

**ASSAULT SECOND DEGREE
(D Felony)
(Inmate Causes Physical Injury)
PENAL LAW 120.05(7)
(Committed on or after Sept. 1, 1981)**

The _____ count is Assault in the Second Degree.

Under our law, a person is guilty of Assault in the Second Degree when,

[having been charged with a crime and while confined in a correctional facility pursuant to such charge,]¹
with intent to cause physical injury to another person, he or she causes such injury to that person [*or* to a third person].

Some of the terms used in this definition have their own special meaning in our law. I will now give you the meaning of the following terms: "physical injury," [and] "intent" [and] ["correctional facility."]²

¹ The definition of the crime contains two alternative elements--the one stated in the text, and:

"having been convicted of a crime and while confined in a correctional facility pursuant to such conviction."

The Appellate Division, Third Department, has held that this element is subject to CPL 200.60(3). *People v Gaddy*, 191 A.D.2d 735 (3rd Dept. 1993); *People v Richardson*, 180 A.D.2d 902 (3rd Dept. 1992); *People v Ali*, 147 A.D.2d 847 (3rd Dept. 1989). *Cf. People v Cooper*, 78 N.Y.2d 476 (1991). Accordingly, this element, if applicable, must be charged in a special information and the defendant must be arraigned upon it in accordance with the procedure set forth in CPL § 200.60(3). If, upon such arraignment, the defendant admits the element, the court must not make any reference to it in the definition of the offense or in listing the elements of the offense. But if the defendant denies the element or remains mute, the court must add the element to the definition of the offense and the list of elements.

² If the alternative element of this crime is applicable and the defendant has admitted that element when arraigned upon the special information, the definition of "correctional facility" must not be given.

PHYSICAL INJURY means impairment of physical condition or substantial pain.³

INTENT means conscious objective or purpose. Thus, a person acts with intent to cause physical injury to another when that person's conscious objective or purpose is to cause physical injury to another.⁴

[NOTE: In a case of "transferred intent," add the following paragraph:

Under our law, it is not required that the person who is injured be the same person who was intended to be injured.]

[A CORRECTIONAL FACILITY means any institution operated by the state department of correctional services, [or any local correctional facility, that is, any county jail, county penitentiary, county lockup, city jail, police station jail, town or village jail or lockup, court detention pen or hospital prison ward], [or any place used, pursuant to a contract with the state or a municipality, for the detention of persons charged with or convicted of a crime.]⁵

In order for you to find the defendant guilty of this crime, the People are required to prove, from all the evidence in the case, beyond a reasonable doubt, both [each] of the following two [three] elements:

1. That on or about (date), in the county of (county), the

³See Penal Law § 10.00(9).

⁴See Penal Law § 15.05(1).

⁵See Correction Law § 40(3) for the definition of "correctional facility," and Correction Law § 40(2) for the definition of the term "local correctional facility" used in the definition of "correctional facility."

defendant, (defendant's name), caused physical injury to (specify); [and]

2. That the defendant did so with intent to cause physical injury to (specify); [and]
- [3. That, at such time, the defendant was charged with a crime and was confined in a correctional facility pursuant to such charge.]⁶

Therefore, if you find that the People have proven beyond a reasonable doubt both [each] of those elements, you must find the defendant guilty of the crime of Assault in the Second Degree as charged in the _____ count.

On the other hand, if you find that the People have not proven beyond a reasonable doubt either one or both [any one or more] of those elements, you must find the defendant not guilty of the crime of Assault in the Second Degree as charged in the _____ count.

⁶ If the alternative element of this offense is applicable and the defendant has admitted that element when arraigned upon the special information, then the offense will consist of *only* the first two elements. If the alternative element is applicable and the defendant has denied it or stood mute, then element number three should read:

"3. That, at such time, the defendant had been convicted of a crime and was confined in a correctional facility pursuant to such conviction."