

**ASSAULT IN THE THIRD DEGREE**  
**(Criminal Negligence)**  
**Penal Law § 120.00(3)**  
**(Committed on or after Nov. 1, 1986) <sup>1</sup>**  
**Revised April, 2018 <sup>1</sup>**

The (*specify*) count is Assault in the Third Degree.

Under our law, a person is guilty of Assault in the Third Degree when, with criminal negligence, that person causes physical injury to another person by means of a of a deadly weapon [or dangerous instrument].

The following terms used in that definition have a special meaning:

PHYSICAL INJURY means impairment of physical condition or substantial pain.<sup>2</sup>

A person acts with CRIMINAL NEGLIGENCE with respect to physical injury by means of a deadly weapon [*or dangerous instrument*] when

that person engages in conduct which creates or contributes to a substantial and unjustifiable risk that physical injury to another person by means of a deadly weapon [*or dangerous instrument*]

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<sup>1</sup>-This charge applies when the crime was committed on or after November 1, 1986, except as to the following weapons which were added to the definition of "deadly weapon" [Penal Law § 10.00(12)] after that date:

November 1, 1995, was the effective date of an amendment to the definition of "deadly weapon" to add a "metal knuckle knife." L. 1995, ch. 219.

November 1, 2008, was the effective date of an amendment to that definition to add "plastic knuckles." L. 2008, ch. 257.

The 2018 revision was (1) to move the opening paragraph of the definition of "criminal negligence" to the end of the definition and otherwise conform it to the paragraph at the end of the definition of "criminal negligence" in the charge for criminally negligent homicide (Penal Law § 125.10, and (2) to include in the definition of "deadly weapon" both statutory additions and decisional law definitions of weapons as set forth in footnote 5.

<sup>2</sup>Penal Law § 10.00(9); See *People v. Chiddick*, 8 NY3d 445 (2007).

will occur, and

when he or she fails to perceive that risk,

and when that risk is of such nature and degree that failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.<sup>3</sup>

You may notice from that definition that CRIMINAL NEGLIGENCE is not the same type of negligence you may be familiar with from a civil lawsuit seeking a money judgment. The carelessness required for criminal negligence is appreciably more serious; it must be such that its seriousness would be apparent to anyone who shares the community's general sense of right and wrong.<sup>4</sup>

DEADLY WEAPON means:

Select appropriate alternative:

any loaded weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged.

a switchblade knife defined as any knife having a blade which opens automatically by hand pressure applied to a button, spring or other device in the handle of the knife.

a gravity knife defined as any knife having a blade which is released from the handle or sheath thereof by the force of gravity or the application of centrifugal force which, when released, is locked in place by means of a button, spring, lever or other device.

a pilum ballistic knife defined as any knife having a blade which can be projected from the handle by hand pressure applied to a button, lever, spring or other device in the handle of the knife.

a metal knuckle knife, defined as a weapon that, when closed, cannot function as a set of plastic knuckles or metal knuckles, nor as a knife and when open, can function as both a set of plastic knuckles or metal knuckles as well as a knife.

metal knuckles, defined as a metal object with multiple holes, through which individual places his or her fingers so that a metal bar rests atop

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<sup>3</sup> See Penal Law § 15.05(4); *People v. Boutin*, 75 NY2d 692, 696 (1990).

<sup>4</sup> See *People v. Cabrera*, 10 N.Y.3d 370, 376 (2008).

the individual's knuckles.

a billy, defined as a cylindrical or rounded, rigid, club or baton with a handle grip which, from its appearance and inherent characteristics, is designed to be used as a striking weapon and not for other lawful purposes.

a dagger

a blackjack

plastic knuckles.<sup>5</sup>

[DANGEROUS INSTRUMENT means any instrument, article or substance (including a vehicle) which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or other serious physical injury,<sup>6</sup> that is, serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ.<sup>7</sup> Under that definition, death or other serious physical injury need not, in fact, be caused.]

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 of the following two elements:

1. That on or about (date), in the county of (county), the defendant, (defendant's name), caused physical injury to

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<sup>5</sup> Penal Law § 10.00(12) defines "deadly weapon." See Penal Law § 265.00 for the definitions of "switchblade knife," "gravity knife," "pilum ballistic knife" and "metal knuckle knife"; *People v. Aragon*, 28 N.Y.3d 125 (2016) (for the definition of "metal knuckles"); *People v. Ocasio*, 28 N.Y.3d 178 (2016) (for the definition of "billy").

There is no controlling statutory or decisional law definition of "plastic knuckles" albeit the legislative memorandum in support of adding that term equated it with "brass [metal] knuckles"; thus, for the definition of "plastic knuckles," a court may wish to consider using the definition of "metal knuckles," substituting "plastic object" for "metal object" and "plastic bar" for "metal bar."

<sup>6</sup> Penal Law § 10.00(13).

<sup>7</sup> Penal Law § 10.00(10).

(specify) by means of a a deadly weapon [or dangerous instrument]; and

2 That the defendant did so with criminal negligence.

If you find the People have proven beyond a reasonable doubt both of those elements, you must find the defendant guilty of this crime.

If you find the People have not proven beyond a reasonable doubt either one or both of those elements, you must find the defendant not guilty of this crime.