28.1383(A)(2)-1

Aggravated [Driving/Actual Control] While Under The Influence (With Two Prior Convictions Within Sixty Months)

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

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

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

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

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

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

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

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

COMMENT: A rebuttable presumption of regularity attaches to prior convictions used to enhance a sentence or as an element of a crime. "When the State seeks to use a prior conviction as a sentence enhancer or as an element of a crime, the State must first prove the existence of the prior conviction. At the time, the presumption of regularity attaches to the final judgment. If the defendant presents some credible evidence to overcome the presumption, the State must fulfill its duty to establish that the prior conviction was constitutionally obtained." *State v. McCann*, 200 Ariz. 27, 31, 21 P.3d 845, 849 (2001), overruling *State v. Reagan*, 103 Ariz. 287, 440 P.2d 907 (1968), and *State v. Renaud*, 108 Ariz. 417, 499 P.2d 712 (1972).