

**CRIMINAL USE OF A CHEMICAL WEAPON
OR BIOLOGICAL WEAPON IN THE THIRD DEGREE
Penal Law § 490.47
(Committed on or after July 23, 2004)**

The (*specify*) count is Criminal Use of a Chemical Weapon or Biological Weapon in the Third Degree.

Under our law, a person is guilty of Criminal Use of a Chemical Weapon or Biological Weapon in the Third Degree when, under circumstances evincing a depraved indifference to human life, he or she uses, deploys, releases, or causes to be used, deployed, or released

Select the appropriate alternative:

any select chemical agent, [or]
any select biological agent

and thereby creates a grave risk of death or serious physical injury to another person not a participant in the crime.

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

[SELECT CHEMICAL AGENT means an identified chemical weapon, including (*specify*) .¹]

[SELECT BIOLOGICAL AGENT means an identified

¹ See Penal Law § 490.05(15) which refers to “a chemical weapon which has been identified in regulations promulgated pursuant to subdivision twenty of section two hundred six of the public health law.” If “chemical weapon” is at issue, the charge should be expanded by adding the applicable definition set forth in Penal Law § 490.05(10).

biological weapon, including *(specify)*.^{2]}

DEPRAVED INDIFFERENCE TO HUMAN LIFE refers to a person's state of mind. A person has a depraved indifference to human life when that person has an utter disregard for the value of human life – a willingness to act, not because he or she means to cause grievous harm, but because he or she simply does not care whether or not grievous harm will result.³ Depraved indifference to human life reflects a wicked, evil or inhuman state of mind, as manifested by brutal, heinous and despicable acts. It is evinced by conduct that is wanton, deficient in a moral sense of concern, and devoid of regard for the life or lives of others.⁴

[Add if appropriate:

In determining whether the defendant acted with depraved indifference to human life, you may consider whether the defendant's mind was affected by intoxicants to such a degree that he was incapable of forming the mental state of depraved

² See Penal Law § 490.05(16) which refers to “a biological weapon which has been identified in regulations promulgated pursuant to subdivision twenty-one of section two hundred six of the public health law.” If “biological weapon” is at issue, the charge should be expanded by adding the applicable definition set forth in Penal Law § 490.05(9).

³ "...depraved indifference is best understood as an utter disregard for the value of human life— a willingness to act not because one intends harm, but because one simply doesn't care whether grievous harm results or not" (*Feingold* at 296, quoting *Suarez*, 6 N.Y.3d at 214).

⁴ “Reflecting wickedness, evil or inhumanity, as manifested by brutal, heinous and despicable acts, depraved indifference is embodied in conduct that is ‘so wanton, so deficient in a moral sense of concern, so devoid of regard of the life or lives of others, and so blameworthy’ as to render the actor as culpable as one whose conscious objective is to kill” (*Suarez*, 6 N.Y.3d at 214 quoting *People v Russell*, 91 NY2d 280, 287 (1998)).

indifference to human life.^{5]}

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, protracted impairment of health or protracted loss or impairment of the function of any bodily organ.⁶

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, each of the following three elements:

1. That on or about (date), in the county of (county), the defendant, (defendant's name) used, deployed, released, or caused to be used, deployed, or released

Select the appropriate alternative:

any select chemical agent, or
any select biological agent;

2. That the defendant did so under circumstances

⁵ Penal Law § 15.25 provides that "Intoxication is not, as such, a defense to a criminal charge; but in any prosecution for an offense, evidence of intoxication of the defendant may be offered by the defendant whenever it is relevant to negative an element of the crime charged." In *Register*, the Court of Appeals held that "depraved indifference to human life" was not a culpable mental state, that "it is not an element in the traditional sense but rather a definition of the factual setting in which the risk creating conduct must occur – objective circumstances which are not subject to being negated by evidence of defendant's intoxication" (60 N.Y.2d at 276). *Feingold*, however, overruled *Register*, and held that "depraved indifference to human life is a culpable mental state" (7 N.Y.3d at 294). Thereafter, in *People v Coon*, 34 A.D.3d 869 (3d Dept. 2006), the Court noted that the defendant's level of intoxication by his voluntary use of crack cocaine made him "incapable of possessing the culpable mental state necessary to prove depraved indifference."

⁶ See Penal Law § 10.00(10).

evincing a depraved indifference to human life; and

3. That the defendant thereby created a grave risk of death or serious physical injury to another person not a participant in the crime.

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

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