STATUTORY CRIMINAL 2.024

TRANSFERRED INTENT

You may find that the defendant acted "intentionally" or with "intent to" as to [name of the alleged victim] on the charge of [name of offense and, if need for clarity, the count number] if you find "transferred intent". Transferred intent is established if the actual result of the defendant's action differs from that which the defendant intended or contemplated only in the respect that:

1. A different person or different property is injured or affected; or

2. The injury or harm intended or contemplated would have been more serious or extensive than that caused.

SOURCE: A.R.S. §13-203(B)(statutory language as of October 1, 1978).

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

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

The actual intended victim can be different or the intended harm may be different in degree but not both. *State v. Johnson,* 205 Ariz. 413, 72 P.3d 343 (App.2003).

There must be an intent to cause a particular result as an element of an offense before the doctrine of transferred intent applies. *State v. Siner*, 205 Ariz. 301, 69 P.3d 1022(App.2003).

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Submitted to the State Bar: ________

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2.025

Affirmative Defense

The defendant has raised the affirmative defense of [ ] with respect to the charged offense[s] of [ ]. The burden of proving each element of the offense[s] beyond a reasonable doubt always remains on the State. However, the burden of proving the affirmative defense of [ ] is on the defendant. The defendant must prove the affirmative defense of [ ] by a preponderance of the evidence. If you find that the defendant has proven the affirmative defense of [ ] by a preponderance of the evidence you must find the defendant not guilty of the offense[s] of [ ].

SOURCE: A.R.S. § 13-205 (statutory language as of July 21, 1997)

USE NOTE: Justification defenses under Chapter 4 of A.R.S. Title 13 are not affirmative defenses for crimes occurring on or after April 24, 2006, pursuant to legislative enactment. However for crimes occurring before this date, they remain affirmative defenses. In such cases, the court shall instruct on "affirmative defense" so as to inform the jury on the burden of proof. "Affirmative defense" is defined in A.R.S. § 13-205 (Statutory Instruction 2.025). An affirmative defense must be shown by a preponderance of the evidence. "Preponderance of the evidence" is defined in Standard 5b(2).

The affirmative defense at issue may apply to all charged offenses. The instruction should specify the particular offenses to which it is applicable. Use language in the brackets as appropriate to the facts and charges.

COMMENT: In the vast majority of cases proof of the affirmative defense will require the jurors to acquit the defendant on the applicable charged offense[s]. However, in certain instances proof of the affirmative defense may only reduce the defendant's legal culpability. In those instances, the final sentence of the instruction should be modified accordingly.

A.R.S. § 13-205 provides that "[e]xcept as otherwise provided by law" the defendant must prove an affirmative defense by a preponderance of the evidence. Currently, the only exception to the preponderance of evidence standard are the affirmative defenses of entrapment and insanity, which must be proven by clear and convincing evidence. See A.R.S. §§ 13–206, –502(c). When the affirmative defenses of entrapment or insanity are raised, this instruction should not be given. The entrapment (2.036) and insanity (5.02) instructions should be given, which include the clear and convincing evidence standard.

This instruction is consistent with the affirmative defense instruction (on self defense) suggested by the court of appeals in *State v. Sierra-Cervantes*, 201 Ariz. 459, 37 P.3d 432 (App. 2001).

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STATUTORY CRIMINAL 2.026

[Replaces Standard 13]

ENTRAPMENT

The defendant has raised the affirmative defense of entrapment with respect to the charged offenses[s] of [________]. The defendant must prove the following by clear and convincing evidence;

1. The idea of committing the offense[s] started with law enforcement officers or their agents rather than the defendant; *and*
2. The law enforcement officers or their agents urged and induced the defendant to commit the offense[s], and
3. The defendant was not predisposed to commit the type of offenses[s] charged before the law enforcement officers or their agents urged and induced the defendant to commit the offenses[s].

The defendant does not establish entrapment if [he] [she] was predisposed to commit the offenses[s]. It is not entrapment for law enforcement officers or their agents to use a ruse or to conceal their identity.

The conduct of law enforcement officers and their agents may be considered in determining if the defendant has proven entrapment.

If you find that the defendant has proven entrapment by clear and convincing evidence you must find the defendant not guilty of the offense[s].

SOURCE: A.R.S. § 13-206 (Statutory language as of July 21, 1997).

USE NOTE: Use language in brackets as applicable to the charges.

COMMENT: In 1997, the legislature codified the entrapment defense in A.R.S. § 13-206. *See State v. Preston,* 197 Ariz. 461, 4 P.3d 1004, 1006-07 (App. 2000). Consistent with prior case law, the statute requires that the defendant admit the substantial elements of the offense[s] as a condition of raising the entrapment defense. *Id.* 4 P.3d at 1007. However, the statute now requires the defendant to prove entrapment by clear and convincing evidence. *Id.*

Subsection D of the statute required that the trial court instruct the jurors that the defendant had admitted the elements of the offense[s] and "that the only issue for their consideration is whether the [defendant] has proven the affirmative defense of entrapment by clear and convincing evidence." A.R.S. § 13-206(D). However, in *Preston,* the Arizona Court of Appeals declared subsection D of the statute unconstitutional because it effectively denied a criminal defendant the presumption of innocence and the right to a jury determination of guilt. 4 P.3d at 1009-11. The court held that subsection D was severable from the remainder of

the statute. *Id.* at 1011. The court upheld placing upon the defendant the burden of proving the affirmative defense of entrapment by “clear and convincing evidence.” *Id.* at 1007-08.

Approved by Committee – April 2001

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