 568, 575 (Colo. 2011) ("We hold that sections 42–4–1601(1) and –1603(1) require a driver of a vehicle involved in an accident to affirmatively identify himself as the driver before leaving the scene of the

accident if that fact is not otherwise reasonably apparent from the circumstances.”).

42:23.INT FAILURE TO FULFILL DUTIES AFTER INVOLVEMENT IN AN ACCIDENT INVOLVING INJURY, SERIOUS BODILY INJURY, OR DEATH - INTERROGATORY

If you find the defendant not guilty of failure to fulfill duties after involvement in an accident involving injury, serious bodily injury, or death, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of failure to fulfill duties after involvement in an accident involving injury, serious bodily injury, or death, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question:

Did the accident result in [injury] [serious bodily injury] [death]? (Answer "Yes" or "No")

The accident resulted in [injury] [serious bodily injury] [death] only if:

1. The accident resulted in [[injury] [serious bodily injury] to]] [the death of] any person.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 42-4-1601(2)(a-c), C.R.S. 2015.

2. *See* Instruction F:36 (defining "bodily injury"); Instruction F:332 (defining "serious bodily injury"); *see, e.g.*, Instruction E:28 (special verdict form).

3. Use a separate copy of this interrogatory for each bracketed sentence enhancement factor that is at issue.

42:24 FAILURE TO FULFILL DUTIES AFTER INVOLVEMENT IN AN ACCIDENT RESULTING IN DAMAGE TO A DRIVEN OR ATTENDED VEHICLE

The elements of the crime of failure to fulfill duties after involvement in an accident resulting in damage to a driven or attended vehicle are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. drove a vehicle, and

4. was directly involved in an accident resulting only in damage to a vehicle which was driven or attended by any person, and

5. failed to do the following, without obstructing traffic more than was necessary: immediately stop his [her] vehicle at the scene of the accident, or as close to the accident scene as possible, and immediately return to the scene of the accident and remain at the scene of the accident until he [she] had fulfilled the legal requirements of giving notice, information, and aid.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to fulfill duties after involvement in an accident resulting in damage to a driven or attended vehicle.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to fulfill duties after involvement in an accident resulting in damage to a driven or attended vehicle.

COMMENT

1. *See* § 42-4-1602(1), C.R.S. 2015.

2. *See* Instruction F:386 (defining "vehicle").

42:25.SP SPECIAL INSTRUCTION - FAILURE TO FULFILL DUTIES AFTER INVOLVEMENT IN AN ACCIDENT RESULTING IN DAMAGE TO A DRIVEN OR ATTENDED VEHICLE (LEGAL REQUIREMENTS OF GIVING NOTICE, INFORMATION, AND AID)

When an accident occurs on the traveled portion, median, or ramp of a divided highway and each vehicle involved can be safely driven, each driver shall move such driver's vehicle as soon as practicable off the traveled portion, median, or ramp to a frontage road, the nearest suitable cross street, or other suitable location to fulfill the following requirements.

The driver of any vehicle involved in an accident resulting in damage to any vehicle which was driven or attended by any person shall give the driver's name, the driver's address, and the registration number of the vehicle he [she] was driving and shall upon request exhibit his [her] driver's license to the person struck or the driver or occupant of or person attending any vehicle collided with and where practical shall render to any person injured in such accident reasonable assistance, including the carrying, or the making of arrangements for the carrying, of such person to a physician, surgeon, or hospital for medical or surgical treatment if it is apparent that such treatment is necessary or if the carrying is requested by the injured person.

A driver does not commit the crime of failure to fulfill duties after involvement in an accident resulting in damage to any vehicle which was driven or attended by any person if, after fulfilling the requirements set forth above, he [she] leaves the scene of the accident for the purpose of reporting the accident to a duly authorized police authority.

In the event that none of the persons specified above are in condition to receive the information to which they otherwise would be entitled and no police officer is present, the driver of any vehicle involved in such accident after fulfilling all other requirements, insofar as possible on the driver's part to be performed, shall immediately report the accident to the nearest office of a duly authorized police authority and give that authority notice of the location of the accident, as well as all information specified above.

COMMENT

1. *See* § 42-4-1602, C.R.S. 2015 (referencing section 42-4-1603, which incorporates section 42-4-1606(1)).

42:26 FAILURE TO FULFILL DUTIES AFTER STRIKING AN UNATTENDED VEHICLE OR OTHER PROPERTY

The elements of the crime of failure to fulfill duties after striking an unattended vehicle or other property are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. drove a vehicle, and

4. collided with or was involved in an accident with any vehicle or other property which was unattended (other than a highway fixture or a traffic control device),

5. resulting in any damage to such vehicle or other property, and

6. [failed to do the following, without obstructing traffic more than was necessary: immediately stop, and immediately either locate and notify the operator or owner of such vehicle or other property of the accident or collision, the defendant's name and address, and the registration number of the vehicle he [she] was driving, or attach securely in a conspicuous place in or on such vehicle or other property a written notice giving the driver's name and address and the registration number of the vehicle he [she] was driving]

   [; or] [failed [also] to give immediate notice of the location of such accident to the nearest office of the duly authorized police authority, and provide such police authority with his [her] name, address, and the registration number of the vehicle he [she] was driving].

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to

fulfill duties after striking an unattended vehicle or other property.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to fulfill duties after striking an unattended vehicle or other property.

COMMENT

1. *See* § 42-4-1604, C.R.S. 2015 (incorporating section 42-4-1606, which references the informational requirements of section 42-4-1603(2), which, in turn, references the informational requirements of section 42-4-1603(1)).

2. *See* Instruction F:386 (defining "vehicle").

42:27 FAILURE TO FULFILL DUTIES AFTER STRIKING A HIGHWAY FIXTURE OR TRAFFIC CONTROL DEVICE

The elements of the crime of failure to fulfill duties after striking a highway fixture or traffic control device are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. drove a vehicle, and

4. was involved in an accident resulting only in damage to fixtures or traffic control devices upon or adjacent to a highway, and

5. failed to notify the road authority in charge of such property of the accident, and of his [her] name and address and of the registration number of the vehicle he [she] was driving; or failed to give immediate notice of the location of such accident to the nearest office of the duly authorized police authority, and provide such police authority with his [her] name, address, and the registration number of the vehicle he [she] was driving.

[6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to fulfill duties after striking a highway fixture or traffic control device.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to fulfill duties after striking a highway fixture or traffic control device.

COMMENT

1. *See* § 42-4-1605, C.R.S. 2015 (incorporating section 42-4-1606, which references the informational requirements of section 42-4-1603(2), which, in turn, references the informational requirements of section 42-4-1603(1)).

2. *See* Instruction F:386 (defining "vehicle").

3. The terms "fixture" and "traffic control device" are not defined in section 42-1-102, C.R.S. 2015.