

ASSAULT IN THE FIRST DEGREE
(Felony Assault; Serious Physical Injury)
Penal Law § 120.10(4).
(Committed on or after Sept. 1, 1967)

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

Under our law, a person is guilty of Assault in the First Degree when, in the course of and in furtherance of the commission [*or attempted commission*] of (*name of felony charged*) [*or of immediate flight therefrom*], that person [*or another participant if there be any*], causes serious physical injury to a person other than one of the participants.

[*NOTE: Add if multiple participants in the underlying felony:*

Under that law, when, in the course of and in furtherance of the commission (*or attempted commission*) of (*name of felony charged*) (*or in immediate flight therefrom*), a participant in the commission (*or attempted commission*) of that felony causes serious physical injury to a non-participant, all the participants--the one who caused the serious physical injury as well as the other participants in the felony--are guilty of Assault in the First Degree.]

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

SERIOUS PHYSICAL INJURY means impairment of a person's physical condition which creates a substantial risk of death, or which causes death, or serious and protracted disfigurement, or protracted impairment of health or protracted loss or impairment of the function of any bodily organ.¹ If you find that serious physical injury was caused by the defendant [*or by a participant in the crime*], then it does not matter that the physical injury was caused unintentionally or accidentally, rather than with an intention to cause such injury, or that it resulted from the victim's fear or fright.

(Add name and definition of felony)

¹See Penal Law § 10.00(10).

[NOTE: Add where appropriate:

In determining whether a person is in IMMEDIATE FLIGHT from the commission (or attempted commission) of (name of felony), you may consider: (1) the distance, if any, between the location of the (name of felony) and the location where serious physical injury was caused; (2) the interval of time, if any, between the commission (or attempted commission) of the (name of felony) and the causing of serious physical injury; (3) whether (police, security personnel, citizens) were in close pursuit at the time serious physical injury was caused; (4) whether such person possessed fruits of the (name of felony) at the time serious physical injury was caused; and (5) whether such person(s) had reached a place of temporary safety before the serious physical injury was caused.]²

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), committed [or attempted to commit] (name of felony); and
2. That, in the course of and in furtherance of the commission [or attempted commission] of (name of felony) [or of immediate flight therefrom], the defendant [or another participant in the commission (or attempted commission) of that felony] caused serious physical injury to (specify) and that (specify) was not a participant in the felony.

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

²See *People v. Gladman*, 41 NY2d 123, 129 (1976). The factors which are inapplicable to the case should be omitted in the charge to the jury.

defendant not guilty of this crime.